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WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, January 25, 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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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register
Vol. 75, No. 240
Wednesday, December 15, 2010

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271, 272, 273, and 276

[FNS–2008–0034]

RIN 0584–AD25

Supplemental Nutrition Assistance Program (SNAP): Clarifications and Corrections to Recipient Claim Establishment and Collection Standards

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: Supplemental Nutrition Assistance Program (SNAP) recipient claims are established and collected against households that receive more benefits than they are entitled to receive. This rulemaking corrects and clarifies provisions of the final rule on recipient claims published at 65 FR 41752 on July 6, 2000. The purposes of this final rulemaking are to remove a definition and several provisions that were made obsolete by the final rule; correct the typographical errors; correct the omission of the requirement that a copy of the claims management plan be submitted to the FNS Regional Office for informational purposes; reinforce current practices and requirements in the areas of fair hearings, fees, due dates, delinquent claims, retention, claim referrals, negligence and fraud; make conforming changes needed as a result of a subsequent rulemaking pertaining to a sponsor's responsibility for overissuances of an alien household; and to remove an overpayment exception that is no longer applicable to the Program.

DATES: This rule is effective January 14, 2011.

FOR FURTHER INFORMATION CONTACT: Jane Duffield, State Administration Branch, Program Accountability and Administration Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 818, Alexandria, Virginia 22302. Telephone: (703) 605–4385. Internet: *jane.duffield@fns.usda.gov.*

SUPPLEMENTARY INFORMATION: On April 2, 2009 (74 FR 14935), the Department published a proposed rule clarifying and correcting provisions of the final rule on recipient claims published at 65 FR 41752, July 6, 2000. One comment was received on the proposed rule. The comment addressed fair hearing and due process rights of recipients who are subject to a claim. Because these issues are not being considered in this rulemaking, we have not addressed the comment in this final rule. Therefore, without exception, the Department is adopting the proposed rule as final.

I. Procedural Matters

Executive Order 12866

This final rule has been determined to be not significant and was not reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). It has been certified that this rule will not have a significant impact on a substantial number of small entities. State and local welfare agencies will be the most affected to the extent that they administer the Program.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (UMRA), establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under Section 202 of UMRA, FNS generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local, or Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and Tribal governments or the private sector of $100 million or more in any one year. This rule is therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

SNAP is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related Notice (48 FR 29,115, June 24, 1983), this Program is excluded from the scope of Executive Order 12372 that requires intergovernmental consultation with State and local officials.

Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13132. FNS has considered this rule's impact on State and local agencies and has determined that it does not have federalism implications under Executive Order 13132.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. As addressed in the Dates paragraph, with the exception of providing an informational copy of the claims management plan, the provisions are already in force. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with the Department

Regulation 4300–4, "Civil Rights Impact Analysis," to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, and the characteristics of SNAP households and individual participants, FNS has determined that there are no civil rights impacts in this final rule. All data available to FNS indicate that protected individuals have the same opportunity to participate in SNAP as non-protected individuals.

FNS specifically prohibits the State and local government agencies that administer the Program from engaging in actions that discriminate against any application or participant in any aspect of Program administration, including, but not limited to, the certification of households, the issuance of benefits, the conduct of fair hearings, or the conduct of any other Program service for reasons of age, race, color, sex, handicap, religious creed, national origin, or political beliefs. SNAP nondiscrimination policy can be found at 7 CFR 272.6(a). Discrimination in any aspect of Program administration is prohibited by these regulations, the Food and Nutrition Act of 2008, the Age Discrimination Act of 1975 (Pub. L. 94–135), the Rehabilitation Act of 1973 (Pub. L. 93–112, section 504), and Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000(d)). Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations at 7 CFR 272.6. Enforcement action may be brought under any applicable Federal law. Title VI complaints shall be processed in accord with 7 CFR part 15.

Executive Order 13175

USDA will undertake, within 6 months after this rule becomes effective, a series of Tribal consultation sessions to gain input by elected Tribal officials or their designees concerning the impact of this rule on Tribal governments, communities and individuals. These sessions will establish a baseline of consultation for future actions, should any be necessary, regarding this rule. Reports from these sessions for consultation will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule and will provide additional venues, such as webinars and teleconferences, to periodically host collaborative conversations with Tribal leaders and their representatives concerning ways to improve this rule in Indian country. The policies contained in this rule would not have Tribal implications that preempt Tribal law.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; *see* 5 CFR part 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. Information collections in this final rule have been previously approved under OMB Nos. 0584–0069, expiration date 8/2012, 0584–0446, expiration date 2/2013 and 0584–0492, expiration date 7/2011.

FNS–209 Report (OMB No. 0584–0069)

Claims activity is reported by State agencies on the Status of Claims Against Households (FNS–209) report. The OMB approved the information collection requirements for completing and submitting the FNS–209 report under OMB Control Number 0584–0069. This rule does not change this burden.

Federal Collection Methods for Supplemental Nutrition Assistance Program Recipient Claims (0584–0446)

The information collection burden for Federal collections of recipient claims is covered under OMB Control Number 0584–0446. This rule makes some changes to those requirements. This rule does not change this burden.

Repayment Demand and Program Disqualification (0584–0492)

The burden associated with providing notice and demand for payment to households has been approved under OMB Control Number 0584–0492. This rule does not change this burden.

E-Government Act Compliance

FNS is committed to compliance with the E-Government Act of 2002 (Pub. L. 107–347) (E-Gov), 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 to the extent possible.

II. Background

Prior to the July 6, 2000 final rule, the last major revision to the SNAP recipient claim regulations was in 1983. The July 6, 2000 final rule accomplished several specific objectives while updating the SNAP recipient claims regulations. First, it incorporated changes mandated by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104–193). Second, it streamlined the presentations of our policies, and in some cases, the policies themselves. Third, it incorporated Federal debt management regulations and statutory revisions into recipient claim management. Finally, that rule provided State agencies with additional tools to facilitate the establishment, collections and disposition of recipient claims.

Purpose of this Rule

This rulemaking corrects and clarifies provisions of the July 6, 2000 final rule on recipient claims published at 65 FR 41752, July 6, 2000. This rule does not create new standards for establishing and collecting SNAP recipient claims. Rather, consistent with what we indicated in our proposals, this rulemaking clarifies areas of the final rule, as published, to reflect longstanding policy. Additionally, this rule makes minor technical changes and corrects typographical errors. With this final rule we continue to improve claims management in SNAP while affirming our longstanding position that State agencies have a great amount of flexibility in their efforts to increase claim collection.

Areas of Policy Clarification

The following policy areas are being clarified in this rulemaking: fair hearings, fees, due dates, delinquency date, retention of collections, and claim referral timeframes. All of these policy areas fall within 7 CFR 273.18.

Claims and Fair Hearings

Section 11(e)(10) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. 2020(e)(10)) specifically provides for a fair hearing when a claim for an over issuance is established against a household. We are concerned that the omission of the word "fair" in paragraphs 273.18(e)(3)(iii) and 273.18(e)(3)(iv)(I) could inadvertently deprive a household of its due process rights. Therefore, we are adding the word "fair" into the regulatory text. By adding this text, we are affirming the household's right to a fair hearing.

Due Dates

In accordance with paragraph 273.18(e)(3)(iv), when a claim is established, the State issues an initial notification letter or demand letter to the household. Among other things, current rules require that the initial notification letter include a due date or time frame to either repay or make

arrangements to repay the claim unless the State agency is going to impose allotment reduction. However, we recognize that households that may initially repay their claims through allotment reduction may at some point cease to receive benefits. In order to ensure that all households are treated fairly, we expect that these households will be notified of a due date or time frame to either repay or make arrangements to repay the claim should they cease to receive benefits while they have an outstanding claim. Therefore, we are adding new language at paragraph 273.18(e)(3)(iv)(O) that reinforces this expectation that all households be notified of a due date in the initial notification letter.

Delinquency Date

FNS is required by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134), to submit eligible SNAP recipient debts to the Treasury Offset Program (TOP) for collection. One of the requirements is that a SNAP recipient debt must be at least 180 days delinquent in order to be submitted to TOP. We consider the starting point for counting the 180 days to be the delinquency date. We intend that the delinquency date, once established, remain the same throughout the existence of the claim. The change in regulatory text contained in this rulemaking at paragraph 273.18(e)(5)(iii) emphasizes that post-delinquency repayment agreements do not alter the delinquency date.

Retention of Claims

Section 16(a) of the Food and Nutrition Act of 2008 (7 U.S.C. 2024(a)) permits States to retain 35 percent collected for Intentional Program Violation (IPV) claims and 20 percent for Inadvertent Household Error (IHE) claims. We are adding provisions at paragraph 273.18(k)(2) to clarify that there is no retention by the State in situations where payments are not returned to the State because the household is ordered by a court to perform community service in lieu of a claim or in situations where payments made to a court are not forwarded to the State. This was inadvertently not addressed in the July 6, 2000, rulemaking.

Claim Referral and Establishment

Under the Claim Referral Management section at paragraph 273.18(d), State agencies have a standard timeframe for establishing claims. These timeframes are intended to be used primarily as a management tool by States to prevent the backlog of claims and to reinforce our expectation that States run an efficient and effective claims management system. States have always had the option to develop and follow their own claims referral management plan. We do not consider recipient claims that have been established outside of these timeframes invalid claims. However, claims that are established timely have a better chance of being collected. Therefore, we are adding a paragraph at paragraph 273.18(d)(3) that clarifies FNS's position that States must establish SNAP recipient claims even if they cannot be established within the referral management timeframes outlined in paragraph 273.18(d).

Additional Actions of this Regulation

Other final actions included in this rule are corrections as a result of typographical errors and changes that were neglected at the time of the July 6, 2000 rulemaking; removal of the definition for "Claims Collection Point"' from § 271.2 because the term is no longer used; addition of the requirement at paragraph 272.2(d)(1)(x) for State agencies to submit an informational copy of the claims management plan to the FNS regional office; changes to conform paragraph 273.18(a)(4) to subsequent changes made by the November 21, 2000 (65 FR 70134) final regulation on sponsored aliens, which eliminated the sponsor's liability for overpayments of the alien household's benefits; and removal of the exception to overpayments caused by households transacting Authorization to Participate (ATP) cards, as they are no longer used in the Program.

List of Subjects

7 CFR Part 271

SNAP, Grant programs—social programs, Reporting and recordkeeping requirements.

7 CFR Part 272

Alaska, Civil rights, SNAP, Grant programs—social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedure, Aliens, Claims, SNAP, Fraud, Grant programs—social programs, Penalties, Reporting and recordkeeping requirements, Social Security, Students.

7 CFR Part 276

Administrative practice and procedure, SNAP, Fraud, Grant programs—social programs.

■ Accordingly, 7 CFR parts 271, 272, 273, and 276 are amended as follows:

■ 1. The authority citation for parts 271, 272, 273 and 276 continues to read as follows:

Authority: 7 U.S.C. 2011 through 2036.

PART 271—GENERAL INFORMATION AND DEFINITIONS

§ 271.2 [Amended]

■ 2. In § 271.2, remove the definition for "Claims Collection Point".

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

■ 3. In § 272.2 revise paragraph (d)(1)(x) to read as follows.

§ 272.2 Plan of operation.

* * * * *

(d) * * *

(1) * * *

(x) Claims Management Plan as required by § 273.18(a)(3) to be submitted for informational purposes only; not subject to approval as part of the plan submission procedures under paragraph (e) of this section.

* * * * *

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

■ 4. In § 273.18:

■ a. Remove paragraph (a)(4)(ii) and redesignate (a)(4)(iii) as (a)(4)(ii);

■ b. Amend paragraph (b)(3) by removing the last sentence;

■ c. Amend paragraph (c)(1)(ii)(D) by removing "(e)(1)(ii)(C)" and adding in its place "(c)(1)(ii)(C)";

■ d. Add paragraph (d)(3);

■ e. Amend paragraph (e)(1) by removing "(g)(2)" and adding in its place "(e)(2)";

■ f. Remove "a hearing" and add in its place "a fair hearing" in paragraphs (e)(3)(iii) and (e)(3)(iv)(I);

■ g. Redesignate paragraph (e)(3)(iv)(O) as (e)(3)(iv)(P) and add a new paragraph (e)(3)(iv)(O);

■ h. Revise the first sentence of paragraph (e)(5)(iii);

■ i. Revise paragraph (k)(2).

■ The additions and revisions read as follows:

§ 273.18 Claims against households.

* * * * *

(d) * * *

(3) States must establish claims even if they cannot be established within the timeframes outlined under paragraph (d) of this section.

(e) * * *

(3) * * *

(iv) * * *

(O) If allotment reduction is to be imposed, a due date or time frame to either repay or make arrangements to

repay the claim in the event that the household stops receiving benefits.

* * * * *

(5) * * *

(iii) The date of delinquency for a claim covered under paragraph (e)(5)(i)(B) of this section is the due date of the missed installment payment unless the claim was delinquent prior to entering into a repayment agreement, in which case the due date will be the due date on the initial notification/demand letter. * * *

* * * * *

(k) * * *

(2) These rates do not apply to:

(i) Any reduction in benefits when you disqualify someone for an IPV;

(ii) The value of court-ordered public service performed in lieu of the payment of a claim; or

(iii) Payments made to a court that are not subsequently forwarded as payment of an established claim.

* * * * *

PART 276—STATE AGENCY LIABILITIES AND FEDERAL SANCTIONS

§ 276.2 [Amended]

■ 5. In § 276.2, amend paragraph (c) by removing "273.18(h)" and adding in its place "273.18(l)".

Dated: December 2, 2010.

Julia Paradis,

Administrator, Food and Nutrition Service.

[FR Doc. 2010–31459 Filed 12–14–10; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 730, 734, 736, 742, 744, and 745

[Docket No. 101118556–0556–02]

RIN 0694–AF05

Updated Statements of Legal Authority To Reflect Continuation of Emergency Declared in Executive Order 12938

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule updates the Code of Federal Regulations (CFR) legal authority citations for the Export Administration Regulations (EAR) to replace citations to the President's Notice of November 6, 2009, *Continuation of Emergency Regarding Weapons of Mass Destruction,* with citation to the President's Notice of November 4, 2010 on the same subject. This rule also updates the authority citation for one executive order to reflect the compilation of that executive order into title 3 of the CFR. BIS is making these changes to keep the CFR's legal authority citations for the EAR current.

DATES: *Effective Date:* December 15, 2010.

ADDRESSES: Comments concerning this rule should be sent to *publiccomments@bis.doc.gov,* or to Regulatory Policy Division, Bureau of Industry and Security, Room H2705, U.S. Department of Commerce, Washington, DC 20230. Please refer to regulatory identification number (RIN) 0694–AF05 in all comments, and in the subject line of e-mail comments.

FOR FURTHER INFORMATION CONTACT: William Arvin, Regulatory Policy Division, Bureau of Industry and Security, telephone: (202) 482–2440.

SUPPLEMENTARY INFORMATION:

Background

In Executive Order 12938 of November 14, 1994 (59 FR 59099, 3 CFR, 1994 Comp., p. 950), the President declared a national emergency with respect to the unusual and extraordinary threat to the national security, foreign policy and economy of the United States posed by the proliferation of nuclear, biological and chemical weapons and the means of delivering such weapons. That emergency has been continued in effect through successive annual presidential notices. The authority for parts 730, 734, 736, 742, 744 and 745 of the EAR (15 CFR parts 730, 734, 736, 742, 744 and 745) rests in part on E.O. 12938, as amended, and on the successive annual notices continuing the emergency. This rule revises the authority citations in those parts of the CFR to cite the notice of November 4, 2010, which is the most recent such annual Presidential notice, and to remove the citation to the notice of November 6, 2009 on the same topic.

The authority for parts 730 and 736 of the EAR also rests in part on Executive Order 13338 of May 11, 2004, *Blocking Property of Certain Persons and Prohibiting the Export of Certain Goods to Syria.* This rule adds the title 3 CFR citation for that executive order to parts 730 and 736 to reflect the fact the E.O. 13338 has been codified into title 3 of the CFR.

BIS is making these revisions so that title 15 of the CFR will cite the current authority for the parts mentioned above. This rule is purely procedural, and makes no changes other than to revise CFR authority citations paragraphs. It does not change the text of any section of the EAR, nor does it alter any right, obligation or prohibition that applies to any person under the EAR.

Rulemaking Requirements

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

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule does not involve any collection of information.

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

4. The Department finds that there is good cause under 5 U.S.C. 553(b)(3)(B) to waive the provisions of the Administrative Procedure Act requiring prior notice and the opportunity for public comment because they are unnecessary. This rule only updates legal authority citations and is non-discretionary. This rule does not alter any right, obligation or prohibition that applies to any person under the EAR. Because these revisions are not substantive changes, it is unnecessary to provide notice and opportunity for public comment. In addition, the 30-day delay in effectiveness required by 5 U.S.C. 553(d) is not applicable because this rule is not a substantive rule. Because neither the Administrative Procedure Act nor any other law requires that notice of proposed rulemaking and an opportunity for public comment be given for this rule, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

List of Subjects

15 CFR Part 730

Administrative practice and procedure, Advisory committees, Exports, Reporting and recordkeeping requirements, Strategic and critical materials.

15 CFR Part 734

Administrative practice and procedure, Exports, Inventions and patents, Research, Science and technology.

15 CFR Part 736

Exports.

15 CFR Part 742

Exports, Terrorism.

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

15 CFR Part 745

Administrative practice and procedure, Chemicals, Exports, Foreign trade, Reporting and recordkeeping requirements.

■ Accordingly, the EAR (15 CFR parts 730–774) is amended as follows:

PART 730—[AMENDED]

■ 1. The authority citation for 15 CFR part 730 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c; 22 U.S.C. 2151 note; 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 15 U.S.C. 1824a; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 11912, 41 FR 15825, 3 CFR, 1976 Comp., p. 114; E.O. 12002, 42 FR 35623, CFR, 1977 Comp., p. 133; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12214, 45 FR 29783, 3 CFR, 1980 Comp., p. 256; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 179; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 12981, 60 FR 62981, 3 CFR, 1995 Comp., p. 419; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p. 168; Notice of August 12, 2010, 75 FR 50681 (August 16, 2010); Notice of November 4, 2010, 75 FR 68673 (November 8, 2010).

PART 734—[AMENDED]

■ 2. The authority citation for 15 CFR part 734 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2010, 75 FR 50681 (August 16, 2010); Notice of November 4, 2010, 75 FR 68673 (November 8, 2010).

PART 736—[AMENDED]

■ 3. The authority citation for 15 CFR part 736 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 2151 note; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p. 168; Notice of August 12, 2010, 75 FR 50681 (August 16, 2010); Notice of November 4, 2010, 75 FR 68673 (November 8, 2010).

PART 742—[AMENDED]

■ 4. The authority citation for 15 CFR part 742 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Notice of August 12, 2010, 75 FR 50681 (August 16, 2010); Notice of November 4, 2010, 75 FR 68673 (November 8, 2010).

PART 744—[AMENDED]

■ 5. The authority citation for 15 CFR part 744 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of August 12, 2010, 75 FR 50681 (August 16, 2010); Notice of November 4, 2010, 75 FR 68673 (November 8, 2010).

PART 745—[AMENDED]

■ 6. The authority citation for 15 CFR part 745 is revised to read as follows:

Authority: 50 U.S.C. 1701 *et seq.;* E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; Notice of November 4, 2010, 75 FR 68673 (November 8, 2010).

Dated: December 10, 2010.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2010–31488 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. FDA–2000–N–0011]

Uniform Compliance Date for Food Labeling Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is establishing January 1, 2014, as the uniform compliance date for food labeling regulations that are issued between January 1, 2011, and December 31, 2012. FDA periodically announces uniform compliance dates for new food labeling requirements to minimize the economic impact of label changes. On December 8, 2008, FDA established January 2, 2012, as the uniform compliance date for food labeling regulations issued between January 1, 2009, and December 31, 2010 (January 1, 2012 fell on a Sunday; therefore the uniform compliance date was January 2, 2012).

DATES: This rule is effective December 15, 2010. Submit either electronic or written comments by February 14, 2011.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2000–N–0011, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

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

Written Submissions

Submit written submissions in the following ways:

- *FAX:* 301–827–6870.
- *Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and docket number for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, *see* the "Comments" paragraph of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or

comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Louis B. Brock, Center for Food Safety and Applied Nutrition (HFS–24), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2378.

SUPPLEMENTARY INFORMATION: FDA periodically issues regulations requiring changes in the labeling of food. If the effective dates of these labeling changes were not coordinated, the cumulative economic impact on the food industry of having to respond separately to each change would be substantial. Therefore, the Agency periodically has announced uniform compliance dates for new food labeling requirements (*see, e.g.,* the **Federal Register** of October 19, 1984 (49 FR 41019), December 24, 1996 (61 FR 67710), December 27, 1996 (61 FR 68145), December 23, 1998 (63 FR 71015), November 20, 2000 (65 FR 69666), December 31, 2002 (67 FR 79851), December 21, 2006 (71 FR 76599), and December 8, 2008 (73 FR 74349). Use of a uniform compliance date provides for an orderly and economical industry adjustment to new labeling requirements by allowing sufficient lead time to plan for the use of existing label inventories and the development of new labeling materials. This policy serves consumers' interests as well because the cost of multiple short-term label revisions that would otherwise occur would likely be passed on to consumers in the form of higher prices.

The Agency has determined under 21 CFR 25.30(k) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

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

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Order 12866 directs Agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Agency believes that this final rule is not a significant regulatory action under the Executive order.

The establishment of a uniform compliance date does not in itself lead to costs or benefits. We will assess the costs and benefits of the uniform compliance date in the regulatory impact analyses of the labeling rules that take effect at that date.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant economic impact of a rule on small entities. Because the final rule does not impose compliance costs on small entities, the Agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $135 million, using the most current (2009) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the Agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

This action is not intended to change existing requirements for compliance dates contained in final rules published before January 1, 2011. Therefore, all final FDA regulations published in the **Federal Register** before January 1, 2011, will still go into effect on the date stated in the respective final rule.

The Agency generally encourages industry to comply with new labeling regulations as quickly as feasible, however. Thus, when industry members voluntarily change their labels, it is appropriate that they incorporate any new requirements that have been published as final regulations up to that time.

In rulemaking that began with publication of a proposed rule on April 15, 1996 (61 FR 16422), and ended with a final rule on December 24, 1996, FDA provided notice and an opportunity for comment on the practice of establishing uniform compliance dates by issuance of a final rule announcing the date. Receiving no comments objecting to this practice, FDA finds any further rulemaking unnecessary for establishment of the uniform compliance date. Nonetheless, under 21 CFR 10.40(e)(1), FDA is providing an opportunity for comment on whether this uniform compliance date should be modified or revoked.

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.

The new uniform compliance date will apply only to final FDA food labeling regulations that require changes in the labeling of food products and that publish after January 1, 2011, and before December 31, 2012. Those regulations will specifically identify January 1, 2014, as their compliance date. All food products subject to the January 1, 2014, compliance date must comply with the appropriate regulations when initially introduced into interstate commerce on or after January 1, 2014. If any food labeling regulation involves special circumstances that justify a compliance date other than January 1, 2014, the Agency will determine for that regulation an appropriate compliance date, which will be specified when the final regulation is published.

Dated: December 9, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–31382 Filed 12–14–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9509]

RIN 1545–BE23

Farmer and Fisherman Income Averaging

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to the averaging of farm and fishing income in computing income tax liability. The regulations reflect changes made by the American Jobs Creation Act of 2004 and the Tax Extenders and Alternative Minimum Tax Relief Act of 2008. The regulations provide guidance to individuals engaged in a farming or fishing business who elect to reduce their tax liability by treating all or a portion of the current taxable year's farm or fishing income as if one-third of it had been earned in each of the prior three taxable years.

DATES: *Effective Date:* These regulations are effective on December 15, 2010.

Applicability Date: For date of applicability, see § 1.1301–1(g).

FOR FURTHER INFORMATION CONTACT: Erika Reigle, (202) 622–4950 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains amendments to 26 CFR part 1. On July 22, 2008, temporary regulations (TD 9417) were published in the **Federal Register** (73 FR 42522) relating to the averaging of farm and fishing income in computing tax liability. A notice of proposed rulemaking (REG–161695–04) cross-referencing the temporary regulations also was published in the **Federal Register** (73 FR 42538) on July 22, 2008. No comments in response to the notice of proposed rulemaking or requests to hold a public hearing were received, and no hearing was held. This Treasury decision adopts the proposed regulations with minor changes and removes the temporary regulations.

Section 504 of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Div. C of Public Law 110–343 (122 Stat. 3765), enacted on October 3, 2008, provides that a taxpayer may treat qualified settlement income received in connection with the civil action *In re Exxon Valdez,* No. 8–095–CV (HRH) (Consolidated) (D. Alaska), as income from a fishing business eligible for income averaging. Therefore, these final regulations include this qualified settlement income in the definition of income from a fishing business. Qualified settlement income is limited to interest and punitive damages. The extent to which compensatory damages are treated as income from a fishing business is determined under the generally applicable rules of section 1301.

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 notice of proposed rulemaking 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 Erika Reigle of the Office of Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

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

■ **Par. 2.** Section 1.1301–1 is amended by revising the section heading and paragraphs (a), (b)(1), (b)(3), (c)(1), (d)(3)(ii), (d)(4), (e), (f)(2), (f)(4), and (g) to read as follows:

§ 1.1301–1 Averaging of farm and fishing income.

(a) *Overview.* An individual engaged in a farming or fishing business may make a farm income averaging election to compute current year (election year) income tax liability under section 1 by averaging, over the prior three-year period (base years), all or a portion of the individual's current year electible farm income as defined in paragraph (e) of this section. Electible farm income includes income from both farming and fishing businesses. An individual who makes a farm income averaging election—

(1) Designates all or a portion of the individual's electible farm income for the election year as elected farm income; and

(2) Determines the election year section 1 tax by calculating the sum of—

(i) The section 1 tax that would be imposed for the election year if taxable income for the year were reduced by elected farm income; plus

(ii) The amount by which the section 1 tax would be increased if taxable income for each base year were increased by one-third of elected farm income.

(b) *Individual engaged in a farming or fishing business*—(1) *In general*—(i) *Farming or fishing business.* "Farming business" has the same meaning as provided in section 263A(e)(4) and the regulations under that section. *Fishing business* means the conduct of commercial fishing as defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802(4)). Accordingly, a fishing business is fishing in which the fish harvested are intended to or do enter commerce through sale, barter, or trade. *Fishing* means the catching, taking, or harvesting of fish; the attempted catching, taking, or harvesting of fish; any activities that reasonably can be expected to result in the catching, taking, or harvesting of fish; or any operations at sea in support of or in preparation for the catching, taking, or harvesting of fish. Fishing does not include any scientific research activity conducted by a scientific research vessel. *Fish* means finfish, mollusks, crustaceans, and all other forms of marine animal and plant life, other than marine mammals and birds. *Catching, taking, or harvesting* includes activities that result in the killing of fish or the bringing of live fish on board a vessel.

(ii) *Exxon Valdez settlement payments.* For purposes of this section, a qualified taxpayer who receives qualified settlement income in any taxable year is treated as engaged in a fishing business, and the income is treated as income attributable to a fishing business, for that taxable year. A *qualified taxpayer* is an individual plaintiff in the civil action *In re Exxon*

Valdez, No. 89–095–CV (HRH) (Consolidated) (D. Alaska). *Qualified taxpayer* also means any individual who is a beneficiary of the estate of such a plaintiff, was the spouse or immediate relative of that plaintiff, and acquired the right to receive the settlement income from that plaintiff. *Qualified settlement income* means any interest and punitive damage awards that are received in connection with the civil action *In re Exxon Valdez* (whether as lump-sum or periodic payments, whether pre- or post-judgment, and whether related to a settlement or to a judgment) and that are otherwise includible in income.

(iii) *Form of business.* An individual engaged in a farming or fishing business includes a sole proprietor of a farming or fishing business, a partner in a partnership engaged in a farming or fishing business, and a shareholder of an S corporation engaged in a farming or fishing business. Except as provided in paragraph (e)(1)(i) of this section, services performed as an employee are disregarded in determining whether an individual is engaged in a farming or fishing business for purposes of section 1301 of the Internal Revenue Code.

(iv) *Base years.* An individual is not required to have been engaged in a farming or fishing business in any of the base years in order to make a farm income averaging election.

* * * * *

(3) *Lessors of vessels used in fishing.* A lessor of a vessel is engaged in a fishing business for purposes of section 1301 with respect to payments that are received under the lease and are based on a share of the catch from the lessee's use of the vessel in a fishing business (or a share of the proceeds from the sale of the catch) if this manner of payment is determined under a written lease agreement entered into before the lessee begins any significant fishing activities resulting in the catch. A lessor of a vessel is not engaged in a fishing business for purposes of section 1301 with respect to fixed lease payments or with respect to lease payments based on a share of the lessee's catch (or a share of the proceeds from the sale of the catch) if the share is determined under either an unwritten agreement or a written agreement entered into after the lessee begins significant fishing activities resulting in the catch.

(c) *Making, changing, or revoking an election*—(1) *In general.* A farm income averaging election is made by filing Schedule J, "Income Averaging for Farmers and Fishermen," with an individual's Federal income tax return for the election year (including a late or amended return if the period of limitation on filing a claim for credit or refund has not expired).

* * * * *

(d) * * *

(3) * * *

(ii) *Example.* The rules of this paragraph (d)(3) are illustrated by the following example:

Example. (i) T is a fisherman who uses the calendar taxable year. In each of the years 2007, 2008, and 2009, T's taxable income is $20,000, none of which is electible farm income. In 2010, T has taxable income of $30,000 (prior to any farm income averaging election), $10,000 of which is electible farm income. T makes a farm income averaging election with respect to $9,000 of the electible farm income for 2010. Under paragraph (a)(2)(ii) of this section, $3,000 of elected farm income is allocated to each of the base years 2007, 2008, and 2009. Under paragraph (a)(2) of this section, T's 2010 tax liability is the sum of the following amounts:

(A) The section 1 tax on $21,000, which is T's taxable income of $30,000, minus elected farm income of $9,000.

(B) For each of the base years 2007, 2008, and 2009, the amount by which the section 1 tax would be increased if one-third of elected farm income were allocated to each year. The amount for each year is the section 1 tax on $23,000 (T's taxable income of $20,000, plus $3,000, which is one-third of elected farm income for the 2010 election year), minus the section 1 tax on $20,000.

(ii) In 2011, T has taxable income of $50,000, $12,000 of which is electible farm income. T makes a farm income averaging election with respect to all $12,000 of the electible farm income for 2011. Under paragraph (a)(2)(ii) of this section, $4,000 of elected farm income is allocated to each of the base years 2008, 2009, and 2010. Under paragraph (a)(2) of this section, T's 2011 tax liability is the sum of the following amounts:

(A) The section 1 tax on $38,000, which is T's taxable income of $50,000, minus elected farm income of $12,000.

(B) For each of the base years 2008 and 2009, the amount by which section 1 tax would be increased if, after adjustments for previous farm income averaging elections pursuant to paragraph (d)(3)(i) of this section, one-third of 2011 elected farm income were allocated to each year. The amount for each year is the section 1 tax on $27,000 (T's taxable income of $20,000 increased by $3,000 for T's 2010 farm income averaging election and further increased by $4,000, which is one-third of elected farm income for the 2011 election year), minus the section 1 tax on $23,000 (T's taxable income of $20,000 increased by $3,000 for T's 2010 farm income averaging election).

(C) For base year 2010, the amount by which section 1 tax would be increased if, after adjustments for previous farm income averaging elections pursuant to paragraph (d)(3)(i) of this section, one-third of elected farm income were allocated to that year. This amount is the section 1 tax on $25,000 (T's 2010 taxable income of $30,000 reduced by $9,000 for T's 2010 farm income averaging election and increased by $4,000, which is one-third of elected farm income for the 2011 election year), minus the section 1 tax on $21,000 (T's taxable income of $30,000 reduced by $9,000 for T's 2010 farm income averaging election).

(4) *Deposits into Merchant Marine Capital Construction Fund*—(i) *Reductions to taxable income and electible farm income.* Under section 7518(c)(1)(A), certain deposits to a Merchant Marine Capital Construction Fund (CCF) reduce taxable income for purposes of the Internal Revenue Code (the CCF reduction). The amount of the CCF reduction is limited under section 7518(a)(1)(A) to the taxpayer's taxable income (determined without regard to the reduction) attributable to specified maritime operations including operations in fisheries of the United States. The CCF reduction is taken into account in determining the taxable income used in computations under this section. In addition, except to the extent the amount described in section 7518(a)(1)(A) is not attributable to the individual's fishing business, the CCF reduction is treated in computing electible farm income as an item of deduction attributable to the individual's fishing business.

(ii) *Example.* The rules of this paragraph (d)(4) are illustrated by the following example:

Example. (i) T is a fisherman who uses the calendar taxable year. In each of the years 2007, 2008, and 2009, T's taxable income (before taking any CCF reduction into account) is $20,000. For taxable year 2008, all of T's income is described in section 7518(a)(1)(A) and is attributable to T's fishing business. T makes a $5,000 deposit into a CCF for taxable year 2008. In 2010, T has total taxable income of $30,000 (before taking any CCF reduction into account). T's electible farm income for 2010 (before taking the CCF reduction into account) is $10,000, all of which is described in section 7518(a)(1)(A) and is attributable to T's fishing business. For taxable year 2010, T makes a $4,000 deposit into a CCF.

(ii) The amount of the 2010 CCF deposit reduces taxable income. Accordingly, T's taxable income for 2010 is $26,000 ($30,000–$4,000). In addition, the entire amount of the CCF reduction is treated as an item of deduction attributable to T's fishing business. Accordingly, T's electible farm income for 2010 is $6,000 ($10,000–$4,000). Similarly, the amount of the 2008 CCF deposit reduces T's taxable income for 2008. Accordingly, T's taxable income for 2008 is $15,000 ($20,000–$5,000).

(iii) T makes an income averaging election with respect to all $6,000 of the electible farm income for 2010. Under paragraph (a)(2)(ii) of this section, $2,000 of elected farm income is allocated to each of the base years 2007, 2008, and 2009. Under paragraph (a)(2) of this section, T's 2010 tax liability is the sum of the following amounts:

(A) The section 1 tax on $20,000, which is T's taxable income of $26,000 ($30,000

reduced by the $4,000 CCF deposit), minus elected farm income of $6,000.

(B) For each of the base years 2007, 2008, and 2009, the amount by which section 1 tax would be increased if one-third of elected farm income were allocated to each year. The amount for base years 2007 and 2009 is the section 1 tax on $22,000, (T's taxable income of $20,000, plus $2,000, which is one-third of elected farm income for the election year), minus the section 1 tax on $20,000. The amount for base year 2008 is the section 1 tax on $17,000, which is T's taxable income of $15,000 ($20,000 reduced by the $5,000 CCF deposit), plus $2,000 (one-third of elected farm income for the election year), minus the section 1 tax on $15,000.

(e) *Electible farm income*—(1) *Identification of items attributable to a farming or fishing business*—(i) *In general.* Farm and fishing income includes items of income, deduction, gain, and loss attributable to an individual's farming or fishing business. Farm and fishing losses include, to the extent attributable to a farming or fishing business, any net operating loss carryover or carryback or net capital loss carryover to an election year. Income, gain, or loss from the sale of development rights, grazing rights, and other similar rights is not treated as attributable to a farming business. In general, farm and fishing income does not include compensation received as an employee. However, a shareholder of an S corporation engaged in a farming or fishing business may treat compensation received from the corporation as farm or fishing income if the compensation is paid by the corporation in the conduct of the farming or fishing business. If a crewmember on a vessel engaged in commercial fishing (within the meaning of section 3 of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1802(4)) is compensated by a share of the boat's catch of fish or a share of the proceeds from the sale of the catch, the crewmember is treated for purposes of section 1301 as engaged in a fishing business and the compensation is treated for such purposes as income from a fishing business.

(ii) *Gain or loss on sale or other disposition of property*—(A) *In general.* Gain or loss from the sale or other disposition of property that was regularly used in the individual's farming or fishing business for a substantial period of time is treated as attributable to a farming or fishing business. For this purpose, the term *property* does not include land, but does include structures affixed to land. Property that has always been used solely in the farming or fishing business by the individual is deemed to meet both the regularly used and substantial period tests. Whether property not used solely in the farming or fishing business was regularly used in the farming or fishing business for a substantial period of time depends on all of the facts and circumstances.

(B) *Cessation of a farming or fishing business.* If gain or loss described in paragraph (e)(1)(ii)(A) of this section is realized after cessation of a farming or fishing business, the gain or loss is treated as attributable to a farming or fishing business only if the property is sold within a reasonable time after cessation of the farming or fishing business. A sale or other disposition within one year of cessation of the farming or fishing business is presumed to be within a reasonable time. Whether a sale or other disposition that occurs more than one year after cessation of the farming or fishing business is within a reasonable time depends on all of the facts and circumstances.

(2) *Determination of amount that may be elected farm income*—(i) *Electible farm income.* (A) The maximum amount of income that an individual may elect to average (electible farm income) is the sum of any farm and fishing income and gains, minus any farm and fishing deductions or losses (including loss carryovers and carrybacks) that are allowed as a deduction in computing the individual's taxable income.

(B) Individuals conducting both a farming business and a fishing business must calculate electible farm income by combining income, gains, deductions, and losses derived from the farming business and the fishing business.

(C) Except as otherwise provided in paragraph (d)(4) of this section, the amount of any CCF reduction is treated as a deduction from income attributable to a fishing business in calculating electible farm income.

(D) Electible farm income may not exceed taxable income, and electible farm income from net capital gain attributable to a farming or fishing business may not exceed total net capital gain. Subject to these limitations, an individual who has both ordinary income and net capital gain from a farming or fishing business may elect to average any combination of the ordinary income and net capital gain.

(ii) *Examples.* The rules of this paragraph (e)(2) are illustrated by the following examples:

Example 1. A has ordinary income from a farming business of $200,000 and deductible expenses from a farming business of $50,000. A's taxable income is $150,000 ($200,000–$50,000). Under paragraph (e)(2)(i) of this section, A's electible farm income is $150,000, all of which is ordinary income.

Example 2. B has capital gain of $20,000 that is not from a farming or fishing business, capital loss from a farming business of $30,000, and ordinary income from a farming business of $100,000. Under section 1211(b), B's allowable capital loss is limited to $23,000. B's taxable income is $97,000 (($20,000–$23,000) + $100,000). B has a capital loss carryover from a farming business of $7,000 ($30,000 total loss − $23,000 allowable loss). Under paragraph (e)(2)(i) of this section, B's electible farm income is $77,000 ($100,000 ordinary income from a farming business, minus $23,000 capital loss from a farming business), all of which is ordinary income.

Example 3. C has ordinary income from a fishing business of $200,000 and ordinary loss from a farming business of $60,000. C's taxable income is $140,000 ($200,000 − $60,000). Under paragraph (e)(2)(i)(B) of this section, C must deduct the farm loss from the fishing income in determining C's electible farm income. Therefore, C's electible farm income is $140,000 ($200,000–$60,000), all of which is ordinary income.

Example 4. D has ordinary income from a farming business of $200,000 and ordinary loss of $50,000 that is not from a farming or fishing business. D's taxable income is $150,000 ($200,000 − $50,000). Under paragraph (e)(2)(i)(D) of this section, electible farm income may not exceed taxable income. Therefore, D's electible farm income is $150,000, all of which is ordinary income.

Example 5. E has capital gain from a farming business of $50,000, capital loss of $40,000 that is not from a farming or fishing business, and ordinary income from a farming business of $60,000. E's taxable income is $70,000 (($50,000 − $40,000) + $60,000). Under paragraph (e)(2)(i)(D) of this section, electible farm income may not exceed taxable income, and electible farm income from net capital gain attributable to a farming or fishing business may not exceed total net capital gain. Therefore, E's electible farm income is $70,000 of which $10,000 is capital gain and $60,000 is ordinary income.

(f) * * *

(2) *Changes in filing status.* An individual is not prohibited from making a farm income averaging election solely because the individual's filing status is not the same in an election year and the base years. For example, an individual who is married and files a joint return in the election year, who filed as single in one or more of the base years, may elect to average farm or fishing income, by using the single filing status to compute the increase in section 1 taxes for the base years in which the individual filed as single.

* * * * *

(4) *Alternative minimum tax.* A farm income averaging election is disregarded in computing the tentative minimum tax and the regular tax under section 55 for the election year or any base year. The election is taken into

account, however, in determining the regular tax liability under section 53(c) for the election year.

* * * * *

(g) *Effective/applicability date.* This section applies for taxable years beginning after December 15, 2010. See the provisions of §§ 1.1301–1 and 1.1301–1T as in effect on December 14, 2010 for rules that apply for taxable years beginning on or before December 15, 2010. In addition, a taxpayer may apply paragraph (b)(1)(ii) of this section in taxable years beginning after December 31, 2003.

§ 1.1301–1T [Removed]

■ **Par. 3.** Section 1.1301–1T is removed.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

Approved: December 7, 2010.

Michael Mundaca,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2010–31497 Filed 12–14–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9510]

RIN 1545–BJ54

Requirement of a Statement Disclosing Uncertain Tax Positions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations allowing the IRS to require corporations to file a schedule disclosing uncertain tax positions related to the tax return as required by the IRS.

DATES: *Effective date:* This regulation is effective on December 15, 2010.

Applicability date: For dates of applicability, see § 1.6012–2(a)(5).

FOR FURTHER INFORMATION CONTACT: Kathryn Zuba at (202) 622–3400 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 6012 relating to the returns of income corporations are required to file. Section 6011 provides that persons liable for a tax imposed by Title 26 shall make a return when required by regulations prescribed by the Secretary of the Treasury according to the forms and regulations prescribed by the Secretary. Treasury Regulation § 1.6011–1 requires every person liable for income tax to make the returns required by regulation. Section 6012 requires corporations subject to an income tax to make a return with respect to that tax. Treasury Regulation § 1.6012–2 sets out the corporations that are required to file returns and the form those returns must take.

A proposed regulation under section 6012 (REG–119046–10) was published in the **Federal Register** on September 9, 2010. Requirement of a Statement Disclosing Uncertain Tax Positions, 75 FR 54802 (proposed Sept. 9, 2010). The IRS received one written comment concerning the proposed regulation, and a public hearing regarding the proposed regulation was held on October 19, 2010. Neither of the two speakers at the public hearing had comments relating to the proposed regulation, although both organizations the speakers represented had previously submitted written comments concerning the draft Schedule UTP and instructions. Announcement 2010–30, 2010–19 IRB 668. After considering the comments, the proposed regulation is adopted by this Treasury decision with one non-substantive change related to the effective date. While the proposed regulation applied to returns filed for tax years beginning after December 15, 2009 and ending after the date the regulations were published in the **Federal Register**, the final regulation applies to returns filed for tax years beginning on or after January 1, 2010.

Explanation and Summary of Comments

This rule will authorize the IRS to require certain corporations, as set out in forms, publications, instructions, or other guidance, to provide information concerning uncertain tax positions concurrent with the filing of a return. On September 24, 2010, the IRS released Schedule UTP with accompanying instructions that explain how the IRS plans to implement the authority provided by this regulation. One commentator asked that the proposed regulation not be adopted because Schedule UTP would require the disclosure of privileged information. If the regulation is adopted, the commentator recommended it should state that taxpayer may assert any applicable privileges to providing information sought by Schedule UTP and that any disclosure of information on that schedule will not constitute a waiver of any applicable privilege.

The final regulation does not adopt this recommendation. The regulation addresses the IRS's authority to require certain corporations to provide information concerning uncertain tax positions. The IRS has decided to require the filing of Schedule UTP based on its determination that the information about uncertain tax positions taken in a tax return required by the schedule is essential to achieving an effective and efficient self-assessment tax system. Provisions relating to the assertion of privilege are not included in this regulation, since it does not affect the existence of any applicable privileges taxpayers may have concerning information requested by a return or how they may assert those privileges.

Special Analyses

It has been determined that this final rule is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required.

This regulation will only affect taxpayers that prepare or are required to issue audited financial statements. Small entities rarely prepare or are required to issue audited financial statements due to the expense involved. It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6). Accordingly, a regulatory flexibility analysis is not required. Pursuant to 5 U.S.C. 553(d)(3), it has been determined that there is good cause for the effective date of this final rule, which is less than 30 days after the date of publication.

Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding this regulation was 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 Kathryn Zuba of the Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Section 1.6012–2 is also issued under the authority of 26 U.S.C. 6011 and 6012.

■ **Par. 2.** Section 1.6012–2 is amended by adding paragraphs (a)(4) and (5) to read as follows:

§ 1.6012–2 Corporations required to make returns of income.

(a) * * *

(4) *Disclosure of uncertain tax positions.* A corporation required to make a return under this section shall attach Schedule UTP, Uncertain Tax Position Statement, or any successor form, to such return, in accordance with forms, instructions, or other appropriate guidance provided by the IRS.

(5) *Effective/applicability date.* Paragraph (a)(4) of this section applies to returns filed for tax years beginning on or after January 1, 2010.

* * * * *

Steven T. Miller

Deputy Commissioner for Services and Enforcement.

Approved: December 9, 2010.

Michael Mundaca,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2010–31576 Filed 12–13–10; 11:15 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 January 2011 and interest assumptions under the asset allocation regulation for valuation dates in the first quarter of 2011. Interest assumptions are also published on PBGC's Web site (*http://www.pbgc.gov*).

DATES: Effective January 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 January 2011 and updates the asset allocation interest assumptions for the first quarter (January through March) of 2011.

The first-quarter 2011 interest assumptions under the allocation regulation will be 4.07 percent for the first 25 years following the valuation date and 3.93 percent thereafter. In comparison with the interest assumptions in effect for the fourth quarter of 2010, these interest assumptions represent no change in the select period (the period during which the select rate (the initial rate) applies), a decrease of 0.41 percent in the select rate, and a decrease of 0.58 percent in the ultimate rate (the final rate).

The January 2011 interest assumptions under the benefit payments regulation will be 2.25 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 December 2010, 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 January 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 207 is added to the table to read as follows:

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
*	*		*	*	*	*	*	
207	1–1–11	2–1–11	2.25	4.00	4.00	4.00	7	8

■ 3. In appendix C to part 4022, Rate Set 207 is added to the table to read as follows:

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
*	*		*	*	*	*	*	
207	1–1–11	2–1–11	2.25	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 January–March 2011 is added to the table to read as follows:

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

* * * * *

For valuation dates occurring in the months—	The values of $_{it}$ are:					
	i_t	for t =	i_t	for t =	i_t	for t =
*	*	*	*	*	*	
January–March 2011	0.0407	1–25	0.0393	>25	N/A	N/A

Issued in Washington, DC, on this 13th day of December 2010.

Vincent K. Snowbarger,

Deputy Director for Operations, Pension Benefit Guaranty Corporation.

[FR Doc. 2010–31616 Filed 12–14–10; 8:45 am]

BILLING CODE 7709–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2010–1084]

Drawbridge Operation Regulation; Upper Mississippi River, Clinton, IA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Clinton Railroad Drawbridge across the Upper Mississippi River, mile 518.0, at Clinton, Iowa. The deviation is necessary to allow the bridge owner time to perform preventive maintenance that is essential to the continued safe operation of the drawbridge. Maintenance is scheduled in the winter and when there is less impact on navigation; instead of scheduling work in the summer, when river traffic increases. This deviation allows the bridge to open on signal if at least 24 hours advance notice is given.

DATES: This deviation is effective from 12:01 a.m., December 15, 2010 to 9 a.m., March 1, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2010–1084 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–1084 in the "Keyword" box and then clicking "Search". They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Eric A. Washburn, Bridge Administrator, Western Rivers, Coast Guard; telephone 314–269–2378, e-mail *Eric.Washburn@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Union Pacific Railroad requested a temporary deviation for the Clinton Railroad Drawbridge, across the Upper Mississippi River, mile 518.0, at Clinton, Iowa to open on signal if at least 24 hours advance notice is given for 77 days from 12:01 a.m., December 15, 2010 to 9 a.m., March 1, 2011 to allow the bridge owner time for preventive maintenance. The Clinton Railroad Drawbridge currently operates in accordance with 33 CFR 117.5, which states the general requirement that drawbridges shall open promptly and fully for the passage of vessels when a

request to open is given in accordance with the subpart.

There are no alternate routes for vessels transiting this section of the Upper Mississippi River.

Winter conditions on the Upper Mississippi River coupled with the closure of Army Corps of Engineer's Lock No. 20 (Mile 343.2 UMR), Lock No. 21 (Mile 324.9 UMR) and Lock No. 22 (Mile 301.2 UMR) from January 3, 2011 to February 28, 2011 will preclude any significant navigation demands for the drawspan opening.

The Clinton Railroad Drawbridge, in the closed-to-navigation position, provides a vertical clearance of 18.7 feet above normal pool. Navigation on the waterway consists primarily of commercial tows and recreational watercraft. The drawbridge will open if at least 24-hours advance notice is given. This temporary deviation has been coordinated with waterway users.

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

Dated: December 2, 2010.

Eric A. Washburn,

Bridge Administrator.

[FR Doc. 2010–31408 Filed 12–14–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2010–1028]

Drawbridge Operation Regulations; Mystic River, Mystic, CT

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Route 1 Bridge across the Mystic River, mile 2.8, at Mystic, CT. The deviation is necessary to facilitate painting operations at the bridge. Under this deviation the bridge may remain in the closed position during the winter months December through April.

DATES: This deviation is effective for enforcement: With actual notice from December 2, 2010, through December 15, 2010 and with constructive notice from December 15, 2010 through April 5, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2010–1028 and are available online at *http://www.regulations.gov,* inserting USCG–2010–1028 in the "Keyword" and then clicking "Search". They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Ms. Judy K. Leung-Yee, Project Officer, First Coast Guard District, telephone (212) 668–7165, *judy.k.leung-yee@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Route 1 Bridge across the Mystic River at mile 2.8, has a vertical clearance of 4 feet at mean high water and 7 feet at men low water. The drawbridge operation regulations are listed at 33 CFR 117.211. The normal waterway users are predominantly recreational craft of various sizes.

The owner of the bridge, Connecticut Department of Transportation, requested a temporary deviation from the regulations to allow the bridge to remain in the closed position to facilitate painting operations at the bridge.

Under this temporary deviation the Route 1 Bridge may remain in the closed position from December 2, 2010, through April 15, 2011, for bridge painting. Vessels that can pass under the bridge in the closed position may do so at any time.

The bridge has received few requests to open during this time period during the past three years. The waterway users were advised of the requested bridge closure and no objections were received.

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

Dated: December 2, 2010.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2010–31409 Filed 12–14–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2010–1077]

Drawbridge Operation Regulations; Annisquam River and Blynman Canal, Gloucester, MA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Massachusetts Bay Commuter Railroad Bridge at mile 0.7 across the Annisquam River and Blynman Canal. The deviation is necessary to facilitate emergency structural repair. This deviation allows the bridge to remain in the closed position during the deviation period.

DATES: This deviation is effective for enforcement: With actual notice from December 1, 2010, through December 15, 2010 and with constructive notice from December 15, 2010 through April 17, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2010–1077 and are available online at *http://www.regulations.gov,* inserting USCG–2010–1077 in the "Keyword" and then clicking "Search". They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, contact Mr. John McDonald, Project Officer, First Coast Guard District, *john.w.mcdonald@uscg.mil,* or telephone (617) 223–8364. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Massachusetts Bay Commuter Railroad (MBCR) bridge, across the Annisquam River and Blynman Canal at mile 0.7, at Gloucester, MA, has a vertical clearance in the closed position of 16 feet at mean high water and 25 feet at mean low water. The drawbridge operation regulations are listed at 33 CFR 117.586.

The owner of the bridge MBCR requested a temporary deviation from the regulations to facilitate emergency structural repairs at the bridge. Under this temporary deviation the MBCR Bridge may remain in the closed position from December 1, 2010 through April 17, 2011. The bridge can be opened for emergencies by calling Ms. Patricia Mallon, Assistant Chief of Engineering at 617–222–3617 or 617–590–9828.

The bridge seldom receives requests to open December through April and there is an alternate route for vessel traffic since the waterway has outlets to open water at both ends. Vessels that can pass under the bridge in the closed position may do so at any time.

The Gloucester Harbor Master and the local marinas were notified and no objections were received.

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

Dated: December 1, 2010.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2010–31407 Filed 12–14–10; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0850; FRL–9238–9]

Approval and Promulgation of Air Quality Implementation Plans; Wisconsin; The Milwaukee-Racine and Sheboygan Areas; Determination of Attainment of the 1997 8-hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is making determinations under the Clean Air Act (CAA) that the Milwaukee-Racine and Sheboygan, Wisconsin areas have attained the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS). The Milwaukee-Racine area includes Milwaukee, Ozaukee, Racine, Washington, Waukesha, and Kenosha Counties. The Sheboygan area includes Sheboygan County. The determinations are based on complete, quality-assured and certified ambient air monitoring data that show that the areas have monitored attainment of the 1997 8-hour ozone standard for the 2006–2008 and 2007–2009 monitoring periods. Preliminary data available for 2010 indicate that the areas continue to monitor attainment. As a result of these determinations, the requirements for these areas to submit attainment demonstrations and associated reasonably available control measures (RACM), reasonable further progress plans (RFP), contingency measures, and other State Implementation Plan (SIP) revisions related to attainment of the standard are suspended for as long as the areas continue to attain the 1997 8-hour ozone standard. These determinations also suspend the requirement for EPA to promulgate attainment demonstration, RFP, and any other attainment-related Federal Implementation Plans (FIPs) for these areas.

DATES: This direct final rule will be effective February 14, 2011, unless EPA receives adverse comments by January 14, 2011. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2010–0850, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: mooney.john@epa.gov.*
3. *Fax:* (312) 692–2551.
4. *Mail:* John M. Mooney, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* John M. Mooney, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2010–0850. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *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.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Kathleen D'Agostino, Environmental Engineer, at (312) 886–1767 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Kathleen D'Agostino, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–1767, *dagostino.kathleen@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This **SUPPLEMENTARY INFORMATION** section is arranged as follows:

I. What is the background for these actions?

The CAA establishes a process for air quality management through the NAAQS. Before promulgation of the 8-hour standard, the ozone NAAQS was based on a 1-hour standard. On November 6, 1991 (56 FR 56693 and 56852), the Milwaukee-Racine and Sheboygan areas were designated as severe and serious nonattainment areas, respectively, under the 1-hour ozone NAAQS. The Sheboygan area was subsequently redesignated to attainment of the 1-hour standard on August 26, 1996 (61 FR 43675). The Milwaukee-Racine area was monitoring attainment of the 1-hour ozone standard by the end of the 2005 ozone season when, on June 15, 2005, EPA revoked the 1-hour ozone NAAQS. However, the Milwaukee-Racine area was still designated as nonattainment under the 1-hour ozone NAAQS.

On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone standard of 0.08 parts per million parts (ppm). On April 30, 2004 (69 FR 23857), EPA published a final rule designating and classifying areas under the 8-hour ozone NAAQS. These designations and classifications became effective June 15, 2004. EPA designated as nonattainment any area that was violating the 8-hour ozone NAAQS based on the three most recent years of air quality data, 2001–2003.

The CAA contains two sets of provisions, subpart 1 and subpart 2, that address planning and control requirements for nonattainment areas. (Both are found in Title I, part D, 42 U.S.C. 7501–7509a and 7511–7511f, respectively.) Subpart 1 contains general requirements for nonattainment areas for any pollutant, including ozone, governed by a NAAQS. Subpart 2 provides more specific requirements for ozone nonattainment areas.

Under EPA's implementation rule for the 1997 8-hour ozone standard, 69 FR 23951 (April 30, 2004), an area was classified under subpart 2 based on its 8-hour ozone design value (*i.e.* the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration), if it had a 1-hour design value at the time of designation at or above 0.121 ppm (the lowest 1-hour design value in Table 1 of subpart 2) (69 FR 23954). The Milwaukee-Racine and Sheboygan areas were designated as subpart 2, 8-hour ozone moderate nonattainment areas by EPA on April 30, 2004 (69 FR 23857 and 23947), based on air quality monitoring data from 2001–2003 (69 FR 23860).

On March 27, 2008 (73 FR 16436), EPA promulgated a revised 8-hour ozone standard of 0.075 ppm. In May 2008, states, environmental groups, and industry groups filed petitions with the United States Court of Appeals for the District of Columbia Circuit for review of the 2008 ozone standards. In March 2009, the court granted EPA's request to stay the litigation so EPA could review the standards and determine whether they should be reconsidered. On September 16, 2009, EPA announced reconsideration of the 2008 decision setting national standards for ground-level ozone. The designation process for that standard has been stayed. On January 6, 2010, EPA proposed to set the level of the primary 8-hour ozone standard within the range of 0.060 to 0.070 ppm, rather than at 0.075 ppm. EPA is working to complete reconsideration of the standard and expects thereafter to proceed with designations. The actions addressed in today's rulemaking relate only to the 1997 8-hour ozone standard.

II. What actions is EPA taking?

EPA is determining that the Milwaukee-Racine and Sheboygan 1997 8-hour ozone nonattainment areas have attained the 1997 8-hour ozone NAAQS. These determinations are based upon complete, quality-assured and certified ambient air monitoring data for the years 2007–2009 showing that the areas have monitored attainment of the 1997 8-hour ozone NAAQS. Today's rulemaking does not address requirements for the 2008 8-hour ozone NAAQS or any future revisions to these NAAQS.

III. What is the effect of these actions?

For the Milwaukee-Racine and Sheboygan areas, under the provisions of 40 CFR 51.918, these determinations would: (1) Suspend the requirements for the State to submit a SIP and/or for EPA to promulgate a FIP for an attainment demonstration and associated RACM (including reasonably available control technologies), RFP plan, contingency measures, and any other planning SIPs or FIPs related to attainment of the 1997 8-hour ozone NAAQS; (2) continue until such time, if any, that EPA subsequently determines that the area has violated the 1997 8-hour NAAQS; (3) be separate from, and not influence or otherwise affect, any future designation determination or requirements for the areas based on the revision to the 2008 8-hour ozone NAAQS or the reconsidered 8-hour ozone NAAQS; and (4) remain in effect regardless of whether EPA designates the area as a nonattainment area for purposes of the revised or reconsidered 2008 8-hour ozone NAAQS.

If EPA subsequently determines, after notice-and-comment rulemaking in the **Federal Register,** that the Milwaukee-Racine and/or Sheboygan area has violated the 1997 8-hour ozone NAAQS, the basis for the suspension of certain requirements for that area, set forth at 40 CFR 51.918, would no longer exist, and the area would thereafter have to address pertinent requirements.

The determinations of attainment in this notice are not equivalent to redesignations to attainment under section 107(d)(3) of the CAA because we have not approved maintenance plans for the areas under section 175A of the CAA, nor have we found that the areas have met the other statutory requirements for redesignation. The designation status of each of the areas remains nonattainment for the 1997 8-hour ozone NAAQS until such time as EPA determines that it meets the CAA requirements for redesignation to attainment.

IV. What is EPA's analysis of the relevant air quality data?

Whether an area is considered to be attaining the 8-hour ozone NAAQS is determined in accordance with 40 CFR 50.10 and part 50, Appendix I, based on three complete, consecutive calendar years of quality-assured air quality monitoring data. To attain the standard, the 3-year average of the fourth-highest daily maximum 8-hour average ozone concentrations measured at each monitor within an area over each year must not exceed 0.08 ppm. Based on the rounding convention described in 40 CFR part 50, appendix I, the standard is attained if the design value is 0.084 ppm or below. The data must be collected and quality-assured in accordance with 40 CFR part 58, and recorded in the EPA's Air Quality System (AQS). The monitors generally should have remained at the same location for the duration of the monitoring period required for determining attainment.

Wisconsin has quality-assured and certified all of the ambient monitoring data for 2006–2008 and 2007–2009 in accordance with 40 CFR 58.10, and has recorded it in the AQS database. The data meet the completeness criteria in 40 CFR part 50, Appendix I, which require a minimum completeness of 75% annually and 90% over each 3-year period. Monitoring data are presented in

Table 1 below. Preliminary data available for 2010 are consistent with continued attainment.

TABLE 1—ANNUAL 4TH HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATION AND 3-YEAR AVERAGES OF 4TH HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATIONS

Area	County	Monitor	2006 4th high (ppm)	2007 4th high (ppm)	2008 4th high (ppm)	2009 4th high (ppm)	2006–2008 average (ppm)	2007–2009 average (ppm)
Milwaukee-Racine	Kenosha	Pleasant Prairie 55–059–0019.	0.079	0.085	0.072	0.071	0.078	0.076
	Milwaukee	16th St. HC 55–079–0010.	0.064	0.067	0.059	0.066	0.063	0.064
		WDNR SERHQ 55–079–0026.	0.068	0.075	0.063	0.067	0.068	0.068
		UWM–North 55–079–0041.	0.073	0.078	0.065	0.068	0.072	0.070
		Bayside 55–079–0085.	0.073	0.083	0.069	0.072	0.075	0.074
	Ozaukee	Grafton 55–089–0008.	0.071	0.082	0.064	0.067	0.072	0.071
		Harr. Beach 55–089–0009.	0.072	0.084	0.067	0.070	0.074	0.073
	Racine	Racine 55–101–0017.	0.071	0.077	0.065	0.071	0.071	0.071
	Washington	Slinger 55–131–0009.	0.066	0.071	0.060	0.065	0.065	0.065
	Waukesha	Waukesha 55–133–0027.	0.067	0.072	0.060	0.059	0.066	0.063
Sheboygan	Sheboygan	Kohler Andre Park 55–117–0006.	0.083	0.088	0.075	0.074	0.082	0.079

On the basis of this review, EPA has concluded that the Milwaukee-Racine area and the Sheboygan area have attained the 1997 8-hour NAAQS based on the most recent complete, quality assured 3 year period of data: 2007–2009. In addition, preliminary monitoring data for 2010 that are available to date indicate that these areas continue to attain the 1997 8-hour ozone NAAQS.

V. What are EPA's determinations and their consequences?

EPA is making determinations that the Milwaukee-Racine and Sheboygan, Wisconsin areas have attained the 1997 8-hour ozone NAAQS. The determinations are based upon complete, quality-assured and certified ambient air monitoring data, which show that the areas have monitored attainment of the 1997 8-hour ozone standard for the 2006–2008 and 2007–2009 monitoring periods. Preliminary data for 2010 indicate that the areas continue to monitor attainment.

As provided in 40 CFR 51.918, the determinations of attainment for the Milwaukee-Racine and Sheboygan areas suspend the requirements for the State of Wisconsin to submit for these areas: an attainment demonstration, associated RACM, RFP plan, contingency measures, and any other planning SIPs related to attainment of the 1997 8-hour ozone NAAQS. These determinations also suspend any requirement for EPA to promulgate FIPs for these areas deriving from the concomitant SIP obligations.

The attainment-related SIP and FIP obligations remain suspended for each area for so long as it continues to attain the 1997 8-hour ozone NAAQS or until it is redesignated for that NAAQS, at which time the obligations end. 40 CFR 51.918.

We are publishing these actions without prior proposal because we view them as noncontroversial and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to determine that the Milwaukee and/or Sheboygan area has attained the 1997 8-hour ozone standard if relevant adverse written comments are filed with respect to that area. This rule will be effective February 14, 2011 without further notice unless we receive relevant adverse written comments by January 14, 2011. If we receive such comments with respect to either the Milwaukee-Racine or the Sheboygan area, we will withdraw the action with regard to that area before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. The EPA will not institute a second comment period. Any parties interested in commenting on these actions should do so at this time. Please note that if EPA receives adverse comment on a section of this rule and if that portion may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. If we do not receive any comments, this action will be effective February 14, 2011.

VI. Statutory and Executive Order Reviews

These actions make determinations based on air quality data, and would, if finalized, result in the suspension of certain Federal requirements. For that reason, these actions:

- Are not "significant regulatory actions" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because a determinations of attainment is an action that affects the status of a geographical area and does not impose any new regulatory requirements on tribes, impact any existing sources of air pollution on tribal lands, nor impair the maintenance of ozone national ambient air quality standards in tribal lands. However, because there are tribal lands located in Milwaukee County, we provided the affected tribe with the opportunity to consult with EPA on the attainment determination. The consultation occurred on November 15, 2010. The affected tribe raised no concerns.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 14, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of these actions for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw these direct final rules and address the comment in the proposed rulemaking. These actions may not be challenged later in proceedings to enforce their requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: November 24, 2010.

Susan Hedman,

Regional Administrator, Region 5.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart YY—Wisconsin

■ 2. Section 52.2585 is amended by adding paragraph (y) to read as follows:

§ 52.2585 Control strategy: Ozone.

* * * * *

(y) *Determination of attainment.* EPA has determined, as of December 15, 2010 that the Milwaukee-Racine, WI and Sheboygan, WI areas have attained the 1997 8-hour ozone standard. These determinations suspend the requirements for these areas to submit attainment demonstrations and associated reasonably available control measures (RACM), reasonable further progress plans (RFP), contingency measures, and other State Implementation Plan (SIP) revisions related to attainment of the standard for as long as the areas continue to attain the 1997 8-hour ozone standard. These determinations also stay the requirement for EPA to promulgate attainment demonstration and RFP Federal Implementation Plans (FIPs) for these areas.

[FR Doc. 2010–31339 Filed 12–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2010–0521; FRL–9233–3]

Revisions to the Arizona State Implementation Plan, Maricopa County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the Maricopa County portion of the Arizona State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on September 2, 2010 and concern particulate matter (PM) emissions from fugitive dust sources such as construction sites and related activities, unpaved roads, unpaved parking lots, and disturbed soils on vacant lots. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: *Effective Date:* This rule is effective on January 14, 2011.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2010–0521 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Andrew Steckel, EPA Region IX, (415) 947–4115, *steckel.andrew@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

Table of Contents

IV. Statutory and Executive Order Reviews

I. Proposed Action

On September 2, 2010 (75 FR 53907), EPA proposed to approve the following rules into the Arizona SIP.

Local agency	Rule No.	Rule title	Adopted	Submitted
MCAPCD	310	Fugitive Dust From Dust-Generating Operations	01/27/10	04/12/10
MCAPCD	310.01	Fugitive Dust From Non-Traditional Sources of Fugitive Dust	01/27/10	04/12/10
MCAPCD		Appendix C–Fugitive Dust Test Methods	03/26/08	07/10/08

We proposed to approve these rules because we determined that they complied with the relevant CAA requirements. Our proposed action contains more information on the rules and our evaluation.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

No comments were submitted that change our assessment that the submitted rules comply with the relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving these rules into the Arizona SIP.

IV. 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
- Will not have disproportionately high and adverse human health or environmental effects on minority, low-income or Tribal populations because it maintains or increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population as described in 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.

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, particulate matter, Reporting and recordkeeping requirements.

Dated: November 3, 2010.

Jared Blumenfeld,

Regional Administrator, Region IX.

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

PART 52—[AMENDED]

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

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

Subpart D—Arizona

■ 2. Section 52.120 is amended by adding paragraphs (c)(146) and (c)(147) to read as follows:

§ 52.120 Identification of plan.

* * * * *

(c) * * *

(146) The following plan was submitted on April 12, 2010 by the Governor's designee.

(i) Incorporation by reference.

(A) Maricopa County Air Quality Department.

(*1*) Rule 310, "Fugitive Dust From Dust-Generating Operations," adopted on January 27, 2010.

(*2*) Rule 310.01, "Fugitive Dust From Non-Traditional Sources of Fugitive Dust," adopted on January 27, 2010.

(147) The following plan was submitted on July 10, 2008 by the Governor's designee.

(i) Incorporation by reference.

(A) Maricopa County Air Quality Department.

(*1*) Appendix C—"Fugitive Dust Test Methods," adopted on March 26, 2008.

[FR Doc. 2010–31331 Filed 12–14–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 97

[WT Docket No. 09–209; FCC 10–189]

Amateur Service Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document revises the Amateur Radio Service rules to amend and clarify the rules with respect to amateur service vanity call signs. The rules are necessary to amend the amateur service rules and to conform them to prior Commission decisions. The effect of this action is to enhance the usefulness of the amateur service rules by making them conform with other Commission rules, thereby eliminating licensee confusion when applying the rules to amateur service operations.

DATES: Effective February 14, 2011.

FOR FURTHER INFORMATION CONTACT: William T. Cross, Mobility Division, Wireless Telecommunications Bureau, at (202) 418–0680, or TTY (202) 418–7233.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order* (*R&O*), adopted November 2, 2010, and released November 8, 2010. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.* Alternative formats are available to persons with disabilities by sending an e-mail to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

1. By this action, the Commission amends the vanity call sign system rules to clarify the date on which the call sign associated with a license that is canceled due to the licensee's death becomes available for reassignment, and to clarify the exceptions to the general rule that a call sign is unavailable to the vanity call sign system for two years after the license terminates.

2. Also, by this action, the Commission limits who can file applications on behalf of a club, how many vanity call signs a club can hold, and how many clubs can have the same license trustee.

3. In addition, the Commission makes certain minor, non-substantive amendments to the amateur service rules to amend part 97 to remove obsolete references to Technician Plus Class operator licenses and to remove references to RACES station licenses.

4. The Commission also revises § 97.21 to reference § 1.949 of our rules, which requires that renewal applications be filed no sooner than ninety days prior to expiration of the license, and amends §§ 0.191 and 0.392 to remove references to § 97.401(b), which the Commission removed in 2006.

5. The rules that the Commission adopted in this *R&O* apply to amateur radio clubs, some of which may be small entities. The Commission certifies that no regulatory flexibility analysis is necessary here because, even if a substantial number of small entities, namely, amateur radio clubs, were affected by the rules, there would not be a significant economic impact on those entities. The rules we are adopting do not impose economic requirements. Instead, they relate to the administration of the amateur radio service. Therefore, we certify that the rule changes adopted in this *R&O* will not have a significant economic impact on a substantial number of small entities.

6. This *R&O* and the rule amendments are issued under the authority contained in 47 U.S.C. 154(i), 303(r), and 403.

7. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Report and Order,* including the Initial and Final Regulatory Flexibility Certifications, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 0

Organization and functions (Government agencies)

47 CFR Part 97

Radio.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 0 and 97 as follows:

PART 0—COMMISSION ORGANIZATION

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

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

§ 0.191 [Amended]

■ 2. Remove and reserve paragraph (o) of § 0.191.

§ 0.392 [Amended]

■ 3. Remove and reserve paragraph (g) of § 0.392.

PART 97—AMATEUR RADIO SERVICE

■ 4. The authority citation for part 97 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064–1068, 1081–1105, as amended; 47 U.S.C. 151–155, 301–609, unless otherwise noted.

■ 5. Section 97.3 is amended by redesignating paragraphs (a)(27) through (a)(49) as paragraphs (a)(28) through (a)(50), and adding a new paragraph (a)(27) to read as follows:

§ 97.3 Definitions.

* * * * *

(a) * * *

(27) *In-law.* A parent, stepparent, sibling, or step-sibling of a licensee's spouse; the spouse of a licensee's sibling, step-sibling, child, or stepchild; or the spouse of a licensee's spouse's sibling or step-sibling.

* * * * *

■ 6. Section 97.5 is amended by removing paragraph (b)(4) and revising paragraph (b)(2) to read as follows:

§ 97.5 Station license required.

* * * * *

(b) * * *

(2) A club station license grant. A club station license grant may be held only by the person who is the license trustee designated by an officer of the club. The trustee must be a person who holds an operator/primary station license grant. The club must be composed of at least four persons and must have a name, a document of organization, management, and a primary purpose devoted to amateur service activities consistent with this part.

* * * * *

■ 7. Section 97.9 is revised to read as follows:

§ 97.9 Operator license grant.

(a) The classes of amateur operator license grants are: Novice, Technician, General, Advanced, and Amateur Extra.

The person named in the operator license grant is authorized to be the control operator of an amateur station with the privileges authorized to the operator class specified on the license grant.

(b) The person named in an operator license grant of Novice, Technician, General or Advanced Class, who has properly submitted to the administering VEs a FCC Form 605 document requesting examination for an operator license grant of a higher class, and who holds a CSCE indicating that the person has completed the necessary examinations within the previous 365 days, is authorized to exercise the rights and privileges of the higher operator class until final disposition of the application or until 365 days following the passing of the examination, whichever comes first.

■ 8. Section 97.17 is amended by revising paragraphs (a) and (d) to read as follows:

§ 97.17 Application for new license grant.

(a) Any qualified person is eligible to apply for a new operator/primary station, club station or military recreation station license grant. No new license grant will be issued for a Novice or Advanced Class operator/primary station.

* * * * *

(d) One unique call sign will be shown on the license grant of each new primary, club and military recreation station. The call sign will be selected by the sequential call sign system. Effective February 14, 2011, no club station license grants will be issued to a licensee who is shown as the license trustee on an existing club station license grant.

■ 9. Section 97.19 is amended by revising paragraphs (a), (c)(2), and (c)(3) to read as follows:

§ 97.19 Application for a vanity call sign.

(a) The person named in an operator/primary station license grant or in a club station license grant is eligible to make application for modification of the license grant, or the renewal thereof, to show a call sign selected by the vanity call sign system. Effective February 14, 2011, the person named in a club station license grant that shows on the license a call sign that was selected by a trustee is not eligible for an additional vanity call sign. (The person named in a club station license grant that shows on the license a call sign that was selected by a trustee is eligible for a vanity call sign for his or her operator/primary station license grant on the same basis as any other person who holds an operator/primary station license grant.) Military recreation stations are not eligible for a vanity call sign.

* * * * *

(c) * * *

(2) A call sign shown on a surrendered or canceled license grant (except for a license grant that is canceled pursuant to § 97.31) is not available to the vanity call sign system for 2 years following the date such action is taken. (The availability of a call sign shown on a license canceled pursuant to § 97.31 is governed by paragraph (c)(3) of this section.)

(i) This 2-year period does not apply to any license grant pursuant to paragraph (c)(3)(i), (ii), or (iii) of this section that is surrendered, canceled, revoked, voided, or set aside because the grantee acknowledged or the Commission determined that the grantee was not eligible for the exception. In such a case, the call sign is not available to the vanity call sign system for 30 days following the date such action is taken, or for the period for which the call sign would not have been available to the vanity call sign system pursuant to paragraphs (c)(2) or (3) of this section but for the intervening grant to the ineligible applicant, whichever is later.

(ii) An applicant to whose operator/primary station license grant, or club station license grant for which the applicant is the trustee, the call sign was previously assigned is exempt from the 2-year period set forth in paragraph (c)(2) of this section.

(3) A call sign shown on a license canceled pursuant to § 97.31 of this part is not available to the vanity call sign system for 2 years following the person's death, or for 2 years following the expiration of the license grant, whichever is sooner. If, however, a license is canceled more than 2 years after the licensee's death (or within 30 days before the second anniversary of the licensee's death), the call sign is not available to the vanity call sign system for 30 days following the date such action is taken. The following applicants are exempt from this 2-year period:

(i) An applicant to whose operator/primary station license grant, or club station license grant for which the applicant is the trustee, the call sign was previously assigned; or

(ii) An applicant who is the spouse, child, grandchild, stepchild, parent, grandparent, stepparent, brother, sister, stepbrother, stepsister, aunt, uncle, niece, nephew, or in-law of the person now deceased or of any other deceased former holder of the call sign, provided that the vanity call sign requested by the applicant is from the group of call signs corresponding to the same or lower class of operator license held by the applicant as designated in the sequential call sign system; or

(iii) An applicant who is a club station license trustee acting with a written statement of consent signed by either the licensee *ante mortem* but who is now deceased, or by at least one relative as listed in paragraph (c)(3)(ii) of this section, of the person now deceased or of any other deceased former holder of the call sign, provided that the deceased former holder was a member of the club during his or her life.

* * * * *

■ 10. Section 97.21 is amended by revising paragraphs (a)(1), (a)(3) introductory text, (a)(3)(iii), and (c) to read as follows:

§ 97.21 Application for a modified or renewed license grant.

(a) * * *

(1) Must apply to the FCC for a modification of the license grant as necessary to show the correct mailing address, licensee name, club name, license trustee name, or license custodian name in accordance with § 1.913 of this chapter. For a club or military recreation station license grant, the application must be presented in document form to a Club Station Call Sign Administrator who must submit the information thereon to the FCC in an electronic batch file. The Club Station Call Sign Administrator must retain the collected information for at least 15 months and make it available to the FCC upon request. A Club Station Call Sign Administrator shall not file with the Commission any application to modify a club station license grant that was submitted by a person other than the trustee as shown on the license grant, except an application to change the club station license trustee. An application to modify a club station license grant to change the license trustee name must be submitted to a Club Station Call Sign Administrator and must be signed by an officer of the club.

* * * * *

(3) May apply to the FCC for renewal of the license grant for another term in accordance with §§ 1.913 and 1.949 of this chapter. Application for renewal of a Technician Plus Class operator/primary station license will be processed as an application for renewal of a Technician Class operator/primary station license.

* * * * *

(iii) For a club station or military recreation station license grant showing

a call sign obtained through the sequential call sign system, and for a club station license grant showing a call sign obtained through the vanity call sign system but whose grantee does not want to have the vanity call sign reassigned to the station, the application must be presented in document form to a Club Station Call Sign Administrator who must submit the information thereon to the FCC in an electronic batch file. The replacement call sign will be selected by the sequential call sign system. The Club Station Call Sign Administrator must retain the collected information for at least 15 months and make it available to the FCC upon request.

* * * * *

(c) Except as provided in paragraph (a)(4) of this section, a call sign obtained under the sequential or vanity call sign system will be reassigned to the station upon renewal or modification of a station license.

■ 11. Add § 97.31 to subpart A to read as follows:

§ 97.31 Cancellation on account of the licensee's death.

(a) A person may request cancellation of an operator/primary station license grant on account of the licensee's death by submitting a signed request that includes a death certificate, obituary, or Social Security Death Index data that shows the person named in the operator/primary station license grant has died. Such a request may be submitted as a pleading associated with the deceased licensee's license. *See* § 1.45 of this chapter. In addition, the Commission may cancel an operator/primary station license grant if it becomes aware of the grantee's death through other means. No action will be taken during the last thirty days of the post-expiration grace period (*see* § 97.21(b)) on a request to cancel a license due to the licensee's death.

(b) A license that is canceled due to the licensee's death is canceled as of the date of the licensee's death.

■ 12. Section 97.119 is amended by revising paragraphs (f)(2) and (f)(3) to read as follows:

§ 97.119 Station identification.

* * * * *

(f) * * *

(2) For a control operator who has requested a license modification from Novice or Technician to General Class: AG;

(3) For a control operator who has requested a license modification from Novice, Technician, General, or Advanced Class to Amateur Extra Class: AE.

* * * * *

■ 13. Section 97.201 is amended by revising paragraph (a) to read as follows:

§ 97.201 Auxiliary station.

(a) Any amateur station licensed to a holder of a Technician, General, Advanced or Amateur Extra Class operator license may be an auxiliary station. A holder of a Technician, General, Advanced or Amateur Extra Class operator license may be the control operator of an auxiliary station, subject to the privileges of the class of operator license held.

* * * * *

■ 14. Section 97.203 is amended by revising paragraph (a) to read as follows:

§ 97.203 Beacon station.

(a) Any amateur station licensed to a holder of a Technician, General, Advanced or Amateur Extra Class operator license may be a beacon. A holder of a Technician, General, Advanced or Amateur Extra Class operator license may be the control operator of a beacon, subject to the privileges of the class of operator license held.

* * * * *

■ 15. Section 97.301 is amended by revising paragraphs (a) introductory text and (e) introductory text to read as follows:

§ 97.301 Authorized frequency bands.

* * * * *

(a) For a station having a control operator who has been granted a Technician, General, Advanced, or Amateur Extra Class operator license or who holds a CEPT radio-amateur license or IARP of any class:

* * * * *

(e) For a station having a control operator who has been granted an operator license of Novice Class or Technician Class:

* * * * *

■ 16. Section 97.313 is amended by revising paragraph (c)(2) to read as follows:

§ 97.313 Transmitter power standards.

* * * * *

(c) * * *

(2) On the 3.525–3.60 MHz, 7.025–7.125 MHz, 21.025–21.20 MHz, and 28.0–28.5 MHz segment when the control operator is a Novice Class operator or a Technician Class operator; or

* * * * *

■ 17. Section 97.407 is revised to read as follows:

§ 97.407 Radio amateur civil emergency service.

(a) No station may transmit in RACES unless it is an FCC-licensed primary, club, or military recreation station and it is certified by a civil defense organization as registered with that organization. No person may be the control operator of an amateur station transmitting in RACES unless that person holds a FCC-issued amateur operator license and is certified by a civil defense organization as enrolled in that organization.

(b) The frequency bands and segments and emissions authorized to the control operator are available to stations transmitting communications in RACES on a shared basis with the amateur service. In the event of an emergency which necessitates invoking the President's War Emergency Powers under the provisions of section 706 of the Communications Act of 1934, as amended, 47 U.S.C. 606, amateur stations participating in RACES may only transmit on the frequency segments authorized pursuant to part 214 of this chapter.

(c) An amateur station registered with a civil defense organization may only communicate with the following stations upon authorization of the responsible civil defense official for the organization with which the amateur station is registered:

(1) An amateur station registered with the same or another civil defense organization; and

(2) A station in a service regulated by the FCC whenever such communication is authorized by the FCC.

(d) All communications transmitted in RACES must be specifically authorized by the civil defense organization for the area served. Only civil defense communications of the following types may be transmitted:

(1) Messages concerning impending or actual conditions jeopardizing the public safety, or affecting the national defense or security during periods of local, regional, or national civil emergencies;

(2) Messages directly concerning the immediate safety of life of individuals, the immediate protection of property, maintenance of law and order, alleviation of human suffering and need, and the combating of armed attack or sabotage;

(3) Messages directly concerning the accumulation and dissemination of public information or instructions to the civilian population essential to the activities of the civil defense organization or other authorized governmental or relief agencies; and

(4) Communications for RACES training drills and tests necessary to ensure the establishment and maintenance of orderly and efficient operation of the RACES as ordered by the responsible civil defense organization served. Such drills and tests may not exceed a total time of 1 hour per week. With the approval of the chief officer for emergency planning in the applicable State, Commonwealth, District or territory, however, such tests and drills may be conducted for a period not to exceed 72 hours no more than twice in any calendar year.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101203602–0602–1]

RIN 0648–BA29

Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish Retention Standard; Emergency Rule

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

ACTION: Emergency rule; request for comments.

SUMMARY: NMFS is exempting, through this emergency rule, trawl catcher/processor vessels (C/Ps) that are not specified in regulation as American Fisheries Act (AFA) vessels, referred to throughout this rule as non-AFA trawl C/Ps, and Amendment 80 cooperatives from the groundfish retention standard (GRS) in the Bering Sea and Aleutian Islands management area. The GRS was implemented to increase the retention and utilization of groundfish caught by the non-AFA trawl C/Ps and to respond to bycatch reduction goals described in National Standard 9. NMFS recently discovered that the regulatory methodology used to calculate compliance with and to enforce the GRS percentages established for 2010 and 2011 effectively require the sector to meet GRS well above that considered by the North Pacific Fishery Management Council or that implemented by NMFS. As a result, the retention requirements are expected to impose significantly higher costs due to the increased level of retention and to generate an unanticipated level of noncompliance in the Amendment 80 fleet. Further, monitoring and enforcement of the GRS has proven far more complex, challenging, and potentially costly than anticipated by NMFS. This emergency rule is necessary to exempt non-AFA trawl C/Ps and Amendment 80 cooperatives from the regulatory provisions of the GRS program before the end of the 2010 fishing season and prior to the start of the 2011 fishing season. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area, and other applicable law.

DATES: Effective December 15, 2010 through June 13, 2011. Comments must be received by January 14, 2011.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by RIN 0648–BA29, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal at *http://www.regulations.gov.*
- *Fax:* (907) 586–7557, Attn: Ellen Sebastian.
- *Mail:* P.O. Box 21668, Juneau, AK 99802.
- *Hand delivery to the Federal Building:* 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record and will be posted to *http://www.regulations.gov,* generally without change. No comments will be posted for public viewing until after the comment period has closed. All Personal Identifying Information (for example, name, address) 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.

Electronic copies of the Regulatory Impact Review (RIR), and the Categorical Exclusion prepared for this action may be obtained from *http://www.regulations.gov* or from the Alaska Region Web site at *http://alaskafisheries.noaa.gov.* The Environmental Assessment, RIR, and Final Regulatory Flexibility Analysis for Amendment 79 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) and the Environmental Assessment, RIR, and Final Regulatory Flexibility Analysis for Amendment 80 to the FMP are available from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Seanbob Kelly, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the U.S. groundfish fisheries of the Bering Sea and Aleutian Islands management area (BSAI) in the Exclusive Economic Zone under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). The North Pacific Fishery Management Council (Council) prepared the FMP pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Regulations implementing the FMP appear at 50 CFR part 679. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

Groundfish Retention Standard

The Groundfish Retention Standard (GRS) originally was adopted by the Council as Amendment 79 to the FMP in June 2003. The GRS was intended to increase retention of groundfish by non-American Fisheries Act (AFA) trawl catcher processors (C/Ps) that were equal to or greater than 125 ft (38.1 m) length overall (LOA). In adopting that action, the Council focused on non-AFA trawl C/Ps because, as a group, they had the lowest retained catch rates of any C/P sector operating in the BSAI groundfish fishery. The Council's stated policy objective for developing the GRS was based on the Council's commitment to "reducing bycatch, minimizing waste, and improving utilization of fish resources to the extent practicable * * * [and acknowledged] the fact that any solution to the problem of reducing discards must take into account the ability of NOAA Fisheries to monitor discards and adequately enforce any regulations that are promulgated."

The final rule implementing the GRS was effective January 20, 2008 (71 FR 17362, April 6, 2006), and required non-AFA trawl C/Ps 125 ft (38.1 m) LOA or greater to retain and utilize an increased percentage of groundfish caught during fishing operations; these percentages are referred to as groundfish retention standards. Non-AFA trawl C/Ps less than 125 ft (38.1 m) LOA initially were excluded from the GRS because GRS

compliance costs associated with observers and scale monitoring requirements were found to be higher for these vessels, and their contribution to the overall bycatch and discard of groundfish were minimal compared to vessels equal to or greater than 125 ft (38.1 m) LOA.

Regulations at 50 CFR sections 679.27(j)(1) through (4) implement the GRS by prohibiting the owner or operator of a non-AFA trawl C/P equal to or greater than 125 ft (38.1 m) LOA from retaining an amount of groundfish during a fishing year that is less than the groundfish retention standard as determined by the equation used for determining GRS compliance at § 679.27(j)(2). Although compliance with the GRS percentages is calculated on an annual basis, the variables used to calculate annual retention are obtained from data collected throughout the year and from each haul by a vessel. NMFS implemented a different methodology for monitoring and enforcing annual retention standards in regulations implementing the GRS than that used in the Amendment 79 analysis in order to ensure that calculations were verifiable and enforceable on an individual vessel basis. The GRS was phased in to allow the affected vessels time to adjust to the retention requirements. The GRS schedule can be found at § 679.27(j)(4) and is listed below in Table 1.

TABLE 1—ANNUAL GROUNDFISH RETENTION STANDARD

GRS Schedule	Annual GRS (percent)
2008	65
2009	75
2010	80
2011 and each year after	85

In June 2006, the Council adopted Amendment 80 to the FMP, which was implemented with a final rule published in 2007 and was fully effective starting with the 2008 fishing year (72 FR 52668, September 14, 2007). Among other measures, Amendment 80 authorized the allocation of specified groundfish species to harvesting cooperatives and established a catch share program for the non-AFA trawl C/Ps, also referred to as the Amendment 80 sector. Amendment 80 was intended to meet a number of policy objectives that included improving retention and utilization of fishery resources by the Amendment 80 sector, reducing potential bycatch reduction costs, encouraging fishing practices with lower discard rates, and improving increasing the opportunity for increasing the value of harvested species. To meet these goals, Amendment 80 extended the GRS to non-AFA trawl C/Ps of all sizes by including C/P vessels less than 125 ft (38.1 m) LOA, and also extended the GRS to Amendment 80 harvesting cooperatives, rather than the individual vessels in the cooperative, to encourage fishing practices with lower discard rates.

The Council included all Amendment 80 sector vessels because some vessels, particularly the non-AFA trawl C/Ps less than 125 ft (38.1 m) LOA, could reduce the compliance costs associated with the GRS program if those vessels formed harvesting cooperatives under the Amendment 80 catch share program. Amendment 80 authorized a cooperative to meet the GRS by aggregating the retention rate of all vessels assigned to the cooperative. Owners of non-AFA C/Ps with relatively low retention rates could choose to join a cooperative, assign their harvest privilege to the cooperative, and allow vessels with higher retention rates to harvest the cooperative's exclusive allocation of fish. Additionally, for non-AFA trawl C/Ps that fish under a cooperative's exclusive harvest privilege, the costs associated with retaining less valuable fish under the GRS may be offset by increased profitability because they are no longer operating in a race for fish.

Recent and Unforeseen Issues With the GRS

In its March 2010 report to the Council, the Best Use Cooperative, a cooperative established under the cooperative formation provisions of Amendment 80, noted several issues that could pose potential compliance problems with the current GRS regulations. Specifically, the report stated that as retention requirements are increased through 2011, current GRS percentages may become economically impractical and unattainable.

In response to these concerns, the Council asked NMFS to assess the GRS and the issues raised by the Best Use Cooperative. In June 2010, NMFS reported to the Council the agency's opinion that unintended implementation, compliance, and enforcement issues are apparent with the GRS program. These issues center around (1) the regulatory methodology used to calculate annual GRS percentages for vessels and (2) the high enforcement and prosecution costs associated with the GRS.

NMFS has recently discovered that the regulatory methodology for calculating vessel specific GRS percentages results in lower estimates of groundfish retention percentages than the analytical methodology used by the Council when it adopted the GRS (*see* Table 2 of this preamble). Using information from NMFS' catch accounting database and the methodology used in the Amendment 79 analysis to calculate retention, the retention of groundfish by vessels in the Amendment 80 sector increased from 71 percent in 2003, when the Council adopted the GRS, to 90 percent in 2009 (*see* Table 2 of this preamble). The 90 percent retention rate in 2009 surpassed the Council policy objective of an 85 percent groundfish retention rate by 2011. However, the regulatory methodology set forth at § 679.27(j)(2) and (3) and used by NMFS to determine GRS compliance, differs from the analytical methodology that the Council used to calculate the GRS percentages. The methodology at § 679.27(j)(2) and (3) indicates that the retention of groundfish by vessels in the sector had only increased from 65% in 2003 to 83% in 2009. NMFS had purposefully implemented the different methodology at § 679.27(j)(2) and (3) than that used in the Amendment 79 analysis in order to ensure that calculations were verifiable and enforceable on an individual vessel basis.

To calculate the percent of retained catch, both the analytical and regulatory methodologies divide the retained catch (numerator) by total catch (denominator). The total catch (denominator), in both methodologies is a vessel's groundfish catch, as weighted on a certified flow scale, by haul. However, the retained catch (numerator) in each methodology is estimated by different methods. In the regulatory methodology, the retained catch (numerator) is a vessel's total round weight equivalent of retained catch based on primary groundfish production and NMFS product recovery rates. In the analytical method (*See* Column B, Table 2 of this preamble), the calculation relied on estimates of retained catch (numerator) based on several observer calculations and estimations. This resulted in estimates of retained catch that are unlike those used in the regulatory approach (*See* Column C, Table 2 of this preamble) to determine retained catch compliance with the GRS. Section 1.2.6 of the RIR for this action provides a detailed explanation of the analytical and regulatory methodologies (*see* **ADDRESSES**).

TABLE 2—COMPARISON OF GROUNDFISH RETENTION PERCENTAGES DERIVED UNDER THE APPROACH USED BY THE ANALYSIS SUPPORTING AMENDMENT 79 AND THE REGULATORY APPROACH FOR GRS COMPLIANCE

Year	Regulatory GRS (percent)	Total Catch (A)	Retained catch (B)	Round Weight Equivalent Reported Production (C)	Analytical Approach for Selecting GRS (percent) (B)/(A)	Regulatory Approach for Determining Compliance with GRS (percent) (C)/(A)
2003	.....	281,083	200,631	183,260	71	65
2004	.....	313,942	214,904	200,338	68	64
2005	.....	300,814	235,627	216,210	78	72
2006	.....	295,028	232,973	214,637	79	73
2007	.....	317,540	246,199	223,560	78	70
2008	65	352,698	315,453	264,245	89	75
2009	75	325,252	292,416	268,632	90	83

Note: All weights are in metric tons.

As demonstrated in Table 2, the regulatory methodology results in retention rates that are consistently lower than those considered, and recommended, by the Council for Amendment 79 and approved by the Secretary. In 2008, this difference was 15 percentage points, while the difference in 2009 was 7 percentage points. Using the regulatory methodology to determine individual vessels' specific annual retention, in 2009 three vessels had a retention rate less than 76 percent, seven vessels had a retention rate between 76 percent and 80 percent, and the remaining 10 vessels had a retention rate greater than 80 percent. Of the three vessels with retention rates below 76 percent, one vessel appears to be under the GRS and an enforcement action is pending against this vessel. The other two vessels are not subject to an enforcement action because the vessels were members of an Amendment 80 cooperative in 2009 and the cooperative as a whole exceeded the GRS.

As the GRS increases to 80 percent in 2010 and 85 percent in 2011, a large number of vessels that met or exceeded the GRS regulatory requirement in 2009, will not likely meet the standard in 2010 and 2011. Since the regulatory calculation of GRS can vary by as much as 15 percentage points from the Amendment 79 methodology, it is mathematically possible that a vessel could retain 100 percent of its catch and still fall at or below the regulatory GRS compliance rate, thereby triggering a larger number of enforcement actions than anticipated under Amendment 79 or Amendment 80. The high probability that vessels will be unable to meet the GRS in 2010 and each following year represents an unnecessary burden to the Amendment 80 sector, considering that under the analytical methodology for calculating compliance with the GRS, the Council's objectives for the GRS appear to be met and/or exceeded two years earlier than required.

Many participants in this sector have expressed strong concern about the feasibility of achieving the 2010 and 2011 GRS percentages under existing regulatory provisions. The Council recognized that the cooperative provisions, which were intended to increase retention rates by encouraging underperforming members of the Amendment 80 sector to assign their harvest privilege to a cooperative, may not be effective if a large portion of the fleet is unable to comply with the GRS. A cooperative may not be able to absorb the additional catch shares from underperforming vessels due to the limited fishing seasons and recent reductions in fleet capacity, including vessels exiting the fishery and one vessel lost at sea. Furthermore, NMFS has determined that the provisions of Amendment 80, which promote cooperative formation, will be undermined as more vessels are unable to meet the GRS. There is little incentive for an Amendment 80 cooperative to include underperforming vessels due to the potential for reduced retention rates at the cooperative level.

When the GRS program was approved by NMFS, NMFS anticipated difficulties in prosecuting vessel-specific violations of the GRS. These concerns primarily focused on the GRS's reliance on an annual groundfish retention percentage based in part on data collected by numerous observers deployed on a vessel over the course of a year, and the fact that observers may not be available (in future years) to support the prosecution process. These concerns persisted under Amendment 80 because the number of observers necessary to support an enforcement case and associated prosecution would increase substantially in enforcement actions including multiple vessels.

In early 2010, the NOAA Office of Law Enforcement (OLE) began to investigate an alleged violation of the GRS for the 2009 fishing year. This alleged violation involves a vessel, not part of an Amendment 80 cooperative, that fished for a portion of the fishing year. This case, which appeared to be a relatively simple GRS case, created an opportunity to evaluate the evidence collection processes necessary for prosecution of a GRS violation. This evaluation showed that the sufficiency of data sets for prosecution purposes must be examined for each vessel and that the evidence collection process may result in an unanticipated increase in enforcement costs. Prior to considering an alleged GRS violation for prosecution, OLE investigators must perform a detailed analysis and verification of the sampling procedures and protocols employed by embarked observers, and must find that the observed data have a high degree of reliability. This task is both time and labor intensive.

Recent experience shows that the estimated cost to NOAA OLE for an investigation of a simple case is $50,000 or more per vessel. Enforcement costs are likely to increase significantly depending on vessel size, number and availability of observers, and the portion of the season actively fished by the vessel. If the number of vessels investigated for GRS noncompliance increase, the cost of investigating a suspected violation of the GRS is also expected to rise to levels significantly higher than anticipated under Amendment 79 or Amendment 80.

A recent Office of the Inspector General investigation of OLE recommended greater emphasis on

prioritizing enforcement work at the regional and national levels, *http://www.oig.doc.gov/oig/reports/2010/OIG-19887.pdf.* Given the limited resources available to OLE, NMFS must balance the priority of particular regulatory schemes with overall enforcement time and personnel demands. Furthermore, the report recommended targeting regional enforcement operations on actions that warrant focused enforcement. Knowledge gained through the current one-vessel GRS case indicates future investigations will be much more labor and time intensive than expected. This level of investment does not appear to coincide with regional priorities, or NMFS's national enforcement objectives, considering the current high level of groundfish retention in the sector.

At this time, NMFS is unable to predict the magnitude of the level of noncompliance that will result under the regulatory methodology for calculating compliance with the 2010 and 2011 GRS. However, the disparity between the analytical methodology for establishing the GRS and the regulatory methodology for calculating compliance with the GRS poses serious concern. Therefore, NMFS has encouraged the Council to consider the implications of continuing to dedicate agency resources to the GRS. NMFS and representatives for the Amendment 80 sector recommended that the Council consider a more flexible, non-regulatory approach for assessing whether or not the Amendment 80 sector is maintaining recent improvements to retention rates. This suggested non-regulatory approach would include withdrawing the specific regulatory provisions for the GRS and instead relying on cooperative formation and annual reports to the Council on cooperative activity relative to catch and discard percentages to ensure that recent improvements in discard rates are maintained.

In response to this input, the Council initiated an analysis of alternatives to address the compliance and enforcement issues identified with the GRS and will consider an analysis supporting an FMP amendment to remove the GRS at its December 2010 meeting. While the FMP amendment and associated regulations are being developed, the Council requested that NMFS implement an emergency rule to exempt non-AFA trawl C/Ps from the GRS for the 2010 and 2011 fishing years.

Emergency Action

This emergency rule exempts non-AFA trawl C/Ps and Amendment 80 cooperatives from the GRS regulations at § 679.27(j)(1) through (4), including the minimum GRS percentages established for 2010 and 2011. This action would be implemented for 180 days, and would span two groundfish fishing years. An exemption from a portion of a fishing year precludes the calculation of annual compliance with the GRS; therefore, the practical effect of this emergency rule is that the non-AFA trawl C/Ps will be exempt from both the 2010 and 2011 GRS requirements. This emergency rule does not exempt non-AFA trawl C/Ps from the recordkeeping, permitting, or monitoring regulations at § 679.93; those requirements must remain effective to ensure proper catch accounting under the Amendment 80 quota-based catch share program.

Section 305(c) of the Magnuson-Stevens Act provides authority for rulemaking to address an emergency. Under that section, a Council may recommend emergency rulemaking, if it finds an emergency exists.

At its June 2010 meeting, the Council voted 10 to 1 to request that NMFS promulgate an emergency rule to relieve the GRS requirement for the non-AFA trawl C/Ps. The Council determined that an emergency exists because the regulations established to calculate compliance with annual GRS rates require a level of retention much higher than that intended by the Council. This discrepancy has only recently been identified and is aggravated by the scheduled increase in required retention rates in 2010 and 2011. In addition, the regulatory methodology requires a level of minimum retention higher than that contemplated when NMFS approved Amendment 79. The regulatory GRS rates cannot be sustained by many non-AFA trawl C/Ps; they create compliance costs above those anticipated when the GRS was approved, and they cannot be effectively enforced. Additional and potentially significant compliance costs associated with the 2010 and 2011 GRS percentages are not warranted because the improvements in retention rates by the non-AFA trawl C/Ps through 2009 have met Council objectives.

Enforcement of the GRS has proven far more complex, challenging, and potentially more costly than anticipated. Given the estimated increase in groundfish retention since 2003, it appears that the Council's policy objectives to decrease bycatch and waste in the non-AFA trawl C/P sector have been largely successful. The Amendment 80 sector has operated under a cooperative system for nearly 3 years in a manner that seems to facilitate compliance with the GRS to date (*See* Table 2 of this preamble). In addition, NMFS now has experience indicating that the costs to NOAA of developing a GRS compliance case are high and will increase if GRS noncompliance increases in 2010 and 2011. Given that NMFS's management objectives for the GRS seem to be met generally, other enforcement and prosecution priorities should take precedence over allocating additional resources to the enforcement of the GRS.

Exempting non-AFA trawl C/Ps and Amendment 80 cooperatives from the minimum GRS requirements at § 679.27(j)(1) through (4) before the end of the 2010 fishing year and prior to the start of the 2011 fishing year will enable the Amendment 80 sector to engage in ongoing civil contract agreements addressing groundfish discard rates and associated reports to the Council on its progress toward minimizing discard while the Council develops an FMP amendment to permanently address this situation. Without this exemption, regulatory compliance with the GRS may not be possible for the Amendment 80 fleet and may result in noncompliance rates that were unanticipated with this program.

In making this recommendation, the Council considered the NMFS policy guidelines for the development and approval of regulations to address emergencies. Emergency rulemaking is intended for circumstances that are extremely urgent, where substantial harm to or disruption of the fishery would be caused in the time it would take to follow standard rulemaking procedures (62 FR 44421, August 21, 1997). An emergency is a situation that results from recent, unforeseen events or recently discovered circumstances; presents serious conservation or management problems in the fishery; and 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 finds that an emergency exists because:

- Recent and unforeseen discrepancies between the analytical methodology used to establish the GRS percentages and the regulatory methodology used to monitor and enforce these percentages impose higher retention standards than those adopted by the Council or approved by the Secretary.
- Recent and unanticipated consequences of regulations implementing the GRS at § 679.27(j)(1) through (4) have been determined to unduly constrain the non-AFA trawl C/Ps in 2010 and 2011 potentially leading to widespread noncompliance with the GRS.

• Enforcing the GRS in 2010 and 2011 as currently written is likely to result in an unanticipated and significant increase in enforcement costs. The strong likelihood that a large portion of vessels will be unable to comply with the 2010 and 2011 GRS percentages presents a serious management and enforcement problem.

• Recent recognition that the 2010 and 2011 GRS percentages could disrupt or impede participation of some vessels in Amendment 80 cooperatives erodes overall policy and management objectives for the Amendment 80 catch share program.

• Exempting participants from the GRS before the end of 2010 and prior to the 2011 fishing year provides immediate benefits from the costs identified above that outweigh the value of the deliberative notice-and-comment rulemaking process. In addition, notice-and-comment rulemaking would not relieve restrictions with sufficient time to offset the potential costs of compliance in 2010. The agency has determined that the GRS regulations are currently unacceptable, and non-AFA trawl C/Ps and Amendment 80 cooperatives must be exempted as soon as possible.

Although this emergency rule exempts non-AFA trawl C/Ps from the 2010 and 2011 GRS standards, non-AFA trawl C/Ps will continue to participate in Amendment 80 cooperatives and associated civil contract agreements to maintain discard rates that are consistent with Council intent and the Magnuson-Stevens Act requirement that each fishery management plan and the implementing regulations be consistent with the national standards for fishery conservation and management, including National Standard 9 which requires regulations to minimize bycatch to the extent practicable. The circumstances that justified the increasing constraint on fishing operations to increase groundfish retention have changed, and the regulatory constraint and associated GRS standards established for the 2010 and 2011 fishing years no longer achieve the goals that led to their establishment under Amendments 79 and 80. Therefore, exempting the Amendment 80 sector from the current constraints should relieve an unnecessary and unanticipated burden, eliminate unanticipated and significant compliance costs and enforcement costs, and enhance resource management and conservation through ongoing commitments by the Amendment 80 sector to continue to pursue cooperative agreements and civil contracts to maintain recent improvements in groundfish retention rates.

Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this emergency rule is consistent with the national standards and other provisions of the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws. The rule may be extended for a period of not more than 186 days as described under section 305(c)(3)(B) of the Magnuson-Stevens Fishery Conservation Management Act.

The Assistant Administrator for Fisheries, NOAA, finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be impracticable and contrary to the public interest. This action would allow the GRS restriction to be relieved before the end of 2010, and prior to the 2011 fishing year, to address unforeseen and unnecessary compliance costs to the non-AFA trawl C/Ps, address enforcement and prosecution concerns associated with unattainable GRS standards as calculated under existing regulations, and provide for enhanced flexibility of the Amendment 80 sector to engage in an ongoing and more flexible approach for meeting Council objectives to minimize bycatch in this fleet. After NMFS discovered the unforeseen compliance and enforcement costs and the enforcement and prosecution concerns, it determined that maintaining the existing GRS percentages for 2010 and 2011 is neither warranted nor achievable. This action would address these issues by exempting non-AFA trawl C/Ps and Amendment 80 cooperatives from the minimum GRS requirements at § 679.27(j)(1) through (4) before the end of the 2010 fishing year and prior to the start of the 2011 fishing year, and will enable the Amendment 80 sector to engage in ongoing civil contract agreements addressing groundfish discard rates and associated reports to the Council on its progress toward minimizing discard.

Without the exemption implemented by this rule, regulatory compliance with the GRS may not be possible for the Amendment 80 fleet and may result in noncompliance rates that were unanticipated with this program. Maintaining the regulations as currently written for non-AFA trawl C/Ps for 2010 and into 2011 would result in unavoidable noncompliance with the GRS regulations by some fishery participants, increased compliance costs by industry participants, and unwarranted enforcement and prosecution costs to NMFS.

NMFS was not able to implement this action earlier as NMFS was not fully aware of the enforcement and prosecution concerns and additional compliance and enforcement costs with the GRS until shortly before the June 2010 Council meeting. After the Council recommended this emergency rule, NMFS and OLE required additional time to assess and substantiate the problems identified by the Council and the Amendment 80 sector representatives. NMFS has completed this process and is now implementing the exemption through this final rule to meet the objectives of this action. This emergency rule has broad support from the Council and the affected industry.

For the reasons above, the Assistant Administrator for Fisheries finds good cause under 5 U.S.C. 553(d)(1) to waive the 30-day delay in effectiveness provision of the Administrative Procedure Act.

This emergency rule has been determined to be not significant for purposes of Executive Order 12866. The RIR prepared for this action is available from NMFS (*see* **ADDRESSES**).

This emergency rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is not subject to the requirement to provide prior notice and opportunity for public comment pursuant to 5 U.S.C. 553 or any other law.

Authority: 16 U.S.C. 773 *et seq.;* 1801 *et seq.;* 3631 *et seq.;* Pub. L. 108–447.

Dated: December 9, 2010.

Samuel D. Rauch III,

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

[FR Doc. 2010–31531 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 75, No. 240
Wednesday, December 15, 2010

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1243; Directorate Identifier 2010–CE–058–AD]

RIN 2120–AA64

Airworthiness Directives; Cessna Aircraft Company (Cessna) Model 172 Airplanes Modified by Supplemental Type Certificate (STC) SA01303WI

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 would require installing a full authority digital engine control (FADEC) backup battery, replacing the supplement pilot's operating handbook and FAA approved airplane flight manual, and replacing the FADEC backup battery every 12 calendar months. This proposed AD was prompted by an incident where an airplane experienced an in-flight engine shutdown caused by a momentary loss of electrical power to the FADEC. We are proposing this AD to prevent interruption of electrical power to the FADEC, which could result in an uncommanded engine shutdown. This failure could lead to a loss of engine power.

DATES: We must receive comments on this proposed AD by January 31, 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:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Thielert Aircraft Engines Service GmbH, Platanenstraße 14, D–09350 Lichtenstein, Deutschland; telephone: +49 (37204) 696–1474; fax: +49 (37204) 696–1910; Internet: *http://www.thielert.com/.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Richard Rejniak, Aerospace Engineer, Wichita Aircraft Certification Office (ACO), FAA, 1801 Airport Road, Room 100; phone: (316) 946–4128; fax: (316) 946–4107; e-mail: *richard.rejniak@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1243; Directorate Identifier 2010–CE–058–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

In 2007, a Diamond DA42 airplane experienced a dual in-flight engine shutdown. Our review of the incident determined the root cause was an unsafe design feature that allowed momentary interruption of electrical power to both engine FADECs. The interruption caused the FADECs to reset, shutting down both engines with a consequent loss of engine power. Cessna Model 172 airplanes modified by STC No. SA01303WI have a similar unsafe design feature that can allow the FADEC to shut down or reset if the main battery is depleted and the electrical charging system malfunctions.

This condition, if not corrected, could result in an uncommanded engine shutdown. This failure could lead to a loss of engine power.

Relevant Service Information

We reviewed Thielert Aircraft Engines GmbH Service Bulletins TM TAE 601–0007, Revision 8, dated October 14, 2010, and TM TAE 601–1001 P1, Revision 8, dated October 14, 2010. The service information describes procedures for installation of a FADEC backup battery.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD affects 14 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
For airplanes with a 14-volt battery system; installation of a 14-volt FADEC backup battery.	24 work-hours × $85 per hour = $2,040	$820	$2,860	$14,300
For airplanes with a 28-volt battery system; installation of a 28-volt FADEC backup battery.	24 work-hours × $85 per hour = $2,040	1,160	3,200	28,800

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Cessna Aircraft Company: Docket No. FAA–2010–1243; Directorate Identifier 2010–CE–058–AD.

Comments Due Date

(a) We must receive comments by January 31, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all serial numbers of the following airplanes, certified in any category, that are modified by Supplemental Type Certificate (STC) SA01303WI, as identified in Table 1 of this AD:

TABLE 1

Model	Engine	Group
(1) 172F, 172G, 172H, 172I, 172K, 172L, 172M, F172F, F172G, F172H, F172K, F172L, and F172M	TAE 125–01	1
(2) 172F, 172G, 172H, 172I, 172K, 172L, 172M, F172F, F172G, F172H, F172K, F172L, and F172M	TAE 125–02–99	2
(3) 172N, 172P, F172N, and F172P	TAE 125–01	3
(4) 172N, 172P, F172N, and F172P	TAE 125–02–99	4
(5) 172R and 172S	TAE 125–01	5
(6) 172R and 172S	TAE 125–02–99	6

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 72: Engine.

Unsafe Condition

(e) This AD was prompted by an incident where an airplane experienced an in-flight engine shutdown caused by a momentary loss of electrical power to the FADEC. We are issuing this AD to prevent interruption of electrical power to the FADEC, which could result in an uncommanded engine shutdown. This failure could lead to a loss of engine power.

Compliance

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

Actions	Compliance	Procedures
(1) *For all airplanes:* Modify the engine electrical system by installing a backup battery system and associated wiring and circuitry.	Within the next 100 hours time-in-service after the effective date of this AD or within 30 days after the effective date of this AD, whichever occurs first.	(i) *For groups 1, 3, and 5 airplanes:* Follow Thielert Aircraft Engines GmbH Service Bulletin TM TAE 601-0007, Revision 8, dated October 14, 2010.

Actions	Compliance	Procedures
		(ii) *For groups 2, 4, and 6 airplanes:* Follow Thielert Aircraft Engines GmbH Service Bulletin TM TAE 601–1001 P1, Revision 8, dated October 14, 2010.
(2) *For all airplanes:* Replace the FADEC backup battery.	Within 12 calendar months after doing the modification required in paragraph (f)(1) of this AD and repetitively thereafter within 12 calendar months after the previous replacement.	(i) *For groups 1, 3, and 5 airplanes:* Follow page 8 of Chapter 20–AMM–24–01–US, Issue 2, Revision No.: 2, dated October 8, 2010, of Thielert Aircraft Engines GmbH Supplement Airplane Maintenance Manual Cessna 172 & Reims F172 TAE 125–01, Doc. No.: AMM–20–01 (U.S.-Version) Version: 2/4. (ii) *For groups 2, 4, and 6 airplanes:* Follow page 7 of Chapter 20–AMM–24–02–US, Issue: 1, Rev. No: 1, dated October 8, 2010, of Thielert Aircraft Engines GmbH Supplement Airplane Maintenance Manual Cessna 172 & Reims F172 CENTURION 2.0 (TAE 125–02–99), Doc. No.: AMM–20–02 (U.S.-Version) Version: 1/1.
(3) *For groups 1 and 2 airplanes:* Incorporate Thielert Aircraft Engines GmbH Supplemental Airplane Flight Manual or Pilot's Operating Handbook and FAA Approved Airplane Flight Manual Supplement (as applicable), TAE–No.: 20–0310–21042, Issue 2–1, dated October 4, 2010, into the pilot's operating handbook.	Before further flight after doing the modification required in paragraph (f)(1) of this AD.	Not applicable.
(4) *For groups 3 and 4 airplanes:* Incorporate Thielert Aircraft Engines GmbH Supplemental Airplane Flight Manual or Pilot's Operating Handbook and FAA Approved Airplane Flight Manual Supplement (as applicable), TAE–No.: 20–0310–20042, Issue 2–1, dated October 4, 2010, into the pilot's operating handbook.	Before further flight after doing the modification required in paragraph (f)(1) of this AD.	Not applicable.
(5) *For groups 5 and 6 airplanes:* Incorporate Thielert Aircraft Engines GmbH Supplemental Pilot's Operating Handbook and FAA Approved Airplane Flight Manual Supplement, TAE–No.: 20–0310–22042, Issue 2–1, dated October 4, 2010, into the pilot's operating handbook.	Before further flight after doing the modification required in paragraph (f)(1) of this AD.	Not applicable.

Alternative Methods of Compliance (AMOCs)

(g)(1) The Manager, Wichita 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) Before using any approved AMOC, notify your Principal Maintenance Inspector or Principal Avionics Inspector, as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

Related Information

(h) For more information about this AD, contact Richard Rejniak, Aerospace Engineer, Wichita ACO, FAA, 1801 Airport Road, Room 100; phone: (316) 946–4128; fax: (316) 946–4107; e-mail: *richard.rejniak@faa.gov.*

(i) For service information identified in this AD, contact Thielert Aircraft Engines Service GmbH, Platanenstraße 14, D–09350 Lichtenstein, Deutschland; telephone: +49 (37204) 696–1474; fax: +49 (37204) 696–1910; Internet: *http://www.thielert.com/.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

Issued in Kansas City, Missouri, on December 9, 2010.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–31428 Filed 12–14–10; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 310

RIN 3084–AB19

Telemarketing Sales Rule

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

ACTION: Advance notice of proposed rulemaking; request for public comments.

SUMMARY: The Commission requests public comment on provisions of the FTC's Telemarketing Sales Rule concerning caller identification services and disclosure of the identity of the seller or telemarketer responsible for telemarketing calls.

DATES: Written comments must be received on or before January 28, 2011.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form, by

following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be submitted at *https://ftcpublic.commentworks.com/ftc/tsrcalleridanprm* (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 Q), 600 Pennsylvania Avenue, NW., Washington, DC 20580, in the manner detailed in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Michael Tankersley, (202) 326–2991, Attorney, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

Summary

When the Commission amended the Telemarketing Sales Rule ("TSR" or "Rule") in 2003, it added a requirement that telemarketers transmit identifying information to caller identification ("Caller ID") services.[1] Most companies that offer basic telephone service also offer services that will display to the recipient of the call the telephone number and name for the calling party. Traditional Caller ID services rely upon telecommunications signals that allow the caller's local telephone exchange to send a telephone number of the calling party, and a code that signals whether or not the caller wants its number to be blocked. Enhanced Caller ID services—which, as the name implies, go beyond basic display of the calling party's number—use directories or databases to associate the calling party number with a name. Thus, the "Caller ID" information provided to consumers may include both a telephone number and name for the originator of an incoming call.

The use of Caller ID information, however, has changed with the growing availability of technologies that allow callers to alter the number that appears on the recipient's Caller ID display. Many businesses now have access to technologies that allow them to transmit Caller ID numbers that are not associated with their geographical location, or that, when dialed, connect the caller to a voice mail service. Users of these technologies also have the ability to cause the recipient's Caller ID equipment to display a telephone number that is not in service as the source of the call, or create the appearance that the call is coming from someone who is not affiliated with the actual caller.[2] In addition, these advanced technologies also enable callers to control and manipulate the name information displayed by Caller ID services.[3]

The Commission solicits comments on whether changes should be made to the TSR to reflect the current use and capabilities of Caller ID technologies. In particular, the Commission is interested in whether the TSR should be amended to better achieve the objectives of the Caller ID provisions—including namely, to enable consumers and law enforcement to use Caller ID information to identify entities responsible for illegal telemarketing practices. The Commission also solicits comment on whether it should amend the TSR specifically to regulate services that misrepresent, conceal, or obscure the identity of telemarketers or sellers, or should expand the provisions of the TSR that require oral disclosure of the identity of the seller or charitable organization on whose behalf a call is being made to require additional or more specific disclosures.[4]

I. How Caller Identification Services Work

Caller identification services rely upon identifying information transmitted with the signaling codes that accompany a telephone transmission. Telephone calls on the public switch telephone network are routed to their destinations by means of a specialized protocol called "signaling system seven," or "SS7." SS7 includes a calling party number ("CPN") that is intended to identify the telephone number of the caller, and a privacy code that indicates whether access to this information should be restricted.[5] Carriers using SS7 are generally required to transmit the CPN associated with an interstate call.[6]

The CPN is used in a number of services provided to consumers. If a consumer subscribes to a Caller ID service and has Caller ID-capable equipment, the telephone number identified as the source of the call will be displayed with the incoming call.[7] Telephone service providers also use CPN to offer consumers call-return service. This feature provides call recipients who press *69 after receiving a telephone call either: (1) Information regarding the last incoming call, and the option to dial the caller back, or (2) the ability to return the last incoming call.[8] Consumers can also purchase services or equipment that selectively blocks incoming calls, or selectively forwards calls based on the CPN transmitted with a call.[9]

Enhanced Caller ID services provide additional information by associating the CPN with a caller name. The caller name is typically obtained by the call recipient's service provider sending a query to a centralized calling name ("CNAM") database or directory that associates telephone numbers with names of up to 15 characters. If the database returns an associated name, the name, or both the name and the number, are displayed by the call recipient's equipment while the call is ringing, unless a privacy code indicates that access to the name is blocked.[10] The name information may come directly from telephone carriers or from database compilers that are not carriers.[11]

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[1] 68 FR 4579, 4672 (2003) (codified at 16 CFR 310.4(a)(7)).

[2] *See* S. Rept. 96, 111th Cong., 1st Sess. 1–2 (2009); Hearing before the House Subcomm. on Telecomm. and the Internet, Truth in Caller ID Act, 110th Cong., 1st Sess. Ser. No. 110–8, 9–10 (2007) (test. of Kris Monteith); H. Sengar, D. Wijesekera, S. Jojodia, Authentication and Integrity in Telecommunication Signaling Network, *Proceedings of the 12th IEEE Intern. Conf. and Workshops on the Eng. of Computer-Based Systems* (2005).

[3] *See* Ed Norris and Harry Hetz, "Caller ID Integrity Attacks,'' *The ISSA J.* 6 (Jan. 2004).

[4] 16 CFR 310.4(d), (e).

[5] 47 CFR 64.1600(c), (d) (2009).

[6] 47 CFR 64.1601(a), (d).

[7] Rules and Regulations Regarding Calling Number Identification Service—Caller ID, 10 FCC Rcd. 11700, 11705 ¶9 (1994) (''Second Report'').

[8] 68 FR at 44,166; Second Report, 10 FCC Rcd. at 11708–09¶21.

[9] Telephone service providers also offer call trace or "customer-originated trace" services that enable a subscriber to initiate a trace of the last call received. The subscriber initiates the trace by disconnecting the call and dialing a code that prompts the service provider to capture information that may assist law enforcement in tracing the origin of the call. The call trace may involve the use of CPN and automatic number service information. *See* 47 CFR 64.1601(d)(4)(iii) (exempting legally authorized call tracing or trapping procedures from restrictions on CPN delivery); 47 CFR 64.1602(a)(3)(iv) (allowing disclosure of information from automatic number service or charge number service for the purpose of complying with applicable law or legal process).

[10] Second Report, 10 FCC Rcd. at 11708, 11746; Powers, *Calling Name Delivery,* IEEEE International Conference on Communications, 1908 (Chicago, IL, 1992); R. Robrock, II, "The Many Faces of the LIDB Database," *IEEE Intern. Conf. Comm.,* 1903, 1904 (Chicago, IL, 1992); *see, e.g.,* Cisco Systems, Inc., Calling Name Delivery (CNAM) (2007), available at *http://www.cisco.or.at/en/US/docs/voice_ip_comm/pgw/9/feature/module/9.7_3_/cnam.pdf.*

[11] Telephony protocols other than SS7 may transmit caller name information directly from the originator of the call, without relying on a query to a separate database. *See* Session Initiation Protocol, ¶ 6.2 (Internet Working Group 1999), *available at http://www.ietf.org/rfc/rfc2543.txt* (describing optional ''display-name'' parameter in Internet telephony protocol).

It is important to note that the CPN is not the same as the calling party's ''charge number'' or "automatic number identification" (''ANI'').[12] ANI and its SS7-based equivalent, the charge number, refer to the delivery of the calling party's billing number for billing and routing purposes.[13] Although the CPN and the ANI/charge number for a given call may be the same, the CPN and ANI/charge number may differ and often do differ in calls from business lines.[14]

The CPN and ANI/charge number are also subject to different regulatory restrictions. Federal Communications Commission ("FCC") regulations impose tighter restrictions on carriers' disclosure of the ANI or charge number on interstate calls than the disclosure of CPN. These regulations, with exceptions that are not applicable to consumers receiving telemarketing calls, prohibit disclosure, reuse or sale of the telephone number or billing information without first notifying the originating telephone subscriber and obtaining affirmative consent of the subscriber for such reuse or sale.[15] By contrast, privacy protection for the CPN depends upon a privacy indicator in the signaling protocol that allows the calling party to prevent the CPN from being revealed to the recipient of the call.[16] FCC regulations protect the ability of calling parties to use this parameter to conceal CPN on a per-line or per-call basis. If the party originating a call has requested that the CPN not be transmitted, these regulations prohibit carriers from revealing the calling party's name or number, and prohibit carriers from allowing the called party to automatically return the call.[17]

[12] *See* Rules and Policies Regarding Caller Number Identification Service, 9 FCC Rcd. 1764, 1772–73 (1994) ("First Report"). ANI's original purpose was to enable carriers to bill customers for calls.

[13] Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 FR 44,144, 41,167 (2003).

[14] Second Report, 10 FCC Rcd. at 11707 ¶ 17 & n.14.

[15] 47 CFR 64.1602.

[16] 47 CFR 64.1601(b).

[17] Second Report, 10 FCC Rcd. at 11705 ¶ 10. These regulations require that carriers recognize *67 as a request for privacy when CPN would otherwise be transmitted to the recipient of the call. Dialing *67 before placing a call, referred to as "per call blocking," allows subscribers to block their numbers from transmission to the public switched network. Telephone service providers may also block the transmission of CPN for particular lines, and carriers must recognize *82 as a request by the caller that the CPN be transmitted on an otherwise blocked line. *See* 47 CFR 64.1601(b); *Rules and Policies Regarding Calling Number Identification Service—Caller ID,* Third Report and Order, Memorandum Opinion and Order on Further Reconsideration, and Memorandum Opinion and Order on Reconsideration, FCC 97–103, CC Docket No. 91–281, 12 FCC Rcd 3867, 3870 (1997); Second Report, 10 FCC Rcd. at 11719, 11728–34.

II. Current Requirements Concerning Caller Identification

As amended in January 2003, the TSR provides that it is an abusive telemarketing act or practice for any seller or telemarketer to engage in "[f]ailing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any Caller ID service in use by a recipient of a telemarketing call."[18] The Rule also permits the substitution of "the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours."[19] "Caller identification service" is defined as "a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone."[20]

In the Statement of Basis and Purpose adopting the TSR, the Commission explained that requiring telemarketers to transmit information used by Caller ID services has three benefits. First, requiring the transmission of Caller ID information promotes consumers' privacy by allowing them to screen out unwanted calls and identify companies that have contacted them so that they can place "do-not-call" requests to those companies.[21] Indeed, many consumers subscribe to Caller ID to identify incoming calls from telemarketers and screen out unwanted telemarketing calls.[22]

Second, eliminating anonymity in telemarketing benefits both consumers and industry by promoting increased accountability.[23] Caller ID information provides a record of identification that is available to the consumer after the telemarketing call is complete. Without such a record, consumers who have received unlawful telemarketing calls—such as abandoned calls or prerecorded solicitations—find it difficult, if not impossible, to ascribe these calls to a particular telemarketer.[24] Accurate Caller ID information increases the ability of consumers to distinguish between businesses that are responsible for deceptive and abusive telemarketing, and businesses that adopt effective measures to prevent such calls.

Finally, requiring the transmission of Caller ID information by telemarketers benefits law enforcement. The transmission of telemarketers' Caller ID information should help identify sellers and telemarketers that fail to honor "do-not-call" requests by consumers or abandon calls, and reduce fraud before it occurs by enabling consumers to contact government agencies or the Better Business Bureau to verify the legitimacy of a telemarketer or seller.[25]

In July 2003, six months after the Commission adopted these requirements in the TSR, the FCC adopted regulations pursuant to the Telephone Communications Privacy Act ("TCPA"), 47 U.S.C. 227, that provide that any person or entity who engages in telemarketing must transmit "caller identification information."[26] The text of the FCC regulations is not identical, but is substantially similar to 16 CFR 310.4(a)(7). The FCC regulations specify that "caller identification information must include either CPN or ANI, and, when made available by the telemarketer's carrier, the name of the telemarketer."[27] Like the TSR, the FCC's regulations also allow the person or entity making the call to fulfill this obligation by transmitting the "name of the seller on behalf of which the telemarketing call is placed and the seller's customer service telephone number." *Id.* Furthermore, "the telephone number so provided must permit any individual to make a do-not-

[18] 16 CFR 310.4(a)(7).

[19] *Id.*

[20] 16 CFR 310.2(d).

[21] 68 FR at 4624, 4626.

[22] *Id.* at 4626 n.534.

[23] *Id.* at 4627 (citing statement of commenter DialAmerica that, "[d]elivery of Caller ID information, that will be displayed on a consumer's Caller ID device or that can be accessed through such services as *69, is essential to create accountability in the outbound telemarketing industry.").

[24] *Id.*

[25] *Id.* In adopting its regulations concerning Caller ID information, the FCC also noted that benefits of transmitting Caller ID information are not limited to consumers who subscribe to caller ID services:

> Consumers can also use the *69 feature to obtain caller ID information transmitted by a telemarketer. The *69 feature, available through many subscribers' telephone service providers, provides either: (1) Information regarding the last incoming call, and the option to dial the caller back, or (2) the ability to return the last incoming call. Call information, however, would not be available for an incoming call, if the caller failed to transmit caller ID information or blocked such information. Caller ID also should increase accountability and provide an important resource for the FCC and FTC in pursuing enforcement actions against TCPA and TSR violators.

68 FR at 44166.

[26] *See* 68 FR 44144, 44179 (2003) (codified at 47 CFR 64.1601(e)).

[27] 47 CFR 64.1601(e)(i); *see also* 47 CFR 64.1600(c) (defining CPN); *id.* 64.1600(b) (defining ANI).

call request during regular business hours." *Id.* Although the FCC's regulations generally permit a caller to protect its anonymity by blocking Caller ID information, Section 64.1601(e)(2) unequivocally prohibits telemarketers from blocking the transmission of such information. In adopting these requirements, the FCC explained:

> Consistent with the FTC's rules, CPN can include any number associated with the telemarketer or party on whose behalf the call is made, that allows the consumer to identify the caller. This includes a number assigned to the telemarketer by its carrier, the specific number from which a sales representative placed a call, the number for the party on whose behalf the telemarketer is making the call, or the seller's customer service number.

68 FR at 44167.

Many states have also adopted laws aimed at prohibiting the transmission of deceptive Caller ID information or requiring telemarketers to transmit specified information. These state requirements include recently adopted statutes that specifically prohibit the use of computers or Internet telephone equipment to insert false information into Caller ID systems.[28] While most state statutes simply prohibit blocking or interfering with Caller ID services, several state laws impose obligations on telemarketers to transmit specific information, such as codes that identify the name of the telemarketer, or a telephone number at which consumers can contact personnel of the entity responsible for the telephone call.[29]

Independent of the Caller ID provisions of the TSR, the Rule also requires that telemarketers orally disclose the seller and purpose of the call. Specifically, the TSR mandates that "a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services" disclose truthfully, promptly, and in a clear and conspicuous manner: (1) The identity of the seller; (2) that the purpose of the call is to sell goods or services; and (3) the nature of the goods or services.[30] In a call to solicit charitable solicitations, the telemarketer must similarly disclose the charitable organization on behalf of which the request is being made, and the purpose of the telephone call.[31]

When the Commission adopted these provisions in 2003, it rejected proposals that it add the telephone number of the seller or charitable organization to this list of introductory oral disclosures, in part, because it believed that the requirement to transmit Caller ID information would help mitigate the problems identified by those who advocated requiring oral disclosure of the seller's telephone number at the outset of an outbound telephone call.[32] By contrast, while FCC regulations adopted pursuant to the Telephone Communications Privacy Act also require that a person making a telemarketing call disclose "the name of the person or entity on whose behalf the call is being made," they further require disclosure of "a telephone number or address at which the person or entity may be contacted."[33]

The Commission also has addressed the manipulation of Caller ID information in the context of debt collection. The Federal Debt Collection Practices Act provides that debt collectors may not, in connection with the collection of a debt, place telephone calls "without meaningful disclosure of the caller's identity."[34] Courts have affirmed that this obligation applies to the information transmitted to Caller ID services when a debt collector places such calls.[35] In 2008, the Commission charged that a debt collector violated this provision of the statute by making collection calls that did not display the debt collector's name, and manipulating the calling party number so that it would display a telephone number with the borrower's local area code.[36]

III. Caller Identification Spoofing and Abuse

Current telecommunications technologies make it possible for telemarketers to select the numbers that are transmitted to Caller ID services. Telemarketers also can make arrangements to control the calling names in databases used by Caller ID services. These technologies can be used to serve legitimate interests of telemarketers, sellers, and charitable organizations in altering the caller number and name displayed by Caller ID services.[37]

The increasingly common manipulation of Caller ID information, however, also has undermined the ability of consumers and law enforcement to identify the entities responsible for illegal telemarketing practices.[38] When telemarketers that

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[28] *See, e.g.,* Anti-Caller ID Spoofing Act, La. Rev. Stat. tit. 51, ch.19–C; Ok. Stat. Ann. §§ 776.22, 776.23; Internet Caller Identification Act, Ill. Comp. Stat. § 517/10.

[29] *See* La. Rev. Stat. § 844.2.A.(1) (telemarketer must have identification code that will correctly identify the name of the telephone solicitor); Mont. Code Ann. § 30–14–1412 (telemarketer may substitute "name and number that accurately identify the entity causing the call to be made and a working telephone number at which the entity's personnel can be contacted."); N.H. Rev. Stat. § 359–E:5–a (telemarketer may not prevent "caller identification information for telephone solicitor's lines used to make telephone calls" from being shown by caller identification device); Tex. Bus. & Comm. Code Ann. § 304.151(b)(2) (telemarketer may not fail to provide caller identification information in a manner that is accessible by a caller identification service if the telemarketer is capable of providing the information in that manner); Ill. Comp. Stat. Ann. § 413/15(c) (live operator soliciting sale of goods or services may not impede display of "the solicitor's telephone number"); 2010 Tenn. Pub. Acts, Ch. 684 (requiring that automatic dial announcing devices display the number utilized by the dialing equipment, unless the device displays a telephone number that has an area code within the state or a toll-free number that is answered during regular business hours and the name of the person is displayed along with the telephone number).

[30] 16 CFR 310.4(d)(1)–(3); *see also* 15 U.S.C. 6102(3)(C) (statute directs Commission to adopt rules that include "a requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services.").

If a prize promotion is offered, the telemarketer must also disclose that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning. *Id.* 16 CFR 310.4(d)(4). FCC regulations also require verbal disclosure of the identity of the caller in addition to the transmission of Caller ID information. *See* 47 CFR 64.1200(e)(iv) (2009); 68 FR at 44,167 ("Provision of Caller ID information does not obviate the requirement for a caller to verbally supply identification information during a call.").

[31] 16 CFR 310.4(e); *see also* 15 U.S.C. 6102(3)(D) (statute directs Commission to adopt rules that include "a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.").

[32] 68 FR at 4648.

[33] 47 CFR 64.1200(d)(4).

[34] 15 U.S.C. 1692d(6).

[35] *Knoll* v. *Allied Interstate, Inc.,* 502 F. Supp. 2d 943, 946 (D. Minn. 2007) (allegation that debt collector arranged for false caller name "Jennifer Smith" to be displayed on caller identification device stated a claim for violation of 15 U.S.C. 1692d(6)).

[36] *FTC* v. *EMC Mortgage Comp.,* C.A. No. 4:08–cv–338, Complaint (E.D. Tex. Sept. 9, 2008). The defendants, EMC Mortgage Corporation and The Bear Stearns Companies LLC, agreed to the entry of a stipulated judgment that settled this claim and other claims in the complaint without admission or adjudication of liability. *Id.,* Stipulated Final Judgment and Order (filed Sept. 9, 2008).

[37] H. Rep. 461, Truth in Caller ID Act of 2010, 111th Cong., 2d Sess. 7 (2010) (describing legitimate reasons for manipulation of Caller ID information in business and non-business calls).

[38] For example, the Commission has received tens of thousands of complaints concerning telemarketing calls to telephone numbers listed on the National Do Not Call Registry for which the calling numbers transmitted with calls are not valid telephone numbers but, rather, a string of digits that does not correspond to any operating telephone number (*e.g.,* 000–000–0000). Commission

make improper robocalls or repeatedly call persons who have made do-not-call requests use "spoofed" calling party numbers, consumers cannot identify the source of the calls and, therefore, cannot take effective action to stop them. Moreover, false or misleading Caller ID information frustrates law enforcement investigations seeking to hold telemarketers responsible for illegal conduct, and harms the reputation of telemarketers and sellers who are not responsible for the unlawful telephone calls.

In addition to allowing telemarketers to "spoof" the names and numbers transmitted to Caller ID services, these technologies also have been used to manipulate Caller ID in other ways that frustrate the purpose of the TSR's requirements regarding Caller ID. For example, telemarketers have transmitted calling party numbers that are valid telephone numbers but have only an attenuated connection to the telemarketer or seller and cannot readily be used by consumers to identify the source of a call.[39] The telephone numbers transmitted in telemarketing campaigns often are not associated with the telemarketer or the seller in any publicly available directory, or even in carrier databases that identify the subscriber to whom the telephone number is assigned. Similarly, telemarketers have arranged for the transmission of caller name information that does not identify the telemarketer or seller by name, and provides consumers with only cryptic abbreviations or generic terms, such as "Warranty Alert," that do not allow the consumer to identify the telemarketer or seller.[40] In another example, consumers who attempt to identify the entity responsible for a call by telephoning the telephone numbers transmitted to a Caller ID service have been unable to do so because their calls are not connected to a live representative of the telemarketer or seller. Instead, calls to the number displayed by the Caller ID service are answered by a recording that offers to accept a do-not-call request but does not identify the telemarketer or the seller that initiated the telephone call.

The Commission anticipates that the manipulation of Caller ID information may become more prevalent as advanced telecommunications and networking technologies become more ubiquitous and continue to develop. In the past, manipulating Caller ID information required special phone connections and expensive equipment. The barriers to manipulating Caller ID, however, have been reduced by advances in technology and the increasing availability of services such as Voice over Internet Protocol, or Internet protocol-enabled ("IP-enabled") voice services. Moreover, telemarketers can obtain access to the telephone network through service providers who offer the ability to spoof Caller ID numbers or names.

At the same time, the Commission recognizes that advances in communications technologies may afford consumers more control over whether and how they receive telephone calls, including calls from telemarketers. Effective regulation of Caller ID may promote the development of technologies that increase consumers' ability to prevent or minimize the harms from abusive telemarketing practices.

IV. Request for Comment

The Commission requests comments on whether it is possible to amend the Caller ID provisions of the TSR to promote the delivery of more reliable or specific Caller ID information. The Commission seeks information on how Caller ID is being used by consumers and regulated parties, and how telemarketers and their service providers may use Caller ID technologies in ways that are benign or abusive. The Commission is particularly interested in information concerning recently introduced or soon to be introduced technologies that affect the ability of consumers and law enforcement to use Caller ID information. Commenters should provide detailed, factual information to support their observations or proposals.

The Commission solicits comments on the following specific questions:

(1) What services exist to assist consumers in identifying the source of deceptive or abusive calls in which the telemarketer does not truthfully disclose the name of the telemarketer, seller, or charitable organization at the outset of the call or abandons a call without identifying the source of the call? Are these services dependent on reliable transmission of CPN or equivalent information? How much does it cost consumers to use these services?

(2) How widespread is consumer use of Caller ID services to screen unwanted calls? Do consumers use other services that rely on transmission of CPN, such as call-blocking equipment, to avoid or block unwelcome telemarketing calls?

(3) Would changes to the TSR improve the ability of Caller ID services to accurately disclose to consumers the source of telemarketing calls, or improve the ability of service providers to block calls in which information on the source of the call is not available or has been spoofed? If so, what specific amendments should be made to the TSR?

(4) Should the Commission amend the Caller ID provisions of the TSR to recognize or anticipate specific developments in telecommunications technologies relating to the transmission and use of Caller ID information? If so, what specific amendments should the Commission make?

(5) What role do telephone service providers (including those that are not common carriers) play in providing services, equipment or software that allows telemarketers, sellers and charitable organizations to manipulate the caller number and name information in telemarketing calls? The TSR provides that it is a violation of the Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates enumerated provisions of the Rule. Is this provision adequate to regulate service providers that assist telemarketers and sellers in manipulating caller number and name information?

(6) When the Commission adopted the Caller ID provisions of the TSR in 2003,

enforcement actions also have uncovered evidence that telemarketers engaged in abusive and deceptive practices have transmitted valid telephone numbers that are not associated with the telemarketer or seller responsible for the calls. Since 2005, the Commission has brought or referred to the Department of Justice ten enforcement actions that included charges that a telemarketer had violated the TSR by failing to transmit appropriate caller identification information. *See United States* v. *Srikanth Venkataraman,* Civ. No. 3:06–cv–01928–MLC–JJH (D. N.J. filed Apr. 26, 2006); *United States* v. *Civic Development Group, LLC,* Civ. No. 2:07–cv–04593–FSH–PS (D.N.J. filed Sept. 25, 2007); *United States* v. *Global Mortgage Funding, Inc.,* Civ. No. 8:07–cv–1275 (C.D. Cal. filed Oct. 30, 2007); *United States* v. *Guardian Communications, Inc.,* Civ. No. 4:07–cv–04070–MMM–JAG (C.D. Ill. filed Nov. 6, 2007); *FTC* v. *MCS Programs, LLC,* Civ. No. 09–cv–5380–RJB (W.D. Wash. filed June 25, 2009); *FTC* v. *JPM Accelerated Services, Inc.,* Civ. No. 6:09–CV–2021–ORL–28–KRS (M.D. Fla. filed Nov. 30, 2009); *FTC* v. *2145183 Ontario, Inc.,* Civ. No. 1 09–CV–3307 (N.D. Ill. filed Nov. 30, 2009); *FTC* v. *Economic Relief Technologies, LLC,* Civ. No. 09C–7423 (N.D. Ga. filed Nov. 30, 2009); *FTC* v. *Transcontinental Warranty, Inc.,* Civ. No. 09CV2927 (N.D. Ill., filed May 13, 2009); *FTC* v. *Voice Touch, LLC,* Civ. No. 09CV2929 (N.D. Ill. filed May 13, 2009).

[39] Complaint ¶ 17, *United States* v. *Srikanth Venkataraman (d/b/a/Scorpio Systems),* Civ. No. 3:06–cv–01928–MLC–JJH (D. N.J. filed Apr. 26, 2006) (defendant transmitted phony caller identification number 234–567–8923).

[40] *Arkansas* v. *SVM, Inc.,* Civ. No. 4:09–cv–00456–BSM (E.D. Ark. filed Dec. 22, 2009); *see also* Complaint ¶ 22, *United States* v. *Guardian Communications, Inc.,* Civ. No. 4:07–cv–04070–MMM–JAG, (C.D. Ill. filed Nov. 6, 2007) (defendant caused "Cust Service," "Services, Inc.," "Card Services," "DWC," or "LTR" to be transmitted as the name of the caller).

it acknowledged the possibility that a small number of telemarketers may not have access to telecommunications systems capable of transmitting calling number information.[41] Do all telemarketers now have access to technology that allows them to transmit or arrange for the transmission of such information? Should the Commission amend the Caller ID provisions of the TSR to specify that telemarketers, sellers, and charitable organizations must use technology that causes the CPN to be transmitted with all telemarketing calls? Commenters should address whether there are currently areas that are served only by telephone companies that are not capable of transmitting Caller ID information or, more specifically, not capable of transmitting CPN. If services that transmit CPN are available to a telemarketer, is there any justification for giving such a telemarketer the option of using technology that does not transmit CPN, but transmits ANI or some other identifier? Specifically, is it more expensive to use a service that transmits CPN than one that does not? If so, how much more expensive?

(7) Should the Commission amend the Caller ID provisions of the TSR to require, without qualification, that telemarketers use technologies or subscribe to services that provide caller name identification to recipients who use enhanced Caller ID services? Are there any telemarketers that do not have access to services that cause caller name information to be transmitted to Caller ID services? What portion of consumers receive caller name information through Caller ID services? Would requiring telemarketers to use technologies or services that provide caller name information increase telemarketers' costs? If so, how much does it cost to use these technologies or services?

(8) Should the Commission amend the Caller ID provisions of the TSR to further harmonize the TSR with the regulations promulgated by the FCC pursuant to the TCPA? Have differences in the language in 16 CFR 310.4(a)(7) and 47 CFR 64.1601(e) caused problems in industry compliance?[42]

(9) Should the Commission amend the Caller ID provisions of the TSR to further specify the characteristics of the telephone number transmitted to any Caller ID service? For example, should the TSR require that the telephone number transmitted be:

(a) a number that is listed in publicly available directories as the telephone number of the telemarketer, seller, or charitable organization?

(b) a number with an area code and prefix that are associated with the physical location or principal place of business of the telemarketer or the seller?[43]

(c) a number that is answered by live representatives or automated services that identify the telemarketer, seller, or charitable organization by name?

(d) a number that provides for prompt and easy communication with the live representatives of the telemarketer, seller, or charitable organization?[44] or

(e) a number that is the same as the telephone number that is listed in direct mail solicitations or other advertising (such as Internet or broadcast media) as the telephone number for the telemarketer, seller, or charitable organization?

(10) Should the Commission amend the Caller ID provisions of the TSR to permit a seller or telemarketer to use trade names or product names, rather than the actual name of the seller or telemarketer, in the caller name provided to Caller ID services? Should the Commission allow the use of acronyms or abbreviations? If so, are there circumstances in which the use of an acronym, abbreviation, trade name or product name should be prohibited?

(11) Do consumers benefit from provisions in the TSR that give calling parties the option of substituting the number and name of the seller or charitable organization for the number and name of the telemarketer? Should the Commission amend the Caller ID provisions of the TSR to require that the name provided to Caller ID services be the name of the seller or charitable organization on behalf of which a telemarketing call is placed? Should the Commission amend the TSR to allow telemarketers to cause Caller ID services to display the number of the telemarketer, but display the name of the seller?

(12) In general, what benefits has the Rule provided to consumers, telemarketers, sellers, and charitable organizations? What evidence supports the asserted benefits?

(13) Could the benefits that the Rule has provided to consumers, telemarketers, sellers, and charitable organizations be achieved through less burdensome or less restrictive means?

(14) In considering amendments to 16 CFR 310.4(a)(7), should the Commission also consider amendments to 16 CFR 310.4(d) and (e), which describe the oral disclosures that must be made to identify the seller or charitable organization at the outset of an outbound telephone call or upsell?

Interested parties are invited to submit written comments electronically or in paper form. Comments should state "Advance Notice of Proposed Rulemaking Concerning Caller Identification, Matter P104405" both in the text and on the envelope. 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 an 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

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[41] The Commission observed that "[a] very small number of telemarketers may be located in areas of the country that are served only by telephone companies that are not capable of transmitting Caller ID information or assigning a telephone number to the telemarketer that can be transmitted to a called consumer." 68 FR at 4626. In July 2003, the FCC made similar observations concerning the feasibility of telemarketers transmitting caller ID information and stated that a telemarketer could transmit ANI as an alternative to CPN. 68 FR at 44,167.

[42] In adopting 16 CFR 310.4(a)(7), the Commission observed that this regulation is not inconsistent with the FCC's regulations concerning Caller ID blocking to protect privacy because those regulations are designed to address specific calling situations where protecting the caller's anonymity is warranted, such as undercover law enforcement operations and calls placed from battered women's shelters. 68 FR at 4627. No such privacy justification applies to telemarketing calls. *Id.; accord* 68 FR at 44,167 (FCC concludes that "the caller ID requirements for commercial telephone solicitation calls do not implicate the privacy concerns associated with blocking capability for individuals" and that it "has determined to prohibit any request by a telemarketer to block caller ID information or ANI."). The Commission does not anticipate proposing any changes to the TSR that would be inconsistent with the FCC regulations which, since 2004, have expressly prohibited any person or entity engaged in telemarketing, other than a tax-exempt nonprofit organization, from blocking the transmission of Caller ID information. 47 CFR 64.1601(e)(2).

[43] *See* North American Numbering Plan, Geographic NPAs In Service Sorted by Number, *available at http://www.nanpa.com/nas/public/npasInServiceByNumberReport.do?method=displayNpasInServiceByNumberReport.*

[44] *Cf.* Organization for Economic Cooperation and Development, Guidelines for Consumer Protection in the Context of Electronic Commerce, Part III.A (1999), *available at http://www.oecd.org/document/51/0,2340,en_2649_34267_1824435_1_1_1_1,00.html* (businesses engaged in electronic commerce should provide accurate, clear and easily accessible information about themselves sufficient to allow, at a minimum, "prompt, easy and effective consumer communication with the business").

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 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 and clearly labeled "Confidential." [45]

Because mail delivered to the FTC by the United States Postal Service 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 by using the following weblink: *https://ftcpublic.commentworks.com/ftc/tsrcalleridanprm* (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 the weblink *https://ftcpublic.commentworks.com/ftc/tsrcalleridanprm.* If this Notice appears at *http://www.regulations.gov/search/index.jsp,* you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it. 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 reference the ''Advance Notice of Proposed Rulemaking Concerning Caller Identification, Matter P104405'' 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 Q), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The FTC requests 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 Federal Trade Commission Act ("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.*

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2010–31390 Filed 12–14–10; 8:45 am]

BILLING CODE 6750–01–P

[45] The comment must also 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* Commission Rule 4.9(c), 16 CFR 4.9(c).

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 21, and 39

RIN 3038–AC98

Information Management Requirements for Derivatives Clearing Organizations

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing regulations to implement certain core principles for derivatives clearing organizations (DCOs) as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The proposed *regulations* would establish standards for compliance with DCO Core Principles J (Reporting), K (Recordkeeping), L (Public Information), and M (Information Sharing). Additionally, the Commission is proposing technical amendments to parts 1 and 21 in connection with the proposed regulations. Finally, the Commission also is proposing to delegate to the Director of the Division of Clearing and Intermediary Oversight the Commission's authority to perform certain functions in connection with the proposed regulations.

DATES: Submit comments on or before February 14, 2011.

ADDRESSES: You may submit comments, identified by RIN number 3038–AC98, by any of the following methods:

- *Agency Web site, via its Comments Online process: http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.Regulations.gov.* Follow the instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Phyllis P. Dietz, Associate Director, 202–418–5449, *pdietz@cftc.gov,* or Jacob Preiserowicz, Attorney-Advisor, 202–418–5432, *jpreiserowicz@cftc.gov,* Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents

[1] Commission regulations referred to herein are found at 17 CFR Ch. 1 (2010). They are accessible on the Commission's Web site at *http://www.cftc.gov.*

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act.[2] Title VII of the Dodd-Frank Act [3] amended the Commodity Exchange Act (CEA) [4] to establish a comprehensive new regulatory framework to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to all registered entities and intermediaries subject to the Commission's oversight.

Section 725(c) of the Dodd-Frank Act amended Section 5b(c)(2) of the CEA, which sets forth core principles with which a DCO must comply to be registered and to maintain registration as a DCO. The core principles were added to the CEA by the Commodity Futures Modernization Act of 2000 (CFMA).[5] The Commission did not adopt implementing rules and regulations, but instead promulgated guidance for DCOs on compliance with the core principles.[6] Under Section 5b(c)(2), as amended by the Dodd-Frank Act, Congress expressly confirmed that the Commission may adopt implementing rules and regulations pursuant to its rulemaking authority under Section 8a(5) of the CEA.[7] This rulemaking is one of a series that will, in its entirety, propose regulations to implement all 18 DCO core principles.[8]

The Commission continues to believe that, where possible, each DCO should be afforded an appropriate level of discretion in determining how to operate its business within the statutory framework. At the same time, the Commission recognizes that specific bright-line regulations may be necessary in order to facilitate DCO compliance with a given core principle, and ultimately, to protect the integrity of the U.S. clearing system. Accordingly, in developing the proposed regulations, the Commission has endeavored to strike an appropriate balance between establishing general prudential standards and prescriptive requirements.

Core Principle J, Reporting, as amended by the Dodd-Frank Act, requires a DCO to provide the Commission with all information that the Commission determines to be necessary to conduct oversight of the DCO.[9] The Commission is proposing to adopt § 39.19 to establish requirements that a DCO will have to meet in order to comply with Core Principle J.

Core Principle K, Recordkeeping, as amended by the Dodd-Frank Act, requires a DCO to maintain records of all activities related to the business of the DCO as a DCO, in a form and manner that is acceptable to the Commission and for a period of not less than 5 years.[10] The Commission is proposing to adopt § 39.20 to establish requirements that a DCO will have to meet in order to comply with Core Principle K.

Core Principle L, Public Information, as amended by the Dodd-Frank Act, requires a DCO to provide market participants sufficient information to enable the market participants to identify and evaluate accurately the risks and costs associated with using the DCO's services.[11] A DCO is, more specifically, required to make available to market participants information concerning the rules and operating and default procedures governing its clearing and settlement systems and also disclose publicly and to the Commission the terms and conditions of each contract, agreement, and transaction cleared and settled by the DCO, each clearing and other fee charged to members,[12] the DCO's margin-setting methodology, daily settlement prices, and other matters relevant to participation in the DCO's clearing and settlement activities.[13] The Commission is proposing to adopt § 39.21 to establish requirements that a DCO will have to meet in order to comply with Core Principle L.

Core Principle M, Information Sharing, as amended by the Dodd-Frank Act, requires a DCO to enter into and abide by terms of each appropriate and applicable domestic and international information-sharing agreement and use relevant information obtained under such agreements in carrying out its risk management program.[14] The

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[2] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov./LawRegulation/OTCDERIVATIVES/index.htm.*

[3] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[4] 7 U.S.C. 1 *et seq.*

[5] *See* Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (2000).

[6] *See* 17 CFR part 39, app. A.

[7] *See* 7 U.S.C. 7a–1(c)(2). Section 8a(5) of the CEA authorizes the Commission to promulgate such Regulations "as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of [the CEA]." 7 U.S.C. 12a(5).

[8] *See* 75 FR 63732 (Oct. 18, 2010) (proposing regulations to implement Core Principle P (Conflicts of Interest); and 75 FR 63113 (Oct. 14, 2010) (proposing regulations to implement Core Principle B (Financial Resources)). Concurrent with issuing this notice, the Commission also is proposing regulations to implement Core Principles A (Compliance), H (Rule Enforcement), N (Antitrust Considerations), and R (Legal Risk). The Commission expects to issue two additional notices of proposed rulemaking to implement DCO core principles.

[9] *See* Section 5b(c)(2)(J) of the CEA; 7 U.S.C. 7a–1(c)(2)(J). Prior to amendment by the Dodd-Frank Act, Core Principle J provided that "The [DCO] applicant shall provide to the Commission all information necessary for the Commission to conduct the oversight function of the applicant with respect to the activities of the [DCO]."

[10] *See* Section 5b(c)(2)(K) of the CEA; 7 U.S.C. 7a–1(c)(2)(K). Prior to amendment by the Dodd-Frank Act, Core Principle K provided that "The [DCO] applicant shall maintain records of all activities related to the business of the applicant as a [DCO] in a form and manner acceptable to the Commission for a period of 5 years."

[11] *See* Section 5b(c)(2)(L) of the CEA; 7 U.S.C. 7a–1(c)(2)(L).

[12] The statutory language refers to fees charged to "members and participants," and the Commission interprets this phrase to mean fees charged to "clearing members," a term which it proposes to define as "any person that has clearing privileges such that it can process, clear and settle trades through a derivatives clearing organization on behalf of itself or others. The derivatives clearing organization need not be organized as a membership organization." The Commission is proposing to amend the definition of "clearing member" in § 1.3(c) of its regulations, as part of a separate proposed rulemaking.

[13] This core principle has been expanded greatly. Prior to amendment by the Dodd-Frank Act, Core Principle L provided that "The [DCO] applicant shall make information concerning the rules and operating procedures governing the clearing and settlement systems (including default procedures) available to market participants."

[14] *See* Section 5b(c)(2)(M) of the CEA, 7 U.S.C. 7a–1(c)(2)(M). The Dodd-Frank Act made minor

Commission is proposing to adopt § 39.22 to codify the statutory requirement.

Section 805(a) of the Dodd-Frank Act allows the Commission to prescribe regulations for those DCOs that the Financial Stability Oversight Council has determined are systemically important financial market utilities.[15] The Commission is not proposing to adopt additional or enhanced requirements for systemically important DCOs (SIDCOs) in connection with the proposed rules to implement Core Principles J, K, L and M. This is based on the Commission's view that rigorous information management requirements should apply equally to all DCOs, regardless of their size or systemic importance.

The Commission requests comment on all aspects of the proposed rules, as well as comment on the specific provisions and issues highlighted in the discussion below.

II. Proposed Regulations

A. Reporting Requirements

Proposed § 39.19 would require certain reports to be made by the DCO to the Commission: (1) On a periodic basis (daily, quarterly or annually), (2) where the reporting requirement is triggered by the occurrence of a significant event; and (3) upon request by the Commission.[16] Unless otherwise specified by the Commission or its designee, each DCO would have to submit the information required by this section to the Commission electronically and in a form and manner prescribed by the Commission.

The Commission has determined that the information required by proposed § 39.19 would enable it to conduct more effective and more streamlined financial oversight of a DCO. In this regard, obtaining the required data would enhance the Commission's ability to conduct a more in-depth and timely analysis of a DCO's activities, thereby enabling the Commission to identify insipient problems and address them at an earlier stage. This is particularly important in connection with a DCO that clears swaps, in light of the increased risk that swaps may pose to DCOs.[17]

Unless otherwise specified by the Commission or its designee, any stated time in these proposed regulations would be Central time for information concerning DCOs located in that time zone, and Eastern time for information concerning all other DCOs (including clearing organizations registered as DCOs but located outside the United States).[18]

1. Information Required on a Daily Basis

Currently, the Commission receives initial margin data from several, but not all DCOs and not necessarily on a daily basis. The Commission receives variation margin data through the Shared Market Information System (SHAMIS), which is maintained by The Clearing Corporation, a subsidiary of IntercontinentalExchange, Inc. However, the Commission has found it difficult to obtain a complete data set from SHAMIS on a regular basis and in the necessary format. Moreover, not all DCOs participate in SHAMIS. The Commission is therefore proposing regulations that would require reporting by all DCOs on a daily basis. By requiring both sets of data as well as intraday initial margin calls[19] to be reported directly to the Commission, the Commission would be better positioned to conduct risk surveillance activities efficiently, to monitor the financial health of the DCO, and to detect any unusual activity in a timely manner.

Proposed § 39.19(c)(1)(i) would require a DCO to report both the initial margin requirement for each clearing member, by customer origin and house origin,[20] and the initial margin on deposit for each clearing member, by origin. Proposed § 39.19(c)(1)(ii) would require a DCO to report the daily variation margin collected and paid by the DCO. The report would separately list the mark-to-market amount collected from or paid to each clearing member, by origin.[21]

Proposed § 39.19(c)(1)(iii) would require the DCO to report all other cash flows relating to clearing and settlement including, but not limited to, option premiums and payments related to swaps such as coupon amounts, collected from or paid to each clearing member, by origin. This data, supplementing the initial margin and variation margin data, would provide the Commission with a more complete picture of the financial risk profile of the DCO and its clearing members.

Proposed § 39.19(c)(1)(iv) would require a DCO to report the end-of-day positions for each clearing member, by origin. Although the Commission currently receives large trader reports that are essential to an understanding of significant financial risk exposures, receipt of the proposed reports directly from the DCO would facilitate the ability of the Commission to evaluate the risk of each DCO as well as the aggregate financial risk across all DCOs.

Proposed § 39.19(c)(1) would require the report to be compiled as of the end of each trading day and to be submitted to the Commission by 10 a.m. the following business day. Although the proposed daily reporting requirements would be new, the Commission notes that in the ordinary course of a DCO conducting its clearing and settlement business, the information required to be reported is already known or is readily ascertainable by a DCO.

2. Information Required on a Quarterly Basis

The Commission recently proposed a new § 39.11(f)(1) under which, at the end of each fiscal quarter, or at any time upon Commission request, a DCO would be required to report to the Commission: (i) The amount of financial resources necessary to meet the requirements set forth in the regulation; and (ii) the value of each financial resource available to meet those requirements.[22] The DCO would have to include with the report its financial statements, including the balance sheet, income statement, and statement of cash flows of the DCO or its parent company. If one of the financial resources a DCO is using to meet the regulation's requirements is a guaranty fund, the DCO would also have to report the value

changes in the language of Core Principle M, but did not make any substantive changes.

[15] Section 804 of the Dodd-Frank Act authorizes the Financial Stability Oversight Council to designate financial market utilities involved in clearing and settlement as "systemically important."

[16] Requirements that certain information be submitted upon request of the Commission are currently found in the Commission's regulations as paragraphs (a) and (b) of § 39.5. 17 CFR 39.5. *See infra* discussion of technical amendments regarding §§ 39.5(a) and 39.5(b) at Section II.A.5. of this notice.

[17] The Commission notes that DCOs may be subject to additional reporting requirements that are not covered by Core Principle J and therefore are not addressed in proposed § 39.19, *e.g.,* requirements for reporting to a swap data repository under proposed part 45 of the Commission's regulations.

[18] *See* proposed § 39.19(b)(2).

[19] *See infra* discussion of proposed Regulation 39.19(c)(4)(v) which would require intraday reporting of initial margin calls at Section II.A.4.(e) of this notice.

[20] In a separate rulemaking, the Commission is proposing to define the terms "customer account or customer origin" and "house account or house origin" in proposed § 39.1(b). "Customer account or customer origin" would be defined as a clearing member's account held on behalf of customers, as defined in § 1.3(k) of the Commission's regulations, and would clarify that a customer account is also a futures account, as that term is defined by § 1.3(vv). "House account or house origin" would be defined as a clearing member's combined proprietary accounts, as defined in § 1.3(y).

[21] This requirement would apply to options transactions only to the extent a DCO uses futures-style margining for options.

[22] *See* 75 FR 63113 (Oct. 14, 2010) (proposing DCO financial resources requirements pursuant to Core Principle B).

of each individual clearing member's guaranty fund deposit. Proposed § 39.11(f)(3) would require a DCO to provide the Commission with sufficient documentation that explains both the methodology it used to calculate its financial requirements and the basis for its determinations regarding valuation and liquidity. The DCO also would have to provide copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement that evidences or otherwise supports its conclusions.

By this notice, the Commission is proposing a new § 39.19(c)(2) under which a DCO would be required to report its financial resources in accordance with proposed § 39.11(f). The Commission notes that certain significant changes in financial resources would trigger additional reporting requirements under proposed § 39.19(c)(4)(i).[23]

3. Information Required on an Annual Basis

Proposed § 39.19(c)(3)(i) would require a DCO's chief compliance officer to submit the annual compliance report required by Section 725(b) of the Dodd-Frank Act[24] and proposed § 39.10.[25] The form and content of the annual compliance report would be codified in proposed § 39.10.

Proposed § 39.19(c)(3)(ii) would require a DCO to provide the Commission with audited year-end financial statements of the DCO, or if there are no financial statements available for the DCO itself, the consolidated audited year-end financial statements of the DCO's parent company.

Proposed § 39.19(c)(3)(iii) would require a DCO to submit to the Commission concurrently, the annual compliance report and audited financial statements required by (c)(3)(i) and (ii), respectively, not later than 90 days after the end of the DCO's fiscal year. The DCO would be able to request from the Commission an extension of time to submit either report, provided the DCO's failure to submit the report in a timely manner could not be avoided without unreasonable effort or expense. Extensions of the deadline would be granted at the discretion of the Commission.

4. Event-Specific Reporting

(a) Decrease in Financial Resources

Proposed § 39.19(c)(4)(i) would alert the Commission in a timely manner of a significant decrease in the value of a DCO's financial resources and the reason for the decrease, *e.g.,* whether such a decrease is an indicator of inadequate financial resources or if it is merely the result of a corresponding decrease in the margin requirements of the DCO. A DCO would be required to report certain decreases of the financial resources required to be maintained by proposed § 39.11(a) or, as applicable if the DCO is a SIDCO, proposed § 39.29(a): [26] (1) A 10 percent decrease from the total value of the financial resources reported on the last quarterly report submitted under proposed § 39.11(f); or (2) a 10 percent decrease from the total value of the financial resources as of the close of the previous business day. Reporting a decrease from the last quarterly report is intended to capture a situation where a DCO has a gradual decrease of financial resources. Reporting a decrease from the previous business day is intended to capture a situation where the DCO would experience a sudden decrease in financial resources over a short period of time. Although in such a situation the DCO may still have financial resources on hand that are greater in value than what was reported on the most recent quarterly report, the Commission believes that such a rapid drop in the value of a DCO's financial resources is a situation that warrants notice to the Commission. The Commission invites comment on possible alternatives regarding what would be considered a significant drop in the value of financial resources and whether there should be alternative reporting requirements.

The DCO would be required to report each such decrease to the Commission no later than one business day following the day the 10 percent threshold was reached. The report would have to include the total value of the financial resources: (1) As of the close of business the day the 10 percent threshold was reached; and (2) if reporting a 10 percent decrease from the previous business day, the total value of the financial resources immediately prior to the 10 percent drop. This would include a breakdown of the value of each financial resource available as reported in each (1) and (2) above, calculated in accordance with the requirements of proposed § 39.11(d) or, as applicable if the DCO is a SIDCO, § 39.29(b),[27] including the value of each individual clearing member's guaranty fund deposit, if the DCO reports guaranty fund deposits as a financial resource. The report would also include a detailed explanation for the decrease.

(b) Decrease in Ownership Equity

Proposed § 39.19(c)(4)(ii) would require a DCO to notify the Commission of an event which the DCO knows or should reasonably know will cause a decrease of 20 percent in ownership equity from the last reported ownership equity balance. This notice would be required to be provided no later than two business days prior to the event. The last reported ownership equity balance would generally be on the quarterly or audited financial statements that would be required to be submitted by proposed § 39.19(c)(2) [28] or proposed § 39.19(c)(3)(ii),[29] respectively. For events which the DCO did not know, and reasonably could not know, would cause a decrease of 20 percent prior to the event occurring, the DCO would be able to report the triggering event no later than two business days after the decrease in ownership equity. Reports submitted prior to an event would have to include pro forma financial statements, reflecting the DCO's estimated future financial condition following the anticipated decrease and details describing the reason for the anticipated decrease. Reports submitted after the event would have to include current financial statements and details describing the reason for the decrease.

Proposed § 39.19(c)(4)(ii) is intended to alert the Commission of major planned events that would significantly affect ownership equity, most of which are events the DCO would have advance knowledge of, such as a reinvestment of capital, dividend payment, or major acquisition. The report would notify the Commission of such an event and would allow the Commission to

[23] *See infra* discussion of proposed § 39.19(c)(4)(i) at Section II.A.4.(a) of this notice.

[24] Section 5b(i) of the CEA, 7 U.S.C. 7a–1(i).

[25] Section 39.10 is being proposed in a separate notice of proposed rulemaking.

[26] Proposed § 39.11(a) would require a DCO to maintain sufficient financial resources to: (1) Meet its financial obligations to its clearing members notwithstanding a default by the clearing member creating the largest financial exposure for the DCO in extreme but plausible market conditions, and (2) cover its operating costs for at least one year, calculated on a rolling basis. Proposed § 39.29(a) would establish a different default resources standard for SIDCOs, requiring a SIDCO to maintain sufficient financial resources to meet its financial obligations to its clearing members notwithstanding a default by the two clearing members creating the largest combined financial exposure for the SIDCO in extreme but plausible market conditions. *See* 75 FR at 63118–19.

[27] Proposed § 39.11(d)(2) and § 39.29(b) address valuation of clearing member assessments for purposes of calculating default resources. *See* 75 FR at 63119–20.

[28] *See supra* discussion of proposed § 39.19(c)(2) at Section II.A.2. of this notice.

[29] *See supra* discussion of proposed § 39.19(c)(3)(ii) at Section II.A.3. of this notice.

evaluate its effect on the financial health of the DCO. The Commission invites commenters to propose alternative reporting requirements which would also provide the Commission with this type of information.

(c) Six-Month Liquid Asset Requirement

The Commission recently proposed a new § 39.11(e)(2) which would establish a six-month liquid asset requirement. It would require DCOs to maintain unencumbered liquid financial assets in the form of cash or highly liquid securities equal to six months operating costs.[30] In this notice, the Commission is proposing a new § 39.19(c)(4)(iii) that would require immediate notice to the Commission when a DCO knows or reasonably should know of a deficit in the six-month liquid asset requirement of proposed § 39.11(e)(2). The Commission believes that immediate notification of a DCO's deficit in the six-month liquid asset requirement is critical because of its potential impact on the ability of the DCO to continue to operate as a going concern.

(d) Change in Working Capital

Proposed § 39.19(c)(4)(iv) would require notice to the Commission no later than two business days after a DCO's working capital becomes negative. Working capital is defined as current assets minus current liabilities. The notice would include a balance sheet that reflects the DCO's working capital and an explanation as to the reason for the negative balance. The Commission believes that it is essential that it be made aware, in a timely manner, when a DCO has negative working capital, as this development can be an indicator of the declining financial health of a DCO.

The Commission invites comment as to whether this is a meaningful indicator of a DCO's financial condition, if there are alternative or additional measures that might be applied, and if the timing for notification is appropriate given the information to be provided.

(e) Intraday Initial Margin Calls to Clearing Members

Proposed § 39.19(c)(4)(v) would require a DCO to report any intraday initial margin calls to clearing members. While proposed § 39.19(c)(1), discussed above, would provide the Commission with initial margin and daily variation margin data, the Commission would not receive that data until the following business day. Learning of an intraday initial margin call soon after the call would assist the Commission in determining whether certain clearing member positions could affect the ability of a DCO to meet its end-of-day financial obligations in a timely manner. This data would alert the Commission to positions that could pose greater risk. This is especially important given that intraday initial margin calls are unusual and are often due to increasing position size. The Commission invites commenters to recommend other possible reporting solutions that could serve to inform the Commission of a clearing member that is potentially building up position size during the current trading day.

The report would have to be submitted no later than 1 hour following the margin call and would have to separately list each request and include the name of the clearing member, the amount requested and the account origin.

The Commission notes that while this may impose an occasional reporting requirement on DCOs, many DCOs already have such reports generated for submission to a clearing member's depository as a request for intraday funds. The primary burden would be arranging a mechanism that would allow submission of these reports to the Commission in a timely manner. Thus, the Commission believes that it would be a de minimis burden.

(f) Delay in Collection of Initial Margin

Proposed § 39.19(c)(4)(vi) would require the DCO to immediately notify the Commission when it has not received additional initial margin that it requested from a clearing member, in a timely manner. The proposed reporting requirement is intended to alert the Commission of a development that could be an indicator of a potential clearing member default. Payment of additional initial margin would be considered late if the DCO has not received payment within the time frame allowed by the DCO's rules and procedures.[31] The Commission invites comment on this reporting requirement and the time frame used in determining when a payment is not considered timely.

(g) Management of Clearing Member Positions

Proposed §§ 39.19(c)(4)(vii)–(ix) would require a DCO to apprise the Commission of different levels of financial distress of a clearing member, and the status of the DCO's actions to manage the risks associated with the clearing member's financial situation. The DCO would be required to report situations where a clearing member's position(s) must be reduced, transferred or liquidated, or where the clearing member defaults.

Proposed § 39.19(c)(4)(vii) would require a DCO to immediately notify the Commission of the DCO's request to a clearing member to reduce its positions because the DCO has determined that the clearing member has exceeded its exposure limit, that the clearing member has failed to meet an initial or variation margin call, or that it has failed to fulfill any other financial obligation to the DCO. The notice would have to include: (A) The name of the clearing member; (B) the time the clearing member was contacted; (C) the number of positions by which the DCO requested the clearing member to reduce its position size; (D) the contracts that are the subject of the request; and (E) the reason for the request.

Proposed § 39.19(c)(4)(viii) would require a DCO to immediately notify the Commission of the DCO's determination that any position the DCO carries for one of its clearing members must be liquidated immediately or transferred immediately, or that the trading of any account of a clearing member can be only for the purposes of liquidation because that clearing member has failed to meet an initial or variation margin call or failed to fulfill any other financial obligation to the DCO. The notice would have to include: (A) The name of the clearing member; (B) the time the clearing member was contacted; (C) the contracts that are subject to the determination; (D) the number of positions that are subject to the determination; and (E) the reason for the determination.

The provisions of proposed § 39.19(c)(4)(viii) are substantially similar to the requirements of § 1.12(f)(1) of the Commission's regulations. Accordingly, the Commission is proposing to remove § 1.12(f)(1) and redesignate it as proposed § 39.19(c)(4)(viii) in substantially the same form. The difference would be that while § 1.12(f)(1) applies only to a DCO's determination concerning a clearing member that is a registered futures commission merchant (FCM) or registered leverage transaction merchant, proposed § 39.19(c)(4)(viii) would apply to all DCO clearing members, even those that are not registrants.

[30] *See* 75 FR at 63116.

[31] The DCO's rules and procedures are required to be submitted to the Commission under Section 5c(c) of the CEA, 7 U.S.C. 7a–2(c), and § 40.6. Such information is required to be made available to clearing members and the public under Core Principle L and proposed § 39.21. *See infra* Section II.C. of this notice.

Proposed § 39.19(c)(4)(ix) would require a DCO to immediately notify the Commission of the default of a clearing member. An event of default would be determined in accordance with the rules of the DCO. The notice of default would have to include: (A) The name of the clearing member; (B) the contracts the clearing member defaulted upon; (C) the number of positions the clearing member defaulted upon; and (D) the amount of the unmet financial obligation.

(h) Change in Ownership or Corporate or Organizational Structure

Proposed § 39.19(c)(4)(x) is intended to provide advance notice to the Commission of major ownership, corporate, or organizational changes of a DCO. The DCO would be required to report any anticipated ownership, corporate, or organizational changes of the DCO or its parent company that would: (i) Result in at least a 10 percent change of ownership of the DCO; (ii) create a new subsidiary of the DCO or the parent company; (iii) eliminate a current subsidiary of the DCO or its parent company; or (iv) result in a transfer of all or substantially all of its assets, including its registration as a DCO, to another legal entity (*e.g.,* as a result of a reincorporation, or corporate merger). Such changes could include, but would not be limited to, the DCO's change of corporate structure from a partnership to a corporation, or from a member owned company to a publicly held company, or a change in corporate domicile. The report would include: (1) A chart outlining the new ownership or corporate or organizational structure, (2) a brief description of the purpose and impact of the change; and (3) any relevant agreements effecting the change and corporate documents such as new articles of incorporation and bylaws. With respect to a corporate change that results in a transfer of all or substantially all of a DCO's assets, the informational requirements of proposed § 39.19(c)(4)(x)(B) would be satisfied by the DCO's compliance with proposed § 39.3(h)(3).[32]

Because a DCO is likely to be aware of such changes well in advance of their effective date, the proposed regulation would require the report to be submitted to the Commission no later than three months prior to the anticipated change. The Commission is allowing an exception to the three-month prior notice requirement if the DCO does not know and reasonably could not have known of the anticipated change three months prior to that change. In such event, the DCO would be required to immediately report such change to the Commission as soon as it knows of the change. The Commission requests comment on whether the three-month notice period is appropriate or whether a different notice period should be required.

Proposed § 39.19(c)(4)(x)(D) would require a second report to the Commission of the consummation of the corporate or organizational change no later than 2 business days following the effective date of the change.

The Commission notes that there may be differences in the proposed notification requirements for changes in the ownership or corporate or organizational structure of DCOs, designated contract markets, swap execution facilities, and swap data repositories.[33] The Commission requests comment on the proposed reporting requirements under § 39.19(c)(4)(x), generally, and, more specifically, the extent to which there should be uniformity or differentiation in notification procedures applied to different types of registrants.

(i) Change in Key Personnel

Proposed § 39.19(c)(4)(xi) would require a DCO to report to the Commission the departure or addition of persons who are key personnel, as defined in proposed § 39.1(b), no later than two business days following any such change. As applicable when a position is vacated, the report would include the name of the person who will assume the duties of the position on a temporary basis until a permanent replacement fills the position.

Key personnel would be defined by proposed § 39.1(b) as personnel who play a significant role in the operation of the DCO, provision of clearing and settlement services, risk management, or oversight of compliance with the CEA and Commission regulations. Key personnel would include, but would not be limited to, those persons who are or perform the functions of any of the following: The chief executive officer; president; chief compliance officer; chief operating officer; chief risk officer; chief financial officer; chief technology officer; and emergency contacts or persons who are responsible for business continuity and disaster recovery.[34] The term "emergency" would have the same meaning as defined in § 40.1(g), which the Commission has proposed to revise and redesignate as § 40.1(h).[35] The Commission intends to require listing key personnel on a DCO's initial application in furtherance of the applicant's representation that it can satisfy the requirements of Core Principle B, *i.e.,* that it will have adequate managerial resources.[36] From a practical standpoint, notification of any changes of key personnel, particularly those responsible for handling emergency situations, is important for purposes of the Commission's general oversight of each DCO, as well as its ability to establish contact with key personnel in a timely manner, as circumstances may warrant.

(j) Credit Facility Funding Arrangement Change

Under proposed § 39.19(c)(4)(xii), a DCO would be required to notify the Commission of material changes in a credit facility funding arrangement, if the DCO has one in place. A credit facility funding arrangement is generally used as a stop-gap measure in an emergency situation such as to provide liquidity during a clearing member default or to temporarily provide the DCO with adequate operating funds.[37]

[32] In a separate proposed rulemaking, the Commission is proposing procedures for the transfer of a DCO's registration and open interest under proposed § 39.3(h).

[33] Such requirements would be proposed in separate rulemakings, each for a specific registrant.

[34] In a separate rulemaking, the Commission is proposing to adopt this definition for "key personnel" in a new § 39.1(b).

[35] *See* 75 FR 67282, 67292 (Nov. 2, 2010) (provisions common to registered entities; proposing to revise and redesignate § 40.1(g) as § 40.1(h)). The term "emergency" is currently defined as:

> Any occurrence or circumstance that, in the opinion of the governing board of a registered entity, or a person or persons duly authorized to issue such an opinion on behalf of the governing board of a registered entity under circumstances and pursuant to procedures that are specified by rule, requires immediate action and threatens or may threaten such things as the fair and orderly trading in, or the liquidation of or delivery pursuant to, any agreements, contracts or transactions, including: (1) Any manipulative or attempted manipulative activity; (2) Any actual, attempted, or threatened corner, squeeze, congestion, or undue concentration of positions; (3) Any circumstances which may materially affect the performance of agreements, contracts or transactions, including failure of the payment system or the bankruptcy or insolvency of any participant; (4) Any action taken by any governmental body, or any other registered entity, board of trade, market or facility which may have a direct impact on trading; and (5) Any other circumstance which may have a severe, adverse effect upon the functioning of a registered entity.

17 CFR 40.1(g).

[36] *See* Section 5b(c)(2)(B)(i) of the CEA; 17 USC 7a–1(c)(2)(B)(i) (requiring each DCO to have "adequate financial, operational, and managerial resources, as determined by the Commission, to discharge each responsibility of the derivatives clearing organization"). The Commission expects to include in a future rulemaking revised instructions for DCO applications which will include a requirement that applicants list key personnel and emergency contacts.

[37] *See* 75 FR at 63116 (proposing that a DCO may use a committed line of credit or similar facility to

Thus, it is essential for the Commission to be promptly notified of changes that would affect the DCO's immediate access to cash. Under the proposed regulation, a DCO would have to notify the Commission no later than one business day after a DCO changes a credit facility funding arrangement, is notified that such an arrangement has changed, or knows or reasonably should know that the arrangement will change, including but not limited to a change in lender, change in the size of the facility, change in expiration date, or any other material changes or conditions.

(k) Rule Enforcement

As mandated by Core Principle H, proposed § 39.19(c)(4)(xiii) would require a DCO to report to the Commission regarding rule enforcement activities and sanctions imposed against clearing members. More specifically, it would require a DCO to notify the Commission no later than two business days after the DCO (A) initiates a rule enforcement action against a clearing member, or (B) imposes sanctions against a clearing member. The Commission notes that while an exchange has 30 days within which to notify the Commission of a decision pursuant to which a disciplinary action has become final,[38] a DCO taking disciplinary action against a clearing member is a less common occurrence, and the clearing member's offense could potentially impact the financial integrity of the DCO. Thus, the Commission believes that it should be notified of such actions, sooner. Nonetheless, the Commission requests comment on whether a 30-day reporting period would be more appropriate under proposed § 39.19(c)(4)(xiii).

(l) Financial Condition and Events

Proposed § 39.19(c)(4)(xiv) is intended to alert the Commission of certain events and situations that may affect the financial integrity of a DCO. Under the proposed regulation, a DCO would be required to immediately notify the Commission after the DCO knows or reasonably should know of: (A) The institution of any legal proceedings which may have a material adverse financial impact on the DCO; (B) any event, circumstance or situation that would not otherwise be required to be reported under § 39.19 and that would materially impede the DCO's ability to comply with part 39 of the Commission's regulations; and (C) any material adverse change in the financial condition of any clearing member that would not otherwise be required to be reported under § 39.19. These requirements would place an affirmative duty on the DCO to be aware of and monitor such events, and would permit the DCO to exercise its discretion in determining which events rise to the level of requiring notification to the Commission.

Proposed § 39.19(c)(4)(xv) would require a DCO, when it discovers or is notified by an independent public accountant of the existence of any material inadequacy, to give notice of such material inadequacy within 24 hours, and within 48 hours after giving such notice to file a written report stating what steps have been and are being taken to correct the material inadequacy. Proposed § 39.19(c)(4)(xv) is consistent with § 1.12(d), a similar requirement for FCMs and introducing brokers.

5. Technical Amendments

Sections 39.5(a) and (b) require certain reports from a DCO upon request by the Commission. The Commission is proposing redesignating § 39.5(a) and (b) as proposed § 39.19(c)(5)(i) and (ii), respectively, in substantially the same form. The Commission believes that the addition of proposed § 39.19 as the DCO reporting regulation would make that section the appropriate placement for the provisions of § 39.5(a) and (b). Section 39.5(a), which is proposed as new § 39.19(c)(5)(i), requires that, upon request by the Commission, a DCO file with the Commission such information related to its business as a clearing organization, including information relating to trade and clearing details, in the form and manner and within the time as specified by the Commission in the request. Section 39.5(b), which is proposed as new § 39.19(c)(5)(ii), requires that, upon request by the Commission, a DCO file with the Commission a written demonstration, containing such supporting data, information and documents, in the form and manner and within such time as the Commission may specify, that the DCO is in compliance with one or more core principles and the relevant provisions of part 39, as specified in the request.

Section 39.5(c) currently requires a DCO to submit large trader reports in circumstances where they are not required to be filed by FCMs, clearing members or others.[39] The Commission is proposing to remove § 39.5(c) because the data from such large trader reports would be available pursuant to a combination of other large trader reporting requirements and the requirements of proposed § 39.19(c)(1).[40]

Section 39.5(d) currently requires, upon special call, reports by certain persons for positions cleared on a DCO.[41] The Commission is proposing to redesignate § 39.5(d) as § 21.04 because part 21 (Special Calls) is the appropriate placement for this provision.[42] As such, the Commission also proposes to redesignate current § 21.04 as § 21.05 and add § 21.06 which would delegate its authority under proposed § 21.04 to the Director of the Division of Clearing and Intermediary Oversight.[43]

B. Recordkeeping Requirements

To implement Core Principle K, the Commission proposes to codify the requirements of the core principle such that each DCO will have to maintain records of all activities related to its business as a DCO in the form and manner acceptable to the Commission for a period of not less than five years. To clarify this general standard by way of example, and to supplement pre-existing recordkeeping requirements

meet the liquidity requirements set forth in proposed § 39.11(e)(1) and 39.11(e)(2)).

[38] *See* 17 CFR 9.11(a).

[39] Section 39.5(c) states:

Information regarding transactions by large traders cleared by a derivatives clearing organization shall be filed with the Commission, in a form and manner acceptable to the Commission, by futures commission merchants, clearing members, foreign brokers or registered entities other than a derivatives clearing organization, as applicable. Provided, however, that if no such person or entity is required to file large trader information with the Commission, such information must be filed with the Commission by a derivatives clearing organization.

17 CFR 39.5(c).

[40] *See supra* discussion of proposed daily reporting requirements at Section II.A.1. of this notice.

[41] Section 39.5(d) states:

Upon special call by the Commission, each futures commission merchant, clearing member or foreign broker shall provide information to the Commission concerning customer accounts or related positions cleared on a derivatives clearing organization or other multilateral clearing organization in the form and manner and within the time specified by the Commission in the special call.

17 CFR 39.5(d).

[42] In a recent proposed rulemaking, the Commission proposed to renumber § 39.5 as § 39.6. *See* 75 FR 67277, 67281 (Nov. 2, 2010) (process for review of swaps for mandatory clearing). Renumbering would no longer be necessary if the requirements of § 39.5 are redesignated as proposed in this notice. (As discussed in this section, the Commission is proposing to: (1) Redesignate § 39.5(a) as § 39.19(c)(5)(i); (2) redesignate § 39.5(b) as § 39.19(c)(5)(ii); (3) remove § 39.5(c); (4) redesignate § 21.04 as § 21.05; (5) redesignate § 39.5(d) as § 21.04; and (6) add § 21.06). Additionally, the earlier proposal to redesignate §§ 39.6 and 39.7 as §§ 39.7 and 39.8, respectively, would no longer be necessary. *See* 75 FR at 67281. The Commission notes that it intends to propose a revised and renumbered part 39 in conjunction with an upcoming notice of proposed rulemaking.

[43] This delegation provision is the same as the delegation provision for the Director of the Division of Market Oversight in current § 21.04.

imposed by various Commission regulations,[44] the Commission is proposing to list examples of information subject to the recordkeeping requirement.

Proposed § 39.20(a)(1) would require a DCO to maintain records of all cleared transactions, including swaps. This is information that a DCO already maintains in the ordinary course of its business as a clearing house.

More specifically, proposed § 39.20(a)(2) would require a DCO to retain all information necessary to record allocation of bunched orders for cleared swaps. This provision would highlight an important recordkeeping component of swaps clearing.

Proposed § 39.20(a)(3) would require a DCO to maintain records of all information required to be generated, created, or reported under part 39. This would include, but would not be limited to, the results of and the methodology used for all tests, reviews, and calculations in connection with setting and evaluating margin levels, determining the value and adequacy of financial resources, and establishing settlement prices.

Proposed § 39.20(a)(4) would require a DCO to maintain records of all rules and procedures of the DCO. Specifically, the DCO would be required to maintain records of all rules and procedures required to be submitted pursuant to part 39 and part 40 of the Commission's regulations, including all proposed changes in rules, procedures or operations of SIDCOs, subject to proposed § 40.10.[45]

Proposed § 39.20(a)(5) would require a DCO to maintain any data or documentation required by the Commission or the DCO to be submitted to the DCO by its clearing members, or by any other person in connection with the DCO's clearing and settlement activities.

Proposed § 39.20(b)(1) would require a DCO to maintain records required by the Commission's regulations in accordance with the provisions of § 1.31 (books and records; keeping and inspection), for a period of not less than five years. However, there is an exception in proposed § 39.20(b)(2) that would require each DCO that clears swaps to maintain swap data in accordance with the requirements of part 45 (swap data repositories) of the Commission's regulations.

[44] For example, §§ 1.26 and 1.27 impose recordkeeping requirements for DCOs and FCMs related to the investment of customer funds.

[45] *See* 75 FR 67282 (Nov. 2, 2010) (proposing amendments to part 40 of the Commission's regulations).

C. Public Information

To implement Core Principle L, the Commission proposes to codify the requirements of the core principle, requiring DCOs to provide or make available certain information to the public and to market participants.

1. Availability of Information

Proposed § 39.21(a) would require each DCO to provide to market participants sufficient information to enable the market participants to identify and evaluate accurately the risks and costs associated with using the services of the DCO.[46] In furtherance of this objective, each DCO would be required to have clear and comprehensive rules and procedures. Proposed § 39.21(b) would require each DCO to make information concerning the rules and the operating and default procedures governing the clearing and settlement systems of the DCO available to market participants.[47]

2. Public Disclosure

Proposed § 39.21(c) would require each DCO to disclose publicly and to the Commission information concerning: (1) The terms and conditions of each contract, agreement, and transaction cleared and settled by the DCO; (2) each clearing and other fee that the DCO charges its clearing members; (3) the DCO's margin methodology; (4) the size and composition of the financial resource package available in the event of a clearing member default; (5) daily settlement prices, volume, and open interest for each contract, agreement or transaction cleared or settled by the DCO; (6) the DCO's rules and procedures for defaults pursuant to proposed § 39.16;[48] and (7) any other matter that is relevant to participation in the clearing and settlement activities of the DCO.[49]

Under proposed § 39.21(d) the DCO would be required to make its rulebook, a list of all current clearing members, and the information listed in proposed § 39.21(c) readily available to the general public, in a timely manner, by posting such information on the DCO's website, unless otherwise permitted by the Commission. The information that would be required by proposed § 39.21(c)(5) would have to be made available to the public no later than the business day following the day to which the information pertains.

[46] *See* Section 5b(c)(2)(L)(i) of the CEA; 7 U.S.C. 7a–1(c)(2)(L)(i).

[47] *See* Section 5b(c)(2)(L)(ii) of the CEA; 7 U.S.C. 7a–1(c)(2)(L)(ii).

[48] In a future proposed rulemaking, the Commission intends to propose a new § 39.16 to implement DCO Core Principle G, regarding default rules and procedures. *See* Section 5b(c)(2)(G) of the CEA; 7 U.S.C. 7a–1(c)(2)(G).

[49] *See* Section 5b(c)(2)(L)(iii) of the CEA, 7 U.S.C. 7a–1(c)(2)(L)(iii).

D. Information Sharing

Proposed § 39.22 would require each DCO to enter into, and abide by the terms of, each appropriate and applicable domestic and international information-sharing agreement and to use relevant information obtained from each such agreement in carrying out the risk management program of the DCO. Proposed § 39.22 would codify the statutory provisions of Core Principle M. The Commission believes that the language affords each DCO the appropriate level of discretion regarding the appropriate information-sharing agreements to enter into and the rules to abide by, and it does not perceive a need to articulate more specific requirements. The Commission requests comment on this approach.

III. Effective Date

The Commission is proposing that the requirements proposed in this notice become effective 180 days from the date the final rules are published in the **Federal Register**. The Commission believes that this would give DCOs adequate time to implement the technology and the procedures necessary to fulfill the proposed reporting requirements. This period of time also would be sufficient to allow for compliance with the recordkeeping, public information and information sharing requirements. The Commission requests comment on whether 180 days is an appropriate time frame for compliance with the proposed rules. The Commission further requests comment on possible alternative effective dates and the basis for any such alternative date.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[50] The rules proposed by the Commission will affect only DCOs (some of which will be designated as SIDCOs). The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its regulations on small

[50] 5 U.S.C. 601 *et seq.*

entities in accordance with the RFA.[51] The Commission has previously determined that DCOs are not small entities for the purpose of the RFA.[52] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. OMB has not yet assigned a control number to the new collection. The Paperwork Reduction Act of 1995 (PRA)[53] imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. This proposed rulemaking would result in new collection of information requirements within the meaning of the PRA. The Commission therefore is submitting this proposal to the Office of Management and Budget (OMB) for review. If adopted, responses to this collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR Part 145, "Commission Records and Information." In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

1. Information Provided by Reporting Entities/Persons

The proposed regulations require each respondent to file information with the Commission (1) periodically, on a daily, quarterly, and annual basis,[54] (2) as specified events occur, and (3) upon Commission request.[55]

For daily reports, these would result in an estimated total of 12 initial responses and 250 responses per respondent on an annual basis. Commission staff estimates that respondents could expend up to $690 initially and $1,400 annually, based on an hourly rate ranging from $46 to $56, to comply with the proposed regulations. This would result in an aggregated cost of $8,280 initially (12 respondents × $690) and $16,800 per annum (12 respondents × $1,400).

For annual reports, these would result in an estimated total of 1 response per respondent on an annual basis. Commission staff estimates that respondents could expend up to $482,110 annually, based on an hourly rate of $185, to comply with the proposed regulations. This would result in an aggregated cost of $5,785,320 per annum (12 respondents × $482,110).[56]

For event-specific reports, these would result in an estimated total of 4 responses per respondent on an annual basis. Commission staff estimates that respondents could expend up to $1,680 annually, based on an hourly rate of $75, to comply with the proposed regulations. This would result in an aggregated cost of $20,160 per annum (12 respondents × $1,680).[57]

For recordkeeping requirements, these would result in an estimated total of 1 response per respondent on an annual basis. Commission staff estimates that respondents could expend up to $1,000 annually, based on an hourly rate of $10, to comply with the proposed regulations. This would result in an aggregated cost of $12,000 per annum (12 respondents × $1,000).

2. Information Collection Comments

The Commission invites the public and other federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comment in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by e-mail at *OIRAsubmissions@omb.eop.gov.* Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting *RegInfo.gov.* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

C. Cost-Benefit Analysis

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a rule or to determine whether the benefits of the rulemaking outweigh its costs; rather, it requires that the Commission to "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to

[51] 47 FR 18618 (Apr. 30, 1982).

[52] *See* 66 FR 45604, 45609 (Aug. 29, 2001).

[53] 44 U.S.C. 3501 *et seq.*

[54] Quarterly financial resources reports and annual compliance reports are the subjects of separate Paperwork Reduction Act submissions in connection with other proposed rulemakings.

[55] Reports submitted upon Commission request are current requirements.

[56] This amount reflects the estimated cost of preparing audited annual financial statements, an activity which many, if not all, respondents already perform on an annual basis.

[57] This amount reflects the estimated cost of putting systems in place which would alert a respondent of certain event-specific-reporting requirements. It is expected, however, that most respondents already have most, if not all, of these systems in place. Additionally, this amount takes into account the preparation of reports such as the pro forma financial statement for a decrease in ownership equity, a document which a respondent would most likely already have produced in connection with whatever specific event the respondent anticipated would cause a decrease in ownership equity.

accomplish any of the purposes of the CEA.

Summary of proposed requirements. The proposed regulations would implement the reporting, recordkeeping, public information, and information-sharing requirements for DCOs under the CEA, as amended by the Dodd-Frank Act.

Costs. With respect to costs, the Commission has determined that the costs of the new reporting requirements are not expected to be significant given that the information required to be reported is readily available to the DCO and, in certain instances, is already being reported to the Commission. The incremental increases in operating costs will have a negligible effect on the markets' efficiency, effectiveness and financial competitiveness.

Benefits. With respect to benefits, the Commission has determined that receiving such data required by the daily, annual and event-specific reporting requirements in a timely manner and in one format would further the Commission's goal of monitoring the financial health and financial integrity of DCOs and whether a DCO's financial and risk management practices are effective. It would also assist the Commission in taking prompt action as necessary to identify insipient problems and address them at an earlier stage. This would further the goal of avoiding systemic risk due to the default of a clearing member and thereby protect market participants and the public and serve the public interest by promoting sound risk management practices. Similarly, the recordkeeping requirements allow for making certain records available for Commission inspection, which helps further the goals of the reporting requirements and is necessary for the Commission to effectively monitor a DCO's financial integrity and compliance with the CEA and Commission regulations. The public information requirements serve the public interest by facilitating the dissemination of important information about the DCO, including its clearing and settlement activities and default procedures. Information-sharing requirements promote cooperation among industry participants, facilitating more effective risk management.

Public Comment. The Commission invites public comment on its cost-benefit considerations. Commentators are also invited to submit any data or other information that they may have quantifying or qualifying costs and benefits of the Proposal with their comment letters.

List of Subjects

17 CFR Part 1

Brokers, Commodity futures, Consumer protection.

17 CFR Part 21

Brokers, Commodity futures, Reporting and recordkeeping requirements

17 CFR Part 39

Definitions, commodity futures, reporting and recordkeeping requirements, swaps.

For the reasons stated in the preamble, the Commission proposes to amend 17 CFR parts 1, 21 and 39 as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

Authority and Issuance

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

2. In § 1.12, remove and reserve paragraph (f)(1).

PART 21—SPECIAL CALLS

Authority and Issuance

3. The authority for part 21 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 2a, 4, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 12a, 19 and 21, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010); 5 U.S.C. 552 and 552(b), unless otherwise noted.

4. Redesignate § 21.04 as § 21.05.

5. Add § 21.06 to read as follows:

§ 21.06 Delegation of authority to the Director of the Division of Clearing and Intermediary Oversight.

The Commission hereby delegates, until the Commission orders otherwise, the special call authority set forth in § 21.04 to the Director of the Division of Clearing and Intermediary Oversight to be exercised by such Director or by such other employee or employees of such Director as designated from time to time by the Director. The Director of the Division of Clearing and Intermediary Oversight may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated in this section to the Director.

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

Authority and Issuance

6. The authority for part 39 is proposed to read as follows:

Authority: 7 U.S.C. 2, 5, 6, 6d, 7a–1,7a–2, and 7b as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

7. Add § 39.19 to read as follows:

§ 39.19 Reporting.

(a) *In general.* Each derivatives clearing organization shall provide to the Commission the information specified in this section and any other information that the Commission deems necessary to conduct its oversight of a derivatives clearing organization.

(b) *Submission of reports.* (1) Unless otherwise specified by the Commission or its designee, each derivatives clearing organization shall submit the information required by this section to the Commission electronically and in a form and manner prescribed by the Commission.

(2) *Time zones.* Unless otherwise specified by the Commission or its designee, any stated time in this section is Central time for information concerning derivatives clearing organizations located in that time zone, and Eastern time for information concerning all other derivatives clearing organizations.

(c) *Reporting requirements.* Each registered derivatives clearing organization shall provide to the Commission or other person as may be required or permitted by this paragraph the information specified below:

(1) *Daily reporting.* A report containing the information specified by this paragraph (c)(1), which shall be compiled as of the end of each trading day and shall be submitted to the Commission by 10 a.m. on the following business day:

(i) Initial margin requirements and initial margin on deposit for each clearing member, by customer origin and house origin;

(ii) Daily variation margin, separately listing the mark-to-market amount collected from or paid to each clearing member, by customer origin and house origin;

(iii) All other daily cash flows relating to clearing and settlement including, but not limited to, option premiums and payments related to swaps such as coupon amounts, collected from or paid to each clearing member, by customer origin and house origin; and

(iv) End-of-day positions for each clearing member, by customer origin and house origin.

(2) Quarterly reporting. A report of the derivatives clearing organization's financial resources as required by § 39.11(f); *provided that,* additional reports may be required by paragraph (c)(4)(i) of this section or § 39.11(f).

(3) *Annual reporting.* (i) *Annual report of chief compliance officer.* The annual report of the chief compliance officer required by § 39.10.

(ii) *Audited financial statements.* Audited year-end financial statements of the derivatives clearing organization or, if there are no financial statements available for the derivatives clearing organization itself, the consolidated audited year-end financial statements of the derivatives clearing organization's parent company.

(iii) *Time of report.* The reports required by this paragraph (c)(3) shall be submitted concurrently to the Commission not more than 90 days after the end of the derivatives clearing organization's fiscal year; *provided that,* a derivatives clearing organization may request from the Commission an extension of time to submit either report, provided the derivatives clearing organization's failure to submit the report in a timely manner could not be avoided without unreasonable effort or expense. Extensions of the deadline will be granted at the discretion of the Commission.

(4) *Event-specific reporting.* (i) *Decrease in financial resources.* If there is a decrease of 10 percent in the total value of the financial resources required to be maintained by the derivatives clearing organization under § 39.11(a) or, as applicable, § 39.29(a), either from the last quarterly report submitted under § 39.11(f) or from the value as of the close of the previous business day, the derivatives clearing organization shall report such decrease to the Commission no later than one business day following the day the 10 percent threshold was reached. The report shall include:

(A) The total value of the financial resources:

(*1*) as of the close of business the day the 10 percent threshold was reached, and

(*2*) if reporting a decrease in value from the previous business day, the total value of the financial resources immediately prior to the 10 percent decline;

(B) A breakdown of the value of each financial resource reported in each of paragraph (4)(i)(A)(*1*) and (*2*), calculated in accordance with the requirements of § 39.11(d) or, as applicable, § 39.29(b), including the value of each individual clearing member's guaranty fund deposit if the derivatives clearing organization reports guaranty fund deposits as a financial resource; and

(C) A detailed explanation for the decrease.

(ii) *Decrease in ownership equity.* No later than two business days prior to an event which the derivatives clearing organization knows or should reasonably know will cause a decrease of 20 percent or more in ownership equity from the last reported ownership equity balance as reported on a quarterly or audited financial statements required to be submitted by paragraph (c)(2) or (c)(3)(ii), respectively, of this section, but in any event no later than two business days after such decrease in ownership equity for events that caused the decrease for which the derivatives clearing organization does not know and reasonably should not have known about prior to the event. The report shall include:

(A) Pro forma financial statements reflecting the DCO's estimated future financial condition following the anticipated decrease for reports submitted prior to the anticipated decrease and current financial statements for reports submitted after such a decrease; and

(B) Details describing the reason for the decrease or anticipated decrease in the balance.

(iii) *Six-month liquid asset requirement.* Immediate notice when a derivatives clearing organization knows or reasonably should know of a deficit in the six-month liquid asset requirement of § 39.11(e)(2).

(iv) *Change in working capital.* No later than two business days after working capital becomes negative; the notice shall include a balance sheet that reflects the derivatives clearing organization's working capital and an explanation as to the reason for the negative balance.

(v) *Intraday initial margin calls.* (A) *Reporting requirement.* Any intraday initial margin call to a clearing member.

(B) *Required information.* The report shall separately list each request and include the name of the clearing member, the amount requested and the account origin.

(C) *Time of report.* The report shall be submitted to the Commission no later than 1 hour following the margin call.

(vi) *Delay in collection of initial margin.* Immediate notice when a derivatives clearing organization has not received additional initial margin that it requested from a clearing member within the time frame allowed by the derivatives clearing organization's rules and procedures.

(vii) *Request to clearing member to reduce its positions.* Immediate notice, of a derivatives clearing organization's request to a clearing member to reduce its positions because the derivatives clearing organization has determined that the clearing member has exceeded its exposure limit, has failed to meet an initial or variation margin call, or has failed to fulfill any other financial obligation to the derivatives clearing organization. The notice shall include:

(A) The name of the clearing member;

(B) The time the clearing member was contacted;

(C) The number of positions by which the derivatives clearing organization requested the clearing member to reduce its position size;

(D) All contracts that are the subject of the request; and

(E) The reason for the request.

(viii) *Determination to transfer or liquidate positions.* Immediate notice, of a determination that any position a derivatives clearing organization carries for one of its clearing members must be liquidated immediately or transferred immediately, or that the trading of any account of a clearing member shall be only for the purposes of liquidation because that clearing member has failed to meet an initial or variation margin call or has failed to fulfill any other financial obligation to the derivatives clearing organization. The notice shall include:

(A) The name of the clearing member;

(B) The time the clearing member was contacted;

(C) The contracts that are subject to the determination;

(D) The number of positions that are subject to the determination; and

(E) The reason for the determination.

(ix) *Default of a clearing member.* Immediate notice, upon the default of a clearing member. An event of default shall be determined in accordance with the rules of the derivatives clearing organization. The notice of default shall include:

(A) The name of the clearing member;

(B) The contracts the clearing member defaulted upon;

(C) The number of positions the clearing member defaulted upon; and

(D) The amount of the financial obligation.

(x) *Change in ownership or corporate or organizational structure.* (A) *Reporting requirement.* Any anticipated change in the ownership or corporate or organizational structure of the derivatives clearing organization or its parent company that would:

(*1*) Result in at least a 10 percent change of ownership of the derivatives clearing organization,

(*2*) create a new subsidiary or eliminate a current subsidiary of the derivatives clearing organization or its parent company, or

(*3*) result in the transfer of all or substantially all of its assets, including its registration as a derivatives clearing organization to another legal entity.

(B) *Required information.* The report shall include: A chart outlining the new ownership or corporate or organizational structure; a brief description of the purpose and impact of the change; and any relevant agreements effecting the change and corporate documents such as articles of incorporation and bylaws. With respect to a corporate change for which a derivatives clearing organization submits a request for approval to transfer its derivatives clearing organization registration and open interest under § 39.3(h) of this part, the informational requirements of this paragraph (c)(4)(x)(B) shall be satisfied by the derivatives clearing organization's compliance with § 39.3(h)(3).

(C) *Time of report.* The report shall be submitted to the Commission no later than three months prior to the anticipated change; *provided that* the derivatives clearing organization may report the anticipated change to the Commission later than three months prior to the anticipated change if the derivatives clearing organization does not know and reasonably could not have known of the anticipated change three months prior to the anticipated change. In such event, the derivatives clearing organization shall immediately report such change to the Commission as soon as it knows of such change.

(D) *Confirmation of change report.* The derivatives clearing organization shall report to the Commission the consummation of the change no later than 2 business days following the effective date of the change.

(xi) *Change in key personnel.* No later than two business days following the departure, or addition of persons who are key personnel as defined in § 39.1(b), a report that includes, as applicable, the name of the person who will assume the duties of the position on a temporary basis until a permanent replacement fills the position.

(xii) *Credit facility funding arrangement change.* No later than one business day after a derivatives clearing organization changes a credit facility funding arrangement it may have in place, is notified that such arrangement has changed, or knows or reasonably should have known that the arrangement will change, including but not limited to a change in lender, change in the size of the facility, change in expiration date, or any other material changes or conditions.

(xiii) *Rule enforcement.* Notice of action taken, no later than two business days after the derivatives clearing organization:

(A) Initiates a rule enforcement action against a clearing member; or

(B) Imposes sanctions against a clearing member.

(xiv) *Financial condition and events.* Immediate notice after the derivatives clearing organization knows or reasonably should have known of:

(A) The institution of any legal proceedings which may have a material adverse financial impact on the derivatives clearing organization;

(B) Any event, circumstance or situation that materially impedes the derivatives clearing organization's ability to comply with this part and is not otherwise required to be reported under this section; or

(C) A material adverse change in the financial condition of any clearing member that is not otherwise required to be reported under this section.

(xv) *Financial statements material inadequacies.* If a derivatives clearing organization discovers or is notified by an independent public accountant of the existence of any material inadequacy, such derivatives clearing organization must give notice of such material inadequacy within 24 hours, and within 48 hours after giving such notice file a written report stating what steps have been and are being taken to correct the material inadequacy.

§ 39.5(a) [Redesignated as § 39.19(c)(5)(i)]

8. Redesignate § 39.5(a) as § 39.19(c)(5)(i).

9. Redesignate § 39.5(b) as § 39.19(c)(5)(ii) and revise to read as follows:

§ 39.19 Reporting.

* * * * *

(c) * * *

(5) * * *

(ii) Upon request by the Commission, a derivatives clearing organization shall file with the Commission a written demonstration, containing such supporting data, information and documents, in the form and manner and within such time as the Commission may specify, that the derivatives clearing organization is in compliance with one or more core principles and relevant provisions of this part, as specified in the request.

§ 39.5(d) [Redesignated as § 21.04]

10. Redesignate § 39.5(d) as § 21.04.

§ 39.5 [Amended]

11. Remove § 39.5(c) and reserve the section.

12. Add § 39.20 to read as follows:

§ 39.20 Recordkeeping.

(a) *Requirement to maintain information.* Each derivatives clearing organization shall maintain records of all activities related to its business as a derivatives clearing organization. Such records shall include, but are not limited to, records of:

(1) All cleared transactions, including swaps.

(2) All information necessary to record allocation of bunched orders for cleared swaps;

(3) All information required to be created, generated, or reported under this part 39, including but not limited to the results of and methodology used for all tests, reviews, and calculations in connection with setting and evaluating margin levels, determining the value and adequacy of financial resources, and establishing settlement prices;

(4) All rules and procedures required to be submitted pursuant to this part 39 and part 40 of this chapter, including all proposed changes in rules, procedures or operations subject to § 40.10 of this chapter; and

(5) Any data or documentation required by the Commission or by the derivatives clearing organization to be submitted to the derivatives clearing organization by its clearing members, or by any other person in connection with the derivatives clearing organization's clearing and settlement activities.

(b) *Form and manner of maintaining information.* (1) In general. The records required to be maintained by this chapter shall be maintained in accordance with the provisions of § 1.31 of this chapter, for a period of not less than 5 years, except as provided in paragraph (b)(2) of this section.

(2) *Exception for swap data.* Each derivatives clearing organization that clears swaps must maintain swap data in accordance with the requirements of part 45 of this chapter.

15. Add § 39.21 to read as follows:

§ 39.21 Public information.

(a) *In general.* Each derivatives clearing organization shall provide to market participants sufficient information to enable the market participants to identify and evaluate accurately the risks and costs associated with using the services of the derivatives clearing organization. In furtherance of this objective, each

derivatives clearing organization shall have clear and comprehensive rules and procedures.

(b) *Availability of information.* Each derivatives clearing organization shall make information concerning the rules and the operating and default procedures governing the clearing and settlement systems of the derivatives clearing organization available to market participants.

(c) *Public disclosure.* Each derivatives clearing organization shall disclose publicly and to the Commission information concerning:

(1) The terms and conditions of each contract, agreement, and transaction cleared and settled by the derivatives clearing organization;

(2) Each clearing and other fee that the derivatives clearing organization charges its clearing members;

(3) The margin-setting methodology;

(4) The size and composition of the financial resource package available in the event of a clearing member default;

(5) Daily settlement prices, volume, and open interest for each contract, agreement, or transaction cleared or settled by the derivatives clearing organization;

(6) The derivatives clearing organization's rules and procedures for defaults in accordance with § 39.16 of this part; and

(7) Any other matter that is relevant to participation in the clearing and settlement activities of the derivatives clearing organization.

(d) *Publication of information.* The derivatives clearing organization shall make its rulebook, a list of all current clearing members and the information listed in paragraph (c) of this section readily available to the general public, in a timely manner, by posting such information on the derivatives clearing organization's website, unless otherwise permitted by the Commission. The information required in paragraph (c)(5) of this section shall be made available to the public no later than the business day following the day to which the information pertains.

16. Add § 39.22 to read as follows:

§ 39.22 Information sharing.

Each derivatives clearing organization shall enter into, and abide by the terms of, each appropriate and applicable domestic and international information-sharing agreement, and shall use relevant information obtained from each such agreement in carrying out the risk management program of the derivatives clearing organization.

Issued in Washington, DC, on December 1, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendices to Information Management Requirements for Derivatives Clearing Organizations—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Sommers, Chilton and O'Malia voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the proposed rulemaking concerning information management, recordkeeping and reporting requirements for derivatives clearing organizations. The requirements would enable the Commission to conduct financial risk surveillance more efficiently and effectively. Further, they would promote transparency to the regulators, enhancing the Commission's ability to detect and resolve potential concerns before they escalate into major problems. The rule also fulfills Congress's direction that clearinghouses be required to make settlement prices and open interest public in all their contracts on a daily basis.

The proposed reporting rules apply uniform standards to all DCOs, thereby helping to avoid inconsistency in DCO reporting. The recordkeeping requirements are rooted in sound business practices, and the public information requirements serve the public interest by promoting transparency and disclosure. By codifying the information-sharing core principle into the Commission's regulations, the Commission would reaffirm its commitment to promoting cooperation among industry participants in carrying out risk management functions.

[FR Doc. 2010–31131 Filed 12–14–10; 8:45 am]

BILLING CODE 6351–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0850; FRL–9239–1]

Approval and Promulgation of Air Quality Implementation Plans; Wisconsin; The Milwaukee-Racine and Sheboygan Areas; Determination of Attainment of the 1997 8-hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to determine under the Clean Air Act (CAA) that the Milwaukee-Racine and Sheboygan, Wisconsin areas have attained the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS). The Milwaukee-Racine area includes Milwaukee, Ozaukee, Racine, Washington, Waukesha, and Kenosha Counties. The Sheboygan area includes Sheboygan County. The proposed determinations are based on complete, quality-assured and certified ambient air monitoring data that show that the areas have monitored attainment of the 1997 8-hour ozone standard for the 2006–2008 and 2007–2009 monitoring periods. Preliminary data available for 2010 indicate that the areas continue to monitor attainment. If EPA finalizes this action, as a result of these determinations, the requirements for these areas to submit attainment demonstrations and associated reasonably available control measures (RACM), reasonable further progress plans (RFP), contingency measures, and other State Implementation Plan (SIP) revisions related to attainment of the standard would be suspended for as long as the areas continue to attain the 1997 8-hour ozone standard. These determinations would also suspend the requirement for EPA to promulgate attainment demonstration, RFP, and any other attainment-related Federal Implementation Plans (FIPs) for these areas.

DATES: Comments must be received on or before January 14, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2010–0850, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *E-mail: mooney.john@epa.gov.*

3. *Fax:* (312) 692–2551.

4. *Mail:* John M. Mooney, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

5. *Hand Delivery:* John M. Mooney, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through

Friday, 8:30 am to 4:30 pm, excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Kathleen D'Agostino, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–1767, *dagostino.kathleen@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is approving the attainment determinations as a direct final rule without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, with respect to either the Milwaukee-Racine or the Sheboygan area, the direct final rule will be withdrawn with regard to that area and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: November 24, 2010.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2010–31341 Filed 12–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Chapter I

[EPA–HQ–OA–2010–0992 FRL–9239–4]

Proposed Final Policy on Consultation and Coordination With Indian Tribes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of document for public comment.

SUMMARY: The Environmental Protection Agency (EPA) is announcing a 60-day public comment period for the proposed Final EPA Policy on Consultation and Coordination with Indian Tribes (Policy). The Policy complies with the Presidential Memorandum on Tribal Consultation issued November 5, 2009, directing agencies to develop a plan to implement fully Executive Order 13175 (Executive Order). The Executive Order specifies that each Agency must have a process that is accountable to establish regular and meaningful consultation and coordination with tribal officials in the development of policies that have tribal implications.

The goals of the Policy are to: Establish clear EPA standards for the consultation process, including defining the what, when, and how of consultation; designate specific EPA personnel responsible for serving as consultation points of contact in order to promote consistency in, and coordination of, the consultation process; and establish a management oversight and reporting structure that will ensure accountability and transparency. The proposed final Policy sets a broad standard for when EPA should consider consulting with federally-recognized tribal governments. Notably, the scope of EPA's proposed consultation policy is intended to be broader than that found in Executive Order 13175.

The Policy reflects the principles expressed in the 1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984 Policy) for interacting with tribes. The 1984 Policy remains the cornerstone for EPA's Indian program and assure[s] that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect tribes.

EPA is requesting comment on the policy described in this document.

DATES: Comments must be received on or before February 16, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. [EPA–HQ–OA–2010–0992], by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Mail:* EPA's Proposed Final Policy on Consultation and Coordination with Indian Tribes, Environmental Protection Agency, Mailcode: 2822–1T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. 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–OA–2010–0992. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* (or e-mail). The *http://www.regulations.gov* website 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 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 HQ EPA Docket Center. EPA's Proposed Final Policy on Consultation and Coordination with Indian Tribes 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.

FOR FURTHER INFORMATION CONTACT: David Guest, Office of International and Tribal Affairs (MC2690M), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; *telephone number:* (202) 566–2872; *fax number:* (202) 564–0298; *e-mail address: guest.david@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, tribal governments, and tribal organizations. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the point of contact listed under **FOR FURTHER INFORMATION CONTACT**.

What should I consider as I prepare my comments for EPA?

Tips for Preparing Your Comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

Table of Contents

I. Policy Statement

EPA's policy is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. Consultation is a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes. As a process, consultation includes several methods of interaction that may occur at different levels. The appropriate level of interaction is determined by past and current practices, adjustments made through this Policy, the continuing dialogue between EPA and tribal governments, and program and regional office consultation procedures and plans.

This Policy establishes national guidelines and institutional controls for consultation across EPA. EPA program and regional offices have the primary responsibility for consulting with tribes. All program and regional office consultation plans and practices must be in accord with this Policy. This Policy seeks to strike a balance between providing sufficient guidance for purposes of achieving consistency and predictability and allowing for, and encouraging, the tailoring of consultation approaches to reflect the circumstances of each consultation situation and to accommodate the preferences of tribal governments. The consultation process is further detailed in Section V of this document.

II. Background

To put into effect the policy statement above, EPA has developed this proposed EPA Policy on Consultation and Coordination with Indian Tribes (Policy). The Policy complies with the Presidential Memorandum (Memorandum) issued November 5, 2009, directing agencies to develop a plan to implement fully Executive Order 13175 (Executive Order). The Executive Order specifies that each Agency must have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.

This Policy reflects the principles expressed in the 1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984 Policy) for interacting with tribes. The 1984 Policy remains the cornerstone for EPA's Indian program and "assure[s] that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect" tribes (1984 Policy, p. 3, principle no. 5).

One of the primary goals of this Policy is to fully implement both the Executive Order and the 1984 Indian Policy, with the ultimate goal of strengthening the consultation, coordination, and partnership between tribal governments and EPA.

The most basic result of this full implementation is that EPA takes an expansive view of the need for consultation in line with the 1984 Policy's directive to consider tribal interests whenever EPA takes an action that may affect tribal interests.

The Policy is intended to be implemented using existing EPA structures to the extent possible. The use of current EPA business processes, such as the Action Development Process, National and Regional Tribal Operations Committees, and tribal partnership groups is purposeful so that consultation with tribal governments becomes a standard EPA practice and not an additional requirement.

The issuance of this Policy supports and guides the development and use of program and regional office consultation plans and practices consistent with this Policy.

III. Definitions

A. Indian tribe or tribe means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1944, 25 U.S.C. 479a.

B. Tribal official means an elected, appointed, or designated official or employee of a tribe.

C. Indian country means:

1. All land within limits of any Indian reservation [1] under the jurisdiction of the United States government, notwithstanding the issuance of any

[1] EPA's definition of reservation encompasses both formal reservations and informal reservations, i.e., trust lands set aside for Indian tribes. *See for example Oklahoma Tax Comm'n* v. *Sac and Fox Nation,* 508 U.S. 114, 123 (1993); 56 FR 64876, Dec. 12, 1991; or 63 FR 7254, Feb. 12, 1998.

patent, and, including rights-of-way running through the reservation;

2. All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

3. All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

IV. Guiding Principles

To understand both the purpose and scope of the Policy as well as the integration of the Policy, Memorandum, and Executive Order, it is helpful to list principles found in EPA's January 2010 Plan to Develop a Tribal Consultation and Coordination Policy Implementing Executive Order 13175:

EPA's fundamental objective in carrying out its responsibilities in Indian country is to protect human health and the environment.

EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe's land and membership, and not as political subdivisions of states or other governmental units.

EPA recognizes the federal government's trust responsibility, which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law.

EPA ensures the close involvement of tribal governments and gives special consideration to their interests whenever EPA's actions may affect Indian country or other tribal interests.

When EPA issues involve other federal agencies, EPA carries out its consultation responsibilities jointly with those other agencies, where appropriate.

In addition, it is helpful to note the distinction between this Policy, federal environmental laws pertaining to public involvement, and Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. Under this Policy, EPA consults with federally recognized tribal governments when Agency actions and decisions may affect tribal interests. EPA also recognizes its obligations to involve the public as required by federal environmental laws. Finally, EPA recognizes the need to be responsive to the environmental justice concerns of non-federally recognized tribes, individual tribal members, tribal community-based/grassroots organizations and other indigenous stakeholders.

V. Consultation

A. The Consultation Process

To the fullest extent possible, EPA plans to use existing EPA business operations to put this Policy into effect.

Tribal officials may request consultation in addition to EPA's ability to determine what requires consultation. EPA attempts to honor the tribal government's request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors.

Consultation at EPA consists of four phases: Identification, Notification, Input, and Follow-up:

1. *Identification Phase:* EPA identifies activities that may be appropriate for consultation, using the mechanisms described in section B.2, below. The identification phase should include a determination of the complexity of the activity, its potential implications for tribes, and any time and/or resource constraints relevant to the consultation process. This phase should also include an initial identification of the potentially affected tribe(s).

2. *Notification Phase:* EPA notifies the tribes of activities that may be appropriate for consultation.

Notification can occur in a number of ways depending on the nature of the activity and the number of tribes potentially affected. For example, EPA may send out a mass mailing to all tribes, may contact the tribal governments by telephone, or provide notice through other agreed upon means. EPA normally honors tribal preferences regarding the specific mode of contact.

Notification includes sufficient information for tribal officials to make an informed decision about the desire to continue with consultation and sufficient information to understand how to provide informed input.

Notification should occur sufficiently early in the process to allow for meaningful input by the tribe(s).

3. *Input Phase:* Tribes provide input to EPA on the consultation matter. This phase may include a range of interactions including written and oral communications including exchanges of information, phone calls, meetings, and other appropriate interactions depending upon the specific circumstances involved. EPA coordinates with tribal officials during this phase to be responsive to their needs for information and to provide opportunities to provide, receive, and discuss input. During this phase, EPA considers the input regarding the activity in question. EPA may need to undertake subsequent rounds of consultation if there are significant changes in the originally-proposed activity or as new issues arise.

4. *Follow-up Phase:* EPA provides feedback to the tribes(s) involved in the consultation to explain how their input was considered in the final action. This feedback should be a formal, written communication from a senior EPA official involved to the most senior tribal official involved in the consultation.

B. What activities may involve consultation?

1. *General Categories of Activities Appropriate for Consultation:* The broad scope of consultation contemplated by this Policy creates a large number of actions that may be appropriate for consultation.

The following list of EPA activity categories provides a general framework from which to begin the determination of whether any particular action or decision is appropriate for consultation. The final decision on consultation is normally made after examining the complexity of the activity, its implications for tribes, time and/or resource constraints, an initial identification of the potentially affected tribe(s), application of the mechanisms for identifying matters for consultation, described below, and interaction with tribal partnership groups and tribal governments.

The following, non-exclusive list of EPA activity categories are normally appropriate for consultation if they may affect a tribe(s):

a. Regulations or rules
b. Policies, guidance documents, directives
c. Budget and priority planning development
d. Legislative comments [2]
e. Permits
f. Civil enforcement and compliance monitoring actions [3]

[2] Legislative comments are a special case where, due to short legislative timeframes, consultation in advance of comment submission may not always be possible. Nevertheless, EPA will strive to inform tribes when it submits legislative comments on activities that may affect Indian country or other tribal governmental interests.

[3] Primary guidance on civil enforcement matters involving tribes can be found in "Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy," and "Questions and Answers on the Tribal Enforcement Process." This guidance is intended to work with the Tribal Consultation Policy in a complementary fashion to ensure appropriate consultation with tribes on civil enforcement

g. Response actions and emergency preparedness [4]

h. State or tribal authorizations or delegations

i. International Treaties and Agreements

2. *EPA's Mechanisms for Identifying Matters for Consultation:* The mechanisms EPA uses for identifying matters appropriate for consultation are as follows:

a. Tribal Government-Requested Consultation. Tribal officials may request consultation in addition to EPA's ability to determine what requires consultation. EPA attempts to honor the tribal government's request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors.

b. Regulatory Steering Committee (RSC). This committee oversees EPA's Action Development Process (ADP), which covers all EPA regulations and non-regulatory actions of national significance. The RSC identifies matters appropriate for consultation on the Comprehensive Regulatory Data Form. These forms are available to tribes in the semiannual Regulatory Agenda as well as in the subset of rules on the Regulatory Gateway accessed through the EPA website.

This Policy is not intended to subject additional Agency actions to the ADP process for the sole purpose of a consultation analysis. Non-ADP actions are subject to consultation analysis through other mechanisms identified within the Policy.

c. National Program Offices and Regional Offices. For those actions and decisions not in the ADP process, program and regional offices also determine if consultation is appropriate under this Policy. EPA's Tribal Consultation Advisors, described below, provide assistance with that determination. Such determination includes coordination with national and/or regional tribal partnership groups.

d. National and Regional Tribal Partnership Groups. EPA meets regularly with a number of national and regional tribal partnership groups. These groups assist in the identification of matters that may be appropriate for consultation.

matters. EPA generally does not consult on criminal investigations and enforcement actions.

[4] The term response as defined under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes removals and remedial actions.

C. When Consultation Occurs

Consultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration. As proposals and options are developed, consultation and coordination should be continued, to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that occur later in the process.

D. How Consultation Occurs

There is no single formula for what constitutes appropriate consultation, and the analysis, planning, and implementation of consultation should consider all aspects of the action under consideration. In the case of national rulemaking, a series of meetings in geographically diverse areas may be appropriate. For more routine operational matters, a less formal process may be sufficient.

VI. Managing the Consultation Process

A. Roles and Responsibilities

The following roles and responsibilities have been defined to allow EPA to effectively implement this Policy. These roles and responsibilities reflect the fact that, while oversight and coordination of consultation occurs at EPA headquarters, as a practical matter, much of the actual consultation activity occurs in EPA's program and regional offices. The responsibility for initially analyzing the need for consultation and then subsequently carrying it out, resides with these offices.

Designated Consultation Official—In addition to being the EPA's National Program Manager for the EPA Tribal Program, EPA's Assistant Administrator for the Office of International and Tribal Affairs (OITA) is the EPA-Designated Consultation Official under the Executive Order.

These responsibilities include coordination and implementation of tribal consultation in accordance with this Policy and Agency compliance with the 1984 Indian Policy.

The Designated Consultation Official has the authority for: Defining EPA actions appropriate for consultation, evaluating the adequacy of that consultation, and ensuring that EPA program and regional office consultation practices are consistent with this Policy.

Per the Memorandum, the Designated Consultation Official reports annually to OMB on the implementation of the Executive Order.[5] Further, the Designated Consultation Official certifies compliance with the Executive Order for applicable EPA activities. The American Indian Environmental Office (AIEO) is located within OITA and coordinates the operational details of the Policy and compiles consultation-related information for the Designated Consultation Official.

2. Assistant Administrators—Assistant Administrators oversee the consultation process in their respective offices including analysis for potential consultation and the consultation process. Each program office is directed to prepare a semi-annual agenda of matters appropriate for consultation and a brief summary of consultation that has occurred. The program offices provide this information to AIEO for reporting to OMB. Each office is directed to designate a Tribal Consultation Advisor.

3. Regional Administrators—Regional Administrators oversee the consultation process in their respective offices including analysis for potential consultation and the consultation process. Each region is directed to prepare a semi-annual agenda of matters appropriate for consultation and a brief summary of consultation that has occurred. The regions provide this information to AIEO for reporting to OMB. Each region is directed to designate a Tribal Consultation Advisor.

4. Tribal Consultation Advisors—Tribal Consultation Advisors (TCAs) assist in identifying matters appropriate for consultation and prepare summary information on consultation activities and provide it to AIEO. TCAs receive and provide advice within their respective program offices and regions on what actions may be appropriate for consultation. TCAs also serve as a point-of-contact for EPA staff, tribal governments, and other parties interested in the consultation process. TCAs are the in-office subject matter experts to assist staff and management in the implementation of the Policy.

B. National Consultation Meeting

OITA/AIEO may convene a periodic National Consultation Meeting to be chaired by the Designated Consultation Official to review the consultation process across the Agency.

C. Reporting

Pursuant to the Memorandum, EPA submits annual progress reports to OMB on the status of the consultation process and actions and provides any updates to this Policy.

[5] Report is filed by August 3rd.

D. EPA Senior Management Review

The Designated Consultation Official communicates regularly with the Assistant and Regional Administrators to review the consultation system, to consider any matters requiring senior management attention, and to make adjustments necessary to improve the Policy or its implementation.

EPA plans to receive ongoing feedback on the Policy from all parties to assess its effectiveness and implement improvements.

Dated: December 8, 2010.

Michael Stahl,

Acting Director American Indian Environmental Office.

[FR Doc. 2010–31332 Filed 12–14–10; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 75, No. 240
Wednesday, December 15, 2010

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket No. AMS–FV–09–0034; FV–09–707]

Privacy Act of 1974: New System of Records

AGENCY: USDA, Agricultural Marketing Service.

ACTION: Notice of a new system of records for information collected pursuant to the operation and enforcement of Research and Promotion programs.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the Agricultural Marketing Service (AMS) proposes to add a system of records to its inventory of records systems. The system of record will cover information collected under Research and Promotion programs in AMS. This notice is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of record systems maintained by the agency. Although the Privacy Act requires only that the portion of the system that describes "routine uses" of the system be published for comment, we invite comment on all portions of this notice. AMS Research and Promotion branches and its components and offices have relied on preexisting Privacy Act system of records notices for the collection and maintenance of records that pertain to research and promotion program management.

DATES: The established system of records will be effective February 14, 2011 unless comments are received that would result in a contrary determination. Written comments must be submitted on or before January 14, 2011.

ADDRESSES: Interested persons are invited to submit written comments on the Internet at *http://www.regulations.gov* or to Kimberly Coy, Marketing Specialist, Research and Promotion Branch, FV, AMS, USDA, Stop 0244, Room 0634–S, 1400 Independence Avenue, SW., Washington, DC 20250–0244; telephone (202) 720–9915 or (888) 720–9917 (toll free) or e-mail *kimberly.coy@ams.usda.gov.*

All comments received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Kimberly Coy, Marketing Specialist, Research and Promotion Branch, FV, AMS, USDA, Stop 0244, Room 0634–S, 1400 Independence Avenue, SW., Washington, DC 20250–0244; telephone (202) 720–9915 or (888) 720–9917 (toll free) or e-mail *kimberly.coy@ams.usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Agriculture (USDA), through AMS, helps the agricultural industries develop and expand domestic and international markets for their commodities through self-help programs that conduct research and promotion activities. There are currently 18 Research and Promotion programs in AMS. AMS exercises its authority and oversight of these Research and Promotion programs on specific domestic and imported agricultural commodities. As part of its authority and oversight role of various Research and Promotion programs, AMS requires information and data relating to the production and the importation of those products and commodities that fall within its authority. Part of this information is maintained by U.S. Customs and Border Protection (CBP) in the Automated Commercial Environment (ACE). In support of these requirements, CBP through ACE collects and transmits the identified information as it relates to the import of various agricultural commodities and products. AMS agrees that the information obtained from CBP will only be used for the purposes of implementing AMS laws and regulations, including using this data for regulatory enforcement actions brought in USDA administrative proceedings and/or Federal courts, preparing and releasing summary and statistical market news reports on agricultural commodities and related products, verification of payment of assessments, and referendum procedures. However, any further dissemination not expressly identified here will not occur without the express written permission of CBP. AMS further agrees that any request pursuant to the FOIA (5 U.S.C. 552) for CBP information transferred to AMS will be sent to CBP by secure connectivity for response. The information will be reviewed only by authorized AMS personnel on a roll base and a need-to-know basis and will be kept secure.

In regards to the information collected from domestic production, AMS and the commodity boards or councils maintain such confidential information as required under the specific statutes and government policies relating to confidential information.

While an order issued under the review and guidance of AMS is in effect with respect to an agricultural commodity, assessments shall be paid by producers, first handlers, or others in the marketing chain with respect to the agricultural commodity produced and marketed in the United States and paid by importers with respect to the agricultural commodity imported into the United States, if the imported agricultural commodity is covered by the order. Assessments required under an order shall be remitted to the board established under the order at the time and in the manner prescribed by the order. Late-payment and interest charges may be levied on each person subject to an order who fails to remit an assessment. The rate for the charges shall be specified by the Secretary. The board/council, with the approval of the Secretary, may enter into agreements authorizing other organizations to collect assessments and possibly personally identifiable information in its behalf. Any such organization shall be required to maintain the confidentiality of such information as is required by the board/council for collection purposes. Persons failing to remit total assessments due in a timely manner may also be subject to actions under Federal debt collection procedures. In order to verify that assessments are indeed required to be

paid, and if so, that assessments required are considered late, the Department must collect information from the board/council as well as the assessment payer.

Each order shall establish a board/council to carry out a program of generic promotion, research, and information regarding the agricultural commodity covered by the order. Each board shall consist of the number of members as established by the order for each specific commodity. In addition to members, the Secretary may also provide for alternates on the board. The Secretary shall appoint the members and any alternates of a board from among producers of the agricultural commodity and first handlers and others in the marketing chain as appropriate. If imports of the agricultural commodity covered by an order are subject to assessment, the Secretary shall also appoint importers as members of the board and as alternates, if alternates are included on the board. The Secretary may appoint one or more members of the general public to each board. The Secretary may make appointments from nominations made pursuant to the method set forth in each commodity's respective order. In order to nominate members to the board, the department must collect information to verify identity and eligibility to serve on the boards/councils.

AMS Research and Promotion branches and its components and offices have relied on preexisting Privacy Act system of records notices for the collection and maintenance of records that pertain to research and promotion program management.

As part of its efforts to streamline and consolidate its Privacy Act record systems, AMS is establishing a new Research and Promotion program-wide system of records under the Privacy Act (5 U.S.C. 552a) for research and promotion records management. This will ensure that all AMS Research and Promotion branches follow the same privacy rules for collecting and handling individuals' security management records.

II. Privacy Act

The Privacy Act of 1974, as amended (5 U.S.C. 552a) requires agencies to publish in the **Federal Register** any notice of a new or revised system of records maintained by the agency. A system of records is a group of any records under the control of any agency, from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to an individual. The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. In the Privacy Act, an individual is defined to encompass United States citizens and legal permanent residents. As a matter of policy, AMS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request their own records that are maintained in a system of records in the possession or under the control of AMS by complying with AMS Privacy Act regulations.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals to more easily find such files within the agency. Below is a description of the USDA Research and Promotion Programs System of Records Notice.

SYSTEM NUMBER:

USDA/AMS–12

SYSTEM NAME:

USDA/Research and Promotion Programs Information Retrieval (RPPIR) (New)

SECURITY CLASSIFICATION:

Unclassified, sensitive, for official use only, and classified.

SYSTEM LOCATION:

Records are maintained at several USDA Headquarters locations and in Research and Promotion Boards or Councils offices in the USDA, Agricultural Marketing Service, 1400 Independence Avenue, SW., Washington, DC 20250–0244, and in field locations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include: (1) All Research and Promotion Board or Council nominees including, but not limited to: Producers, handlers, importers, foreign producers, and at-large members; (2) importers that are self-proprietors and maintain a valid Customs importer number; (3) all individuals covered by a Research and Promotion program under AMS supervision; (4) individuals who are regulated by the subject Acts and Regulations who may be investigated for possible violations; including customers, producers, handlers, importers, plant operators, farmers, licenses, inspectors, graders, weighers, classers, collaborators, agents, appointees, samplers, and other non-Federal employees; and (5) any other individuals involved in a review or investigation as an alleged violator.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system consists of investigatory material which may include intra- and interdepartmental recommendations pertaining to an alleged violation of the subject Acts. It may include name, social security number, tax identification number, employment history, performance ratings, criminal history, financial information, background information, biographical data, customs operations, license files, bond records, commodity information, power of attorney, and case file information. The case file contains evidence gathered in the course of the review or investigations. The system will also contain the following records:

- Records relating to nominations to the board/council including, but not limited to:
  - Individual's name;
  - Social Security number;
  - Date of birth;
  - Address;
  - Employment information;
  - Professional affiliation(s);
  - Education;
  - Tax Identification Number;
  - Income sources for amounts over $10,000; and
  - Criminal history.
- Records relating to compliance including, but not limited to:
  - The total quantity of commodity acquired during the reporting period;
  - Total quantity handled during the period;
  - The total quantity for sale from the first handler's own production;
  - The quantity purchased from a first handler or importer responsible for paying the assessment;
  - The date assessment payments were made; and
  - The first handler's tax identification number.
  - For importers, the information may include: The total quantity imported during such reporting period;
  - A record of each lot imported during the reporting period including quantity, date, country of origin, and port of entry; and
  - The importer of record tax identification number.
- Records relating to customs include, but not limited to:

- Importer Number (tax identification number, Duns number, etc.)
- Importer name and address (need physical address)
- Importer contact name, phone
- Country
- Port
- Collection date
- Trans number
- Terminal ID
- Collection type
- Document number
- Quantity (volume)
- Harmonized Tariff Schedule Code
- Assessment collected

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Privacy Act of 1974, as amended, 5 U.S.C. 552a; Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425) (Blueberries, Honey Packers and Importers, Lamb, Mangos, Peanuts, Sorghum, and other laws, statutes, regulations or orders as designated), Beef Research and Promotion Act (7 U.S.C. 2901–2911), Cotton Research and Promotion Act (7 U.S.C. 2101–2118), Dairy Production Stabilization Act of 1983 (7 U.S.C. 4501–4514), Egg Research and Consumer Information Act of 1974 (7 U.S.C. 2701–2718), Fluid Milk Promotion Act of 1990 (7 U.S.C. 6401–6417), Hass Avocado Promotion, Research, and Information Act of 2000 (7 U.S.C. 7801–7813), Mushroom Promotion, Research, and Consumer Information Act of 1990 (7 U.S.C. 6101–6112), Popcorn Promotion, Research, and Consumer Information Act (7 U.S.C. 7481–7491), Pork Promotion, Research, and Consumer Information Act of 1985 (7 U.S.C. 4801–4819), Potato Research and Promotion Act (7 U.S.C. 2611–2627), Soybean Promotion, Research, and Consumer Information Act of 1990 (7 U.S.C. 6301–6311), Watermelon Research and Promotion Act (7 U.S.C. 4901–4916), 7 CFR Parts 1150, 1160, 1205, 1206, 1207, 1209, 1210, 1212, 1215, 1216, 1218, 1219, 1220, 1221, 1230, 1250, 1260, 1280, and all the various agricultural products and commodities in which AMS Research and Promotion has present or future statutory or regulatory interest.

PURPOSE:

The purpose of this system is to maintain the information to verify the eligibility of persons nominated to positions to the commodity boards as well as to verify the eligibility of persons applying for exemptions or credit of assessments. The system also permits AMS to use CBP ACE DATA to ensure compliance with AMS laws and regulations, and publicly disseminate in aggregate form daily market information for various individual agricultural commodities and related products. This system also allows the collection of information related to all AMS Research and Promotion programs for referendum purposes and for compliance cases to ensure compliance with AMS laws and regulations.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. Routine use for disclosure to the Department of Justice for use in litigation: To the Department of Justice when: (a) The agency or any component thereof; or (b) any employee of the agency in his or her official capacity where the Department of Justice has agreed to represent the employee; (c) any employee of the agency in his or her individual capacity where the agency or the Department of Justice has agreed to represent the employee; or (d) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records by the Department of Justice is therefore deemed by the agency to be for a purpose that is compatible with the purpose for which the agency collected the records.

2. Routine use for disclosure to adjudicative body in litigation: To a court or adjudicative body in a proceeding when: (a) The agency or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the agency has agreed to represent the employee; or (d) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records is therefore deemed by the agency to be for a purpose that is compatible with the purpose for which the agency collected the records.

3. Routine use for law enforcement purposes: When a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, disclosure may be made to the appropriate agency, whether Federal, foreign, State, local, or tribal, or other public authority responsible for enforcing, investigating, or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto, if the information disclosed is relevant to any enforcement, regulatory, investigative or prosecutive responsibility of the receiving entity.

4. Routine use for disclosure to a Member of Congress at the request of a constituent: To a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

5. Routine use for disclosure to National Archives and Records Administration (NARA): Records from this system of records may be disclosed to the National Archives and Records Administration or to the General Services Administration for records management inspections conducted under 44 U.S.C. 2904 and 2906.

6. Routine use for disclosure to contractors under section (m): To agency contractors, grantees, experts, consultants or volunteers who have been engaged by the agency to assist in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity. Recipients shall be required to comply with the requirements of the Privacy Act of 1974, as amended, pursuant to 5 U.S.C. 552a(m).

7. Routine use to HHS parent locator system for finding parents who don't pay child support: The name and current address of record of an individual may be disclosed from this system of records to the parent locator service of the Department of HHS or authorized persons defined by Public Law 93–647. 42 U.S.C. 653

8. Routine use for use in nominations, employment, clearances, licensing, contract, grant or other benefits decisions by the agency: Disclosure may be made to Federal, State, local or foreign agency maintaining civil, criminal, or other relevant enforcement records, or other pertinent records, or to another public authority or professional organization, if necessary to obtain information relevant to an investigation concerning the nomination of a board or council member, retention of an employee or other personnel action (other than hiring), the retention of a security clearance, the letting of a contract, or the issuance or retention of a grant, or other benefit.

9. For use in nominations, employment, clearances, licensing, contract, grant or other benefit decisions by other than the agency: Disclosure

may be made to a Federal, State, local, foreign, or tribal or other public authority the fact that this system of records contains information relevant to the nomination of a board or council member, retention of an employee, the retention of a security clearance, the letting of a contract, or the issuance or retention of a license, grant, or other benefit. The other agency or licensing organization may then make a request supported by the written consent of the individual for the entire record if it so chooses. No disclosure will be made unless the information has been determined to be sufficiently reliable to support a referral to another office within the agency or to another Federal agency for criminal, civil, administrative, personnel, or regulatory action.

10. MANDATORY Routine Use—information security breaches: To appropriate agencies, entities, and persons when: (a) [the agency] suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

11. To comply with FFATA and similar statutory requirements for public disclosure in situations where records reflect loans, grants, or other payments to members of the public: USDA will disclose information about individuals from this system of records in accordance with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282; codified at 31 U.S.C. 6101, *et seq.*); section 204 of the E-Government Act of 2002 (Pub. L. 107B347; 44 U.S.C. 3501 note), and the Office of Federal Procurement Policy Act (41 U.S.C. 403 *et seq.*), or similar statutes requiring agencies to make available publicly, information concerning Federal financial assistance, including grants, sub-grants, loan awards, cooperative agreements and other financial assistance; and contracts, subcontracts, purchase orders, task orders, and delivery orders.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

To a "consumer reporting agency" as defined in the Fair Credit Reporting Act (12 U.S.C. 1681a(f) or the Federal Claims Collection Reporting Act of 1966 (15 U.S.C. 3701(a)(3) in accordance with section 3711(f) of Title 31.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored in paper and electronic format.

RETRIEVABILITY:

Records are retrieved by individual's name or other unique identifier.

SAFEGUARDS:

All records containing personal information are maintained in secured file cabinets or in restricted areas, in which access is limited to authorized personnel. Access to computerized data is password-protected and under the responsibility of the system manager and subordinates. The database administrator has the ability to review audit trails, thereby permitting regular ad hoc monitoring of computer usage.

RETENTION AND DISPOSAL:

Records are maintained for a period of 5 years, as required by 7 CFR part 6. The records are then destroyed in accordance with USDA procedures.

SYSTEM MANAGER AND ADDRESS:

A System Manager manages the system for each of the following AMS Programs: Cotton and Tobacco, Dairy, Fruit and Vegetable, Livestock and Seed, Poultry, Science and Technology, Transportation and Marketing, Compliance and Analysis Offices, and the Information Technology Services Program. For general information, you may contact Douglas Bailey, Chief, Information Technology, USDA/ST/IT/OCIO, Mail Stop 1742, 1400 Independence Avenue, SW., Washington, DC 20250–1064.

NOTIFICATION PROCEDURE:

Any individual may request information concerning himself/herself from this system from the Office of the System Manager having custody of his records at the system location. Individuals seeking notification to access any record contained in this system of records, or seeking to contest its contents may submit a request in writing to Douglas C. Bailey, Chief Information Officer, Department of Agriculture, Agricultural Marketing Service, Mail Stop 0244, Room 1752–S, 1400 Independence Avenue, SW., Washington, DC 20250–0244.

When seeking records about yourself from this system of records or any other Departmental system of records, your request must conform to the Privacy Act regulations set forth in 7 CFR part 1. You must first verify your identity, meaning that you must provide your full name, current address, and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain more information for this purpose from the Privacy Act Officer, FOIA, *http://www.da.usda.gov/foia.htm,* or (202) 720–2498. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the record would have been created;
- Provide any other information that will help the FOIA staff determine which AMS component agency may have responsive records;

If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his or her agreement for you to access his or her records.

Without complete information, the component(s) will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORDS ACCESS PROCEDURE:

See the "Notification Procedure" above.

CONTESTING RECORD PROCEDURES:

See the "Notification Procedure" above.

RECORD SOURCE CATEGORIES:

These records contain information obtained from the individual who is the subject of these records and from CBP and information the individual provided to CBP.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Pursuant to 5 U.S.C. 552a(k)(2), material in this system of records is exempt from the requirements of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) because it consists of investigatory material compiled for law enforcement purposes 7 CFR 1.123.

5 U.S.C. 552a(d) requires that an individual be given access to, and the right to, amend files pertaining to him or her. Individual access to these files could impair investigations in progress and alert subjects involved in the investigations that their actions are under scrutiny, which may allow them the opportunity to alter their actions or prevent detection of any illegal actions to escape prosecution. Release of these records would also disclose investigative techniques and procedures employed by AMS and other agencies, which would hamper law enforcement activities.

5 U.S.C. 552a(c)(3) requires that an accounting of disclosures be made available to an individual. This would impair investigations by alerting subjects of investigations to the existence of those investigations. Release of the information could result in the altering or destruction of documentary evidence, improper influencing of witnesses, and other activities that could impede or compromise the investigation. 5 U.S.C. 552a(e)(1) requires that only such information as is relevant and necessary to accomplish a purpose of the agency required by statute or Executive Order can be maintained. Exemption from this provision is required because relevance and necessity can be determined only after information is evaluated. Evaluation at the time of collection is too consuming for the efficient conduct of an investigation. Further, determining relevance or necessity of specific information in the early stages of an investigation is not possible.

5 U.S.C. 552a(e)(4)(G) and (H), and (f) provides for notification and access procedures. These requirements, if followed, would necessarily alert subjects of investigations to the existence of the investigation which could impair the investigation. Access to the records likewise could interfere with investigative and enforcement proceedings; disclose confidential informants and information; constitute an unwarranted invasion of personal privacy of others; and reveal confidential investigative techniques and procedures.

5 U.S.C. 552a(e)(4)(I), requires that categories of sources of records in each system be published. Application of this provision could disclose investigative techniques and procedures and cause sources to refrain from giving such information because of fear of reprisal, or fear of breach of promises of anonymity and confidentially. This would compromise the ability to conduct investigations.

Dated: December 8, 2010.

Thomas J. Vilsack,

Secretary.

[FR Doc. 2010–31400 Filed 12–14–10; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0104]

Notice of Availability of a Pest Risk Analysis for the Importation of Fresh Rambutan Fruit (Nephelium lappaceum) From Malaysia and Vietnam

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that we have prepared a pest risk analysis that evaluates the risks associated with the importation into the continental United States of fresh rambutan fruit (*Nephelium lappaceum*) from Malaysia and Vietnam. Based on this analysis, we believe that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of fresh rambutan fruit from Malaysia and Vietnam. 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 February 14, 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-2010-0104* 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–2010–0104, 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–2010–0104.

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: Ms. Claudia Ferguson, Regulatory Policy Specialist, Regulations, Permits, and Import Manuals, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 734–0754.

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 assessment as likely to follow the import pathway; and/or
- The fruits or vegetables are a commercial consignment.

APHIS received requests from the Governments of Malaysia and Vietnam to allow the importation of fresh rambutan fruit (*Nephelium lappaceum*)

from Malaysia and Vietnam into the continental United States. We have completed a pest list for this commodity to identify pests of quarantine significance that could follow the pathway of importation into the United States and, based on this list, have prepared a risk management document to identify phytosanitary measures that could be applied to fresh rambutan fruit from Malaysia and Vietnam to mitigate the pest risk. We have concluded that fresh rambutan fruit can be safely imported into the continental United States from Malaysia and Vietnam 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 a link to Regulations.gov and information on the location and hours of the reading room). You may request paper copies of the pest risk analysis by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT.** Please refer to the subject of the pest risk analysis you wish to review when requesting copies.

After reviewing any comments we receive, we will announce our decision regarding the import status of fresh rambutan fruit from Malaysia and Vietnam 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 rambutan fruit from Malaysia and Vietnam 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 December 2010.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2010–31461 Filed 12–14–10; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest, Northern Hills Ranger District; South Dakota; Steamboat Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service will prepare an environmental impact statement on a proposal to implement multiple resource management actions within the Steamboat Project Area to implement the amended Black Hills National Forest Land and Resource Management Plan. The Steamboat Project Area covers approximately 21,833 acres of National Forest System land and approximately 2,713 acres of interspersed private land northwest of Rapid City, South Dakota. Proposed actions include a combination of vegetation and fuels treatments to provide structural diversity in big game winter range, reduce the risk of mountain pine beetle infestations and reduce the risk of high severity wildfire. The proposed action includes approximately 4,665 acres of *commercial thinning,* 970 acres of *overstory removal,* 1,408 acres of *non-commercial thinning,* 1,379 acres of *shelterwood cuts,* 255 acres of *group selection,* 1,186 acres of individual tree selection, 636 acres of *hardwood enhancement,* 200 acres of *meadow enhancement,* 1,031 acres of *product-other-than-log thinning,* 460 acres of *understory thinning,* and 190 acres of *patch clearcutting.* In addition, approximately 10,608 acres will be analyzed for prescribed burning. Approximately 18 miles of new road construction would be necessary to carry out the proposed vegetation management actions.

DATES: Comments concerning the scope of the analysis must be received by January 14, 2011. The draft environmental impact statement is expected May 2011 and the final environmental impact statement is expected September 2011.

ADDRESSES: Send written comments to Rhonda O'Byrne, District Ranger, Northern Hills Ranger District, 2014 N. Main Street, Spearfish, SD 57783. Comments may also be sent via e-mail to *comments-rocky-mountain-black-hills-northern-hills@fs.fed.us* with "Steamboat Project" as the subject or via facsimile to 605–642–4156.

FOR FURTHER INFORMATION CONTACT: Chris Stores, Assistant NEPA Planner, Northern Hills Ranger District, 2014 N. Main Street, Spearfish, SD 57783. Telephone number: 605–642–4622.

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 Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The purpose of and need for the action in the Steamboat project area is to create greater structural diversity in an area managed for big game winter range, to reduce the risk of mountain pine beetle infestation, and to reduce the risk of high severity wildfire. All actions are intended to move toward or achieve related Forest Plan Goals and Objectives, consistent with Forest Plan Standards and Guidelines.

Proposed Action

The Forest Service is proposing actions on National Forest System lands to move toward or achieve Forest Plan Goals and Objectives in the Steamboat project area northwest of Rapid City, South Dakota and adjacent to the towns of Nemo and Piedmont, South Dakota. Proposed actions include the following:

Create structural diversity in an area managed as big game winter range through meadow enhancement, hardwood enhancement, uneven-aged management, thinning of the forest's overstory and understory, and patch clear cuts to create open browsing areas.

Reduce acres at high or medium susceptibility to mountain pine beetle by thinning stands and changing stand structure. Commercial and non-commercial (including prescribed burning) methods may be used.

Reduce acres at high or very high risk to wildfire by thinning stands and reducing the amount of fuel available to fires. Commercial and non-commercial (including prescribed burning) methods may be used.

Road construction and maintenance activities would be necessary to access areas proposed for timber harvest. New roads would be closed following management activities.

Implementation of proposed activities would likely begin sometime during 2012 and continue for up to ten years following a project decision.

The Forest Service is the sole responsible agency for this project; no cooperators are participating in project planning.

Responsible Official

Rhonda O'Byrne, District Ranger, Northern Hills Ranger District, 2014 North Main Street, Spearfish, SD 57783.

Nature of Decision To Be Made

The decision to be made is whether or not to approve the proposed action or alternatives to the proposed action that may be developed. No Forest Plan amendments are proposed.

Scoping Process

This notice of intent initiates the scoping process, which guides the development of the environmental impact statement. The Northern Hills Ranger District will also provide a letter including a description of the proposed action and soliciting comments on the proposal to local land owners, interested tribal entitites, permittees that use the project area, and others who have expressed interest in projects similar to this one. A public meeting will be held at the Piedmont Fire Department in Piedmont, South Dakota during the comment period. Forest Service personnel will be on hand to answer questions about the project, and large-scale maps of the proposed action will be available for review.

It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered, however.

Dated: December 8, 2010.

Craig Bobzien,

Forest Supervisor, Black Hills National Forest.

[FR Doc. 2010–31443 Filed 12–14–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest Advisory Board Public Meeting Dates Announced

AGENCY: Forest Service, USDA.

ACTION: Notice of meetings.

SUMMARY: The Black Hills National Forest Advisory Board (NFAB) has announced its meeting dates for 2011. These meetings are open to the public, and public comment is accepted at any time in writing, at the pleasure of the Chair, and during the last 15 minutes of each meeting, limited to three (3) minutes per person for oral comments.

Meeting dates are the third Wednesday of each month unless otherwise indicated:

January 5 (first Wednesday).
February 16.
March 16.
April 20.
May 18.
June 15.
July (No Meeting).
August 17 (Summer Field Trip—TBA).
September 21.
October 19.
November 16.
December (No Meeting).
January 4, 2012 (Tentative).

ADDRESSES: Meetings will begin at 1 p.m. and end no later than 5 p.m. at the Forest Service Center, 8221 S. Highway 16, Rapid City, SD 57702.

Agendas: The Board will consider a variety of issues related to national forest management. Agendas will be announced in advance but principally concern implementing phase two of the forest land and resource management plan. The Board will consider such topics as integrated vegetation management (wild and prescribed fire, fuels reduction, controlling insect epidemics, invasive species), travel management (off highway vehicles, the new OHV rule, and related topics), and continuing access to multiple-use management of public lands, among others.

FOR FURTHER INFORMATION CONTACT: Frank Carroll, Committee Management Officer, Black Hills National Forest, 1019 N. 5th Street, Custer, SD, 57730, (605) 673–9200.

Dated: December 8, 2010.

Craig Bobzien,

Forest Supervisor.

[FR Doc. 2010–31431 Filed 12–14–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Notice of Request for Revision of a Currently Approved Information Collection

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Proposed collection; comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Business-Cooperative Service's intention to request an extension for a currently approved information collection in support of the Rural Business Investment Program.

DATES: Comments on this notice must be received by February 14, 2011 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Michael Foore, Program Policy Advisor, Rural Development, Business and Cooperative Programs, U.S. Department of Agriculture, STOP 3201, 1400 Independence Ave., SW., Washington, DC 20250–3201, Telephone (202) 205–0056.

SUPPLEMENTARY INFORMATION:

Title: Rural Business Investment Program.

OMB Number: 0570–0051.

Expiration Date of Approval: March 31, 2011.

Type of Request: Revision of a currently approved information collection.

Abstract: The Rural Business Investment Program ("RBIP") is a Developmental Venture Capital program for the purpose of promoting economic development and the creation of wealth and job opportunities in Rural Areas and among individuals living in such areas through the licensing of Rural Business Investment Companies ("RBICs").

The information USDA seeks to collect is critical to the integrity of the process for selecting RBICs for participation in the RBIP and to the accomplishment of the objectives of the RBIP. Without this collection of information, USDA would be unable to meet the requirements of the Act and effectively administer the RBIP, ensuring safety and soundness.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1 hour per response.

Respondents: Newly established, for-profit entities applying for RBIC licensure) and licensed RBICs (venture capital companies approved by USDA to participate in the RBIP).

Estimated Number of Respondents: 1.

Estimated Number of Responses per Respondent: 148.

Estimated Number of Responses: 148.

Estimated Total Annual Burden on Respondents: 167.

Copies of this information collection can be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services Division at (202) 692–0043.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of USDA, including whether the information will have practical utility; (b) the accuracy of USDA's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and

clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250–0742. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: *December 6, 2010.*

Judith A. Canales,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2010–31493 Filed 12–14–10; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: Information and Communication Technology Survey.

Form Number(s): ICT–1(S), ICT–1(M), ICT–1(L).

OMB Control Number: 0607–0909.

Type of Request: Extension of a currently approved collection.

Burden Hours: 84,610.

Number of Respondents: 47,250.

Average Hours per Response: 1.8 hours.

Needs and Uses: Economic policymakers are concerned about the lack of available data related to e-business infrastructure investment. Such data are critical for evaluating productivity growth, changes in industrial capacity, and current economic developments. Rapid advances in Information and Communication Technology (ICT) equipment have resulted in these assets having short useful lives and being replaced much more faster than other types of equipment. Companies are expensing the full cost of such assets during the current annual period rather than capitalizing the value of such assets and expensing the cost over two or more years. In some cases this is due not only to the short useful life of the asset, but also to the fact that companies have varying dollar levels for capitalization.

The Annual Capital Expenditures Survey (ACES) (OMB Project 0607–0782) currently collects summary data on business capital expenditures annually and detailed data on types of structures and equipment every five years. The fact that the ACES program does not include non-capitalized expenditures for e-business infrastructure and infrequently collects detailed data on types of structures and equipment creates serious data gaps. To fill these gaps and as a supplement to the ACES survey, the Census Bureau created the Information and Communication Technology Survey (ICTS). The ICTS uses the ACES sampling, follow-up and estimation methodologies including mailing to the same employer companies.

This request is for a continuation of a currently approved collection and will cover the 2010 through 2012 ICTS (conducted in fiscal years 2011 through 2013).

The ICTS is an important part of the Federal Government's effort to improve and supplement ongoing statistical programs. The Bureau of Economic Analysis (BEA), Federal Reserve Board, Bureau of Labor Statistics and industry analysts use these data to evaluate productivity and economic growth prospects. In addition, the ICTS provides improved source data significant to BEA's estimate of the investment component of Gross Domestic Product, capital stock estimates, and capital flow tables.

Affected Public: Business or other for-profit, Not-for-profit institutions.

Frequency: Annually.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C., Sections 182, 224, and 225.

OMB Desk Officer: Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: December 9, 2010.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–31406 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: NOAA Space-Based Data Collection System (DCS) Agreements.

OMB Control Number: 0648–0157.

Form Number(s): NA.

Type of Request: Regular submission (renewal of an existing information collection).

Number of Respondents: 415.

Average Hours per Response: GOES use agreement, two hours and six minutes; ARGO use agreement, 1 hour.

Burden Hours: 470.

Needs and Uses: This notice is for renewal of an existing information collection.

The National Oceanic and Atmospheric Administration (NOAA) operates two space-based data collection systems (DCS), the Geostationary Operational Environmental Satellite (GOES) DCS and the Polar-Orbiting Operational Environmental Satellite (POES) DCS, also known as the Argos system. NOAA allows users access to the DCS if they meet certain criteria. The applicants must submit information to ensure that they meet these criteria. NOAA does not approve agreements where there is a commercial service available to fulfill the user's requirements.

Affected Public: Individuals or households; business or other for-profit organizations; not-for-profit institutions; Federal government; State, local or tribal government.

Frequency: Every three to five years.

Respondent's Obligation: Required to obtain/retain benefits.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance

Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: December 10, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–31464 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–HR–P

DEPARTMENT OF COMMERCE

[Docket No. 101207607–0607–02]

Privacy Act System of Records

AGENCY: U.S. Census Bureau, Department of Commerce.

ACTION: Notice of amended Privacy Act System of Records: COMMERCE/CENSUS–8, Statistical Administrative Records System.

SUMMARY: The Department of Commerce publishes this notice to announce the effective date of a Privacy Act System of Records notice entitled COMMERCE/CENSUS–8, Statistical Administrative Records System.

DATES: The system of records becomes effective on December 15, 2010.

ADDRESSES: For a copy of the system of records please mail requests to: Chief Privacy Officer, Privacy Office, Room HQ–8H168, U.S. Census Bureau, Washington, DC 20233–3700.

FOR FURTHER INFORMATION CONTACT: Chief Privacy Officer, Privacy Office, Room HQ–8H168, U.S. Census Bureau, Washington, DC 20233–3700, 301–763–6560.

SUPPLEMENTARY INFORMATION: On October 27, 2010, the Department of Commerce published and requested comments on a proposed Privacy Act System of Records notice entitled COMMERCE/CENSUS–8, Statistical Administrative Records System (75 FR 66061). No comments were received in response to the request for comments. By this notice, the Department is adopting the proposed system as final without changes effective December 15, 2010.

Dated: December 9, 2010.

Brenda Dolan,

U.S. Department of Commerce, Freedom of Information/Privacy Act Officer.

[FR Doc. 2010–31422 Filed 12–14–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; Questionnaire for Building Permit Official

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 February 14, 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*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Erica Filipek, U.S. Census Bureau, MCD, CENHQ Room 7K181, 4600 Silver Hill Road, Washington, DC 20233, telephone (301)763–5161 (or via the Internet at *Erica.Mary.Filipek@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

The U.S. Census Bureau plans to request an extension of the current Office of Management and Budget (OMB) clearance of the Questionnaire for Building Permit Official (SOC–QBPO). The Census Bureau uses the Computer-Assisted Personal Interviewing (CAPI) electronic questionnaire SOC–QBPO to collect information from state and local building permit officials on: (1) The types of permits they issue, (2) the length of time a permit is valid, (3) how they store permits, and (4) the geographic coverage of the permit system. We need this information to carry out the sampling for the Survey of Housing Starts, Sales, and Completions (OMB number 0607–0110), also known as Survey of Construction (SOC). The SOC provides widely used measures of construction activity, including the economic indicators Housing Starts, Housing Completions, and New Housing Sales.

The current clearance of SOC–QBPO is scheduled to expire on July 31, 2011. We will continue to use the current CAPI questionnaire without any revisions and are requesting approval of continual use of the existing questionnaire in the field. There are no revisions to the current questionnaire. The overall length of the interview and the sample size also will not change.

II. Method of Collection

The Census Bureau uses its field representatives to obtain information on the operating procedures of a permit office using the SOC–QBPO. The field representative visits the permit office, conducts the interview, and completes this electronic form.

III. Data

OMB Control Number: 0607–0125.
Form Number: SOC–QBPO.
Type of Review: Regular submission.
Affected Public: State and local Government.
Estimated Number of Respondents: 900.
Estimated Time Per Response: 15 minutes.
Estimated Total Annual Burden Hours: 225 hours.
Estimated Total Annual Cost: The cost to the respondents is estimated to be $5,475 based on an average hourly salary of $24.34 for local government employees. This estimate was taken from the Census Bureau's Annual Survey of Government Employment for 2009.
Respondent's Obligation: Voluntary.
Legal Authority: Title 13, U.S.C., Section 182.

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: December 10, 2010.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–31466 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; Center for Economic Studies Research Proposal Process and Project Management

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 February 14, 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*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Dr. Brian P. Holly, Project Review Coordinator, Center for Economic Studies, U.S Census Bureau, Room 2K139, 4600 Silver Hill Road, Washington, DC 20746 (or via the Internet at *brian.p.holly@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

The U.S. Census Bureau through its network of Census Research Data Centers (RDCs) supports and encourages research activity using Census Bureau microdata to improve Census Bureau programs. The RDCs provide access to researchers, federal agencies, and other institutions meeting the requirements of Title 13 United States Code, Section 23(c) to non-publicly available Census Bureau data files. The Center for Economic Studies operates the RDC system on behalf of the Census Bureau.

The objective of the Center for Economic Studies (CES) and the Research Data Centers (RDCs) is to increase the utility and quality of Census Bureau data products. The external research program supported by CES and the RDCs increases the quality and utility of Census data in several ways. First, access to microdata encourages knowledgeable researchers to become familiar with Census data products and Census collection methods. More importantly, providing qualified researchers access to confidential microdata enables research projects that would not be possible without access to respondent-level information. This increases the value of data that has been collected. Access to the microdata also allows for data linking not possible with aggregates, both cross-survey linkages and longitudinal linkages. These linkages leverage the value of preexisting data. Creative use of microdata can address important policy questions without the need for additional data collections.

In addition, the best means by which the Census Bureau can check on the quality of the data it collects, edits, and tabulates is to make its micro records available in a controlled, secure environment to sophisticated users who, by employing the micro records in the course of rigorous analysis, will uncover the strengths and weaknesses of the micro records. Each set of observations is the end result of dozens upon dozens of decision rules covering definitions, classifications, coding procedures, processing rules, editing rules, disclosure rules, and so on. The validity and consequences of all these decision rules only become evident when the Census Bureau's micro databases are tested in the course of analysis. Exposing to the light of research the conceptual and processing assumptions that are embedded in the Census Bureau's micro databases constitutes a core element in the Census Bureau's commitment to quality. CES and the RDCs conduct, facilitate, and support microdata research.

The Proposal Process

Persons wishing to conduct research at a Research Data Center must submit a research proposal using the CES Web site (*http://www.ces.census.gov*). Detailed guidelines describe the research proposal submission process. There are two distinct steps to submit a research proposal. The first step is the development of a *preliminary proposal.* The second step is the submission of a *final proposal.*

Preliminary Proposal Development

Researchers who wish to develop a proposal to conduct research at one of the Census Bureau's Research Data Centers (RDC) initially contact the RDC administrator at the center where the research will be conducted. The researcher discusses the proposed project with the administrator to determine whether the research fits with the Bureau's mission, is feasible, and is likely to provide benefits to Census Bureau programs under Title 13, Chapter 5 of the U.S. Code. The researcher registers as a user with CES by opening an account through the Center's Web site (*http://www.ces.census.gov*). All researchers must have a user account in order to submit preliminary and final proposals to CES.

Working closely with the RDC administrator, researchers develop a preliminary research proposal that includes information about the researcher(s), RDC location(s) where the research will be carried out, purpose of the research, funding source, requested datasets, desired software, a brief narrative description of the research project and proposed benefits to the Census Bureau. The researcher enters this information via the CES on-line proposal management system accessible on the CES Web site.

Once a preliminary proposal has been submitted, the RDC administrator reviews it and advises the researcher of any suggestions for improvement. The administrator must approve the preliminary proposal before the researcher can submit a final proposal to CES.

Final Proposal Submission

The final proposal consists of three separate documents in Adobe Acrobat Portable Document Format (PDF): (1) Abstract of the proposal, (2) Project description (full proposal), and (3) Statement of benefits to the Census Bureau. The submitter uploads the final documents to the CES management system via his or her user account and submits for Census Review by clicking on the Submit link button. This locks the project entry to prevent further edits or document uploads.

Document length varies by type. The abstract is limited to one page, the

proposal narrative is limited to fifteen pages single-spaced or thirty pages double spaced, and the benfits statement can range from five to as much as twelve pages at the submitter's discretion.

Progress Reports

Each project research team is expected to file annual progress reports and agrees to submit a final project report called a Post Project Certification (PPC). The annual progress reports vary in length and content and have no fixed format. The Post Project Certification follows a fixed format and is initially generated as a template by the project management system.

II. Method of Collection

User Account. Individuals create a user account on the CES Project Management System by visiting the CES Web site (*http://www.ces.census.gov/index/php*) and click on the "Register" link on the front page. A template appears which requests contact information from the respondent, including name, mailing address, e-mail address, telephone, professional affiliation, and citizenship. Some fields are required and others are voluntary. The information is retained in the system database and periodically modified by authorized CES staff when needed for activating the user's status on an approved research project. Users can update their contact information in their account at any time.

Research Project Information Template. Individuals with valid user accounts may create a research project entry in the system by clicking on the link "Start a New Proposal." This action opens a template where the user enters required information about a research project he or she wishes to carry out at a Census Bureau Research Data Center (RDC). The first page consists of a six-item prerequisite checklist to which the user must agree before being allowed to proceed to the next page. The second page requests the following information: project title, requested duration in months, funding source, Research Data Center, research personnel (selected from a list of current user accounts), brief project description, requested research datasets supplied by Census, research datasets supplied by filer, proposed benefits (from checklist of 13 permitted) and a text box for additional information the filer wishes to include. The filer clicks on a continue button to move to a verification page. The filer can reset the form contents at any time. The filer then verifies the entered information and saves the project information to the database. The system assigns a project number, and sets the project's status to NEW.

Research Proposal Documents.

- Abstract—A one-page document that summarizes the project's objectives, describes requested data, and lists proposed benefits to the Census Bureau.
- Project Narrative—Describes in detail the research question(s) to be addressed, Census Bureau and researcher supplied datasets to be used, a description of the research design (methodology, hypotheses, statistical models), expected duration and outsomes, source of funding, and a list of references cited in the text.
- Benefits Statement—Known formally as the Predominant Purpose Statement (PPS), this document is generated in draft form by the system. It is populated with some standard language, project title, Principle Investigator's name, preselected benefits, and a list of requested Census Bureau datasets. This document is editable by the submitter, primarily to expand upon the narrative statements associated with each proposed benefit.
- Annual Progress Report—Required for projects of three or more years in duration. Consists of a brief description of progress to date.
- Post Project Certification—This document is submtted following completion of the project and summarizes the project's findings in terms of benefits to the Census Bureau. It resembles the Predominant Purpose Statement in form and content except that it describes how and whether the project's proposed benefits were achieved. Census Bureau staff review this document and either certify it or send it back to the submitter for revision.

Approved research projects have an average duration of four years.

III. Data

OMB Control Number: None.
Form Number: None.
Type of Review: Regular submission.
Affected Public: Individuals.
Estimated Number of Respondents: 60 projects per year.
Estimated Time Per Response: 63 hours annually.
Estimated Total Annual Burden Hours: 3,780.
Estimated Total Annual Cost: $173,625.
Respondent's Obligation: Voluntary.
Legal Authority: Title 13 U.S.C., Section 9 and Section 23(c).

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: December 10, 2010.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–31471 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; 2012 Economic Census Classification Report for the Construction, Manufacturing, and Mining Sectors and Selected Wholesale Industries

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 February 14, 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*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should

be directed to Scott P. Handmaker, Chief, Economic Classifications Operations Branch, U.S. Census Bureau, 8K149, Washington, DC 20233, Telephone: 301–763–7107 or e-mail at *Scott.P.Handmaker@census.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau is the preeminent collector of timely, relevant and quality data describing 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 U.S.C., 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 Economic Census Classification Report (NC–99026) collects data on manufacturing, mining, construction, and selected wholesale businesses for the purpose of assigning an accurate 8-digit North American Industry Classification System (NAICS) based code for use in the 2012 Economic Census. This report, conducted separately in fiscal years 2012 and 2013, samples approximately 75,000 businesses each year.

The Census Bureau will select establishments to receive this survey from the Census Bureau's Business Register. The Census Bureau will mail the NC–99026 to establishments that have been assigned a partial manufacturing, mining, or construction NAICS code by administrative records and from other categories of administrative codes that may be identified. Additionally, wholesale establishments currently classified in select industries will be sampled in order to verify correct classification due to changes in NAICS for 2012.

Collecting this classification information will ensure the Economic Census mailing list for the targeted sectors are complete and accurate prior to the mailing of the 2012 Economic Census. This information is also used to determine whether an establishment will be mailed a form in the Economic Census, and if so, what form type. Many businesses are small and will not receive additional Economic Census forms, making this report the only medium by which to obtain an accurate 8-digit NAICS-based code. In other cases, the Census Bureau produces sample estimates. The results of this collection will be used to select a statistically reliable and efficient sample, minimizing the reporting burden on sampled sectors. Proper NAICS classification data ensures high quality economic statistics while reducing respondent burden and overall processing costs. Failure to collect this data will have an adverse effect on the quality and usefulness of economic information provided by the Census Bureau.

There are few changes since the last request was submitted to OMB in 2006. Selected wholesale industries will be added to verify proper NAICS classification. Also, changes will be made to the wording and organization of existing economic activity descriptions. Additionally, respondents will have the option to respond electronically via the Internet, which can reduce respondent burden and costs.

II. Method of Collection

Information is collected by mail, Internet, fax, and telephone follow-up.

III. Data

OMB Control Number: 0607–0925.
Form Number: NC–99026.
Type of Review: Regular submission.
Affected Public: Businesses and organizations (both profit and non-profit); State and local governments; small businesses.
Estimated Number of Respondents: 75,000.
Estimated Time per Response: 5 minutes.
Estimated Total Annual Burden Hours: 6,250.
Estimated Total Annual Cost: $181,313.
Respondent's Obligation: Mandatory.
Legal Authority: Title 13 U.S.C. 131, 193 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: December 9, 2010.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–31385 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and opportunity for public comment.

Pursuant to Section 251 of the Trade Act of 1974, as amended (19 U.S.C. 2341 *et seq.*), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of these firms contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION OF ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE 11/11/2010 THROUGH 12/9/2010

Firm name	Address	Date accepted for investigation	Products
Fort McDowell Yavapai Materials.	17100 E. Shea Blvd., Ste 330, Fountain Hills, AZ 85268.	11/19/2010	The firm produces concrete batch plants producing ready-mix concrete. A small number of concrete blocks are made as a by-product. Sand & gravel mine producing construction aggregates and USGA (golf course) sand. Granite pit producing crushed granite landscaping rock.
PCS Edventures!.com, Inc.	345 Bobwhite Ct #200, Boise, ID 83706.	12/8/2010	The firm creates and manufacturers educational and scientific materials for use in the instruction of science, math and other educational lessons. These products consist of robotic instruction systems, micro-controllers and software, curriculum.
Stellar Recognition, Inc. dba Sports Awards and Pacesetter Awards.	5544 W. Armstrong Avenue, Chicago, IL 60646.	11/24/2010	The firm designs, manufactures and assembles awards, recognition items and promotional products such as trophies, plaques, glass and acrylic awards and various related promotional products.
The Woods Company, Inc.	985 Superior Avenue, Chambersburg, PA 17201.	11/5/2010	The firm uses reclaimed solid wood flooring and architectural products.
Thuro Metal Products, Inc.	21–25 Grand Boulevard North, Brentwood, NY 11717.	11/18/2010	The Firm is a manufacturer of custom engineered precision component parts including threaded shafts and assemblies.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance for Firms Division, Room 7106, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.9 for procedures to request a public hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Dated: December 9, 2010.

Bryan Borlik,

Director, Trade Adjustment Assistance for Firms.

[FR Doc. 2010–31444 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF COMMERCE

International Trade Administration

Limitation of Duty-free Imports of Apparel Articles Assembled in Haiti Under the Haitian Hemispheric Opportunity Through Partnership for Encouragement Act (HOPE)

AGENCY: Department of Commerce, International Trade Administration.

ACTION: Notification of Annual Quantitative Limit on Certain Apparel under HOPE.

DATES: *Effective Date:* December 20, 2010.

FOR FURTHER INFORMATION CONTACT: Maria Dybczak, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3651.

SUPPLEMENTARY INFORMATION:

Authority: The Caribbean Basin Recovery Act ("CBERA"), as amended by the Haitian Hemispheric Opportunity Through Partnership for Encouragement Act of 2006 ("HOPE"), Title V of the Tax Relief and Health Care Act of 2006 and the Food, Conservation, and Energy Act of 2008 ("HOPE II"); the Haiti Economic Lift Program Act of 2010 ("HELP"); and implemented by Presidential Proclamations No. 8114, 72 FR 13655, 13659 (March 22, 2007), and No. 8596, 75 FR 68153 (November 4, 2010).

HOPE provides for duty-free treatment for certain apparel articles imported directly from Haiti. Section 213A(b)(1)(B) of HOPE outlines the requirements for certain apparel articles to qualify for duty-free treatment under a "value-added" program. In order to qualify for duty-free treatment, apparel articles must be wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, and yarns, as long as the sum of the cost or value of materials produced in Haiti or one or more countries, as described in HOPE, or any combination thereof, plus the direct costs of processing operations performed in Haiti or one or more countries, as described in HOPE, or any combination thereof, is not less than an applicable percentage of the declared customs value of such apparel articles. Pursuant to HELP, the applicable percentage for the period December 20, 2010 through December 19, 2011, is 50 percent or more.

For every twelve month period following the effective date of HOPE, duty-free treatment under the value-added program is subject to a quantitative limitation. HOPE provides that the quantitative limitation will be recalculated for each subsequent 12-month period. Section 213A (b)(1)(C) of HOPE, as amended by HOPE II and HELP, requires that, for the twelve-month period beginning on December 20, 2010, the quantitative limitation for qualifying apparel imported from Haiti under the value-added program will be an amount equivalent to 1.25 percent of the aggregate square meter equivalent of all apparel articles imported into the United States in the most recent 12-month period for which data are available. The aggregate square meters equivalent of all apparel articles imported into the United States is derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing ("ATC"), and the conversion factors for units of measure into square meter equivalents used by the United States in implementing the ATC. For purposes of this notice, the most recent 12-month period for which data are available as of December 20, 2010 is the 12-month period ending on October 31, 2010.

Therefore, for the one-year period beginning on December 20, 2010 and extending through December 19, 2011, the quantity of imports eligible for preferential treatment under the value-added program is 324,408,946 square

meters equivalent. Apparel articles entered in excess of these quantities will be subject to otherwise applicable tariffs.

Dated: December 10, 2010.

Sergio Botero,

Acting Deputy Assistant Secretary for Textiles and Apparel.

[FR Doc. 2010–31518 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–805]

Certain Circular Welded Non-Alloy Steel Pipe From Mexico: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests by interested parties, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain circular welded non-alloy steel pipe from Mexico. This administrative review covers mandatory respondents Mueller Comercial de Mexico, S. de R.L. de C.V. (Mueller) and Ternium Mexico, S.A. de C.V. (Ternium). Tuberia Nacional, S.A. de C.V. (TUNA) is subject to a concurrent changed circumstances review of this order; in its changed circumstances review, the Department has preliminarily determined that Lamina y Placa Comercial, S.A. de C.V. (Lamina) is the successor-in-interest to TUNA. *See Preliminary Results of Antidumping Duty Changed Circumstances Review: Certain Circular Welded Non-Alloy Steel Pipe and Tube from Mexico,* 75 FR 67685 (November 3, 2010). Therefore, we are continuing to refer to this entity as TUNA for these preliminary results, pending a final determination. The period of review (POR) is November 1, 2008, through October 31, 2009.

We preliminarily determine that sales of subject merchandise have been made at less than normal value (NV). One of the companies, Ternium, refused to cooperate with the Department in this administrative review. We have calculated a dumping margin for Mueller. We preliminarily determine that TUNA had no reviewable sales, shipments, or entries during the POR. The Department's review of import data supported TUNA's claim (*see* "TUNA's No-Shipment Claim" section of this notice for further explanation). Interested parties are invited to comment on these preliminary results.

DATES: *Effective Date:* December 15, 2010.

FOR FURTHER INFORMATION CONTACT: Mark Flessner or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–6312 or (202) 482–0469, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 2, 1992, the Department published the antidumping duty order on certain circular welded non-alloy steel pipe from Mexico. *See Notice of Antidumping Duty Orders: Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Welded Non-Alloy Steel Pipe from Korea,* 57 FR 49453 (November 2, 1992) (*Antidumping Duty Order*). On November 2, 2009, the Department published a notice of opportunity to request an administrative review in the **Federal Register**. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 74 FR 56573 (November 2, 2009). On November 30, 2009, the Department received requests for administrative review of Ternium (including its affiliates Hylsa, Ternium Grupo IMSA, and Galvak), TUNA, and Mueller from petitioners Allied Tube and Conduit Corp. (Allied) and TMK IPSCO; respondents Mueller and TUNA also submitted requests for administrative review on that day. On December 23, 2009, the Department published a **Federal Register** notice initiating an antidumping administrative review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 74 FR 68229 (December 23, 2009). On December 28, 2009, TUNA withdrew its request for an administrative review. However, the Department did not terminate the review with regard to TUNA because petitioners had timely requested a review of TUNA. On January 6, 2010, the Department issued its antidumping questionnaire to Mueller, TUNA, and Ternium.

On February 5, 2010, Ternium and TUNA notified the Department that they would not submit responses to the Department's questionnaire; TUNA did so with a no-shipments claim. With regard to TUNA's no-shipments claim, on February 17, 2010, petitioners Allied and TMK IPSCO submitted comments; on August 4, 2010, they submitted further comments. On August 16, 2010, TUNA replied to the petitioner's comments. On August 31, 2010, the Department issued a supplemental questionnaire to TUNA concerning its U.S. sales of mechanical tubing. On September 8, 2010, TUNA submitted its response to the supplemental questionnaire concerning mechanical tubing.

With respect to sales data, on February 26, 2010, Mueller submitted its response to section A of the questionnaire; on March 19, 2010, Mueller submitted its sections B and C response to the questionnaire. On May 25, 2010, the Department issued its first supplemental section A, B, and C questionnaire to Mueller. On June 4, 2010, Mueller submitted its responses to the first supplemental section A, B, and C questionnaire. On June 24, 2010, Mueller submitted a clarification of its first supplemental section A questionnaire response. On June 17, 2010, the Department issued its second supplemental section A, B, and C questionnaire to Mueller. On July 14, 2010, Mueller submitted its response to the second supplemental section A questionnaire; on July 16, 2010, Mueller submitted its response to the second supplemental sections B and C questionnaire. On July 19, 2010, Mueller submitted corrections to its response to the second supplemental sections B and C questionnaire. On December 1, 2010, Mueller submitted revised home and U.S. market databases in response to the Department's request made at the end of verification (*see* "Verification" section below).

On April 8, 2010, petitioner U.S. Steel alleged that Mueller had made sales below the cost of production (COP) during the POR. On June 30, 2010, the Department required both TUNA and Ternium [1] to submit COP data. *See* the memorandum from Maryanne Burke to the file entitled "*Administrative Review of Circular Welded Non-Alloy Steel Pipe from Mexico: Mueller Comercial de Mexico, S. de R.L. de C.V. and Southland Pipe Nipples Company, Inc.,*" dated June 30, 2010. On July 13, 2010, the Department issued supplemental section D questionnaires to Ternium, TUNA, and Mueller. On August 20, 2010, Ternium, TUNA, and Mueller each submitted a response to the section

[1] Though U.S. Steel's April 8, 2010, allegation was directed at Mueller, we required Mueller to obtain and report COP information from TUNA and Ternium because these suppliers produced subject merchandise sold by Mueller.

D questionnaire. On October 1, 2010, U.S. Steel submitted comments on the respondents' cost data submissions. On October 12, 2010, the Department issued supplemental section D questionnaires to TUNA and Mueller; on October 13, 2010, the Department issued a supplemental section D questionnaire to Ternium. On November 8, 2010, TUNA, Mueller, and Ternium submitted their responses to the Department's first supplemental section D questionnaires. On November 24, 2010, U.S. Steel submitted comments with regard to the section D responses of Mueller, TUNA, and Ternium. On December 1, 2010, Mueller submitted a response to U.S. Steel's comments with regard to the section D responses of Mueller, TUNA, and Ternium.

On July 29, 2010, the Department extended the deadline for the preliminary results of this review from August 9, 2010, to December 7, 2010. *See Certain Circular Welded Non-Alloy Steel Pipe From Mexico; Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 44763 (July 29, 2010).

Verification

As provided in section 782(i) of the Act, and 19 CFR 351.307, we conducted a verification of Mueller's sales responses on October 25–29, 2010, in Monterrey, Mexico. We conducted a verification of TUNA's no-shipment claim on November 1–3, 2010, in Monterrey, Mexico. We used standard verification procedures, including on-site inspection of both companies' facilities. Because there was insufficient time to complete the verification report for the preliminary results of review, we are unable to consider verification report findings for purposes of these preliminary results but intend to consider them in the final results. However, Mueller submitted sales data on December 1, 2010, based on revisions discussed at the verifications; we have used this data in our margin calculations for Mueller. Interested parties will have an opportunity to comment on the verification memoranda in their case briefs. *See* "Disclosure and Public Comment" section below.

Scope of the Order

The products covered by this order are circular welded non-alloy steel pipes and tubes, of circular cross-section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, beveled end, threaded, or threaded and coupled). These pipes and tubes are generally known as standard pipes and tubes and are intended for the low pressure conveyance of water, steam, natural gas, and other liquids and gases in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses, and generally meet ASTM A–53 specifications. Standard pipe may also be used for light load-bearing applications, such as for fence tubing, and as structural pipe tubing used for framing and support members for reconstruction or load-bearing purposes in the construction, shipbuilding, trucking, farm equipment, and related industries. Unfinished conduit pipe is also included in these orders. All carbon steel pipes and tubes within the physical description outlined above are included within the scope of this order, except line pipe, oil country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit. Standard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe of a kind used for oil or gas pipelines is also not included in this order.

The merchandise covered by the order and subject to this review are currently classified in the *Harmonized Tariff Schedule of the United States* (HTSUS) at subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of these proceedings is dispositive.

Date of Sale

The Department's regulations state that it will normally use the date of invoice, as recorded in the exporter's or producer's records kept in the ordinary course of business, as the date of sale. *See* 19 CFR 351.401(i). However, if the Department is satisfied that "a different date * * * better reflects the date on which the exporter or producer establishes the material terms of sale," the Department may choose a different date. *Id.* Mueller has reported the invoice date as the sale date. In Mueller's normal books and records, invoice date is recorded as the date of sale. However, changes in prices or quantities do occur. *See* Mueller's July 16, 2010, supplemental questionnaire response at 21–22. Therefore, the Department preliminarily determines that the invoice date is the date of sale provided that the invoice is issued on or before the shipment date; the shipment date will be used as the date of sale where the invoice is issued after the shipment date. *See* Certain Circular Welded Non-Alloy Steel Pipe from Mexico: Preliminary Results Analysis Memorandum for Mueller Comercial de Mexico, S. de R.L., dated December 7, 2010 (Analysis Memorandum), for further discussion of date of sale. A public version of this memorandum is on file in the Department's Central Records Unit (CRU) located in Room 7046 of the main Department of Commerce Building, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Sales Made Through Affiliated Resellers

Mueller has two U.S. affiliates who sold subject merchandise in the United States during the POR to unaffiliated customers. The first is Southland Pipe and Nipples Company, Inc. (Southland), which is Mueller's importer-of-record for direct sales in the United States. *See* "Export Price" section, below; *see also* Mueller's section A response at 3–4. The second is Mueller Streamline Co. (Streamline). Streamline sells Mueller's subject merchandise to unaffiliated customers in the United States out of inventory maintained in warehouses in the United States for many of its sales; for others, it makes sales in which Mueller's subject merchandise is shipped directly from Mueller's facilities in Mexico ("indent sales"). *Id. See* "Constructed Export Price" section, below. Mueller, Southland, and Streamline are wholly-owned subsidiaries of Mueller Industries, Inc. *Id.* For these preliminary results of review, we have included both Southland's and Streamline's sales of subject merchandise to unaffiliated customers in the United States in our margin calculation. Mueller made no sales to affiliates in the home market. *See* Mueller's section A response at 14.

Fair Value Comparisons

To determine whether sales of circular welded non-alloy steel pipe and tube from Mexico to the United States were made at less than fair value (LTFV), we compared EP and CEP sales made in the United States by Mueller, Southland, and Streamline to unaffiliated purchasers to NV as described in the "Constructed Export Price" and "Normal Value" sections of this notice, below. In accordance with section 777A(d)(2) of the Tariff Act of 1930, as amended (the Act), we compared individual EP and CEP sales prices to monthly weighted-average NVs.

Product Comparisons

In accordance with section 771(16) of the Act we considered all products produced by Mueller covered by the description in the "Scope of the Order" section above, and sold in the home market during the POR, to be foreign like product for purposes of determining appropriate product comparisons to U.S. sales. We relied on five characteristics to match U.S. sales of subject merchandise to comparison sales of the foreign like product (listed in order of priority): (1) Grade; (2) nominal pipe size; (3) wall thickness; (4) surface coating; and (5) end-finish. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics and reporting instructions listed in the Department's original January 6, 2010, questionnaire.

Export Price (EP)

Section 772(a) of the Act defines EP as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States," as adjusted under section 772(c) of the Act. In accordance with section 772(a) of the Act, we used EP for a number of Mueller's U.S. sales because these sales were made before the date of importation and were sales directly to unaffiliated customers in the United States, and because CEP methodology was not otherwise indicated.

As mentioned above, Southland is Mueller's importer-of-record for direct sales in the United States. *See* Mueller's section A response at 3–4. These sales are made prior to importation and shipped directly from Mueller's facilities to the unaffiliated U.S. customer. Mueller therefore treated these sales as EP sales. *Id.*

We based EP on the packed, delivered duty paid, cost and freight (C&F) or free on board (FOB) prices to unaffiliated customers in the United States. Mueller reported discounts for which we accounted in the margin program. *See* Analysis Memorandum. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act, which included, where appropriate, foreign inland freight from the mill to the U.S. border, inland freight from the border to the customer or warehouse, and U.S. brokerage and handling. In addition, we made adjustments for differences in circumstances of sale in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(c) by deducting direct selling expenses incurred on home market sales (credit expenses) and adding U.S. direct selling expenses (credit expenses).

Constructed Export Price

Mueller stated it made CEP sales through its U.S. affiliate, Streamline, by two methods during the POR. The first was sales of Mueller subject merchandise by Streamline from Streamline's U.S. warehouses ("warehouse sales"). The second was sales of Mueller subject merchandise by Streamline in which Mueller shipped its product directly to the Streamline customer ("indent sales"). For all sales under each method, Southland was the actual seller to Streamline. *See* Mueller's section A response at pages 3–4.

In accordance with section 772(b) of the Act, CEP is the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter. We preliminarily find Mueller properly classified all of its U.S. sales of subject merchandise through its U.S. affiliate Streamline as CEP transactions because such sales were made in the United States to unaffiliated purchasers. We based CEP on packed prices to unaffiliated purchasers in the United States sold by Streamline. We made adjustments for billing adjustments, discounts and rebates, where applicable. We also made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act, including foreign inland freight, foreign brokerage and handling, inland insurance, U.S. customs duties, U.S. inland freight, U.S. brokerage and handling, and U.S. warehousing expenses. As directed by section 772(d)(1) of the Act, we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*i.e.,* credit expenses and warranty expenses), inventory carrying costs, packing costs, and other indirect selling expenses. We also made an adjustment for profit in accordance with section 772(d)(3) of the Act. *See* Analysis Memorandum.

Because Streamline neither segregates product in its warehouses according to manufacturer, nor records the manufacturer when the subject merchandise is entered into its warehouses, Streamline and Mueller are unable to state with certainty which of Mueller's suppliers manufactured the particular subject merchandise in any given Streamline "warehouse sale." However, Mueller is able to report the percentage manufactured by its suppliers (for each diameter and surface coating) which it shipped to Streamline warehouses. Applying these percentages, a percentage for each manufacturer can be assigned for each such sale. We preliminarily determine that this methodology is the best available and have used it in the margin program.

Level of Trade

In accordance with section 773(a)(1)(B)(i) of the Act, to the extent practicable, we base NV on sales made in the comparison market at the same level of trade (LOT) as the export transaction. The NV LOT is based on the starting price of sales in the home market or, when NV is based on CV, on the LOT of the sales from which SG&A expenses and profit are derived. With respect to CEP transactions in the U.S. market, the CEP LOT is defined as the level of the constructed sale from the exporter to the importer. *See* 19 CFR 351.412(c)(1)(ii).

To determine whether NV sales are at a different LOT than EP or CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the customer. *See* 19 CFR 351.412(c)(2). If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make a LOT adjustment under section 773(a)(7)(A) of the Act. For CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP offset provision). *See, e.g., Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil; Preliminary Results of Antidumping Duty Administrative Review,* 70 FR 17406, 17410 (April 6, 2005), results unchanged in *Notice of Final Results of Antidumping Duty Administrative Review: Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil,* 70 FR 58683 (October 7, 2005); *see also Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes From*

Canada, 67 FR 8781 (February 26, 2002) and accompanying Issues and Decisions Memorandum at Comment 8. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and CEP profit under section 772(d)(3) of the Act. *See Micron Technology, Inc.* v. *United States,* 243 F.3d 1301, 1314–15 (Fed. Cir. 2001). We expect that if the claimed LOTs are the same, the functions and activities of the seller should be similar. Conversely, if a party claims that the LOTs are different for different groups of sales, the functions and activities of the seller should be dissimilar. *See Porcelain-on-Steel Cookware from Mexico: Final Results of Antidumping Duty Administrative Review,* 65 FR 30068 (May 10, 2000) and accompanying Issues and Decisions Memorandum at Comment 6.

Mueller reported it sold circular welded non-alloy steel pipe and tube to end-users and distributors in the home market and to end-users in the United States. For the home market, Mueller identified two channels of distribution: Direct shipments (channel 1) and warehouse shipments (channel 2). *See* Mueller's section A response at 14–15 and Exhibit A–5. For the U.S. market, Mueller identified two channels of distribution: Direct sales (channel 1) and indirect sales (channel 2). *Id.* Mueller stated that "a level-of-trade adjustment cannot be established;" rather, a CEP offset was requested. *See* Mueller's section B response at 28.

We obtained information from Mueller regarding the marketing stages involved in making its reported home market and U.S. sales. *See* Mueller's July 16, 2010, supplemental questionnaire response at 13–19. We reviewed Mueller's claims concerning the intensity to which all selling functions were performed for each home market channel of distribution and customer category. Based on our analysis of all of Mueller's home market selling functions, we agree with Mueller's conclusion that a level-of-trade adjustment cannot be established. We further conclude that there is a single level of trade in the home market.

In the U.S. market, Mueller did not report multiple levels of trade for EP sales. Accordingly, we agree with Mueller and preliminarily determine that all EP sales were made at the same LOT.

We compared Mueller's EP level of trade to the single NV level of trade found in the home market. While we find differences in the levels of intensity performed for some of these functions between the home market NV level of trade and the EP level of trade, such differences are minor and do not establish distinct levels of trade between the home market and the U.S. market. Based on our analysis of all of Mueller's home market and EP selling functions, we find these sales were made at the same level of trade.

For CEP sales, Mueller claims that the number and intensity of selling functions performed by Mueller in making its sales to Streamline are lower than the number and intensity of selling functions Mueller performed for its EP sales, and further claims that CEP sales are at a less advanced stage than home market sales. *See* Mueller's July 16, 2010, supplemental questionnaire response at 13–19.

We compared the NV LOT (based on the selling activities associated with the transactions between Mueller and its customers in the home market) to the CEP LOT (which is based on the selling activities associated with the transaction between Mueller and its affiliated importer, Streamline). Our analysis indicates the selling functions performed for home market customers are either performed at a higher degree of intensity or are greater in number than the selling functions performed for Streamline. For example, in comparing Mueller's selling activities, we find many of the reported selling functions performed in the home market are not performed with respect to CEP sales in the U.S. market. For those selling activities performed for both home market sales and CEP sales, Mueller reported it performed each activity at either the same or at a higher level of intensity in one or both of the home market channels of distribution. *See* Mueller's July 16, 2010 supplemental questionnaire response at Exhibit SA–10. Based on the foregoing, we conclude that the NV LOT is at a more advanced stage than the CEP LOT.

Because we found the home market and U.S. CEP sales were made at different LOTs, we examined whether a LOT adjustment or a CEP offset may be appropriate in this review. As we found only one LOT in the home market, it was not possible to make a LOT adjustment to home market sales, because such an adjustment is dependent on our ability to identify a pattern of consistent price differences between the home market sales on which NV is based and home market sales at the LOT of the U.S. sales. *See* 19 CFR 351.412(d)(1)(ii). Furthermore, we have no other information that provides an appropriate basis for determining a LOT adjustment. Because the data available do not form an appropriate basis for making a LOT adjustment, and because the NV LOT is at a more advanced stage of distribution than the CEP LOT, we have made a CEP offset to NV in accordance with section 773(a)(7)(B) of the Act.

Normal Value

A. Selection of Comparison Market

To determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.,* the aggregate volume of home market sales of the foreign like product is greater than five percent of the aggregate volume of U.S. sales), we compared Mueller's volume of home market sales of the foreign like product to the volume of its U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(B) of the Act. Because Mueller's aggregate volume of home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales for subject merchandise, we determined the home market was viable. *See, e.g.,* Mueller's July 16, 2010, supplemental questionnaire response (revised home market and U.S. sales databases).

B. Cost of Production Analysis

In response to a timely allegation from U.S. Steel, and in accordance with section 773(b)(1) of the Act, we initiated an investigation to determine whether Mueller made home market sales of the foreign like product at prices below its cost of production during the POR. Because Mueller is a re-seller of pipe, and not a manufacturer, we solicited COP data from its two principal suppliers, TUNA and Ternium. We also requested that Mueller report its costs for the further processing it performs (*e.g.,* threading or cutting to length) on the pipe it purchases from TUNA and Ternium.

In accordance with section 773(b)(3)(A) of the Act, we calculated COP based on the sum of the supplier's cost of materials, fabrication or other processing employed in producing the foreign like product. In accordance with section 773(b)(3)(B) and (C) of the Act, we included amounts for SG&A expenses and packing costs. For pipe further processed by Mueller, we added the costs of materials, direct labor and variable overhead incurred by Mueller. We also included amounts for Mueller's SG&A expenses and packing costs, if any. Based on the review of record evidence, Mueller did not appear to experience significant changes in cost of manufacturing during the period of review. Therefore, we followed our normal methodology of calculating an annual weighted-average cost. We relied

on home market sales and COP information provided by Mueller, TUNA and Ternium in their respective section D questionnaire responses, except as noted below:

For Mueller, we adjusted the reported depreciation, G&A, and financial expenses. For additional details, *see* the memorandum from Heidi K. Schriefer to Neal M. Halper entitled "Cost of Production Adjustments for the Preliminary Results—Mueller Comercial de Mexico, S. de R.L. de C.V." dated December 7, 2010.

For TUNA, we adjusted the reported hot-rolled coil, G&A and financial expenses. For additional details, *see* the memorandum from Heidi K. Schriefer to Neal M. Halper entitled "Cost of Production Adjustments for the Preliminary Results—Tuberia Nacional, S.A. de C.V." dated December 7, 2010.

For Ternium, we adjusted the reported G&A and financial expenses. Due to time constraints, the Department has accepted Ternium's submissions, as adjusted, for the preliminary results. However, we note that there are several outstanding issues which include Ternium's failure to provide an overall reconciliation and to account for the cost differences associated with dimensional physical characteristics which will need to be resolved for the final results. For additional details on the adjustments made to Ternium's submissions for the preliminary results, *see* the memorandum from Heidi K. Schriefer to Neal M. Halper entitled "Cost of Production Adjustments for the Preliminary Results—Ternium Mexico, S.A. de C.V." dated December 7, 2010.

In determining whether to disregard home market sales made at prices below the COP, we examine, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether such sales were made within an extended period of time and in substantial quantities, and whether such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. As noted in section 773(b)(2)(D) of the Act, prices are considered to provide for recovery of costs if such prices are above the weighted average per-unit COP for the period of investigation or review.

Where less than 20 percent of the respondent's home market sales of a given model are at prices below the COP, we do not disregard any below-cost sales of that model because we determine that the below-cost sales are not made within an extended period of time and in "substantial quantities." Where 20 percent or more of the respondent's home market sales of a given model are at prices less than the COP, we disregarded the below-cost sales; because: (1) They were made within an extended period of time in "substantial quantities," in accordance with sections 773(b)(2)(B) and (C) of the Act; and (2) based on our comparison of prices to the weighted-average COPs for the POR, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

Our cost test for Mueller revealed that, for home market sales of certain models, less than 20 percent of the sales of those models were at prices below the COP. We therefore retained all such sales in our analysis and used them as the basis for determining NV. Our cost test also indicated that for home market sales of other models, more than 20 percent were sold at prices below the COP within an extended period of time and at prices which would not permit the recovery of all costs within a reasonable period of time. Thus, in accordance with section 773(b)(1) of the Act, we excluded these below-cost sales from our analysis and used the remaining above-cost sales as the basis for determining NV.

C. Affiliated Party Transactions and Arm's-Length Test

Mueller made no sales to affiliates in the home market. *See* Mueller's section A response at 14.

D. Constructed Value

In accordance with section 773(e) of the Act, we calculated CV as described above in the "Cost of Production Analysis" section of this notice, plus profit and U.S. packing costs. In accordance with section 773(e)(2)(A) of the Act, we based SG&A expenses and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade, for consumption in the foreign country.

E. Price-to-Price Comparisons

We calculated NV based on prices to unaffiliated customers. Mueller reported home market sales in Mexican pesos during the POR. *See* Mueller's section B response at Exhibit B–1. We accounted for billing adjustments, discounts, and rebates, and advertising expenses where appropriate. We also made deductions, where appropriate, for foreign inland freight, insurance, handling, and warehousing, pursuant to section 773(a)(6)(B) of the Act. In addition, we made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise compared pursuant to section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also made adjustments for differences in circumstances of sale (COS) in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. In particular, we made COS adjustments for imputed credit expenses and warranty expenses. Finally, we deducted home market packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

F. Price-to-CV Comparisons

Where we were unable to find a home market match of such or similar merchandise, in accordance with section 773(a)(4) of the Act, we based NV on CV. Where appropriate, we made adjustments to CV in accordance with section 773(a)(8) of the Act.

TUNA's No-Shipment Claim

TUNA maintains that while the CBP data placed on the record indicate there were shipments of the subject merchandise manufactured by TUNA during the POR, in fact, it was not the exporter for any entries. TUNA originally submitted a "no-shipment" letter, dated February 5, 2010, in which the company claimed it did not have exports, sales, or entries of subject merchandise to the United States during the POR. Rather, TUNA asserts it made sales of subject merchandise to unaffiliated companies in the Mexican home market and believes some of those home market customers export the subject merchandise to the United States. However, TUNA insists it did not know where the material was destined at the time of TUNA's sale to its customers. TUNA explains the sales in question were "co-export" sales and, thus, exempt from the value-added tax (VAT) normally collected on sales in the domestic market. However, TUNA insists that at the time of sale, it has no idea which shipments of pipe are actually destined for the United States. Accordingly, TUNA requests, pursuant to 19 CFR 351.213(d)(3), that we rescind this administrative review with respect to TUNA.

Meanwhile, on February 17, 2010, Allied and TMK IPSCO submitted comments arguing TUNA's "no-shipment" claims are not supported by record evidence. Allied and TMK IPSCO urged the Department to gather more information regarding TUNA's sales to an unaffiliated exporter. According to Allied and TMK IPSCO, the nature of TUNA's home market sales pursuant to Mexico's IMMEX "co-export" program made it highly probable TUNA knew at the time of the sale that its merchandise

was destined for the United States. Allied and TMK IPSCO also urged the Department to gather more information from U.S. Customs and Border Protection (CBP), such as Customs Forms 7501 and other import documentation. *See* Allied and TMK IPSCO's letter dated February 17, 2010.

The Department did, in fact, solicit additional information from both TUNA and CBP. *See, e.g.,* Memorandum from Richard Weible, Director, Office 7 to Michael Walsh, Director, AD/CVD Revenue Policy & Programs, U.S. Customs and Border Protection, dated May 3, 2010 (entering on the record entry documentation for selected TUNA entries). In addition, between November 1 and November 3, 2010, the Department conducted an on-site verification of TUNA's no shipment claims.

From our examination of the customs entry documentation, we saw no evidence to suggest TUNA had made any reviewable entries of subject merchandise to the United States. Rather, the documentation indicated sales were made to a certain home market customer under Mexico's IMMEX co-export program. *See* Mueller's July 14, 2010, supplemental questionnaire response at Exhibit S–5. While TUNA had a general knowledge that some of its pipe would be exported—perhaps to the United States or elsewhere—it did not know which specific pipes would be exported to the United States at the time of its sale to its customer. *See* Mueller's section A response at 5. Therefore, we find the record provides no information to contradict TUNA's claim that, at the time of its sales to the home market customer, it did not have knowledge its merchandise would be exported to the United States. As a result, we preliminarily find TUNA had no knowledge its merchandise entered the United States and is, therefore, not properly subject to review.

Use of Facts Available

Section 776(a)(2) of the Act, provides that if an interested party withholds information requested by the administering authority, or fails to provide such information by the deadlines for submission of the information and in the form or manner requested (subject to subsections (c)(1) and (e) of section 782 of the Act), or significantly impedes a proceeding under this title, or provides such information but the information cannot be verified as provided in section 782(i) of the Act, then the administering authority shall use (subject to section 782(d) of the Act) facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that if the administering authority determines that a response to a request for information does not comply with the request, the administering authority shall promptly inform the responding party and provide an opportunity to remedy the deficient submission. Section 782(e) of the Act states further that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Because Ternium has not responded to sections A, B, or C of the Department's original questionnaire in the instant administrative review, its actions constitute a refusal to provide information necessary to conduct the Department's antidumping analysis under sections 776(a)(2)(A) and (B) of the Act. Thus, Ternium withheld information requested by the Department's original questionnaire and significantly impeded the administrative review. *See* section 776(a)(2)(A) and (C) of the Act. Therefore, we preliminarily determine to base the margin for Ternium on facts otherwise available, pursuant to sections 776(a)(2)(A) and (C) of the Act.

Application of Adverse Inferences for Facts Available

In applying the facts otherwise available, section 776(b) of the Act provides that—if the Department finds an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information—in reaching the applicable determination under this title, the Department may use an inference adverse to the interests of that party in selecting from among the facts otherwise available.

Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1 (1994) at 870 (*SAA*). Further, "affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference." *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27340 (May 19, 1997). Ternium failed to cooperate to the best of its ability by failing to answer sections A, B, or C of the Department's questionnaire. As a result, we determine that Ternium failed to cooperate by not acting to the best of its ability to comply with the Department's request for information. Therefore, pursuant to section 776(b) of the Act, the Department has preliminarily determined that in selecting from among the facts otherwise available, an adverse inference is warranted. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products From Japan,* 65 FR 42985, 42986 (July 12, 2000) (the Department applied total AFA where a respondent failed to respond to subsequent antidumping questionnaires).[2]

Selection and Corroboration of Information Used as Facts Available

Section 776(b) of the Act provides that the Department may use as AFA information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record. When selecting an AFA rate from among the possible sources of information, the Department's practice has been to ensure the margin is sufficiently adverse to induce respondents to provide the Department with complete and accurate information in a timely manner. *See, e.g., Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part,* 71 FR 65082, 65084 (November 7, 2006).

Accordingly, as total AFA, we have assigned Ternium the rate of 48.33 percent, which is the highest calculated transaction-specific margin from the most recently-completed administrative review of this antidumping duty order in which a rate was calculated. *See Circular Welded Non-Alloy Steel Pipe From Mexico: Amended Final Results of Antidumping Duty Administrative Review,* 66 FR 37454 (July 18, 2001); *see*

[2] Ternium submitted no response to the Department's section A, B, or C questionnaires during the course of this review. Ternium did, however, submit a response to the Department's section D questionnaire with respect to subject merchandise manufactured by Ternium which was exported to the United States by Mueller. Sales by Mueller or its affiliates will be assessed at the Mueller rate without the use of adverse inferences; otherwise, sales of subject merchandise manufactured by Ternium will be assessed at a rate determined from facts available. *See* "Preliminary Results of Review" and "Assessment" sections below.

also Magnesium Metal From the Russian Federation: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 39919 (August 10, 2009) (single-highest transaction margin assigned as AFA to respondent AVISMA). *See* Memorandum from Christian Marsh to Paul Piquado entitled "Certain Circular Welded Non-Alloy Steel Pipe from Mexico: Use of Facts Available for Ternium and the Corroboration of Secondary Information," dated December 7, 2010 (Facts Available Memorandum). We find this rate is sufficiently adverse to serve the purpose of facts available and is appropriate, as it is the highest transaction-specific margin determined in the most recently completed review in which a rate was calculated.

Section 776(c) of the Act provides that, to the extent practicable, the Department shall corroborate secondary information used for facts available by reviewing independent sources reasonably at its disposal. Information from a prior segment of the proceeding constitutes secondary information. *See SAA* at 870; *Antifriction Bearings and Parts Thereof From France, et al.: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part,* 69 FR 55574, 55577 (September 15, 2004). The word "corroborate" means the Department will satisfy itself that the secondary information to be used has probative value. *See SAA* at 870; *see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 57391, 57392 (November 6, 1996). To corroborate secondary information, the Department will examine, to the extent practicable, the reliability and relevance of the information used.

As fully explained in the Facts Available Memorandum, the Department finds the rate of 48.33 percent to be reliable and relevant for use as AFA. *See* Facts Available Memorandum at 7–8. As such, the Department finds this rate to be corroborated to the extent practicable consistent with section 776(c) of Act. We have, therefore, selected the rate of 48.33 percent to apply as an AFA rate to Ternium and consider it to be sufficiently high so as to encourage participation in future segments of this proceeding.

Preliminary Results of Review

As a result of our review, we preliminarily determine the following weighted-average dumping margins exist for the period November 1, 2008, through October 31, 2009:

Manufacturer/exporter	Weighted-average margin (percentage)
Ternium (formerly known as Hylsa [3])	48.33
Mueller	4.81

Disclosure and Public Comment

We will disclose pertinent memoranda concerning these preliminary results to parties in this review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). We shall be releasing the sales verification reports from this administrative review with sufficient time to allow parties to comment upon their contents. Any interested party may request a hearing within 30 days of the publication of this notice in the **Federal Register**. *See* 19 CFR 351.310(c). If a hearing is requested, the Department will notify interested parties of the hearing schedule.

Interested parties are invited to comment on the preliminary results of this review. The Department will consider case briefs filed by interested parties within 30 days after the date of publication of this notice in the **Federal Register.** *See* 19 CFR 351.309(c). Interested parties may file rebuttal briefs, limited to issues raised in the case briefs. *See* 19 CFR 351.309(d). Any hearing, if requested, will be held two days after the deadline for submission of rebuttal briefs. *See* 19 CFR 351.310(d). Parties who submit arguments are requested to submit with each argument: (1) A statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities cited. Further, we request that parties submitting written comments provide the Department with an electronic copy of the public version of such comments. We intend to issue the final results of this administrative review, including the results of our analysis of issues in any such case briefs, rebuttal briefs, and written comments or at a hearing, within 120 days of publication of these preliminary results in the **Federal Register.**

[3] Ternium is the successor in interest to Hylsa, S.A. de C.V. *See Final Results of Antidumping Duty Changed Circumstances Review: Certain Circular Welded Non-Alloy Steel Pipe and Tube from Mexico,* 74 FR 41681 (August 18, 2009).

Assessment

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. Upon completion of this administrative review, pursuant to 19 CFR 351.212(b), the Department will calculate an assessment rate on all appropriate entries. Mueller has reported entered values for all of its sales of subject merchandise to the United States during the POR. Therefore, in accordance with 19 CFR 351.212(b)(1), we will calculate importer-specific duty assessment rates on the basis of the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales of that importer. These rates will be assessed uniformly on all entries the respective importers made during the POR if these preliminary results are adopted in the final results of review. Where the assessment rate is above *de minimis,* we will instruct CBP to assess duties on all entries of subject merchandise by that importer. Because we are relying on total AFA to establish Ternium's dumping margin, we will instruct CBP to apply a dumping margin of 48.33 percent *ad valorem* to all entries of subject merchandise during the POR that was produced and/or exported by Ternium (except those entries produced by Ternium and exported by Mueller, to which the Mueller assessment will apply). In accordance with 19 CFR 356.8(a), the Department intends to issue appropriate assessment instructions directly to CBP on or after 41 days following the publication of the final results of review.

Cash Deposit Requirements

If these preliminary results are adopted in the final results of review, the following deposit requirements will be effective upon completion of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication of the final results of this administrative review, as provided in section 751(a)(1) of the Act: (1) The cash-deposit rate for Mueller and Ternium will be the rate established in the final results of this review; (2) for previously reviewed or investigated companies not covered in this review, the cash-deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value (LTFV) investigation but the manufacturer is, the cash-deposit rate

will be the rate established for the most recent period for the manufacturer of the subject merchandise; (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous segment of the proceeding, the cash-deposit rate will continue to be the all-others rate established in the LTFV investigation which is 32.62 percent. *See Antidumping Duty Order.* These cash-deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

The preliminary results of administrative review and this notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 7, 2010.

Paul Piquado,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–31517 Filed 12–14–10; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–475–819]

Certain Pasta From Italy: Preliminary Results of Countervailing Duty Changed Circumstances Review and Intent To Revoke, In Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 17, 2010, the Department of Commerce ("the Department") published a notice of initiation of a changed circumstances review and consideration of revocation, in part, of the countervailing duty order on certain pasta from Italy. *See Certain Pasta From Italy: Notice of Initiation of Changed Circumstances Review and Consideration of Revocation of Order, in Part,* 75 FR 56992 (September 17, 2010) ("*Initiation Notice*"). The Department confirmed that New World Pasta Company, Dakota Growers Pasta Company, and American Italian Pasta Company (collectively "Petitioners") have no interest in countervailing duty relief from imports of gluten-free pasta. Therefore, we are notifying the public of our intent to revoke, in part, the countervailing duty order as it relates to imports of gluten-free pasta, as described below. The Department invites interested parties to comment on these preliminary results.[1]

DATES: *Effective Date:* December 15, 2010.

FOR FURTHER INFORMATION CONTACT: Patricia Tran or Austin Redington, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–1503 and (202) 482–1664, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 24, 1996, the Department published in the **Federal Register** the countervailing duty ("CVD") order on certain pasta from Italy. *See Notice of Countervailing Duty Order and Amended Final Affirmative Countervailing Duty Determination: Certain Pasta From Italy,* 61 FR 38544 (July 24, 1996). On July 29, 2010, the Department received a request on behalf of H.J. Heinz Company ("Heinz") to initiate a no-interest changed circumstance review and revocation, in part, of the CVD order on certain pasta from Italy with respect to gluten-free pasta. On September 17, 2010, the Department published a notice of initiation of changed circumstances review and consideration of revocation of order, in part, with respect to the CVD order on certain pasta from Italy and invited interested parties to comment. *See* Initiation Notice.

On September 27, 2010, Petitioners expressed a lack of interest in maintaining the order with respect to gluten-free pasta. *See* Memorandum to the File from Austin Redington, International Trade Compliance Analyst, AD/CVD Operations Office 1, entitled "Changed Circumstance Review of Certain Pasta from Italy: Statement of No Opposition from Domestic Industry," dated October 13, 2010 ("No Opposition Memo"). On October 12, 2010, Heinz submitted comments, restating its request that the Department revoke the CVD order, in part, with respect to gluten-free pasta. On November 30, 2010, Petitioners confirmed that they represent "substantially all" of the production of the domestic like product. *See* Memorandum to the File from Patricia Tran, Acting Program Manager, entitled "Ex Parte Memorandum: Phone Conversation with Counsel for Petitioners," dated November 30, 2010 ("Substantially All Memo").

We received no comments to counter Heinz's request. Although we stated in the *Initiation Notice* that we would issue final results within 45 days if all parties agreed to the outcome, we have instead determined to publish these preliminary results of changed circumstances review and intent to revoke the order, in part, so that our intention to revoke is clear to parties and our determination may be commented upon, as set forth below. *See* 19 CFR 351.222(g)(3)(v).

Scope of Order

Imports covered by the order are shipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by the scope of the order is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

Excluded from the scope of the order are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by the Instituto Mediterraneo Di Certificazione, Bioagricoop S.r.l., QC&I International Services, Ecocert Italia, Consorzio per il Controllo dei Prodotti Biologici, Associazione Italiana per l'Agricoltura Biologica, or Codex S.r.l. In addition, based on publicly available information, the Department has determined that, as of August 4, 2004, imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by Bioagricert S.r.l. are also excluded from the order. *See* Memorandum from Eric B. Greynolds to Melissa G. Skinner,

[1] On July 2, 2009, the Department published a notice of initiation and preliminary results of a changed circumstances review and intent to revoke, in part, the AD order of certain pasta from Italy, in part, with respect to gluten-free pasta. The Department gave interested parties an opportunity to comment on the preliminary results and notice of intent to revoke, but received no comments. The Department issued their final results on August 14, 2009 and revoked the AD order, in part, with respect to gluten-free pasta. *See Certain Pasta From Italy: Notice of Final Results of Antidumping Duty Changed Circumstances Review and Revocation, in Part,* 74 FR 41120 (August 14, 2009).

dated August 4, 2004, which is on file in the Department's Central Records Unit ("CRU") in Room 7046 of the main Department building. In addition, based on publicly available information, the Department has determined that, as of March 13, 2003, imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by Instituto per la Certificazione Etica e Ambientale are also excluded from the order. *See* Memorandum from Audrey Twyman to Susan Kuhbach, dated February 28, 2006, entitled "Recognition of Instituto per la Certificazione Etica e Ambientale (ICEA) as a Public Authority for Certifying Organic Pasta from Italy" which is on file in the Department's CRU.

The merchandise subject to review is currently classifiable under items 1901.90.90.95 and 1902.19.20 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Scope Rulings

The Department has issued the following scope rulings to date:

(1) On August 25, 1997, the Department issued a scope ruling finding that multicolored pasta, imported in kitchen display bottles of decorative glass that are sealed with cork or paraffin and bound with raffia, is excluded from the scope of the antidumping ("AD") and CVD orders. *See* Memorandum from Edward Easton to Richard Moreland, dated August 25, 1997, which is on file in the CRU.

(2) On July 30, 1998, the Department issued a scope ruling finding that multipacks consisting of six one-pound packages of pasta that are shrink-wrapped into a single package are within the scope of the AD and CVD orders. *See* Letter from Susan H. Kuhbach to Barbara P. Sidari, dated July 30, 1998, which is on file in the CRU.

(3) On October 26, 1998, the Department self-initiated a scope inquiry to determine whether a package weighing over five pounds as a result of allowable industry tolerances is within the scope of the AD and CVD orders. On May 24, 1999, we issued a final scope ruling finding that, effective October 26, 1998, pasta in packages weighing or labeled up to (and including) five pounds four ounces is within the scope of the AD and CVD orders. *See* Memorandum from John Brinkmann to Richard Moreland, dated May 24, 1999, which is on file in the CRU.

(4) On April 27, 2000, the Department self-initiated an anti-circumvention inquiry to determine whether Pastificio Fratelli Pagani S.p.A.'s importation of pasta in bulk and subsequent repackaging in the United States into packages of five pounds or less constitutes circumvention with respect to the AD and CVD orders on pasta from Italy pursuant to section 781(a) of the Tariff Act of 1930, as amended ("the Act"), and 19 CFR 351.225(b). *See Certain Pasta From Italy: Notice of Initiation of Anti-Circumvention Inquiry on the Antidumping and Countervailing Duty Orders,* 65 FR 26179 (May 5, 2000). On September 19, 2003, we published an affirmative finding in the anti-circumvention inquiry. *See Anti-Circumvention Inquiry of the Antidumping and Countervailing Duty Orders on Certain Pasta from Italy: Affirmative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders,* 68 FR 54888 (September 19, 2003).

Preliminary Results of Changed Circumstance Review and Intent To Revoke, In Part

Pursuant to section 751(b)(1) of the Act, and 19 CFR 351.216, the Department will conduct a changed circumstances review upon receipt of information concerning, or a request from an interested party for review of, an AD or CVD order which shows changed circumstances sufficient to warrant a review of the order. Additionally, pursuant to 19 CFR 351.222(g)(1)(i), the Department will revoke an order in whole or in part, if the Secretary concludes that "{p}roducers accounting for substantially all of the production of the domestic like product to which the order (or part of the order to be revoked) * * * have expressed a lack of interest in the order, in whole or in part." In its administrative practice, the Department has interpreted "substantially all" to mean at least 85 percent. *See, e.g., Natural Bristle Paint Brushes and Brush Heads From the People's Republic of China: Notice of Initiation and Preliminary Results of Changed Circumstance Review, and Intent To Revoke the Order,* 75 FR 34097, 34098 (June 16, 2010).

In accordance with section 751(b)(1) of the Act and 19 CFR 351.222(g)(1)(i), Petitioners have expressed a lack of interest in the order, in part, with respect to gluten-free pasta and further confirmed with the Department that they comprise substantially all of the production of the domestic like product. *See* No Opposition Memo; *see also* Substantially All Memo. Based on the expression of no interest by Petitioners, and absent any objection by any other interested parties, we have preliminarily determined that the domestic producers of the like product have no interest in the continued application of the CVD order on certain pasta from Italy to the merchandise that is subject to this request. Accordingly, we are notifying the public of our intent to revoke, in part, the CVD order with respect to gluten-free pasta. Therefore, we intend to change the scope of the CVD order on certain pasta from Italy to include the following exclusion: Excluded from the scope is gluten-free pasta.

Public Comment

Interested parties are invited to comment on these preliminary results. Written comments may be submitted no later than 10 days after the date of publication of these preliminary results. Rebuttals to written comments, limited to issues raised in such comments, may be filed no later than 17 days after the date of publication of these preliminary results. The Department will issue the final results of this changed circumstances review, which will include its analysis of any written comments, no later than 270 days after the date on which this review was initiated, or within 45 days if all parties agree to our preliminary results. *See* 19 CFR 351.216(e).

If final revocation occurs, we will instruct U.S. Customs and Border Protection to end the suspension of liquidation for the merchandise covered by the revocation on the effective date of the notice of revocation and to release any cash deposit or bond. *See* 19 CFR 351.222(g)(4). The current requirement for a cash deposit of estimated countervailing duties on all subject merchandise will continue unless and until it is modified pursuant to the final results of this changed circumstances review.

These preliminary results of changed circumstance review and notice are in accordance with sections 751(b)(1) and 777(i) of the Act and 19 CFR 351.216, 351.221, and 351.222.

Dated: December 8, 2010.

Paul Piquado,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–31494 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Minority Business Development Agency

Proposed Information Collection; Comment Request; Survey of Minority-Owned Business Participation, Opportunities and Barriers to Global Commerce

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before February 14, 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).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Ivonne Cunarro, Research and Knowledge Management Unit, 202–482–2157, *icunarro@mbda.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Minority Business Development Agency's (MBDA) Research and Knowledge Management unit will be conducting a survey of minority-owned businesses to gather data on their participation in global commerce. The survey will provide valuable information on the markets minority businesses are exporting goods to, job creation as a result of export activity, exporting minority business industries, and barriers and opportunities to exporting. Findings from this survey support President's Obama National Export Initiative, Executive Order 13534, which calls for doubling exports in five years and identifying and reducing barriers to exports. The survey also supports the MBDA's mission of furthering the growth and expansion of minority-owned businesses as exemplified in Executive Order 11625 and 15 CFR part 1400. The findings from the survey will also be published in a report and released during MBDA's Minority Enterprise Development Week Conference in September, 2011.

II. Method of Collection

The data will be collected electronically through the use of a web-based survey instrument.

III. Data

OMB Control Number: 0640–0027.

Form Number(s): None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,000.

Estimated Time per Response: 45 minutes.

Estimated Total Annual Burden Hours: 750 hours.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will 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: December 9, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–31398 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–21–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Proposed Information Collection; Comment Request; Building for Environmental and Economic Sustainability (BEES) Please

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before February 14, 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).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Barbara C. Lippiatt, (301) 975–6133 or at *blippiatt@nist.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

Over the last 16 years, the Engineering Laboratory of the National Institute of Standards and Technology (NIST) has developed and automated an approach for measuring the life-cycle environmental and economic performance of building products. Known as BEES (Building for Environmental and Economic Sustainability), the tool reduces complex, science-based technical content (*e.g.,* over 500 material and energy flows from raw material extraction through product disposal) to decision-enabling results and delivers them in a visually intuitive graphical format. BEES Please is a voluntary program to collect data from product manufacturers so that the environmental performance of their products may be evaluated scientifically using BEES. BEES measures environmental performance using the environmental life-cycle assessment approach specified in the International Organization for Standardization 14040 series of standards. All stages in the life of a product are analyzed: Raw material acquisition, manufacture, transportation, installation, use, and recycling and waste management. Economic performance is measured using the American Society for Testing and Materials standard lifecycle cost method, which covers the costs of initial investment, replacement, operation, maintenance and repair, and disposal. NIST will publish in BEES Online (*http://ws680.nist.gov/bees*) an aggregated version of the data collected

from manufacturers that protects data confidentiality, subject to manufacturer's review and approval.

II. Method of Collection

Data on materials use, energy consumption, waste, and environmental releases will be collected using an electronic, MS Excel-based questionnaire. An electronic, MS Word-based User Manual accompanies the questionnaire to help in its completion.

III. Data

OMB Control Number: 0693–0036.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 30.

Estimated Time per Response: 62 hours and 30 minutes.

Estimated Total Annual Burden Hours: 1,875.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 10, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–31423 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA081

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Receipt of applications for scientific research permits; request for comments.

SUMMARY: Notice is hereby given that NMFS has received applications for scientific research from Thomas R. Payne and Associates (TRPA) in Arcata, CA (15542), the Glenn-Colusa Irrigation District (GCID) in Willows, CA (15573), the University of California at Davis (UC–Davis) in Davis, CA (15926), and Natural Resource Scientists, Incorporated (NRSI) in Red Bluff, CA (16083). These permits would affect the Federally endangered Sacramento River winter-run Chinook salmon and the threatened Central Valley spring-run Chinook salmon Evolutionarily Significant Units (ESUs), the Federally threatened Central Valley steelhead Distinct Population Segment (DPS), and the Federally threatened southern DPS of North American green sturgeon (southern DPS green sturgeon). This document serves to notify the public of the availability of the permit applications for review and comment.

DATES: Written comments on the permit applications must be received no later than 5 p.m. Pacific Standard Time on January 14, 2011.

ADDRESSES: Comments submitted by e-mail must be sent to the following address; *FRNpermitsSAC@noaa.gov.* The applications and related documents are available for review by appointment, for permits: Protected Resources Division, NMFS, 650 Capitol Mall, Suite 5–100, Sacramento, CA 95814 (ph: 916–930–3606, fax: 916–930–3629).

FOR FURTHER INFORMATION CONTACT: Shirley Witalis at phone number 916–930–3606 or e-mail: *Shirley.Witalis@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Authority

Issuance of permits and permit modifications, as required by the Endangered Species Act of 1973 (16 U.S.C. 1531–1543) (ESA), is based on a finding that such permits/modifications: (1) Are applied for in good faith; (2) would not operate to the disadvantage of the listed species which are the subject of the permits; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. Authority to take listed species is subject to conditions set forth in the permits. Permits and modifications are issued in accordance with and are subject to the ESA and NMFS regulations governing listed fish and wildlife permits (50 CFR parts 222–226).

Those individuals requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (*see* **ADDRESSES**). The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the permit action summaries are those of the applicant and do not necessarily reflect the views of NMFS.

Species Covered in This Notice

This notice is relevant to Federally-listed endangered Sacramento River winter-run Chinook salmon *(Oncorhynchus tshawytscha*) ESU, threatened Central Valley spring-run Chinook salmon (*O. tshawytscha*) ESU, threatened Central Valley steelhead (*O. mykiss*) DPS, and threatened southern DPS of North American green sturgeon (*Acipenser medirostris*).

Applications Received

TRPA requests a 10-year permit (15542) for take of juvenile and adult Central Valley steelhead while conducting fish monitoring surveys in lower Putah Creek, a tributary in the Sacramento River basin, California. The surveys are conducted under the auspices of the Lower Putah Creek Coordinating Committee (LPCCC) to monitor the annual fluctuations in the abundance, distribution, condition, and health of fishes in lower Putah Creek, and determine if flow management actions by the LPCCC are attaining desired goals. TRPA anticipates an annual non-lethal take of 200 juvenile (with an estimated total of 2 percent non-intentional mortality) and 2 adult steelhead. TRPA proposes to capture fish by boat electrofisher and dipnet; sample fish for species identification, tags, marks and finclips, lengths and weights; and release fish back into Putah Creek.

GCID requests a 5-year permit (15573) for monitoring activities associated with juvenile Sacramento River winter-run and Central Valley spring-run Chinook salmon, and Central Valley steelhead emigration on the Sacramento River at the GCID fish screen bypass channel

(river mile 206). Rotary screw-trap (RST) operations have been on-going at the GCID fish screen by the State of California from 1991 through 2009. GCID proposes continuous monitoring operations by RST, and the capture, identification and enumeration of fish to species. A subsample of 30 captured salmon will be anesthetized, measured, revived and released downstream from the trapping location. GCID anticipates an annual non-lethal take of up to 4,000 natural and 500 hatchery juvenile winter-run Chinook salmon (with an estimated 1 percent non-intentional mortality), 1,000 natural and 500 hatchery juvenile spring-run Chinook salmon (with an estimated 1 percent non-intentional mortality), 500 natural and 500 hatchery juvenile steelhead (with an estimated 1 percent non-intentional mortality), and 50 natural juvenile southern DPS green sturgeon (including an estimated .02 percent non-intentional mortality).

The University of California at Davis (UCD) requests a five-year permit (15926) for the possession and genotyping (single nucleotide polymorphism (SNP) analyses) of Sacramento River winter-run and Central Valley spring-run Chinook salmon and Central Valley steelhead tissues currently maintained in the California Department of Fish and Game Salmonid Tissue Archive and those to be collected in future non-lethal agency and research trapping activities. UCD anticipates possession of natural and hatchery-origin fish tissues representative of salmonid populations throughout the Central Valley, California. The results of this study will contribute to the genetic management and hatchery operations regarding Chinook salmon and steelhead reintroductions to the upper San Joaquin River system, with a focus on potential natural recolonization and effective population size of spring-run populations and a broad genetic diversity assessment.

The Natural Resource Scientists, Incorporated (NRSI) requests a 2-year permit (16083) for take of juvenile Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead, and southern DPS of green sturgeon while conducting site-specific research at five irrigation diversion outfall sites within the Sacramento River and Delta system, California. Entrained fish will be collected via fyke net, and sampled from March through January of each year to encompass the primary irrigation season. The research is part of an on-going investigation into developing criteria for prioritizing fish screening projects, and will correlate fish entrainment with the physical, hydraulic, and habitat variables at each diversion site. All fish will be identified as to species, enumerated, measured for length, and placed back into the canals; all entrained fish captured live will be returned to the river. Sampling at each diversion site will be performed continuously from March 1 through January 31 during the study period. NRSI requests authorization for an estimated annual non-lethal take of 1,227 juvenile winter-run Chinook salmon,1,341 juvenile spring-run Chinook salmon, 150 juvenile steelhead, and 145 juvenile green sturgeon. No indirect mortality is anticipated during fish capture and sampling activities carried out for the study.

Dated: December 9, 2010.

Therese Conant,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–31519 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Science Advisory Board; Notice of Public Meeting

AGENCY: Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of public meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the NOAA Science Advisory Board. The members will discuss and provide advice on issues outlined in the agenda below.

DATES: The meeting is scheduled for: Wednesday, December 22 from 11–12 p.m. Eastern Time.

ADDRESSES: Conference call. Public access is available at: NOAA, SSMC 3, Room 12836, 1315 East-West Highway, Silver Spring, MD.

FOR FURTHER INFORMATION CONTACT: Dr. Cynthia Decker, Executive Director, Science Advisory Board, NOAA, Rm. 11230, 1315 East-West Highway, Silver Spring, Maryland 20910. (Phone: 301–734–1156, Fax: 301–713–1459, E-mail: *Cynthia.Decker@noaa.gov*).

SUPPLEMENTARY INFORMATION: The Science Advisory Board (SAB) was established by a Decision Memorandum dated September 25, 1997, and is the only Federal Advisory Committee with responsibility to advise the Under Secretary of Commerce for Oceans and Atmosphere on strategies for research, education, and application of science to operations and information services. SAB activities and advice provide necessary input to ensure that National Oceanic and Atmospheric Administration (NOAA) science programs are of the highest quality and provide optimal support to resource management.

Matters To Be Considered: The agenda for the meeting is as follows:

Date and Time: Wednesday, December 22, 2010, 11 a.m.–12 p.m. Eastern Time.

Agenda

1. Consideration of the Report from the External Review of the Cooperative Institute for Limnology and Ecosystem Research.

Dated: December 9, 2010.

Mark E. Brown,

Chief Financial Officer-Chief Administrative Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2010–31399 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–KD–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA085

Endangered Species; File No. 14400

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that Channel Islands National Park, 1901 Spinnaker Drive, Ventura, CA 93001 [Responsible Party: Daniel Richards] has been issued a permit to take black abalone for purposes of scientific research and enhancement.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562) 980–4001; fax (562) 980–4018.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Colette Cairns, (301) 713–2289.

SUPPLEMENTARY INFORMATION: On August 27, 2009, notice was published in the **Federal Register** (74 FR 43679) that a request for a scientific research and enhancement permit to take black abalone (*Haliotis cracherodii*) had been submitted by the above-named organization. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

This permit authorizes the continued monitoring of black abalone, a species listed as endangered on February 13, 2009. The objective of this monitoring is to identify population trends through population counts and size distribution measurements. Monitoring would consist of only non-lethal take to measure abalone, and at selected sites, tag some individuals to determine survivorship and growth. This permit is valid for five years.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) Was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: December 9, 2010.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–31520 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA063

Takes of Marine Mammals Incidental to Specified Activities; Columbia River Crossing Project, Washington and Oregon

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

ACTION: Notice; receipt of application for letter of authorization; request for comments and information.

SUMMARY: NMFS has received a request from the Department of Transportation's Federal Transit Authority (FTA) and Federal Highway Administration (FHWA), on behalf of the Columbia River Crossing project (CRC), for authorization to take marine mammals incidental to bridge construction and demolition activities at the Columbia River and North Portland Harbor, Washington and Oregon, over the course of five years; approximately July 2013 through June 2018. Pursuant to regulations implementing the Marine Mammal Protection Act (MMPA), NMFS is announcing receipt of CRC's request for the development and implementation of regulations governing the incidental taking of marine mammals and inviting information, suggestions, and comments on CRC's application and request.

DATES: Comments and information must be received no later than January 14, 2011.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing e-mail comments is *ITP.Laws@noaa.gov.* Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 713–2289.

SUPPLEMENTARY INFORMATION:

Availability

A copy of CRC's application may be obtained by writing to the address specified above (*see* **ADDRESSES**), telephoning the contact listed above (*see* **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined "negligible impact" in 50 CFR 216.103 as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

On November 22, 2010, NMFS received a complete application from CRC requesting authorization for take of three species of marine mammals incidental to construction and demolition activities in the Columbia River and North Portland Harbor, Washington and Oregon. Portions of the project are anticipated to potentially last until March 2021; CRC has requested regulations to be effective for the period of five years from approximately July 2013 through June 2018. Marine mammals would be exposed to various operations, including noise from pile driving, demolition of existing structures, and the presence of construction-related vessels. Because the specified activities have the potential to take marine mammals present within the action area, CRC requests authorization to take, by Level B harassment, Steller sea lions (*Eumetopias jubatus*), California sea lions (*Zalophus californianus*), and harbor seals (*Phoca vitulina*).

Specified Activities

CRC is proposing a multimodal transportation project along a 5-mile section of the I–5 corridor connecting Vancouver, Washington and Portland, Oregon, including the following activities:

- Replacement of the existing Columbia River bridges with two new structures;
- Widening of the existing North Portland Harbor Bridge, and construction of three new structures across the harbor; and

• Demolition of existing Columbia River bridges.

In summary, the new Columbia River crossing will carry traffic on two separate pier-supported bridges and will include a new light rail transit (LRT) line and improved bicycle/pedestrian facilities, using a stacked alignment to reduce the number of in-water piers in the Columbia River by approximately one-third. CRC proposes six in-water pier complexes for a total of 12 piers for the Columbia River bridges.

CRC proposes to widen the existing I–5 southbound bridge over North Portland Harbor, and will add three new bridges adjacent to the existing bridges. Starting from the east, these structures will carry:

• A three-lane northbound collector-distributor (CD) ramp carrying local traffic;

• Northbound and southbound I–5 on the widened existing bridge across the North Portland Harbor;

• A southbound CD ramp carrying local traffic; and

• LRT combined with a bicycle/pedestrian path.

Each bridge will have four or five in-water bents, consisting of one to three drilled shafts. The permanent in-water piers of both the Columbia River and North Portland Harbor crossings will be constructed using drilled shafts, rather than impact-driven piles. However, the project will include numerous temporary in-water structures to support equipment and materials during the course of construction which may require the use of temporary impact-driven piles. These structures will include work platforms, work bridges, and tower cranes.

The existing Columbia River bridges will be demolished after the new Columbia River bridges have been constructed and after associated interchanges are operating. The existing Columbia River bridges will be demolished in two stages: (1) Superstructure demolition and (2) substructure demolition. In-water demolition will be accomplished either within cofferdams or with the use of diamond wire/wire saw. A full description of the activities proposed by CRC is described in the application.

Information Solicited

Interested persons may submit information, suggestions, and comments concerning CRC's request (*see* **ADDRESSES**). All information, suggestions, and comments related to CRC's request and NMFS' potential development and implementation of regulations governing the incidental taking of marine mammals by CRC will be considered by NMFS in developing, if appropriate, regulations governing the issuance of letters of authorization.

Dated: December 9, 2010.

James H. Lecky,

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

[FR Doc. 2010–31528 Filed 12–14–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Navy

Record of Decision for the U.S. Marine Corps East Coast Basing of the F–35B Aircraft

AGENCY: Department of the Navy, DoD.

ACTION: Record of decision.

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, 42 United States Code (U.S.C.) Section 4332(2)(c), the regulations of the Council on Environmental Quality (CEQ) for Implementing the Procedural Provisions of NEPA (40 Code of Federal Regulations [CFR] parts 1500–1508), the Department of the Navy (DoN) NEPA regulations (32 CFR part 775), and the Marine Corps Environmental Compliance and Protection Manual, which is Marine Corps Order P5090.2A with change 2 (MCO P5090.2A), the DoN announces its decision to base and operate 11 operational F–35B Joint Strike Fighter (JSF) squadrons (up to 16 aircraft per squadron, for a total of 176 aircraft) and one Pilot Training Center (PTC) (composed of two Fleet Replacement Squadrons [FRS]) (up to 20 aircraft per squadron, for a total of 40 aircraft) at two locations on the East Coast of the United States (U.S.). More specifically, the DoN has decided to implement Alternative 1, the Preferred Alternative, which includes basing three F–35B operational squadrons and the PTC at Marine Corps Air Station (MCAS) Beaufort in Beaufort, South Carolina, and eight operational squadrons at MCAS Cherry Point in Havelock, North Carolina. To support the basing action, the Marine Corps will: (1) Construct and/or renovate airfield facilities and infrastructure necessary to accommodate and maintain the F–35B squadrons; (2) change personnel to accommodate squadron staffing; and (3) conduct F–35B training operations to attain and maintain proficiency in the operational employment of the F–35B. The F–35B aircraft will replace 84 legacy Marine Corps F/A–18A/B/C/D Hornet and 68 AV–8B Harrier aircraft in the Second Marine Air Wing (2d MAW) and the 4th MAW. All practical means to avoid or minimize environmental impacts resulting from implementation of the Preferred Alternative have been adopted.

SUPPLEMENTARY INFORMATION: The complete text of the Record of Decision is available for public viewing on the project Web site at *http://www.usmcjsfeast.com* along with copies of the Final Environmental Impact Statement (EIS). For further information, contact the JSF East Coast EIS Project Manager, Environmental Planning & Conservation Division (Attn: Linda Blount); Naval Facilities Engineering Command Mid-Atlantic, Code EV21; 9742 Maryland Avenue, Z–144, 1st Floor; Norfolk, VA 23511; 757–341–0491.

Dated: December 9, 2010.

D. J. Werner,

Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2010–31469 Filed 12–14–10; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Record of Decision for the U.S. Marine Corps West Coast Basing of the F–35B Aircraft

AGENCY: Department of the Navy, DoD.

ACTION: Record of decision.

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, 42 United States Code (U.S.C.) Section 4332(2)(c), the regulations of the Council on Environmental Quality (CEQ) for Implementing the Procedural Provisions of NEPA (40 Code of Federal Regulations [CFR] parts 1500–1508), the Department of the Navy (DoN) NEPA regulations (32 CFR part 775), and the Marine Corps Environmental Compliance and Protection Manual, which is Marine Corps Order P5090.2A with change 2 (MCO P5090.2A), the DoN announces its decision to base and operate 11 operational F–35B Joint Strike Fighter (JSF) squadrons (up to 16 aircraft per squadron, for a total of 176 aircraft), and 1 F–35B Operational Test and Evaluation (OT&E) squadron (8 aircraft) on the West Coast of the United States (U.S.). More specifically, the DoN has decided to implement Alternative 1, the Preferred Alternative, which includes basing six F–35B operational squadrons at Marine Corps Air Station (MCAS) Miramar in San Diego, California, and five operational

squadrons plus one OT&E squadron at MCAS Yuma in Arizona. Each operational squadron will consist of up to 16 F–35B aircraft. To support the basing action, the DoN will: (1) Construct and/or renovate airfield facilities and infrastructure necessary to accommodate and maintain the F–35B squadrons; (2) change personnel to accommodate squadron staffing; and (3) conduct F–35B readiness and training operations to attain and maintain proficiency in the operational employment of the F–35B and special exercise operations. The Proposed Action also includes construction and operation of a new Auxiliary Landing Field (ALF) within the Goldwater Range, to accommodate Field Carrier Landing Practice for the F–35B. The F–35B aircraft will replace 126 legacy F/A–18A/B/C/D Hornet and 56 AV–8B Harrier aircraft in the Third Marine Air Wing (3D MAW) and 4th MAW. All practical means to avoid or minimize environmental impacts resulting from implementation of the Preferred Alternative have been adopted.

SUPPLEMENTARY INFORMATION: The complete text of the Record of Decision is available for public viewing on the project Web site at *http://www.usmcjsfwest.com* along with the Final Environmental Impact Statement (EIS). For further information, contact the JSF West EIS Project Manager, 1220 Pacific Highway, San Diego, California 92132–5190. Telephone 619–532–4742.

Dated: December 10, 2010.

D.J. Werner,

Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2010–31468 Filed 12–14–10; 8:45 am]

BILLING CODE 3810–FF–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 February 14, 2011.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. 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: December 10, 2010.

Darrin A. King,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: New.

Title of Collection: Impact Evaluation of Race to the Top (RTT) and School Improvement Grants (SIG).

OMB Control Number: 1850–NEW.

Agency Form Number(s): N/A.

Frequency of Responses: Once.

Affected Public: State, Local, or Tribal Government, State Educational Agencies, Local Educational Agencies.

Total Estimated Number of Annual Responses: 591.

Total Estimated Number of Annual Burden Hours: 2,083.

Abstract: This Office of Management and Budget (OMB) package requests clearance for activities to recruit 50 states and the District of Columbia, and up to 825 schools across an estimated 170 districts for inclusion in an evaluation of Race to the Top (RTT) and School Improvement Grants (SIG). The American Recovery and Reinvestment Act contained substantial funding for systemic education reform. This included $4.35 billion in RTT grants, which were awarded to 11 states and the District of Columbia based both on their education reform plans and their past success in creating the conditions for reform, and $3 billion in additional funding for SIG, which is aimed at implementing one of four school turnaround models (STMs) in the lowest-performing schools. The evaluation is designed to (1) study the implementation of RTT and SIG; (2) analyze the impact of SIG-funded STMs on student outcomes using a regression discontinuity design; (3) analyze the impact of receipt of RTT funds on student outcomes using an interrupted time series design; and (4) investigate the relationship between STM turnaround models (and strategies within those models) and student outcomes in low-performing schools. No data are being collected or analyzed as part of recruitment activities. A second OMB submission will request clearance for the evaluation's data collection, analysis, and reporting activities. This future package will include data collection forms, and burden estimates of the number of respondents and hours of response time.

Requests for 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 4468. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information

Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–31503 Filed 12–14–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Management of Energy and Water Efficiency in Federal Buildings: Availability of Guidance

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of availability.

SUMMARY: This notice of availability announces that the U.S. Department of Energy (DOE) Office of Energy Efficiency and Renewable Energy (EERE), Federal Energy Management Program (FEMP) is soliciting public comments on a draft guidance document regarding Federal agency implementation of energy and water efficiency requirements. The draft *Guidance for the Implementation and Follow-up of Identified Energy and Water Efficiency Measures in Covered Facilities* (*per 42 U.S.C. 8253 Subsection (f), Use of Energy and Water Efficiency Measures in Federal Buildings*) is available at: *http://www1.eere.energy.gov/femp/pdfs/draft_EISA_project_guidance.pdf*

DATES: Comments, data, and information regarding this draft guidance must be received by December 29, 2010.

ADDRESSES: Interested parties are encouraged to submit comments to Christopher Tremper, Federal Energy Management Program, via e-mail at *EISA-432-Guidance@ee.doe.gov* or via mail at: Christopher Tremper, Federal Energy Management Program, EE–2L, U.S. Department of Energy; 1000 Independence Ave., SW., Washington, DC 20585. DOE encourages respondents to submit comments electronically to ensure timely receipt.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher Tremper, U.S. Department of Energy Federal Energy Management Program, EE–2L, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586–7632, e-mail: *Chris.Tremper@ee.doe.gov.*Ms. Ami Grace-Tardy, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586–5709, e-mail: *Ami.Grace-Tardy@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: Section 432 of the Energy Independence and Security Act of 2007 (EISA) amends section 543 of the National Energy Conservation Policy Act, by adding a new subsection that describes Federal agency facility energy and water project management and benchmarking requirements, including:

- Designate covered facilities and assign facility energy managers for ensuring compliance of covered facilities subject to the requirements;
- Conduct comprehensive energy and water evaluations;
- Implement identified efficiency measures;
- Follow-up on implemented efficiency measures;
- Deploy and use web-based tracking system for covered facilities' energy use, evaluations, projects, follow-up and analysis;
- Benchmark metered buildings that are, or part of, covered facilities; and
- Disclose Federal agency progress in evaluating covered facilities, project implementation, follow-up status, and benchmarked building performance implementation status. (42 U.S.C. 8253(f)(4))

The draft *Guidance for the Implementation and Follow-up of Identified Energy and Water Efficiency Measures in Covered Facilities* (per 42 U.S.C. 8253 Subsection (f), *Use of Energy and Water Efficiency Measures in Federal Buildings*) provides guidance to Federal agencies pertaining to the implementation of energy and water efficiency measures identified and undertaken per Section 432 of EISA (42 U.S.C. 8253(f)(4) and (5)) and details how these activities fit into the comprehensive approach to Federal agency facility energy and water management.

This draft guidance is available at: http://www1.eere.energy.gov/femp/pdfs/draft_EISA_project_guidance.pdf. DOE will accept comments, data, and information regarding the draft guidance no later than the date specified in the **DATES** section.

More information on DOE's FEMP is available at: *http://www1.eere.energy.gov/femp/*

Issued in Washington, DC, on December 10, 2010.

Dr. Timothy D. Unruh,

Program Manager, DOE–EERE Federal Energy Management Program.

[FR Doc. 2010–31467 Filed 12–14–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Competing Preliminary Permit Applications Accepted for Filing and Soliciting Comments and Motions To Intervene

December 8, 2010

Lock+™ Hydro Friends Fund XXXVI.	Project No. 13733–000
FFP Missouri 8, LLC.	Project No. 13752–000
Solia 6 Hydro-electric, LLC.	Project No. 13768–000
Montgomery Hydro, LLC.	Project No. 13792–000

On May 18, 2010, Lock+™ Hydro Friends Fund XXXVI, FFP Missouri 8, LLC, and Solia 6 Hydroelectric, LLC, filed applications, and on May 19, 2010, Montgomery Hydro, LLC, filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower at the U.S. Army Corps of Engineers Montgomery Locks and Dam on the Ohio River near the town of Industry, in Beaver County, Pennsylvania. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

Descriptions of the proposed Montgomery Locks and Dam Projects: Lock+™ Hydro Friends Fund XXXVI's proposed project (Project No. 13733–000) would consist of: (1) Two lock frame modules 170 feet long, 40 feet high, and weighing 1.16 million pounds each, and containing 15 generating units with a total combined capacity of 54 megawatts (MW); (2) a 67-foot-high, 75-foot-long prefabricated concrete wall attached to pilings in the river to support each lock frame module; (3) a 25-foot-long, 50-foot-wide switchyard containing a transformer; and (4) a 2,000-foot-long, 69-kilovolt (kV) transmission line to an existing substation. The proposed project would have an average annual generation of 236.68 gigawatt-hours (GWh), which would be sold to a local utility.

Applicant Contact: Mr. Mark R. Stover, Hydro Green Energy LLC, 5090 Richmond Avenue #390, Houston, TX 77056; phone (877) 556–6566 x709.

FFP Missouri 8, LLC's proposed project (Project No. 13752–000) would consist of: (1) An excavated intake and

tailrace channel slightly longer and wider than the powerhouse; (2) a 200-foot-long, 250-foot-wide, 50-foot-high powerhouse containing three generating units having a total installed capacity of 50 MW; and (3) a 1,500-foot-long, ranging from 34.0 to 230-kV, transmission line. The proposed project would have an average annual generation of 220 GWh, which would be sold to a local utility.

Applicant Contact: Ms. Ramya Swaminathan, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930; phone (978) 283–2822.

Solia 6 Hydroelectric, LLC's proposed project (Project No. 13768–000) would consist of: (1) A 300-foot-long, 160-foot-wide excavated intake channel; (2) a 200-foot-long, 160-foot-wide excavated tailrace; (3) a 200-foot-long, 250-foot-wide, 50-foot-high concrete powerhouse containing three generating units with a combined capacity of 50 MW; and (4) a 1,600-foot-long transmission line. The proposed project would have an average annual generation of 220 GWh, which would be sold to a local utility.

Applicant Contact: Mr. Douglas Spaulding, P.E., Nelson Energy, 8441 Wayzata Blvd., Suite 101, Golden Valley, MN, 55426; phone (952) 544–8133.

Montgomery Hydro, LLC's proposed project (Project No. 13792–000) would consist of: (1) A 240-foot-long, excavated power canal; (2) a 165-foot-long excavated tailrace; (3) a powerhouse containing four 10-MW generating units having an estimated total capacity of 39.9 MW; (4) a switchyard; and (5) a 0.4-mile-long, 69.0-kV transmission line. The proposed project would have an average annual generation of 156 GWh, which would be sold to a local utility.

Applicant Contact: Mr. Brent Smith, Symbiotics LLC., P.O. Box 535, Rigby, ID 83442; phone (208) 745–0834.

FERC Contact: Gaylord Hoisington, (202) 502–6032. Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13733–000, 13752–000, 13768–000, or 13792–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31411 Filed 12–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Competing Preliminary Permit Applications Accepted for Filing and Soliciting Comments, and Motions To Intervene

December 8, 2010.

Lock+™ Hydro Friends Fund XLII.	Project No. 13739–000
FFP Missouri 10, LLC.	Project No. 13751–000
Braddock Hydro, LLC.	Project No. 13778–000

On May 18, 2010, Lock+™ Hydro Friends Fund XLII, FFP Missouri 10, LLC, and Braddock Hydro, LLC filed applications, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower at the U.S. Army Corps of Engineers Braddock Lock and Dam located on the Monongahela River in Alleghany County, Pennsylvania. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

Descriptions of the proposed Braddock Lock & Dam Projects: Lock+™ Hydro Friends Fund XLII's proposed project (Project No. 13739–000) would consist of: (1) One lock frame module 109 feet long, 40 feet high, and weighing 1.16 million pounds each, and containing 10 generating units a total combined capacity of 10 megawatts (MW); (2) a 38-foot-high, 75-foot-long prefabricated concrete wall attached to pilings in the river to support the lock frame module; (3) a 25-foot-long, 50-foot-wide switchyard containing a transformer; and (4) a 3,000-foot-long, 69-kilovolt (kv) transmission line to an existing substation. The proposed project would have an average annual generation of 43.83 gigawatts-hours (GWh), which would be sold to a local utility.

Applicant Contact: Mr. Mark R. Stover, Hydro Green Energy LLC, 5090 Richmond Avenue #390, Houston, TX 77056; phone (877) 556–6566 x709.

FFP Missouri 10, LLC's proposed project (Project No. 13751–000) would consist of: (1) An excavated intake and tailrace channel slightly longer and wider than the powerhouse; (2) an 85-foot-long, 160-foot-wide, 60-foot-high powerhouse containing two generating units having a total installed capacity of 6.6 MW; and (3) a proposed 3,300-foot-long, ranging from 34.0 to 230-kv transmission line. The proposed project would have an average annual generation of 39.0 GWh, which would be sold to a local utility.

Applicant Contact: Ms. Ramya Swaminathan, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930; phone (978) 283–2822.

Braddock Hydro, LLC's proposed project (Project No. 13778–000) would consist of: (1) A 460-foot-long, excavated power canal; (2) a 230-foot-long excavated tailrace; (3) a powerhouse containing three generating units having a total installed capacity of 13.2 MW; and (4) a 0.5-mile-long, 69.0-kv transmission line. The proposed project would have an average annual generation of 33.3 GWh, which would be sold to a local utility.

Applicant Contact: Mr. Brent Smith, Symbiotics LLC., P.O. Box 535, Rigby, ID 83442; phone (208) 745–0834.

FERC Contact: Gaylord Hoisington, (202) 502–6032.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of

intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13739–000, 13751–000, or 13778–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31413 Filed 12–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13738–000; Project No. 13761–000; Project No. 13770–000]

Lock+™ Hydro Friends Fund XXXVII; FFP Missouri 6, LLC; Solia 1 Hydroelectric, LLC; Notice of Competing Preliminary Permit Applications Accepted for Filing and Soliciting Comments, and Motions To Intervene

December 8, 2010.

On May 18, 2010, Lock+ Hydro Friends Fund XXXVII, FFP Missouri 6, LLC, and Solia 1 Hydroelectric, LLC, filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower at the U.S. Army Corps of Engineers Emsworth Back Channel Dam on the Ohio River in Allegheny County, Pennsylvania. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

Descriptions of the proposed Emsworth Back Channel Dam Projects: Lock+™ Hydro Friends Fund XXXVII's proposed project (Project No. 13738–000) would consist of: (1) Two lock frame modules 109 feet long, 40 feet high, and weighing 1.16 million pounds each, and containing 10 generating units each with a total combined capacity of 36 megawatts (MW); (2) each lock frame module would be housed between two 30-foot-high and 75-foot-long prefabricated concrete walls; (3) a 25-foot-long, 50-foot-wide switchyard containing a transformer; and (4) a 4,000-foot-long, 69-kilovolt (kV) transmission line to an existing substation. The proposed project would have an average annual generation of 157.78 gigawatt-hours (GWh), which would be sold to a local utility.

Applicant Contact: Mr. Mark R. Stover, Hydro Green Energy LLC, 5090 Richmond Avenue #390, Houston, TX 77056; phone (877) 556–6566 x709.

FFP Missouri 6, LLC's proposed project (Project No. 13761–000) would consist of: (1) An excavated intake and tailrace channel slightly longer and wider than the powerhouse; (2) a 200-foot-long, 200-foot-wide, 50-foot-high powerhouse containing five turbine generator units having a total installed capacity of 32.7 MW; and (3) a 13,300-foot-long, transmission line ranging from 34.0 to 230-kV. The proposed project would have an average annual generation of 141.3 GWh, which would be sold to a local utility.

Applicant Contact: Ms. Ramya Swaminathan, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930; phone (978) 283–2822.

Solia 1 Hydroelectric, LLC's proposed project (Project No. 13770–000) would consist of: (1) A 300-foot-long, 160-foot-wide excavated intake channel; (2) a 200-foot-long, 160-foot-wide excavated tailrace; (3) a 200-foot-long, 200-foot-wide, 50-foot-high concrete powerhouse containing two generating units with a combined capacity of 32 MW; and (4) a 2.47-mile-long transmission line ranging from 34.0 to 230-kV. The proposed project would have an average annual generation of 141.3 GWh, which would be sold to a local utility.

Applicant Contact: Mr. Douglas Spaulding, P.E., Nelson Energy, 8441 Wayzata Blvd., Suite 101, Golden Valley, MN, 55426; phone (952) 544–8133.

FERC Contact: Gaylord Hoisington, (202) 502–6032.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 Days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13738–000, 13761–000, or 13770–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31412 Filed 12–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13742–000; Project No. 13757–000; Project No. 13764–000; Project No. 13786–000]

Lock+™ Hydro Friends Fund XXXIV; FFP Missouri 5, LLC; Solia 2 Hydroelectric, LLC; Emsworth Hydro, LLC; Notice of Competing Preliminary Permit Applications Accepted for Filing and Soliciting Comments, and Motions to Intervene

December 8, 2010.

On May 18, 2010, Lock+ Hydro Friends Fund XXXIV, FFP Missouri 5, LLC, and Solia 2 Hydroelectric, LLC, filed applications, and on May 19, 2010, Emsworth Hydro, LLC, filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower at the U.S. Army Corps of Engineers Emsworth Locks and Dam on the Ohio River near the town of Emsworth, in Allegheny County, Pennsylvania. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

Descriptions of the proposed Emsworth Lock and Dam Projects:

Lock+$_{TM}$ Hydro Friends Fund XXXIV's proposed project (Project No. 13742–000) would consist of: (1) Two lock frame modules 109 feet long, 40 feet high, and weighing 1.16 million pounds each, and containing 10 generating units having a total combined capacity of 36 megawatts (MW); (2) two 30-foot-high, 75-foot-long prefabricated concrete walls attached to pilings in the river; (3) a 25-foot-long, 50-foot-wide switchyard having a transformer; and (4) a 1,500-foot-long, 69-kilovolt (kV) transmission line to an existing substation. The proposed project would have an average annual generation of 157.79 gigawatt-hours (GWh), which would be sold to a local utility.

Applicant Contact: Mr. Mark R. Stover, Hydro Green Energy LLC, 5090 Richmond Avenue #390, Houston, TX 77056; phone (877) 556–6566 x709.

FFP Missouri 5, LLC's proposed project (Project No. 13757–000) would consist of: (1) An excavated intake and tailrace channel slightly longer and wider than the powerhouse; (2) a 200-foot-long, 200-foot-wide, 50-foot-high powerhouse containing five generating units having a total installed capacity of 32.7 MW; and (3) a 1,500-foot-long, ranging from 34.0 to 230–kV, transmission line. The proposed project would have an average annual generation of 141.3 GWh, which would be sold to a local utility.

Applicant Contact: Ms. Ramya Swaminathan, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930; phone (978) 283–2822.

Solia 2 Hydroelectric, LLC's proposed project (Project No. 13764–000) would consist of: (1) A 300-foot-long, 160-foot-wide excavated intake channel; (2) a 200-foot-long, 160-foot-wide excavated tailrace; (3) a 200-foot-long, 200-foot-wide, 50-foot-high concrete powerhouse containing two generating units with a combined capacity of 32 MW; and (4) a 11,500-foot-long transmission line. The proposed project would have an average annual generation of 140.0 GWh, which would be sold to a local utility.

Applicant Contact: Mr. Douglas Spaulding, P.E., Nelson Energy, 8441 Wayzata Blvd., Suite 101, Golden Valley, MN, 55426; phone (952) 544–8133.

Emsworth Hydro, LLC's proposed project (Project No. 13786–000) would consist of: (1) A 240-foot-long, excavated power canal; (2) a 165-foot-long, excavated tailrace; (3) a powerhouse containing four 7.8–MW generating units having an estimated total capacity of 31 MW; (4) a switchyard; and (5) a 1.6-mile-long, 69.0–kV transmission line. The proposed project would have an average annual generation of 116.7 GWh, which would be sold to a local utility.

Applicant Contact: Mr. Brent Smith, Symbiotics LLC., P.O. Box 535, Rigby, ID 83442; phone (208) 745–0834.

FERC Contact: Gaylord Hoisington, (202) 502–6032.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13742–000, 13757–000, 13764–000, or 13786–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31414 Filed 12–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13744–000; Project No. 13755–000]

Lock+™ Hydro Friends Fund XXXVIII, FFP Missouri 12, LLC, et al.; Notice of Competing Preliminary Permit Applications Accepted for Filing and Soliciting Comments, and Motions To Intervene

December 8, 2010.

Lock+™ Hydro Friends Fund XXXVIII.	Project No. 13744–000
FFP Missouri 12, LLC	Project No. 13755–000
Allegheny 2 Hydro, LLC.	Project No. 13774–000
Three Rivers Hydro, LLC.	Project No. 13780–000

On May 18, 2010, Lock+™ Hydro Friends Fund XXXVIII, FFP Missouri 12, LLC, Allegheny 2 Hydro, LLC, and Three Rivers Hydro, LLC, filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower at the U.S. Army Corps of Engineers Allegheny Lock and Dam 2 on the Allegheny River near the town of Sharpsburg, in Allegheny County, Pennsylvania. The sole purpose of a preliminary permit, if issued, is to grant

the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

Descriptions of the proposed Allegheny River Lock and Dam 2 Projects:

Lock+™ Hydro Friends Fund XXXVIII's proposed project (Project No. 13744–000) would consist of: (1) One lock frame module 109 feet long, 40 feet high, and weighing 1.16 million pounds each, and containing 10 generating units with a total combined capacity of 10 megawatts (MW); (2) a 63-foot-high, 75-foot-long prefabricated concrete wall attached to pilings in the river to support the lock frame module; (3) a 25-foot-long, 50-foot-wide switchyard containing a transformer; and (4) a 9,000-foot-long, 69-kilovolt (kV) transmission line to an existing substation. The proposed project would have an average annual generation of 43.83 gigawatt-hours (GWh), which would be sold to a local utility.

Applicant Contact: Mr. Mark R. Stover, Hydro Green Energy LLC, 5090 Richmond Avenue #390, Houston, TX 77056; phone (877) 556–6566 x709.

FFP Missouri 12, LLC's proposed project (Project No. 13755–000) would consist of: (1) An excavated intake and tailrace channel slightly longer and wider than the powerhouse; (2) a 125-foot-long, 160-foot-wide, 60-foot-high powerhouse containing three generating units having a total installed capacity of 12 MW; and (3) a 10,000-foot-long, ranging from 34.0 to 230-kV, transmission line. The proposed project would have an average annual generation of 66 GWh, which would be sold to a local utility.

Applicant Contact: Ms. Ramya Swaminathan, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930; phone (978) 283–2822.

Allegheny 2 Hydro, LLC's proposed project (Project No. 13774–000) would consist of: (1) A 200-foot-long, excavated power canal; (2) a 200-foot-long tailrace; (3) a powerhouse containing three 5.4-MW generating units having an estimated total capacity of 16.1 MW; (4) a switchyard; and (5) a 2-mile-long, 69.0-kV transmission line. The proposed project would have an average annual generation of 64.7 GWh, which would be sold to a local utility.

Applicant Contact: Mr. Brent Smith, Symbiotics LLC., P.O. Box 535, Rigby, ID 83442; phone (208) 745–0834.

Three Rivers Hydro, LLC's proposed project (Project No. 13780–000) would consist of: (1) An 85-foot-long, 100-foot-wide, 14-foot-deep excavated power canal; (2) a 95-foot-long, 100-foot-wide, 10-foot-deep excavated tailrace; (3) a 100-foot-long, 90-foot-wide, 45-foot-high concrete powerhouse containing three generating units having a total installed capacity of 12 MW; and (4) a 5,000-foot-long, 23-kV transmission line. The proposed project would have an average annual generation of 66 GWh, which would be sold to a local utility.

Applicant Contact: Mr. Cornelius J. Collins, Three Rivers Hydro, LLC, 316 South Clinton Street, Suite 4, Syracuse, NY 13202; phone (315) 477–9914.

FERC Contact: Gaylord Hoisington, (202) 502–6032.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13744–000, 13755–000, 13774, or 13780–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31416 Filed 12–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13890–000]

Dodge Mill Realty, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 8, 2010.

On December 3, 2010, Dodge Mill Realty, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Dodgeville Dam Hydroelectric Project to be located on the 10 Mile River near the Town of Attleboro, in Bristol County, Massachusetts. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of: (1) The existing 20-foot-high, 400-foot-long Dodgeville dam equipped with a 40-foot-long spillway; (2) the existing 23-acre Dodgeville pond with a normal pool elevation of 101.5 feet NGVD; (3) a new 4-foot-wide, 7-foot-high intake structure equipped with a new slide gate and trashrack; (4) a new 4-foot-diameter, 50-foot-long penstock; (5) a new powerhouse with four turbine generating units with a total installed capacity of 56 kilowatts; and (6) a new 220 volt, 300-foot-long transmission line. The project would produce an estimated average annual generation of about 236 megawatt-hours.

Applicant Contact: Gary Demers, 453 South Main Street, Attleboro, MA 02703, phone: (508) 222–2181 or (508) 369–5955.

FERC Contact: Tom Dean (202) 502–6041.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit

brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13890) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31418 Filed 12–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13884–000]

Pennamaquan Tidal Power, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 8, 2010.

On November 22, 2010, Pennamaquan Tidal Power, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Pennamaquan Tidal Power Plant Project to be located on the Pennamaquan River and Cobscook Bay, Washington County, Maine. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of: (1) A 692-acre tidal area of the Pennamaquan River and Cobscook Bay; (2) two new impervious core, sand, and crushed rock embankments, one 689-feet-long and another 164-feet-long; (3) a new 505-foot-long concrete modular wall panel extending about 11 feet above mean sea level consisting of: (a) New concrete support columns; (b) a new boat lift; and (c) a new powerhouse with four reversible bulb generating units with a total capacity of 21.1 megawatts; and (4) a new 35 kilovolt, 2.5-mile-long transmission line. The project would produce an estimated average annual generation of about 66,400 megawatt-hours.

Applicant Contact: Andrew Landry, 45 Memorial Circle, PO Box 1058, Augusta, ME 04332, *phone:* (207) 791–3191, e-mail: *alandry@preti.com.*

FERC Contact: Tom Dean (202) 502–6041.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13884) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31417 Filed 12–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Lock+™ Hydro Friends Fund XLVII, FFP Missouri 16, LLC, et al.; Notice of Competing Preliminary Permit Applications Accepted for Filing and Soliciting Comments, and Motions To Intervene

December 8, 2010.

Lock+™ Hydro Friends Fund XLVII.	Project No. 13743–000.
FFP Missouri 16, LLC	Project No. 13753–000.
Solia 7 Hydroelectric, LLC.	Project No. 13769–000.
Three Rivers Hydro, LLC.	Project No. 13785–000.
Opekiska Hydro, LLC	Project No. 13791–000.

On May 18, 2010, Lock+ Hydro Friends Fund XLVII, FFP Missouri 16, LLC, Solia 7 Hydroelectric, LLC, and Three Rivers Hydro, LLC, filed applications, and on May 19, 2010, Opekiska Hydro, LLC, filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower at the U.S. Army Corps of Engineers Opekiska Lock and Dam on the Monongahela River in Monongahela County, West Virginia. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

Descriptions of the proposed Opekiska Lock and Dam Projects:

Lock+™ Hydro Friends Fund XLVII's proposed project (Project No. 13743–000) would consist of: (1) One lock frame module 109 feet long, 40 feet high, and weighing 1.16 million pounds each, and containing 10 generating units with a total combined capacity of 20 megawatts (MW); (2) a 57-foot-high, 75-foot-long prefabricated concrete wall attached to pilings in the river to support the lock frame module; (3) a 25-foot-long, 50-foot-wide switchyard containing a transformer; and (4) a 4,000-foot-long, 69-kilovolt (kV) transmission line to an existing substation. The proposed project would have an average annual generation of 87.66 gigawatt-hours (GWh), which would be sold to a local utility.

Applicant Contact: Mr. Mark R. Stover, Hydro Green Energy LLC, 5090

Richmond Avenue #390, Houston, TX 77056; phone (877) 556–6566 x709.

FFP Missouri 16, LLC's proposed project (Project No. 13753–000) would consist of: (1) An excavated intake and tailrace channel slightly longer and wider than the powerhouse; (2) a 160-foot-long, 45-foot-wide, 60-foot-high powerhouse containing one generating unit having a total installed capacity of 10 MW; and (3) a 4,900-foot-long, ranging from 34.0 to 230-kV, transmission line. The proposed project would have an average annual generation of 42.0 GWh, which would be sold to a local utility.

Applicant Contact: Ms. Ramya Swaminathan, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930; phone (978) 283–2822.

Solia 7 Hydroelectric, LLC's proposed project (Project No. 13769–000) would consist of: (1) A 300-foot-long, 160-foot-wide excavated intake channel; (2) a 200-foot-long, 160-foot-wide excavated tailrace; (3) a 45-foot-long, 160-foot-wide, 60-foot-high concrete powerhouse containing one generating unit with a capacity of 10 MW; and (4) a 4,900-foot-long, transmission line ranging from 34.0 to 230-kV. The proposed project would have an average annual generation of 42 GWh, which would be sold to a local utility.

Applicant Contact: Mr. Douglas Spaulding, P.E., Nelson Energy, 8441 Wayzata Blvd., Suite 101, Golden Valley, MN, 55426; phone (952) 544–8133.

Three Rivers Hydro, LLC's proposed project (Project No. 13785–000) would consist of: (1) A 75-foot-long, 65-foot-wide, 20-foot-deep excavated power canal; (2) a 55-foot-long, 65-foot-wide, 8-foot-deep excavated tailrace; (3) a 45-foot-long, 110-foot-wide, 40-foot-high concrete powerhouse containing two generating units having a total installed capacity of 4.5 MW; and (4) a 4,900-foot-long, 23-kV transmission line. The proposed project would have an average annual generation of 24.0 GWh, which would be sold to a local utility.

Applicant Contact: Mr. Cornelius J. Collins, Three Rivers Hydro, LLC, 316 South Clinton Street, Suite 4, Syracuse, NY 13202; phone (315) 477–9914.

Opekiska Hydro, LLC's proposed project (Project No. 13791–000) would consist of: (1) A 125-foot-long, excavated power canal; (2) a 190-foot-long excavated tailrace; (3) a powerhouse containing a 4.2 MW generating unit; (4) a switchyard; and (5) a 0.8-mile-long, 69.0-kV transmission line. The proposed project would have an average annual generation of 13.9 GWh, which would be sold to a local utility.

Applicant Contact: Mr. Brent Smith, Symbiotics LLC., P.O. Box 535, Rigby, ID 83442; phone (208) 745–0834.

FERC Contact: Gaylord Hoisington, (202) 502–6032.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13743–000, 13753–000, 13769–000, 13785–000, or 13791–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31415 Filed 12–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Proposed Restricted Service List for a Programmatic Agreement for Managing Properties Included in or Eligible for Inclusion in the National Register of Historic Places

December 8, 2010.

Uniontown Hydro, and Newburgh Hydro, LLC	Project No. 12958–001 and Project No. 12962–001—Kentucky and Indiana Uniontown Hydroelectric Project and Newburgh Hydroelectric Project.

Rule 2010 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR section 385.2010, provides that, to eliminate unnecessary expense or improve administrative efficiency, the Secretary may establish a restricted service list for a particular phase or issue in a proceeding. The restricted service list should contain the names of persons on the service list who, in the judgment of the decisional authority establishing the list, are active participants with respect to the phase or issue in the proceeding for which the list is established.

The Commission staff is consulting with the Kentucky State Historic Preservation Officer (hereinafter, SHPO), the Indiana SHPO, and the Advisory Council on Historic Preservation (hereinafter, Advisory Council) pursuant to the Advisory Council's regulations, 36 CFR part 800, implementing section 106 of the National Historic Preservation Act, *as amended,* (16 U.S.C. section 470 f), to prepare a Programmatic Agreement for managing properties included in, or eligible for inclusion in, the National Register of Historic Places at the Uniontown Hydroelectric Project and the Newburgh Hydroelectric Project.

The Programmatic Agreement, when executed by the Commission, the Kentucky SHPO, the Indiana SHPO, and the Advisory Council, would satisfy the Commission's section 106 responsibilities for all individual undertakings carried out in accordance with the license until the license expires or is terminated (36 CFR section 800.13[e]). The Commission's responsibilities pursuant to section 106

for the project would be fulfilled through the Programmatic Agreement, which the Commission staff proposes to draft in consultation with certain parties listed below.

Uniontown Hydro, LLC and Newburgh Hydro, LLC, as the applicants for Project Nos. 12958–001 and 12962–001, respectively, are invited to participate in consultations to develop the Programmatic Agreement and to sign as concurring parties to the Programmatic Agreement. For purposes of commenting on the Programmatic Agreement, we propose to restrict the service list for Project Nos. 12958–001 and 12962–001 as follows:

John Fowler, Executive Director, Advisory Council on Historic Preservation, The Old Post Office Building, Suite 803, 1100 Pennsylvania Avenue, NW., Washington, DC 20004.

Jill A. McNutt, Kentucky Heritage Council, 300 Washington Street, Frankfort, KY 40601.

Phillip Johnson, Kentucky Heritage Council, 300 Washington Street, Frankfort, KY 40601.

Cathy Draeger-Williams, Indiana Division of Historic Preservation & Archaeology, 402 W. Washington Street, W274, Indianapolis, IN 46204.

Chad Slider, Indiana Division of Historic Preservation & Archaeology, 402 W. Washington Street, W274, Indianapolis, IN 46204.

Chairman Ron Sparkman, Shawnee Tribe P.O. Box 189, Miami, OK 74355

Governor Scott Miller, Absentee Shawnee Tribe, 2025 S. Gordon Cooper Drive, Shawnee, OK 74801.

Chief Thomas E. Gamble, Miami Tribe of Oklahoma, P.O. Box 1326, Miami, OK 74355.

Chief John P. Froman, Peoria Tribe of Indians of Oklahoma, P.O. Box 1527, Miami, OK 74355.

Chief Michell Hicks, The Eastern Band of Cherokee Indians, P.O. Box 455, Cherokee, NC 28719.

Governor Bill Anoatubby, Chickasaw Nation, P.O. Box 1548. Ada, OK 74821.

Principal Chief Chad Smith, Cherokee Nation of Oklahoma, P.O. Box 948, Tahlequah, OK 74465.

Dr. James Kardatzke, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, TN 37214.

Chief Glenna J. Wallace, Eastern Shawnee Tribe of Oklahoma, P.O. Box 350, Seneca, MO 64865.

Ken Lamkin or Representative, U.S. Army Corps of Engineers, P.O. Box 59, Louisville, KY 40201–0059.

Erik Steimle or Representative, Symbiotics, 2950 SE Stark Street, Suite 110, Portland, OR 97214.

Any person on the official service list for the above-captioned proceedings may request inclusion on the restricted service list, or may request that a restricted service list not be established, by filing a motion to that effect within 15 days of this notice date. An original plus seven copies of any such motion must be filed with the Secretary of the Commission (888 First Street, NE., Washington, DC 20426) and must be served on each person whose name appears on the official service list. If no such motions are filed, the restricted service list will be effective at the end of the 15-day period. Otherwise, a further notice will be issued ruling on the motion.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31419 Filed 12–14–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2003–0004; FRL–8857–2]

Access to Confidential Business Information by Science Applications International Corporation and Its Identified Subcontractors

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor, Science Applications International Corporation (SAIC) of San Diego, CA, and Its Identified Subcontractors, to access information which has been submitted to EPA under all sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be Confidential Business Information (CBI).

DATES: Access to the confidential data occurred December 1, 2010.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Pamela Moseley, Information Management Division (7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8956; fax number: (202) 564–8955; e-mail address: *moseley.pamela@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this notice apply to me?

This action is directed to the public in general. This action may, however, be of interest to all who manufacture, process, or distribute industrial chemicals. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2003–0004. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

II. What action is the agency taking?

Under EPA contract number GS–35F–4461G, Task Order Number 1668, contractors SAIC of 10260 Campus Point Drive, San Diego, VA; Federated IT, Inc., of 1200 G Street, NW., Suite 800, Washington, DC; Intervise Consultants, Inc., of 10110 Molecular Drive, Suite 100, Rockville, MD; and Premier Technical Services of 312 Main Street, Luray, VA, will assist the Office of Pollution Prevention and Toxics (OPPT) in providing system

administrative support for servers, storage, and other infrastructure hosting TSCA CBI data. This includes support for servers, operating systems, and utilities such as anti-virus and backup software. The contractors shall also support devices located in the CBI and Administrative LANs in Washington, DC, and the National Computer Center located in Research Triangle Park, NC. The support team will be based in Research Triangle Park, NC, and will be supplemented by or near on-site resources in Washington, DC.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number GS–35F–4461G, Task Order Number 1668, SAIC and Its Identified Subcontractors will require access to CBI submitted to EPA under all sections of TSCA to perform successfully the duties specified under the contract. SAIC and Its Identified Subcontractors' personnel will be given access to information submitted to EPA under all sections of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA may provide SAIC and Its Identified Subcontractors access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Headquarters and facilities at Research Triangle Park, NC, in accordance with EPA's TSCA CBI Protection Manual.

Access to TSCA data, including CBI, will continue until September 30, 2016. If the contract is extended, this access will also continue for the duration of the extended contract without further notice.

SAIC and Its Identified Subcontractors' personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

List of Subjects

Environmental protection, Confidential business information.

Dated: December 9, 2010.

Matthew Leopard,

Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2010–31492 Filed 12–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OEI–2010–0746; FRL–9239–5]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Confidentiality Rules (Renewal); EPA ICR No. 1665.10, OMB Control No. 2020–0003

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before January 18, 2011.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OEI–2010–0746 to (1) EPA online using *www.regulations.gov* (our preferred method), by e-mail to *oei.docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460 and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Larry F. Gottesman, National Freedom of Information Act Officer, Collection Strategies Division, Office of Information Collection, Mail Code 2822T, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: 202–566–2162; fax number: 202–566–2147; e-mail address: *gottesman.larry@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On September 28, 2010, (75 FR 59708), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID. No. EPA–HQ–OEI–2010–0746, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Office of Environmental Information Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Office of Environmental Information Docket is 202–566–0219.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: Confidentiality Rules (Renewal).

ICR numbers: EPA ICR No. 1665.10, OMB Control No. 2020–0003.

ICR Status: This ICR is scheduled to expire on December 31, 2010. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: In the course of administering environmental protection statutes, EPA collects data from thousands of facilities in many sectors of the U.S. economy. In many cases, industry marks the data it submits to EPA as CBI. In addition, businesses

submit information to EPA without the Agency requesting the information. EPA established the procedures described in 40 CFR part 2, subparts A and B, to protect the confidentiality of information as well as the rights of the public to obtain access to information under the Freedom of Information Act (FOIA). In accordance with these regulations, when EPA finds it necessary to make a final confidentiality determination (e.g., in response to a FOIA request or in the course of rulemaking or litigation), or in advance confidentiality determination, it shall notify the affected business and provides an opportunity to comment (i.e., to submit a substantiation of confidentiality claim). This ICR relates to the collection of information that will assist EPA in determining whether previously submitted information is entitled to confidential treatment.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1.5 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Entities potentially affected by this action are businesses and other for-profit companies.

Estimated Number of Respondents: 1,320.

Frequency of Response: 1 per year.

Estimated Total Annual Hour Burden: 1,992.30 hours.

Estimated Total Annual Cost: $88,825.25 includes $0 annualized capital or O&M costs.

Changes in the Estimates: There has been a decrease of 10 hours in the estimated burden currently identified in the OMB Inventory of Approved ICR Burdens.

Dated: December 9, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–31481 Filed 12–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0012; FRL–8853–1]

Notice of Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the Agency's receipt of several initial filings of pesticide petitions proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before January 14, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to the docket ID number and the pesticide petition number of interest as shown in the body of this document. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line 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 regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* 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, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: A contact person, with telephone number and e-mail address, is listed at the end of each pesticide petition summary. You may also reach each contact person by mail at Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or

pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the pesticide petition summary of interest.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the agency taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petitions described in this notice contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this notice, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

New Tolerances

1. *PP* OE7788. (EPA–HQ–OPP–2010–0865). BASF Corporation, P.O. Box 13528, Research Triangle Park, NC 27709, proposes to establish a tolerance in 40 CFR part 180 for residues of the herbicide tepraloxydim, (2-[1-[[[(2*E*)-3-chloro-2-propenyl]oxy]imino]propyl]-3-hydroxy-5-(tetrahydro-2*H*-pyran-4-yl)-cyclohexene-1-one) and its metabolites convertible to GP (3- (tetrahydropyran-4-yl)pentane-1,5-dioic acid) and OH–GP (3-hydroxy-3-(tetrahydropyran-4-yl)pentane-1,5-dioic acid), calculated as tepraloxydim, in or on pea and bean, dried shelled, except soybean, subgroup 6C at 0.10 parts per million (ppm); and sunflower, subgroup 20B at 0.25 ppm for imported commodities. The analytical method involves extraction, concentration, precipitation, centrifugation/filtration, oxidation, partition, and clean-up. Samples are then analyzed by gas chromatography-mass spectrometry (GC/MS) (selected ion monitoring). The limit of quantitation (LOQ) is 0.05 ppm for each analyte, parent and metabolite. *Contact:* Susan Stanton, (703) 305–5218; *e-mail address: stanton.susan@epa.gov.*

2. *PP* 0E7772. (EPA–HQ–OPP–2010–0879). Cheminova A/S, c/o Cheminova, Inc., 1600 Wilson Blvd., Suite 700, Arlington, VA 22209–2510, proposes to establish a tolerance in 40 CFR part 180 for residues of the fungicide flutriafol, [(±)-α-(2-fluorophenyl)-α-(4-fluorophenyl)-1*H*-1,2,4-triazole-1-ethanol], including its metabolites and degradates, in or on banana, whole (import tolerance) at 0.50 ppm. Adequate enforcement analytical methods for determining flutriafol in or on appropriate raw agricultural commodities and processed commodities are available for the established and proposed tolerances. *Contact:* Tamue L. Gibson, (703) 305–9096; *e-mail address: gibson.tamue@epa.gov.*

3. *PP* 0F7737. (EPA–HQ–OPP–2010–0864). Isagro S.p.A., 430 Davis Drive, Suite 240, Morrisville, NC 27560, proposes to establish a tolerance in 40 CFR part 180 for residues of the fungicide tetraconazole, 1-[2-(2,4-dichlorophenyl)-3-(1,1,2,2-tetrafluoroethoxy)propyl]-1*H*-1,2,4-triazole, in or on corn; field, forage; field, grain; field, stover; pop, grain; and pop, stover at 1.0, 0.01, 1.5, 0.01 and 1.5 ppm, respectively. Adequate enforcement methodology (capillary gas chromatography with electron capture detector (GC/ECD)) is available to enforce the tolerance expression. An

additional new enforcement method using liquid chromatography/MS/MS (LC/MS/MS) detection has been submitted to the Agency. *Contact:* Lisa Jones, (703) 308–9424; *e-mail address: jones.lisa@epa.gov.*

4. *PP* 0F7750. (EPA–HQ–OPP–2010–0845). Bayer CropScience, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709, proposes to establish a tolerance in 40 CFR part 180 for the combined residues of the herbicide isoxaflutole, 5-cyclopropyl-4-(2-methylsulfonyl-4-trifluoromethylbenzoyl) isoxazole and its metabolite 1-(2-methylsulfonyl-4-trifluoromethylphenyl)-2-cyano-3-cyclopropyl propane-1,3-dione (RPA 202248), calculated as the parent compound, in or on soybean at 0.05 ppm; and soybean, aspirated grain fractions at 0.25 ppm. Bayer CropScience has submitted a method description and validation for an LC/MS/MS (CAL study #019–03) for use in corn and rotational crops. This method is the proposed enforcement method for all crops. A modification of this method, IS–004–P10–02, was developed and validated for use in soybean field trials. *Contact:* James M. Stone, (703) 305–7391; *e-mail address: stone.james@epa.gov.*

5. *PP* 0F7764. (EPA–HQ–OPP–2010–0866). Bayer CropScience, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709, proposes to establish a tolerance in 40 CFR part 180 for residues of the fungicide fenamidone, (4*H*-Imidazol-4-one, 3,5-dihydro-5-methyl-2-(methylthio)-5-phenyl-3 (phenylamino)-, (*S*)-), in or on grain, cereal, group 15 (except rice) at 0.1 ppm; grain, forage, group16 (except rice) at 0.3 ppm; and grain, stover, group 16 (except rice) at 0.5 ppm. Although residue levels approaching the proposed tolerances are unlikely, independently validated enforcement methods LC/MS/MS are available for determining residues of fenamidone and relevant metabolites in rotational crops. *Contact:* RoseMary Kearns, (703) 305–5611; *e-mail address: kearns.rosemary@epa.gov.*

6. *PP* 0F7768. (EPA–HQ–OPP–2010–0849). Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419, proposes to establish a tolerance in 40 CFR part 180 for residues of the herbicide fluazifop-p-butyl, butyl(*R*)-2-[4-[[5-(trifluoromethyl)-2-pyridinyl]oxy]phenoxy]propanoate, and the free and conjugated forms of the resolved isomer of fluazifop, (*R*)-2-[4-[[5-(trifluoromethyl)-2-pyridinyl]oxy]phenoxy]propanoic acid, expressed as fluazifop, in or on cotton, undelinted seed at 0.9 ppm; and cotton, gin byproducts at 0.8 ppm. Syngenta has developed and validated analytical methodology for enforcement purposes. An extensive database of method validation data using this method on various crop commodities is available. *Contact:* James M. Stone, (703) 305–7391; *e-mail address: stone.james@epa.gov.*

7. *PP* 0F7770. (EPA–HQ–OPP–2010–0876). Cheminova A/S, c/o Cheminova, Inc., 1600 Wilson Blvd., Suite 700, Arlington, VA 22209–2510, proposes to establish rotational crop tolerances in 40 CFR part 180 for the indirect or inadvertent residues of the fungicide flutriafol, [(±)-α-(2-fluorophenyl)-α-(4-fluorophenyl)-1*H*-1,2,4-triazole-1-ethanol], including its metabolites and degradates, in or on sweet corn, field corn and cotton raw agricultural commodities (corn, sweet, forage at 0.05 ppm; corn, sweet, stover at 0.09 ppm; corn, sweet, kernels plus cob with husks removed at 0.01 ppm; corn, field, forage at 0.10 ppm; corn, field, stover at 0.07 ppm; corn, field, grain at 0.01 ppm; cotton, undelinted seed at 0.01 ppm; and cotton, gin byproducts at 0.05 ppm) grown in fields previously planted with soybeans that were treated with flutriafol. Residues of flutriafol in sweet corn, field corn and cotton raw agricultural commodity products can be determined by GC with mass selective detection (GC/MSD). The method was validated for determination of residues of flutriafol in sweet corn, field corn and cotton raw agricultural commodities. Residues of flutriafol in animal matrices can be determined by GC/MSD. The method was validated for determination of residues of flutriafol in milk, muscle, kidney, liver and egg. *Contact:* Tamue L. Gibson, (703) 305–9096; *e-mail address: gibson.tamue@epa.gov.*

8. *PP* 0F7771. (EPA–HQ–OPP–2010–0875). Cheminova A/S, c/o Cheminova, Inc., 1600 Wilson Blvd., Suite 700, Arlington, VA 22209–2510, proposes to establish a tolerance in 40 CFR part 180 for residues of the fungicide flutriafol, [(±)-α-(2-fluorophenyl)-α-(4-fluorophenyl)-1*H*-1,2,4-triazole-1-ethanol], including its metabolites and degradates, in or on corn, field, forage at 4.0 ppm; corn, field, stover at 6.0 ppm; corn, field, grain at 0.01 ppm; corn, field, flour at 0.03 ppm; corn, field, oil at 0.07 ppm; corn, field, meal at 0.03 ppm; corn, pop, stover at 6.0 ppm; corn, pop, grain at 0.01 ppm; grape at 1.1 ppm; grape, raisin at 2.5 ppm; peanut at 0.08 ppm; peanut, hay at 18 ppm; fruit, pome (Crop Group 11) at 0.60 ppm; fruit, stone (Crop Group 12) at 0.80 ppm; beet, sugar, root at 1.5 ppm; beet, sugar, tops at 2.5 ppm; beet, sugar, refined at 0.70 ppm; beet, sugar, molasses at 1.0 ppm; beet, sugar, dried pulp at 1.0 ppm; wheat, forage at 25 ppm; wheat, hay at 9.0 ppm; wheat, straw at 6.0 ppm; wheat, grain at 0.15 ppm; wheat, grain, bran at 0.20 ppm; wheat, grain, germ at 0.20 ppm; barley, hay at 9.0 ppm; barley, straw at 6.0 ppm; barley, grain at 0.15 ppm; barley, grain, bran at 0.20 ppm; buckwheat, grain at 0.15 ppm; oats, forage at 25 ppm; oats, hay at 9.0 ppm; oats, straw at 6.0 ppm; oats, grain at 0.15 ppm; oats, grain, bran at 0.20 ppm; rye, forage at 25 ppm; rye, straw at 6.0 ppm; rye, grain at 0.15 ppm; cattle, liver at 0.12 ppm; goat, liver at 0.12 ppm; horse, liver at 0.12 ppm; sheep, liver at 0.12 ppm; and milk at 0.02 ppm. The proposed tolerance for fruit, pome, which is based on new field trial data for pears and previously submitted data for apples, will replace the current tolerance for apples at 0.20 ppm. Adequate enforcement analytical methods for determining flutriafol in/on appropriate raw agricultural commodities and processed commodities are available for the established and proposed tolerances. *Contact:* Tamue L. Gibson, (703) 305–9096; *e-mail address: gibson.tamue@epa.gov.*

9. *PP* 0F7773. (EPA–HQ–OPP–2010–0916). Gowan Company, 370 South Main Street, Yuma, AZ 85364, proposes to amend 40 CFR 180.448 for residues of the insecticide hexythiazox (trans-5-(4-chlorophenyl)-*N*-cyclohexyl-4-methyl-2-oxothiazolidine-3-carboxamide) and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety, by establishing a tolerance in or on grain, aspirated fractions at 0.5 ppm; removing the geographical restriction for the existing tolerances for hexythiazox on corn, field, forage; corn, field, grain; and corn, field, stover; and increasing the tolerance for corn, field, stover from 2.5 ppm to 6.0 ppm. A practical analytical method, high pressure liquid chromatography with a ultraviolet (UV) detector, which detects and measures residues of hexythiazox and its metabolites as a common moiety, is available for enforcement purposes. *Contact:* Olga Odiott, (703) 308–9369; *e-mail address: odiott.olga@epa.gov.*

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 6, 2010.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–31218 Filed 12–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0650; FRL–8855–5]

Propionic Acid and Salts, Urea Sulfate, Methidathion, and Methyl Parathion; Registration Review Final Decisions; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's final registration review decisions for the pesticides propionic acid and salts, case no. 4078, urea sulfate, case no. 7213, methidathion, case no. 0034, and methyl parathion, case no. 0153. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, that the pesticide can perform its intended function without causing unreasonable adverse effects on human health or the environment. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

FOR FURTHER INFORMATION CONTACT: *For pesticide specific information, contact:* The chemical review manager identified in Table 1 of Unit II for the pesticide of interest.

For general information on the registration review program, contact: Kevin Costello, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5026; fax number: (703) 308–8090; e-mail address: *costello.kevin@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the pesticide specific contact person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0650. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

II. Background

A. What action is the agency taking?

Pursuant to 40 CFR 155.58(c), this notice announces the availability of EPA's final registration review decisions for the pesticides in the table below—propionic acid and salts, case 4078, urea sulfate, case no. 7213, methidathion, case no. 0034, and methyl parathion, case no. 0153. The active ingredient propionic acid is a fungicide and bactericide that is used to control fungi and bacteria in stored hay and grains, inhibit bacterial growth in drinking water for livestock and poultry, control mold and fungi in poultry litter and animal feed, and sanitize pre-cleaned food contact surfaces. Propionic acid is also used as an inert ingredient in pesticide formulations. Propionic acid and its salts, sodium and calcium propionates, are approved by the Food and Drug Administration (FDA) in the United States as Generally Recognized As Safe (GRAS) for use in food. Propionic acid and salts, are exempt from the requirement of a tolerance. Urea sulfate is used as a desiccant on cotton. No food crop uses remain and all tolerances for urea sulfate have been deleted. Methidathion is a non-systemic, organophosphate (OP) used as an insecticide/acaricide on a wide variety of terrestrial food and feed crops and terrestrial non-food crops. Methyl parathion is a restricted use OP insecticide and acaricide registered for use on a variety of food and feed crops, with the majority of use occurring on cotton, corn, and rice.

TABLE—REGISTRATION REVIEW CASES WITH FINAL DECISIONS

Registration review case name and No.	Pesticide Docket ID No.	Chemical review manager, telephone No., e-mail address
Propionic Acid and Salts—4078	EPA–HQ–OPP–2008–0024	Wilhelmena Livingston, (703) 308–8025, *livingston.wilhelmena@epa.gov.*
Urea Sulfate—7213	EPA–HQ–OPP–2007–0202	Andrea Mojica, (703) 308–0122, *mojica.andrea@epa.gov.*
Methidathion—0034	EPA–HQ–OPP–2008–0723	Jose Gayoso, (703) 347–8652, *gayoso.jose@epa.gov.*
Methyl Parathion—0153	EPA–HQ–OPP–2009–0332	Kelly Ballard, (703) 305–8126, *ballard.kelly@epa.gov.*

Pursuant to 40 CFR 155.57, a registration review decision is the Agency's determination whether a pesticide meets, or does not meet, the standard for registration in FIFRA. EPA has considered propionic acid and salts, urea sulfate, methidathion, and methyl parathion in light of the FIFRA standard for registration. The propionic acid and salts, urea sulfate, methidathion, and methyl parathion Final Decision documents in the docket describes the Agency's rationale for issuing a registration review final decision for these pesticides.

In addition to the final registration review decision documents, the registration review docket for propionic acid and salts, urea sulfate, methidathion and methyl parathion also

includes other relevant documents related to the registration review of these cases. The proposed registration review decisions were posted to the docket and the public was invited to submit any comments or new information. During the 60-day comment period, the public comments received were not substantive and did not affect the Agency's final decisions. Pursuant to 40 CFR 155.58(c), the registration review case docket for propionic acid and salts, urea sulfate, methidathion, and methyl parathion will remain open until all actions required in the final decisions have been completed.

Background on the registration review program is provided at: *http://www.epa.gov/oppsrrd1/registration_review.* Links to earlier documents related to the registration review of these chemicals are provided at: *http://www.epa.gov/oppsrrd1/registration_review/propionic_acid/index.htm., http://www.epa.gov/oppsrrd1/registration_review/urea_sulfate/index.htm., http://www.epa.gov/oppsrrd1/registration_review/methidathion/index.htm., http://www.epa.gov/oppsrrd1/registration_review/methyl-parathion/index.html.*

B. What is the agency's authority for taking this action?

Section 3(g) of FIFRA and 40 CFR part 155, subpart C, provide authority for this action.

List of Subjects

Environmental protection, Pesticides and pests, Propionic acid and salts, Urea sulfate, Methidathion, and Methyl parathion.

Dated: December 7, 2010.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2010–31338 Filed 12–14–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 10–2318]

Emergency Access Advisory Committee; Announcement of Establishment, and of Members and Co-Chairpersons, and Announcement of Date of First Meeting

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the establishment, and appointment of members and Co-Chairpersons, of the Emergency Access Advisory Committee ("Committee" or "EAAC") of the Federal Communications Commission ("Commission"). The Commission further announces the date of the Committee's first meeting.

DATES: The Committee was established on December 7, 2010. The first meeting of the Committee will take place on Friday, January 14, 2011, 9:30 a.m. to 4:30 p.m., at Commission Headquarters.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Cheryl King, Consumer and Governmental Affairs Bureau, 202–418–2284 (voice), 202–418–0416 (TTY), or *Cheryl.King@fcc.gov* (e-mail); or Patrick Donovan, Public Safety and Homeland Security Bureau, 202–418–2413, *Patrick.Donovan@fcc.gov* (e-mail).

SUPPLEMENTARY INFORMATION: On December 7, 2010, in document DA 10–2318, Chairman Julius Genachowski announced the establishment, and appointment of members and Co-Chairpersons, of the EAAC, following a nominations period that closed on November 1, 2010.

The EAAC shall conduct monthly meetings during 2011. The first meeting will be held on January 14, 2011 at Commission Headquarters, and subsequent meetings will be held on the second Friday of every month during 2011. All meetings shall be open to the public.

The EAAC is established in accordance with the Twenty-first Century Communications and Video Accessibility Act of 2010, Public Law 111–260 (Accessibility Act), for the purpose of determining the most effective and efficient technologies and methods by which to enable access to Next Generation 911 emergency services by individuals with disabilities. In order to fulfill this mission, the Accessibility Act directs that within one year after the EAAC's members are appointed, the Committee shall conduct a national survey, with the input of groups represented by the Committee's membership, after which the Committee shall develop and submit to the Commission recommendations to implement such technologies and methods.

The Chairman of the Commission is appointing thirty-two (32) members of the EAAC. Of this number, eleven (11) represent interests of persons with disabilities and researchers; seven (7) represent interests of communication service providers; six (6) represent interests of State and local emergency responders and emergency subject matter technologies; three (3) represent venders, developers and manufacturers of systems, facilities and equipment; three (3) represent Federal agencies; and two (2) represent industry organizations. The EAAC's membership is designed to be representative of the Commission's many constituencies, and the diversity achieved ensures a balance among individuals with disabilities and other stakeholders, as required by the Accessibility Act. All appointments are effective immediately and shall terminate December 7, 2012, or when the Committee is terminated, whichever is earlier.

The membership of the EAAC, designated by organization or affiliation as appropriate, is as follows:

- American Foundation for the Blind—Brad Hodges.
- AT&T—Brian Daly.
- Avaya Labs—Paul Michaelis.
- Center for Public Safety Innovation/National Terrorist Preparedness Institute—Christopher Littlewood.
- City of Los Angeles' Department on Disability and National Emergency Numbering Association's Accessibility Committee—Richard Ray.
- Comcast Cable—Angel Arocho.
- Communication Service for the Deaf—Alfred Sonnenstrahl.
- CTIA, The Wireless Association—Matthew Gerst.
- Department of Homeland Security, Federal Emergency Management Agency—Marcie Roth.
- Fairfax County Emergency Management—Bruce McFarlane.
- Gallaudet University—Norman Williams.
- Hearing, Speech & Deafness Center—Donna Platt.
- Intrado, Inc.—John Snapp.
- Louisiana NENA—Roland Cotton.
- Microsoft—Bernard Aboba.
- Norcal Center for Deaf and Hard of Hearing and E911 Stakeholder Council—Sheri A. Farinha.
- Omnitor—Gunnar Hellstrom.
- Partners for Access, LLC—Joel Ziev.
- Purple Communications—Mark Stern.
- RealTime Text Task Force (R3TF)—Arnoud van Wijk.
- Research in Motion (RIM)—Gregory Fields.
- Speech Communication Assistance for the Telephone, Inc.—Rebecca Ladew.
- TeleCommunications Systems, Inc.—Don Mitchell.
- Telecommunications Industry Association and the Mobile Manufacturers Forum—David J. Dzumba.

- Time Warner Cable Communications—Martha (Marte) Kinder.
- T-Mobile, 911 Policy—Jim Nixon.
- Trace R&D Center, University of Wisconsin (IT&Tel–RERC)—Gregg Vanderheiden.
- U.S. Department of Justice, Civil Rights Division/DRS—Robert Mather.
- U.S. Department of Transportation, NHTSA—Laurie Flaherty.
- Verizon Communications—Kevin Green.
- Vonage Holding Corp.—Brendan Kasper.
- Washington Parish, LA Communications District—James Coleman.

Chairman Julius Genachowski has designated Richard Ray and David J. Dzumba as Co-Chairpersons of the EAAC.

To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Karen Peltz Strauss,

Deputy Chief, Consumer and Governmental Affairs Bureau, Federal Communications Commission.

[FR Doc. 2010–31513 Filed 12–14–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Web site *http://www.fmc.gov* or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 011516–007.

Title: Voluntary Intermodal Sealift Discussion Agreement.

Parties: American President Lines, Ltd.; American Roll-On Roll-Off Carrier; Crowley Liner Services, Inc.; Crowley Marine Services, Inc.; Farrell Lines, Inc.; Hapag-Lloyd USA, LLC; Maersk Line, Inc.; Maersk Line, Limited; and Matson Navigation Company.

Filing Party: Gerald A. Malia, Esq.; 1660 L Street, NW.; Suite 506; Washington, DC 20036.

Synopsis: The amendment changes the address of American Presidents Lines, Ltd. and Hapag-Lloyd USA, LLC.

Agreement No.: 012112.

Title: Evergreen/Maersk Slot Charter Agreement.

Parties: Evergreen Line Joint Service Agreement and A.P. Moller-Maersk A/S.

Filing Party: Paul M. Keane, Esq.; Cichanowicz, Callan, Keane, Vengrow & Textor, LLP; 61 Broadway, Suite 3000, New York, NY 10006–2802.

Synopsis: The agreement authorizes Maersk to charter space from Evergreen Line in the trade from ports in Taiwan to ports in California.

Agreement No.: 012113.

Title: CSCL/CSAV Slot Swap Agreement.

Parties: China Shipping Container Lines Co. Ltd., China Shipping Container Lines (Hong Kong) Co. Ltd., and Compania Sud-Americana de Vapores S.A.

Filing Party: Tara L. Leiter, Esq., Blank Rome LLP; 600 New Hampshire Avenue, NW.; Washington, DC 20037.

Synopsis: The agreement authorizes the parties to charter space to each other in the trade between U.S. Atlantic Coast ports and ports in Mexico, Panama, Jamaica, Colombia, and the Far East, including China, Hong Kong, and Korea.

Agreement No.: 012114.

Title: POS/TSL Vessel Sharing Agreement.

Parties: Hainan P O Shipping Co., Ltd., and T.S. Lines Ltd.

Filing Party: Neal A. Mayer, Esq.; Hoppel, Mayer, & Coleman; 1050 Connecticut Avenue, NW., 10th Floor, Washington, DC 20036.

Synopsis: The agreement authorizes the parties to share vessel space in the trade between United States ports and ports in China and Vietnam.

Agreement No.: 201208–001.

Title: Marine Terminal Services Agreement Port of Houston Authority and NYK Line (North America) Inc.

Parties: NYK Line (North America), Inc. and Port of Houston Authority.

Filing Party: Erik A. Eriksson, Esq.; Port of Houston Authority; PO Box 2562; Houston, TX 77252–2562.

Synopsis: The amendment clarifies that NYK (North America) is acting on behalf of Nippon Yusen Kaisha.

By Order of the Federal Maritime Commission.

Dated: December 10, 2010.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2010–31496 Filed 12–14–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 12, 2011.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Citizens National Corporation,* Wisner, Nebraska to acquire up to an additional 2 percent for a total of approximately 34 percent of the voting shares of Republic Corporation, and thereby indirectly control United Republic Bank, both in Omaha, Nebraska

Board of Governors of the Federal Reserve System, December 10, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–31462 Filed 12–14–10; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Pre-Travel Health: Improving and Expanding the Implementation of Counseling and Surveillance of International Travelers, Funding Opportunity Announcement (FOA) CK11–004, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 12 p.m.–2 p.m., February 10, 2011 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters to be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to "Pre-Travel Health: Improving and Expanding the Implementation of Counseling and Surveillance of International Travelers, Funding Opportunity Announcement FOA CK11–004."

Contact Person for More Information: Amy Yang, PhD, Scientific Review Officer, CDC, 1600 Clifton Road, NE., Mailstop E60, Atlanta, Gerogia 30333, Telephone: (404) 498–2733.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: December 6, 2010.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2010–31427 Filed 12–14–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1574–N]

Medicare Program; Re-Chartering of the Advisory Panel on Ambulatory Payment Classification (APC) Groups

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice announces the re-chartering of the Advisory Panel on Ambulatory Payment Classification (APC) Groups (the Panel). The Secretary of the Department of Health and Human Services (the Secretary) re-chartered the Panel on November 21, 2010, for 2 years with the new Charter effective through November 21, 2012.

FOR FURTHER INFORMATION CONTACT: Shirl Ackerman-Ross, (410) 786–4474.

SUPPLEMENTARY INFORMATION:

I. Background

A. Purpose

The Secretary of the Department of Health and Human Services (DHHS) (the Secretary) is required by section 1833(t)(9)(A) of the Social Security Act (the Act), to consult with an expert, outside advisory panel on the clinical integrity of the groups referred to as Ambulatory Payment Classification (APC) groups and their associated weights established under the Medicare hospital Outpatient Prospective Payment System (OPPS).

B. Statutory Authority

Section 1833(t)(9)(A) of the Act (42 U.S.C. 1395l(t)(9)(A)). The Advisory Panel on APC Groups is governed by the provisions of Public Law 92–463, the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory panels.

The Panel was established by statute and has functions that are of a continuing nature. The Panel is re-chartered in accordance with section 14(b)(2) of FACA.

C. Panel Functions

The Panel must advise the Secretary and the CMS Administrator (the Administrator) about the clinical integrity of the APC groups and their associated weights, which are major elements of the Medicare hospital OPPS. The Panel is technical in nature, and it must deal with the following issues:

- Addressing whether procedures within an APC group are similar both clinically and in terms of resource use.
- Reconfiguring APCs (for example, splitting of APCs, moving Healthcare Common Procedure Coding System (HCPCS) codes from one APC to another, and moving HCPCS codes from new technology APCs to clinical APCs).
- Evaluating APC group weights.
- Reviewing packaging the cost of some items and services, including drugs and devices, into procedures and services, including the methodology for packaging and the impact of packaging on APC group structure and payment.
- Removing procedures from the inpatient list for payment under the OPPS.
- Using claims and cost report data for CMS' determination of APC group costs.
- Addressing other technical issues concerning APC group structure.

The subject matter before the Panel must be limited to these and related topics. Unrelated topics are not subjects for discussion. Unrelated topics include, but are not limited to, the conversion factor, charge compression, revisions to the cost report, pass-through payments, correct code usage, and provider payment adjustments.

The Panel may use data collected or developed by entities and organizations other than the DHHS and CMS in conducting its review. The Secretary and the Administrator is advised of all matters pertaining to the Panel (that is, membership, recommendations, subcommittees, and meetings).

D. Structure of the Panel

The Panel must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed. The Panel consists of up to 15 members who are representatives of providers. Members are selected by the Secretary or Administrator among the fields of hospital payment systems; hospital medical care delivery systems; provider billing and accounting systems; APC groups; Current Procedural Terminology codes; HCPCS codes; the use of, and payment for, drugs, medical devices, and other services in the outpatient setting; and other forms of relevant expertise. All members must have a minimum of 5 years experience in their area(s) of expertise, but it is not necessary that any member be an expert in all of the areas listed above. Panel members are full-time employees of hospitals, hospital systems, or other Medicare providers subject to payment under the OPPS.

For purposes of this Panel, consultants or independent contractors are not considered to be representatives of providers. All members must serve on a voluntary basis, without compensation, pursuant to advance written agreement. Members of the Panel must be entitled to receive reimbursement for travel expenses and per diem in lieu of subsistence, in accordance with Standard Government Travel Regulations. Panel members may serve for up to 4-year terms. A member may serve after the expiration of his or

her term until a successor has been sworn in.

A Federal official, designated by the Secretary or the Administrator, must serve as the Chair and facilitate the Panel meetings. The Chair's term must usually be for a period of 4 years, but it may be extended at the discretion of the Administrator or his or her duly appointed designee.

In order to conduct the business of the Panel, a quorum is required. A quorum exists when a majority of currently appointed members is present at full Panel or subcommittee meetings or is participating in conference calls.

With the approval of the Secretary or designee, subcommittees consisting of two or more Panel members may be established to perform functions within the Panel's jurisdiction. One of the members will be designated by his or her peers as chair of the subcommittee. The Department Committee Management Officer will be notified upon establishment of each subcommittee and will be provided information on its name, membership, function, and estimated frequency of meetings. The advice or recommendations of a subcommittee or working group must be deliberated by the Panel. A subcommittee may not report directly to a Federal official, but rather it must report to the parent Panel.

The FACA provides that a Designated Federal Officer (DFO) must be appointed to a Federal advisory committee to attend each Panel meeting and to ensure that all procedures adhere to applicable statutory, regulatory, and DHHS General Administration Manual directives. The DFO approves and prepares all meeting agendas; calls all Panel or subcommittee meetings; adjourns any meeting when he or she determines adjournment to be in the public interest; and chairs meetings when directed to do so by the Secretary or the Administrator. The DFO or his or her designee must be present at all full Panel and subcommittee meetings. The CMS must also provide management and support services to the Panel.

E. APC Panel Meetings

Meetings must be held up to three times a year at the call of the DFO. The agenda, which sets the boundaries for discussion, is developed by CMS and approved by the DFO. Meetings are open to the public, except as determined otherwise by the Secretary or other official to whom the authority has been delegated in accordance with the Government in the Sunshine Act (5 U.S.C. 552b(c)) and FACA. The Panel Chair must facilitate all Panel meetings.

Adequate advance notice of all meetings must be published in the **Federal Register,** as required by applicable laws and departmental regulations, stating reasonably accessible and convenient locations and times. Meetings must be conducted, and records of the proceedings kept, as required by applicable laws and departmental regulations. The records of the Panel and established subcommittees must be managed in accordance with General Records Schedule 26, Item 2, or other approved Agency records disposition schedule. These records must be available for public inspection and copying, subject to the Freedom of Information Act (5 U.S.C. 552).

F. Compensation

All members must serve on a voluntary basis, without compensation, pursuant to advance written agreement. Members of the Panel must be entitled to receive reimbursement for travel expenses and per diem in lieu of subsistence, in accordance with Standard Government Travel Regulations.

G. Annual Cost Estimate

Estimated fiscal year (FY) 2011 annual cost for operating the Panel, including travel expenses for members but excluding staff support, is $77,000. The estimated annual person-years of staff support required for the APC Panel is 1.0 full-time equivalent (FTE) at an estimated annual cost of $105,575. Estimated FY 2012 annual cost for operating the Panel, including travel expenses for members but excluding staff support, is $80,000. The estimated annual person-years of staff support required for the APC Panel is 1.0 FTE at an estimated annual cost of $107,650.

H. Termination Date

Unless renewed by appropriate action prior to its expiration, the APC Panel must terminate 2 years from the date the charter is filed.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance Program; and No. 93.774, Medicare-Supplementary Medical Insurance Program)

Dated: December 2, 2010.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2010–31372 Filed 12–14–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3236–N]

Medicare Program; Town Hall Meeting on Physician Quality Reporting System

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of meeting.

SUMMARY: This notice announces a Town Hall Meeting to discuss the Physician Quality Reporting System (previously known as the Physician Quality Reporting Initiative (PQRI)). The purpose of the Town Hall Meeting is to solicit input from participating stakeholders on the individual quality measures and measures groups being considered for possible inclusion in the proposed set of quality measures for use in the 2012 Physician Quality Reporting System and key components of the design of the Physician Quality Reporting System. Measure developers, eligible professionals, professionals associations, such as medical specialty societies, and other interested stakeholders are invited to participate, in person or by teleconference. The meeting is open to the public, but attendance is limited to space and teleconference lines available.

DATES: *Meeting Date:* The Town Hall Meeting will be held on February 9, 2011, from 10 a.m. until 4 p.m. eastern standard time (e.s.t).

Deadline for Registration of Presenters of the Town Hall Meeting: All presenters for the Town Hall meeting must register and submit their discussion item(s) by 5 p.m. e.s.t. on January 18, 2011.

Deadline for Registration of All Other Participants for the Town Hall Meeting and Request for Special Accommodations: Registration opens on December 20, 2010. All other participants must register no later than 5 p.m. e.s.t. on January 28, 2011. Requests for special accommodations must be received by 5 p.m. e.s.t. on January 28, 2010.

Deadline for Submission of Comments on Key Issues for the Town Hall Meeting: Written comments on key issues for discussion at the Town Hall Meeting must be received by 5 p.m. e.s.t. on January 21, 2011.

Deadline for Submission of Other Written Comments or Statements: Written comments or statements on issues that were discussed at this Town Hall Meeting or other comments, may be sent via regular mail, fax, or electronically to the address specified in

the **ADDRESSES** section of this notice and must be received by 5 p.m. e.s.t. on February 25, 2011.

ADDRESSES: *Meeting Location:* The Town Hall Meeting will be held in the main auditorium of the Central Building of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Registration and Special Accommodations: Persons interested in attending the meeting or participating by teleconference must register by completing the on-line registration via the Web site at *http://www.usqualitymeasures.org.* Individuals who require special accommodations should send a request via email or regular mail to the contact specified in the **FOR FURTHER INFORMATION** section of this notice.

Submission of Written Comments or Statements: Written comments or statements may be sent via e-mail to *Physician_Reporting_TEMP@cms.hhs.gov.* or sent via regular mail to: *Attn:* 2012 Physician Quality Reporting System Town Hall Meeting Comments, Office of Clinical Standards and Quality, Centers for Medicare & Medicaid Services, Mail Stop S3–02–01, 7500 Security Boulevard, Baltimore, MD 21244–1850.

FOR FURTHER INFORMATION CONTACT: Jacquelyn Kosh-Suber, (410).786–6889 via e-mail at *Jacquelyn.Koshsuber@cms.hhs.gov.* or via regular mail as specified in the **ADDRESSES** section of this notice.

SUPPLEMENTARY INFORMATION:

I. Background

The Physician Quality Reporting System is a voluntary reporting program in which eligible professionals and group practices report data on quality measures. An eligible professional who satisfactorily reports data on quality measures may qualify to earn a Physician Quality Reporting System incentive payment based on a percentage of the eligible professional's (or, in the case of a group practice, the group's) total estimated allowed Medicare Part B charges for covered professional services furnished during a specified reporting period. Under section 1848(k)(3)(B) of the Social Security Act (the Act), the term "eligible professional" means any of the following:

- A physician.
- A practitioner described in section 1842(b)(18)(C) of the Act.
- A physical or occupational therapist or a qualified speech-language pathologist or qualified audiologist.

Detailed information about the Physician Quality Reporting System is available on the CMS Web site at *http://www.cms.hhs.gov/PQRI.*

Our goals for the 2012 Physician Quality Reporting System include increasing participation in light of a payment adjustment that begins in 2015, leveraging the benefits of alternative reporting mechanisms, such as registry-based reporting, EHR-based reporting, and the group practice reporting option, and increasing alignment with other programs, such as the EHR Incentive Program.

This Town Hall meeting will be hosted to solicit input from eligible professionals and other interested parties on the individual quality measure and measures group suggestions received in response to the "2012 Physician Quality Reporting System Call for Measures" and on other changes being considered for the future with regard to the key components of the Physician Quality Reporting System described in this notice.

II. Town Hall Meeting Format

The Town Hall meeting will begin with an overview of the objectives for the session. The remainder of the meeting will be devoted to presenting and receiving input on each of the major components of the Physician Quality Reporting System including the following:

- The individual quality measures and measures group suggestions received in response to the "2012 Physician Quality Reporting System Call for Measures" (for more information, *see* the CMS Measures Management System Web site at *http://www.cms.gov/MMS/13_Call%20for%20Measures.asp#TopOfPage*).
- Reporting mechanism.
- Reporting period.
- Criteria for satisfactory reporting.
- The group practice reporting option.
- The Maintenance of Certification Program Incentive.

Following each presentation, the meeting agenda will provide opportunities for brief comments on each of the key issues from on-site session attendees. The time for each presenter's comments will be approximately 2 minutes and will be based on the number of registered presenters. As time allows, telephone participants will also have the opportunity to provide brief comments of no more than 2 minutes on each of the key issues. Presenters will be scheduled to speak in the order in which they register. Therefore, individuals who would like to present must register and submit their comment(s) to the address specified in the **ADDRESSES** section of this notice by the date specified in the **DATES** section of this notice. All other written submissions will be accepted and presented at the meeting if they are received at the address specified in the **ADDRESSES** section of this notice by the date specified in the **DATES** section of this notice.

We anticipate posting an audio download and/or transcript of the Town Hall meeting on the CMS PQRI Web site after completion of the meeting. *See* Web site at *http://www.cms.hhs.gov/PQRI.* The opinions and alternatives provided during this meeting will assist us as we develop the Physician Quality Reporting System for 2012. We anticipate posting a summary of the individual quality measures and measures groups for possible inclusion in the proposed set of quality measures, as well as possible program design options under consideration for use in the 2012 Physician Quality Reporting System on the Physician Quality Reporting System section of the CMS Web site at *http://www.cms.hhs.gov/PQRI* by January 21, 2011.

III. Registration Instructions

While there is no registration fee, for security reasons, any persons wishing to attend this meeting must register by the date listed in the **DATES** section of this notice. Persons interested in attending the meeting or participating by teleconference must register by completing the online registration via the Web site at *http://www.usqualitymeasures.org.* The online registration system will generate a confirmation page to indicate the completion of your registration. Please print this page as your registration receipt. If seating capacity has been reached, you will be notified that the meeting has reached capacity. Individuals may also participate in the Town Hall meeting by teleconference. Registration is required as the number of call-in lines will be limited. The call-in number will be provided upon confirmation of registration. Individuals may also register via telephone by calling the contact listed in the **FOR FURTHER INFORMATION** section of this notice or via regular mail to the address listed in the **ADDRESSES** section of this notice.

IV. Security, Building, and Parking Guidelines

This meeting will be held in a Federal government building; therefore, Federal security measures are applicable. In planning your arrival time, we recommend you to arrive at the central

building no later than 9 a.m. e.s.t. to allow for enough time to clear security and to check in before the meeting begins. The on-site check-in for visitors will begin at 9:30 a.m. e.s.t. All items brought to the building, whether personal or for the purpose of demonstration or to support a presentation, including items such as laptops, cell phones, and palm pilots, are subject to physical inspection.

Security measures include the following:

• Presentation of government-issued photographic identification to the Federal Protective Service or Guard Service personnel.

• Interior and exterior inspection of vehicles (this includes engine and trunk inspection) at the entrance to the grounds. Parking permits and instructions will be issued after the vehicle inspection.

• Passing through a metal detector and inspection of items brought into the building.

We note that all items brought to CMS, whether personal or for the purpose of demonstration or to support a demonstration, are subject to inspection. We cannot assume responsibility for coordinating the receipt, transfer, transport, storage, setup, safety, or timely arrival of any personal belongings or items used for demonstration or to support a demonstration.

Note: *Individuals who are not registered in advance will not be permitted to enter the building and will be unable to attend the meeting. The public may not enter the building earlier than 45 minutes prior to the convening of the meeting. All visitors must be escorted in areas other than the lower and first floor levels in the Central Building. Seating capacity is limited to the first 250 registrants.*

Authority: Section 503 of Public Law 108–173.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program).

Dated: December 7, 2010.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2010–31301 Filed 12–13–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0008]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Guidance for Industry on Citizen Petitions and Petitions for Stay of Action Subject to Section 505(q) of the Federal Food, Drug, and Cosmetic Act

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 (PRA).

DATES: Fax written comments on the collection of information by January 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—NEW and title "Guidance for Industry on Citizen Petitions and Petitions for Stay of Action Subject to Section 505(q) of the Federal Food, Drug, and Cosmetic Act." Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850. 301–796–3792. E-mail: *elizabeth.berbakos@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.

Guidance for Industry on Citizen Petitions and Petitions for Stay of Action Subject to Section 505(q) of the Federal Food, Drug, and Cosmetic Act

In the **Federal Register** of January 21, 2009 (74 FR 3611), FDA announced the availability of a draft guidance for industry entitled "Draft Guidance for Industry on Citizen Petitions and Petitions for Stay of Action Subject to Section 505(q) of the Federal Food, Drug, and Cosmetic Act" (FD&C Act). FDA is now in the process of finalizing this guidance. In that **Federal Register** notice, FDA provided the public with 60 days to comment on the proposed collection of information. FDA received no comments pertaining to the information collection in the draft guidance.

Description of Respondents: Respondents to this collection of information as it is related to citizen petitions are individuals or households, State or local governments, not-for-profit institutions, and businesses or other for-profit institutions or groups. Respondents to this collection of information as it is related to petitions for stay of Agency action are persons who choose to file a petition for an administrative stay of action.

Burden Estimate: Section 505(q)(1)(H) of the FD&C Act requires that citizen petitions and petitions for stay of Agency action that are subject to section 505(q) include a certification to be considered for review by FDA. Section 505(q)(1)(I) of the FD&C Act requires that supplemental information or comments to such citizen petitions and petitions for stay of Agency action include a verification to be accepted for review by FDA. This guidance describes our current thinking on the interpretation of these requirements. The guidance sets forth the criteria the Agency will use in determining if the provisions of section 505(q) apply to a particular citizen petition or petition for stay of agency action. One of the criteria for a citizen petition or petition for stay of Agency action to be subject to section 505(q) of the FD&C Act is that a related ANDA or 505(b)(2) application is pending at the time the citizen petition or petition for stay is submitted. Because petitioners or commenters may not be aware of the existence of a pending ANDA or 505(b)(2) application, the guidance recommends that all petitioners challenging the approvability of a possible ANDA or 505(b)(2) application include the certification required in section 505(q)(1)(H) of the FD&C Act and that petitioners and commenters submitting supplements or comments, respectively, to a citizen petition or petition for stay of action challenging the approvability of a possible ANDA or 505(b)(2) application include the verification required in section 505(q)(1)(I) of the FD&C Act. The guidance also recommends that if a petitioner submits a citizen petition or petition for stay of Agency action that is missing the

required certification but is otherwise within the scope of section 505(q) of the FD&C Act and the petitioner would like FDA to review the citizen petition or petition for stay of Agency action, the petitioner should submit a letter withdrawing the deficient petition and submit a new petition that contains the required certification.

FDA currently has OMB approval for the collection of information entitled, "General Administrative Procedures: Citizen Petitions; Petition for Reconsideration or Stay of Action; Advisory Opinions" (OMB Control Number 0910–0183). This collection of information includes, among other things: (1) The format and procedures by which an interested person may submit to FDA, in accordance with § 10.20 (21 CFR 10.20), a citizen petition requesting the Commissioner of Food and Drugs (Commissioner) to issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action (§ 10.30(b) (21 CFR 10.30(b))); (2) the submission of written comments on a filed citizen petition (§ 10.30(d)); (3) the submission of a supplement or amendment to or a letter to withdraw a filed citizen petition (§ 10.30(g)); (4) the format and procedures by which an interested person may request, in accordance with § 10.20, the Commissioner to stay the effective date of any administrative action (§ 10.35(b) (21 CFR 10.35(b))); and (5) the submission of written comments on a filed petition for administrative stay of action (§ 10.35(c)). This information collection includes citizen petitions, petitions for administrative stay of action, comments to petitions, supplements to citizen petitions, and letters to withdraw a citizen petition, as described previously in this document, that are subject to section 505(q) of the FD&C Act and described in the guidance.

Under section 505(q) of the FD&C Act and the guidance, the following information would be submitted to FDA but is not currently approved by OMB under the PRA:

1. The certification required under section 505(q)(1)(H) of the FD&C Act for citizen petitions that are subject to section 505(q) and/or that are challenging the approvability of a possible ANDA or 505(b)(2) application. Although the submission of a certification for citizen petitions is approved under OMB Control Number 0910–0183, the certification would be broadened under section 505(q) of the FD&C Act and the guidance.

2. The certification required under section 505(q)(1)(H) of the FD&C Act for petitions for stay of Agency action that are subject to section 505(q) and/or that are challenging the approvability of a possible ANDA or 505(b)(2) application.

3. The verification required under section 505(q)(1)(I) of the FD&C Act for comments to citizen petitions.

4. The verification required under section 505(q)(1)(I) of the FD&C Act for comments to petitions for stay of Agency action.

5. The verification required under section 505(q)(1)(I) of the FD&C Act for supplements to citizen petitions.

6. Supplements to petitions for stay of Agency action.

7. The verification required under section 505(q)(1)(I) of the FD&C Act for supplements to petitions for stay of Agency action.

8. The letter submitted by a petitioner withdrawing a deficient petition for stay of Agency action that is missing the required certification but is otherwise within the scope of section 505(q) of the FD&C Act.

Section 505(q)(1)(B) and (C) of the FD&C Act and the guidance state that if FDA determines that a delay in approval of an ANDA or 505(b)(2) application is necessary based on a petition subject to section 505(q), the applicant may submit to the petition docket clarifications or additional data to allow FDA to review the petition promptly. This information collection is not included in this analysis because it is approved under OMB Control Number 0910–0001 (21 CFR 314.54, 314.94, and 314.102).

Based on FDA's knowledge of citizen petitions and petitions for stay of Agency action subject to section 505(q) of the FD&C Act that have been submitted to FDA, as well as the Agency's familiarity with the time needed to prepare a supplement, a certification, and a verification.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
Certification for citizen petitions (505(q)(1)(H))	19	1.32	25	0.5	12.5
Certification for petitions for stay of Agency action (505(q)(1)(H))	3	1	3	0.5	1.5
Verification for comments to citizen petitions (505(q)(1)(I))	9	1.33	12	0.5	6.0
Verification for comments to petitions for stay of Agency action (505(q)(1)(I))	2	1	2	0.5	1.0
Verification for supplements to citizen petitions (505(q)(1)(I))	7	1.43	10	0.5	5.0
Supplements to petitions for stay of Agency action	1	1	1	6.0	6.0
Verification for supplements to petitions for stay of Agency action (505(q)(1)(I))	1	1	1	0.5	0.5
Letter withdrawing a petition for stay of Agency action	1	1	1	0.5	0.5
Total Hours					33

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: December 8, 2010.

Leslie Kux,

Acting Assistant, Commissioner for Policy.

[FR Doc. 2010–31380 Filed 12–14–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0380]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Generic Food and Drug Administration Rapid Response Surveys

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 January 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 0910–0500. 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.

Generic Food and Drug Administration Rapid Response Surveys—(OMB Control Number 0910–0500)—Extension

Section 505 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355), requires that important safety information relating to all human prescription drug products be made available to FDA so that it can take appropriate action to protect the public health when necessary. Section 702 of the FD&C Act (21 U.S.C. 372) authorizes investigational powers to FDA for enforcement of the FD&C Act. Under section 519 of the FD&C Act (21 U.S.C. 360i), FDA is authorized to require manufacturers to report medical device-related deaths, serious injuries, and malfunctions to FDA; to require user facilities to report device-related deaths directly to FDA and to manufacturers; and to report serious injuries to the manufacturer. Section 522 of the FD&C Act (21 U.S.C. 360l) authorizes FDA to require manufacturers to conduct postmarket surveillance of medical devices. Section 705(b) of the FD&C Act (21 U.S.C. 375(b)) authorizes FDA to collect and disseminate information regarding medical products or cosmetics in situations involving imminent danger to health or gross deception of the consumer. Section 903(d)(2) of the FD&C Act (21 U.S.C. 393(d)(2)) authorizes the Commissioner of Food and Drugs to implement general powers (including conducting research) to carry out effectively the mission of FDA. These sections of the FD&C Act enable FDA to enhance consumer protection from risks associated with medical products usage that are not foreseen or apparent during the premarket notification and review process. FDA's regulations governing application for Agency approval to market a new drug (21 CFR part 314) and regulations governing biological products (21 CFR part 600) implement these statutory provisions. Currently, FDA monitors medical product related postmarket adverse events via both the mandatory and voluntary MedWatch reporting systems using FDA Forms 3500 and 3500A (OMB control number 0910–0291) and the vaccine adverse event reporting system. FDA is seeking OMB clearance to collect vital information via a series of rapid response surveys. Participation in these surveys will be voluntary. This request covers rapid response surveys for community based health care professionals, general type medical facilities, specialized medical facilities (those known for cardiac surgery, obstetrics/gynecology services, pediatric services, etc.), other health care professionals, patients, consumers, and risk managers working in medical facilities. FDA will use the information gathered from these surveys to obtain quickly vital information about medical product risks and interventions to reduce risks so the Agency may take appropriate public health or regulatory action including dissemination of this information as necessary and appropriate.

FDA projects 6 emergency risk related surveys per year with a sample of between 50 and 10,000 respondents per survey. FDA also projects a response time of 0.5 hours per response. These estimates are based on the maximum sample size per questionnaire that FDA may be able to obtain by working with health care professional organizations. The annual number of surveys was determined by the maximum number of surveys per year FDA has ever conducted under this collection.

In the **Federal Register** of August 6, 2010 (75 FR 47599), 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 [1]

Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
10,000	[2] 6	60,000	.5	30,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Maximum.

Dated: December 8, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–31381 Filed 12–14–10; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0418]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Institutional Review Boards

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 January 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 0910–0130. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850,. 301–796–3792.
Elizabeth.Berbakos@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.

Institutional Review Boards—OMB Control Number 0910–0130—Extension

When reviewing clinical research studies regulated by FDA, institutional review boards (IRBs) are required to create and maintain records describing their operations, and make the records available for FDA inspection when requested. These records include: Written procedures describing the structure and membership of the IRB and the methods that the IRB will use in performing its functions; the research protocols, informed consent documents, progress reports, and reports of injuries to subjects submitted by investigators to the IRB; minutes of meetings showing attendance, votes and decisions made by the IRB, the number of votes on each decision for, against, and abstaining, the basis for requiring changes in or disapproving research; records of continuing review activities; copies of all correspondence between investigators and the IRB; statement of significant new findings provided to subjects of the research; and a list of IRB members by name, showing each member's earned degrees, representative capacity, and experience in sufficient detail to describe each member's contributions to the IRB's deliberations, and any employment relationship between each member and the IRB's institution. This information is used by FDA in conducting audit inspections of IRBs to determine whether IRBs and clinical investigators are providing adequate protections to human subjects participating in clinical research.

In the **Federal Register** of August 17, 2010 (75 FR 50766), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received regarding the information collection.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section	Number of recordkeepers	Annual frequency per recordkeeping	Total annual records	Hours per recordkeeper	Total hours
56.115	2,500	14.6	36,500	100	3,650,000
Total					3,650,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The recordkeeping requirement burden is based on the following: The burden for each of the paragraphs under 21 CFR 56.115 has been considered as one estimated burden. FDA estimates that there are approximately 2,500 IRBs. The IRBs meet on an average of 14.6 times annually. The agency estimates that approximately 100 hours of person-time per meeting are required to meet the requirements of the regulation.

Dated: December 8, 2010.

Leslie Kux,

Acting Assistant, Commissioner for Policy.

[FR Doc. 2010–31389 Filed 12–14–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0184]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Experimental Study of Patient Information Prototypes

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 January 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–new and title "Experimental Study of Patient Information Prototypes." Also include

the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–792–3792, *Elizabeth.Berbakos@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.

Experimental Study of Patient Information Prototypes—(OMB Control Number 0910–New)

In order to make informed decisions about health care and to use their medications correctly, consumers need easy access to up-to-date and accurate information about the risks, benefits and safe use of their prescription drugs. Consumers currently receive multiple pieces of paper with their prescription drugs from the pharmacy, containing information that is developed and distributed through various sources. Written prescription drug information is provided through a voluntary effort (Consumer Medication Information) [1] as well as through FDA mandated use of Medication Guides [2] and Patient Package Inserts (PPI).[3] Patients describe a wide range of experiences and varying degrees of satisfaction with information currently provided at the time medicines are received at the pharmacy. In some cases, the written documents are difficult to read and understand, duplicative and overlapping, incomplete or contradictory. FDA has held multiple public meetings to solicit feedback on providing balanced, comprehensive, and up-to-date prescription drug information to consumers.

Since 1968, FDA regulations have required that PPIs written specifically for patients be distributed when certain prescription drugs or classes of prescription drugs are dispensed. PPIs are required for estrogens and oral contraceptives, are considered part of the product labeling, and are to be dispensed to the patient with the product. In the 1970s, FDA began evaluating the general usefulness of patient labeling for prescription drugs resulting in a series of regulatory steps to help ensure the availability of useful written consumer information. Other PPIs are submitted to FDA voluntarily by manufacturers and approved by FDA, but their distribution is not mandated by regulation. In the **Federal Register** of July 6, 1979 (44 FR 40016), FDA proposed regulations that would have required written patient information for all prescription drugs, and in the **Federal Register** of September 12, 1980 (45 FR 60754), FDA finalized those regulations. In the **Federal Register** of September 7, 1982 (47 FR 39147), the regulations were revoked based, in part, on assurances that the effort could be handled more efficiently within the private sector.

In the **Federal Register** of August 24, 1995 (60 FR 44182), FDA proposed the "Prescription Drug Product Labeling: Medication Guide Requirements," designed to set specific distribution and quality goals and timeframes for distributing written information to patients. In the **Federal Register** of December 1, 1998 (63 FR 66378), the Agency published a final rule that established a program under which Medication Guides would be required for a small number of drugs considered to pose a serious and significant public health concern (21 CFR 208.20).

Evidence suggests that both the content (*e.g.,* organization) and format (*e.g.,* white space) of a document will impact the comprehension of patient information. Research on reading behavior and document simplification suggests that the use of less complex terminology presented in shorter sentences with a more organized, or chunked, structure should improve consumer processing for at least three reasons. First, it should decrease the cognitive load engendered by the current physician-directed format. Second, a more structured and organized patient information document should present a less imposing processing demand, increasing consumers' willingness and self-perceived ability to read and understand the presented material. Research with the format of over-the-counter (OTC) drug labels,[4] the nutrition facts label,[5] and other information formats [6] demonstrates that information presented with section headings, graphics (such as bullets), and other design elements is more easily read than information presented in paragraph format. Consumers are more likely to engage in behavior they believe they can successfully complete.[7] Third, a patient information document that provides readers with clearer "signals" regarding the most important information should help readers prioritize the importance of the presented information. This should increase the probability that the set of information identified as important is subjected to more complete mental processing, thereby increasing the communication of that information.[8]

As part of FDA's efforts to improve the patient information received with prescription drugs, a Risk Communications Advisory Committee meeting was held on February 26 and 27, 2009. At this meeting, committee members discussed issues such as the ones described previously in this document and listened to stakeholder problems regarding the design and distribution of patient information. Following the advisory committee meeting, the working group created four prototypes to aid discussion at a public workshop to be held later in the year.

This public workshop was held on September 24 and 25, 2009. During the workshop stakeholders from industry, consumer advocacy, and academia converged to discuss desirable features for a single-document patient leaflet, if that were to be developed, consumer tested, and distributed. Participants were divided into six groups to address the pros and cons of the four prototypes with the goal of deciding which features participants appreciated and did not appreciate. For additional information on the September 24 and 25, 2009, public workshop, go to *http://www.fda.gov/Drugs/NewsEvents/ucm168106.htm*.

Given the information obtained from workshop participants, the working

[1] Public Law 104–180, August 6, 1996, Title VI, Effective Medication Guides.

[2] Part 208 (21 CFR part 208).

[3] 21 CFR 310.501 and 310.515.

[4] Aikin, K.J., "Consumer Comprehension and Preference for Variations in the Proposed Over-The-Counter Drug Labeling Format, Final Report," 1998; Vigilante, W.J., M.S. Wogalter, "The Preferred Order of Over-the-Counter (OTC) Pharmaceutical Label Components," *Drug Information Journal,* 31, 973–988, 1997.

[5] Levy, A.S., S.B. Fein, R.E. Schucker, "More Effective Nutrition Label Formats Are Not Necessarily More Preferred," *Journal of the American Dietetic Association,* 92(10), 1230–1234, 1992.

[6] Lorch, R., E. Lorch, "Effects of Organizational Signals on Text-Processing Strategies," *Journal of Educational Psychology,* 87(4), 537–544, 1995; Lorch, R., E. Lorch, "Effects of Organizational Signals on Free Recall of Expository Text," *Journal of Educational Psychology,* 88(1), 38–48, 1996; Lorch, R., E. Lorch, W. Inman, "Effects of Signaling Topic Structure on Text Recall," *Journal of Educational Psychology,* 85(2), 281–290, 1993.

[7] Wood, R., A. Bandura, "Impact of Conceptions of Ability on Self-Regulatory Mechanisms and Complex Decision Making," *Journal of Personality and Social Psychology,* 56(3), 407–415, 1989.

[8] Lorch, R., E. Lorch, "Effects of Organizational Signals on Text-Processing Strategies," *Journal of Educational Psychology,* 87(4), 537–544, 1995; Lorch, R., E. Lorch, "Effects of Organizational Signals on Free Recall of Expository Text," *Journal of Educational Psychology,* 88(1), 38–48, 1996; Lorch, R., E. Lorch, W. Inman, "Effects of Signaling Topic Structure on Text Recall," *Journal of Educational Psychology,* 85(2), 281–290, 1993.

group refined several prototypes and designed a study to investigate the usefulness of three possible patient information formats from a user perspective. The results of this study will inform FDA as to the usefulness and parameters of various format options for the patient information documents.

Description of the Project

This project is designed to test different ways of presenting information about prescription drugs to patients who have obtained a prescription. The information used will be based on a fictitious medication for the treatment of rheumatoid arthritis, ankylosing spondylitis, and plaque psoriasis. Data collection will occur via computer at training and testing facilities with orientation and debriefing conducted by interviewers. Participants will include adults who have been diagnosed with one of the conditions the fictitious drug treats. Participants will be prescreened to obtain a reasonable representation of health literacy, including those who score at the lower end of the scale. Questionnaire measures will include open- and closed-ended questions. Extensive pretesting of materials and stimuli will be conducted to refine the experimental stimuli and dependent measures and to ensure the stimuli meet minimum communication requirements and are delivering expected messages.

Proposed Study Design and Protocol

The study is experimental and will have two independent variables in a 3x2 design. The independent variables are Format (3 levels: Drug Facts, Minimal Column, and Column Plus) and Order (2 levels: Warning first and Indication first).

FORMAT

Order	Drug facts	Minimal column	Column plus
Warning first.			
Indication first.			

The Order manipulation will vary the primacy of the boxed warning information versus the paragraph about the uses to the drug. In terms of Format, the Drug Facts format will follow the conventions of the existing OTC labeling. The Minimal Column condition will contain information in two columns with only basic information in the sections regarding information patients should tell their doctors. The Column Plus condition will also present information in two columns, but will include additional contextual information in the sections about what information patients should report to their doctors.

Participants with relevant medical conditions will be randomly assigned to one of the six experimental conditions and each participant will see only one version of the patient information. Participants will be prescreened to represent a range of health literacy levels, including a portion with low literacy. Thus, all participants in the study will have been diagnosed with rheumatoid arthritis, ankylosing spondylitis, or plaque psoriasis and at least 30 percent of the sample will fall in the lower range of literacy. Because the average reading level in the United States is estimated to be 8th grade [9] and it is recommended that consumer medication information be written at a 5th grade reading level,[10] the low literate cohort will consist of consumers who have 5th to 8th grade reading skills. Education level is not a reliable substitute for literacy testing. At screening, the participants will be assessed for literacy level using a validated instrument.

An additional small study will be conducted via the Internet to determine whether electronic prototype presentation alters the processing of the information in any way. Two-hundred individuals with the same characteristics of the original sample (*e.g.,* medical condition and literacy levels) will be recruited over the Internet and will complete the same questionnaire as original participants.

FDA is undertaking this study because it does not yet have sufficient evidence-based research relating to patient needs, or whether those needs are being effectively met. Research related to the functionality and effectiveness of written patient information consistently identifies the importance of performance-based testing as well as content based testing, which enables the evaluation of materials in order to assure their utility and identify issues in content format, or design. Development of new prescription drug patient materials must be based on consumer testing that focuses on utility to the patient and comprehension of material in the broadest audience possible. FDA has developed three prototypes in order to user test prescription drug information with consumers in order to achieve this goal. For further information, contact Elizabeth Berbakos (*see* **FOR FURTHER INFORMATION CONTACT**).

In the **Federal Register** of May 4, 2010 (75 FR 23775), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received five comments. In the following section, we outline the observations and suggestions raised in the comments and provide our responses. Four of the five comments expressed support for the conductance of the research to explore issues of quantitative benefit information. They all described the collection of data as a worthy endeavor which will provide useful information on how best to communicate information to patients about their prescription drugs.

(Comment 1) The first comment stated that FDA's approach to examining the content and format of the prototypes is reasonable. This comment provided minor suggestions regarding how to improve the study, most of which are currently addressed in the questionnaire. For example, we have included time measurement, questions about the safe use of the product, and scenario-based questions in the questionnaire for the second phase of our study. We have incorporated other suggestions into the qualitative first phase of our project. In this phase, we will present participants with all versions of the prototypes to assess their preferences and will able to probe participants more thoroughly about their reactions and responses to the prototypes.

(Comment 2) This comment provided a statement of support for the approval

[9] Cotunga N., C.E. Vickery, K.M. Carpenter-Haefele, "Evaluation of Literacy Level of Patient Education Pages in Health-Related Journals," *Journal of Community Health,* 30(3), 213–219, 2005.

[10] Andrus, M.R., M.T. Roth, "Health Literacy: A Review," *Pharmacotherapy,* 22(3), 282–302, 2002.

of this data collection, claiming the study will have practical utility.

(Comment 3) This comment provided support for the research proposed in this document and reported that the components identified by FDA are consistent with those found in their own research. The comment suggested the inclusion of a visual system for identifying drug products and the inclusion of a variety of font sizes for people with visual impairments. FDA fully supports the presentation of information for special populations. However, the scope of the present study is to determine one format out of several that works with a range of participants. After this step, we can move toward incorporating special features, such as pictures or large font, to accommodate patients with varying needs.

(Comment 4) Part of comment 4 was outside the scope of the proposed data collection; i.e., regarding the proper channels for distribution of Patient Medication Information (PMI). Regarding the parts of the comment that focused on the proposed research, the comment generally discussed omissions in the current proposed prototypes. These additional pieces of information have all been discussed at length at various public and expert meetings, including the public workshop in September 2009, the Brookings Institute Expert Workshop in July 2010, and the Part 15 hearing in September 2010. When improving medication documents for patients, there is always a trade-off between the desire to keep it simple and the desire to provide more information. Although a small number of individuals reported the desire for exhaustive information, the great majority of the feedback FDA has received and the literature the Agency has reviewed suggests that the information in the currently proposed prototypes is a reasonable collection of the important information that patients need to safely use their medications. Moreover, research suggests that providing large amounts of information will not serve patients well, but may instead impede their understanding of the information.[11] Finally, the proposed research itself is designed to address the issue of whether the information in the prototypes is optimal. The first phase of the research will involve qualitative interviews, wherein participants will have ample opportunity to tell us what they want and need to know. The second phase of the research will involve quantitative assessment of the comprehension of important information in the document. Thus, we believe our two-pronged approach will address some of the concerns raised in this comment and we must defer to the volumes of other feedback we have received regarding the limiting of information in PMI.

(Comment 5) Comment 5 had five main concerns with the study. First, the comment suggested that FDA reach out to Consumer Medication Information (CMI) publishers as early as possible in the development of the prototypes. FDA concurs with the importance of doing this and, in fact, has already done so multiple times and in multiple venues. Several CMI publishers participated in the public workshop held in September 2009 and spoke at the Part 15 hearing in September 2010.

Second, the comment claims that FDA has not used an evidence-based strategy to develop the PMI prototypes. We disagree. FDA developed the prototypes based on the scientific literature. As described in the first section of this document, the prototypes were based on recommendations to include chunks of information that would reduce cognitive load and facilitate processing by including plenty of white space, headings, and maintaining a readable font size. From this first step, public feedback was obtained and incorporated, and feedback from communications experts was obtained and incorporated, resulting in the current prototypes. At this stage, we are proposing the continuation of the gathering of evidence by conducting the proposed two-part study to examine the PMI prototypes.

Third, the comment expresses concerns that the use of a fictitious drug (and only one) may limit the generalizability of the findings of the study. The use of a fictitious drug eliminates the confound of prior knowledge when asking participants about the information they see. Rheutopia was selected to be a very close amalgam of an existing class of drugs. This class was chosen because it has a complicated set of risks, it is given by injection (an unusual administration), and it has multiple indications. FDA's reasoning is that if successful PMI can be developed for such a complex drug, PMI for drugs with simpler profiles will be attainable. It is true we are investigating only one drug in the current study; this decision was based on resource constraints. One research study cannot accomplish all goals. Future studies may be used to assess the applicability of the results in other drug classes.

Fourth, the comment expresses concern that the research will not include a variety of different populations and that the lack of detail provided in the **Federal Register** notice suggests that very little knowledge will be gained from the research. Regarding the first part, the revised research proposed in this document includes low literacy individuals with chronic disease, general population individuals, and individuals with one of the medical conditions that Rheutopia treats. FDA believes these are the populations most relevant to this particular type of drug, as well as other chronic diseases. In terms of the detail provided, the questionnaire, which provided extensive detail about the exact questions proposed, was available upon request during the first comment period and will continue to be available during the second comment period.

Fifth and finally, the comment suggested that comparing variations of a short, one-page document limits the findings because there will be no comparison to a longer document, which may perform better. FDA concurs. In the revised research currently proposed, we have included a control condition. A subset of individuals will be randomly assigned to see the Medication Guide format for Rheutopia. Thus, we will compare two proposed one-page prototypes with an existing document that would be currently required for Rheutopia if it were a real drug.

External Reviewers

In addition to public comment, FDA's Division of Drug Marketing, Advertising, and Communications discussed the prototypes and the research design and protocol with a panel of 19 experts convened by the Brookings Institution on July 21, 2010. The names of these individuals can be found in Appendix A. After the workshop, several experts provided detailed written feedback to FDA, which was incorporated into the design of the study.

FDA estimates the burden of this collection of information as follows:

[11] See, for example, Day, R.S, *PMI: From Concept to Compliance,* Development and Distribution of Patient Medication Information for Prescription Drugs: Part 15 Public Hearing, FDA White Oak Campus, Silver Spring, MD, (September 27, 2010).

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
540	1	540	20/60	180
900	1	900	25/60	375
200	1	200	25/60	83
Total				638

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The burden chart reflects up to 3 pretests of 180 individuals each, 900 participants in the main study, and 200 participants in the followup study involving electronic administration.

Dated: December 8, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–31388 Filed 12–14–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0360]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Food and Drug Administration Public Health Notification Readership Survey (Formerly Known as the Safety Alert/ Public Health Advisory Readership Survey)

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 January 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 0910–0341. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850. 301–796–3793.

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.

Food and Drug Administration Public Health Notification Readership Survey (Formerly Known as the Safety Alert/ Public Health Advisory Readership Survey)—(OMB Control Number 0910–0341)—Reinstatement

Section 705(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 375(b)) authorizes FDA to disseminate information concerning imminent danger to public health by any regulated product. The Center for Devices and Radiological Health (CDRH) communicates these risks to user communities through two publications: (1) The Public Health Notification (PHN) and (2) the Preliminary Public Health Notification (PPHN). The PHN is published when CDRH has information or a message to convey to health care practitioners in order for them to make informed clinical decisions about the use of a device or device type when that information may not be readily available to the affected target audience in the health care community. CDRH can make recommendations that will help the health care practitioner mitigate or avoid the risk.

The PPHN is also published when CDRH has information to convey to health care practitioners in order for them to make informed clinical decisions about the use of a device or device type. However, two additional conditions exist that make use of this type of notification preferable: (1) CDRH's understanding of the problem, its cause(s), and the scope of the risk; the Center believes that health care practitioners need the information they can provide, however incomplete, as soon as possible, and (2) the problem is actively being investigated by the Center, private industry, another Agency, or some other reliable entity, so that the Center expects to be able to update the PPHN when definitive new information becomes available. Notifications are sent to organizations affected by risks discussed in the notification, such as hospitals, nursing homes, hospices, home health care agencies, retail pharmacies, and other health care providers. Through a process for identifying and addressing postmarket safety issues related to regulated products, CDRH determines when to publish notifications.

Section 1701(a)(4) of the Public Health Service Act (42 U.S.C. 300u(a)(4)) authorizes FDA to conduct research relating to health information. FDA seeks to evaluate the clarity, timeliness, and impact of safety alerts and public health advisories by surveying a sample of recipients.

Subjects will receive a questionnaire to be completed and returned to FDA. The information to be collected will address how clearly notifications for reducing risks are explained, the timeliness of the information, and whether the reader has taken any action to eliminate or reduce risks as a result of the information in the alert. Subjects will also be asked whether they wish to receive future notifications electronically, as well as how the PHN program might be improved.

The information collected will be used to shape FDA's editorial policy for the PHN and PPHN. Understanding how target audiences view these publications will aid in deciding what changes should be considered in their content and the format and method of dissemination.

In the **Federal Register** of August 24, 2009 (74 FR 42674), FDA published a 60-day notice requesting comments. No comments were received. However, FDA is republishing this 30-day notice for public comment, due to the amount of time that has passed for submission of this information collection request to OMB.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Public Health Service Act section	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
1701(a)(4)	308	3	924	0.17	157

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on the history of the PHN program, it is estimated that an average of three collections will be conducted a year. The total burden of response time is estimated at 10 minutes per survey. This was derived by CDRH staff completing the survey and through discussions with the contacts in trade organizations.

Dated: December 8, 2010.

Leslie Kux,

Acting Assistant, Commissioner for Policy.

[FR Doc. 2010–31387 Filed 12–14–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0623]

Agency Information Collection Activities; Proposed Collection; Comment Request; Voluntary Cosmetic Registration Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the collection of information associated with the Agency's Voluntary Cosmetic Registration Program (VCRP).

DATES: Submit either electronic or written comments on the collection of information by February 14, 2011.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850. 301–796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Voluntary Cosmetic Registration Program—21 CFR Parts 710 and 720 (OMB Control Number 0910–0027)—Revision

The Federal Food, Drug, and Cosmetic Act (the FD&C Act) provides FDA with the authority to regulate cosmetic products in the United States. Cosmetic products that are adulterated under section 601 of the FD&C Act (21 U.S.C. 361) or misbranded under section 602 of the FD&C Act (21 U.S.C. 362) may not be distributed in interstate commerce. To assist FDA in carrying out its responsibility to regulate cosmetics, the Agency has developed the VCRP.

In 21 CFR part 710, FDA requests that establishments that manufacture or package cosmetic products register with the Agency on Form FDA 2511 entitled "Registration of Cosmetic Product Establishment." The term "Form FDA 2511" refers to both the paper and electronic versions of the form. The electronic version of Form FDA 2511 is available on FDA's VCRP Web site at *http://www.fda.gov/Cosmetics/GuidanceComplianceRegulatoryInformation/VoluntaryCosmeticsRegistrationProgramVCRP/OnlineRegistration/default.htm.* FDA's online registration system, intended to make it easier to participate in the VCRP, was made available industrywide on December 1, 2005. The Agency strongly encourages electronic registration of Form FDA 2511 because it is faster and more convenient. A registering facility will receive confirmation of electronic registration, including a registration number, by e-mail, usually within 7 business days. The online system also allows for amendments to past submissions.

Because registration of cosmetic product establishments is not mandatory, voluntary registration provides FDA with the best information available about the locations, business trade names, and types of activity (manufacturing or packaging) of cosmetic product establishments. FDA places the registration information in a computer database and uses the information to generate mailing lists for distributing regulatory information and for inviting firms to participate in workshops on topics in which they may be interested. FDA also uses the

information for estimating the size of the cosmetic industry and for conducting onsite establishment inspections. Registration is permanent, although FDA requests that respondents submit an amended Form FDA 2511 if any of the originally submitted information changes.

In part 720 (21 CFR part 720), FDA requests that firms that manufacture, pack, or distribute cosmetics file with the Agency an ingredient statement for each of their products. Ingredient statements for new submissions (§§ 720.1 through 720.4) are reported on Form FDA 2512, "Cosmetic Product Ingredient Statement," and on Form FDA 2512a, a continuation form. Amendments to product formulations (§ 720.6) also are reported on Forms FDA 2512 and FDA 2512a. When a firm discontinues the commercial distribution of a cosmetic, FDA requests that the firm file Form FDA 2514, "Notice of Discontinuance of Commercial Distribution of Cosmetic Product Formulation" (§§ 720.3 and 720.6). If any of the information submitted on or with these forms is confidential, the firm may submit a request for confidentiality under § 720.8.

FDA's online filing system is available on FDA's VCRP Web site at *http://wcms.fda.gov/FDAgov/Cosmetics/GuidanceComplianceRegulatoryInformation/VoluntaryCosmeticsRegistrationProgramVCRP/OnlineRegistration/default.htm.* The online filing system contains the electronic versions of Forms FDA 2512, 2512a, and 2514, which are collectively found within the electronic version of Form FDA 2512. The Agency strongly encourages electronic filing of Form FDA 2512 because it is faster and more convenient. A filer will receive confirmation of electronic filing by e-mail.

FDA places cosmetic product filing information in a computer database and uses the information for evaluation of cosmetic products currently on the market. Because filing of cosmetic product formulations is not mandatory, voluntary filings provide FDA with the best information available about cosmetic product ingredients and their frequency of use, businesses engaged in the manufacture and distribution of cosmetics, and approximate rates of product discontinuance and formula modifications. The information assists FDA scientists in evaluating reports of alleged injuries and adverse reactions from the use of cosmetics. The information also is used in defining and planning analytical and toxicological studies pertaining to cosmetics.

Information from the database is releasable to the public under FDA compliance with the Freedom of Information Act. FDA shares nonconfidential information from its files on cosmetics with consumers, medical professionals, and industry.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section or part	Form No.	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
Part 710 (registrations)	FDA 2511 [2]	135	1	135	0.2	27
720.1 through 720.4 (new submissions).	FDA 2512 [3]	141	31	4,371	0.33	1,442
720.6 (amendments)	FDA 2512	109	7	763	0.17	130
720.6 (notices of discontinuance)	FDA 2512	55	41	2,255	0.1	226
720.8 (requests for confidentiality)		1	1	1	2.0	2.0
Total						1,827

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

[2] The term "Form FDA 2511" refers to both the paper Forms FDA 2511 and electronic Form FDA 2511 in the electronic system known as the Voluntary Cosmetic Registration Program, which is available at *http://wcms.fda.gov/FDAgov/Cosmetics/GuidanceComplianceRegulatoryInformation/VoluntaryCosmeticsRegistrationProgramVCRP/OnlineRegistration/default.htm.*

[3] The term "Form FDA 2512" refers to the paper Forms FDA 2512, 2512a, and 2514 and electronic Form FDA 2512 in the electronic system known as the Voluntary Cosmetic Registration Program, which is available at *http://wcms.fda.gov/FDAgov/Cosmetics/GuidanceComplianceRegulatoryInformation/VoluntaryCosmeticsRegistrationProgramVCRP/OnlineRegistration/default.htm.*

FDA bases its estimate of the number of responses on submissions received from fiscal years 2005 to 2007. FDA bases its estimate of the hours per response upon information from cosmetic industry personnel and FDA experience entering data submitted on paper Forms 2511, 2512, 2512a, and 2514. FDA estimates that, annually, 135 establishments that manufacture or package cosmetic products will each submit 1 registration on Form FDA 2511, for a total of 135 annual responses. Each submission is estimated to take 0.2 hour per response for a total of 27 hours. FDA estimates that, annually, 141 firms that manufacture, pack, or distribute cosmetics will file 31 ingredient statements for new submissions on Forms FDA 2512 and FDA 2512a, for a total of 4,371 annual responses. Each submission is estimated to take 0.33 hour per response for a total of 1,442.43 hours, rounded to 1,442. FDA estimates that, annually, 109 firms that manufacture, pack, or distribute cosmetics will file 7 amendments to product formulations on Forms FDA 2512 and FDA 2512a, for a total of 763 annual responses. Each submission is estimated to take 0.17 hour per response for a total of 129.71 hours, rounded to 130. FDA estimates that, annually, 55 firms that manufacture, pack, or distribute cosmetics will file 41 notices of discontinuance on Form FDA 2514, for a total of 2,255 annual responses. Each submission is estimated to take 0.1 hour per response for a total of 225.50 hours, rounded to 226. FDA estimates that, annually, one firm will file one request for confidentiality. Each such request is estimated to take 2 hours to prepare for a total of 2.0 hours. Thus, the total estimated hour burden for this information collection is 1,827 hours.

This is a revision request in which the burden hours for the information collection request (ICR) under OMB control number 0910–0030, "Cosmetic Product Voluntary Reporting Program" are being consolidated under the ICR assigned OMB control number 0910–0027, "Voluntary Registration of Cosmetic Product Establishments," which expires February 28, 2011. The revised ICR for 0910–0027 has been renamed "Voluntary Cosmetic Registration Program." Upon approval of this revision request, the ICR for 0910–0030 will be discontinued.

Dated: December 9, 2010.

Leslie Kux,

Acting Assistant, Commissioner for Policy.

[FR Doc. 2010–31386 Filed 12–14–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–D–0616]

Draft Guidance for Industry on Codevelopment of Two or More Unmarketed Investigational Drugs for Use in Combination; 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 "Codevelopment of Two or More Unmarketed Investigational Drugs for Use in Combination." This guidance is intended to assist sponsors in the codevelopment of two or more novel (not previously marketed) drugs to be used in combination to treat a disease or condition. This guidance provides recommendations and advice on how to address certain scientific and regulatory issues that will arise during codevelopment. The guidance is not intended to apply to development of fixed-dose combinations of already marketed drugs or to development of a single new investigational drug to be used in combination with an approved drug or drugs. The guidance is also not intended to apply to vaccines, gene or cellular therapies, blood products, or medical devices.

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 February 14, 2011.

ADDRESSES: Submit written requests for single copies of the draft 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 draft guidance document.

Submit electronic comments on 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.

FOR FURTHER INFORMATION CONTACT: Colleen Locicero, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, rm 4216, Silver Spring, MD 20993–0002, 301–796–1114.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled "Codevelopment of Two or More Unmarketed Investigational Drugs for Use in Combination." The guidance is intended to assist sponsors interested in developing two or more novel (not previously marketed) drugs to be used in combination. Recent scientific advances have increased our understanding of the pathophysiological processes that underlie many complex diseases, such as cancer, cardiovascular disease, and infectious diseases. This increased understanding has provided further impetus for new therapeutic approaches that rely primarily or exclusively on combinations of drugs directed at multiple therapeutic targets to improve treatment response and minimize development of resistance. In settings in which combination therapy provides significant therapeutic advantages, there is growing interest in the development of combinations of investigational drugs not previously developed for any purpose.

Because the existing developmental and regulatory paradigm focuses primarily on assessment of the effectiveness and safety of a single new investigational drug acting alone, or in combination with an approved drug, FDA believes guidance is needed to assist sponsors in the codevelopment of two or more unmarketed drugs. This guidance is intended to describe a high-level, generally applicable approach to codevelopment of two or more unmarketed drugs. It describes the criteria for determining when codevelopment is an appropriate option, makes recommendations about nonclinical and clinical development strategies, and addresses certain regulatory process issues. The guidance does not apply to vaccines, gene or cellular therapies, or blood products.

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 companion diagnostic devices. 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. 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: December 9, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–31426 Filed 12–14–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0618]

Statement of Organization, Functions and Delegations of Authority

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has reorganized its Center for Tobacco Products (CTP) by establishing two new offices: Office of Health Communication and Education and the Office of Compliance and Enforcement. In addition, CTP has made improvements to the current offices' functional statements. This organizational change is intended to fill the gaps in the current CTP structure and clarify major responsibilities designed for long-term success in administering the Family Smoking Prevention and Tobacco Control Act.

FOR FURTHER INFORMATION CONTACT: Erik Mettler, Office of Management; or Sharon Chartos, Office of Management, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–796–9200.

I. Introduction

The Statement of Organization, Functions and Delegations of Authority for the Center for Tobacco Products (74 FR 41713, August 18, 2009) is amended to reflect the restructuring of the Center for Tobacco Products that was approved by the Secretary of Health and Human Services on November 15, 2010:

II. Organization

The Center for Tobacco Products is headed by the Director and includes the following organizational units:

Center For Tobacco Products (DI)

1. Oversees the implementation of the Family Smoking Prevention and Tobacco Control Act, which provides FDA with several new authorities. These include restricting the marketing of tobacco products to minors; requiring new warning labels for cigarettes and smokeless tobacco products; prohibiting marketing measures that are misleading to consumers; establishing tobacco product standards; requiring Good Manufacturing Practice standards for tobacco product manufacturing facilities; requiring industry reporting of tobacco product ingredient and constituent data, including a description of the nicotine content and delivery mechanisms; educating the public and regulated industry about various provisions of the Family Smoking Prevention and Tobacco Control Act; and enforcement authorities including but not limited to enabling FDA to act quickly and effectively to remove products that are in violation of the statute.

2. Provides programmatic and policy direction to appropriate Center and Agency personnel on all matters related to implementation of the Family Smoking Prevention and Tobacco Control Act and identifies critical public health issues relating to tobacco product use.

3. Establishes and maintains effective relationships with senior FDA, Department of Health and Human Services (HHS), and Administration officials, industry representatives, Members of Congress, counterparts from State, local, territorial, and tribal governments, representatives from academia and public health organizations, and other key stakeholders on matters related to tobacco products.

Office of the Center Director (DIA)

1. Provides vision, leadership, and strategic direction for all Center activities related to regulation of tobacco products and implementation of the Family Smoking Prevention and Tobacco Control Act.

2. Provides vision, leadership, and strategic direction for all Center activities related to protecting the public health and communicating about the negative consequences of tobacco product use.

3. Plans, administers, coordinates, evaluates, and implements overall Center scientific, legal, policy, regulatory, compliance, public education, and management programs, policies, and plans.

4. Provides leadership and direction for Center management, planning, and evaluation systems to ensure optimum utilization of personnel, budgetary and financial resources, information technology, professional development, and facilities.

5. Establishes a program to maintain the highest levels of scientific quality and integrity for the Center.

6. Serves as the primary liaison and spokesperson on tobacco products regulation and the public health consequences of tobacco products use with FDA, HHS, Office of Management and Budget (OMB), the White House, Congress and the media, as well as with a variety of stakeholders, including regulated industry; tobacco control advocacy organizations; scientific, public health, and medical associations; academia; and State, local, territorial, and tribal governments.

7. Provides Center-wide program and strategic planning, execution, and support to Center leadership; coordination, development, clearance, and delivery of all Congressionally mandated reports, studies, and analyses; and also high quality briefing materials, background information for meetings, and speeches.

8. Provides correspondence control for the Center and controls and processes all public correspondence. Develops and operates executive correspondence tracking systems.

9. Manages the Center's Freedom of Information Act activities, coordinating responses with other Center technical, legal, regulatory, and policy units as well as developing direct responses.

10. Manages the Center's Ombudsman program.

11. Manages the Center's history program and archives.

Office of Management (DIB)

1. Provides authoritative advice and guidance to the Center Director on management policies, guidelines, issues and concerns that impact Center programs and initiatives.

2. Provides leadership, guidance, and direction regarding the development of long-range strategic management plans, operational plans, and systems for Center activities. Directs technical support staff in providing essential management services and other critical support functions.

3. Provides leadership and guidance as primary liaison with the FDA Office of Management to ensure provision of a broad range of essential technical support services.

4. Provides leadership and effective coordination as the primary Center liaison and expert with the Office of Information Management for provision and continuous improvement of information technology services to include networking, scientific computing software engineering, systems, and telecommunications.

5. Designs and develops performance management systems and operational/business process plans.

6. Analyzes management performance trends, FDA cost structure, and use of program resources.

7. Directs a variety of short-range and long-range special projects or assignments of substantial significance to the Center.

8. Administers and executes the Center management and fiscal planning and performance activities, budget formulation and execution, payroll, accounting, and property management functions.

9. Analyzes, formulates, and develops the annual budget for the Center in accordance with FDA, HHS, OMB, and Congressional guidelines. Provides oversight and ensures compliance with all regulations governing financial processes as outlined in FDA, HHS, OMB, and U.S. Government Accountability Office policies. Manages FDA, HHS, OMB, and Congressional inquiries regarding budget formulation and execution and required quarterly reports to Congressional Appropriations Committees.

10. Develops, maintains, monitors, analyzes, and reports data to Center management and program officials on the Center's budget/planning resource monitoring and evaluations systems.

11. Provides leadership within the Center to ensure compliance with statutes, executive orders, and administrative directives, such as the Chief Financial Officer Act and the

Federal Financial Managers' Financial Integrity Act.

12. Serves as the liaison between the CTP and the Bethesda Field Office, Atlanta Field Office, and/or Office of Management Programs on all personnel issues including, but not limited to, Human Capital Resources, appointment mechanisms, recruitment flexibilities, Senior Executive Service (SES) appointments, Title 42 appointments, retention flexibilities, and position management. Manages the Center's Performance Management program and the Center's Awards program.

13. Manages, tracks, and maintains the Center's regulatory submissions in accordance with FDA's records retention policies.

14. Receives, tracks, and stores all of Center's regulatory submissions.

15. Manages, conducts, and analyzes studies designed to improve Center processes and resource utilization and support requirements.

16. Manages facility-related activities for the Center including leases, space needs, maintenance, and development of architectural plans for move to FDA's White Oak campus.

17. Manages the Center's employee training and development activities, including individual employee development plans. Manages the Center's regulatory science fellowship program and other academic-based fellowship programs.

Office of Policy (DIC)

1. Advises the Center Director and other key Agency officials on public health, scientific, and regulatory policy development at the Center.

2. Develops and evaluates Center-wide priorities and policies, assuring FDA's statutory public health goals and policy needs are integrated into initiatives across science, regulations, compliance, public education, and management programs across the Center.

3. Ensures that Center policy decisions are consensus-based and informed, when relevant and appropriate, through communications with stakeholders in CTP, FDA, the Centers for Disease Control and Prevention, National Institutes for Health, HHS, and other government and relevant stakeholders and private agencies.

4. Monitors, coordinates, and advises the Center Director on policy involving sensitive, controversial, and complex issues related to Center activities that may involve precedent-setting matters or issues of particular concern to the Center Director or FDA Commissioner of Food and Drugs.

5. Analyzes and evaluates the impact and effectiveness of the Center's overall impact on public health.

6. Oversees public health policy and analytics; coordinates and conducts contingency analyses; manages special projects that require quick reaction/problem solving and planning; and develops and oversees the Center's approach to evolving issues in tobacco product regulation and control, such as impact on population health, development of policy aspects of tobacco product standards, modified risk products, substantial equivalence, and marketing and advertising.

7. Provides economic and modeling analyses on policy options as required.

8. Provides authoritative policy advice, guidance, assistance, interpretations, and recommendations to CTP, FDA, HHS officials, and scientific and professional personnel, intra-governmental counterparts (State, territorial and tribal officials).

9. Prepares and reviews legislative proposals, Congressional testimony; and materials related to implementing, amending, or modifying the Family Smoking Prevention and Tobacco Control Act, FDA laws, and regulations in collaboration with the Office of the Commissioner, Office of Legislation.

10. Provides advice and analysis for international tobacco control policies and acts as the Center's liaison with international stakeholders, including foreign governments.

11. Advises external stakeholders, including large and small tobacco manufacturers, tobacco control advocacy groups, medical and professional trade associations, State, territorial, local, and tribal governments, and others concerning the policy implications of the law and regulations.

12. Manages the Center's small business assistance activities.

Office of Regulations (DID)

1. Provides Center's oversight and leadership in, and coordinates the development of regulations, policies, procedures, and guidance related to the regulation of tobacco products.

2. Reviews and clears draft regulations developed by the Center, other FDA Centers, and other agencies.

3. Provides Center-level leadership and coordination for briefings within FDA, and with HHS, OMB, and other Federal agencies related to regulations and guidance documents.

4. Serves as the Center's focal point for developing and maintaining communications, policies, and programs with regard to regulations development, review, clearance, and publication.

5. Serves as the Center's primary liaison with the FDA's Office of Chief Counsel and the HHS Office of General Counsel; and provides support for legal defense in litigation.

6. Manages the development and implementation of plans for the Center's regulation development activities.

7. Provides technical assistance on the development of legislative proposals related to FDA responsibilities of the Family Smoking Prevention and Tobacco Control Act.

8. Manages the citizens' petition process on behalf of the Center.

9. Supports the Center in its regulatory litigation activities.

Office of Science (DIE)

1. Conducts scientific research and reviews programs to support the Center's goals for implementing the Family Smoking Prevention and Tobacco Control Act, as part of a comprehensive effort to reduce the toll of disease, disability, and death caused by tobacco products.

2. Serves as the focal point for overall management of Center activities related to science priorities and resources. Advises and assists the Center Director, FDA Commissioner of Food and Drugs, and other key officials on scientific issues that have an impact on public health, policy, direction, and long-range goals, and on the functions, capabilities, and management of scientific research facilities; and participates with other Agency components in planning such facilities.

3. Coordinates the Tobacco Products Scientific Advisory Committee which advises the Center Director, FDA Commissioner of Food and Drugs, HHS Secretary of Health and Human Services, and other key officials on certain issues related to the public health impact of tobacco products.

4. Organizes, plans, directs, and conducts research related to the development, manufacture, testing, labeling, and marketing of tobacco products in order to develop and maintain a scientific base for establishing policies, tobacco product standards, and test methods appropriate for the protection of public health.

5. Plans, directs, and conducts epidemiological research regarding the initiation, use, and cessation of tobacco products and the impact on the public health.

6. Coordinates targeted research to address Center priorities in collaboration with leading scientists in other segments of FDA, other Federal agencies, and the scientific community at large.

7. Plans, directs, and conducts research related to behavioral science, including consumer behavior and consumer perception of risks of harm from tobacco products.

8. Establishes and publishes a list of harmful and potentially harmful constituents in each regulated tobacco product.

9. Develops policies and procedures governing the submission and review of ingredient and constituent information for regulated tobacco products and oversees their implementation.

10. Develops and implements policies and procedures governing the submission and review of applications and postmarketing surveillance studies for modified-risk tobacco products.

11. Develops and implements policies and procedures governing the submission and premarket review of reports of substantially equivalent tobacco products and applications for new tobacco products.

12. Develops and implements policies and procedures governing submission and review of information regarding investigational tobacco products.

13. Develops, maintains, monitors, and analyzes policies, programs, and databases of adverse reactions to tobacco products.

14. Reviews, evaluates, and takes appropriate action on recommendations concerning denial or withdrawal of marketing and modified-risk authorizations for tobacco products.

15. Develops, in coordination with other Center offices, standards for Good Manufacturing Practices regarding methods, facilities, and controls for manufacturing, testing, and storage of tobacco products.

16. Participates, in coordination with other Agency components, in inspections of manufacturing facilities for compliance with applicable manufacturing and tobacco product standards.

17. Represents the Center in interactions with other government agencies, State and local governments, industry, academia, consumer organizations, Congress, national and international organizations, and the scientific community on tobacco science and regulation issues.

18. Coordinates and provides guidance on science policy in program areas that cross major Agency component lines and on scientific aspects of critical or controversial issues, including Agency risk assessment policies.

Office of Health Communication and Education (DIF)

1. Serves as a comprehensive health communication enterprise developed as a part of a comprehensive effort to reduce the toll of disease, disability, and death caused by tobacco products.

2. Develops, coordinates, and evaluates public health communication and education activities in support of requirements of the Family Smoking Prevention and Tobacco Control Act.

3. Serves as the central point for communication about the Center's activities, campaigns, and key messages, including executing programs and implementing strategies about the regulation of tobacco products and the health risks associated with tobacco product use.

4. Ensures consistent branding, messaging, and strategic communications for all Center public education output.

5. Provides effective collaboration and coordination with partners and stakeholders on public health education and communications programs.

6. Provides accurate and timely public health information and education about tobacco products regulation and the requirements of the Family Smoking Prevention and Tobacco Control Act.

7. Develops and manages informational materials for health professionals and consumers, including Web pages and print media.

8. Manages Center's Web sites (Intranet and Internet).

9. Constructs risk communication messages in support of the requirements of the Family Smoking Prevention and Tobacco Control Act, using appropriate research methods.

10. Serves as the liaison between the Center and its stakeholders on public health education and communication programs.

Office of Compliance and Enforcement (DIG)

1. Advises the Center Director and other Agency officials on legal, administrative, and regulatory programs and policies concerning Agency compliance and enforcement responsibilities relating to tobacco products.

2. Coordinates, interprets, and evaluates the Center's overall compliance and enforcement efforts.

3. Provides technical support and guidance in the development and review of standards, regulations, and guidance related to compliance and enforcement.

4. Develops, directs, coordinates, evaluates, and monitors compliance and enforcement programs covering regulated industry.

5. Coordinates, develops, and directs State compliance and enforcement programs.

6. Provides training of Federal, State, and territorial compliance personnel.

7. Conducts field tests and inspections when necessary for regulatory purposes and evaluates regulated industry activities to assure compliance with regulations.

8. Provides advice to Agency field offices and commissioned officials, and manages Center activities relating to legal actions, case development, and contested case assistance.

9. Designs, develops, and implements Center programs to register tobacco establishments and product lists.

10. Coordinates all field planning activities and issues all field assignments for the Center.

11. Advises actual or potential manufacturers, distributors, retailers, and importers concerning the requirements of the law and regulations related to compliance and enforcement.

III. Delegation of Authority

Pending further delegation, directives, or orders by the Commissioner of Food and Drugs, or the Director of Center for Tobacco Products, all delegations and redelegations of authority made to officials and employees of affected organizational components in effect prior to this date will continue in effect in them or their successors, provided they are consistent with this reorganization.

Dated: December 9, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–31383 Filed 12–14–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Approval From OMB of One New Public Collection of Information: Airport Federalization

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on a new Information Collection Request (ICR) (abstracted below) that we will submit to the Office of Management and Budget (OMB) for approval in compliance with the Paperwork Reduction Act (PRA). The

ICR describes the nature of the information collection and its expected burden. The collection involves the airport operator submitting a Statement of Interest (SOI) and a Federalization Request Letter (FRL) to request that TSA provide passenger and baggage screening services, that is, "Federalization" of an airport.

DATES: Send your comments by February 14, 2011.

ADDRESSES: Comments may be e-mailed to *TSAPRA@dhs.gov* or delivered to the TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Joanna Johnson at the above address, or by telephone (571) 227–3651.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement 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;

(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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Purpose and Description of Data Collection

The FRL is a formal request submitted to the local TSA Federal Security Director (FSD) by management at an airport seeking Federalization of the airport by TSA. The SOI is an enclosure with the FRL and contains information required by TSA to evaluate the request and to begin the Federalization process. The FSD will assist the airport operator in completing the FRL and SOI.

The airport operator seeks airport Federalization in order to support regularly scheduled passenger or public charter service by aircraft operators operating under a full security program under 49 CFR 1544.101(a) or foreign air carriers operating under a security program under 49 CFR 1546.101(a) or (b), which require passenger and baggage screening to be conducted by TSA using either TSA employees or TSA contractors. The SOI provides TSA with information on the background of the requesting airport, including the current status of regularly scheduled passenger or public charter air service, as well as the types of aircraft expected and planned flight schedule of regularly scheduled passenger or public charter air service.

TSA receives approximately 10 Federalization requests per year. TSA expects that preparation of the FRL and SOI by the airport operator will take approximately one hour. The airport will be required to submit this information only one time concerning that request.

Use of Results

TSA Headquarters and local FSDs will use these results to evaluate the airport operator's request and determine whether the operations of the aircraft operators and foreign air carriers regularly served by that airport operator warrant Federalization. This information will allow TSA Headquarters to properly identify the security needs and planning activities required at the local level.

This evaluation is not classified and ordinarily does not involve sensitive security information or proprietary information. If an airport is Federalized, it must develop a complete airport security program in accordance with 49 CFR part 1542 that must be approved by the FSD prior to commencing commercial flight operations as a Federalized airport.

Issued in Arlington, Virginia, on December 10, 2010.

Joanna Johnson,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2010–31532 Filed 12–14–10; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of an Existing Information Collection; Comment Request

ACTION: 60-Day notice of information collection under review; Form G–646, Sworn Statement of Refugee Applying for Admission to the United States; OMB Control No. 1615–0097

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until February 14, 2011.

During this 60-day period, USCIS will be evaluating whether to revise the Form G–646. Should USCIS decide to revise Form G–646 we will advise the public when we publish the 30-day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30 days to comment on any revisions to the Form G–646.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Products Division, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–0997 or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail, please make sure to add OMB Control No. 1615–0097 in the subject box.

Note: The address listed in this notice should only be used to submit comments concerning the extension of the Form G–646. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check "My Case Status" online at *https://egov.uscis.gov/cris/Dashboard.do,* or call the USCIS National Customer Service Center at 1–800–375–5283 (TTY 1–800–767–1833).

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the 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, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection:

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Sworn Statement of Refugee Applying for Admission to the United States.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G–646; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The data collected by Form G–646 is used by USCIS to determine eligibility for the admission of the applicants to the United States as refugees.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 75,000 responses at 20 minutes (.333) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 24,975 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov/.*

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020, Telephone number 202–272–8377.

Dated: December 10, 2010.

Sunday Aigbe,

Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2010–31500 Filed 12–14–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control No. 1615–0050]

Agency Information Collection Activities: Form N–336, Revision to an Existing Information Collection; Comment Request

ACTION: 30-Day notice of information collection under review: Form N–336, Request for Hearing on a Decision in Naturalization Proceedings Under Section 336; OMB Control No. 1615–0050.

On August 18, 2010, USCIS published a 60-day notice in the **Federal Register** at 75 FR 51095 announcing the extension of the Form N–336. The 60-day notice announced that during the 60-day comment period USCIS would be evaluating whether to revise the form and that notification would be provided when we published the 30-day notice in the **Federal Register**. On November 17, 2010, USCIS published a 30-day extension notice in the **Federal Register** at 75 FR 70277. The notice should have said that USCIS would be revising the Form N–336. This notice corrects that inadvertent error.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on August 18, 2010, at 75 FR 51095, allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until January 14, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, 20 Massachusetts Avenue, Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov.* When submitting comments by e-mail please make sure to add OMB Control Number 1615–0050 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this Information Collection

(1) *Type of Information Collection:* Revision to an existing information collection.

(2) *Title of the Form/Collection:* Request for Hearing on a Decision in Naturalization Proceedings Under Section 336.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–336; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or Households.* Form N–336 provides a method for applicants, whose applications for naturalization are denied, to request a new hearing by an Immigration Officer of the same or higher rank as the denying officer, within 30 days of the original decision.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 4,145 responses at 2 hours and 45 minutes (2.75) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 11,398 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov.*

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020; Telephone 202–272–8377.

Dated: December 10, 2010.

Stephen Tarragon,

Deputy Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2010–31501 Filed 12–14–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5376–N–122]

Notice of Submission of Proposed Information Collection to OMB; Notice of Proposed Information Collection for Public Comment; Mortgage Record Change

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Mortgage Record Change information is used by FHA-approved mortgagees to comply with HUD requirements for reporting the sale of a mortgage between investors and/or the transfer of the mortgage servicing responsibility, as appropriate.

DATES: *Comments Due Date: January 14, 2011.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within thirty (30) days from the date of this Notice. Comments should refer to the proposal by name and or OMB approval number (2502–0422) and should be sent to: Ross A. Rutledge, HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail: *Ross.A.Rutledge@omb.eop.gov*; Fax: 202–395–3086.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Colette.Pollard@HUD.gov*; telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (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; (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 collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Mortgage Record Change.

Description of the Need for the Information and Its Proposed Use: The Mortgage Record Change information is used by FHA-approved mortgagees to comply with HUD requirements for reporting the sale of a mortgage between investors and/or the transfer of the mortgage servicing responsibility, as appropriate.

OMB Control Number: 2502–0422.

Form Numbers: None.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	x	Hours per response	=	Burden hours
Reporting Burden	2,500,000	0.1		26		6,500

Total Estimated Burden Hours: 6,500.

Status: Extension without change of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 9, 2010.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2010–31506 Filed 12–14–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5376–N–123]

Notice of Submission of Proposed Information Collection to OMB HUD Conditional Commitment/Direct Endorsement Statement of Appraised Value

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The information is used by appraisers and/or underwriters upon their review of the appraisal report (USAR) to determine if a property meets FHA guidelines to be eligible for HUD mortgage insurance. Underwriters are required to sign and submit a copy of the completed form to HUD for endorsement as part of the case binder; to provide a copy to the homebuyer; and to maintain a copy for the mortgagee.

DATES: *Comments Due Date: January 14, 2011.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0494) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington,

DC 20503; fax: 202–395–5806. E-mail: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (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; (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 collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: HUD Conditional Commitment/Direct Endorsement Statement of Appraised Value.

OMB Approval Number: 2502–0494.

Form Numbers: HUD–92800.5B.

Description of the Need for the Information and its Proposed Use: The information is used by appraisers and/or underwriters upon their review of the appraisal report (USAR) to determine if a property meets FHA guidelines to be eligible for HUD mortgage insurance. Underwriters are required to sign and submit a copy of the completed form to HUD for endorsement as part of the case binder; to provide a copy to the homebuyer; and to maintain a copy for the mortgagee.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	Burden hours
Reporting Burden:	5,668	8.336		0.119	5,668

Total Estimated Burden Hours: 5,668.

Status: Revision of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: December 9, 2010.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2010–31511 Filed 12–14–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR957000–L625100000–PM000: HAG11–0075]

Filing of Plats of Survey: Oregon/Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management Oregon/Washington State Office, Portland, Oregon, 30 days from the date of this publication.

Willamette Meridian

Oregon

T. 6 S., R. 10 E., accepted November 1, 2010
T. 41 S., R. 15 E., accepted November 1, 2010
T. 41 S., R. 14½ E., accepted November 1, 2010
T. 3 S., R. 44 E., accepted November 1, 2010
T. 26 S., R. 12 W., accepted November 5, 2010

ADDRESSES: A copy of the plats may be obtained from the Land Office at the Bureau of Land Management, Oregon/Washington State Office, 333 S.W. 1st Avenue, Portland, Oregon 97204, upon required payment. A person or party who wishes to protest against a survey must file a notice that they wish to protest (at the above address) with the Oregon/Washington State Director, Bureau of Land Management, Portland, Oregon.

FOR FURTHER INFORMATION CONTACT: Kyle Hensley, (503) 808–6124, Branch of Geographic Sciences, Bureau of Land Management, 333 S.W. 1st Avenue, Portland, Oregon 97204.

Pamela J. Chappel,

Acting Chief, Branch of Land, Mineral, and Energy Resources.

[FR Doc. 2010–31430 Filed 12–14–10; 8:45 am]

BILLING CODE 4310–33–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Starter Motors and Alternators,* DN 2773; the Commission is soliciting comments on any public interest issues raised by the complaint.

FOR FURTHER INFORMATION CONTACT: Marilyn R. Abbott, Secretary to the Commission, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and 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 *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 has received a complaint filed on behalf of Remy International, Inc. on December 9, 2010. The complaint alleges violations of section 337 of the Tariff Act of 1930 (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 starter motors and alternators. The complaint names as respondents Wetherill Associates, Inc. d/b/a WAIGlobal of Fort Lauderdale, FL; Linhai Yongci of Zhenjiang China; Metric Sales & Engineering of Northfield, IL; Wan Li Industrial Development, Inc. of South El Monte, CA; Yongkang Boyu Auto Motor Company of Zhenjiang China; Wuxi Susan Auto Parts Company of Changzhou China; American Automotive Parts, Inc. of Niles, IL; and Motorcar Parts of America, Inc. of Torrance, CA.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) Indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) Indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, five business days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Submissions should refer to the docket number ("Docket No. 2773") in a prominent place on the cover page and/or the first page. The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf.*) Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

By order of the Commission.

Issued: December 9, 2010.

Marilyn R. Abbott

Secretary to the Commission

[FR Doc. 2010–31395 Filed 12–14–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Extension of Public Comment Period

On November 15, 2010, a proposed consent decree in *United States, et al.* v. *Bouchard Transportation Company, Inc., et al.,* Civil Action No. 1:10-cv-11958–NMG, was lodged with the United States District Court for the District of Massachusetts. The proposed consent decree will settle a portion of the claims of the United States (on behalf of the Department of Commerce/National Oceanic and Atmospheric Administration and the Department of the Interior/Fish and Wildlife Service), the Commonwealth of Massachusetts, and the State of Rhode Island for natural resource damages under the Oil Pollution Act, 33 U.S.C. 2701, *et seq.,* ("Trustees") against Bouchard Transportation Company, Inc., and related companies relating to an oil spill from the tank barge *Bouchard No. 120,* which occurred in April 2003 in Buzzards Bay. Notice of the lodging of the proposed Consent Decree appeared in 75 FR 70947 (November 19, 2010).

Notice is hereby given that the Department of Justice has extended for thirty (30) days the length of the period during which it will receive comments relating to the proposed consent decree. Therefore, the Department of Justice will now receive comments through January 20, 2011. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States, et al.* v. *Bouchard Transportation Company, Inc., et al.,* D.J. Ref. 90–5–1–1–08159.

During the public comment period, the Consent Decree, may also be examined on the following Department of Justice Web site, to *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $13.50 (25 cents per page reproduction costs of Consent Decree and Appendices) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–31394 Filed 12–14–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on December 8, 2010, a proposed Consent Decree in *United States of America and the Commonwealth of Kentucky* v. *Logan Aluminum, Inc.,* Case No. 1:10–cv–00177–TBR was lodged with the United States District Court for the Western District of Kentucky.

The proposed Consent Decree resolves claims of the United States and the Commonwealth of Kentucky, under the Clean Air Act ("CAA"), 42 U.S.C. 7412, and related provisions of the laws of the Commonwealth of Kentucky, for violations of the National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production as set forth in 40 CFR part 63, Subparts A and RRR and the Title V permit provisions of the CAA, 42 U.S.C. 7661a(a), occurring at Logan Aluminum's Russellville, Kentucky secondary aluminum facility.

The proposed Consent Decree requires Logan Aluminum to perform work in a timely fashion to come into full compliance with the above laws and regulations, and pay a civil penalty in the amount of $285,000.

For a period of 30 days from the date of this publication, the Department of Justice will receive comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611. Comments should refer to: *United States of America et al.* v. *Logan Aluminum, Inc.,* DJ # 90–5–2–1–08632.

The proposed Consent Decree may be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* Copies of the proposed Consent Decree may be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy of the proposed Consent Decree, please enclose a check in the amount of $8.00 for a copy exclusive of signature pages (25 cent per page reproduction cost) or $9.00 for a copy including signature pages (25 cent per page reproduction cost), payable to the U.S. Treasury, or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–31392 Filed 12–14–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–NEW]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Letter Requesting Supporting Documents Identifying a Legal Entity.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), 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. This notice requests comments from the public and affected agencies concerning the proposed information collection. Comments are encouraged and will be accepted on or before February 14, 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 Gary Schaible, *Gary.Schiable@atf.gov* National Firearms Act Branch, 99 New York Avenue, NE., Washington, DC 20226 Fax (202) 648–9601.

Written comments and suggestions from the public and affected agencies concerning the proposed information collection 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's 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.

Summary of Collection:

(1) *Type of Information Collection:* New.

(2) *Title of the Form/Collection:* Letter Requesting Supporting Documents Identifying a Legal Entity.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond:*

Primary: Business or other for-profit.

Other: None.

Need for Collection: The collection of information will be used to determine the lawful existence and validity of a legal entity before ATF approves the transfer of an NFA firearm to that entity.

(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 5,000 respondents will spend approximately 30 minutes to compile documentation requested by the letter.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 5,000 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, 2 Constitution Square, Room 2E–502, 145 N Street, NE., Washington, DC 20530.

Dated: December 9, 2010.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–31401 Filed 12–14–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1537]

Draft NIJ Selection and Application Guide to Ballistic-Resistant Body Armor for Law Enforcement, Corrections, and Public Safety

AGENCY: National Institute of Justice.

ACTION: Notice of Draft NIJ Selection and Application Guide to Ballistic-Resistant Body Armor for Law Enforcement, Corrections, and Public Safety.

SUMMARY: In an effort to obtain comments from interested parties, the

U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (NIJ) will make available to the general public the draft "NIJ Selection and Application Guide to Ballistic-Resistant Body Armor for Law Enforcement, Corrections, and Public Safety." The opportunity to provide comments on this document is open to industry technical representatives, criminal justice agencies and organizations, research, development and scientific communities, and all other stakeholders and interested parties. Those individuals wishing to obtain and provide comments on the draft document under consideration are directed to the following Web site: *http://www.justnet.org.*

DATES: The comment period will be open until January 21, 2011.

FOR FURTHER INFORMATION CONTACT: Casandra Robinson, by telephone at 202–305–2596 [**Note:** this is not a toll-free telephone number], or by e-mail at *casandra.robinson@usdoj.gov.*

Dr. John H. Laub,

Director, National Institute of Justice.

[FR Doc. 2010–31473 Filed 12–14–10; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1538]

Vehicular Digital Multimedia Evidence Recording System (VDMERS) Standard for Law Enforcement

AGENCY: National Institute of Justice, Department of Justice.

ACTION: Notice of Draft VDMERS Standard for Law Enforcement.

SUMMARY: In an effort to obtain comments from interested parties, the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (NIJ) will make available to the general public the draft "Vehicular Digital Multimedia Evidence Recording System Standard for Law Enforcement." The opportunity to provide comments on this voluntary standard is open to industry technical representatives, law enforcement agencies and organizations, research, development and scientific communities, and all other stakeholders and interested parties. Those individuals wishing to obtain and provide comments on the draft standard under consideration are directed to the following Web site: *http://www.justnet.org.*

DATES: Comments must be received on or before January 31, 2011.

FOR FURTHER INFORMATION CONTACT: Casandra Robinson, by telephone at 202–305–2596 [**Note:** this is not a toll-free telephone number], or by e-mail at *casandra.robinson@usdoj.gov.*

John H. Laub,

Director, National Institute of Justice.

[FR Doc. 2010–31486 Filed 12–14–10; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Telephone Point of Purchase Survey

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) hereby announces the submission of the Bureau of Labor Statistics (BLS) sponsored information collection request (ICR) titled, "Telephone Point of Purchase Survey," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Submit comments on or before January 14, 2011.

ADDRESSES: A copy of this ICR, with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain* or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Bureau of Labor Statistics (BLS), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the Telephone Point of Purchase Survey is to develop and maintain a timely list of retail, wholesale, and service establishments at which urban consumers shop for specific items. The information collected is used as the sampling universe for selecting establishments at which prices of specific items are collected and monitored for use in calculating the Consumer Price Index (CPI). The survey has been ongoing since 1980 and has provided expenditure data that allows items that are priced in the CPI to be properly weighted.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is currently approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1220–0044. The current OMB approval is scheduled to expire on January 31, 2011; however, it should be noted that information collections submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on September 10, 2010 (75 FR 55356).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference OMB Control Number 1220–0044. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated,

electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Bureau of Labor Statistics (BLS).

Title of Collection: Telephone Point of Purchase Survey.

OMB Control Number: 1220–0044.

Affected Public: Individuals or households.

Total Estimated Number of Respondents: 24,469.

Total Estimated Number of Responses: 63,375.

Total Estimated Annual Burden Hours: 11,619.

Total Estimated Annual Costs Burden: $0.

Dated: December 3, 2010.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2010–31404 Filed 12–14–10; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Division of Longshore and Harbor Workers' Compensation; Proposed Extension of Existing Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the paperwork Reduction Act of 1995 (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. Currently, the Office of Workers' Compensation (OWCP) is soliciting comments concerning the proposed collection: Request for Examination and/or Treatment (LS–1). A copy of the proposed information collection request can be obtained by contacting the office listed below in the address section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before February 14, 2011.

ADDRESSES: Mr. Vincent Alvarez, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0372, fax (202) 693–1378, E-mail *Alvarez.Vincent@dol.gov.* Please use only one method of transmission for comments (mail, fax, or E-mail).

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Workers' Compensation Programs (OWCP) administers the Longshore and Harbor Workers' Compensation Act (LHWCA). The Act provides benefits to workers injured in maritime employment on the navigable waters of the United States or in an adjoining area customarily used by an employee in loading, unloading, repairing or building a vessel. In addition, several acts extend coverage to certain other employees.

Under section 7 (33 U.S.C., Chapter 18, Section 907) of the Longshore Act the employer/insurance carrier is responsible for furnishing medical care for the injured employee for such period of time as the injury or recovery period may require. Form LS–1 serves two purposes: it authorizes the medical care, and it provides a vehicle for the treating physician to report the findings, treatment given, and anticipated physical condition of the employee. This information collection is currently approved for use through May 31, 2011.

II. Review Focus

The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. Current Actions

The Department of Labor seeks the extension of approval of this information collection in order to carry out its responsibility to verify authorized medical care and entitlement to compensation benefits.

Agency: Office of Workers' Compensation Programs.

Type of Review: Extension.

Title: Request for Examination and/or Treatment.

OMB Number: 1240–0029.

Agency Number: LS–1.

Affected Public: Individuals or households; Business or other for-profit.

Total Respondents: 24,000.

Total Annual Responses: 72,000.

Estimated Total Burden Hours: 77,760.

Estimated Time per Response: 65 minutes.

Frequency: On occasion.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $33,840.

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 will also become a matter of public record.

Dated: December 8, 2010.

Vincent Alvarez,

Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.

[FR Doc. 2010–31295 Filed 12–14–10; 8:45 am]

BILLING CODE 4510–CF–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting

TIME AND DATE: The Legal Services Corporation Board of Directors' Development Committee ("Committee") will meet telephonically on December 17, 2010. The meeting will begin at 4:30 p.m., Eastern Time, and continue until completion of the Committee's agenda.

LOCATION: Legal Services Corporation, F. William McCalpin Conference Center, 3rd Floor, 3333 K Street, NW., Washington, DC 20007.

PUBLIC OBSERVATION: Unless otherwise noticed, all meetings of the LSC Board of Directors are open to public observation. Members of the public that are unable to attend but wish to listen to a public proceeding may do so by following the telephone call-in directions given below. You are asked to keep your telephone muted to eliminate background noises. From time to time the presiding Chair may solicit comments from the public.

CALL-IN DIRECTIONS FOR OPEN SESSIONS:

- Call toll-free number: 1 (866) 451–4981;
- When prompted, enter the following numeric pass code: 5907707348;
- When connected to the call, please "mute" your telephone immediately.

STATUS OF MEETING: Open, except that a portion of the meeting will be closed to the public pursuant to a vote of the Board of Directors authorizing the Committee to consider and possibly act on a pool of potential donors. Such closure is authorized by the relevant provisions of the Government in the Sunshine Act [5 U.S.C. 552b(c)(6)] and LSC's implementing regulation 45 CFR 1622.5(e).[1] The transcript of any portions of the closed session falling within the relevant provisions of the Government in Sunshine Act, 5 U.S.C. 552b(c)(6), and LSC's implementing regulation, 45 CFR 1622.5(e), will not be available for public inspection. The transcript of any portions not falling within these provisions will be available for public inspection.

MATTERS TO BE CONSIDERED:

Open Session

1. Approval of Agenda
2. Consider and act on proposed calendar year 2011 initiatives and agenda for the Committee
3. Public Comment

Closed Session

4. Consider and act on pool of potential donors
5. Consider and act on other business
6. Consider and act on adjournment of meeting

CONTACT PERSON FOR INFORMATION: Katherine Ward, Executive Assistant, at (202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

SPECIAL NEEDS: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Katherine Ward at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov.*

Dated: December 13, 2010.

Patricia D. Batie,

Corporate Secretary.

[FR Doc. 2010–31645 Filed 12–13–10; 4:15 pm]

BILLING CODE 7050–01–P

[1] 45 CFR 1622.5(e) protects information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

OFFICE OF PERSONNEL MANAGEMENT

Privacy Act of 1974: New System of Records

AGENCY: U.S. Office of Personnel Management (OPM).

ACTION: Projected date for publishing a revised notice for a new system of records.

SUMMARY: Based on the comments it has received in response to its October 5, 2010 and November 15, 2010 notices for this new system of records, OPM/Central-15, Health Claims Data Warehouse, OPM has determined that it will publish a revised systems notice. The revised notice will provide more detailed information regarding OPM authorities for maintaining the system, systems security measures that will be taken to protect the records, and the circumstances under which records will be released from the system. OPM plans to publish the revised notice by January 31, 2011. Although the comment period for the initial systems notice is closed as of December 15, 2010, the public will be provided an opportunity to comment on the revised notice before the system becomes operational.

DATES: The comment period for the initial systems notice closed on December 15, 2010; OPM plans to publish a revised systems notice by January 31, 2011.

FOR FURTHER INFORMATION CONTACT: Gary A. Lukowski, PhD, Manager, Data Analysis, at 202–606–1449.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2010–31555 Filed 12–10–10; 10:11 am]

BILLING CODE 6325–46–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63465; File No. SR–EDGX–2010–20]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGX Exchange, Inc. Fee Schedule

December 8, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2010, the EDGX Exchange, Inc. (the "Exchange" or the "EDGX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fees and rebates applicable to Members[3] of the Exchange pursuant to EDGX Rule 15.1(a) and (c).

All of the changes described herein are applicable to EDGX Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.directedge.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Currently, for orders routed to Nasdaq BX in Tape A and C Securities and that remove liquidity, a rebate of $0.0001 per share is provided to Members (yielding Flag "C"). The Exchange proposes to increase the rebate to $0.0002 per share to reflect an increase in rebate provided by Nasdaq BX. The Exchange also proposes to delete the reference to Tape A and C securities in the Flag C description and thus, provide the rebate for orders in securities on all Tapes. A conforming amendment is proposed to the text of footnote 3 to reflect this amendment.

Currently, the "O" flag describes orders that are routed to the Nasdaq's

[3] A Member is any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange.

opening cross. Since the Exchange routes to multiple trading centers for the opening cross, such as NYSE, the Exchange proposes to amend the description of the "O" flag to state that it applies to orders routed to the primary exchange's opening cross.

The Exchange proposes to add an additional rebate and corresponding new flag to its fee schedule. Orders that are routed to BATS BYX Exchange that remove liquidity using order types ROUC or ROBY will yield a "BY" flag and be rebated $0.0003 per share.

Finally, the Exchange proposes to clarify in the Flag K description that the BATS Exchange referred to is the BATS BZX Exchange.

EDGX Exchange proposes to implement these amendments to the Exchange fee schedule on December 1, 2010.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[4] in general, and furthers the objectives of Section 6(b)(4),[5] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange. The Exchange believes that the proposed rates are equitable in that they apply uniformly to all Members. The Exchange believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act[6] and Rule 19b–4(f)(2)[7] thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml;* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–EDGX–2010–20 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGX–2010–20. 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,[8] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGX–2010–20 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31432 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 19b-4(f)(2).

[8] The text of the proposed rule change is available on Exchange's Web site at *http://www.directedge.com,* on the Commission's Web site at *http://www.sec.gov,* at EDGX, and at the Commission's Public Reference Room.

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63468; File No. SR–EDGX–2010–19]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Fee Schedule To Add Two New Routing Options

December 8, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2010, the EDGX Exchange, Inc. (the "Exchange" or the "EDGX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fee schedule, which contains a list of routing options, to add two new

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

additional ones. The text of the proposed rule change is attached as Exhibit 5 and is available on the Exchange's Web site at *http://www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange's fee schedule contains a current list of routing options. The Exchange proposes to amend this schedule to add certain new routing options, effective upon filing with the Commission. The Exchange intends to implement the rule change on or about December 1, 2010.

The Exchange proposes to introduce the ROBX and ROBY routing options and add these to its routing table, which is part of the Exchange fee schedule.

The Exchange proposes to add the following descriptions of the ROBY and ROBX routing strategies to its routing table: For the ROBY strategy, the order sweeps the EDGX book and routes to BATS BYX Exchange as an immediate or cancel (IOC) order, with the remainder being cancelled if there is no execution. For the ROBX strategy, the order sweeps the EDGX book and routes to Nasdaq BX Exchange as an immediate or cancel (IOC) order, with the remainder being cancelled if there is no execution.

The Exchange believes that the proposed introduction of the ROBX and ROBY routing strategies will provide market participants with greater flexibility in routing orders, without having to develop their own complicated routing strategies.

Finally, the Exchange proposes to clarify in the description of the ROBA routing strategy that the BATS Exchange referred to is the BATS BZX Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[3] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed change to introduce the ROBX and ROBY routing options will provide market participants with greater flexibility in routing orders without developing complicated order routing strategies on their own. In addition, it will provide additional clarity and specificity to the Exchange's fee schedule regarding routing strategies and will further enhance transparency with respect to Exchange routing offerings.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act[4] and Rule 19b–4(f)(6) thereunder.[5]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[6] However, Rule 19b–4(f)(6)[7] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative upon filing. The Commission notes (i) The proposal could provide market participants with more options to route orders; (ii) it presents no novel issues; and (iii) it may provide a benefit to market participants. For these reasons, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay, and hereby grants such waiver.[8]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml;* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–EDGX–2010–19 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGX–2010–19. 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

[3] 15 U.S.C. 78f(b)(5).

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires the Exchange to give 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 on which the Exchange filed the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived the five-day pre-filing requirement.

[6] 17 CFR 240.19b–4(f)(6)(iii).

[7] *Id.*

[8] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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,[9] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGX–2010–19 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31435 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63479; File No. SR–NYSE–2010–80]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Rule 128, Which Governs Clearly Erroneous Executions, To Extend the Effective Date of the Pilot

December 9, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 7, 2010, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 128, which governs clearly erroneous executions, to extend the effective date of the pilot by which portions of such Rule operate until the earlier of approval by the Securities and Exchange Commission ("SEC" or "Commission") to make such pilot permanent or April 11, 2011. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, *http://www.sec.gov,* and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Rule 128, which governs clearly erroneous executions, to extend the effective date of the pilot by which portions of such Rule operate, until the earlier of Commission approval to make such pilot permanent or April 11, 2011. The pilot is currently scheduled to expire on December 10, 2010.[4]

On September 10, 2010, the Commission approved, on a pilot basis, market-wide amendments to exchanges' rules for clearly erroneous executions to set forth clearer standards and curtail discretion with respect to breaking erroneous trades. In connection with this pilot initiative, the Exchange amended NYSE Rule 128(c), (e)(2), (f), and (g). The amendments provide for uniform treatment of clearly erroneous execution reviews (1) in Multi-Stock Events[5] involving twenty or more securities, and (2) in the event transactions occur that result in the issuance of an individual security trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[6] The amendments also eliminated appeals of certain rulings made in conjunction with other exchanges with respect to clearly erroneous transactions and limited the Exchange's discretion to deviate from Numerical Guidelines set forth in the Rule in the event of system disruptions or malfunctions.

If the pilot were not extended, the prior versions of paragraphs (c), (e)(2), (f), and (g) of Rule 128 would be in effect, and the NYSE would have different rules than other exchanges and greater discretion in connection with breaking clearly erroneous transactions. The Exchange proposes to extend the pilot amendments to NYSE Rule 128 until the earlier of permanent approval by the Commission or April 11, 2011 in order to maintain uniform rules across markets and allow the pilot to continue to operate without interruption during the same period that the Rule 80C trading pause rule pilot is also in effect. Extension of the pilot would permit the Exchange, other national securities exchanges and the Commission to further assess the effect of the pilot on the marketplace, including whether additional measures should be added, whether the parameters of the rule should be modified or whether other initiatives should be adopted in lieu of the current pilot.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[7] of the Act, in general, and furthers the objectives of Section 6(b)(5)[8] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of

[9] The text of the proposed rule change is available on Exchange's Web site at *http://www.directedge.com,* on the Commission's Web site at *http://www.sec.gov,* at EDGX, and at the Commission's Public Reference Room.

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NYSE–2010–47).

[5] Terms not defined herein are defined in NYSE Rule 128.

[6] Separately, the Exchange has proposed extend the effective date of the trading pause pilot under NYSE Rule 80C, which requires the Exchange to pause trading in an individual security listed on the Exchange if the price moves by 10% as compared to prices of that security in the preceding five-minute period during a trading day. *See* SR–NYSE–2010–81.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. More specifically, the NYSE believes that the extension of the pilot will help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule changes also should help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6)(iii) thereunder.[10] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[11] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–NYSE–2010–80 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–NYSE–2010–80. 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 the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSE–2010–80 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31439 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63481; File No. SR–ISE–2010–118]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE Rule 2128 To Extend the Pilot Program

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 8, 2010, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 2128 (Clearly Erroneous Trades) to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

extend the expiration of the pilot rule to April 11, 2011.

The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com,* at the principal office of the Exchange, at the Commission's Public Reference Room, and at *http://www.sec.gov.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend ISE Rule 2128 (Clearly Erroneous Trades) to extend the expiration of the pilot rule. Amendments to ISE Rule 2128 to provide for uniform treatment of certain clearly erroneous execution reviews and transactions that occur before a trading pause is in effect on the Exchange were approved by the Securities and Exchange Commission ("Commission") on September 10, 2010 on a pilot basis to end on December 10, 2010.[3] The Exchange now proposes to extend the date by which this pilot rule will expire to April 11, 2011. Extending this pilot program will provide the exchanges with a continued opportunity to assess the effect of this rule proposal on the markets.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[4] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1)[5] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes uniformity across markets concerning decisions relating to clearly erroneous trades in a security when there are significant price movements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6)(iii) thereunder.[7] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[8] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–ISE–2010–118 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2010–118. 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.,

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–ISE–2010–62).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78k–1(a)(1).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[8] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–ISE–2010–118 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31441 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63483; File No. SR–FINRA–2010–065]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Period of Amendments to FINRA Rule 11892 Governing Clearly Erroneous Transactions

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 8, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend FINRA Rule 11892 (Clearly Erroneous Transactions in Exchange-Listed Securities) to extend the effective date of the pilot, which is currently scheduled to expire on December 10, 2010, until April 11, 2011.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, at the Commission's Web site at *http://www.sec.gov,* 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, FINRA 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. FINRA 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

FINRA proposes to amend FINRA Rule 11892.02 to extend the effective date of the amendments set forth in File No. SR–FINRA–2010–032 (the "pilot"), which are currently scheduled to expire on December 10, 2010, until April 11, 2011.

The pilot was drafted in consultation with other self-regulatory organizations ("SROs") and Commission staff to provide for uniform treatment: (1) Of clearly erroneous execution reviews in Multi-Stock Events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary listing market and subsequent transactions that occur before the trading pause is in effect for transactions otherwise than on an exchange. FINRA also implemented additional changes to the Rule as part of the pilot that reduce the ability of FINRA to deviate from the objective standards set forth in the Rule.[4]

The extension proposed herein would allow the pilot to continue to operate without interruption while FINRA and the other SROs further assess whether the pilot should be adopted permanently and whether other initiatives should be adopted in lieu of the current pilot.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[5] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change is consistent with the clearly erroneous rules of other SROs and will promote the goal of transparency and uniformity across markets concerning reviews of potentially clearly erroneous executions in various contexts. Further, FINRA believes that the proposed changes enhance the objectivity of decisions made by FINRA with respect to clearly erroneous executions.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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.

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, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6)(iii) thereunder.[7] FINRA has asked

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 62885 (September 10, 2010), 75 FR 56641 (September 16, 2010) (Order Approving File No. SR–FINRA–2010–032).

[5] 15 U.S.C. 78*o*–3(b)(6).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the

Continued

the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[8] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–FINRA–2010–065 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–FINRA–2010–065. 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 the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–FINRA–2010–065 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31445 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

proposed rule change, at least five business days prior to the filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that FINRA has satisfied this requirement.

[8] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63485; File No. SR–CBOE–2010–113]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to the Extension of the Clearly Erroneous Policy Pilot Program

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 8, 2010, the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend a pilot program pertaining to the CBOE Stock Exchange ("CBSX"), the CBOE's stock trading facility, through April 11, 2011. This rule change simply seeks to extend the pilot. No other changes to the pilot are being proposed. The text of the proposed rule change is available on the Exchange's Web site *http://www.cboe.org/Legal*, at the Exchange's Office of the Secretary, at the Commission's Public Reference Room, and on the Commission's Web site *(www.sec.gov).*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Certain amendments to Rule 52.4, *Clearly Erroneous Policy,* were approved by the Commission on September 10, 2010 on a pilot basis to end on December 10, 2010.[5] The clearly erroneous policy changes were developed in consultation with other markets and the Commission staff to provide for uniform treatment: (i) Of clearly erroneous execution reviews in Multi-Stock Events involving twenty or more securities; and (ii) in the event transactions occur that result in the issuance of an individual stock trading

[5] Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–CBOE–2010–056).

pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange. Additional changes were also made to Rule 52.4 that reduce the ability of the Exchange to deviate from the objective standards set forth in the Rule. As the duration of the pilot expires on December 10, 2010, the Exchange is proposing to extend the effectiveness of the clearly erroneous policy changes to Rule 52.4 through April 11, 2011.

2. Statutory Basis

Extension of the pilot period will allow the Exchange to continue to operate the pilot on an uninterrupted basis. Accordingly, CBOE believes the proposed rule change is consistent with the Act[6] and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.[7] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6)(iii) thereunder.[10] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[11] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–CBOE–2010–113 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–113. 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 the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–CBOE–2010–113 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31447 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78a *et seq.*

[7] 15 U.S.C. 78(f)(b).

[8] 15 U.S.C. 78(f)(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Release No. 34–63487; File No. SR–CHX–2010–23]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend Pilot Program Related to Clearly Erroneous Execution Transactions

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b–4[2] thereunder, notice is hereby given that on December 7, 2010, the Chicago Stock Exchange, Inc. ("CHX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Items I and II below, which Items have been prepared by the CHX. CHX has filed this proposal pursuant to Exchange Act Rule 19–4(f)(6) [3] which is effective upon filing with the Commission.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CHX proposes to amend its rules to extend the pilot program related to clearly erroneous transactions. The text of this proposed rule change is available on the Exchange's Web site at *http://www.chx.com* and in the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX 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

In September, 2010, CHX obtained Commission approval of a filing amending its rules relating to clearly erroneous transactions on a pilot basis until December 10, 2010.[4] The proposed rule change merely extends the duration of the pilot program until April 11, 2011. Extending the pilot for an additional four months will allow the Commission more time to consider the impact of the pilot program.

2. Statutory Basis

Approval of the rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[5] In particular, the proposed change is consistent with Section 6(b)(5) of the Act,[6] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. The proposed rule change is also designed to support the principles of Section 11A(a)(1) [7] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning reviews of potentially clearly erroneous executions in various contexts, including reviews in the context of a Multi-Stock Event involving twenty or more securities and reviews resulting from a Trigger Trade and any executions occurring immediately after a Trigger Trade but before a trading pause is in effect on the Exchange. Further, the Exchange believes that the proposed changes enhance the objectivity of decisions made by the Exchange with respect to clearly erroneous executions.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or 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, it has become effective pursuant to Section 19(b)(3)(A) of the Act [8] and Rule 19b–4(f)(6)(iii) thereunder.[9] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[10] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–CHX–2010–23 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–CHX–2010–23. 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

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 34–62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) approving SR–CHX–2010–13.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78k–1(a)(1).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[10] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–CHX–2010–23 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31449 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63489; File No. SR–NASDAQ–2010–160)

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Period of Amendments to the Clearly Erroneous Transactions Rule

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 6, 2010, The NASDAQ Stock Market LLC ("Exchange"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the pilot period of recent amendments to Rule 11890, concerning clearly erroneous transactions, so that the pilot will now expire on April 11, 2011.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in brackets.[3]

* * * * *

11890. Clearly Erroneous Transactions

The provisions of paragraphs (C), (c)(1), (b)(i), and (b)(ii) of this Rule, as amended onSeptember 10, 2010, shall be in effect during a pilot period set to end on *April 11, 2011* [December 10, 2010]. If the pilot is not either extended or approved permanent by *April 11, 2011* [December 10, 2010], the prior versions of paragraphs (C), (c)(1), and (b) shall be in effect.

(a)–(f) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On September 10, 2010, the Commission approved, for a pilot period to end December 10, 2010, a proposed rule change submitted by the Exchange, together with related rule changes of the BATS Exchange, Inc., NASDAQ OMX BX, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., International Securities Exchange LLC, New York Stock Exchange LLC, NYSE Amex LLC, NYSE Arca, Inc., and National Stock Exchange, Inc., to amend certain of their respective rules to set forth clearer standards and curtail discretion with respect to breaking erroneous trades.[4] The changes were adopted to address concerns that the lack of clear guidelines for dealing with clearly erroneous transactions may have added to the confusion and uncertainty faced by investors on May 6, 2010.

The Exchange believes that the pilot program has been successful in providing greater transparency and certainty to the process of breaking erroneous trades. The Exchange also believes that a four month extension of the pilot is warranted so that it may continue to monitor the effects of the pilot on the markets and investors, and consider appropriate adjustments, as necessary.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Securities Exchange Act of 1934 (the "Act"),[5] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1)[6] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning decisions to break erroneous trades.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

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

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at *http://nasdaq.cchwallstreet.com.*

[4] Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78k–1(a)(1).

the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6)(iii) thereunder.[8] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[9] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–NASDAQ–2010–160 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–2010–160. 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 the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NASDAQ–2010–160 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31451 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[9] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63472; File No. SR–CBOE–2010–103]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Fees Schedule and Circular Regarding Trading Permit Holder Application and Other Related Fees

December 8, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 30, 2010, the Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") 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 CBOE. 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

Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") proposes to amend its Fees Schedule and circular regarding Trading Permit Holder application and other related fees ("Trading Permit Fee Circular") as they apply to the description of a Market-Maker Trading Permit. The text of the proposed rule change is available on the Exchange's Web site *http://www.cboe.org/legal/,* at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE 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. CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

CBOE is proposing to amend the Market-Maker Trading Permit description in its Fees Schedule and Trading Permit Fee Circular to accommodate the listing of series on the Hybrid Trading System, in a class that is typically traded on the Hybrid 3.0 Platform.[3] Currently, the bandwidth allowance associated with a Market-Maker Trading Permit where the Trading Permit Holder maintains an appointment in a Hybrid 3.0 class is proportionately reduced to [sic] by the appointment cost of the class. However, if a Market-Maker is able to submit electronic quotes in a Hybrid 3.0 class, such as a Lead Market-Maker that streams quotes in the class, the Market-Maker shall receive the quoting bandwidth allowance attributable to that Hybrid 3.0 class to quote in, and only in, that class.

To accommodate the listing of series on the Hybrid Trading System in a class that is considered to be a Hybrid 3.0 class, CBOE is proposing the following changes effective December 1, 2010. First, because there is only one product that trades on Hybrid 3.0 (the S&P 500 Index option class or "SPX"), and the appointment cost for that class is 1.0, CBOE is proposing to delete the provision in the CBOE Fees Schedule and the Trading Permit Fee Circular that reduces [sic] amount of quoting bandwidth proportionate to the appointment cost allocated to Market-Maker Trading Permit Holders that maintain an appointment in a Hybrid 3.0 class and CBOE is proposing to delete the language referencing the bandwidth allowance "attributable to that class." Second, CBOE is proposing to add language to the description in both the Fees Schedule and the Trading Permit Fee Circular to specifically reference series traded on the Hybrid Trading System within a Hybrid 3.0 class. The allocated bandwidth allowance will continue to be limited to quoting only in that class. For example, if a particular series of SPX trades on the Hybrid Trading System, a Market-Maker Trading Permit Holder with an appointment in SPX may only use its allocated bandwidth to trade in SPX.

2. Statutory Basis

The proposed rule change will treat all Market-Maker Trading Permit Holders with an appointment in a Hybrid 3.0 class in a consistent manner. Accordingly, the Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Section 6(b)(4) of the Act[5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among persons using its facilities for the reasons described above.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and subparagraph (f)(2) of Rule 19b–4[7] thereunder. 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-comments@sec.gov.* Please include File Number SR–CBOE–2010–103 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–103. 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 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 No. SR–CBOE–2010–103 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31437 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[3] CBOE Rule 1.1(aaa) provides that the "'Hybrid Trading System' refers to the Exchange's trading platform that allows Market-Makers to submit electronic quotes in their appointed classes. 'Hybrid 3.0 Platform' is an electronic trading platform on the Hybrid Trading System that allows one or more quoters to submit electronic quotes which represent the aggregate Market-Maker quoting interest in a series for the trading crowd * * * Classes authorized by the Exchange for trading on the Hybrid 3.0 Platform shall be referred to as Hybrid 3.0 classes."

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63470; File No. SR–CBOE–2010–108]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to CBOE's Marketing Fee Program

December 8, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2010, Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by CBOE under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal 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

Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") proposes to amend its Fees Schedule and specifically make certain changes to its Marketing Fee Program. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE 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. CBOE 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

CBOE proposes to amend its Marketing Fee Program in two respects. First, CBOE proposes to amend the types of transactions in which the fee is assessed in the SPY option class. Currently, the marketing fee is assessed on transactions as set forth in footnote 6 of the Fees Schedule.[5] In that regard, CBOE notes that it is assessed on both electronic and open outcry transactions. CBOE now proposes to not assess the marketing fee on electronic transactions in SPY options, except that it would continue to assess the marketing fee on electronic transactions resulting from its Automated Improvement Mechanism ("AIM ") pursuant to CBOE Rule 6.74A and transactions in open outcry. CBOE proposes to implement this change on a pilot basis starting on December 1, 2010 and continuing through March 31, 2011.

This proposed change is intended to attract more customer volume to the Exchange in this option class and to allow CBOE market-makers to better compete for order flow. CBOE notes that the SPY option class is unique in the manner in which it trades and is one of the most active option classes. CBOE also notes that DPMs and Preferred Market-Makers can utilize the marketing fee funds to attract orders from payment accepting firms that are executed in AIM and in open outcry. Finally, CBOE believes that the marketing fee funds received by payment accepting firms may be used to offset transaction and other costs related to the execution of an order in AIM and in open outcry, including in the SPY option class. For these reasons, CBOE believes that it would make sense to continue to assess the marketing fee in transactions resulting from AIM and in open outcry in the SPY option class, and would assist in attracting customer volume to the Exchange.

In addition, CBOE proposes to amend its Marketing Fee Program to not assess the fee in transactions in Flexible Exchange Options ("FLEX"), which CBOE believes may encourage Market-Makers to transact in FLEX options. CBOE proposes to implement this change to the marketing fee program beginning on December 1, 2010. CBOE is not amending its Marketing Fee Program in any other respects.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 ("Act"),[6] in general, and furthers the objectives of Section 6(b)(4)[7] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities in that it is intended to attract more customer volume on the Exchange in the SPY option class and also to encourage Market-Makers to transact in FLEX options.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of [sic] purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and subparagraph (f)(2) of Rule 19b–4[9] thereunder. 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] In particular, the marketing fee is assessed only on transactions of Market-Makers, e-DPMs, and DPMs, resulting from (i) customer orders from payment accepting firms, or (ii) customer orders that have designated a "Preferred Market-Maker" under CBOE Rule 8.13. However, as described in footnote 6, the marketing fee does not apply to: Market-Maker-to-Market-Maker transactions including transactions resulting from orders from non-Trading Permit Holder market-makers; transactions resulting from accommodation liquidations (cabinet trades); and transactions resulting from any of the strategies identified and/or defined in footnote 13 of this Fees Schedule; and transactions in the Penny Pilot classes resulting from orders executed through the Hybrid Agency Liaison under Rule 6.14.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

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-comments@sec.gov*. Please include File Number SR–CBOE–2010–108 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–108. 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 CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2010–108 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31436 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63496; File No. SR–NYSEArca–2010–114]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Equities Rule 7.11 To Extend the Effective Date of the Pilot

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b–4[2] thereunder, notice is hereby given that on December 7, 2010, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Equities Rule 7.11 to extend the effective date of the pilot by which such rule operates, which is currently scheduled to expire on December 10, 2010, until April 11, 2011. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Equities Rule 7.11 to extend the effective date of the pilot by which such rule operates, which is currently scheduled to expire on December 10, 2010,[3] until April 11, 2011.

NYSE Arca Equities Rule 7.11 requires the Exchange to pause trading in an individual security listed on the Exchange if the price moves by 10% as compared to prices of that security in the preceding five-minute period during a trading day, which period is defined as a "Trading Pause." The pilot was developed and implemented as a market-wide initiative by the Exchange and other national securities exchanges in consultation with the Commission staff and is currently applicable to all S&P 500 Index securities, Russell 1000 Index securities, and specified exchange-traded products.[4]

The extension proposed herein would allow the pilot to continue to operate without interruption while the Exchange, other national securities exchanges and the Commission further assess the effect of the pilot on the marketplace or whether other initiatives should be adopted in lieu of the current pilot.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),[5] in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the change proposed herein meets these requirements in that it promotes uniformity across markets concerning decisions to pause trading in a security when there are significant price movements. Additionally, extension of

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (SR–NYSEArca–2010–41).

[4] The Exchange notes that the other national securities exchanges have adopted the pilot in substantially similar form.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

the pilot to April 11, 2011 would allow the pilot to continue to operate without interruption while the Exchange and the Commission further assess the effect of the pilot on the marketplace or whether other initiatives should be adopted in lieu of the current pilot.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protetion of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act[7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[9] However, Rule 19b–4(f)(6)[10] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission has considered the Exchange's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program.[11] Therefore, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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-comments@sec.gov*. Please include File Number SR–NYSEArca–2010–114 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–114. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–114 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31470 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required to give 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 Commission notes that the Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6)(iii).

[10] *Id.*

[11] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63495; File No. SR–Phlx–2010–171]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating to Collection of Exchange Fees

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 6, 2010, NASDAQ OMX PHLX LLC ("Phlx" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Section 19(b)(1) of the Act[3] and Rule 19b–4

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

thereunder,[4] proposes to amend Exchange Rule 3202, Application of Other Rules of the Exchange, to add Exchange Rule 909, Collection of Exchange Fees and Other Claims, to the list of Rules which are applicable to PSX Participants.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to require PSX Participants to provide a clearing account number for an account at the National Securities Clearing Corporation ("NSCC") for purposes of permitting the Exchange to debit any undisputed or final fees, fines, charges and/or other monetary sanctions or other monies due and owing to the Exchange or other charges related to Rule 924. Currently, the Exchange requires all members of the Exchange trading options to provide such an NSCC account number. The Exchange believes that the proposed debiting process for PSX Participants would create an efficient method of collecting undisputed or final fees, fines, charges and/or other monetary sanctions or monies due and owing to the Exchange from those PSX Participants.[5] Further, this proposal would provide a cost savings to the Exchange in that it would alleviate administrative processes related to the collection of monies owed to the Exchange for PSX Participants as it does today for members trading options. Collection matters divert staff resources away from the Exchange's regulatory and business purposes. In addition, the debiting process would prevent PSX Participant accounts from becoming overdue.

The Exchange proposes to require PSX Participants and applicants to provide a clearing account number for an account at NSCC in order to permit the Exchange to debit any undisputed or final fees, fines, charges and/or monetary sanctions or other monies due and owing to the Exchange or other charges related to Rule 924.[6] The Exchange would send a monthly invoice[7] to each PSX Participant on approximately the 3rd–10th business day of the following month. The Exchange would also send a file to NSCC each month on approximately the 23rd of the following month to initiate the debit of the appropriate amount stated on the PSX Participant's invoice for the prior month. Because the PSX Participant would receive an invoice well before any monies are debited (normally within two weeks), the PSX Participant would have adequate time to contact the staff with any questions concerning their invoice.

If a PSX Participant disagrees with the invoice, the Exchange would not commence the debit until the dispute is resolved. Specifically, the Exchange will not include the disputed amount in the debit if the member has disputed the amount in writing to the Exchange's designated staff by the 15th of the month, or the following business day if the 15th is not a business day, and the amount in dispute is at least $10,000 or greater. Once NSCC receives the file from the Exchange, NSCC would proceed to debit the amounts indicated from the clearing members' account. In the instance where the PSX Participant clears through an Exchange clearing member, the estimated transactions fees owed to the Exchange are typically debited by the clearing member on a daily basis in order to ensure adequate funds have been escrowed. The Exchange would debit any monies owed including undisputed or final fees,[8] fines, charges and/or monetary sanctions or monies due and owed to the Exchange.[9] The Exchange believes that the debit process would eliminate the risk of unpaid invoices because of the large amounts of capital held at NSCC by members.

The Exchange proposes to add Rule 909 to the list of Exchange Rules which are applicable to PSX Participants. The Exchange proposes this rule change become operative upon ten (10) days written notice to PSX Participants, upon the publication of this rule change in the federal register.[10]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[11] in general, and furthers the objectives of Section 6(b)(5) of the Act[12] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by providing PSX Participants with an efficient process to pay undisputed or final fees, fines, charges and/or monetary sanctions or monies dues and owing to the Exchange. The Exchange believes that this process of debiting NSCC accounts would ease the PSX Participant's administrative burden in paying monthly invoices, avoid overdue balances and provide same day collection from all PSX Participants, who owe monies to the Exchange, which results in equitable treatment.

[4] 17 CFR 240.19b–4.

[5] The Exchange will not debit accounts for fees that are unusually large or for special circumstances, unless such debiting is requested by the member.

[6] Exchange Rule 924 entitled, Obligations of Members and Member Organizations to the Exchange, states, among other things, that members and member organizations shall be liable for such fees, fines, dues, penalties and other amounts imposed by the Exchange.

[7] The monthly invoice will indicate that the amount on the invoice will be debited from the designated NSCC account. Each month, the Exchange will send a file to the member's clearing firm which will indicate the amounts to be debited from each member. If a member is "self-clearing", no such file would be sent as the member would receive the invoice, as noted above, which would indicate the amount to be debited.

[8] Exchange fees are noted on the Exchange Fee Schedule.

[9] This includes, among other things, fines which result from: violation of Rule 60, Order and Decorum; violations of the Minor Rule Plan pursuant to Rule 970; monetary sanctions imposed by the Business Conduct Committee relating to a Letter of Caution; and monetary sanctions imposed by a Hearing Panel in connection with Disciplinary Violations. With respect to disciplinary sanctions that are imposed by either the Business Conduct Committee or a Hearing Panel, the Exchange would not debit any monies until such action is final. The Exchange would not consider an action final until all appeal periods have run and/or all appeal timeframes are exhausted. With respect to non-disciplinary actions, the Exchange would similarly not take action to debit a member account until all appeal periods have run and/or all appeal timeframes are exhausted. Any uncontested disciplinary or non-disciplinary actions will be debited, and the amount due will appear on the members invoice prior to the actual NSCC debit.

[10] The Exchange would also notify members by phone and through Equity Trader Alerts of this proposal prior to the approval of the proposal to prepare members for this rule change.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or 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 after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Exchange Act [13] and Rule 19b–4(f)(6) [14] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[15] However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest.[16] The Exchange has requested that the Commission waive the 30-day operative delay. The Exchange has requested that the Commission waive the 30-day operative delay and designate the proposed rule change to become operative upon ten days written notice to PSX Participants, upon this proposal's publication in the **Federal Register.** [17] The Exchange proposes to uniformly apply Exchange Rule 909 to all members of NASDAQ OMX PHLX, options and equities. The Exchange currently requires members who transact options to comply with Rule 909 and provide the Exchange with an NSCC number for the purpose of direct debiting. The Exchange believes that expanding this Rule to apply to members transacting equities, PSX Participants, would allow the Exchange to alleviate administrative processes related to the collection of monies. The Exchange desires to provide PSX Participants adequate time to transition to direct debit and therefore requests the Commission waive the 30-day operative delay. Based on the foregoing, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and hereby designates the proposal operative upon ten days written notice to PSX Participants, upon this proposal's publication in the **Federal Register**.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2010–171 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–Phlx–2010–171. 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 website (*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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–171 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31457 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] *Id.*

[17] The Exchange has stated that it will notify members by phone and through Equity Trader Alerts to prepare members for this rule change.

[18] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63494; File No. SR–ISE–2010–112]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees and Rebates for Adding and Removing Liquidity

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 26, 2010, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission the proposed rule change, as described in Items I and II, and below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 ISE is proposing to amend its transaction fees and rebates for adding and removing liquidity. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently assesses a per contract transaction charge to market participants that add or remove liquidity from the Exchange ("maker/taker fees") in 100 options classes (the "Select Symbols").[3] The Exchange currently charges a take fee of: (i) $0.25 per contract for Market Maker, Market Maker Plus,[4] Firm Proprietary and Customer (Professional)[5] orders; (ii) $0.35 per contract for Non-ISE Market Maker[6] orders; (iii) $0.20 per contract for Priority Customer[7] orders for 100 or more contracts. Priority Customer orders for less than 100 contracts are not assessed a fee for removing liquidity. The Exchange also currently charges a take fee to $0.40 per contract for Market Maker, Market Maker Plus, Firm Proprietary, Customer (Professional) and Non-ISE Market Maker interest that responds to special orders.[8]

Additionally, the Exchange currently charges a make fee of: (i) $0.10 per contract for Market Maker, Non-ISE Market Maker, Firm Proprietary and Customer (Professional) orders. Priority Customer orders, regardless of size, and Market Maker Plus orders are not assessed a fee for adding liquidity.

In order to promote and encourage liquidity in the Select Symbols, the Exchange currently offers a rebate of: (i) $0.10 per contract for Market Maker Plus orders; (ii) $0.15 per contract to contracts that do not trade with the contra order in the Exchange's Facilitation Mechanism and Solicited Order Mechanism; (iii) $0.20 per contract for Priority Customer Complex orders, regardless of size, that trade with non-customer orders in the Exchange's Complex Order Book; and (iv) $0.25 per contract to contracts that do not trade with the contra order in the Exchange's Price Improvement Mechanism.

The Exchange now proposes to amend its maker/taker fees by making the following changes to the Select Symbols: (i) Remove AAPL, BIDU and GS and (ii) add Sirius XM radio, Inc. ("SIRI"), Starbucks Corporation ("SBUX") and Vivus, Inc. ("VVUS").

The Exchange has designated this proposal to be operative on December 1, 2010.

2. Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(4)[9] that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The impact of the proposal upon the net fees paid by a particular market participant will depend on a number of variables, most important of which will be its propensity to add or remove liquidity in options overlying the Select Symbols. The Exchange operates in a highly competitive market in which market participants can readily direct order flow to another exchange if they deem fee levels at a particular exchange to be excessive. The Exchange believes that the proposed fees it charges for options overlying the Select Symbols remain competitive with fees charged by other exchanges and therefore continue to be reasonable and equitably allocated to those members that opt to direct orders to the Exchange rather than to a competing exchange. Additionally, the Exchange believes that the addition and removal of option classes that are subject to the Exchange's maker/taker fees are both equitable and reasonable because those fees apply to all categories of participants in the same manner. The Exchange's maker/taker fees, which are currently applicable to each market participant, will continue to apply to the Select Symbols.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

[3] Options classes subject to maker/taker fees are identified by their ticker symbol on the Exchange's Schedule of Fees. *See* Securities Exchange Act Release Nos. 61869 (April 7, 2010), 75 FR 19449 (April 14, 2010) (SR–ISE–2010–25), 62048 (May 6, 2010), 75 FR 26830 (May 12, 2010) (SR–ISE–2010–43), 62282 (June 11, 2010), 75 FR 34499 (June 17, 2010) (SR–ISE–2010–54), 62319 (June 17, 2010), 75 FR 36134 (June 24, 2010) (SR–ISE–2010–57), 62508 (July 15, 2010), 75 FR 42809 (July 22, 2010) (SR–ISE–2010–65), 62507 (July 15, 2010), 75 FR 42802 (July 22, 2010) (SR–ISE–2010–68), 62665 (August 9, 2010), 75 FR 50015 (August 16, 2010) (SR–ISE–2010–82) and 62805 (August 31, 2010), 75 FR 54682 (September 8, 2010) (SR–ISE–2010–90).

[4] A Market Maker Plus is a market maker who is on the National Best Bid or National Best Offer 80% of the time for series trading between $0.03 and $5.00 (for options whose underlying stock's previous trading day's last sale price was less than or equal to $100) and between $0.10 and $5.00 (for options whose underlying stock's previous trading day's last sale price was greater than $100) in premium in each of the front two expiration months and 80% of the time for series trading between $0.03 and $5.00 (for options whose underlying stock's previous trading day's last sale price was less than or equal to $100) and between $0.10 and $5.00 (for options whose underlying stock's previous trading day's last sale price was greater than $100) in premium across all expiration months in order to receive the rebate. The Exchange determines whether a market maker qualifies as a Market Maker Plus at the end of each month by looking back at each market maker's quoting statistics during that month. If at the end of the month, a market maker meets the Exchange's stated criteria, the Exchange rebates $0.10 per contract for transactions executed by that market maker during that month. The Exchange provides market makers a report on a daily basis with quoting statistics so that market makers can determine whether or not they are meeting the Exchange's stated criteria.

[5] A Customer (Professional) is a person who is not a broker/dealer and is not a Priority Customer.

[6] A Non-ISE Market Maker, or Far Away Market Maker ("FARMM"), is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended ("Exchange Act"), registered in the same options class on another options exchange.

[7] A Priority Customer is defined in ISE Rule 100(a)(37A) as a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

[8] *See* Securities Exchange Act Release No. 63283 (November 9, 2010), 75 FR 70059 (November 16, 2010) (SR–ISE–2010–106).

[9] 15 U.S.C. 78f(b)(4).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[10] At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml*); or
- Send an E-mail to *rule-comments@sec.gov*. Please include File No. SR–ISE–2010–112 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2010–112. 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 the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2010–112 and should be submitted by January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31456 Filed 12–14–10; 8:45 am]

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[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63493; File No. SR–NYSEArca–2010–110]

Self-Regulatory Organizations; NYSE Arca Inc.; Notice of Filing of Proposed Rule Change To List and Trade Shares of the Teucrium Natural Gas Fund Under NYSE Arca Equities Rule 8.200

December 9, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 3, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the Teucrium Natural Gas Fund under NYSE Arca Equities Rule 8.200. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Arca Equities Rule 8.200, Commentary .02 permits the trading of Trust Issued Receipts ("TIRs") either by listing or pursuant to unlisted trading privileges ("UTP").[4] The Exchange proposes to list and trade shares ("Shares") of the Teucrium Natural Gas Fund ("Fund") pursuant to NYSE Arca Equities Rule 8.200.

The Exchange notes that the Commission has previously approved the listing and trading of other issues of Trust Issued Receipts on the American Stock Exchange LLC,[5] trading on NYSE Arca pursuant to unlisted trading privileges ("UTP"),[6] and listing on NYSE Arca.[7] Among these is the Teucrium Corn Fund, a series of the Teucrium Commodity Trust ("Trust").[8] In addition, the Commission has approved other exchange-traded fund-like products linked to the performance of underlying commodities.[9]

[4] Commentary .02 to NYSE Arca Equities Rule 8.200 applies to TIRs that invest in "Financial Instruments". The term "Financial Instruments", as defined in Commentary .02(b)(4) to NYSE Arca Equities Rule 8.200, means any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars and floors; and swap agreements.

[5] *See, e.g.,* Securities Exchange Act Release No. 58161 (July 15, 2008), 73 FR 42380 (July 21, 2008) (SR–Amex–2008–39).

[6] *See, e.g.,* Securities Exchange Act Release No. 58163 (July 15, 2008), 73 FR 42391 (July 21, 2008) (SR–NYSEArca–2008–73).

[7] *See, e.g.,* Securities Exchange Act Release No. 58457 (September 3, 2008), 73 FR 52711 (September 10, 2008) (SR–NYSEArca–2008–91).

[8] *See* Securities Exchange Act Release No. 62213 (June 3, 2010), 75 FR 32828 (June 9, 2010) (SR–NYSEArca–2010–22) (order approving listing on the Exchange of Teucrium Corn Fund).

[9] *See, e.g.,* Securities Exchange Act Release Nos. 57456 (March 7, 2008), 73 FR 13599 (March 13, 2008) (SR–NYSEArca–2007–91) (order granting accelerated approval for NYSE Arca listing the

The Shares represent beneficial ownership interests in the Fund, as described in the Registration Statement.[10] The Fund is a commodity pool that is a series of the Trust, a Delaware statutory trust. The Fund is managed and controlled by Teucrium Trading, LLC ("Sponsor"). The Sponsor is a Delaware limited liability company that is registered as a commodity pool operator ("CPO") with the Commodity Futures Trading Commission ("CFTC") and is a member of the National Futures Association.

Teucrium Natural Gas Fund

According to the Fund's Registration Statement, the investment objective of the Fund is to have the daily changes in percentage terms of the Shares' net asset value ("NAV") reflect the daily changes in percentage terms of a weighted average of the following: the nearest to spot month March, April, October and November Henry Hub Natural Gas Futures Contracts ("Natural Gas Futures Contracts") traded on the NYMEX, weighted 25% equally in each contract month, less the Fund's expenses. (This weighted average of the four referenced Natural Gas Futures Contracts is referred to herein as the "Gas Benchmark," and the four Natural Gas Futures Contracts that at any given time make up the Gas Benchmark are referred to herein as the "Gas Benchmark Component Futures Contracts.").[11]

The Fund seeks to achieve its investment objective by investing under normal market conditions in Gas Benchmark Component Futures Contracts or, in certain circumstances, in other Natural Gas Futures Contracts traded on the New York Mercantile Exchange ("NYMEX"), Intercontinental Exchange ("ICE"), and other foreign exchanges. In addition, and to a limited extent, the Fund will invest in natural gas-based swap agreements that are cleared through the ICE or its affiliated provider of clearing services ("Cleared Natural Gas Swaps") to the extent permitted and appropriate in light of the liquidity in the Cleared Natural Gas Swap market. Once position limits in Natural Gas Futures Contracts are applicable, the Fund may also invest first in Cleared Natural Gas Swaps to the extent permitted by the position limits applicable to Cleared Natural Gas Swaps and appropriate in light of the liquidity in the Cleared Natural Gas Swaps market, and then in contracts and instruments such as cash-settled options on Natural Gas Futures Contracts and forward contracts, swaps other than Cleared Natural Gas Swaps, and other over-the-counter transactions that are based on the price of natural gas and Natural Gas Futures Contracts (collectively, "Other Natural Gas Interests" and together with Natural Gas Futures Contracts and Cleared Natural Gas Swaps, "Natural Gas Interests"). The circumstances under which such investments in Other Natural Gas Interests may be utilized (*e.g.,* imposition of position limits or accountability limits) are discussed below.

Natural Gas Futures Contracts traded on the NYMEX are listed for the current year and the next five years. However, the nature of the Gas Benchmark is such that the Fund will not hold futures contracts beyond approximately the first 14 months of listed Natural Gas Futures Contracts.

It is the intent of the Sponsor to never hold a Gas Benchmark Component Futures Contract to spot. For example, in terms of the Gas Benchmark, in January of a given year, the Gas Benchmark Component Futures Contracts will be the contracts expiring in March (the first-to-expire Gas Benchmark Component Futures Contract), April (the second-to-expire Gas Benchmark Component Futures Contract), October (the third-to-expire Gas Benchmark Component Futures Contract), and November (the fourth-to-expire Gas Benchmark Component Futures Contract). Because the next-to-expire Gas Benchmark Component Futures Contract (the March contract) will become spot on the third-to-last trading day in January, the Sponsor will "roll" or change that contract prior to the third-to-last trading day in January for a position in the same month (March) of the following year, never holding any futures contract to spot.

According to the Registration Statement, the Fund seeks to achieve its investment objective primarily by investing in Natural Gas Interests such that daily changes in the Fund's NAV will be expected to closely track the changes in the Gas Benchmark. The Fund's positions in Natural Gas Interests will be changed or "rolled" on a regular basis in order to track the changing nature of the Gas Benchmark. For example, four times a year in the month in which a Gas Benchmark Component Futures Contract is set to become the first-to-expire-natural [sic] Natural Gas Futures Contract traded on NYMEX (commonly called the "spot" contract), the first-to-expire Gas Benchmark Component Contract will become the next-to-expire (spot) Natural Gas Futures Contract and will no longer be a Gas Benchmark Component Futures Contract, and the Fund's investments will have to be changed accordingly. In order that the Fund's trading does not cause unwanted market movements and to make it more difficult for third parties to profit by trading based on such expected market movements, the Fund's investments typically will not be rolled entirely on that day, but will typically be rolled over a period of several days.

Consistent with achieving the Fund's investment objective of closely tracking the Gas Benchmark, the Sponsor may for certain reasons cause the Fund to enter into or hold Natural Gas Futures Contracts other than the Gas Benchmark Component Futures Contracts, Cleared Natural Gas Swaps and/or Other Natural Gas Interests. For example, certain Cleared Natural Gas Swaps have standardized terms similar to, and are priced by reference to, a corresponding Gas Benchmark Component Futures Contract. Additionally, Other Natural Gas Interests that do not have standardized terms and are not exchange-traded can generally be structured as the parties to the Natural Gas Interest contract desire. Therefore, the Fund might enter into multiple Other Natural Gas Interests, including Cleared Natural Gas Swaps, intended to exactly replicate the performance of each of the Gas Benchmark Component Futures Contracts, or a single Other Natural Gas Interest designed to replicate the performance of the Gas Benchmark as a whole. According to the Registration Statement, assuming that there is no default by a counterparty to

iShares GS Commodity Trusts); 59781 (April 17, 2009), 74 FR 18771 (April 24, 2009) (SR–NYSEArca–2009–28) (order granting accelerated approval for NYSE Arca listing the ETFS Silver Trust); 59895 (May 8, 2009), 74 FR 22993 (May 15, 2009) (SR–NYSEArca–2009–40) (order granting accelerated approval for NYSE Arca listing the ETFS Gold Trust); 61219 (December 22, 2009), 74 FR 68886 (December 29, 2009) (order approving listing on NYSE Arca of the ETFS Platinum Trust).

[10] *See* Amendment No. 1 to registration statement on Form S–1 for Teucrium Commodity Trust, dated September 7, 2010 (File No. 333–167593) relating to the Teucrium Natural Gas Fund ("Registration Statement"). The discussion herein relating to the Trust and the Shares is based on the Registration Statement.

[11] Natural gas futures volume on NYMEX for 2009 and 2010 (through October 29, 2010) was 47,864,639 contracts and 52,490,180 contracts, respectively. As of October 29, 2010, NYMEX open interest for natural gas futures was 794,741 contracts, and open interest for near month futures was 47,313 contracts. The contract price was $40,380 ($4.038 per MMBtu and 10,000 MMBtu per contract). The approximate value of all outstanding contracts was $32.1 billion. The position limits for all months is 12,000 contracts and the total value of contracts if position limits were reached would be approximately $484.56 million (based on the $40,380 contract price). As of October 29, 2010, open interest in natural gas swaps cleared on the NYMEX was approximately 2,618,092 contracts, with an approximate value of $26.4 billion ($4.038 per MMBtu and 2,500 MMBtu per contract). Natural gas futures are also traded on ICE and the European Energy Exchange.

an Other Natural Gas Interest, the performance of the Other Natural Gas Interest will necessarily correlate exactly with the performance of the Gas Benchmark or the applicable Gas Benchmark Component Futures Contract. The Fund might also enter into or hold Natural Gas Interests other than Gas Benchmark Component Futures Contracts to facilitate effective trading, consistent with the discussion of the Fund's "roll" strategy in the preceding paragraph. In addition, the Fund might enter into or hold Natural Gas Interests that would be expected to alleviate overall deviation between the Fund's performance and that of the Gas Benchmark that may result from certain market and trading inefficiencies or other reasons.

The Fund invests in Natural Gas Interests to the fullest extent possible without being leveraged or unable to satisfy its expected current or potential margin or collateral obligations with respect to its investments in Natural Gas Interests.[12] After fulfilling such margin and collateral requirements, the Fund will invest the remainder of its proceeds from the sale of baskets in Treasury Securities or cash equivalents, and/or hold such assets in cash (generally in interest-bearing accounts). Therefore, the focus of the Sponsor in managing the Fund is investing in Natural Gas Interests and in Treasury Securities, cash and/or cash equivalents. The Fund will earn interest income from the Treasury Securities and/or cash equivalents that it purchases and on the cash it holds through the Fund's Custodian.

The Sponsor endeavors to place the Fund's trades in Natural Gas Interests and otherwise manage the Fund's investments so that the Fund's average daily tracking error against the Gas Benchmark will be less than 10 percent over any period of 30 trading days. More specifically, the Sponsor will endeavor to manage the Fund so that A will be within plus/minus 10 percent of B, where A is the average daily change in the Fund's NAV for any period of 30 successive valuation days, *i.e.,* any trading day as of which the Fund calculates its NAV, and B is the average daily change in the Gas Benchmark over the same period.

The Sponsor employs a "neutral" investment strategy intended to track the changes in the Gas Benchmark regardless of whether the Gas Benchmark goes up or down. The Fund's "neutral" investment strategy is designed to permit investors generally to purchase and sell the Fund's Shares for the purpose of investing indirectly in the natural gas market in a cost-effective manner. Such investors may include participants in the natural gas market and other industries seeking to hedge the risk of losses in their natural gas-related transactions, as well as investors seeking exposure to the natural gas market. The Sponsor does not intend to operate the Fund in a fashion such that its per share NAV will equal, in dollar terms, the spot price of British Thermal Units ("MMBtu") of natural gas or the price of any particular Natural Gas Futures Contract.

According to the Registration Statement, the current accountability level for investments at any one time in Natural Gas Futures Contracts is 12,000 in any one month. While this is not a fixed ceiling, it is a threshold above which the NYMEX may exercise scrutiny and control over an investor, including limiting an investor to holding no more than 12,000 Natural Gas Futures Contracts.

Cleared Natural Gas Swaps are subject to accountability levels that are substantially identical to, but measured separately from, the accountability levels on Natural Gas Futures Contracts. Accountability levels are imposed by ICE of 48,000 contracts for all months (12,000 NYMEX NG contract equivalents); and 24,000 (6,000 NYMEX NG contract equivalents) for any one month. Exemptions may be obtained from these accountability levels for bona fide hedging, risk management and spread positions.

In addition to accountability levels, the NYMEX and ICE may impose position limits on contracts held in the last few days of trading in the near month contract to expire. It is unlikely that the Fund will be subject to such position limits because of the Fund's investment strategy to "roll" from the near month contract to expire to the same month of the following year during the period beginning two weeks from the expiration of the contract. The Fund, however, does not believe the current position limits imposed by the NYMEX and ICE will have any impact on the Fund.[13]

The exchanges may also set price fluctuation limits on futures contracts. The Natural Gas Futures Contracts price fluctuation limit establishes the maximum amount that the price of futures contracts may vary either up or down from the previous day's settlement price or for the price at which the limit was last imposed. When a price fluctuation limit is in effect for a particular futures contract, no trades may be made at a price beyond that limit.[14]

The Fund does not intend to limit the size of the offering and will attempt to expose substantially all of its proceeds to the natural gas market utilizing Natural Gas Interests. If the Fund encounters position limits, accountability levels, or price fluctuation limits for Natural Gas Futures Contracts on the NYMEX or Cleared Natural Gas Swaps on the ICE, it may then, if permitted under applicable regulatory requirements, purchase Natural Gas Interests, including Natural Gas Futures Contracts listed on foreign exchanges. However, the Natural Gas Futures Contracts available on such foreign exchanges may have different underlying sizes, deliveries, and prices. The Natural Gas Futures Contracts available on such foreign exchanges may be subject to their own position limits and accountability levels. In any case, notwithstanding the potential availability of these instruments in certain circumstances, position limits could force the Fund to limit the

[12] The Sponsor represents that the Fund will invest in Natural Gas Interests in a manner consistent with the Fund's investment objective and not to achieve additional leverage.

[13] As stated in the Fund's Registration Statement, on July 21, 2010, "The Dodd-Frank Wall Street Reform and Consumer Protection Act" ("Dodd-Frank Act") was signed into law. This new law contains broad changes to the financial services industry including provisions changing the regulation of commodity interests. Such changes include the requirement that position limits on energy-based commodity futures contracts be established; new registration, recordkeeping, capital and margin requirements for "swap dealers" and "major swap participants"; the forced use of clearinghouse mechanisms for most over-the-counter transactions; and the aggregation, for purposes of position limits, of all positions in energy futures held by a single entity and its affiliates, whether such positions exist on U.S. futures exchanges, non-U.S. futures exchanges, or in over-the-counter contracts. The CFTC has announced that in accord with the significant amendments introduced to the Commodity Exchange Act of 1936 ("CEA") (7 U.S.C. 1) by the Dodd-Frank Act, the CFTC plans to issue a notice of rulemaking proposing position limits for regulated exempt commodity contracts, including energy commodity contracts, as directed by the CEA. *See* Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations, 75 FR 50950 (August 18, 2010).

[14] For example, the NYMEX imposes a $3.00 per MMBtu ($30,000 per contract) price fluctuation limit for Natural Gas Futures Contracts. This limit is initially based off of the previous NYMEX trading day's settlement price. If any Natural Gas Futures Contract is traded, bid or offered at the limit for five minutes, trading is halted for five minutes. When trading resumes it begins at the point where the limit was imposed and the limit is reset to be $3.00 per MMBtu in either direction of that point. If another halt were triggered, the market would continue to be expanded by $3.00 per MMBtu in either direction after each successive five-minute trading halt. There is not a maximum price fluctuation limit during any one trading session.

number of Creation Baskets (as defined below) that it sells.

Creation and Redemption of Shares

The Fund creates and redeems Shares only in blocks called Creation Baskets and Redemption Baskets, respectively, each consisting of 50,000 Shares for the Fund. Only Authorized Purchasers may purchase or redeem Creation Baskets or Redemption Baskets. An Authorized Purchaser is under no obligation to create or redeem baskets, and an Authorized Purchaser is under no obligation to offer to the public Shares of any baskets it does create. Baskets are generally created when there is a demand for Shares, including, but not limited to, when the market price per share is at (or perceived to be at) a premium to the NAV per share. Similarly, baskets are generally redeemed when the market price per share is at (or perceived to be at) a discount to the NAV per share. Retail investors seeking to purchase or sell Shares on any day are expected to effect such transactions in the secondary market, on the NYSE Arca, at the market price per share, rather than in connection with the creation or redemption of baskets.

The total deposit required to create each basket ("Creation Basket Deposit") is the amount of Treasury Securities and/or cash that is in the same proportion to the total assets of each Fund (net of estimated accrued but unpaid fees, expenses and other liabilities) on the purchase order date as the number of Shares to be created under the purchase order is in proportion to the total number of Shares outstanding on the purchase order date. The redemption distribution from the Fund will consist of a transfer to the redeeming Authorized Purchaser of an amount of Treasury Securities and/or cash that is in the same proportion to the total assets of the Fund (net of estimated accrued but unpaid fees, expenses and other liabilities) on the date the order to redeem is properly received as the number of Shares to be redeemed under the redemption order is in proportion to the total number of Shares outstanding on the date the order is received.

Purchase or redemption orders for Creation and Redemption Baskets must be placed by 12 p.m. E.T. or the close of regular trading on the New York Stock Exchange, whichever is earlier.

The Fund will meet the initial and continued listing requirements applicable to Trust Issued Receipts in NYSE Arca Equities Rule 8.200 and Commentary .02 thereto. With respect to application of Rule 10A–3 [15] under the Act, the Trust relies on the exception contained in Rule 10A–3(c)(7).[16] A minimum of 100,000 Shares for the Fund will be outstanding as of the start of trading on the Exchange.

A more detailed description of Natural Gas Interests as well as investment risks, are set forth in the Registration Statement for the Fund. All terms relating to the Fund that are referred to, but not defined in, this proposed rule change are defined in the Registration Statement.

Net Asset Value

The NAV for the Fund will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time.[17] In determining the value of Natural Gas Futures Contracts, the Administrator will use the NYMEX closing price (usually determined as of 2:30 p.m. E.T.). The value of Cleared Natural Gas Swaps and over-the-counter Natural Gas Interests will be determined based on the value of the commodity or futures contract underlying such Natural Gas Interest, except that a fair value may be determined if the Sponsor believes that the Fund is subject to significant credit risk relating to the counterparty to such Natural Gas Interest.

Treasury Securities held by the Fund will be valued by the Administrator using values received from recognized third-party vendors and dealer quotes. NAV will include any unrealized profit or loss on open Natural Gas Interests and any other credit or debit accruing to the Fund but unpaid or not received by the Fund.

The Exchange also will disseminate on a daily basis via the Consolidated Tape Association ("CTA") information with respect to recent NAV, and shares outstanding. The Exchange will also make available on its Web site daily trading volume of the Shares, closing prices of such Shares, and the corresponding NAV.

[15] 17 CFR 240.10A–3.

[16] 17 CFR 240.10A–3(c)(7).

[17] The NAV will be calculated by taking the current market value of the Fund's total assets and subtracting any liabilities. Under the Funds' current operational procedures, the Administrator, will calculate the NAV of the Fund's Shares as of the earlier of 4 p.m. Eastern Time ("E.T.") or the close of the New York Stock Exchange (ordinarily, 4 p.m. E.T.) each day. NYSE Arca will calculate an approximate net asset value every 15 seconds throughout each day that the Fund's Shares are traded on the NYSE Arca for as long as NYMEX's main pricing mechanism is open.

Availability of Information Regarding the Shares

The Web site for the Fund (http://*www.teucriumnaturalgasfund.com*) and/or the Exchange, which are publicly accessible at no charge, will contain the following information: (a) The current NAV per share daily and the prior business day's NAV and the reported closing price; (b) the midpoint of the bid-ask price in relation to the NAV as of the time the NAV is calculated (the "Bid-Ask Price"); (c) calculation of the premium or discount of such price against such NAV; (d) the bid-ask price of Shares determined using the highest bid and lowest offer as of the time of calculation of the NAV; (e) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV, within appropriate ranges for each of the four (4) previous calendar quarters; (f) the prospectus; and (g) other applicable quantitative information. The Fund will also disseminate its holdings on a daily basis on the Fund's Web site.

The Gas Benchmark will be disseminated by one or more major market data vendors every 15 seconds during the NYSE Arca Core Trading Session of 9:30 a.m. to 4 p.m. E.T. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. In addition, the Exchange will provide a hyperlink on its Web site at *http://www.nyse.com* to the Fund's Web site, which will display all intraday and closing Gas Benchmark levels, the intraday Indicative Trust Value (*see* below), and NAV.

The daily settlement prices for the Natural Gas Futures Contracts held by the Fund are publicly available on the Web site of the NYMEX. In addition, various data vendors and news publications publish futures prices and data. The Exchange represents that quotation and last sale information for the Natural Gas Futures Contracts are widely disseminated through a variety of major market data vendors worldwide, including Bloomberg and Reuters. In addition, the Exchange further represents that complete real-time data for the Natural Gas Futures Contracts is available by subscription from Reuters and Bloomberg. The NYMEX and ICE also provide delayed futures information on current and past trading sessions and market news free of charge on their Web sites. The specific contract specifications for the futures contracts are also available at the NYMEX and ICE Web sites, as well as other financial informational sources. The spot price of natural gas also is

available on a 24-hour basis from major market data vendors. Price and volume information for cleared swaps is available from major market data vendors and on the NYMEX Web site.

The Fund will provide Web site disclosure of portfolio holdings daily and will include, as applicable, the names, quantities, prices and market values of Financial Instruments held by the Fund and the characteristics of such instruments and cash equivalents, and amount of cash held in the portfolio of the Fund. This Web site disclosure of the portfolio composition of the Fund will occur at the same time as the disclosure by the Sponsor of the portfolio composition to Authorized Purchasers so that all market participants are provided portfolio composition information at the same time. Therefore, the same portfolio information will be provided on the public Web site as well as in electronic files provided to Authorized Purchasers. Accordingly, each investor will have access to the current portfolio composition of the Fund through the Fund's Web site.

Dissemination of Indicative Trust Value

In addition, in order to provide updated information relating to the Fund for use by investors and market professionals, an updated Indicative Trust Value ("ITV") will be calculated. The ITV is calculated by using the prior day's closing NAV per Share of the Fund as a base and updating that value throughout the trading day to reflect changes in the value of the Gas Benchmark Component Futures Contracts. As stated in the Registration Statement, changes in the value of over-the-counter Natural Gas Interests, Treasury Securities and cash equivalents will not be included in the calculation of the ITV. The ITV disseminated during NYSE Arca trading hours should not be viewed as an actual real time update of the NAV, which is calculated only once a day.

The ITV will be disseminated on a per Share basis by one or more major market data vendors every 15 seconds during the NYSE Arca Core Trading Session. The normal trading hours for Natural Gas Futures Contracts on NYMEX are 9:00 a.m. to 2:30 p.m. E.T. The ITV will not be updated, and, therefore, a static ITV will be disseminated, between the close of trading on NYMEX of Natural Gas Futures Contracts and the close of the NYSE Arca Core Trading Session. The value of a Share may be influenced by non-concurrent trading hours between NYSE Arca and the NYMEX and ICE when the Shares are traded on NYSE Arca after normal trading hours of Natural Gas Futures Contracts on NYMEX.

The Exchange believes that dissemination of the ITV provides additional information regarding the Fund that is not otherwise available to the public and is useful to professionals and investors in connection with the related Shares trading on the Exchange or the creation or redemption of such Shares.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. E.T. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, Commentary .03, the minimum price variation ("MPV") for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

The trading of the Shares will be subject to NYSE Arca Equities Rule 8.200, Commentary .02(e), which sets forth certain restrictions on ETP Holders acting as registered Market Makers in Trust Issued Receipts to facilitate surveillance. See "Surveillance" below for more information.

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the underlying futures contracts, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in Shares will be subject to trading halts caused by extraordinary market volatility pursuant to the Exchange's "circuit breaker" rule [18] or by the halt or suspension of trading of the underlying futures contracts.

The Exchange represents that the Exchange may halt trading during the day in which the interruption to the dissemination of the ITV or the value of the underlying futures contracts occurs. If the interruption to the dissemination of the ITV or the value of the underlying futures contracts persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products, including Trust Issued Receipts, to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable Federal securities laws.

The Exchange's current trading surveillances focus on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. The Exchange is able to obtain information regarding trading in the Shares, the physical commodities included in, or options, futures or options on futures on, Shares through ETP Holders, in connection with such ETP Holders' proprietary or customer trades through ETP Holders which they effect on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions occurring on the NYMEX or ICE, which are members of the Intermarket Surveillance Group ("ISG"). A list of ISG members is available at *http://www.isgportal.org.* [19]

In addition, with respect to the Fund's futures contracts traded on exchanges, not more than 10% of the weight of such futures contracts in the aggregate shall consist of components whose principal trading market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

The Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

[18] *See* NYSE Arca Equities Rule 7.12.

[19] The Exchange notes that not all Natural Gas Interests may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) The risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated ITV will not be calculated or publicly disseminated; (2) the procedures for purchases and redemptions of Shares in Creation Baskets and Redemption Baskets (and that Shares are not individually redeemable); (3) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (4) how information regarding the ITV is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Information Bulletin will advise ETP Holders, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Fund. The Exchange notes that investors purchasing Shares directly from the Fund will receive a prospectus. ETP Holders purchasing Shares from the Fund for resale to investors will deliver a prospectus to such investors. The Information Bulletin will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

In addition, the Information Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Information Bulletin will also reference that the CFTC has regulatory jurisdiction over the trading of Natural Gas Futures Contracts traded on U.S. markets.

The Information Bulletin will also disclose the trading hours of the Shares of the Fund and that the NAV for the Shares is calculated after 4 p.m. E.T. each trading day. The Bulletin will disclose that information about the Shares of the Fund is publicly available on the Fund's Web site.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[20] in general, and furthers the objectives of Section 6(b)(5),[21] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the proposed rule change will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. In addition, the listing and trading criteria set forth in NYSE Equities Rule 8.200 are intended to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or Within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2010–110 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–110. 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 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–NYSEArca–2010–110 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31455 Filed 12–14–10; 8:45 am]

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[20] 15 U.S.C. 78f(b).

[21] 15 U.S.C. 78f(b)(5).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63492; File No. SR–Phlx–2010–172]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating To Changing the Starting Time for NASDAQ OMX PSX

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 3, 2010, NASDAQ OMX PHLX LLC ("Phlx" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend certain rules of NASDAQ OMX PSX, the Exchange's equity trading facility ("PSX"), to change the starting time from 9 a.m. Eastern Time ("ET") to 8 a.m. ET. The Exchange proposes to amend provisions of PSX Rules 3100, 3217, 3301, 3302 and 3306 to reflect the proposed amended starting time.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend certain rules of PSX to change the starting time from 9 a.m. ET to 8 a.m. ET. More specifically, the Exchange proposes to amend the following PSX rules in the following manner:

i. PSX Rule 3100 (b)(4)(B) to reflect that the trading session begins at 8 a.m. instead of 9 a.m.

ii. PSX Rule 3217 to reflect that the normal business hours for the automated system for order execution and trade reporting owned and operated by the Exchange for the purpose of trading securities on PSX ("System") operates from 8 a.m. ET instead of 9 a.m. ET.

iii. PSX Rule 3301(h)(1) to reflect that System Hours Immediate or Cancel[3] orders must be will be available for entry and execution from 8 a.m. ET instead of 9 a.m. ET.

iv. PSX Rule 3301(h)(2) to reflect that System Hours Day[4] orders must remain available for potential display and/or execution from 8 a.m. ET instead of 9 a.m. ET.

v. PSX Rule 3301(h)(4) to reflect that System Hours Expire Time[5] orders must remain for entry and execution from 8 a.m. ET instead of 9 a.m. ET.

vi. PSX Rule 3301(h)(8) to reflect that "good-til-market close"[6] orders must be available for entry and potential execution from 8 a.m. ET instead of 9 a.m. ET.

vii. PSX Rule 3302 to reflect that the System will be opened for order entry at 8 a.m. instead of 9 a.m.

viii. PSX Rule 3306(a)(3) to reflect that orders can be entered into the System (or previously entered orders cancelled) from 8 a.m. ET instead of 9 a.m. ET.

PSX is a fully electronic system that accommodates diverse business models and trading preferences. PSX utilizes technology to aggregate and display liquidity and make it available for execution of orders. PSX is proposing to expand its operational hours to open the System earlier so that firms can enter orders and execute beginning at 8 a.m. rather than 9 a.m.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Sections 6(b)(1) and 6(b)(5) of the Act,[8] in particular, in that the proposal enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance by members, member organizations, and persons associated with members and member organizations with provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. The proposal is also consistent with Section 6 of the Act in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. An earlier open will enhance the national market system by providing market participants increased opportunity to more effectively carryout the execution of orders in the manner addressed by PSX rules. Such improvements will enhance the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition not

[3] "System Hours Immediate or Cancel" shall mean, for orders so designated, that if after entry into the System the order (or a portion thereof) is not marketable, the order (or unexecuted portion thereof) shall be canceled and returned to the entering Participant. *See* PSX Rule 3301(h)(1).

[4] "System Hours Day" shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or the unexecuted portion thereof) shall remain available for potential display and/or execution from 9 a.m. until 5 p.m. Eastern Time on the day it was submitted unless cancelled by the entering party. *See* PSX Rule 3301(h)(2).

[5] "System Hours Expire Time" or "SHEX" shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or the unexecuted portion thereof) shall remain available for potential display and/or execution for the amount of time specified by the entering Participant (up to 5 p.m. on the day entered) unless canceled by the entering Participant. *See* PSX Rule 3301(h)(4).

[6] "Good-til-market close" shall mean for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution until cancelled by the entering party, or until 4 p.m., after which it shall be returned to the entering party. *See* PSX Rule 3301(h)(8).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(1), (5).

necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or 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 after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Exchange Act [9] and Rule 19b–4(f)(6) [10] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[11] However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest.[12] The Exchange has requested that the Commission waive the 30-day operative delay. The Commission notes that Phlx's proposal is substantially similar to the rules of other national securities exchanges and does not raise any new substantive issues. In addition, Phlx notes that other exchanges open their markets for entry of orders prior to 9 a.m.,[13] and, in order to be competitive, the Exchange would like to extend the same opportunity to its market participants. The Exchange would like to implement this proposed rule on December 13, 2010. Based on the foregoing, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and hereby designates the proposal operative upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml;* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2010–172 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–Phlx–2010–172. 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 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–Phlx–2010–172 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31454 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] *Id.*

[13] *See* The NASDAQ Stock Market LLC Rule 4617 (opens at 7 a.m. EST). *See also* NASDAQ OMX BX Rule 4617 (opens at 8 a.m. EST), and NYSE Arca Equities Rule 7.34 (opens at 1 a.m. Pacific Time).

[14] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63491; File No. SR–Phlx-2010–173]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Period of Amendments to the Clearly Erroneous Transactions Rule

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 6, 2010, NASDAQ OMX PHLX LLC ("Exchange"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to extend the pilot period of recent amendments to Rule 3312, concerning clearly erroneous transactions, so that the pilot will now expire on April 11, 2011.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com,* at the principal office of the Exchange, at the Commission's Public Reference Room, and at *http://www.sec.gov.*

The text of the proposed rule change is below. Proposed new language is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

italicized; proposed deletions are in brackets.

* * * * *

Rule 3312. Clearly Erroneous Transactions

The provisions of paragraphs (a)(2)(C), (b), and (c)(1) of this Rule, as amended by SR–Phlx-2010–125, shall be in effect during a pilot period set to end on *April 11, 2011*[December 10, 2010]. If the pilot is not either extended or approved permanent by *April 11, 2011*[December 10, 2010], the prior versions of paragraphs (a)(2)(C), (b), and (c)(1) shall be in effect. (a)–(f) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On September 10, 2010, the Commission approved, for a pilot period to end December 10, 2010, a proposed rule change submitted by the BATS Exchange, Inc., NASDAQ OMX BX, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., International Securities Exchange LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE Amex LLC, NYSE Arca, Inc., and National Stock Exchange, Inc. (collectively, the "Exchanges"), to amend certain of their respective rules to set forth clearer standards and curtail discretion with respect to breaking erroneous trades.[3] The changes were adopted to address concerns that the lack of clear guidelines for dealing with clearly erroneous transactions may have added to the confusion and uncertainty faced by investors on May 6, 2010. In connection with its resumption of trading of NMS Stocks through PSX, the Exchange amended Rule 3312 to conform it to the newly-adopted changes to the Exchanges' clearly erroneous rules, so that it could participate in the pilot program.[4]

The Exchange believes that the pilot program has been successful in providing greater transparency and certainty to the process of breaking erroneous trades. The Exchange also believes that a four month extension of the pilot is warranted so that it may continue to monitor the effects of the pilot on the markets and investors, and consider appropriate adjustments, as necessary.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Securities Exchange Act of 1934 (the "Act"),[5] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1)[6] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning decisions to break erroneous trades.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6)(iii) thereunder.[8] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[9] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–PHLX–2010–173 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

[3] Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010).

[4] Securities Exchange Act Release No. 63023 (September 30, 2010), 75 FR 61802 (October 6, 2010).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78k–1(a)(1).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[9] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–PHLX–2010–173. 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 the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–PHLX–2010–173 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31453 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63490; File No. SR–BX–2010–086]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Period of Amendments to the Clearly Erroneous Transactions Rule

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 6, 2010, NASDAQ OMX BX, Inc. ("Exchange"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to extend the pilot period of recent amendments to Rule 11890, concerning clearly erroneous transactions, so that the pilot will now expire on April 11, 2011.

The text of the proposed rule change is available at *http://nasdaqomxbx.cchwallstreet.com,* at the Exchange's principal office, at *http://www.sec.gov,* and at the Commission's Public Reference Room.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in brackets.

* * * * *

11890. Clearly Erroneous Transactions

The provisions of paragraphs (C), (c)(1), (b)(i), and (b)(ii) of this Rule, as amended on September 10, 2010, shall be in effect during a pilot period set to end on *April 11, 2011* [December 10, 2010]. If the pilot is not either extended or approved permanent by *April 11, 2011* [December 10, 2010], the prior versions of paragraphs (C), (c)(1), and (b) shall be in effect.

(a)–(f) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On September 10, 2010, the Commission approved, for a pilot period to end December 10, 2010, a proposed rule change submitted by the Exchange, together with related rule changes of the BATS Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., International Securities Exchange LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE Amex LLC, NYSE Arca, Inc., and National Stock Exchange, Inc., to amend certain of their respective rules to set forth clearer standards and curtail discretion with respect to breaking erroneous trades.[3] The changes were adopted to address concerns that the lack of clear guidelines for dealing with clearly erroneous transactions may have added to the confusion and uncertainty faced by investors on May 6, 2010.

The Exchange believes that the pilot program has been successful in providing greater transparency and certainty to the process of breaking erroneous trades. The Exchange also believes that a four month extension of the pilot is warranted so that it may continue to monitor the effects of the pilot on the markets and investors, and consider appropriate adjustments, as necessary.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Securities Exchange Act of 1934 (the "Act"),[4] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1)[5] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning decisions to break erroneous trades.

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78k–1(a)(1).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6)(iii) thereunder.[7] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[8] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–BX–2010–086 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–BX–2010–086. 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 the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–BX–2010–086 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31452 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[8] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63508; File No. SR–NASDAQ–2010–134]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Adopt Additional Criteria for Listing Commodity Stockpiling Companies That Have Indicated That Their Business Plan Is To Buy and Hold Commodities

December 9, 2010.

On October 15, 2010, The NASDAQ Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt additional criteria for listing commodity stockpiling companies ("CSCs") that have indicated that their business plan is to buy and hold commodities. The proposed rule change was published for comment in the **Federal Register** on November 3, 2010.[3] The Commission received no comments on the proposal.

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is December 18, 2010.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period to take

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 63207 (October 28, 2010), 75 FR 67788.

[4] 15 U.S.C. 78s(b)(2).

action on the proposed rule change so that it has sufficient time to consider the Exchange's proposal, which would establish, for the first time, standards for listing securities of companies whose business plan is to buy and hold commodities.

Accordingly, pursuant to Section 19(b)(2) of the Act,[5] the Commission designates February 1, 2011 as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File Number SR–NASDAQ–2010–134).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31485 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63506; File No. SR–ISE–2010–117)

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE Rule 2102 To Extend the Pilot Program

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on December 7, 2010, the International Securities Exchange, LLC (the "Exchange" or "ISE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 2102 (Hours of Business) to extend the expiration of the pilot rule to April 11, 2011.

The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend ISE Rule 2102 to extend the expiration of the pilot rule. Initial amendments to ISE Rule 2102 to allow the Exchange to pause trading in an individual stock when the primary listing market for such stock issues a trading pause were approved by the Securities and Exchange Commission ("Commission") on June 10, 2010 on a pilot basis to end on December 10, 2010.[3] On September 10, 2010, ISE Rule 2102 was amended again to expand the pilot rule to apply to the Russell 1000® Index and other specified exchange traded products.[4] The Exchange now proposes to extend the date by which this pilot rule will expire to April 11, 2011. Extending this pilot program will provide the exchanges with a continued opportunity to assess the effect of this rule proposal on the markets.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[5] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1) [6] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes uniformity across markets concerning decisions to pause trading in a security when there are significant price movements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act [7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[9] However, Rule 19b–4(f)(6) [10] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission has considered the Exchange's request to waive the 30-day

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62271 (June 10, 2010), 75 FR 34493 (June 17, 2010) (SR–ISE–2010–58).

[4] *See* Securities Exchange Act Release No. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010) (SR–ISE–2010–66).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78k–1(a)(1).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required to give 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 Commission notes that the Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6)(iii).

[10] *Id.*

operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program.[11] Therefore, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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-comments@sec.gov*. Please include File Number SR–ISE–2010–117 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2010–117. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2010–117 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31484 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[11] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63505; File No. SR–NASDAQ–2010–162]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Period of the Trading Pause for Individual Stocks Contained in the Standard & Poor's 500 Index, Russell 1000 Index, and Specified Exchange Traded Products That Experience a Price Change of 10% or More During a Five-Minute Period

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on December 7, 2010, The NASDAQ Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the pilot period of the trading pause for individual stocks contained in the Standard & Poor's 500 Index, Russell 1000 Index, and specified Exchange Traded Products that experience a price change of 10% or more during a five-minute period, so that the pilot will now expire on April 11, 2011.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

4120. Trading Halts

(a) Authority To Initiate Trading Halts or Pauses

In circumstances in which Nasdaq deems it necessary to protect investors and the public interest, Nasdaq, pursuant to the procedures set forth in paragraph (c):

(1)–(10) No change.

(11) shall, between 9:45 a.m. and 3:35 p.m., or in the case of an early scheduled close, 25 minutes before the close of trading, immediately pause trading for 5 minutes in any Nasdaq-listed security when the price of such security moves 10 percent or more within a 5-minute period. At the end of the trading pause, Nasdaq will re-open the security using the Halt Cross process set forth in Nasdaq Rule 4753. In the event of a significant imbalance at the end of a trading pause, Nasdaq may delay the re-opening of a security.

Nasdaq will issue a notification if it cannot resume trading for a reason other than a significant imbalance.

Price moves under this paragraph will be calculated by changes in each consolidated last-sale price disseminated by a network processor over a five-minute rolling period measured continuously. Only regular way in-sequence transactions qualify for use in calculations of price moves. Nasdaq can exclude a transaction price from use if it concludes that the transaction price resulted from an erroneous trade.

If a trading pause is triggered under this paragraph, Nasdaq shall immediately notify the single plan processor responsible for consolidation of information for the security pursuant to Rule 603 of Regulation NMS under the Securities Exchange Act of 1934. If a primary listing market issues an individual stock trading pause, Nasdaq will pause trading in that security until trading has resumed on the primary

listing market or notice has been received from the primary listing market that trading may resume. If the primary listing market does not reopen within 10 minutes of notification of a trading pause, Nasdaq may resume trading the security.

The provisions of this paragraph shall only apply to securities in the Standard & Poor's 500 Index, the Russell 1000 Index, as well as a pilot list of Exchange Traded Products.

The provisions of this paragraph shall be in effect during a pilot set to end on *April 11, 2011* [December 10, 2010].

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On June 10, 2010, the Commission granted accelerated approval, for a pilot period to end December 10, 2010, for a proposed rule change submitted by the Exchange, together with related rule changes of the BATS Exchange, Inc., NASDAQ OMX BX, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., International Securities Exchange LLC, New York Stock Exchange LLC, NYSE Amex LLC, NYSE Arca, Inc., and National Stock Exchange, Inc. (collectively, the "Exchanges"), to pause trading during periods of extraordinary market volatility in S&P 500 stocks.[3] The rules require the Listing Markets [4] to issue five-minute trading pauses for individual securities for which they are the primary Listing Market if the transaction price of the security moves ten percent or more from a price in the preceding five-minute period. The Listing Markets are required to notify the other Exchanges and market participants of the imposition of a trading pause by immediately disseminating a special indicator over the consolidated tape. Under the rules, once the Listing Market issues a trading pause, the other Exchanges are required to pause trading in the security on their markets. On September 10, 2010, the Commission approved the respective rule filings of the Exchanges to expand application of the pilot to the Russell 1000® Index and specified Exchange Traded Products.[5]

The Exchange believes that the pilot program has been successful in reducing the negative impacts of sudden, unanticipated price movements in the securities covered by the pilot. The Exchange also believes that an additional four-month extension of the pilot is warranted so that it may continue to assess whether additional securities need to be added and whether the parameters of the rule need to be modified to accommodate trading characteristics of different securities. Accordingly, the Exchange is filing to seek a four-month extension of the existing pilot.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Securities Exchange Act of 1934 (the "Act"),[6] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1) [7] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning decisions to pause trading in a security when there are significant price movements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act [8] and Rule 19b–4(f)(6) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[10] However, Rule 19b–4(f)(6) [11] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission has considered the Exchange's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program.[12] Therefore, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if

[3] Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010).

[4] The term "Listing Markets" refers collectively to NYSE, NYSE Amex, NYSE Arca, and NASDAQ.

[5] Securities Exchange Act Release No. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78k–1(a)(1).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required to give 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 Commission notes that the Exchange has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] *Id.*

[12] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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-comments@sec.gov*. Please include File Number SR–NASDAQ–2010–162 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–2010–162. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2010–162 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31483 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63504; File No. SR–Phlx–2010–174]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Period of the Trading Pause for Individual Stocks Contained in the Standard & Poor's 500 Index, Russell 1000 Index, and Specified Exchange Traded Products That Experience a Price Change of 10% or More During a Five-Minute Period

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on December 7, 2010, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the pilot period of the trading pause for individual stocks contained in the Standard & Poor's 500 Index, Russell 1000 Index, and specified Exchange Traded Products that experience a price change of 10% or more during a five-minute period, so that the pilot will now expire on April 11, 2011.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

Rule 3100. Trading Halts on PSX

(a) Authority To Initiate Trading Halts or Pauses

In circumstances in which the Exchange deems it necessary to protect investors and the public interest, and pursuant to the procedures set forth in paragraph (c):

(1)–(3) No change.

(4) If a primary listing market issues an individual stock trading pause in any of the Circuit Breaker Securities, as defined herein, the Exchange will pause trading in that security until trading has resumed on the primary listing market. If, however, trading has not resumed on the primary listing market and ten minutes have passed since the individual stock trading pause message has been received from the responsible single plan processor, the Exchange may resume trading in such stock. The provisions of this paragraph (a)(4) shall be in effect during a pilot set to end on *April 11, 2011* [December 10, 2010]. During the pilot, the term "Circuit Breaker Securities" shall mean the securities included in the S&P 500 ® Index and the Russell 1000 ® Index, as well as a pilot list of Exchange Traded Products.

(b)–(c) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On June 10, 2010, the Commission granted accelerated approval, for a pilot period to end December 10, 2010, of proposed rule changes submitted by the of the BATS Exchange, Inc., NASDAQ OMX BX, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., International Securities Exchange LLC, The NASDAQ Stock Market LLC, New York Stock

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Exchange LLC, NYSE Amex LLC, NYSE Arca, Inc., and National Stock Exchange, Inc. (collectively, the "Exchanges"), to pause trading during periods of extraordinary market volatility in S&P 500 stocks.[3] The rules require the Listing Markets [4] to issue five-minute trading pauses for individual securities for which they are the primary Listing Market if the transaction price of the security moves ten percent or more from a price in the preceding five-minute period. The Listing Markets are required to notify the other Exchanges and market participants of the imposition of a trading pause by immediately disseminating a special indicator over the consolidated tape. Under the rules, once the Listing Market issues a trading pause, the other Exchanges are required to pause trading in the security on their markets. On September 10, 2010, the Commission approved the respective rule filings of the Exchanges to expand application of the pilot to securities comprising the Russell 1000® Index and specified Exchange Traded Products.[5]

In connection with its resumption of trading of NMS Stocks through the NASDAQ OMX PSX system, the Exchange adopted Rule 3100(a)(4) so that it could participate in the pilot program.[6] On September 29, 2010, the Exchange amended Rule 3100(a)(4) to include stocks comprising the Russell 1000® Index and specified Exchange Traded Products.[7]

The Exchange believes that the pilot program has been successful in reducing the negative impacts of sudden, unanticipated price movements in the securities covered by the pilot. The Exchange also believes that an additional four month extension of the pilot is warranted so that it may continue to assess whether additional securities need to be added and whether the parameters of the rule need to be modified to accommodate trading characteristics of different securities. Accordingly, the Exchange is filing to seek a four-month extension of the existing pilot.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Securities Exchange Act of 1934 (the "Act"),[8] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1) [9] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning decisions to pause trading in a security when there are significant price movements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act [10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[12] However, Rule 19b–4(f)(6) [13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission has considered the Exchange's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program.[14] Therefore, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2010–174 on the subject line.

[3] Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010).

[4] The term "Listing Markets" refers collectively to NYSE, NYSE Amex, NYSE Arca, and NASDAQ.

[5] Securities Exchange Act Release No. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010).

[6] Securities Exchange Act Release No. 62877 (September 9, 2010), 75 FR 56633 (September 16, 2010).

[7] Securities Exchange Act Release No. 63004 (September 29, 2010), 75 FR 61547 (October 5, 2010).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78k–1(a)(1).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required to give 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 Commission notes that the Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] *Id.*

[14] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–Phlx–2010–174. 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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–174 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31482 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63502; File No. SR–CBOE–2010–112]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to the Extension of the Individual Stock Trading Pause Pilot Program

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on December 7, 2010, Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The 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 Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") proposes to extend a pilot program pertaining to the CBOE Stock Exchange ("CBSX"), the CBOE's stock trading facility, through April 11, 2011. This rule change simply seeks to extend the pilot. No other changes to the pilot are being proposed. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule 6.3C, *Individual Stock Trading Pauses Due to Extraordinary Market Volatility,* was approved by the Securities and Exchange Commission ("Commission") on June 10, 2010 on a pilot basis to end on December 10, 2010.[3] The rule was developed in consultation with U.S. listing markets to provide for uniform market-wide trading pause standards for certain individual stocks that experience rapid price movement.[4] As the duration of the pilot expires on December 10, 2010, the Exchange is proposing to extend the effectiveness of Rule 6.3C through April 11, 2011.

2. Statutory Basis

Extension of the pilot period will allow the Exchange to continue to operate the pilot on an uninterrupted basis. Accordingly, CBOE believes the proposed rule change is consistent with the Act [5] and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [7] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest. The proposed rule change is also designed to support the principles of Section 11A(a)(1) [8] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning decisions to pause trading in a stock when there are significant price movements.

[3] *See* Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (SR–CBOE–2010–047).

[4] The pilot list of stocks originally included all stocks in the S&P 500 Index, but it has been expanded to also include all stocks in the Russell 1000 Index and a pilot list of Exchange Traded Products. *See* Securities Exchange Act Release No. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010) (SR–CBOE–2010–065).

[5] 15 U.S.C. 78a *et seq.*

[6] 15 U.S.C. 78(f)(b).

[7] 15 U.S.C. 78(f)(b)(5).

[8] 15 U.S.C. 78k–1(a)(1).

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act [9] and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[11] However, Rule 19b–4(f)(6) [12] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission has considered the Exchange's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program.[13] Therefore, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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-comments@sec.gov.* Please include File Number SR–CBOE–2010–112 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–112. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2010–112 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31479 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required to give 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 Commission notes that the Exchange has satisfied this requirement.

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] *Id.*

[13] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63501; File No. SR–NYSEAmex–2010–117]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Amex Equities Rule 80C To Extend the Effective Date of the Pilot

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on December 7, 2010, NYSE Amex LLC ("NYSE Amex" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Amex Equities Rule 80C to extend the effective date of the pilot by which such rule operates, which is currently scheduled to expire on December 10, 2010, until April 11, 2011. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Amex Equities Rule 80C to extend the effective date of the pilot by which such rule operates, which is currently scheduled to expire on December 10, 2010,[3] until April 11, 2011.

NYSE Amex Equities Rule 80C requires the Exchange to pause trading in an individual security listed on the Exchange if the price moves by 10% as compared to prices of that security in the preceding five-minute period during a trading day, which period is defined as a "Trading Pause." The pilot was developed and implemented as a market-wide initiative by the Exchange and other national securities exchanges in consultation with the Commission staff and is currently applicable to all S&P 500 Index securities, Russell 1000 Index securities, and specified exchange-traded products.[4]

The extension proposed herein would allow the pilot to continue to operate without interruption while the Exchange, other national securities exchanges and the Commission further assess the effect of the pilot on the marketplace or whether other initiatives should be adopted in lieu of the current pilot.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),[5] in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the change proposed herein meets these requirements in that it promotes uniformity across markets concerning decisions to pause trading in a security when there are significant price movements. Additionally, extension of the pilot to April 11, 2011 would allow the pilot to continue to operate without interruption while the Exchange and the Commission further assess the effect of the pilot on the marketplace or whether other initiatives should be adopted in lieu of the current pilot.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act[7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[9] However, Rule 19b–4(f)(6)[10] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission has considered the Exchange's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program.[11] Therefore, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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-comments@sec.gov.* Please include File Number SR–NYSEAmex–2010–117 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

[3] *See* Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (SR–NYSEAmex–2010–46).

[4] The Exchange notes that the other national securities exchanges have adopted the pilot in substantially similar form.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required to give 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 Commission notes that the Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6)(iii).

[10] *Id.*

[11] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2010–117. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAmex–2010–117 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31478 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63500; File No. SR–NYSE–2010–81]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Rule 80C To Extend the Effective Date of the Pilot

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on December 7, 2010, New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 80C to extend the effective date of the pilot by which such rule operates, which is currently scheduled to expire on December 10, 2010, until April 11, 2011. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Rule 80C to extend the effective date of the pilot by which such rule operates, which is currently scheduled to expire on December 10, 2010,[3] until April 11, 2011.

Rule 80C requires the Exchange to pause trading in an individual security listed on the Exchange if the price moves by 10% as compared to prices of that security in the preceding five-minute period during a trading day, which period is defined as a "Trading Pause." The pilot was developed and implemented as a market-wide initiative by the Exchange and other national securities exchanges in consultation with the Commission staff and is currently applicable to all S&P 500 Index securities, Russell 1000 Index securities, and specified exchange-traded products.[4]

The extension proposed herein would allow the pilot to continue to operate without interruption while the Exchange, other national securities exchanges and the Commission further assess the effect of the pilot on the marketplace or whether other initiatives should be adopted in lieu of the current pilot.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),[5] in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the change proposed herein meets these requirements in that it promotes uniformity across markets concerning decisions to pause trading in a security when there are significant price movements. Additionally, extension of the pilot to April 11, 2011 would allow the pilot to continue to operate without interruption while the Exchange and the Commission further assess the effect of the pilot on the marketplace or whether other initiatives should be adopted in lieu of the current pilot.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (SR–NYSE–2010–39).

[4] The Exchange notes that the other national securities exchanges have adopted the pilot in substantially similar form.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act[7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[9] However, Rule 19b–4(f)(6)[10] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission has considered the Exchange's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program.[11] Therefore, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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-comments@sec.gov.* Please include File Number SR–NYSE–2010–81 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–NYSE–2010–81. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2010–81 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31477 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required to give 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 Commission notes that the Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6)(iii).

[10] *Id.*

[11] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63498; File No. SR–CHX–2010–24]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Program Related to Individual Securities Circuit Breakers

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4[2] thereunder, notice is hereby given that on December 7, 2010, Chicago Stock Exchange, Inc. ("CHX" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The 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

CHX proposes to amend its rules to extend the pilot program relating to individual securities circuit breakers. The text of this proposed rule change is available on the Exchange's Web site at (*http://www.chx.com*) and in the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In June, 2010, CHX obtained Commission approval to amend Article 20, Rule 2 to create circuit breakers in individual securities on a pilot basis to end on December 10, 2010.[3] Shortly thereafter, in September, the Commission approved another amendment to Article 20, Rule 2 to add securities included in the Russell 1000® Index ("Russell 1000") and certain specified Exchange Traded Products ("ETP") to the pilot rule.[4] The proposed rule change merely extends the duration of the pilot program until April 11, 2011. Extending the pilot for an additional four months will allow the Commission more time to consider the impact of the pilot program.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)(5) of the Securities Exchange Act of 1934 (the "Act"), which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1) of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes uniformity across markets concerning decisions to pause trading in a security when there are significant price movements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

[3] *See* Securities Exchange Act Release No. 62214 (June 10, 2010), 75 FR 34183 (June 16, 2010) approving SR–CHX–2010–10.

[4] *See* Securities Exchange Act Release No. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010) approving SR–CHX–2010–14.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act[5] and Rule 19b–4(f)(6) thereunder.[6]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[7] However, Rule 19b–4(f)(6)[8] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission has considered the Exchange's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program.[9] Therefore, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required to give 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 Commission notes that the Exchange has satisfied this requirement.

[7] 17 CFR 240.19b–4(f)(6)(iii).

[8] *Id.*

[9] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CHX–2010–24 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–CHX–2010–24. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–

2010–24 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31475 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63499; File No. SR–BX–2010–087]

Self-Regulatory Organizations; NASDAQ OMX BX; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Clarify Quote Management Procedures

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on December 6, 2010, NASDAQ OMX BX ("BX" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to clarify quote management procedures.

The text of the proposed rule change is below. Proposed new language is in italics and proposed deletions are in brackets.[4]

* * * * *

4613. Market Maker Obligations

A member registered as an Equities Market Maker shall engage in a course of dealings for its own account to assist in the maintenance, insofar as reasonably practicable, of fair and orderly markets in accordance with this Rule.

(a) Quotation Requirements and Obligations

(1) No Change.

(2) Pricing Obligations. For NMS stocks (as defined in Rule 600 under Regulation NMS) an Equities Market Maker shall adhere to the pricing obligations established by this Rule during Regular Market Hours.

(A)–(E) No Change.

(F) [Quotation Creation and Adjustment. For each Issue in which an Equities Market Maker is registered, the System shall automatically create a quotation for display to comply with this Rule. System-created compliant displayed quotations will thereafter be allowed to rest and not be further adjusted by the System unless the relationship between the quotation and its related National Best Bid or National Best Offer, as appropriate, shrinks to the greater of: (a) 4 percentage points, or (b) one-quarter the applicable percentage necessary to trigger an individual stock trading pause as described in NASDAQ OMX BX Rule 4120(a)(11), or expands to within that same percentage less 0.5%, whereupon the System will immediately re-adjust and display the Equities Market Maker's quote to the appropriate Designated Percentage set forth in section (D) above. As the System allows for multiple attributable quotations by a Equities Market Maker in an issue, quotations originally entered by Equities Market Makers shall be allowed to move freely towards or away from the National Best Bid or National Best Offer, as appropriate, for potential execution.] *Reserved.*

(G) [Quotation Refresh After Execution. In the event of an execution against a System-created compliant quotation, the Equities Market Maker shall have its quote refreshed by the System on the executed side of the market at the applicable Designated Percentage away from the then National Best Bid (Offer) (or if no National Best Bid (Offer), the last reported sale).] *Reserved.*

(H)–(K) No Change.

(b)–(e) No Change.

* * * * *

4752. Opening Process; Opening and Closing Price

(a) Trading Prior To Normal Market Hours. The system shall process all eligible Quotes/Orders at 8 a.m.:

(1) At 8 a.m., the system shall add in time priority all eligible Orders in accordance with each order's defined characteristics.

(2) Quoting Market Participants *must enter quotations in compliance with Rule 4613 at 9:25 a.m. until market open, and at all times thereafter during Regular Market Hours.* [may instruct the Exchange to open their Quotes at 9:25 a.m. at price of $0.01 (bid) and $999,999 (offer) and a size of one round lot in order to provide a two-sided quotation. In all other cases, the quote of a participant shall be at the price and size entered by the participant]

(3) No Change.

(b) No Change.

* * * * *

(b) Not applicable.

(c) Not applicable.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Recently, the Exchange adopted rules enhancing market maker quotation obligations. In connection with the implementation with these new standards, the Exchange proposes to clarify quote management procedures. Under the proposal, market makers themselves will be responsible for maintaining quotations at prices that comply with the new minimum standards set forth in Rule 4613. The Exchange will provide no automated system to create or adjust market maker quotes to ensure compliance, and the responsibility to maintain required quote prices will be responsibility of the market maker. In addition, the Exchange is removing and updating language from Rule 4752 to make explicit the requirement to comply with minimum quote prices.

The Exchange believes that the proposal will enhance compliance with the new market maker quotation standards.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] Changes are marked to the rule text that appears in the electronic manual of NASDAQ found at *http://nasdaqomx.cchwallstreet.com.*

the provisions of Section 6 of the Act,[5] in general, and with Sections 6(b)(5) of the Act,[6] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule meets these requirements in that it enhances compliance with the new market maker quotation standards.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change 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: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act[7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[9] However, Rule 19b–4(f)(6)[10] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission has considered the Exchange's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will enable the Exchange to implement the proposed change consistent with the implementation date for the new market maker pricing obligations.[11] Therefore, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the 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-comments@sec.gov. Please include File Number SR–BX–2010–087 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–BX–2010–087. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2010–087 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31474 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required to give 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.

[9] 17 CFR 240.19b–4(f)(6)(iii).

[10] *Id.*

[11] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63467; File No. SR–EDGA–2010–20]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Fee Schedule To Add Two New Routing Options

December 8, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2010, the EDGA Exchange, Inc. (the "Exchange" or the "EDGA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fee schedule, which contains a list of routing options, to add two new additional ones. The text of the proposed rule change is attached as Exhibit 5 and is available on the Exchange's Web site at *http://www.directedge.com*, at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange's fee schedule contains a current list of routing options. The Exchange proposes to amend this schedule to add certain new routing options, effective upon filing with the Commission. The Exchange intends to implement the rule change on or about December 1, 2010.

The Exchange proposes to introduce the ROBX and ROBY routing options and add these to its routing table, which is part of the Exchange fee schedule.

The Exchange proposes to add the following descriptions of the ROBY and ROBX routing strategies to its routing table: For the ROBY strategy, the order sweeps the EDGA book and routes to BATS BYX Exchange as an immediate or cancel (IOC) order, with the remainder being cancelled if there is no execution. For the ROBX strategy, the order sweeps the EDGA book and routes to Nasdaq BX Exchange as an immediate or cancel (IOC) order, with the remainder being cancelled if there is no execution.

The Exchange believes that the proposed introduction of the ROBX and ROBY routing strategies will provide market participants with greater flexibility in routing orders, without having to develop their own complicated routing strategies.

Finally, the Exchange proposes to clarify in the description of the ROBA routing strategy that the BATS Exchange referred to is the BATS BZX Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[3] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed change to introduce the ROBX and ROBY routing options will provide market participants with greater flexibility in routing orders without developing complicated order routing strategies on their own. In addition, it will provide additional clarity and specificity to the Exchange's fee schedule regarding routing strategies and will further enhance transparency with respect to Exchange routing offerings.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act[4] and Rule 19b–4(f)(6) thereunder.[5]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[6] However, Rule 19b–4(f)(6)[7] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative upon filing. The Commission notes (i) the proposal could provide market participants with more options to route orders; (ii) it presents no novel issues; and (iii) it may provide a benefit to market participants. For these reasons, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay, and hereby grants such waiver.[8]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–EDGA–2010–20 on the subject line.

[3] 15 U.S.C. 78f(b)(5).

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires the Exchange to give 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 on which the Exchange filed the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived the five-day pre-filing requirement.

[6] 17 CFR 240.19b–4(f)(6)(iii).

[7] *Id.*

[8] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGA–2010–20. 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,[9] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGA–2010–20 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31434 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[9] The text of the proposed rule change is available on Exchange's Web site at *http://www.directedge.com,* on the Commission's Web site at *http://www.sec.gov,* at EDGA, and at the Commission's Public Reference Room.

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63497; File No. SR–BATS–2010–037]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Pilot Program Related to Trading Pauses Due to Extraordinary Market Volatility

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on December 7, 2010, BATS Exchange, Inc. (the "Exchange" or "BATS") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to extend a pilot program previously approved by the Commission related to Rule 11.18, entitled "Trading Halts Due to Extraordinary Market Volatility." The Exchange proposes to extend the pilot program through April 11, 2011.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's rule related to individual stock circuit breakers, which is contained in Rule 11.18(d) and Interpretation and Policy .05 to Rule 11.18. The rule, explained in further detail below, was approved to operate under a pilot program set to expire on December 10, 2010. The Exchange proposes to extend the pilot program to April 11, 2011.

On June 10, 2010, the Commission approved on a pilot basis changes to BATS Rule 11.18 to provide for uniform market-wide trading pause standards for individual securities in the S&P 500® Index that experience rapid price movement.[3] Later, the Exchange and other markets proposed extension of the trading pause standards to individual securities in the Russell 1000® Index and specified Exchange Traded Products, which changes the Commission approved on September 10, 2010.[4] The Exchange believes the benefits to market participants from the individual stock trading pause rule should be continued on a pilot basis.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[5] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[6] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The proposed rule change is also consistent with Section 11A(a)(1) of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning decisions to pause trading in a security

[3] Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (SR–BATS–2010–014).

[4] Securities Exchange Act Release No. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010) (SR–BATS–2010–018).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

when there are significant price movements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act[7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[9] However, Rule 19b–4(f)(6)[10] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission has considered the Exchange's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program.[11] Therefore, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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-comments@sec.gov.* Please include File Number SR–BATS–2010–037 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BATS–2010–037. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BATS–2010–037 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31472 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required to give 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 Commission notes that the Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6)(iii).

[10] *Id.*

[11] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63503; File No. SR–FINRA–2010–064]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Effective Date of the Trading Pause Pilot

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4[2] thereunder, notice is hereby given that on December 7, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. 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

FINRA is proposing to amend FINRA Rule 6121 (Trading Halts Due to Extraordinary Market Volatility) to extend the effective date of the pilot, which is currently scheduled to expire on December 10, 2010, until April 11, 2011.

The text of the proposed rule change is available on FINRA's Web site at

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

http://www.finra.org, at the principal office of FINRA 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, FINRA 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. FINRA 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

FINRA proposes to amend FINRA Rule 6121.01 to extend the effective date of the pilot by which such rule operates, which is currently scheduled to expire on December 10, 2010, until April 11, 2011.

FINRA Rule 6121.01 provides that if a primary listing market has issued an individual stock trading pause under its rules, FINRA will halt trading otherwise than on an exchange in that security until trading has resumed on the primary listing market. The pilot was developed and implemented as a market-wide initiative by FINRA and other self-regulatory organizations ("SROs") in consultation with Commission staff, and is currently applicable to the S&P 500® Index,[3] the Russell 1000® Index and a pilot list of Exchange Traded Products.[4]

The extension proposed herein would allow the pilot to continue to operate without interruption while FINRA and the other SROs further assess the effect of the pilot on the marketplace and whether other initiatives should be adopted in lieu of the current pilot.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[5] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change meets these requirements in that it promotes uniformity across markets concerning decisions to pause trading in a security when there are significant price movements.

Additionally, extension of the pilot to April 11, 2011 would allow the pilot to continue to operate without interruption while FINRA and the other SROs further assess the effect of the pilot on the marketplace and whether other initiatives should be adopted in lieu of the current pilot.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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.

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: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) 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 Act[6] and Rule 19b–4(f)(6) thereunder.[7]

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.[8] However, Rule 19b–4(f)(6)[9] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. FINRA has requested that the Commission waive the 30-day operative delay.

The Commission has considered FINRA's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program.[10] Therefore, the Commission designates the proposed rule change to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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-comments@sec.gov.* Please include File Number SR–FINRA–2010–064 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–FINRA–2010–064. 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

[3] *See* Securities Exchange Act Release No. 62251 (June 10, 2010), 75 FR 34183 (June 16, 2010) (Order Approving File No. SR–FINRA–2010–025).

[4] *See* Securities Exchange Act Release No. 62883 (September 10, 2010), 75 FR 56608 (September 16, 2010) (Order Approving File No. SR–FINRA–2010–033).

[5] 15 U.S.C. 78*o*–3(b)(6).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, a self-regulatory agency is required to give 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 Commission notes that FINRA has satisfied this requirement.

[8] 17 CFR 240.19b–4(f)(6)(iii).

[9] *Id.*

[10] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2010–064 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31480 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63517; File No. SR–EDGA–2010–24]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGA Rule 11.13 To Extend the Operation of a Pilot Pursuant to Rule 11.13 Until April 11, 2011

December 10, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 9, 2010, the EDGA Exchange, Inc. (the "Exchange" or "EDGA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend EDGA Rule 11.13 to extend the operation of a pilot pursuant to the Rule until April 11, 2011. The text of the proposed rule change is available on the Exchange's Web site at *http://www.directedge.com,* at the Exchange's principal office, on the Commission's Web site at *http://www.sec.gov,* and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions, Rule 11.13. The rule, explained in further detail below, was approved to operate under a pilot program set to expire on December 10, 2010. The Exchange proposes to extend the pilot program to April 11, 2011.

On September 10, 2010, the Commission approved, on a pilot basis, changes to EDGA Rule 11.13 to provide for uniform treatment: (1) Of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[3] The Exchange also adopted additional changes to Rule 11.13 that reduced the ability of the Exchange to deviate from the objective standards set forth in Rule 11.13.[4] The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should be approved to continue on a pilot basis.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[5] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6)(iii) thereunder.[7] The Exchange

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–EDGA–2010–03).

[4] *Id.*

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[8] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov*. Please include File Number SR–EDGA–2010–24 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGA–2010–24. 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 the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–EDGA–2010–24 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31491 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[8] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63515; File No. SR–EDGX–2010–23]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGX Rule 11.13 To Extend the Operation of a Pilot Pursuant to Rule 11.13 Until April 11, 2011

December 10, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 9, 2010, the EDGX Exchange, Inc. (the "Exchange" or "EDGX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend EDGX Rule 11.13 to extend the operation of a pilot pursuant to the Rule until April 11, 2011. The text of the proposed rule change is available on the Exchange's Web site at *http://www.directedge.com,* at the Exchange's principal office, on the Commission's Web site at *http://www.sec.gov,* and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions, Rule 11.13. The rule, explained in further detail below, was approved to operate under a pilot program set to expire on December 10, 2010. The Exchange proposes to extend the pilot program to April 11, 2011.

On September 10, 2010, the Commission approved, on a pilot basis, changes to EDGX Rule 11.13 to provide for uniform treatment: (1) Of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[3] The Exchange also adopted additional changes to Rule 11.13 that reduced the ability of the Exchange to deviate from the objective standards set forth in Rule 11.13.[4] The

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–EDGX–2010–03).

[4] *Id.*

Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should be approved to continue on a pilot basis.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[5] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6)(iii) thereunder.[7] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[8] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–EDGX–2010–23 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGX–2010–23. 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 the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–EDGX–2010–23 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31490 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self- regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[8] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63509; File No. SR–Phlx–2010–157]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Relating to Complex Orders

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4[2] thereunder, notice is hereby given that on November 29, 2010, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. On December 6, 2010, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Section 19(b)(1) of the Act [3] and Rule 19b–4 thereunder,[4] proposes to amend Rule 1080.08 to change the following aspects of its Complex Orders System: (i) Permit Complex Orders where one of the components of the Complex Order is the underlying security (stock or Exchange Traded Fund Share ("ETF")); (ii) permit Complex Orders with more than two components; (iii) add a "Do Not Auction" condition for Complex Orders that prevents orders so marked from triggering (or joining) a Complex Order Live Auction; [5] (iv) permit day orders to be sent by certain participants; (v) add an execution priority provision that clarifies execution priority respecting current Complex Orders and establishes the execution priority of the proposed new Complex Orders; and (vi) revise the definition section.

The text of the proposed rule change is available on the Exchange's Website at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In 2008, the Exchange automated the handling of Complex Orders on its electronic trading platform for options, Phlx XL.[6] Currently, the Exchange's Complex Orders functionality is limited to Complex Orders consisting solely of two option components. The Exchange proposes to add Complex Orders where one component is the underlying stock or ETF. The Exchange also proposes to permit Complex Orders consisting of up to six components. The purpose of the proposed rule change is to more efficiently handle these new Complex Orders on the Exchange by establishing rules and systems that would enable the Exchange to handle such orders electronically.[7]

Definitions

The Exchange is proposing to revise the definition of Complex Order in Rule 1080.08(a)(i) to provide that a Complex Order is any order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, priced at a net debit or credit based on the relative prices of the individual components, for the same account, for the purpose of executing a particular investment strategy.[8] Furthermore, a Complex Order can also be a stock-option order, which is an order to buy or sell a stated number of units of an underlying stock or ETF coupled with the purchase or sale of options contract(s).[9] Accordingly, the Exchange is now permitting one component of a Complex Order to consist of the underlying stock or ETF.[10] A Complex Order with one component that is the underlying stock or ETF is also referred to as a stock-option order. The underlying stock or ETF must be the deliverable for the options component of that Complex Order and represent exactly 100 shares per option for regular way delivery.[11] In the case of Complex Orders with a stock or ETF component, these cannot be executed against orders for the individual legs; stock-option orders in the System can only be executed against other stock-option orders. The Exchange is proposing to state that the maximum number of components will be six, including both options and stock components. For example, under the proposal, a Complex Order could consist of up to five options series plus the underlying security. Or, a Complex Order could consist of up to six options series.

This revision of the definition of a Complex Order is intended to simplify the rule and recognizes that there are many types and permutations possible, as strategies develop and become more sophisticated.[12] As a result of this revision of the definition of a Complex Order, several subparagraphs are being deleted because they are too specific and no longer needed, as they are covered under the new, broader definition; these include the definition of a spread order, a straddle order, a combination order, a ratio order, a collar order, and a tied hedge order.[13]

In Rule 1080.08(a)(ii), the Exchange is also revising the definition of Complex Order Strategy, in addition to moving the pricing language, as explained above, to expressly state in the rule that each such strategy is assigned a strategy identifier by the System.[14] This is intended to make the program clearer in the rules. The Exchange is also proposing to better state that a Complex Order Strategy means a particular combination of components and their ratios to one another.

In conjunction with permitting one of the components of a Complex Order to be the underlying security, the

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

[5] *See* Rule 1080.08(e).

[6] Securities Exchange Act Release No. 58361 (August 14, 2008), 73 FR 49529 (August 21, 2008) (SR–Phlx–2008–50). Since that time, the Exchange has enhanced its options trading platform, now known as Phlx XL II. *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32).

[7] Currently, complex orders also trade on the floor of the Exchange pursuant to various rules, including Rule 1033; this proposal does not impact such manual trading.

[8] This includes additional language that provides that a Complex Order is priced at a net debit or credit based on the relative prices of the individual components, which is currently in the definition of Complex Order Strategy in Rule 1080.08(a)(ii), but fits better in the definition of Complex Order.

[9] This definition is similar to ISE Rule 722(a).

[10] The term "stock" is used interchangeably with "underlying security" herein. In addition, in the case of foreign currency options and index options, the underlying cannot be a component of a Complex Order, because such underlying instrument is not a security and instead consists of actual foreign currency and an index, respectively, which are not currently included in the program the Exchange has developed.

[11] Because it must represent exactly 100 shares, there can be no cash component. For example, XRX bought ACS, resulting in an adjusted option trading under the symbol AGY; AGY options settle into 4.935 XRX shares plus $18.60 cash. *See e.g., http://www.theocc.com/components/docs/market-data/infomemos/2010/feb/26947.pdf.* Accordingly, because AGY options settle through delivery of XRX shares and cash rather than AGY shares, it would not possible to enter a AGY stock-option order. Instead, AGY Complex Orders can only consist of options components to be traded on the Exchange.

[12] The ISE has adopted a similar generic provision. *See* Securities Exchange Act Release No. 59021 (November 26, 2008), 73 FR 74545 (December 8, 2008) (SR–ISE–2008–91).

[13] *See* current Phlx Rule 1080.08(a)(i)(A)–(F).

[14] For example, a Complex Order Strategy might be "buy one XYZ January 20 call, sell one XYZ January 20 put." The System would assign this Complex Order Strategy a specific identification number or code that would be used in the System to identify this Complex Order Strategy. Hypothetically, the identification number for this particular Complex Order Strategy could be "Complex Order Strategy #12345." Complex Order Strategy #12345 would have a bid price and an offer price. If an investor wishes to purchase or sell, for example, 10 Complex Order Strategy 12345, such an investor would be bidding for or offering to buy 10 XYZ January 20 calls and sell 10 XYZ January 20 puts. This is not a new feature and was included in the original proposal. *See* Securities Exchange Act Release No. 58361 (August 14, 2008), 73 FR 49529 (August 21, 2008) (SR–Phlx–2008–50).

Exchange proposes to amend subparagraphs (a)(iv) and (vi) to update the definitions of cPBBO and cNBBO, respectively, to include the underlying security. Specifically, both would be amended to state that the best net debit or credit price for a Complex Order Strategy that includes a stock/ETF component includes the national best bid or offer for the underlying security.

The Exchange also proposes to adopt, in new subparagraph (a)(viii), a new order condition called "Do Not Auction," or DNA, which causes an order to not be eligible to begin a Complex Order Live Auction ("COLA").[15] DNA Orders cannot join a COLA in progress. These orders can avoid an auction and, instead, be either executed immediately or cancelled.[16] DNA Orders received prior to the opening or when the Complex Order Strategy is not available for trading will be cancelled. DNA Orders will initially only be available for Complex Orders consisting of more than two option components or where the underlying security is a component; once the Exchange has fully rolled out its enhanced Complex Order System, which will be announced in an Options Trader Alert, DNA Orders will also become available for Complex Orders consisting of two option components.

Priority

The Exchange proposes to clarify and expand upon the trade-through and execution priority provisions applicable to Complex Orders, including the expanded definition of Complex Orders. Accordingly, the Exchange, first, proposes to add to the definitions section of the rule, Rule 1080.08(a), the definition of a conforming ratio. A conforming ratio, in proposed Rule 1080.08(a)(ix), is essentially a permissible ratio, renamed. Specifically, it is where the ratio between the sizes of the options components of a Complex Order is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00). For example, a one-to-two (.5) ratio, a two-to-three (.667) ratio, or a two-to-one (2.00) ratio is a conforming ratio,[17] whereas a one-to-four (.25) ratio or a four-to-one (4.0) ratio is not.[18]

Where one component of the Complex Order is the underlying security, the ratio between any options component and the underlying security component must be eight contracts to 100 shares of the underlying security or less.[19] One example of a two-legged ratio order with a stock component that is conforming is: B 400 GE Dec 16.50 calls, S 400 Dec 17.50 calls and S 12,000 shares of GE at 16.50; after comparing the largest option leg (400) to each 100 lot of shares (100 × 120 = 12,000 shares, or 120 lots of 100), the ratio is 3.33 (400 divided by 120) options per 100 shares, which is less than the maximum allowable 8 options per 100 shares, which is a conforming ratio. In contrast, B 200 GE Dec 16.50 calls, S 400 GE Dec 17.50 calls and S 3,000 shares of GE at 16.50 is a nonconforming ratio, because comparing the largest leg of the options trade (400) to 30 lots of 100 (3,000 shares) equals 13.33 (400 divided by 30) options per 100 shares, which is greater than the maximum allowable 8 options per 100 shares and thus nonconforming. Currently, the same ratio appears in Rule 1080.08(a)(i)(D), within the definition of a Ratio Order; that provision is proposed to be deleted and replaced by the new definition of conforming ratio to make the rule clearer.[20]

Today, Complex Orders consisting of permissible (now called conforming) ratios are excepted from the trade-through prohibitions of the Options Order Protection and Locked/Crossed Market Plan ("Options Linkage Plan"), because the Plan contains an exception for Complex Orders with a certain ratio. Accordingly, these orders can be executed without regard to prices for the individual legs on other exchanges, meaning trading through possibly better prices.[21] The Exchange now proposes to codify this in new subparagraph (c)(iii)(C).

In addition to trade-through provisions, whether a Complex Order has a conforming ratio is also relevant in determining how the Exchange's spread priority rules apply. Today, Rule 1033(d) applies to executions of Complex Orders.[22] Throughout Rule 1080.08, there are cross references to Rule 1033(d), which will now be deleted and replaced with new paragraph (c)(iii), which is the spread priority provision applicable to Complex Orders executed on Phlx XL II. The spread priority provisions in new subparagraph (c)(iii) provide the same priority under the same conditions to a broader class of Complex Orders under this proposal.

Spread priority refers to the priority of orders and quotes on the Exchange's own market and permits part of an eligible Complex Order to have priority over other bids and offers in the marketplace. Today, for a Complex Order consisting of two options components, if the ratio between those options components is a permissible (now called conforming) ratio, then if one option "leg" or component improves the Exchange's market for that option series, then the other option leg can be executed with priority over existing bids/offers (including customers), provided that neither option leg is executed at a price outside of the established bid or offer for that option contract.[23] For example, if a Complex Order is received to buy one option A contract and sell one option B contract for a net debit of .65, where option A has a PBBO of 1.00–1.20 with a 1.00 customer limit order to buy on the book and option B has a PBBO of .45–.50 with a .50 customer limit order to sell on the book, permissible trade prices could be 1.15 for option A and .50 for option B. Option B is allowed to execute at .50 because option A executed at a price that improved the Exchange's market in that option. The application of spread priority to Complex Orders consisting only of options is not changing and will now be covered by new Rule 1080.08(c)(iii)(A).

Furthermore, under this proposal, because Complex Orders with a stock

[15] *See* Rule 1080.08(e).

[16] DNA orders can be marked IOC, which means that the order cannot start an auction (whereas an IOC order can), and get rejected if there is an auction in progress.

[17] One example of a conforming five-legged ratio is: B 100 GE Dec 12.50 calls for 4.00, S 200 GE Dec 15.00 calls for 2.00, B 100 GE Dec 17.50 calls for .60 and also S 100 Dec 17.50/Dec 16.50 put spreads at .60; because the highest volume to the lowest volume is in a ratio of 2:1 (200 versus 100 options), this order is conforming.

[18] One example of a non-conforming five-legged ratio is: B 100 GE Dec 12.50 calls for 4.00, S 200 GE Dec 15.00 calls for 2.00, B 100 GE Dec 17.50 calls for .60 and also S 400 Dec 17.50/Dec 16.50 put spreads at .60; because the highest volume to the lowest volume is in a ratio of 4:1 (400 versus 100 options), this order is not conforming.

[19] These are the same ratios found in ISE Rule 722(a)(4). If the largest option leg versus stock meets the conforming ratio, then, necessarily, all smaller legs would also meet the definition of conforming ratio.

[20] Complex orders consisting of a nonconforming ratio will not be accepted.

[21] *See* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) Options Linkage Plan at Section 5(b)(viii), which prohibits trading through a better price of another exchange unless an exception applies. Phlx Rule 1084(b)(viii) provides an exception for complex orders. This exception applies to Complex Orders executed as such, and not those executed by legging, such as pursuant to Rule 1080.08(e)(vi)(A).

[22] Exchange Rule 1033(d) affords priority to spread type orders over either the bid or the offer established in the marketplace that is not better than the bids or offers comprising such total credit or debit, provided that, the member executes at least one option leg at a better price than established bid or offer for that option contract AND no option leg is executed at a price outside of the established bid or offer for that option contract.

[23] This applies to both trading in the complex orders automated functionality as well as manual trading on the floor. *See* Rule 1033(d).

component will now be permitted on Phlx XL II, priority provisions similar to Rule 1033 will now also apply to Complex Orders on Phlx XL II where one component is the underlying stock or ETF. Today, this is true for Complex Orders with a stock component executed manually on the trading floor, which are subject to Rule 1033(e). Thus, new subparagraph (c)(iii)(B) will govern the execution priority of the new stock-option Complex Orders on Phlx XL II. Specifically, it provides that where a conforming Complex Order consists of the underlying stock or ETF and one options leg, such options leg does not have priority over bids and offers established in the marketplace, including customer orders. Where a conforming Complex Order consists of the underlying stock or ETF and more than one options leg, the options legs have priority over bids and offers established in the marketplace, including customer orders, if at least one options leg improves the existing market for that option.

For example, where there is a conforming Complex Order to buy 1 option A, sell 1 option B, and sell 50 shares of the underlying stock for a net debit of 9.55 where the PBBO of option A is 1.00–1.20 with a customer 1.00 bid, the PBBO of option B is .40–.50, and the stock NBBO is 20.10–20.20, the following trade prices would be permissible: Option A could execute at 1.00, option B at .45, and the stock at 20.20. Option A is able to trade on the PBBO at the same price as the customer because option B improved the PBBO. The price of the stock portion is not relevant in applying the Exchange's option execution priority rules. As a second example, if a conforming Complex Order consists of only one option component and stock, then the option component may not be allowed to be executed at the same price as any existing bid/offer including customer bids/offers. For example, a conforming Complex Order to sell 1 option A and buy 100 shares, with option A having a PBBO of 2.00–2.20 and the stock having a NBBO of 10.00–10.20, for a net debit of 7.90 could receive the following permissible trade prices: Option A could execute at 2.10 with the stock execution occurring at 10.00. Option A could not execute at 2.20, because the option component does not have priority over existing bids/offers.

Order Entry

Currently, under subparagraph (b)(ii), Streaming Quote Traders ("SQTs"),[24] Remote Streaming Quote Traders ("RSQTs"),[25] non-SQT ROTs,[26] specialists and non-Phlx market makers on another exchange are permitted to enter Complex Orders as IOC only. However, for Complex Orders consisting of more than two option components or where the underlying security is a component, SQTs, RSQTs, non-SQT ROTs, specialists and non-Phlx market makers on another exchange may also enter Day orders;[27] once the Exchange has fully rolled out its enhanced Complex Order System, which will be announced in an Options Trader Alert, Day orders will become available for Complex Orders consisting of two option components. The Exchange expects that adding Day orders here should encourage more orders from this group of participants.

Currently, pursuant to subparagraph (b)(iii), Floor Brokers using the Options Floor Broker Management System may enter Complex Orders into the Exchange's electronic Complex Orders System as Day, GTC or IOC on behalf of non-broker-dealer customers and non-market maker off-floor broker-dealers, and as IOC only on behalf of broker-dealers or affiliates of broker-dealers. The Exchange proposes to amend this subparagraph to reflect that DNA orders and orders with more than two legs or a stock/ETF component (which are new) cannot be entered by Floor Brokers at this time. The Exchange believes that Floor Brokers are able to and use other, non-Exchange systems to access Phlx XL II, such that the FBMS, which is primarily intended to capture brokered orders into the options audit trail system, is not the sole method for them to submit orders to the Exchange. In addition, complex orders can be handled manually on the Exchange trading floor today. The Exchange believes that Floor Brokers are not likely to need or request these changes to FBMS, because they execute far more complex orders in the trading crowd today than through FBMS.

Rule 1080.08(c) currently provides that a Complex Order is eligible to trade only when each component of the Complex Order is open for trading on the Exchange. The Exchange proposes to add the word "option" in certain places in this provision, because one component of a Complex Order can now be the underlying security. The Exchange also proposes to require that the underlying security be open for trading on its primary market[28] if such underlying security is a component of a Complex Order.

Complex Order Processing and Execution

Currently, pursuant to Rule 1080.08(e)(i)(B)(2), a Complex Order that would otherwise be a COLA-eligible order that is received in the System during the final ten seconds of any trading session shall not be COLA-eligible. The Exchange proposes to make this time configurable, not to exceed the current ten seconds. The Exchange will issue an Options Trader Alert when the number of seconds changes.

COLA-eligible orders, COLA Sweeps, and responsive Complex Orders trade first based on the best price or prices available at the end of the COLA Timer. If no COLA Sweeps or responsive Complex Orders for the same Complex Order Strategy as the COLA-eligible order that improve the initial cPBBO were received during the COLA Timer, each component of the COLA-eligible order may trade at the PBBO with existing quotes and/or limit orders on the limit order book for the individual components of the Complex Order, provided that each component is executed such that the components comprise the Complex Order Strategy with the correct ratio for the desired net debit or credit. This is known as "legging," and the Exchange proposes to label subparagraph (e)(vi)(A)(1) as such. The Exchange is proposing to add that legging only occurs where there is no underlying security as a component of the Complex Order. If a COLA-eligible order cannot be filled in its entirety, any remaining balance would be placed on the CBOOK unless the COLA-eligible order has been submitted with other instructions (i.e., cancel).

Currently, Complex Orders are automatically executed against orders on the CBOOK in price priority and in

[24] An SQT is a Registered Options Trader ("ROT") who has received permission from the Exchange to generate and submit options quotations electronically through an electronic interface via an Exchange approved proprietary electronic quoting device in eligible options to which such SQT is assigned. *See* Rule 1014(b)(ii)(A).

[25] An RSQT is an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit options quotations electronically in eligible options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange. *See* Rule 1014(b)(ii)(B).

[26] A non-SQT ROT is an ROT who is neither an SQT nor an RSQT. *See* Rule 1014(b)(ii)(C).

[27] As a result of adding Day orders for this category of users, the Exchange also proposes to amend Rule 1080.08(f)(i) to eliminate reference to the types of orders on the Complex Limit Order Book, because it is too specific.

[28] The Exchange intends to consider the primary market for the underlying security to be the listing market; if the Exchange determines to use a market other than the listing market, the Exchange will issue an Options Trader Alert announcing any such change.

time priority at the same price, as described in subparagraph (f)(iii). Specifically, a Complex Order resting on the CBOOK will execute automatically against: (i) Quotes or orders on the limit order book for the individual components of the order (allocated in accordance with Exchange Rule 1014(g)(vii), and an SQT or RSQT quoting on all components of the Complex Order will have priority over SQTs and RSQTs quoting a single component, but not over customer orders); or (ii) an incoming marketable Complex Order that does not trigger a COLA Timer, whichever arrives first. At this time, the Exchange proposes to delete the provision that an SQT or RSQT quoting on all components of the Complex Order will have priority over SQTs and RSQTs quoting a single component in order to simplify the allocation process as the Exchange begins to accept more Complex Order types. Instead, an SQT or RSQT quoting on all components of the Complex Order will be on parity with SQTs and RSQTs quoting a single component.[29] This is being deleted from Rule 1080.08(e)(vi)(A)(1), (f)(iii)(A) and (f)(iii)(B)(1). The Exchange is deleting this provision to simplify system processing and does not believe, currently, that the benefits are material or being realized intentionally by participants. Furthermore, in Rule 1080.08(f)(iii), the Exchange proposes to state that the execution against orders on the limit order book for the individual components means the options components, such that "legging" will not occur where any of the components is the underlying security.

The Exchange proposes to add the word "options" in various places where the provision clearly applies only to the options component. For example, in subparagraph (c)(ii), most of the reasons why Complex Orders would not trade on the System relate to the options components. Similarly, in subparagraph (f)(i) governing what orders go on the CBOOK, "options" is being added to several of the provisions.

Underlying Stock/ETF Component

In addition to making the various new references to the underlying stock/ETF as a component of a Complex Order, the Exchange also proposes to adopt new subparagraph (h), which will state that where one component of a Complex Order is the underlying stock/ETF, the Exchange shall electronically communicate the underlying stock/ETF component of a Complex Order to Nasdaq Options Services LLC ("NOS"), its designated broker-dealer, for execution; this occurs once the Phlx trading System determines that a Complex Order trade is possible and at what prices. Specifically, NOS will act as agent for such stock/ETF orders; NOS will match those orders, which always consist of both a buy and sell order for the stock/ETF, because the System has determined that two Complex Orders can trade with each other.[30] NOS will match these orders not on an exchange, but rather "over-the-counter." Accordingly, the Exchange proposes to permit NOS to perform this function, in addition to its approved routing functions.[31]

NOS is a broker-dealer and member of various exchanges and the Financial Industry Regulatory Authority ("FINRA"). As discussed in detail below, NOS, under this proposal, would be responsible for the proper execution, trade reporting and submission to clearing of the stock/ETF trade that is part of a Complex Order. Because these trades will occur off-exchange, the principal regulator is FINRA, rather than Phlx or NASDAQ. Furthermore, NOS is responsible for compliance with FINRA rules generally and is subject to examination by FINRA. Specifically, NOS is subject to NASD Rule 3010,[32] which generally requires that the policies and procedures and supervisory systems be reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable NASD and FINRA rules, including those relating to the misuse of material non-public information. To this end, NOS intends to have in place policies related to confidentiality and the potential for informational advantages relating to its affiliates, intended to protect against the misuse of material nonpublic information.[33]

In addition, because the execution and reporting of the stock/ETF piece will occur otherwise than on this Exchange or any other exchange, it will be handled by NOS pursuant to applicable rules regarding equity trading,[34] including the rules governing trade reporting, trade throughs and short sales. Specifically, NOS will report the trades to the Trade Reporting Facility.[35] Firms that are members of FINRA or the NASDAQ Stock Market ("NASDAQ") are required to have a Uniform Service Bureau/Executing Broker Agreement ("AGU") with NOS in order to trade Complex Orders containing a stock/ETF component. Firms that are not members of FINRA or NASDAQ are required to have a Qualified Special Representative ("QSR") arrangement with NOS in order to trade Complex Orders containing a stock/ETF component. This requirement is codified in proposed Rule 1080.08(a)(i). Accordingly, this process is available to all Phlx member organizations and the stock/ETF component of a Complex Order, once executed, will be properly processed for trade reporting purposes.

With respect to trade throughs, the Exchange believes that the stock/ETF component of a Complex Order is eligible for the Qualified Contingent Trade Exemption from Rule 611(a) of Regulation NMS. A Qualified Contingent Trade is a transaction consisting of two or more component orders, executed as agent or principal, that satisfy the six elements in the Commission's order exempting Qualified Contingent Trades ("QCTs") from the requirements of Rule 611(a),[36] which requires trading centers to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-

[29] This change will initially only apply to Complex Orders consisting of more than two options components or where the underlying stock/ETF is a component; once the Exchange has fully rolled out its enhanced Complex Order System, which will be announced in an Options Trader Alert, it will apply to Complex Orders consisting of two options components.

[30] This is because Complex Orders consisting of the underlying stock or ETF can only trade with other Complex Orders. *See* proposed Rule 1080.08(a)(i), which reads as follows: Stock-option orders can only be executed against other stock-option orders and cannot be executed by the System against orders for the individual components.

[31] Securities Exchange Act Release Nos. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080); and 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32).

[32] FINRA was created in July 2007 through the consolidation of NASD and the member regulation, enforcement and arbitration functions of the NYSE. The FINRA rulebook currently consists of both NASD Rules and certain NYSE Rules that FINRA has incorporated ("Incorporated NYSE Rules").

[33] Similarly, pursuant to Phlx Rule 1080(m)(iii)(C), the Exchange must establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and the Routing Facility.

[34] *See* Securities Exchange Act Release No. 49023 (January 5, 2004) (SR–ISE–2003–37) ("Once the orders are communicated to the broker-dealer for execution, the broker-dealer has complete responsibility for determining whether the orders may be executed in accordance with all of the rules applicable to execution of equity orders, * * *").

[35] Specifically, the trades will be reported to the FINRA/Nasdaq TRF, which is a facility of FINRA that is operated by The NASDAQ OMX Group, Inc. ("NASDAQ OMX") and utilizes Automated Confirmation Transaction ("ACT") Service technology. *See e.g.,* Securities Exchange Act Release No. 61817 (March 31, 2010) (SR–FINRA–2010–011).

[36] 17 CFR 242.611(a).

throughs.[37] The Exchange believes that the stock/ETF portion of a Complex Order under this proposal complies with all six requirements. Moreover, as explained below, the Phlx trading System will validate compliance with each requirement such that any matched order received by NOS under this proposal has been checked for compliance with the exemption, as follows:

(1) At least one component order is in an NMS stock: The stock/ETF component must be an NMS stock, which is validated by the System;

(2) all components are effected with a product or price contingency that either has been agreed to by the respective counterparties or arranged for by a broker-dealer as principal or agent: A Complex Order, by definition consists of a single net/debit price and this price contingency applies to all the components of the order, such that the stock price computed and sent to NOS allows the stock/ETF order to be executed at the proper net debit/credit price based on the execution price of each of the option legs, which is determined by the Phlx System;

(3) the execution of one component is contingent upon the execution of all other components at or near the same time: Once a Complex Order is accepted and validated by the System, the entire package is processed as a single transaction and each of the option leg and stock/ETF components are simultaneously processed;

(4) the specific relationship between the component orders (e.g., the spread between the prices of the component orders) is determined at the time the contingent order is placed: Complex Orders, upon entry, must have a size for each component and a net debit/credit, which the System validates and processes to determine the ratio between the components; an order is rejected if the net debit/credit price and size are not provided on the order;

(5) the component orders bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or since cancelled: under this proposal, the stock/ETF component must be the underlying security respecting the option legs, which is validated by the System; and

(6) the transaction is fully hedged (without regard to any prior existing position) as a result of the other components of the contingent trade: Under this proposal, the ratio between the options and stock/ETF must be a conforming ratio (8 contracts per 100 shares), which the System validates, and which under reasonable risk valuation methodologies, means that the stock/ETF position is fully hedged.[38]

Furthermore, proposed Rule 1080.08(a)(i) provides that member organizations may only submit Complex Orders with a stock/ETF component if such orders comply with the Qualified Contingent Trade Exemption. Member organizations submitting such Complex Orders with a stock/ETF component represent that such orders comply with the Qualified Contingent Trade Exemption.[39] Thus, the Exchange believes that Complex Orders consisting of a stock/ETF component will comply with the exemption and that the Phlx trading System will validate such compliance to assist NOS in carrying out its responsibilities as agent for these orders.

With respect to short sale regulation, the proposed handling of the stock/ETF component of a Complex Order under this proposal does not raise any issues of compliance with the currently operative provisions of Regulation SHO.[40] When a Complex Order has a stock/ETF component, member organizations must indicate, pursuant to Regulation SHO, whether that order involves a long or short sale. The System will accept Complex Orders with a stock/ETF component marked to reflect either a long or short position; specifically, orders not marked as buy, sell or sell short will be rejected by the Phlx trading System. The Phlx trading System will electronically deliver the stock/ETF component to NOS for execution. Simultaneous to the options execution on the Phlx trading System, NOS will execute and report the stock/ETF component, which will contain the long or short indication as it was delivered by the member organization to the Phlx trading System. Accordingly, NOS, as a trading center under Rule 201, will be compliant with the requirements of Regulation SHO. Of course, broker-dealers, including both NOS and the member organizations submitting orders to the Phlx with a stock/ETF component, must comply with Regulation SHO; various surveillance and examination regulatory programs check for compliance thereto.

Earlier this year, the Commission amended Rule 201 and Rule 200(g) of Regulation SHO under the Act to adopt a short sale-related circuit breaker that, if triggered, imposes a restriction on the price at which securities may be sold short ("short sale price test restriction"); the amendments to Rule 200(g) provide that a broker-dealer may mark certain qualifying short sale orders "short exempt."[41] Recently, the Commission extended the compliance date for the amendments to Rule 201 and Rule 200(g) until February 28, 2011.[42] Once the new provisions of Regulation SHO become operative, NOS will accept orders marked "short exempt." The Exchange intends to file a proposed rule change addressing the new provisions.

For these reasons, the processing of the stock/ETF component of a Complex Order under this proposal will comply with applicable rules regarding equity trading, including the rules governing trade reporting, trade throughs and short sales. NOS' responsibilities respecting these equity trading rules will be documented in NOS' written policies and procedures. NOS compliance with these policies and procedures is monitored, reviewed, and updated as part of NOS' regular and routine regulatory program.

As part of the execution of the stock/ETF component, the Exchange intends to ensure that the execution price is within the intraday high-low range in that stock at the time the Complex Order is processed and within a certain price range from the current market, which the Exchange will establish in an Options Trader Alert. If the stock price is not within these parameters, the Complex Order is not executable.

The Exchange believes that electronic submission of the stock/ETF piece of the Complex Order should help ensure that the Complex Order, as a whole, is executed timely and at the desired price.[43] In addition, electronic communication eliminates the need for each party to separately manually submit the stock component to a broker-dealer for execution. The Exchange

[37] *See* Securities Exchange Act Release No. 57620 (April 4, 2008), 73 FR 19271 (April 9, 2008) ("QCT Release"). *See also* Securities Exchange Act Release No. 54389 (August 31, 2006), 71 FR 52829 (September 7, 2006).

[38] A trading center may demonstrate that an Exempted NMS Stock Transaction is fully hedged under the circumstances based on the use of reasonable risk-valuation methodologies. The release approving the original exemption stated: To effectively execute a contingent trade, its component orders must be executed in full or in ratio at its predetermined spread or ratio * * * "In ratio" clarifies that component orders of a contingent trade do not necessarily have to be executed in full, but any partial executions must be in a predetermined ratio.

[39] *See* Amendment No. 1.

[40] 17 CFR 242.200 *et seq.*

[41] *See* Securities Exchange Act Release No. 61595 (February 26, 2010), 75 FR 11232 (March 10, 2010) ("Rule 201 Adopting Release").

[42] *See* Securities Exchange Act Release No. 63247 (November 4, 2010), 75 FR 68702 (November 9, 2010) (File No. S7–08–09) (Order extending the compliance date until February 28, 2011).

[43] For a similar process, *see* ISE Rule 722.02.

emphasizes that the execution of the stock/ETF portion of a Complex Order will be immediate; the Exchange's System will calculate the stock price based on the net debit/credit price of the Complex Order,[44] while also calculating and determining the appropriate options price(s), all electronically and immediately. The Exchange believes that this is a superior approach and would not require the Exchange to later nullify options trades if the stock price cannot be achieved. Accordingly, the Exchange is not proposing to adopt a rule permitting such option trade nullification, like other exchange rules, because the trade would not occur at a price that required later nullification due to the unavailability of the stock/ETF price.[45] The Exchange further believes that the certainty associated with such electronic calculations and processing should be an attractive feature for users of Complex Orders with a stock or ETF component.

The Exchange also believes that it is appropriate to construct a program wherein its affiliate, NOS, is the exclusive conduit for the execution of the stock/ETF component of a Complex Order under this proposal, similar to the routing functionality of several options and equities exchanges.[46] As a practical matter, complex order programs on other exchanges necessarily involve specific arrangements with a broker-dealer to facilitate prompt execution. NOS does not intend to charge a fee for the execution of the stock/ETF component of a Complex Order, nor does Phlx.[47] The Exchange believes that is consistent with the Act for such an arrangement to involve one broker-dealer, even one that is an affiliate, particularly to offer the aforementioned benefits of a prompt, electronic execution for Complex Orders involving stock/ETFs. Specifically, offering a seamless, automatic execution for both the options and stock/ETF components of a Complex Order is an important feature that should promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system by deeply enhancing the sort of complex order processing available on options exchanges today. Nevertheless, users of Phlx's proposed new Complex Orders system could, in lieu of this proposed arrangement with NOS, choose, instead, the following alternatives: (i) Avoid using Complex Orders that involve stock/ETFs, (ii) use the trading floor manual method of executing complex orders with stock, or (iii) go to another venue, several of which offer a similar feature, as described further below.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[48] in general, and furthers the objectives of Section 6(b)(5) of the Act[49] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by enhancing its System and rules governing Complex Orders, by adding additional order types and components. These additional order types and components should provide market participants with trading opportunities more closely aligned with their investment or risk management strategies. Noting that complex orders, including those with a stock/ETF component are widely recognized and utilized by market participants, this proposal to offer new order types and components on an electronic system should provide a more efficient mechanism for carrying out these strategies.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, this proposal enhances competition by providing an additional alternative to the existing methods of trading complex orders, including the stock/ETF component, in a single, seamless transaction. Member use of the Exchange's proposed Complex Order processing is entirely voluntary.

The Exchange competes vigorously for complex orders among several options exchanges that offer a stock-option order type. The Exchange's proposed new alternative differs from and competes against existing Complex Order mechanisms by offering fully electronic processing. Existing Complex Order mechanisms at Chicago Board Options Exchange, Incorporated ("CBOE") and International Securities Exchange, LLC ("ISE") offer a similar end result—execution of paired option and stock orders—using different, less automated means.

Market participants that prefer not to use the stock/ETF functionality offered herein through NOS have a variety of alternatives; stock-option orders can be executed on other options exchanges via various electronic methods, on various options trading floors or on the Exchange, without employing a stock/ETF component.

Accordingly, in light of these various alternatives and the keen competition among options exchanges for complex order flow, the processing method selected by the Exchange, including the use of NOS, presents no burden on competition. In fact, the Exchange's proposal will likely promote competition for the most efficient means to execute complex orders with a stock/ETF component. The Exchange fully expects that other exchanges will mimic the proposed processing if it succeeds in attracting order flow for which many markets compete.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

[44] The stock/ETF price is, of course, included within the net debit/credit price of the Complex Order. *See e.g.* examples, *infra,* at 36.

[45] *See e.g.,* ISE Rule 722.02 (A trade of a stock-option order will be automatically cancelled if market conditions prevent the execution of the stock or option leg(s) at the prices necessary to achieve the agreed upon net price.).

[46] *See also* Phlx Rule 985(c)(1), which provides that The NASDAQ OMX Group, Inc., which owns NOS and the Exchange, shall establish and maintain procedures and internal controls reasonably designed to ensure that NOS does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members and member organizations in connection with the provision of inbound routing to the Exchange.

[47] However, Trade Reporting Facility and clearing fees, not charged by Phlx or NOS, may result. NSCC and ACT will bill firms directly for their use of the NSCC and ACT systems, respectively. To the extent that NOS is billed by NSCC or ACT, it will not pass through such fees to firms for the stock/ETF portion of a Complex Order under this proposal. Phlx's fees applicable to Complex Orders appear in its Fee Schedule and may change from time to time.

[48] 15 U.S.C. 78f(b).

[49] 15 U.S.C. 78f(b)(5).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 1, 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-comments@sec.gov.* Please include File Number SR–Phlx–2010–157 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–Phlx–2010–157. 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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–157 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[50]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31487 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63488; File No. SR–BATS–2010–036]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend Pilot Program Related To Clearly Erroneous Execution Reviews

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 2, 2010, BATS Exchange, Inc. (the "Exchange" or "BATS") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to extend a pilot program previously approved by the Commission related to Rule 11.17, entitled "Clearly Erroneous Executions." The Exchange proposes to extend both pilot programs through April 11, 2011.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions, Rule 11.17. The rule, explained in further detail below, was approved to operate under a pilot program set to expire on December 10, 2010. The Exchange proposes to extend the pilot program to April 11, 2011.

On September 10, 2010, the Commission approved, on a pilot basis, changes to BATS Rule 11.17 to provide for uniform treatment: (1) Of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[3] The Exchange also adopted additional changes to Rule 11.17 that reduced the ability of the Exchange to deviate from the objective standards set forth in Rule 11.17.[4] The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should be approved to continue on a pilot basis.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[5] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[6] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across

[50] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–BATS–2010–016).

[4] *Id.*

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

markets concerning review of transactions as clearly erroneous.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6)(iii) thereunder.[8] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[9] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–BATS–2010–036 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–BATS–2010–036. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–BATS–2010–036 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31450 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[9] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63486; File No. SR–BYX–2010–006]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend Pilot Program Related to Clearly Erroneous Execution Reviews

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 2, 2010, BATS Y-Exchange, Inc. (the "Exchange" or "BYX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to extend a pilot program related to Rule 11.17, entitled "Clearly Erroneous Executions." The Exchange proposes to extend the pilot program through April 11, 2011.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions, Rule 11.17. The rule, explained in further detail below, was approved to operate under a pilot program set to expire on December 10, 2010. The Exchange proposes to extend the pilot program to April 11, 2011.

On October 4, 2010, the Exchange filed an immediately effective filing to adopt various rule changes to bring BYX Rules up to date with the changes that had been made to the rules of BATS Exchange, Inc., the Exchange's affiliate, while BYX's Form 1 Application to register as a national security exchange was pending approval. Such changes included changes to the Exchange's Rule 11.17, on a pilot basis, to provide for uniform treatment: (1) Of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[3] The Exchange also adopted additional changes to Rule 11.17 that reduced the ability of the Exchange to deviate from the objective standards set forth in Rule 11.17.[4] The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should be approved to continue on a pilot basis.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[5] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[6] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6)(iii) thereunder.[8] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[9] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–BYX–2010–006 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–BYX–2010–006. 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 the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from

[3] Securities Exchange Act Release No. 63097 (October 13, 2010), 75 FR 64767 (October 20, 2010) (SR–BYX–2010–002).

[4] *Id.*

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[9] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–BYX–2010–006 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31448 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63484; File No. SR–NSX–2010–16]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Rules To Extend Pilot Program Regarding Clearly Erroneous Executions

December 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 8, 2010, National Stock Exchange, Inc. filed with the Securities and Exchange Commission ("Commission") the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comment on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

National Stock Exchange, Inc. ("NSX®" or "Exchange") is proposing to amend its rules to extend until April 11, 2011, a certain pilot program regarding clearly erroneous executions.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

With this rule change, the Exchange is proposing to extend the pilot program currently in effect regarding clearly erroneous executions under NSX Rule 11.19. Currently, unless otherwise extended or approved permanently, this pilot program will expire on December 10, 2010. The instant rule filing proposes to extend the pilot program until April 11, 2011.

NSX Rule 11.19 (Clearly Erroneous Executions) was approved by the Securities and Exchange Commission (the "Commission") on September 10, 2010 on a pilot basis to end on December 10, 2010.[3] Similar rule changes were adopted by other markets in the national market system in a coordinated manner. During the pilot period, the Exchange, in conjunction with the Commission and other markets, has continued to assess the effectiveness of the pilot program. The Exchange, in consultation with other markets and the Commission, has determined that the duration of this pilot program should be extended. Accordingly, pursuant to the instant rule filing, the expiration date of the pilot program referenced in the first two sentences of Rule 11.19 is proposed to be changed from "December 10, 2010" to "April 11, 2011".

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,[4] in general, and Section 6(b)(5) of the Act,[5] in particular, in that it is designed, among other things, to promote clarity, transparency and full disclosure, in so doing, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Moreover, the proposed rule change is not discriminatory in that it uniformly applies to all ETP Holders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [6] and Rule 19b–4(f)(6)(iii) thereunder.[7] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[8] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NSX–2010–07).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[8] For purposes only of waiving the 30-day operative delay the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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-comments@sec.gov.* Please include File Number SR–NSX–2010–16 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–NSX–2010–16. 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 the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NSX–2010–16 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31446 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63482; File No. SR–NYSEArca–2010–113]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Rule 7.10, Which Governs Clearly Erroneous Executions, To Extend the Effective Date of the Pilot

December 9, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 7, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Rule 7.10, which governs clearly erroneous executions, to extend the effective date of the pilot by which portions of such Rule operate until the earlier of approval by the Securities and Exchange Commission ("SEC" or "Commission") to make such pilot permanent or April 11, 2011. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, *http://www.sec.gov,* and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Equities Rule 7.10, which governs clearly erroneous executions, to extend the effective date of the pilot by which portions of such Rule operate, until the earlier of Commission approval to make such pilot permanent or April 11, 2011. The pilot is currently scheduled to expire on December 10, 2010.[4]

On September 10, 2010, the Commission approved, on a pilot basis, market-wide amendments to exchanges' rules for clearly erroneous executions to set forth clearer standards and curtail discretion with respect to breaking erroneous trades. In connection with this pilot initiative, the Exchange amended NYSE Arca Equities Rule 7.10(c), (e)(2), (f), and (g). The amendments provide for uniform treatment of clearly erroneous execution reviews (1) in Multi-Stock Events[5] involving twenty or more securities, and (2) in the event transactions occur that result in the issuance of an individual security trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[6] The amendments also eliminated appeals of certain rulings made in conjunction with other exchanges with respect to clearly erroneous transactions and limited the Exchange's discretion to deviate from Numerical Guidelines set forth in the Rule in the event of system disruptions or malfunctions.

If the pilot were not extended, the prior versions of paragraphs (c), (e)(2), (f), and (g) of NYSE Arca Equities Rule 7.10 would be in effect, and NYSE Arca would have different rules than other

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NYSEArca–2010–58).

[5] Terms not defined herein are defined in NYSE Arca Equities Rule 7.10.

[6] Separately, the Exchange has proposed extend the effective date of the trading pause pilot under NYSE Arca Equities Rule 7.11, which requires the Exchange to pause trading in an individual security listed on the Exchange if the price moves by 10% as compared to prices of that security in the preceding five-minute period during a trading day. *See* SR–NYSEArca–2010–114.

exchanges and greater discretion in connection with breaking clearly erroneous transactions. The Exchange proposes to extend the pilot amendments to NYSE Arca Equities Rule 7.10 until the earlier of permanent approval by the Commission or April 11, 2011 in order to maintain uniform rules across markets and allow the pilot to continue to operate without interruption during the same period that the Rule 7.11 trading pause rule pilot is also in effect. Extension of the pilot would permit the Exchange, other national securities exchanges and the Commission to further assess the effect of the pilot on the marketplace, including whether additional measures should be added, whether the parameters of the rule should be modified or whether other initiatives should be adopted in lieu of the current pilot.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[7] of the Act, in general, and furthers the objectives of Section 6(b)(5)[8] 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, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. More specifically, the NYSE Arca believes that the extension of the pilot will help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule changes also should help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6)(iii) thereunder.[10] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[11] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–NYSEArca–2010–113 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–113. 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 the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEArca–2010–113 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31442 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63480; File No. SR–NYSEAmex–2010–116]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Amex Equities Rule 128, Which Governs Clearly Erroneous Executions, To Extend the Effective Date of the Pilot

December 9, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 7, 2010, NYSE Amex LLC (the "Exchange" or "NYSE Amex") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Amex Equities Rule 128, which governs clearly erroneous executions, to extend the effective date of the pilot by which portions of such Rule operate until the earlier of approval by the Securities and Exchange Commission ("SEC" or "Commission") to make such pilot permanent or April 11, 2011. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, *http://www.sec.gov,* and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Amex Equities Rule 128, which governs clearly erroneous executions, to extend the effective date of the pilot by which portions of such Rule operate, until the earlier of Commission approval to make such pilot permanent or April 11, 2011. The pilot is currently scheduled to expire on December 10, 2010.[4]

On September 10, 2010, the Commission approved, on a pilot basis, market-wide amendments to exchanges' rules for clearly erroneous executions to set forth clearer standards and curtail discretion with respect to breaking erroneous trades. In connection with this pilot initiative, the Exchange amended NYSE Amex Equities Rule 128(c), (e)(2), (f), and (g). The amendments provide for uniform treatment of clearly erroneous execution reviews (1) in Multi-Stock Events[5] involving twenty or more securities, and (2) in the event transactions occur that result in the issuance of an individual security trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[6] The amendments also eliminated appeals of certain rulings made in conjunction with other exchanges with respect to clearly erroneous transactions and limited the Exchange's discretion to deviate from Numerical Guidelines set forth in the Rule in the event of system disruptions or malfunctions.

If the pilot were not extended, the prior versions of paragraphs (c), (e)(2), (f), and (g) of NYSE Amex Equities Rule 128 would be in effect, and the NYSE Amex would have different rules than other exchanges and greater discretion in connection with breaking clearly erroneous transactions. The Exchange proposes to extend the pilot amendments to NYSE Amex Equities Rule 128 until the earlier of permanent approval by the Commission or April 11, 2011 in order to maintain uniform rules across markets and allow the pilot to continue to operate without interruption during the same period that the Rule 80C trading pause rule pilot is also in effect. Extension of the pilot would permit the Exchange, other national securities exchanges and the Commission to further assess the effect of the pilot on the marketplace, including whether additional measures should be added, whether the parameters of the rule should be modified or whether other initiatives should be adopted in lieu of the current pilot.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[7] of the Act, in general, and furthers the objectives of Section 6(b)(5)[8] 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, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. More specifically, the NYSE Amex believes that the extension of the pilot will help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule changes also should help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

[4] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NYSEAmex–2010–60).

[5] Terms not defined herein are defined in NYSE Amex Equities Rule 128.

[6] Separately, the Exchange has proposed extend the effective date of the trading pause pilot under NYSE Amex Equities Rule 80C, which requires the Exchange to pause trading in an individual security listed on the Exchange if the price moves by 10% as compared to prices of that security in the preceding five-minute period during a trading day. *See* SR–NYSEAmex–2010–117.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6)(iii) thereunder.[10] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the pilot program to continue uninterrupted and help ensure uniformity among the national securities exchanges and FINRA with respect to the treatment of clearly erroneous transactions.[11] Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-comments@sec.gov.* Please include File Number SR–NYSEAmex–2010–116 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–NYSEAmex–2010–116. 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 the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEAmex–2010–116 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31440 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63466; File No. SR–EDGA–2010–21]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGA Exchange, Inc. Fee Schedule

December 8, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2010, the EDGA Exchange, Inc. (the "Exchange" or the "EDGA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fees and rebates applicable to Members[3] of the Exchange pursuant to EDGA Rule 15.1(a) and (c) by making an amendment to its fee schedule.

All of the changes described herein are applicable to EDGA Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.directedge.com*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Member is any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Currently, for orders routed to Nasdaq BX in Tape A and C Securities and that remove liquidity, a rebate of $0.0001 per share is provided to Members (yielding Flag "C"). The Exchange proposes to increase the rebate to $0.0002 per share to reflect an increase in rebate provided by Nasdaq BX. The Exchange also proposes to delete the reference to Tape A and C securities in the Flag C description and thus, provide the rebate for orders in securities on all Tapes. A conforming amendment is proposed to the text of footnote 3 to reflect this amendment.

Currently, the "O" flag describes orders that are routed to the Nasdaq's opening cross. Since the Exchange routes to multiple trading centers for the opening cross, such as NYSE, the Exchange proposes to amend the description of the "O" flag to state that it applies to orders routed to the primary exchange's opening cross.

The Exchange proposes to add an additional rebate and corresponding new flag to its fee schedule. Orders that are routed to BATS BYX Exchange that remove liquidity using order types ROUC or ROBY will yield a "BY" flag and be rebated $0.0003 per share.

Finally, the Exchange proposes to clarify in the Flag K description that the BATS Exchange referred to is the BATS BZX Exchange.

EDGA Exchange proposes to implement these amendments to the Exchange fee schedule on December 1, 2010.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[4] in general, and furthers the objectives of Section 6(b)(4),[5] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange. The Exchange believes that the proposed rates are equitable in that they apply uniformly to all Members. The Exchange believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act[6] and Rule 19b–4(f)(2)[7] thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–EDGA–2010–21 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGA–2010–21. 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,[8] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGA–2010–21 and should be submitted on or before January 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31433 Filed 12–14–10; 8:45 am]

BILLING CODE 8011–01–P

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 19b–4(f)(2).

[8] The text of the proposed rule change is available on Exchange's Web site at *http://www.directedge.com*, on the Commission's Web site at *http://www.sec.gov,* at EDGA, and at the Commission's Public Reference Room.

[9] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 7268]

Culturally Significant Objects Imported for Exhibition Determinations: "Thomas Lawrence: Regency Power and Brilliance"

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 "Thomas Lawrence: Regency Power and Brilliance," 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 the Yale Center for British Art, New Haven, CT, from on or about February 24, 2011, until on or about June 5, 2011, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/632–6473). The address is U.S. Department of State, SA–5, L/PD, Fifth Floor, Washington, DC 20522–0505.

Dated: December 7, 2010.

Ann Stock,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–31499 Filed 12–14–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 7264]

Review of the Designation of Gama'a al-Islamiyya, (IG and Other Aliases); as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled in this matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) ("INA"), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2004 re-designation of the aforementioned organization as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

Dated: December 6, 2010.

James B. Steinberg,

Deputy Secretary of State.

[FR Doc. 2010–31348 Filed 12–14–10; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

Bureau of Western Hemisphere Affairs

[Public Notice 7269]

Finding of No Significant Impact From the Expansion, Renovation, Operation and Maintenance of the Nogales Mariposa Commercial and Pedestrian Border Crossing

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: The Department of State is publishing a Finding of No Significant Impact (FONSI) for the proposed expansion, renovation, operation and maintenance of the Nogales Mariposa Commercial and Pedestrian Border Crossing between Nogales, Arizona and Nogales, Sonora, Mexico.

FOR FURTHER INFORMATION CONTACT: Mr. Stewart Tuttle, Coordinator of Border Affairs, Office of Mexican Affairs, Bureau of Western Hemisphere Affairs. U.S. Department of State, 2201 C Street, NW., Washington, DC 20520, phone 202–647–6356, or *e-mail: Tuttlesd@state.gov.* General information about Presidential Permits is available on the Internet at *http://www.state.gov/p/wha/rt/permit/.*

SUPPLEMENTARY INFORMATION: The following represents the text of the State Department-approved FONSI—The General Services Administration ("GSA") has submitted an application for a Presidential permit to expand, renovate, operate and maintain the Nogales Mariposa Commercial and Pedestrian Border Crossing between Nogales, Arizona and Nogales, Sonora, Mexico. The Department of State (the "Department") has determined that under Executive Order 11423, as amended, a Presidential permit is required for the proposed alteration of the existing border crossing since it would involve a significant modification in a piercing of the United States-Mexico border. *See* 75 FR 14487 (March 25, 2010).

The Nogales Land Port of Entry (LPOE) was constructed in 1973 and is located at the U.S.-Mexico border between the City of Nogales, Arizona and the City of Nogales, Sonora, Mexico, approximately 65 miles south of Tucson, Arizona. The LPOE is a full-service facility inspecting primarily commercial vehicles, but also personally-owned vehicles and pedestrians entering the U.S. from Mexico. Today the LPOE is one of the ten busiest cargo ports along the entire U.S.-Mexico border. As a result of the North American Free Trade Agreement (NAFTA), the LPOE serves as the primary commercial truck route between the U.S. and Mexico in the Nogales area and is a linchpin in the international trade infrastructure between the U.S., Mexico and Canada.

GSA has sought a Presidential permit because of the need for an upgrade to the current LPOE facilities necessitated by the increased trade volume between the U.S. and Mexico brought about by NAFTA. Pedestrian crossings have tripled since 2002 and are expected to increase nearly 200 percent by 2025. Bus traffic at the LPOE doubled between 2002 and 2006. Currently, the LPOE processes approximately 1,000 commercial vehicles per day. This figure is expected to increase to 1,730 per day by 2030. The current LPOE infrastructure does not conform to GSA's current guidelines governing layout, minimum vehicle clearances, pedestrian and employee safety and national security. Due to its outdated equipment and inefficient traffic circulation, the existing LPOE configuration will not be able to handle the predicted increases in traffic volume. Congress in the Reinvestment and Recovery Act of 2009 provided $199 million to upgrade current facilities and completion of this upgrade is a priority project for both GSA and the Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security (DHS).

The General Services Administration (GSA) published an Environmental Assessment (EA) for the proposed expansion, renovation, operation and maintenance of the Nogales Mariposa Commercial and Pedestrian Border Crossing between Nogales, Arizona and Nogales, Sonora, Mexico on June, 12, 2009. Based on that EA, GSA then also issued its own FONSI on August 7, 2009 concluded that the Nogales project is not a major federal action significantly affecting the quality of the human environment that would require an environmental impact statement and gave public notice of its finding of no significant impact (FONSI) on June 24,

2009. 74 Fed. Reg. 30090. In response to comments from both the Department of State and the Council on Environmental Quality (CEQ), GSA had prepared a revised EA published on June 29, 2010, which it furnished the State Department as part of its application. The State Department staff has reviewed that document and concluded that all of State's comments and suggestions have been satisfied. Therefore, based on the findings and mitigation measure set forth below, we recommend that you adopt the revised EA (which is hereby incorporated by reference) and conclude that project described in the revised EA is not a federal action significantly affecting the quality of the human environment and that an Environmental Impact statement is not required.

The State Department has determined that based upon these documents, all procedural requirements have been met and granting the Presidential permit for this border crossing is not a federal action significantly affecting the quality of the human environment. Therefore, no Environmental Impact Statement will be prepared.

Findings

1. The General Services Administration has previously published in the **Federal Register** (74 FR 30090FR 74, No. 120, Doc E9–14781, June 24, 2009) its determination that expansion, renovation, operation and maintenance of the Nogales Mariposa Commercial and Pedestrian Border Crossing between Nogales, Arizona and Nogales, Sonora, Mexico will not significantly affect the quality of the human environment.

2. All NEPA procedural requirements have been met, including a 30-day public notice period and coordination with federal, state, and local government agencies, as well as with Native Americans tribes.

3. The environmental commitments (mitigation measures) set forth below will offset any negative impacts identified by the in the revised GSA or updated EA (referenced above).

4. No disputes or controversies have arisen regarding the accuracy or presentation of environmental effects, as documented in the revised GSA or updated EA.

5. The Proposed Action would have no impact on historic properties. Pursuant to Section 106 of the National Historic Preservation Act, GSA consulted with the Arizona State Historic Preservation Office, the Tohono O'odham Nation, and the Hopi Tribe. The Arizona State Historic Preservation Office and the Hopi Tribe concurred with this finding in letters which are attached to the revised EA available on the GSA website.

6. Pursuant to Section 7 of the Endangered Species Act (ESA), GSA, as the lead federal agency, determined that the Proposed Action would not affect any proposed or designated critical habitat, and the Department concurs with this decision that implementation of the project will not adversely affect any threatened or endangered species.

7. All soil disturbance and shrub removal will be minimized during relocation.

8. Implementation of this action will have no adverse impact on any Indian Trust Assets.

9. Implementation of this action will not violate federal, state, or local law.

Mitigation Measures

The following mitigation and monitoring measures will be implemented to ensure that the action will not have not have a significant impact on the quality of the human environment:

• Upon completion of the Arizona Department of Transportation small area transportation study, the GSA will reevaluate the impacts of the preferred alternative on local and regional traffic and provide the Department with supporting information for the Regional Transportation Plan.

• During final design, GSA will develop traffic control and trailblazing plans to warn drivers and pedestrians of the construction activities and ensure safe travel through the area.

• During final design, GSA will develop construction sequencing plans ensure smooth border operations and maintain pedestrian, commercial, and non-commercial traffic flow.

• The contractor shall stabilize open storage piles and disturbed areas by covering and/or applying water or chemical/organic dust palliative where appropriate. This applies to both inactive and active sites, during workdays, weekends, holidays, and windy conditions.

• The contractor shall install wind fencing and phase grading operations where appropriate, and operate water trucks for stabilization of surfaces under windy conditions.

• When hauling material and operating non-earthmoving equipment, the contractor shall prevent spillage and limit speeds to 15 mph.

• The contractor shall limit the speed of earth-moving equipment to 10 mph.

• The contractor shall reduce use, trips and unnecessary idling from heavy equipment.

• The contractor shall maintain and tune vehicle engines per manufacturer's specifications to perform at EPA certification levels and to perform at verified standards applicable to retrofit technologies.

• The contractor shall employ periodic, unscheduled inspections to limit unnecessary idling and to ensure that construction equipment is properly maintained, tuned, and modified consistent with established specifications.

• The contractor shall prohibit any tampering with engines and require continuing adherence to manufacturer's recommendations.

• The contractor shall, if practicable, lease newer and cleaner equipment meeting the most stringent of applicable federal or state Standards.

• The contractor shall utilize equipment that has EPA-registered particulate traps and other appropriate controls where suitable to reduce emissions of diesel particulate matter and other pollutants at the construction site.

• The contractor shall prepare an inventory of all equipment prior to construction and identify the suitability of add-on emission controls for each piece of equipment before groundbreaking. The suitability of control devices is based on: Whether there is reduced normal availability of the construction equipment due to increased downtime and/or power output, whether there may be significant damage caused to the construction equipment engine, or whether there may be a significant risk to nearby workers or the public.

• The contractor shall utilize the cleanest available fuel engines in construction equipment and identify opportunities for electrification.

• The contractor shall use low sulfur fuel (diesel with 15 parts per million or less) in engines where alternative fuels such as biodiesel and natural gas are not possible.

• The contractor shall develop a construction-traffic and parking management plan that minimizes traffic interference and maintains traffic flow.

• The contractor shall not disturb any of the drainages surrounding the project a until a determination has been made by the U.S. Army Corps of Engineers that the project may proceed under a Nationwide Permit and an individual Water Quality Certification from the ADEQ has been obtained. Additionally, an individual Water Quality Certification would be obtained from the Arizona Department of Environmental Quality.

• GSA shall submit a preliminary set of plans, a hydrology/hydraulics report, and a CLOMR for the project to the

Santa Cruz County Flood Control District prior to final design and construction.

• GSA shall submit preliminary set of plans, a hydrology/hydraulics report, and a CLOMR for the project will be submitted to the EPA for comment prior to final design and construction.

• Since the Proposed Action would involve demolition of existing structures, GSA shall engage an Asbestos Hazard Emergency Response Act certified inspector to inspect all structures to be demolished. If Regulated Asbestos Containing Material is present in the structures, GSA shall develop a work plan to remove, transport, and dispose of these materials.

• At least 10 days prior to demolition of any structure GSA shall provide the ADEQ National Emission Standard Hazardous Air Pollutant coordinator with a National Emission Standard Hazardous Air Pollutant notification form for each structure to be demolished.

• GSA shall notify the Santa Cruz County Flood Control District and the Arizona Department of Water Resources prior to undertaking any work that would disturb the rainfall and stream level gauges on the upstream headwall of the culverts on Ephraim Canyon/Las Canoas Wash. In accordance with NEPA (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR 1500–1508), and the Department's implementing regulations (22 CFR part 161, and in particular 22 CFR 161.7(c)) and based on the findings and mitigation measures above, the Department of State finds that the project described in the attached Revised GSA EA is not a federal action significantly affecting the quality of the human environment. Therefore, no Environmental Impact statement will be prepared.

Dated: December 10, 2010.

Edward Alexander Lee,

Director, Office of Mexican Affairs, Department of State.

[FR Doc. 2010–31502 Filed 12–14–10; 8:45 am]

BILLING CODE 4710–29–P

DEPARTMENT OF STATE

[Public Notice 7235]

Notice of Public Meeting of the President's Emergency Plan for AIDS Relief (PEPFAR) Scientific Advisory Board

SUMMARY: In accordance with the Federal Advisory Committee Act (FACA), the PEPFAR Scientific Advisory Board hereinafter referred to as "the Board," will meet as indicated below.

The U.S. President's Emergency Plan for AIDS Relief (PEPFAR) Scientific Advisory Board will meet on January 6–7, 2011 at the St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036. The meeting will be from 9 a.m. until approximately 5 p.m. on both days and is open to the public.

The meeting will be hosted by the Office of the U.S. Global AIDS Coordinator, Ambassador Eric Goosby, who leads implementation of the President's Emergency Plan for AIDS Relief (PEPFAR).

The PEPFAR Scientific Advisory Board serves the Global AIDS Coordinator in a solely advisory capacity concerning scientific, implementation, and policy issues related to the global response to HIV/AIDS. These issues will be of concern as they influence the priorities and direction of PEPFAR evaluation and research, the content of national and international strategies and implementation, and the role of PEPFAR in the international discourse regarding appropriate and resourced responses. Topics for the January 6–7th meeting will include an overview of PEPFAR-funded evaluations, priority setting within HIV/AIDS Care, Treatment and Prevention areas, and recommendations to the Ambassador on the future direction of evaluation and research within PEPFAR.

The public may attend this meeting as seating capacity allows. To RSVP and for those requesting reasonable accommodation, please contact the Office of the U.S. Global AIDS Coordinator, Tiffany Peoples: E-mail (*PeoplesTN2@state.gov*), by December 29, 2010. Requests made after that time will be considered, but might not be possible to accommodate. While the meeting is open to public attendance, the Board will determine procedures for public participation and will announce those procedures at the meeting.

For further information about the meeting, please contact Paul Bouey, Deputy Coordinator, Office of the U.S. Global AIDS Coordinator at (202) 663–2440 or *BoueyPD@state.gov.*

Dated: December 8, 2010.

Paul D. Bouey,

Deputy Coordinator, Office of the U.S. Global AIDS Coordinator, Department of State.

[FR Doc. 2010–31498 Filed 12–14–10; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 7261]

Meeting of the United States-Oman Joint Forum on Environmental Cooperation Pursuant to the United States-Oman Memorandum of Understanding on Environmental Cooperation

ACTION: Notice of the meeting of the U.S.-Oman Joint Forum on Environmental Cooperation and request for comments.

SUMMARY: The Department of State is providing notice that the United States and Oman intend to hold a meeting of the U.S.-Oman Joint Forum on Environmental Cooperation ("Joint Forum") in Muscat, Oman, on January 9, 2011, at a venue to be announced. The Governments created the Joint Forum in connection with the U.S.-Oman Memorandum of Understanding on Environmental Cooperation ("MOU"). If you are interested in attending, please email Abby Lindsay at *LindsayA@state.gov* for the specific time and place. *See* below under **SUPPLEMENTARY INFORMATION** for additional details on the background and purpose of the meeting.

During the meeting, the U.S. and Oman will present a brief history of U.S.-Oman environmental cooperation, a review of activities under the 2006–2008 Work Program, presentations on selected activities, and presentation and signature of the 2011–2014 Plan of Action. The entire meeting will be open to the public and include public question and answer sessions. The Department of State invites interested organizations and members of the public to submit written comments or suggestions regarding items to include on the agenda and to attend the meeting.

In preparing comments, we encourage submitters to refer to the following documents:

• U.S.-Oman Memorandum of Understanding on Environmental Cooperation,

• 2006–2008 Work Program Pursuant to the U.S.-Oman Memorandum of Understanding on Environmental Cooperation,

• Chapter 17 of the U.S.-Oman Free Trade Agreement,

• Final Environmental Review of the U.S.-Oman Free Trade Agreement.

These documents are available at: *http://www.state.gov/g/oes/env/trade/oman/index.htm.*

DATES: The U.S. and Oman will hold the Joint Forum meeting on January 9, 2011, in Muscat, Oman. If you are interested

in attending, please email Abby Lindsay at *LindsayA@state.gov* for the specific time and place. To ensure timely consideration, please submit comments and suggestions in writing no later than January 3, 2011.

ADDRESSES: Please submit written comments or suggestions via e-mail (*LindsayA@state.gov*) or fax ((202) 647–5947) to Abby Lindsay, Office of Environmental Policy, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, with the subject line "U.S.-Oman Joint Forum Meeting."

For those with access to the Internet, comments may be submitted at the following address: *http://www.regulations.gov/search/Regs/home.html#home.*

FOR FURTHER INFORMATION CONTACT: Abby Lindsay, Telephone (202) 647–8772.

SUPPLEMENTARY INFORMATION: In Section 2 of the U.S.-Oman Memorandum of Understanding on Environmental Cooperation, the United States and Oman announced the establishment of a Joint Forum on Environmental Cooperation. The mandate of the Joint Forum is to broaden and deepen effective cooperation on environmental issues between Oman and the United States. It was intended provide a venue for the two Governments to discuss ways in which they could work together to strengthen the capacity of Oman to protect and conserve the environment. The Joint Forum is expected to develop a Plan of Action towards meeting this goal.

The 2006–2008 Work Program identified priorities for environmental cooperation between the United States and Oman, with the goal of building human and institutional capacity in the management and conservation of natural resources. The priorities were: (a) Environmental laws and regulations, (b) Environmental impact assessments, (c) Environmental incentives, (d) Public participation in environmental protection, (e) Integrated water resources management and protection, (f) Coastal protection and preservation of marine resources, (g) Protected area management and conservation of flora and fauna, (h) Cleaner production and environmental technology, (i) Chemical hazardous waste management and disposal, and (j) Environmental disaster preparedness. Some indicative actions the U.S. and Oman have undertaken in these areas include workshops on environmental impact assessment, a regional workshop for CITES Management Authorities, and a course on public participation in environmental law. Ongoing work includes technical assistance to Oman on marine turtle conservation and cooperation on sustainable tourism in protected areas. The Department of the Interior, the Environmental Protection Agency, the United States Coast Guard, and others have been involved in implementing these activities. Officials from U.S. and Omani agencies will present and discuss their activities at the Joint Forum meeting.

In the 2011–2014 Plan of Action, we seek to build upon the progress made in the previous Work Program and anticipate defining four main priority areas for cooperation activities: Institutional and policy strengthening for effective implementation and enforcement of environmental laws, including natural resource-related laws; Biodiversity conservation and improved management of protected areas, and other ecologically important ecosystems; Improved private sector environmental performance; and Environmental education, transparency and public participation in environmental decision-making and enforcement. At the meeting, the Joint Forum will review cooperation activities and the two Governments are expected to sign the new Plan of Action.

Dated: December 9, 2010.

Willem H. Brakel,

Director, Office of Environmental Policy, Department of State.

[FR Doc. 2010–31504 Filed 12–14–10; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice is to rescind the FHWA's Buy America waiver for the use of non-domestic steel pipe; A53 Grade B, 26″ OD, 0.375″ wall for the construction of a Recovery Act project on SR 60, Section A40, in Allegheny County, Pennsylvania.

DATES: The effective date of the rescission is December 16, 2010.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via e-mail at *gerald.yakowenko@dot.gov.* For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via e-mail at *michael.harkins@dot.gov.* Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., est., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register's** home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara.*

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including the application of protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice is to rescind the Buy America waiver that was processed and published in the **Federal Register** on October 19, 2010, at 75 FR 64394, for the use of non-domestic steel pipe; A53 Grade B, 26″ OD, 0.375″ wall for a portion of sign support structure no. S–28760 proposed for Recovery Act project on SR 60 in Alleghany County, PA.

During the notice and comment period leading up to the publication of the October 19 notice, the Pennsylvania Department of Transportation (PennDOT) considered the use of steel pipe API 5L, Grade B, PSL 2 as an alternate equivalent product to steel pipe A53 Grade B, 26″ OD, 0.375″ wall. However, it appeared that the steel slab to be used in the production of the pipe was not available domestically. During the 15-day comment period following the publication of the October 19 notice, the FHWA received a comment that steel pipe API 5L, including the steel slab to be used in production, could be produced domestically. After verifying that PennDOT is willing to approve the use of API 5L, Grade B, PSL 2 as an alternate to steel pipe A53 Grade B, 26″ OD, 0.375″ wall and verifying that API 5L, Grade B, PSL 2 can be produced domestically, the FHWA has determined that a Buy America waiver for steel pipe A53 Grade B, 26″ OD, 0.375″ wall is no longer necessary. Therefore, the Buy America waiver issued on October 19 in the **Federal Register** (75 FR 64394) for steel pipe

A53 Grade B, 26″ OD, 0.375″ wall is rescinded.

The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to the Pennsylvania waiver page noted above *http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=51.*

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410).

Issued on: December 7, 2010.

Victor M. Mendez,

Federal Highway Administrator.

[FR Doc. 2010–31421 Filed 12–14–10; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in Nevada

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by FHWA.

SUMMARY: This notice announces actions taken by the FHWA that are final within the meaning of 23 U.S.C. 139(*l*)(1). The actions relate to I–15 Corridor Improvements from Sahara Avenue to US 95 and related local arterial improvements, collectively known as Project NEON, in Clark County in the State of Nevada. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before June 13, 2011. If the Federal law that authorizes judicial review of a claim provides a time period less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For FHWA: Mr. Abdelmoez Abdalla, Environmental Program Manager, Federal Highway Administration, 705 North Plaza Street, Carson City, Nevada 89701–0602; telephone: (775) 687–1231; e- mail *Abdelmoez.Abdalla@fhwa.dot.gov.* The FHWA Nevada Division Office's regular business hours are 7:30 a.m. to 4 p.m. (Pacific Standard Time). For the Nevada Department of Transportation (NDOT): Mr. Steve M. Cooke, P.E., Chief, Environmental Services Division, Nevada Department of Transportation, 1263 South Stewart Street, Carson City, Nevada 89712; telephone: (775) 888–7686; e-mail: *scooke@dot.state.nv.us.* The NDOT office's regular business hours are 8 a.m. to 5 p.m. (Pacific Standard Time).

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA has taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by approving the "Record of Decision" for the following highway project in Clark County in the State of Nevada: Project NEON. The proposed project would involve improvements to the Interstate 15 (I–15) corridor and major street connections beginning south of the I–15/Sahara Avenue interchange and continuing to the I–15/US 95/I–515 interchange (the Las Vegas Spaghetti Bowl) on the north end, covering a distance of 3.7 miles. The actions taken by FHWA, and the laws under which such actions were taken, are described in the Final Environmental Impact Statement (FEIS) for the project, approved on May 28, 2010 (FHWA–NV–EIS–09–01–F), in the FHWA Record of Decision issued on October 21, 2010, and in other documents in the FHWA or NDOT project records. The FEIS, ROD and other project records are available by contacting FHWA or NDOT at the addresses provided above. The FHWA FEIS and ROD can also be viewed at the project Web site at *http://www.ndotprojectneon.com,* or viewed at public libraries in the project area.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. General: National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act (FAHA) [23 U.S.C. 109 and 23 U.S.C. 128]; Public Hearing [23 U.S.C. 128].

2. Air: Clean Air Act [42 U.S.C. 7401–7671(q)].

3. Noise: Procedures for Abatement of Highway Traffic Noise and Construction Noise [23 U.S.C. 109(h), 109(i); 42 U.S.C. 4331, 4332; sec. 339(b), Pub. L. 104–59, 109 Stat. 568, 605; 49 CFR 1.48(b)].

4. Land: Section 4(f) of the Department of Transportation Act of 1966 [23 U.S.C. 138 and 49 U.S.C. 303] and Section 6(f) of the Land and Water Conservation Act as amended [16 U.S.C 4601].

5. Historic and Cultural Resources: Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–470(ll)]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act [25 U.S.C. 3001–3013].

6. Wildlife: Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667 (d)]; Migratory Bird Treaty Act [16 U.S.C. 703–712].

7. Social and Economic: Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)].

8. Executive Orders: E.O. 11990, Protection of Wetlands; E.O. 11988, Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593, Protection and Enhancement of Cultural Resources; E.O. 13007, Indian Sacred Sites; E.O. 1328, Preserve America; E.O. 13175, Consultation and Coordination with Indian Tribal Governments; E.O. 11514, Protection and Enhancement of Environmental Quality; E. O. 13112, Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1).

Issued on: December 9, 2010.

Susan Klekar,

Division Administrator, Carson City, Nevada.

[FR Doc. 2010–31424 Filed 12–14–10; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2010 0109]

Information Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intention to request extension of approval for three years of a currently approved information collection.

DATES: Comments should be submitted on or before February 14, 2011.

FOR FURTHER INFORMATION CONTACT: Christopher Moore, Maritime

Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; *Telephone:* (202) 366–5005 or *e-mail: christopher.moore@dot.gov.* Copies of this collection can also be obtained from that office.

SUPPLEMENTARY INFORMATION:

Title of Collection: Supplementary Training Course Application.

Type of Request: Extension of currently approved information collection.

OMB Control Number: 2133–0030.

Form Numbers: MA–823

Expiration Date of Approval: Three years from date of approval by the Office of Management and Budget.

Summary of Collection of Information: 46 U.S.C. Section 51703 (2007) states that, "the Secretary of Transportation may provide additional training on maritime subjects to supplement other training opportunities and make the training available to the personnel of the merchant mariners of the United States and to individuals preparing for a career in the merchant marine of the United States." Also, the U.S. Coast Guard requires a fire-fighting certificate for U.S. merchant marine officers. This collection provides the information necessary for the maritime schools to plan their course offerings and for applicants to complete their certificate requirements.

Need and Use of the Information: The information collection is necessary for eligibility assessment, enrollment, attendance verification and recordation. Without this information, the courses would not be documented for future reference by the program or individual student.

Description of Respondents: U.S. Merchant Marine Seamen, both officers and unlicensed personnel, and other U.S. citizens employed in other areas of waterborne commerce.

Annual Responses: 500.

Annual Burden: 25 hours.

Comments: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Comments may also be submitted by electronic means via the Internet at *http://www.regulations.gov/search/index.jsp.* Specifically address whether this information collection is necessary for proper performance of the functions of the agency and will have practical utility, accuracy of the burden estimates, ways to minimize this burden, and ways to enhance the quality, utility, and clarity of the information to be collected. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m. *EDT* (or *EST*), Monday through Friday, except Federal Holidays.

An electronic version of this document is available on the World Wide Web at *http://www.regulations.gov/search/index.jsp.*

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.regulations.gov/search/index.jsp.*

(Authority: 49 CFR 1.66)

By Order of the Maritime Administrator.

Dated: December 2, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–31396 Filed 12–14–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on September 15, 2010. No comments were received.

DATES: Comments must be submitted on or before January 14, 2011.

FOR FURTHER INFORMATION CONTACT: Jerome Davis, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–6088; or E-mail: *jerome.davis@dot.gov*. Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title: Voluntary Intermodal Sealift Agreement (VISA).

OMB Control Number: 2133–0532.

Type Of Request: Extension of currently approved collection.

Affected Public: Operators of dry cargo vessels.

Form (s): MA–1020.

Abstract: This information collection is in accordance with Section 708, Defense Production Act, 1950, as amended, under which participants agree to provide commercial sealift capacity and intermodal shipping services and systems necessary to meet national defense requirements. Officials at the Maritime Administration and the Department of Defense use this information to assess the applicants' eligibility for participation in the VISA program.

Annual Estimated Burden Hours: 200 hours.

Addresses: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention MARAD Desk Officer.

Comments Are Invited On: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

Authority: 49 CFR 1.66.

By Order of the Maritime Administrator.

Dated: December 2, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–31402 Filed 12–14–10; 8:45 am]

BILLING CODE 4910–81–P

Federal Register

Wednesday,
December 15, 2010

Part II

Department of Commerce

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 660

Fisheries Off West Coast States; Pacific Coast Groundfish Fishery Management Plan; Amendments 20 and 21; Trawl Rationalization Program; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 660

[Docket No. 100212086–0532–05]

RIN 0648–AY68

Fisheries Off West Coast States; Pacific Coast Groundfish Fishery Management Plan; Amendments 20 and 21; Trawl Rationalization Program

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

ACTION: Final rule.

SUMMARY: NMFS is implementing Amendments 20 and 21 to the Pacific Coast Groundfish Fishery Management Plan (FMP), which were partially approved by the Secretary on August 9, 2010. Amendment 20 establishes a trawl rationalization program for the Pacific Coast groundfish fishery. Amendment 20's trawl rationalization program consists of: An individual fishing quota (IFQ) program for the shorebased trawl fleet (including whiting and non-whiting sectors); and cooperative (coop) programs for the at-sea (whiting only) mothership and catcher/processor trawl fleets. Amendment 21 establishes fixed allocations for limited entry trawl participants. This final rule supplements the final rule published on October 1, 2010 (75 FR 60868), and provides additional program details, including: Program components applicable to IFQ gear switching, observer programs, retention requirements, equipment requirements, catch monitors, catch weighing requirements, coop permits, coop agreement requirements, first receiver site licenses, quota share (QS) accounts, vessel accounts, further tracking and monitoring components, and economic data collection requirements.

DATES: This rule is effective January 1, 2011.

ADDRESSES: Background information and documents, including the final environmental impacts statements for Amendment 20 and Amendment 21, are available at the Pacific Fishery Management Council's Web site at *http://www.pcouncil.org/.* NMFS prepared a Final Regulatory Flexibility Analysis (FRFA), which is summarized in the Classification section of this final rule. Copies of the FRFA and the Small Entity Compliance Guide are available from William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way, NE., Seattle, WA 98115–0070; or by phone at 206–526–6150. Copies of the Small Entity Compliance Guide are also available on the Northwest Regional Office Web site at *http://www.nwr.noaa.gov/.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way, NE., Seattle, WA 98115–0070, and to OMB by e-mail to *OIRA_Submission@omb.eop.gov,* or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Jamie Goen, 206–526–4656; (fax) 206–526–6736; *Jamie.Goen@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Amendment 20 trawl rationalization program is a limited access privilege program under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), as reauthorized in 2007. It consists of: (1) An IFQ program for the shorebased trawl fleet; and (2) coop programs for the mothership and catcher-processor trawl fleets. The trawl rationalization program is intended to increase net economic benefits, create individual economic stability, provide full utilization of the trawl sector allocation, consider environmental impacts, and achieve individual accountability of catch and bycatch. Amendment 21 establishes fixed allocations for limited entry trawl participants. These allocations are intended to improve management under the rationalization program by streamlining its administration, providing stability to the fishery, and addressing halibut bycatch.

The trawl rationalization program is scheduled to be implemented on January 1, 2011. Due to the complexity of the program and the tight timeline for implementation, NMFS has issued, or is in the process of issuing multiple rulemakings to implement this program. The following actions are related to the trawl rationalization program:

- A final rule (75 FR 4684, January 29, 2010) which announced that potential participants in the program should review and, if necessary, correct their data that will be used for the issuance of QS, permits, and endorsements. It also established which data NMFS would use and requested ownership information from potential participants.
- A notice of availability for Amendments 20 and 21 (75 FR 26702, May 12, 2010).
- A proposed rule (75 FR 32994, June 10, 2010) followed by a final rule (75 FR 60868, October 1, 2010) that implemented Amendments 20 and 21, focused on provisions deemed necessary to issue permits and endorsements in time for use in the 2011 fishery and to have the 2011 harvest specifications reflect the new allocation scheme. In addition, the October 1st rule also restructured the entire Pacific Coast groundfish regulations at 50 CFR part 660 from one subpart (Subpart G) to five subparts (Subparts C–G).
- A correction to the June 10th proposed rule (75 FR 37744, June 30, 2010) which corrected two dates referenced in the preamble to the proposed rule regarding the decision date for the FMP amendments and the end date for the public comment period.
- The Secretary's review of and decision to partially approve Amendments 20 and 21 on August 9, 2010.
- A proposed rule (75 FR 53380, August 31, 2010) which proposed for implementation on January 1, 2011, additional program details, including: Measures applicable to gear switching for the IFQ program, observer programs, retention requirements, equipment requirements, catch monitors, catch weighing requirements, coop permits, coop agreement requirements, first receiver site licenses, QS accounts, vessel accounts, further tracking and monitoring components, and economic data collection requirements.
- A correction to the October 1st final rule (75 FR 67032, November 1, 2010) to make sure the correct trip limit tables for 2010 remain effective after November 1, 2010.

This final rule follows the August 31st proposed rule (75 FR 53380) and implements additional program components for the trawl rationalization program. The preambles to both the June 10th and August 31st proposed rules provided more details on the program and are not fully repeated here. The preamble to the June 10th proposed rule (75 FR 32994), called the "initial issuance" proposed rule because it proposed the requirements for initial issuance of new permits and endorsements for the trawl rationalization program, provided detailed information on the trawl rationalization program and a general overview on the provisions in Amendments 20 and 21. In addition, the

preamble to the August 31st proposed rule (75 FR 53380), called the "program components" proposed rule because it proposed further program details for the trawl rationalization program, provided more detail on the additional program components being proposed.

The Pacific Fishery Management Council (Council) began scoping on trailing actions for the trawl rationalization program in the Fall of 2010 and intends to continue developing trailing actions at its 2011 Council meetings on topics including, but not limited to: Cost recovery, safe harbors/community fishing associations, the severability of MS/CV endorsements from limited entry trawl permits, and resubmission of Amendment 21 in response to NMFS' partial disapproval.

Comments and Responses

NMFS solicited public comment on the proposed rule (75 FR 53380, August 31, 2010). The comment period ended September 30, 2010. NMFS received 15 individual letters of comments on the proposed rule submitted by individuals or organizations.

Some commenters have incorporated by reference previous comments submitted during the Council process or on a rulemaking (notice of availability 75 FR 26702, May 12, 2010; proposed rule 75 FR 32994, June 10, 2010; final rule 75 FR 60868, October 1, 2010) for the initial issuance of permits and endorsements and the review of Amendments 20 and 21. Comments presented to the Council are part of the record and were considered by the Council during its deliberation. Comments on the previous rulemaking were addressed in the final rule for that rulemaking.

General Comments in Support and Opposed

Comment 1. NMFS received multiple comments expressing general support for the proposed rule.

Response. NMFS acknowledges these comments.

Comment 2. NMFS received multiple comments expressing general disagreement with the proposed rule and amendments.

Response. NMFS acknowledges these comments.

Comments on Implementation of the Program

Comment 3. One commenter stated that the program and implementing regulations should not be effective until January 1, 2012, in order to provide sufficient time for the groundfish industry to plan their operations under the new regulatory system.

Response. This program has been developed by the Council and NMFS through a public process for over six years, and ample opportunities have been provided for input into the design of the program. The starting date for the trawl rationalization program was discussed and debated on multiple occasions at Council meetings, and based on the input from the public, the Council recommended, and NMFS agreed, to a target implementation date of January, 2011. NMFS notes the commenter's recommendation, but has determined that implementing the program at the earliest practicable date best serves the public interest. NMFS disagrees that any delay is necessary.

Comment 4. One commenter described port outreach efforts and a workshop undertaken by the organization designed to complement the outreach being conducted by NMFS. These outreach meetings and workshop are an effort to speed the transition process to the new trawl rationalization program and provide fishermen tools for success under the catch shares program. Port outreach meetings were held in seven ports, with topics covering ways to reduce observer and operating costs, managing quota portfolios, establishing a business plan, and managing constraining stocks among others. In addition, the two-day informational workshop was attended by over 150 fishery participants; panels included topics on regulatory requirements; managing risks associated with constraining species and modifying fishing behavior; approaches for maximizing opportunity; gear modification; handling techniques and behavior changes; mapping and "hotspot" management; trading, tracking, and financing of quota portfolios; strategies for minimizing observer and other costs; and strategies for improving revenues.

Response. NMFS appreciates the commenter's outreach efforts. In addition to the outreach efforts by outside organizations, NMFS has held a series of public workshops along the West Coast during the months of September and October, 2010, to assist program participants in transitioning to the new trawl rationalization program. Further information on NMFS's outreach efforts is described in the response to Comment 5.

Comments on the Rulemaking and Trailing Amendments

Comment 5. Some commenters stated that the complexity of the rulemakings for the trawl rationalization program have made it difficult to provide meaningful public input.

Response. NMFS acknowledges that implementation of the trawl rationalization program, and associated rulemakings, has been complex. However, NMFS has been making every effort to make the implementation process as simple as possible and to explain the process in many public forums. While the Council developed the trawl rationalization program over several years, the Council and NMFS set an implementation date of January 1, 2011, giving NMFS and the Council approximately a year and a half to develop regulations and fine tune the program. This is a tight timeline for such a complex program which would dramatically change the operation and management of the trawl sector. Because of the tight timeline, NMFS had to split implementation into several rulemakings, focused on timing the rulemakings to allow potential participants the most time possible for the different phases of implementation given the resources available to implement the program. Early in the rulemaking process, NMFS brought forward this approach to the Council at their September 2009 meeting. In addition, NMFS published a brochure in December 2009 which was mailed out to the industry announcing the proposed January 1, 2011 implementation, the rulemaking schedule, and some additional details on the first rulemaking.

The first rulemaking, which spanned late 2009 and early 2010, announced that potential participants should be reviewing and, if necessary, correcting their data before NMFS used the relevant data for initial issuance of permits and endorsements (proposed rule: 74 FR 47545, September 16, 2009; final rule: 75 FR 4684, January 29, 2010). NMFS initially announced that corrections should be done by late-May 2010 and before the initial issuance proposed rule published. NMFS later extended the deadline to July 1 in the initial issuance proposed rule (75 FR 32994, June 10, 2010) for both the Pacific Fisheries Information Network (PacFIN) dataset and for NMFS' Northwest Fisheries Science Center's Pacific whiting observer data from NORPAC (a database of North Pacific fisheries and Pacific whiting information) (this was later changed to August 1, 2010 for NORPAC data through a public notice dated June 22, 2010 (NMFS–SEA–10–08)). This first rulemaking also required completion of an ownership interest form. The results of these forms would be used, in part, to populate the ownership interest forms that would be part of the

application process. This rulemaking laid the groundwork for the application process that would take place in the fall of 2010.

Soon after the final rule published for this first rulemaking, the Council began meetings of its Regulatory Deeming Workgroup (RDW), an advisory body to the Council. The RDW held several public meetings between February and June 2010 to review the regulations that NMFS was developing for the program, to work through implementation details, and to bring issues forward to the Council, as needed. NMFS updated the RDW at all of their meetings on the implementation process and the status of the various rulemakings. The RDW meetings generally preceded Council meetings. The Council then discussed the rulemakings, including the implementation process and schedule, at all of their meetings to date in 2010.

In the spring of 2010, the NOA for both Amendments 20 and 21 was published, announcing an open public comment period on the amendments (75 FR 26702, May 12, 2010). Shortly thereafter, the second rulemaking was initiated that announced the FMP amendments and the initial issuance process for certain new permits and endorsements which required a more intensive application process, and thus more time for implementation. In addition, this rulemaking reorganized the existing groundfish regulations to accommodate the new trawl rationalization program. Staggered after this second rulemaking was the third rulemaking, the subject of this final rule, which announces additional program details for January 1, 2011, including: IFQ gear switching, observer programs, retention requirements, equipment requirements, catch monitors, catch weighing requirements, coop permits, coop agreement requirements, first receiver site licenses, quota share (QS) accounts, vessel accounts, further tracking and monitoring components, and economic data collection requirements. All of these rulemakings have described NMFS' overall approach to the rulemakings and implementation.

To provide support and guidance for the public during this process, NMFS has provided outreach along the West Coast in September and October 2010. These outreach efforts were used to announce the program details and implementation logistics, including the rulemakings and public comment periods. In addition, NMFS Office of Law Enforcement has provided several additional outreach sessions in October 2010 on compliance under the program. NMFS has also created a Web site on the trawl rationalization program to keep the interested public up to date and published and mailed several fact sheets, each focused on different aspects of the program. These fact sheets are also available on the Web site. Finally, NMFS has mailed and e-mailed several public notices to the industry and interested public regarding the trawl rationalization program. So while NMFS acknowledges that this has been a complex rulemaking, NMFS believes that the agency has made every effort to keep the industry and public informed of our approach and aware of the rulemaking process.

Comment 6. One commenter requested that the Pacific whiting season start dates for the shorebased IFQ fishery, the mothership fishery, and the catcher-processor fishery be revisited under a trailing amendment. The commenter explained that separate season start dates between the sectors is no longer needed under a rationalized fishery; staggered start dates contradict the intent of the program, undermining the goals of the program to increase net economic benefits and create individual economic stability.

Response. Start dates for the Pacific whiting season are not part of the program components rule. The Council discussed the Pacific whiting season start dates at its April and June 2010 meetings, and decided not to modify the season start dates at that time. The Council will continue to review management measures in the groundfish trawl fisheries after implementation of the rationalization program, and recommend changes where deemed appropriate. NMFS welcomes and encourages public participation in the Council decision-making process to address issues such as this.

Comment 7. One commenter stated that implementing cost recovery through a trailing amendment does not allow the public or policy makers to know the full economic ramifications of the program. The commenter suggested delaying the program until a cost recovery program has been developed.

Response. Although a recommendation was made by the Council, and NMFS agreed, that the cost recovery program would be implemented through the Council process as a trailing amendment to the program, that does not mean that the "costs" associated with cost recovery cannot be estimated. Under the MSA, as amended, cost recovery associated with program implementation is capped, or restricted to 3 percent of the value of the fishery. This anticipated cost recovery has been considered by NMFS in its record of decision. NMFS encourages public participation as the Council develops and recommends the cost recovery program to be implemented by NMFS, based on those recommendations.

Comment 8. Some commenters stated that community fishing associations (CFAs) should be implemented at the start of the program rather than as a trailing amendment. One commenter suggests delaying the program until CFAs have been developed.

Response. NMFS acknowledges that there are members of the public who feel that CFAs should be implemented at the start of the program. Although the Council considered incorporating provisions for CFAs into the alternatives early in the development process, no strong recommendation or advocacy was voiced by members of the public or representatives on the Trawl Individual Quota Committee, which was intended to represent a cross section of interests for the development of recommendations on structuring the trawl rationalization program. Proposals for including provisions for CFAs in the program emerged later on, when the Council was at the point of adopting a preferred alternative in November 2008, in part tied to the issue of how to deal with QS holding in excess of accumulation limits. Further refinement of the preferred alternative, which occurred at Council meetings in 2009, included additional consideration of CFA provisions. Specifically, at the April 2009 Council meeting, Agenda Item F.4 addressed CFAs, and it was at this time that the Council concluded that it would be more appropriate for CFA provisions to be implemented through a trailing action. However, the moratorium on the transfer of QS during the first two years of the program, combined with provisions to allow divestiture of QS over accumulation limits during years 3 and 4 of the program, were designed to facilitate the transfer of QS to CFAs. The moratorium is in part intended to slow the movement of QS holdings out of communities during a time when the trailing action for CFAs can be developed and implemented in a considered fashion. Recommendations for how to structure the CFA provisions in a trailing action are welcome and should be brought forward as that proposal is developed. The Council is likely to begin developing CFA provisions in 2011 so that they could be in place before the QS divestiture period begins.

Comment 9. One commenter stated that the adaptive management program (AMP) should be promptly implemented as a trailing amendment to address unforeseen impacts, promote

bycatch reduction, and promote sustainable fishing practices.

Response. The AMP was established through the October 1st initial issuance final rule (75 FR 60868), and consists of two primary phases. For the first two years of the program, the 10 percent AMP share is allocated to nonwhiting QS owners to ease the transition to an IFQ system. The Council and NMFS will be evaluating the changes that will occur after implementation, and will then be able to react as necessary in the second phase to address specific objectives for the AMP, identified on page 402 of Appendix A of the FEIS "Rationalization of the Pacific Coast Groundfish Limited Entry Trawl Fishery." This interim situation will also allow for some identification of unforeseen impacts associated with this program, which will better inform both the Council and NMFS in addressing the issues.

Comments on Policies and Legal Standards

Comment 10. One commenter incorporated by reference comments they had previously made on the initial issuance proposed rule and Amendments 20 and 21 on National Standards 1, 2, 4, 6, and 8.

Response. NMFS's responses to comments 56–68 in the final rule to initiate implementation of Amendments 20 and 21 (75 FR 60868, 60884–60887) describe how Amendments 20 and 21, as well as that final rule, comply with National Standards 1, 2, 4, and 8. The explanations articulated there equally apply to the instant rule. With regard to National Standard 6, the commenter does not provide an explanation of why either of the rules or the underlying amendments would be inconsistent with National Standard 6. Nevertheless, this response will address consistency with National Standard 6.

National Standard 6 states that conservation and management measures must: "take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches." 16 U.S.C. 1851(a)(6). The National Standard Guidelines further state that every effort should be made to develop FMPs that discuss and take into account vicissitudes and that, to the extent practicable, FMPs should provide a suitable buffer in favor of conservation. 50 CFR 600.335(c)(2).

Amendments 20 and 21 are expected to give fishermen greater flexibility in determining when and how to fish, thus giving fishermen greater ability to respond individually to unanticipated occurrences. The AMP will provide additional management flexibility and will facilitate response to unanticipated circumstances. Thus, these amendments and the program components implemented through this rule are consistent with National Standard 6.

Comment 11. One commenter stated that the program is inconsistent with National Standards 5 and 8 of the MSA.

Response. As described in NMFS's response to comment 62 in the final rule to initiate implementation of Amendments 20 and 21 (75 FR 60868, 60885), Amendments 20 and 21 were designed to achieve multiple objectives and are consistent with National Standard 5. NMFS has determined that this rule to implement certain components of those amendments is consistent with National Standard 5 for the reasons stated in that previous preamble. NMFS's responses to comments 64–67 in the final rule to initiate implementation of Amendments 20 and 21 (75 FR 60868, 60886) explain how Amendments 20 and 21 are consistent with National Standard 8. NMFS has determined that this rule to implement certain components of those amendments is consistent with National Standard 8 for the reasons stated in that previous preamble. See also responses to comments in the FEIS for Amendment 20, particularly responses to comments 108 and 109.

Comment 12. One commenter stated that the program should be revised to fully retain public control over our public fisheries resources and indicated that the statements in the regulations and Amendments that NMFS retains the right to modify, revoke, or suspend altogether the catch share system are not enough.

Response. Congress, NMFS, and the Council have been clear and explicit that in a limited access privilege program, what is being granted is a privilege that is modifiable and revocable at any time without compensation to the privilege holder (see Section A–2.3.4 of the EIS). NMFS's responses to comments in the FEIS for Amendment 20, particularly responses to comments 86 and 87, provide further discussion on this issue and are not repeated here. In addition, the regulations at §§ 660.25 and 660.100 clearly state that any permits, endorsements, or amounts of harvest from the trawl rationalization program are a privilege that may be revoked, limited, or modified at any time.

Comments on Program Costs, Community Impacts, and the Burden on Small Businesses

Comment 13. Some commenters stated NMFS should minimize and mitigate impacts on small businesses and small communities; the program should not benefit large businesses at the expense of small businesses. One commenter stated that the burden of paperwork and costs of the program would be too much for small businesses and small communities and requested that the paperwork burden be streamlined.

Response. NMFS responded to similar comments in the October 1st final rule (75 FR 60868) about the impacts on small businesses. In particular, concerns were raised about negative impacts on deckhands and smaller boats; that program costs to fishermen, including the costs of entering the fishery and the costs of observers and monitoring are too high; that observer rules need to change for trawl and small boats to reflect the vastly different bycatch which occurs when mistakes are made; about the impact of the allocation formulas on Fort Bragg fishermen; concern that average fishermen will not be able to afford to participate and that this could lead to increased consolidation and leave many ports no longer viable; about negative impacts on processors, that small processors will be driven out of business due to consolidation; and that it will eliminate the "mom and pop businesses."

NMFS has responded to these comments in detail in the October 1st initial issuance final rule (75 FR 60868). That response is applicable to the comments associated with this rule. In terms of impacts on small businesses, the trawl rationalization program is intended to increase net economic benefits, create economic stability, provide full utilization of the trawl sector allocation, consider environmental impacts, and promote conservation through individual accountability for catch and bycatch. The allocations of quota under the new program do not differ significantly from status quo allocations made biennially in terms of total allocations. However, instead of fleetwide quotas, there will now be individual allocations of quota shares and quota pounds to permit owners. Allocations of overfished species constrain all groundfish fishermen, for both large and small operations. In some cases, smaller operators may be constrained to a greater extent. This was recognized in development of the program, and operators are encouraged to work together cooperatively, through mechanisms like combining and sharing quota amounts. The program provides for leasing of additional quota as needed to facilitate operations. The program includes provisions that would have a beneficial impact on small entities. It

would create a management program under which most recent participants in the Pacific Coast groundfish limited entry trawl fishery (many of which are small entities) would be eligible to continue participating in the fishery and under which the fishery itself would experience an increase in economic profitability. Small entities choosing to exit the fishery should receive financial compensation from selling their permit or share of the resource. To prevent a particular individual, corporation, or other entity from acquiring an excessive share of the total harvest privileges in the program, accumulation limits would restrict the amount of harvest privileges that can be held, acquired, or used by individuals and vessels. In addition, for the shoreside sector of the fishery, an AMP was created to mitigate any adverse impacts, including impacts on small entities and communities that might result from the program.

It is expected that the shorebased IFQ fishery will lead to consolidation and this may affect small processors, particularly if they are in disadvantaged ports. Chapter 4 of the Amendment 20 FEIS analyzed the effects on processors from various perspectives: The distribution of landings across west coast ports may change as a result of fleet consolidation, industry agglomeration, and the comparative advantage of ports (a function of bycatch rates in the waters constituting the operational area for the port, differences in infrastructure, and other factors). In particular, the Council analysis indicated that processors associated with disadvantaged communities may see trawl groundfish volumes decline. The analysis highlights that those processors receiving landings from Central California or Neah Bay may see a reduction in trawl caught groundfish if the market is able to redirect activity toward more efficient and advantaged ports. However, in addition to increased landings that are expected to result from the IFQ program, small processors and disadvantaged communities may benefit from the control limits, vessel limits, and adaptive management policies. Control limits will limit the ability of large processors to obtain shares of the fisheries while the AMP processes will allow the Council to consider the impacts on small processors and disadvantaged communities when allocating the AMP quota (10 percent of the total non-whiting trawl quotas). Although vessel accumulation limits tend to lower economic efficiency and restrict profitability for the average vessel, they could help retain vessels in communities because more vessels would remain.

Another process by which small processors and disadvantaged communities may benefit will be the future development of CFAs. Some of the potential benefits of CFAs include: Ensuring access to the fishery resource in a particular area or community to benefit the local fishing economy; enabling the formation of risk pools and sharing monitoring and other costs; ensuring that fish delivered to a local area will benefit local processors and businesses; providing a local source of QSs for new entrants and others wanting to increase their participation in the fishery; increasing local accountability and responsibility for the resource; and benefiting other providers and users of local fishery infrastructure.

In summary, the major impacts of this rule appear to be on shoreside processors which are a mix of large and small processors, and on shorebased trawlers which are also a mix of large and small companies. The non-whiting shorebased trawlers are currently operating at a loss or at best are "breaking even." The new rationalization program would lead to profitability, but with a reduction of about 50 percent of the fleet. This program would lead to major changes in the fishery. To help mitigate against these changes, as discussed above, the agency has announced its intent, subject to available Federal funding, that participants would initially be responsible for 10 percent of the cost of hiring observers and catch monitors. The industry proportion of the costs of hiring observers and catch monitors would be increased every year so that by 2014, once the fishery has transitioned to the rationalization program, the industry would be responsible for 100 percent of the cost of hiring the observers and catch monitors. NMFS believes that an incrementally reduced subsidy to industry funding would enhance the observer and catch monitor program's stability, ensure 100 percent observer and catch monitor coverage, and facilitate the industries' successful transition to the new quota system. In addition, to help mitigate against negative impacts of this program, the Council has adopted an AMP where starting in year 3 of the program, 10 percent of non-whiting QS would be set aside every year to address community impacts and industry transition needs. After reviewing the initial effects of IFQ programs in other parts of the world, the Council had placed a short term QS trading prohibition so that fishermen can learn from their experiences and not make premature sales of their QS. The Council is also envisioning future regulatory processes that would allow community fisheries associations to be established to help aid communities and fishermen.

NMFS has taken a hard look at the reporting burdens of the program and, given the program requirements, reduced the burden on small businesses to the extent possible. For instance, in the IFQ fishery, transactions for QS accounts and vessel accounts will be done online, reducing the paperwork burden. The QS permit renewal process will be the same as the current limited entry permit renewal process and during the same time period because initially most QS permit owners would already be familiar with the limited entry permit renewal process. Similarly, in the mothership sector, the MS/CV-endorsed permit renewal will be combined with their declaration of intent to obligate to a mothership processor so that both are done on the same form at the same time. To the extent possible, NMFS will send out permit renewal forms and other associated forms, such as the ownership interest form, pre-filled to reduce the burden on respondents. For the EDC, the survey design has sought to avoid duplication of data collection, and was developed from meetings with industry participants to discuss making survey questions easily understandable and consistent with the record keeping practices of survey respondents to reduce the burden on respondents. For the trawl monitoring requirements, NMFS has reduced the burden of the catch monitoring plans for first receivers by only requiring essential information needed to assure adequate catch accounting. To reduce the burden of requiring electronic fish tickets, fish ticket software will be provided at no cost, and will use a standard operating system and common software already owned by most businesses; fish ticket software will be compatible with the existing fish ticket requirements in each of the three states; and the software can be used to print a paper copy for submission to the state, when state law allows. To reduce costs, NMFS has determined that a person certified as both an observer and a catch monitor can serve in both capacities, within limitations on hours worked. After consideration of all these efforts and the requirements of the program, NMFS has determined that the remaining reporting requirements are necessary.

Comment 14. One commenter expressed concerns that the inequitable distribution of overfished species QS, such as Canary Rockfish, disproportionately impacts California,

while favoring Washington and Oregon; that the program should not result in an unfair allocation between the states; and that the program should be designed to result in an even consolidation between states and between the sectors (non-whiting shorebased IFQ, whiting shorebased IFQ, mothership sector, and catcher/processor sector).

Response. With respect to the effects on the States including industry consolidation effects, NMFS acknowledges that this program may have different impacts on different states and on different communities. As mentioned above, one of the potential purposes of the AMP is to address differential impacts upon communities and thus the states. National Standard 4 requires that when it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) Fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges. The National Standard 4 guidelines at § 600.325(c)(3)(i)(B) state that: "An allocation of fishing privileges may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups. An allocation need not preserve the status quo in the fishery to qualify as fair and equitable, if a restructuring of fishing privileges would maximize overall benefits. The Council should make an initial estimate of the relative benefits and hardships imposed by the allocation, and compare its consequences with those of alternative allocation schemes, including the status quo."

Thus, the Councils are given wide latitude to determine what is equitable within a particular fishery and to create the appropriate management measures to accomplish the goals of an FMP. The issue of allocation of overfished species was addressed extensively in the response to comments in the October 1st final rule. (75 FR 60868, comments 29 and 31.) Generally speaking, the Council evaluated the impacts of its allocation decisions and adequately determined that, after weighing the costs and benefits of its proposed scheme, the allocations selected were to the overall benefit of the fishery and its participants.

Comment 15. One commenter stated that NMFS has not adopted criteria for participation in CFAs as required by law and improperly excluded CFAs from initial allocations. The commenter further stated that the 10 percent set aside for the AMP would not be enough to meet the needs of CFAs, smaller vessels idled by the program, processors, or new entrants. Another commenter stated that the 10 percent set aside for the AMP should be used to mitigate transition impacts and be used as an incentive pool for conservation results and to improve the program.

Response. NMFS responded to a similar comment in the October 31st final rule (75 FR 60868, comment 41) which is incorporated here by reference. NMFS disagrees that communities have been excluded from initial allocations. Communities have not been precluded from acquiring groundfish limited entry trawl permits, which would make them eligible for the initial allocation of QS associated with a permit. Additionally, the Council's preferred alternative includes a very broad definition of who may own quota shares, so communities are not precluded from acquiring quota once the program is implemented. Just as non-trawl fishermen currently need to obtain a trawl-endorsed limited entry permit to participate in the trawl fishery, under the trawl catch shares program, a trawl permit and quota pounds is all that is needed to participate.

NMFS also disagrees with the statement that the Council and NMFS did not follow the law with regard to CFAs. NMFS created the trawl rationalization program, including allocation to an AMP, consistent with the MSA and with communities in mind. The trawl catch shares program includes several ways to participate beyond the initial issuance of quota share. The AMP specifically reserves 10 percent of the non-whiting shoreside quota share to allocate in such a manner as to promote a wide range of important objectives, beginning with year 3 of the program. The objectives for this program are: Community stability, processor stability, conservation, unintended/unforeseen consequences of IFQ management, and facilitation of new entrants. NMFS agrees with the commenter's statement that the 10 percent set aside for the AMP should be used to mitigate transition impacts. During the first 2 years of the program, the AMP will help mitigate transition impacts by distributing the resulting to QP to trawlers with non-whiting QS to help them as they adjust to the new program, begin to work together and pool their resources, and adjust to new costs. In ongoing years, the AMP will help mitigate impacts of the program and promote conservation following the objectives for the AMP stated above.

In addition to the AMP, the Council is also developing provisions for community involvement through CFAs as a trailing amendment. The trawl catch shares program includes a moratorium on the transfer of quota share during the first two years of the program (quota pounds will be able to be transferred during the moratorium), combined with provisions to require divestiture of quota share over accumulation limits during years 3 and 4 of the program. The moratorium is in part intended to slow the movement of quota share holdings out of communities during a time when the trailing action for community fishing associations can be developed and implemented in a considered fashion. Recommendations for how to structure the CFA provisions in a trailing action are welcome and should be brought forward as that proposal is developed by the Council. Moreover, the Council specifically acknowledged flexibility to adapt to changing circumstances, including provisions for a comprehensive review of the program that includes a community advisory committee, to evaluate effectiveness in relation to the original program goals and objectives, scheduled for year five of the program. The trawl rationalization program has addressed and continues to address directly these issues and ways to improve the program.

Comment 16. One commenter stated that the rapid increase in value of QS and QP will make it hard for communities and CFAs to participate in the program. The commenter further stated that NMFS' new measure to allow limited entry trawl permit transfers during a window of time before the permit and endorsement application period will foster quick inflation of QS value.

Response. NMFS appreciates the commenter's insight into the value of QS based on NMFS providing a window of opportunity for limited entry permit transfers before the permit and endorsement application period. NMFS' intent in providing this window in the October 31st initial issuance final rule (75 FR 60868) was solely to provide some additional flexibility for potential participants in the program in making their business decisions before being locked into their business arrangement for the next 2 years. As stated in the preamble to the final initial issuance rule, NMFS believes this change is consistent with the Council's intent to provide an opportunity for entry level participants to obtain a qualifying trawl limited entry permit prior to initial issuance with reasonable certainty of anticipated QS that would be issued on the basis of that permit. Further, for

permit owners that have qualifying history that would exceed control limits, this change will provide an opportunity to divest permits prior to calculation of QS and any redistribution of QS.

Comments on the Observer and Catch Monitor Programs

Comment 17. Some commenters stated that alternatives should be explored to reduce the industry and taxpayer costs of the program, such as not requiring the industry to pay for observer (*i.e.,* the government should pay as part of its enforcement mandate), requiring less than 100 percent observer coverage, allowing the use of cameras, or measures to reduce observer costs below $350–500 per day. Another commenter agreed with NMFS that an observer can also be a catch monitor to reduce costs but also to gain data tracking efficiencies. A third commenter stated support for 100 percent observer coverage and rigorous observer and catch monitor training requirements.

Response. Less than 100 percent observer coverage and the use of cameras to supplement or substitute for observer coverage were considered by the Council during the program's development, but were rejected. Full and independent accountability of all catch is key to the success of the catch shares program especially programs using individual fishing quotas. NMFS has recognized the increased costs to the industry and is therefore planning to subsidize the cost of observer coverage for at least the first year, subject to appropriations (see response to Comment 22). The defraying of cost via this subsidy will give the fleet time to develop cost cutting measures with other industry members in their port and with the observer provider companies. NMFS recognizes the importance of reigning in costs to the industry and the public and will continue to investigate and implement efficiencies when practical. One such efficiency is that a person can be trained and certified as both an observer and as a catch monitor. That person could act in both capacities even for the same vessel's offload, subject to maximum work hour requirements and other limitations, which may provide some cost savings.

Comment 18. The Pacific Fishery Management Council commented in agreement with the conflict of interest regulations as proposed by NMFS under Alternative 2 for the observer and catch monitor regulations. Another commenter supported rigorous conflict of interest provisions.

Response. In the August 31st proposed rule (75 FR 53380), NMFS provided two alternative sections addressing conflict of interest provisions applicable to observers and catch monitors; Alternative 1 provided provisions as deemed by the Council, Alternative 2 presented the NMFS-proposed language. NMFS provided its rationale for the NMFS-proposed alternative in the proposed rule, and explained that the NMFS-proposed conflict of interest provisions are consistent with existing language in NMFS policy statement 04–109–01 and current standards in the West Coast Groundfish Observer Program. NMFS specifically requested comment on which provisions to include in the final rule and NMFS received no comments in disagreement with the NMFS-proposed alternative included in the final rule.

Comment 19. One commenter stated that Morro Bay, California, will not have enough trawlers to support a catch monitor.

Response. NMFS responded to a similar comment regarding costs of monitoring in the October 31st final rule (75 FR 60873, comment 22). As stated in the response to the prior comment: "Analyses indicate that the program benefits will outweigh the program costs. The EIS anticipates that the value of the fishery will increase through a variety of mechanisms, including increased efficiency of existing vessels, the transfer of effort to the most efficient vessels, and increased retention of target species. The program includes opportunities for adaptive management if actual impacts differ from projected impacts. [* * *] To aid the fishing industry during the transition to a rationalized fishery, the agency has announced its intent, subject to available Federal funding, to cover a portion of the initial cost of hiring observers and catch monitors. As stated by the agency, participants would initially be responsible for 10 percent of the cost of hiring observers and catch monitors, with that amount increased every year so that by 2014, the industry would be responsible for 100 percent of the cost of hiring the observers and catch monitors."

Landings monitoring is an essential component to the rationalization program developed by the Council. Thus, industry members and catch monitor providers need to work together to resolve local implementation issues such as the development of cost-effective deployment of catch monitors in Morro Bay. One potential solution provided for in this final rule would be to contract with providers for the services of observers that are also certified as catch monitors. Such "dual certified" observers, which would already be on board the vessel participating in the Shorebased IFQ Program, could assume the catch monitor role for the IFQ first receiver. Coordination between the fishing vessel, the IFQ first receiver, and the observer/catch monitor provider will help alleviate concerns of program costs under circumstances such as those presented at Morro Bay. NMFS anticipates that further opportunities to reduce costs will develop with experience under the program. See also the response to Comment 20.

Comment 20. California Department of Fish and Game (CDFG) commented that it supports an ongoing dialogue with NMFS and the states about the use of state employees as observers or catch monitors within the trawl rationalization program, provided that such dialogue includes a mechanism to reimburse the states for the use of state employees.

Response. NMFS acknowledges the comment and plans to continue its dialogue with the states regarding the use of state employees as observers and/or catch monitors. Initial discussions conducted thus far indicate that the states are interested in providing some catch monitor services. If state employees serve as catch monitors, NMFS anticipates that reimbursement for costs associated with such services would be a component of legal contracts entered into between the states and the IFQ first receivers or vessels to which the states provide services. NMFS looks forward to continued discussions with the states to support coordination of the trawl rationalization program with state employees.

Comment 21. Some commenters asked for clarification of the terms, "authorized officer," "authorized person," and "NMFS staff" with regard to the catch monitor and observer regulations. One commenter stated that persons authorized access to first receiver facilities should include state-authorized employees, both law enforcement and non-law enforcement, and Pacific States Marine Fisheries Commission staff. Both of these types of personnel are involved in the monitoring and enforcement of the groundfish fishery. The commenter also noted inconsistent use of the terms "authorized officer" and "authorized person" in the regulations and recommended a consistent and encompassing use of the term "authorized person." Another commenter asked that the term "NMFS staff" be defined and should be more

narrow than any employee of NMFS. The commenter suggested a definition.

Response. NMFS appreciates the comments and how they highlight the variety of management and enforcement persons that are involved in the program. However, NMFS disagrees that further definitions are necessary at this time. NMFS believes that the current use of the terms is appropriate and serves to distinguish the different persons that must have access to, or accomplish other duties in connection to program management and enforcement. "Authorized officer" is a term already defined under the MSA in regulations found at 50 CFR part 600. The term is focused exclusively on enforcement officers, both state and Federal, and includes NOAA agents and officers, state officers acting under a JEA with NOAA and USCG boarding officers. This term is important for use involving inspection and enforcement activities. "Authorized person" is not defined but was included to identify persons other than enforcement officers and NMFS staff who are authorized to conduct duties related to the program. The term includes catch monitors as they are not NMFS staff, but are employees of contractors. These persons have authority to conduct duties pursuant to the program regulations. NMFS staff are those persons who have authority to conduct duties under the program regulations, as well. As for state employees, these persons have independent authority under state laws to enter the facility and do their jobs.

Comment 22. One commenter asked if NMFS' offer to cover up to 90 percent of the costs of the observer program during the first year of the program was for all sectors of the fishery, or only the Shorebased IFQ Program.

Response. There is no assurance or guarantee that NMFS will provide funding, as the funding depends on Congressional appropriation. However, assuming that an appropriation is made and those funds are made available to the program and not otherwise restricted, NMFS NWR would apply these funds to help defray both the observer and catch monitor program costs. Further, NMFS would make the funds available to all three sectors (MS, C/P, and Shorebased) not just the Shorebased IFQ program.

Comment 23. One commenter suggested that language on the catch monitor program stating that "monitors have access to telephone lines during the times that Pacific whiting was being processed" may be an artifact of previous regulations for catch monitors. The commenter suggested that NMFS re-examine whether this language should apply to more species than Pacific whiting.

Response. NMFS agrees with the comment and, upon further review, has determined that this requirement is no longer necessary. The commenter was correct that catch monitors may need access to more species that just Pacific whiting for the Shorebased IFQ Program. In addition, any phone may be used, a cell phone or a telephone. However, the IFQ first receiver will not have to provide catch monitors with access to a phone while IFQ species are being processed. That is the responsibility of the catch monitor provider as stated at § 660.17(e)(8)(i)(A). NMFS is removing this language from the IFQ first receiver responsibilities at § 660.140(i)(4). See the section on "Changes from the Proposed Rule."

Comments on the Economic Data Collection (EDC) Program

Comment 24. Some commenters stated that the economic data collection questionnaire was too detailed and burdensome for small businesses. One of those commenters suggested that if it is an annual questionnaire, it should be simplified to collect only crucial information. If the detailed questionnaire is continued, it should be collected periodically, not annually. Another commenter stated that the EDC program is too narrow and will not capture the effects of the trawl rationalization program on jobs, businesses, and communities.

Response. In developing the trawl catch share program, NMFS is striking a balance. NMFS believes the importance and benefits of this program outweighs the burden on small businesses. The statute authorizing LAP programs such as this, Section 303A of the MSA, requires periodic reviews. In order to do that, NMFS must collect both baseline and annual information to judge the effectiveness of the program for the 5 year review. NMFS will continue to work through the Council process to make any necessary changes to the program to assure that that program does collect information needed by the Council meets the requirements of the MSA and the Council including providing assessments on the impacts of the program on jobs, businesses, and communities.

NMFS' authority to collect economic information is limited to those vessels and processors harvesting and processing fish that are regulated under the MSA. Although NMFS could ask for economic information from persons or entities that are not directly regulated under a fishery program, it would be unable to require submission of the information. This is a critical difference and NMFS cannot establish a voluntary economic information program that would certainly be rejected by non-fishery industry persons and entities. NMFS could not ensure confidentiality of voluntarily submitted information and this problem would mean NMFS would never receive information or receive information that was incomplete or unreliable. An incomplete or unreliable database would be unusable.

Regarding a commenter's concern over the EDC program not capturing the effects of the trawl rationalization program on lost jobs, closed businesses, and devastated communities, the Northwest Fisheries Science Center will conduct voluntary interviews through the Trawl Rationalization Program Human Dimensions Study to try and capture some of these other effects of the program.

Comment 25. One commenter agreed with NMFS' definition of "processor" for the EDC Program.

Response. NMFS acknowledges this commenter's concurrence with the proposed definition for "processor" for the EDC program.

Comment 26. One commenter expressed concerns about the EDC audit process, in particular the potential use of a third-party auditor to examine EDC submissions. The comment focused on the handling of "extremely sensitive commercial information". The comment acknowledges that NMFS states that submitted information is confidential, but the comment suggests that there are no standards or rules in place to ensure confidentiality. Further, the comment questions whether NMFS can ask for tax information and require its submission to a third-party auditor and whether this practice may violate IRS rules.

Response. While NMFS understands the concern about information confidentiality, this issue was highlighted in the proposed rule and NMFS explained that the EDC program will ensure information confidentiality. Information submitted to NMFS pursuant to the trawl program is considered confidential not only under the MSA, which specifically states that submitted information is confidential and not disclosable, but also there are at least two other Federal acts that NMFS uses to hold commercial and financial information confidential, namely the FOIA and Trade Secrets Act. NMFS has promulgated regulations that describe information confidentiality and processes to ensure its confidentiality at 50 CFR 600.405. Further, NMFS follows a detailed policy-based process, titled NAO 216–100, directing specifically

how NMFS employees and contractors ensure information confidentiality. NMFS personnel as well as any third-party contractor, such as an auditor, are required to retain information confidentiality. Should information be mishandled and inappropriately disclosed, both civil and criminal sanctions could be applied depending on the circumstances. To further ensure the confidentiality of information submitted to third-parties such as auditors, NMFS wrote regulatory language at section 660.114(e) describing the EDC audit procedures that indicates that any information required for verification of economic data, including that provided to a third-party auditor, is considered a required submission to NMFS. In other economic information collection programs, such as those found in the North Pacific crab and Bering sea trawl groundfish programs, NMFS has adopted the use of professional auditors to evaluate economic and financial information. Due to resource limitations, NMFS has no choice but to contract for these special services and cannot provide them "in-house." Finally, NMFS—like private institutions—can require submission of financial documents, including tax reporting forms, if necessary to ensure that its program receives reliable, verifiable information. If this was not the case, NMFS could not carry-out Congress' intent that commercial and financial information be collected and evaluated for this limited access program's future evaluation and potential effectiveness.

Comment 27. One commenter suggested revised wording for the economic data collection program regulations at § 660.114 to require only one owner of a processor to submit the required data, if the processor is owned by more than one person. The commenter stated that not all owners may have access to the level of detail required on the forms and the additional burden of requiring all owners to submit the data is unnecessary.

Response. NMFS agrees, but does not conclude that a change in the proposed rule text is necessary. NMFS is aware that some processors are owned by more than one person. However, a processor can be considered a single person or entity and thus would report its information on one form. Thus, NMFS requires only one EDC form from a processor provided that the form provides all relevant and complete information from the processor. All owners of a processor, however, are subject to the risk that with the filing of one form for the processor, that the form may not be timely filed or properly completed by whoever is identified as the responsible party for submitting it on behalf of the processor and thus, all the owners.

Comment 28. One commenter suggested that the language in § 660.114, for the trawl fishery economic data collection program, should be revised to read "holder" of a first receiver site license rather than "owner" because the license is a privilege and conveys no ownership rights.

Response. NMFS agrees with the commenter that first receiver site licenses are a privilege and not a right, but declines to change the term from "owner" to "holder" as the commenter suggests. The regulations at § 660.100 clearly state that any privileges (including IFQ first receiver site licenses) in the trawl rationalization program may be revoked, limited, or modified at any time. In order to take delivery of groundfish caught in the Shorebased IFQ Program, an IFQ first receiver would need to have a first receiver site license. "IFQ first receivers" are defined in the October 31st final rule (75 FR 60868) at § 660.111 as "persons who first receive, purchase, or take custody, control, or possession of catch onshore directly from a vessel that harvested the catch while fishing under the Shorebased IFQ Program described at § 660.140, subpart D." For the first receiver site license owner, the term "license owner" is defined at § 660.11 as "a person who is the owner of record with NMFS, SFD, Permits Office of a License issued under § 660.140, subpart D" and is cross-referenced from the "permit owner" definition.

Comments on Ownership and Transfer

Comment 29. One commenter asked if an estate completes probate court during the first two years of the program, can ownership of the limited entry trawl permit and QS permit be transferred from the estate administrator to a beneficiary.

Response. The proposed rule states that "[d]uring the first 2 years after implementation of the program, QS or IBQ cannot be transferred to another QS permit owner, except under U.S. court order and as approved by NMFS." 50 CFR 660.140(d)(3)(ii)(B)(*1*). During the first two years of the program, QS and IBQ are non-transferable. However, NMFS recognizes that there may be some circumstances where a court may order or authorize the distribution of assets, including QS or IBQ. Such a circumstance may arise as a result of death or dissolution of a QS owner, such as in probate or in a bankruptcy action. NMFS drafted this regulatory provision to accommodate such circumstances. Such a transfer would still be subject to review by NMFS, however, to determine whether the transferee is eligible to own QS and whether the ownership interest of the transferee would be within the control limits; NMFS will not approve a transfer if the transferee is ineligible to own QS or if the ownership interest of the transferee would exceed control limits as a result of the transfer. NMFS recognizes that not all distributions of assets in probate or bankruptcy may be set forth in a court order. Accordingly, NMFS has clarified its intent by modifying the regulatory provision to state that "[d]uring the first 2 years after implementation of the program, QS or IBQ cannot be transferred * * * except under U.S. court order or authorization and as approved by NMFS."

Comment 30. One commenter asked if two limited entry trawl permits are owned by the same entity, for example an estate administrator, can the resulting QS from the two limited entry trawl permits be separated into two QS permits if the court orders the permits to be divided between beneficiaries.

Response. In the situation described by this commenter, where a court orders division of the permits, NMFS would transfer the QS and IBQ to the separate beneficiaries, subject to NMFS' approval of the transfer. For NMFS to approve such a transfer, NMFS would first determine whether each beneficiary is eligible to own QS; if a beneficiary is eligible and does not already own a QS permit, NMFS would issue a QS permit to the beneficiary. NMFS would also review the transfer to determine whether either beneficiary's ownership interest in QS or IBQ would exceed control limits as a result of the transfer. If a beneficiary is not eligible to own QS, or if the transfer of QS would cause the beneficiary's ownership of QS or IBQ to exceed control limits, NMFS would not approve the transfer. NMFS would respond in the same manner if the transfer is otherwise authorized by a court. See response to Comment 29.

Comment 31. Several commenters commented on application of ownership limits on trusts.

a. One commenter agreed with NMFS that the trustee should be considered the owner of a trust.

Response. NMFS acknowledges this comment.

b. Another commenter agreed that NMFS correctly identified the nature of trust ownership, but expressed concern that a trustor or beneficiaries could exert control over the trust. The commenter suggested that to prevent this, all parties to the trust (trustor, trustee, and beneficiaries) should be charged with

100 percent of the trust ownership for purposes of application of control limits. Another commenter similarly expressed concern that accumulation limits may be exceeded through ownership by a trust, and also suggested 100 percent ownership be applied to the trustor, trustee, and beneficiary for control test purposes.

Response. NMFS acknowledges the comment that accumulation limits may be exceeded by other parties besides a trustee where QS or IBQ is owned by a trust, but distinguishes between the different accumulation limits that apply. "Accumulation limits," as defined in the proposed rule, means "the maximum extent of permissible *ownership, control or use* of a privilege within the trawl rationalization program[.]" 75 FR 53413 (emphasis added). As stated in the preamble to the proposed rule, NMFS interprets an *ownership* interest by a trust to vest ownership in the trustee; this interpretation applies specifically to permissible ownership. Ownership limits would apply to ownership of MS/CV-endorsed permits and catch history assignment, MS permits, and to QS and IBQ as a subset of applicable control limits. With regard to QS and IBQ and control limits Amendment 20 to the FMP states that "[t]he term 'own or control' was shortened to 'control' for simplicity[;] 'Control' includes ownership[.]" (Appendix E, footnote y, at E–21, August 2010.) In the proposed rule, control limits applicable to the Shorebased IFQ Program are defined as "the maximum amount that a person may *own* or control[.]" 75 FR 53413 (emphasis added). NMFS' interpretation that ownership of QS or IBQ by a trust would vest ownership in the trustee (or trustees, if more than one) only applies to the maximum permissible ownership aspect of compliance with control limits.

Ownership of QS or IBQ by a trust and control by any party other than the trustee—whether such party is the trustor, a beneficiary, or any other party—are two different things. While ownership is one way in which a party may exercise control, control is broader than ownership and a determination of control depends on further investigation beyond identification of the legal ownership of the QS or IBQ involved. A person may exceed control limits for QS or IBQ despite having no ownership of the QS or IBQ. Investigations regarding alleged violations of control limits will depend on the facts unique to each situation; NMFS will make a determination based on all relevant facts and circumstances revealed in an investigation. Ownership will be one fact considered, but not the only one. As stated in the preamble to the proposed rule, NMFS acknowledges that additional information, such as the trust document, may be needed to determine compliance with control limits. As the commenter points out, other facts may be needed as well. Accordingly, the proposed rule and this final rule includes provisions that NMFS may ask for additional information it believes to be necessary for a determination of compliance with control limits.

NMFS disagrees with the commenters' suggestion that NMFS should attribute trust ownership to parties other than the trustee for control limit purposes. One of the commenters described scenarios where parties other than the trustee may possibly exert control, either directly or indirectly, over the trust, the trustee, or the QS or IBQ; however, the commenter has not provided sufficient facts to enable NMFS to determine whether control limits are exceeded under these scenarios. The commenters' suggested approach would presume control exists regardless of the facts and would attribute control to trustors and beneficiaries even where they have no actual control. NMFS acknowledges that one of the commenters expressed concern that an investigation of control would require "valuable time of NMFS staff[,]" but this applies for any enforcement investigation of control by parties other than legal owners, regardless of whether the ownership interest is a trust or any other form of ownership interest. Accordingly, NMFS declines to revise its interpretation of the attribution of ownership interest of a trust to the trustee.

Comment 32. One commenter stated that the proposed Shorebased IFQ Program does not comply with MSA limitations on who can hold, acquire, or use limited access privileges, and that unrestricted ownership of quota shares will increase the cost of entry into the fishery and thwart the conservation benefits of the program.

Response. Section 303A(c)(5)(E) of the MSA states that in developing a limited access privilege program to harvest fish a Council shall "authorize limited access privileges to harvest fish to be held, acquired, used by, or issued under the system to persons who substantially participate in the fishery, including in a specific sector of such fishery, as specified by the Council." NOAA interprets that provision to mean that those who substantially participate in the fishery must be among those eligible to acquire QS, but are not the only entities or person who can receive QS. In other words, as long as those who substantially participate in the fishery are included as those eligible to receive QS, this provision of the statute is satisfied. The Council's eligibility criteria at § 660.140(d)(2) would allow all entities that currently substantially participate in the shorebased IFQ fishery to hold, acquire, use or be issued QS.

Comment 33. One commenter stated that the proposed Shorebased IFQ Program does not comply with the MSA because it allows QS to be acquired to perfect a security interest.

Response. Section 303A(c)(1)(D) of the MSA, which addresses requirements for eligibility for limited access programs, does not prohibit the acquisition of QS to perfect a security interest. This section states that the same statutory eligibility criteria apply to all persons who acquire a privilege to harvest fish, including those who acquire a limited access privilege solely for the purpose of perfecting or realizing on a security interest in such privilege. The MSA would allow United States citizens, corporations, partnerships, other entities established under the laws of the United States or any State, or permanent resident aliens to acquire privileges to harvest fish, including acquiring a privilege for the purpose of perfecting or realizing on a security interest in such privilege, if they meet the eligibility and participation requirements established in the program. The MSA requires that a limited access privilege program prohibit other persons from acquiring a harvesting privilege. The eligibility and participation requirements for the Shorebased IFQ Program in § 660.140(d) are consistent with the MSA.

Comment 34. One commenter asked for clarification in the final rule on whether NMFS addressed the Council's motion that does not require the size (or length) endorsement on a vessel to be reduced for limited entry trawl permits transferred to smaller vessels.

Response. NMFS addressed this issue, consistent with the Council motion, in the October 1st final rule (75 FR 60868) at § 660.25(b)(3)(iii)(B)(*1*) which states, "A limited entry permit may be registered for use with a vessel up to 5 ft (1.52 m) longer than, the same length as, or any length shorter than, the size endorsed on the existing permit without requiring a combination of permits or a change in the size endorsement." Previously, limited entry fixed gear and limited entry trawl permits had different size endorsements limitations. Trawl rationalization changed these requirements making the trawl size endorsement limitations mirror the limited entry fixed gear (i.e., the size endorsement of neither type of permit

has to be reduced if registered to a smaller vessel).

Comments on Initial Allocation of Catch Shares

Comment 35. One commenter stated that the allocation formula for overfished species rewarded fishermen that caught overfished species while penalizing those that successfully avoided them.

Response. NMFS responded to a similar comment in the October 31st final rule (75 FR 60868, comment 31) which stated, "The Council considered and rejected the option of allocating overfished species for nonwhiting trips using the same method as for other nonwhiting IFQ species as not appropriate under the circumstances. In particular, the relative weighting approach, by which landings for a year are measured as a percent of all landings for the year and species, would have given a particularly high amount of credit for pounds caught during the rebuilding period. Additionally, QS would have been allocated to those who targeted some of the overfished species in the mid-1990s (before they were declared overfished) rather than to those who need such QS to access current target species. Accordingly, the Council rejected the approach of using the same allocation formula for overfished species as for nonwhiting target species based on the desire to not reward bycatch during the rebuilding period and in order to provide QS to those who would need it to cover incidental catch taken with their target species QS allocation. Regarding the comment that overfished species years selected were arbitrary, the Council's methodology for allocating overfished species is significantly different than the methodology for allocating target catch. The 1994–2003 period is still used to determine the target species allocation, and the harvest patterns from the 2003–2006 logbooks are used to determine the amount of overfished species an entity would need to take its target species. In this fashion, more recent information for the fishery is used without rewarding post control date increases in effort. The 1994–2003 harvest patterns were not used to determine a target species QS recipients need for overfished species QS. This is because of the substantial changes in fishing patterns which were induced by the determination that some species were overfished and the implementation of the RCAs and because the RCAs will remain in place after the trawl rationalization system is put into place. Therefore, the Council considered that an estimate of likely patterns of activity should be based on a period of time when the RCAs were in place. The RCAs were not in place for most of the 1994–2003 period but were in place for 2003–2006, further supporting the conclusion to use this period for the allocation of overfished species."

Comment 36. Several commenters stated that the program should not result in an unfair allocation between the states, and should be designed to result in an even consolidation between states and between the sectors (non-whiting shorebased IFQ, whiting shorebased IFQ, mothership sector, and catcher/processor sector). One commenter stated that California fishermen have received an unfair allocation of overfished species compared to fishermen in Washington and Oregon, which was not discussed by the Council, analyzed under NEPA, or justified under the Magnuson-Stevens Act.

Response. NMFS responded to a similar comment in the October 31st final rule (75 FR 60868, 60885, comment 61). As stated in the response to the prior comment: "The trawl rationalization program was developed through the Council process, which facilitates substantial participation by state representatives. Generally, state proposals are brought forward when alternatives are crafted and integrated to the degree practicable. Decisions about catch allocation between different sectors or gear groups are also part of this participatory process, and emphasis is placed on equitable division while ensuring conservation goals. The Council determined that none of the alternatives considered, including the final plan, would discriminate against residents of different states. The rationalization program was structured to provide fair and equitable allocations of both target species and overfished species to participants." These concerns were expressly identified and addressed in the FEIS for Amendment 20, as well. See the FEIS "Rationalization of the Pacific Coast Groundfish Limited Entry Trawl Fishery" in Chapter 6, Section 6.2 on pages 611. See also the response to Comment 14, *supra.*

Comment 37. One commenter disagreed with NMFS' decision to move forward with formal allocations to the trawl fishermen, favoring the most impactful gear. The commenter is hopeful that the program can still be utilized to create conservation benefits and lessen bycatch and habitat impacts from destructive gears.

Response. NMFS responded to a similar comment in the October 31st final rule (75 FR 60868, comment 81) which stated, in part, "The action [from the October 31st final rule] largely limits the trawl allocation of many of the Amendment 21 species to percentages less than the historical trawl catch shares to the benefit of the non-trawl sectors. For instance, the proposed action limits the maximum trawl allocation of any Amendment 21species to 95 percent of the directed harvest when historical trawl catch shares for many of these species have been higher than 95 percent. Amendment 21 species' allocations that tend to favor non-trawl sectors (i.e., non-trawl sector allocations greater than observed in the 1995 to 2005 historical catch) include Pacific cod, Pacific ocean perch, chilipepper rockfish south of 40°10′ N. lat., splitnose rockfish south of 40°10′ N. lat., shortspine thornyhead north of 34°27′ N. lat., longspine thornyhead north of 34°27′ N. lat., darkblotched rockfish, Dover sole, English sole, petrale sole, arrowtooth flounder, starry flounder, and species in the Other Flatfish complex. All other Amendment 21 species' allocations under the proposed action are generally favorable to non-trawl sectors in that the highest non-trawl sector catch percentages analyzed were proposed to be allocated to the non-trawl sectors. The only exception to this general trend is lingcod, where a more favorable trawl allocation was adopted as the final action. The rationale for a higher trawl allocation of lingcod is that, unlike the non-trawl sectors that predominantly use hook-and-line gear to target groundfish, the trawl sectors are not as constrained by management measures designed to foster yelloweye rockfish rebuilding. This is because the mandatory use of trawls with small-diameter footropes (i.e., at least 8 inches) shoreward of the RCA effectively keeps bottom trawls out of the high relief habitats where yelloweye occur. A higher trawl allocation of lingcod would minimize stranding of harvestable yields of lingcod that would otherwise be allocated to non-trawl sectors and unavailable for harvest due to yelloweye rebuilding constraints. Thus, the inter-sector allocation does not provide more bottom trawl opportunity than status quo management measures and allocations.

In addition, the trawl rationalization allows limited entry trawl permit holders to switch from trawl to fixed gears to fish their quotas, which, in turn, would reduce trawl impacts. It also allows nontrawl vessels to harvest the allocation to the trawl sector if they acquire a trawl permit and IFQ. These facts lead to the conclusion that potential adverse impacts from trawl

gear could be expected to be lower under the proposed action than under status quo management or under any of the other alternatives analyzed. Moreover, the allocations are consistent with the current distribution of fishing opportunity among groundfish sectors. Even if the fixed gear sector had the capacity and desire to catch significantly greater amounts of groundfish, which is questionable, those factors are not, in and of themselves, criteria for determining allocations. Allocations are necessary precisely because more than one group has some level of "capacity and desire," which engenders potential conflicts over resource access that must be resolved through allocation."

Comments on the Shorebased IFQ Program

Comment 38. One commenter disagrees with the regulatory provision that allows the Shorebased IFQ Program to be closed as a result of a projected overage in another trawl sector (MS Coop Program, C/P Coop Program). The commenter believes NMFS misinterpreted the Council's intent.

Response. NMFS acknowledges the comment, and appreciates the commenter's concern. This concern was raised by representatives of the trawl sectors through the Council during the regulatory deeming process. As explained at that time, this language reflects NMFS' authority to take action in any and/or all sectors of the fishery based on a conservation concern. Overfishing or projected overages on OYs are expected to be less likely under the trawl rationalization program, however, consistent with the MSA, NMFS retains the authority to take action to protect the status of the stocks, if needed.

Comment 39. One commenter stated that fishermen who receive minimal QS or zero QS for overfished bycatch species would face the choice of being tied up at the dock or paying other fishermen for the privilege of using their IFQ for overfished bycatch species.

Response. NMFS disagrees with the comment that these are the only choices available to fishermen that receive low initial allocations of QS for overfished bycatch species. QS is associated with QS permit owners, and is tracked in the QS permit owner's QS account. Each year, NMFS will deposit QP in the QS account based on the amount of QS for the IFQ species and the shoreside trawl allocation for that species. In order for a fisherman to use QP, the fisherman must obtain QP to transfer into the fisherman's unique vessel account associated with the vessel the fisherman will use to catch the fish. QP is required in the vessel account to cover catch of IFQ species.

Unless a fisherman has a negative balance of QP for any IFQ species in their vessel account, they can go fishing in the Shorebased IFQ Program. This is true even if they have zero QP for some IFQ species, including overfished bycatch species. To the extent that the fisherman is adept at avoiding bycatch of IFQ species which the fisherman has no QP for, no QP need ever be transferred to that fisherman's vessel account for those species. If the fisherman does catch IFQ species for which they do not have QP, the fisherman would have 30 days to obtain and transfer QP for that species into their vessel account. Alternatively, if the amount of QP that they need to cover the overage is within the carryover provisions, they can opt out of the fishery for the remainder of the year and use the next year's QP to cover that overage (see comment 41). Fisherman also have the option of working together to share their QP for overfished bycatch species by avoiding overfished bycatch species as much as possible, forming risk pools to use collectively, and using that amount to address inadvertent catch of unwanted bycatch by members of the pooling arrangement.

Comment 40. One commenter supported the proposed requirement that the owner of a vessel account must cover a deficit for any IFQ species within 30 days of when the deficit occurs, or, if the vessel chooses to invoke the carryover provision to avoid penalties, opt out of the fishery for the remainder of the year. The commenter also suggested that in order to encourage clean fishing practices, NMFS should limit the number of times a vessel can use this provision to two years total.

Response. In the August 31st proposed rule (75 FR 53380), NMFS specifically requested comment on the carryover provision. NMFS acknowledges the comment in support of the proposed regulation and the requirement to opt out of the IFQ fishery for the remainder of the year if a fisherman invokes the carryover provision to cover a deficit. Nothing in the Council motion, however, authorizes NMFS to limit the carryover provision to only two years of the program. Amendment 20 does not restrict the carryover provision to the first two years of the program, but does provide a method for future revision of the carryover limit, which may be changed during the biennial specifications process. Appendix E, A–2.2.2b; at E–13. Moreover, the carryover provision, as well as other relevant issues, will be reviewed during the 5-year review. To the extent that the commenter suggests a more restrictive carryover provision than that described in the proposed rule, the appropriate avenue for consideration of this suggestion under the FMP would be through the biennial specifications process or as part of the 5-year review.

Comment 41. Another commenter stated that the proposed rule would require fishermen to cover a deficit within 30 days or opt out of the fishery for the year, and that under the commenter's reading of the proposed rule, fishermen that receive zero QS/QP would start from a position of noncompliance, and would be required to first obtain QP to fish for target species.

Response. The commenter correctly states that a deficit must be covered within 30 days, but does not accurately state what would be required for compliance with this provision. In order to harvest fish without incurring a deficit, a vessel must have sufficient QP in its vessel account. Each vessel participating in the Shorebased IFQ Program would have a vessel account, and all vessel accounts start with a zero balance. In order to be in compliance, the owner of the vessel would have to acquire QP only for the fish that it catches; having a zero balance for QP for any one IFQ species does not automatically result in noncompliance.

Under the rationalized fishery, fishermen have several options to plan their fishing strategies. A QS owner may choose to transfer the resulting QP to the owner's own vessel account, or may elect to lease the QP and transfer them to another vessel account entirely. A vessel owner that chooses to go fishing can obtain QP before the vessel goes fishing, whether from the vessel owner's own QS account or by transfer from another owner of QP, for IFQ species that the vessel intends to harvest or anticipates harvesting, and may go fishing with a zero balance for IFQ species which it intends to avoid. Moreover, if a vessel fishing with a zero balance for an IFQ species were to catch that species, the vessel would have 30 days after that occurrence within which to obtain sufficient QP to cover the deficit, and if the deficit is within the carryover limit, the vessel owner has the option to opt out of the IFQ fishery for the remainder of the year and cover the deficit with QP issued in the following year. A vessel that opts out of the IFQ fishery to use the carryover provision may still fish in other fisheries during the remainder of the year, and may transfer unused QP from the vessel account to another vessel account.

Under none of these scenarios would the fisherman be in a "position of noncompliance," despite having started with a zero balance of QP.

Comment 42. Multiple commenters addressed NMFS' proposed weight conversions. Some commenters agreed with NMFS on the need for a standard, coastwide set of conversion factors for fish not landed whole. The commenters agreed with the values NMFS published in the August 31st proposed rule (75 FR 53380) for most species. For sablefish, lingcod, Pacific whiting, and skates, the commenters recommended NMFS use values from the Oregon Department of Fish and Wildlife (ODFW). Another commenter only supported a non-sector specific sablefish conversion factor of 1.6, but did not support any other proposed additional weight conversion factors at this time for several reasons.

Response. In the August 31st proposed rule (75 FR 53380), NMFS specifically requested comment on the actual values and implications of the proposed conversion factors. NMFS' intent is to have consistent coastwide conversion factors that are as consistent as possible with existing state practices. It is NMFS' understanding that processors will report on electronic fish tickets in a similar manner as the states have been doing for the state paper fish ticket system, which is to report the groundfish species to sorting groups with their current condition noted (e.g., headed and gutted (eviscerated)). If the states have more restrictive landings requirements on the species or condition that fish may be landed in, the Federal regulations will not supersede those more restrictive state requirements. The conversion factor would be applied to the state, PacFIN, or Federal data systems later in the process. While ideally the Federal weight conversion factors would be consistent with values used by the states, they are independent and may be different. As stated in the preamble to the proposed rule, Federal regulations at § 660.60(h)(5)(ii) state that Federal conversion factors will be used for participants in the Shorebased IFQ Program. However, for the limited entry fixed gear and open access fisheries, the regulations say that state conversion factors will be used.

Based on Council discussion at the September 2010 meeting and on public comment received, NMFWS has revised the regulations in this final rule to make sablefish, lingcod, and Pacific whiting consistent with the values from the Oregon Department of Fish and Wildlife (ODFW), with some exceptions, and to clarify that Federal regulations do not supersede more restrictive state regulations on landings requirements for the species or condition that fish may be landed. NMFS is not adopting ODFW conversion factors for filleted Pacific whiting, for winged skates, or for glazed sablefish because processing of groundfish is prohibited at-sea by vessels in the Shorebased IFQ Program at § 660.112(b)(1)(xii), with narrow exceptions, inapplicable here. In addition, skates are not an IFQ species. The value from ODFW for lingcod of 1.1 uses the term "gilled and gutted" which is equivalent to "gutted with the head on" in Federal regulations. The values for other groundfish species will remain as previously specified in the August 31st proposed rule, including a value for Pacific whiting that has been headed and gutted with tail removed. This conversion factor is necessary because there is an exception from the prohibition on processing at-sea for Pacific whiting for vessels that are equal to or shorter than 75-ft (23-m) that head, gut, remove tails and freeze whiting. See the section on "Changes from the Proposed Rule." The conversion factors implemented through this final rule are based on the best available information and are subject to change on the basis of improved scientific information.

Comment 43. One commenter disagreed with the proposed regulations at § 660.113(a)(4)(i) to record the weight of fish on electronic fish tickets in round weight only. The commenter suggested that the weight of fish recorded on electronic fish tickets should be the weight of the fish based on the condition it was landed in, whether dressed or round, and the conversion factors for dressed fish should be applied after the fish ticket reporting. The commenter provided several reasons why this would be preferable, including: ease for the catch monitors to verify weights without dealing with conversion factors; more assurance by NMFS and states that the correct conversion factors are applied, reducing the likelihood of confusion for buyers between state and electronic fish tickets; and consistent weights between state and electronic fish tickets.

Response. NMFS appreciates the comment and has reviewed the required information for electronic fish tickets. NMFS is developing an electronic fish ticket system where weight limit conversion factor will be automated and applied once the data is entered into the data system. Accordingly, the required information that IFQ first receivers must provide on electronic fish tickets is being revised in this final rule to require the actual weight and condition of species landed, rather than the round weight. NMFS is also requiring the vessel account number to be reported on the electronic fish ticket to accurately track landed catch to a specific vessel account. To be clear, the Federal electronic landing report (electronic fish ticket) does not replace any state reporting requirements for landings but is in addition to those requirements.

Comment 44. One commenter stated that NMFS failed to consider impacts of gear switching on fixed gear fisheries, on ports and processors dependent on species harvested by trawl gear, and on the inequities created between sectors (fixed gear and trawl) for gear conversion.

Response. As discussed in response to the commenter's similar comments on Amendments 20 and 21 to the FMP, the potential effects of the trawl rationalization program on other fisheries and on ports and processors dependent on species harvested by trawl gear are specifically addressed in the FEIS "Rationalization of the Pacific Coast Groundfish Limited Entry Trawl Fishery" in Chapter 4, Sections 4.8.2 and 4.8.3 on pages 402–409, and Section 4.9.2 on pages 413–423, respectively. Potential effects specifically due to gear switching that were analyzed in the FEIS include spillover of vessel participation, grounds competition, market competition and regional shifts in landings. These potential effects were identified and analyzed, to the extent possible, without the knowledge of observed or actual impacts. These potential impacts were highlighted for the purpose of monitoring behavioral changes in the fishery, understanding their impacts, and reacting through the Council process to minimize impacts. These matters will also be evaluated through the 5 year comprehensive review of the trawl rationalization program.

Regarding the comment about alleged inequities between sectors, under the license limitation program, trawl vessels are already allowed to use fixed gear to take the trawl allocation, albeit they must do so under the open access regulations, which have much lower limits. In contrast, fixed gear endorsements give a vessel access to the fixed gear allocation. Allowing trawl vessels to switch gear (or other vessels to acquire a trawl permit and IFQ) does not give trawl-permitted vessels access to the fixed gear quota; it merely allows the vessel to use nontrawl gear to take the trawl IFQ. Moreover, with regard to intersector allocations and allowing fixed gear to harvest trawl quota, it should be noted that trawlers who have entered the fishery since 1994 have had to buy trawl permits to access trawl quota, thus in this respect other vessels

would be on an even footing with trawl vessels. This issue of requiring a trawl permit and quota to harvest trawl quota with fixed gear was addressed in the response to comments on the Amendment 20 FEIS at page 661. On average there are about 120 trawl vessels that participate in the fishery each year; however, there are about 168 permits. This indicates some opportunity for nontrawl vessels to acquire trawl permits and use trawl IFQ. Further, it is expected that there will be consolidation in the trawl fleet, increasing the number of trawl permits potentially available for use by nontrawl vessels. Thus, despite the limited scope, the IFQ system will allow for some use of trawl IFQ by nontrawl vessels.

Comment 45. One commenter expressed support for gear switching and recommended that NMFS create incentives for permanent conversion to lower impact gears.

Response. NMFS acknowledges the comment in support of gear switching provisions in the proposed rule; however, nothing in Amendment 20 allows NMFS to provide incentives for permanent gear conversion. The Council considered and rejected permanent gear conversion in its development of alternatives for Amendment 20. The Council's rationale for rejecting permanent gear conversion is included in the FEIS at Appendix A, Section A.7, on pages A–419 to A–423. Since permanent gear conversion is not within the scope of the trawl rationalization program, NMFS declines to provide any incentives for permanent gear conversion.

Comment 46. One commenter was concerned with the timing of applying for an interim first receiver site license and the start of the fishery. The commenter suggested that, if the fishery starts January 1, 2011, no first receiver site license (interim or permanent) should be required until February 1, 2011.

Response. NMFS understands the commenter's concerns, but believes the interim first receiver site license will accommodate the needs of the fishery. Due to the quick implementation of this program, the interim first receiver site license was developed to allow industry participants time to obtain permanent site licenses. An interim first receiver site license is required before an IFQ first receiver begins accepting landings of IFQ species, which could be as early as January 1, 2011. Site licenses are required for tracking and documentation purposes to account for the landings from the quota-based program. NMFS will work with industry from the start of the program through June 30, 2011, to complete an acceptable application and monitoring plan for an annual first receiver site license, including site inspections. First receivers that have accepted Pacific whiting in the past three years are already familiar with many of the site license requirements, including preparation of a monitoring plan, and should only require some modifications to their plans such as expanding them to cover more groundfish species.

Comment 47. Some commenters stated that the maximized retention in the Shorebased IFQ Program should be consistent with the existing maximized retention fishery, where some discards are allowed for operational and safety reasons, but those discards are estimated by an observer.

Response. In the August 31st proposed rule (75 FR 53380), NMFS specifically requested comment on any implications that the prohibition on discarding may have on the prosecution of a maximized retention fishery, and further requested comment on what should constitute discarding under this provision of the Shorebased IFQ Program. NMFS agrees with the commenters that the maximized retention in the Shorebased IFQ Program should be consistent with the existing maximized retention fishery. Under current practices in the maximized retention Pacific whiting fisheries, some minor amounts of operational discard are allowed. Under trawl rationalization, any minor operational amounts of discard would be estimated by the observer and deducted from allocations. NMFS has modified the final rule language in the Shorebased IFQ Program to be consistent with the MS Coop Program language on maximized retention which allows minor operational amounts of discard which are estimated by the observer. See the section on "Changes from the Proposed Rule."

Comment 48. One commenter disagreed with the requirement that a vessel fish in a single management area during a single trip. The commenter stated that with 100 percent observer coverage, observer access to vessel location, all catch recorded, and—in the future—electronic logbooks, there is no need to restrict a vessel's operation by restricting them to a single management area per trip.

Response. Several IFQ species are either a single species with different QS by area; or are a single species in one area and a component of an assemblage, such as minor shelf rockfish or minor slope rockfish, in another. For instance, QS for sablefish is issued with area distinctions either north or south of 36° N. lat. Likewise, QS for shortspine thornyhead is issued with area distinctions either north or south of 34°27′ N. lat. One example of an IFQ species would be yellowtail rockfish, which is an individual IFQ species north of 40°10′, but a component of the minor shelf rockfish species complex south of 40°10′. Similar distinctions exist for bocaccio rockfish, chilipepper rockfish, cowcod, Pacific ocean perch, and splitnose rockfish.

Discards will be accounted for at the tow level, with 100 percent observer coverage and haul locations. However, not all retained catch will be estimated by observers. Landed catch, therefore, would not be attributable to the appropriate management area if a vessel were to fish in multiple management areas in one trip. For example, if a vessel were to catch sablefish both North and South of 36° in the same trip, it would not be possible for an IFQ first receiver to sort or for the catch monitor to verify how much sablefish was caught in either area in order to enter on the electronic fish ticket the appropriate amount for sablefish north of 36° N. lat. versus sablefish south of 36° N. lat. Nor would it be possible for NMFS to determine how much QP should be subtracted from the vessel account for their QP of each IFQ species.

NMFS raised this concern with the Council in its March 2010 meeting. Because landings are a mix of all hauls taken during a single trip, NMFS indicated its intent to implement this provision in order to simplify sorting requirements, at-sea observation, and enforcement of IFQ limits. NMFS considers this approach to be the most straightforward and efficient method to track and verify total catch of a vessel's IFQ limits for individual species and rockfish complexes. Therefore, the Council deemed, and NMFS has implemented, the requirement in the Shorebased IFQ Program for a vessel to fish in a single management area during a trip.

Comment 49. One commenter requested clarification on the provision that allows a vessel to deliver a load of fish to more than one first receiver and how that relates to the requirement that all fish be offloaded once an offload has begun.

Response. A vessel may make more than one delivery as part of the same landing. Current regulations at § 660.11 define land or landing as "to begin transfer of fish, offloading fish, or to offload fish from any vessel[;] Once transfer of fish begins, all fish aboard the vessel are counted as part of the landing." This definition does not prohibit a landing from being offloaded

through more than one delivery; however, all fish aboard a vessel at the start of the first transfer are considered part of the same landing. Current regulations at § 660.12(e)(5) prohibit vessels from landing fish without observer coverage when a vessel is required to carry an observer. The proposed regulations at §§ 660.112(b)(1)(xiii) and 660.140(h)(1) clarify that observer coverage requirements under the Shorebased IFQ Program include having an observer onboard during a trip until such time that all fish from that trip have been offloaded. Observers must also be onboard the vessel during transit from one delivery site to another. Section 660.60(h)(2) reiterates the definition of a landing at § 660.12, and clarifies that not only are all fish aboard the vessel at the time offloading begins counted as part of the same landing, but also that they would be required to be reported as such. Section 660.60(h)(2) of the proposed rule would also prohibit catcher vessels in the mothership sector from setting the gear for a subsequent haul; however, the regulations did not specify that all fish from an IFQ landing would need to be completed before a new fishing trip begins. NMFS appreciates the comment pointing to this discrepancy in the regulations, and accordingly is including additional regulatory language to clarify that an IFQ landing would need to be offloaded prior to starting a new fishing trip. See the section on "Changes from the Proposed Rule" for specific regulatory citations.

Comment 50. One commenter requested clarification on the printed record requirement for scales at first receivers as stated at § 660.140(j)(2)(i) and (ii). The commenter stated that one paragraph exempted scales used for bulk weighing from the printed record requirement while the other paragraph limits the exemption based on the purchasing record of the first receiver and other factors having nothing to do with bulk weighing.

Response. The commenter appears to have misread the exemption. Scales NOT designed for bulk weighing may be exempted from all or part of the printed record requirements (i.e. platform scales). The second paragraph referenced outlines the conditions that are required to obtain the exemption. Based on comments received from industry during public workshops, including comments about the costs for small business that do not accept large volumes of fish, NMFS considered a specific standard for this exemption as appropriate. The requirement for a printed record is to assist the catch monitor in independently monitoring the sorting and weighing processes and ensuring catch accountability. Monitoring may be conducted effectively at facilities that accept small volumes of catch, without the need for a printed record from non-bulk weighing scales, pending the first receiver ensuring that all catch is weighed and that independent verification of the weights are possible.

Comment 51. One commenter suggested that the responsibilities of the first receiver site license should go to the "holder" of the license rather than the owner of the first receiver company because the holder could be an individual other than an owner and restrictions on the license is a primary enforcement tool.

Response. NMFS agrees with the comment. NMFS is revising the final rule at § 660.140(j)(2)(i) and (j)(3) to change the regulations from "the owner of an IFQ first receiver must* * *" to "the IFQ first receiver must* * *." "IFQ first receivers" are defined in the October 31st final rule (75 FR 60868) at § 660.111 as "persons who first receive, purchase, or take custody, control, or possession of catch onshore directly from a vessel that harvested the catch while fishing under the Shorebased IFQ Program described at § 660.140, subpart D." For the first receiver site license owner, the term "license owner" is defined at § 660.11 as "a person who is the owner of record with NMFS, SFD, Permits Office of a License issued under § 660.140, subpart D" and is cross-referenced from the "permit owner" definition. See the section on "Changes from the Proposed Rule" for specific regulatory citations.

Comments on At-Sea Whiting Programs (Mothership or Catcher/Processor)

Comment 52. One commenter stated that transfers of MS/CV endorsed permits should be effective immediately rather than at the start of the next cumulative limit period because 2-month cumulative trip limits do not apply to the at-sea fishery. Another commenter agreed with NMFS' statement in the proposed rule that transfers of MS permits and C/P-endorsed limited entry permits would be effective immediately upon reissuance to the new vessel because neither of these permits would be affected by trip limits.

Response. In the August 31st proposed rule (75 FR 53380), NMFS specifically requested comment on the effective date for an MS/CV-endorsed limited entry permit's second transfer within the same year. At the September 2010 Council meeting and in the Council's letter of public comment on the August 31st proposed rule, the Council stated that the second transfer of an MS/CV-endorsed limited entry permit should be effective immediately because trip limits will not apply to the at-sea sectors (MS or C/P) in 2011 and 2012. NMFS agrees with the Council's recommendation and revised the regulations in this final rule to reflect that. See the section on "Changes from the Proposed Rule" for specific regulatory citations. NMFS also agrees with the second commenter who reaffirmed NMFS regulations in the proposed rule that transfers of MS permits and C/P-endorsed limited entry permits would be effective immediately because they are not subject to trip limits.

Comment 53. Some commenters stated that there is no need for the regulations on the at-sea sector donation program (which allows amounts over retention limits to be donated instead of discarded) because there are no 2-month cumulative trip limits in the at-sea fishery.

Response. In the August 31st proposed rule (75 FR 53380), NMFS specifically requested comment on the implications of removing or retaining the at-sea sector donation program and requested suggested language revisions. The at-sea sector donation program, called the "bycatch reduction and full utilization program for at-sea processors" in regulation, was previously established to allow vessels harvesting unsorted catch to retain and donate amounts of groundfish that were in excess of trip limits. At the September 2010 Council meeting, the Council clarified that the at-sea sector regulations should not require vessels to be subject to trip limits for bycatch of non-whiting groundfish species. In addition to public comment from the Council, another commenter supported this conclusion and both recommended that the donation program is no longer necessary. NMFS agrees with this conclusion and has removed the at-sea donation program from the regulations in this final rule. See the section on "Changes from the Proposed Rule" for specific regulatory citations.

In reviewing regulations that may no longer be necessary because of changes in the trip limit requirements for the at-sea fishery, NMFS also notes that there may be regulations that are no longer necessary or need revisions because of changes in the trip limit requirements for the Shorebased IFQ Program. For the 2011–2012 groundfish harvest specifications and management measures, the Council has recommended trip limits only for non-

IFQ species. The trawl fishery crossover provision regulations, specified in the October 1st final rule at § 660.120, list requirements for handling trip limits when a vessel crosses over a management area within a 2-month cumulative trip limit period. However, all of the species listed in this section of the regulations are now IFQ species that are no longer subject to 2-month cumulative trip limits. NMFS intends to revisit these regulations through a future action to determine if they should be removed altogether or revised with new species or based on changing management concerns.

Comment 54. One commenter asked for clarification on whether discarding of non-whiting species would be required in the absence of 2-month cumulative trip limits in the at-sea fishery.

Response. The regulations for at-sea coop programs would not require discarding of non-whiting groundfish species in the absence of 2-month cumulative trip limits. Allocations of non-whiting species to the at-sea sectors are specified at § 660.150(c) for the MS Coop Program and at § 660.160(c) for the C/P Coop Program, including allocations for some overfished non-whiting groundfish species at risk of being caught with Pacific whiting, set-asides for other non-whiting groundfish species less likely to be caught in whiting fisheries, and no allocation or set-aside for species not expected to be caught in whiting fisheries. Over time, the Council may revisit these allocations, set-asides (or lack thereof), and trip limits if catch of non-whiting groundfish species increases in the at-sea sectors.

Comment 55. One commenter agreed with NMFS' interpretation of the processor obligation for the MS Coop Program where the MS/CV-endorsed permit's catch history assignment is obligated to an MS permit for the year. The commenter also agreed with the timing of the declaration in regulations which is reported to NMFS through the annual MS/CV-endorsed limited entry trawl permit renewal and again through the MS Coop permit application.

Response. NMFS acknowledges this comment.

Comment 56. One commenter asked for clarification about items applicable to the MS Coop Program that NMFS disapproved in Amendment 20, as stated in the preamble to the August 31st proposed rule (75 FR 53380, 53396), and whether they should apply to the C/P Coop Program. In particular, the commenter questioned the requirement for coop agreements to be submitted to the Council and available for public review before the coop is authorized to go fishing, and the requirement to submit a letter to the Department of Justice and provide a copy to NMFS.

Response. On August 9, 2010, NMFS made its decision to partially approve Amendments 20 and 21 to the FMP. The preamble to the October 1st final rule (75 FR 60868) discussed the partial approval of Amendments 20 and 21. The August 31st proposed rule (75 FR 53380) for the additional program components, developed by NMFS and deemed by the Council prior to NMFS' partial approval of the amendments, contained several provisions that NMFS subsequently disapproved. The commenter correctly noted that the preamble to the August 31st proposed rule (75 FR 53380, 53396) described disapproval of items applicable to the MS Coop Program, but did not specify whether similar provisions should apply to the C/P Coop Program. The similar provisions applicable to the C/P Coop Program were not specifically contained in Amendment 20 to the FMP and thus were not specifically disapproved by NMFS' decision on the Amendments; however, they had been deemed by the Council as necessary and appropriate in the regulations for the implementation of the program. NMFS has considered the issue in light of the disapproval of provisions of Amendment 20 applicable to the MS Coop Program, and believes the reasons for disapproval apply equally to the C/P Coop Program. Accordingly, with this final rule, NMFS is removing the requirement that the C/P coop file a coop contract with the Council and make it available for public review and the requirement that the C/P coop file a letter from the Department of Justice and provide a copy to NMFS. See the section on "Changes from the Proposed Rule" for specific regulatory citations.

Items NMFS Requested Comment on in the Proposed Rule

In addition to the comments received above, NMFS specifically requested comment on several items in the proposed rule. NMFS received comments on some but not all of those items. Where NMFS has made changes to the proposed rule where comments were specifically requested, these specific requests are identified in the section on "Changes from the Proposed Rule."

Changes From the Proposed Rule

A. All Trawl Programs

I. Changes To Reflect Recent NMFS Actions

Some changes are made in this final rule to update the regulations to reflect actions that have been implemented at 50 CFR part 660 since the proposed rule (75 FR 53380, August 31, 2010) was published. The regulations in this final rule were reviewed and revised to reflect changes implemented in the final rule published on October 1, 2010 (75 FR 60868), called the "initial issuance" final rule. For example, § 660.25(b)(4)(iv)(A) was revised to include the language from the final rule regarding the restriction on changes in permit ownership during application period.

II. Changes Due to Partial Disapproval of Amendment 20

On August 9, 2010, NMFS made its decision to partially approve Amendments 20 and 21 to the FMP. The preamble to the final rule (75 FR 60868, October 1, 2010) discussed the partial approval of Amendments 20 and 21. The proposed rule (75 FR 53380, August 31, 2010), which was developed by NMFS and deemed necessary by the Council prior to NMFS' partial approval of the amendments, contained several provisions in the MS Coop Program and C/P Coop Program that NMFS subsequently disapproved. Public comment on the proposed rule requested clarification whether the items that were disapproved only affected the MS Coop Program, or whether similar provisions applicable to the C/P Coop Program would also be revised. The similar provisions applicable to the C/P Coop Program were not specifically contained in Amendment 20 to the FMP, however, they had been deemed by the Council as necessary and appropriate for the implementation of the program. NMFS has considered the issue in light of the disapproval of provisions of Amendment 20 applicable to the MS Coop Program, and believes the reasons for disapproval apply equally to the C/P Coop Program. Accordingly, with this final rule, NMFS is removing or revising regulatory language for three provisions based on the partial disapproval of Amendment 20: (1) The requirement that MS coops or the C/P coop file a coop contract with the Council and to make it available for public review [it must still be filed with NMFS]; (2) the requirement that MS coops or the C/P coop file a letter from the Department of Justice; and (3) the

requirement that MS coop agreements include a clause that at least a majority of the members are required to dissolve the coop.

The first provision stated: "Signed copies of the coop agreement must be submitted to NMFS and the Council and available for public review before the coop is authorized to engage in fishing activities." NMFS disapproved of the requirement to submit agreements to the Council and for public review because not only would it be impracticable given the timing for public review, but also could violate restrictions on the disclosure of confidential information under the MSA. Accordingly, NMFS is revising this provision in the final rule for both the MS Coop Program (§ 660.150 (d)(1)(iii)(A)) and the C/P Coop Program (§ 660.160 (d)(1)(iii)(A)) to state: "Signed copies of the coop agreement must be submitted to NMFS before the coop is authorized to engage in fishing activities." The second provision would have required coops to submit a letter to the Department of Justice requesting a business review letter on the fishery coop, and to submit copies of all such correspondence with a coop permit application. NMFS disapproved this provision because compliance with antitrust laws is a separate and distinct obligation of each and every participant and does not need to be a requirement specified in the FMP. Accordingly, NMFS is removing this provision entirely in the final rule for both the MS Coop Program (from § 660.150 (d)(1)(iii)(A)(*2*)) and the C/P Coop Program (from § 660.160 (d)(1)(iii)(A)(*2*)). The third provision would have required coop agreements in the MS Coop Program to include "A requirement that agreement by at least a majority of the members is required to dissolve the coop." NMFS disapproved this provision because it would interfere with private parties' ability to contract and agree to the terms of dissolution that are appropriate for their coop. Accordingly, NMFS is removing this provision in the final rule for the MS Coop Program from § 660.150 (d)(1)(iii)(A)(*1*).

III. Observer and Catch Monitor Programs

In the proposed rule (75 FR 53380, August 31, 2010), NMFS specifically requested comment on two alternatives to the conflict of interest provisions of the observer and catch monitor regulations. Alternative 1 (Council-deemed) represented the more narrow interpretation of the conflict of interest regulations recommended and deemed by the Council. As mentioned in the preamble to the proposed rule, NMFS had concerns that the Council's recommended regulatory language was not consistent with national policy, with conflict of interest regulations for other sectors of the groundfish fishery, or with regulations for other NMFS programs. Therefore, NMFS proposed to implement Alternative 2 (NMFS-proposed) using its authority under section 305(d) of the MSA to publish language in the final rule that differs from what was deemed by the Council. The Council discussed this issue further at their September 2010 meeting and submitted public comment on the proposed rule supporting Alternative 2 (NMFS-proposed) (see Comment 18). With this final rule, NMFS is implementing the conflict of interest regulations from Alternative 2 (NMFS-proposed) in the proposed rule for the observer programs (§§ 660.140(h)(6)(vii)), 660.150(j)(6)(vii), and 660.160(g)(6)(i)(G)) and for the catch monitor program (§ 660.18(c)).

In this final rule, NMFS has further clarified a provision at § 660.112(b)(1)(xiii), Trawl fishery—prohibitions, to make it clear that observer coverage must continue until all IFQ species from the trip are offloaded, regardless of whether the fish is delivered to one or multiple IFQ first receiver(s). Once all IFQ species from the trip are offloaded, the observer will inspect the hold to verify that all IFQ species have been offloaded, completing that trip. In addition, new prohibitions have been added to § 660.12, General groundfish prohibitions, at paragraphs (e)(9) and (f)(9) to make it clear that it is prohibited to fail to meet observer provider and catch monitor provider responsibilities.

Also in this final rule, NMFS has further clarified provisions in the observer program regulations on the effective date of a decertification. The following sentence has been added to regulations at §§ 660.140(h)(6)(ix)(C), 660.150(j)(6)(ix)(C), 660.160(g)(6)(i)(I)(*3*), "Decertification is effective 30 calendar days after the date on the IAD, unless there is an appeal." Language for the observer and catch monitor regulations at §§ 660.18, 660.140(h), 660.150(j), and 660.160(g) have also been revised to make the language on the IAD and appeals more consistent between these sections and with the IAD and appeals language for the trawl rationalization permits and endorsements. Language in these sections has also been revised to make them as consistent with each other as appropriate.

With this final rule, language at § 660.17, Catch monitors and catch monitor providers, and at § 660.18, Certification and decertification procedures for catch monitors and catch monitor providers, was revised in some places to replace the terms "processor" or "processing facility" with "first receiver." Language in these sections has also been revised to make them as consistent as possible with similar provisions for the observer program at §§ 660.140(h), 660.150(j), and 660.160(g). New language was added to the catch monitor provider responsibilities at § 660.17(e)(1)(vii) consistent with similar requirements for the observer program to include additional specifications for the health and fitness exams of catch monitors, including a certificate of insurance. In § 660.17(e)(1)(ix) regarding priority given to candidates that prove their knowledge of West Coast marine species, ability to communicate in writing, etc. was deleted from this final rule because it is not necessary to specify in regulation. Also consistent with the observer program requirements, a new paragraph was added to the catch monitor provider responsibilities at § 660.17(e)(14) to include information on catch monitor training certificate, annual briefing requirement, and validity of the certificate.

With this final rule, a sentence was deleted from § 660.140(i)(2) that stated, "IFQ first receivers are responsible for all associated costs including training time, debriefing time, and lodging while deployed." This sentence was deleted because this is a requirement of the catch monitor provider. The contract between the catch monitor provider and the first receiver will determine the cost paid for catch monitor services.

Based on public comment received (see Comment 23), NMFS is removing regulations regarding telephone access while processing whiting (§ 660.140(i)(4)(iv) of the August 31st proposed rule) because they are no longer necessary.

IV. Initial Issuance Appeals Deadline

NMFS has decided to extend the deadline to appeal an IAD for the initial issuance of the following permits and endorsements: QS permit and associated QS and/or IBQ, MS permit, MS/CV endorsement and associated catch history assignment, and C/P endorsement. Upon further consideration, NMFS is extending the deadline published in the October 1st final rule (75 FR 60868) from 30 calendar days to 60 calendar days. NMFS believes this extension of time is warranted given the time of year in which NMFS anticipates sending out IADs and the potential difficulties in

meeting a 30 day deadline due to holidays, with corresponding reduced staffing, increased administrative burdens, and potential postal delays. Additionally, the extension provides applicants more time to gather documentation in support of any appeal that applicants may wish to make. The regulations at §§ 660.25(g)(4), 660.140(d)(8)(ix), 660.150(f)(6)(vi) and (g)(6)(viii), and 660.160(e)(6)(vii) are revised to reflect the 60 calendar day deadline to appeal an IAD.

V. Minor Edits

NMFS has made some minor edits to the regulations to make terminology more consistent (e.g., references to shorebased IFQ fishery are edited to read Shorebased IFQ Program) and to correct typographical errors and technical errors (e.g., capitalize Shorebased IFQ Program; use "an" before MS permit and MS/CV-endorsed permit; and add a hyphen to "MS/CV-endorsed" and "C/P-endorsed"). In addition, in § 660.25(b)(4) regarding limited entry permits, NMFS has replaced the term "transfer" with "change in vessel registration" as appropriate to distinguish such transfers from changes in permit ownership. To the extent that "transfer" may be used in other sections where a similar confusion may arise, NMFS intends to clarify the term as appropriate in future rulemakings.

B. Shorebased IFQ Program

I. General

Some general changes are made to regulatory language in this final rule. Similar to what was implemented with the "initial issuance" final rule (75 FR 60868, October 1, 2010), where appropriate, the terms "QS" and "QP" have been revised to read "QS and IBQ" and "QP or IBQ pounds," respectively. Pacific halibut is listed as an IFQ species. Pacific halibut, however, has an individual bycatch quota (IBQ) which is distinct from QS for groundfish species listed under the groundfish FMP. This change is to make it clear that Pacific halibut IBQ and IBQ pounds are distinct and may be managed differently than QS or QP.

II. Maximized Retention in the Pacific Whiting IFQ Fishery

In the proposed rule (75 FR 53380, August 31, 2010), NMFS specifically requested comment on any implications that the prohibition on discarding may have on the prosecution of a maximized retention fishery, and further requested comment on what should constitute discarding under this provision of the Shorebased IFQ Program. NMFS received two comments on this issue, both of which stated that the maximized retention provision in the Shorebased IFQ Program should be consistent with the existing maximized retention fishery, where some discards are allowed for operational and safety reasons, but those discards are estimated by an observer (see Comment 47). Under current practices in the maximized retention Pacific whiting fisheries, some minor amounts of operational discard are allowed. Under trawl rationalization, any minor operational amounts of discard would be estimated by the observer and deducted from allocations. NMFS raised this issue at the Council's March 2010 meeting for the maximized retention fishery in the mothership sector (Agenda Item E.6.b, NMFS Report 1, March 2010, #25). For the Shorebased IFQ Program, however, the Council motion was ambiguous. In the proposed rule, NMFS proposed regulations consistent with the Council motion, but not consistent with current practice nor with regulations for the MS Coop Program. With this final rule and based on public comment, NMFS is revising the language at § 660.140(g)(2) to be consistent with the MS Coop Program language at § 660.150(i). The revised language reads, "Maximized retention vessels participating in the Pacific whiting IFQ fishery may discard minor operational amounts of catch at sea if the observer has accounted for the discard (i.e., a maximized retention fishery)." In addition, the prohibition on discarding IFQ species at § 660.112(b)(1)(xiv) is revised to clarify that it is prohibited to discard IFQ species at sea unless that discard has been documented or estimated by an observer.

III. Weight Limits and Conversions

In the proposed rule (75 FR 53380, August 31, 2010), NMFS specifically requested comment on the actual values and implications of the proposed conversion factors. NMFS received multiple comments on this issue (see Comment 42). Based on the September 2010 Council meeting and on public comment received, the regulations at § 660.60(h)(5) have been revised in this final rule to make sablefish, lingcod, and Pacific whiting consistent with the values from ODFW (with some exceptions, described below) and to clarify that Federal regulations do not supersede more restrictive state regulations on landings requirements for the species or condition that fish may be landed. There will not be a Federal conversion factor for filleted Pacific whiting, for winged skates, or for glazed sablefish because processing of groundfish is prohibited at-sea by vessels in the Shorebased IFQ Program at § 660.112(b)(1)(xii), with narrow exceptions, inapplicable here. In addition, skates are not an IFQ species and so are not appropriate to be included. The value from ODFW for lingcod of 1.1 uses the term "gilled and gutted" which is equivalent to "gutted with the head on" in Federal regulations. The values for other groundfish species will remain as previously specified in the August 31st proposed rule. The conversion factors implemented through this final rule are based on the best available scientific information and may change in a future rulemaking based on improved science.

In this final rule, NMFS is also revising regulations at § 660.113(b)(4)(i) on recordkeeping and reporting for electronic fish tickets in the Shorebased IFQ Program. In making the revisions to the weight limit and conversions regulations and in response to public comment (see Comment 43), NMFS reviewed the required information for electronic fish tickets. NMFS is developing an electronic fish ticket system where weight limit conversion factor will be automated and applied once the data is input in the data system. Accordingly, the required information that IFQ first receivers must provide on electronic fish tickets is being revised in this final rule to require the actual weight and condition of species landed, rather than the round weight. NMFS is also requiring the vessel account number to be reported on the electronic fish ticket to accurately track landed catch to a specific vessel account.

IV. Landing Groundfish in the Shorebased IFQ Program

NMFS received public comment requesting clarification of the provision that allows a vessel to deliver a load of fish to more than one first receiver and how that relates to the requirement that all fish be offloaded once an offload has begun (see Comment 49). Based on the public comment received, NMFS is further clarifying this provision in the final rule at § 660.60(h)(2) and is adding a prohibition at § 660.112(b)(1)(xv). These changes will clarify that a vessel participating in the Shorebased IFQ Program may not begin a new fishing trip until all fish aboard the vessel have been offloaded.

V. IFQ Species and Species Groupings

The regulations at § 660.140(c)(1), as specified in the initial issuance final rule (75 FR 60868, October 1, 2010), list

the IFQ species/species groups and area specific designations for those species. Those regulations also state that the IFQ species groupings and area subdivisions will be those for which OYs are specified in the ABC/OY tables, and those for which there is an area-specific precautionary harvest policy. Upon further review, NMFS determined that the IFQ species list published in the initial issuance final rule did not match the ABC/OY table, in particular with regards to area designations for those species. The description of IFQ species in this section needs to be clarified in order for the reallocation provisions (§ 660.140(c)(3)(vii)) to be applied in the future. This final rule clarifies the area designations at § 660.140(c)(1) for the following IFQ species: Pacific ocean perch (north of 40°10′ N. lat.), chilipepper rockfish (south of 40°10′ N. lat.), bocaccio (south of 40°10′ N. lat.), splitnose rockfish (south of 40°10′ N. lat.), yellowtail rockfish (north of 40°10′ N. lat.), cowcod (south of 40°10′ N. lat.), minor shelf rockfish complex north (of 40°10′ N. lat.), minor shelf rockfish complex south (of 40°10′ N. lat.), minor slope rockfish complex north (of 40°10′ N. lat.), and minor slope rockfish complex south (of 40°10′ N. lat.). Similarly, language is revised to reflect these area designations in the tables at § 660.140(d)(4)(i)(C) on the QS and IBQ control limits and at § 660.140(e)(4)(i) on the vessel limits.

In addition, NMFS is clarifying regulations at § 660.140(c)(1) in this final rule to reference the definition of "Groundfish" at § 660.11 for the list of which individual groundfish species are included in the minor shelf complex north and south of 40°10′ N. lat., in the minor slope complex north and south 40°10′ N. lat., and in the other flatfish complex.

VI. QS Accounts and Vessel Accounts

With this final rule, NMFS has expanded the description of the operation of QS accounts and vessel accounts. NMFS has further clarified regulations to require designated account managers for both QS accounts and vessel accounts; to prohibit QP and IBQ pound transfers between vessel accounts from December 15 through 31 each year in order to allow NMFS to reconcile accounts; and to clarify that once a QS account transaction or vessel account transaction has been accepted by the transferee, the transaction will be considered final and permanent. In addition to these more substantive changes which are further described below, NMFS has made some minor changes to these regulations to make the QS account regulations and vessel account regulations more consistent with each other. For example, information on the type of computer access necessary to use the vessel account has been added to the regulations at § 660.140(e), consistent with the regulations for the QS account.

The proposed rule generally described QS accounts and vessel accounts that NMFS will use to manage QS and IBQ, and QP and IBQ pounds, respectively. The final rule expands upon this description, providing further detail of how the QS accounts and vessel accounts will operate. The revised paragraph describes how NMFS will manage QS accounts and vessel accounts, particularly with regards to how NMFS will issue QP and IBQ pounds each year, how NMFS will adjust QS and IBQ amounts if and when necessary, and the mechanics for operation of these accounts. Additionally, NMFS has clarified how the operation of online access to these accounts will function, particularly in regard to transfers between accounts.

In the proposed rule (75 FR 53380, August 31, 2010), the vessel account regulations (§ 660.140(e)) specified an account manager, but the same requirement was not specified under the QS account regulations (§ 660.140(d)(3)). A designated account manager is necessary for either a QS account or a vessel account in order to manage the account activity in cases where the account owner is a business (individuals may name themselves as an account manager). Without a designated account manager when the account owner is a business, sensitive information (*e.g.,* notices of account activity or the personal identification number (PIN) or password) may not get directed to the proper person. The designated account manager would be identified to NMFS through the QS permit or vessel account renewal process (except that for the 2011 fishery, the designated QS account manager may be requested by NMFS through a separate process because this information was not included on the initial issuance applications for QS permits). The designated account manager's contact information, such as phone number and email, would be requested. Their email address, while optional, provides the most flexibility and quickest resource for disseminating information. The designated account manager is an extension of what NMFS brought forward at the June 2010 Council meeting (Agenda Item B.6.b, Supplemental NMFS Report 3, June 2010, #10) which stated that NMFS would issue a unique ID and PIN to account owners. If the account owner is not a business but is an individual person, the account owner would be the designated account manager. Because of the sensitive nature of this information and because account owners may be businesses, NMFS is revising language in this final rule to identify designated account managers and their contact information for QS accounts and for vessel accounts.

There may be times when transactions in QS accounts and vessel accounts may need to be prohibited. As stated in the August 31st proposed rule for both types of accounts, "during the year there may be situations where NMFS deems it necessary to prohibit transfers (i.e., account reconciliation, system maintenance, or for emergency fishery management reasons)." In addition, the August 31st proposed rule stated that, for QS accounts, transactions are prohibited between December 1 and December 31 each year. This prohibition is intended to provide time for the QS account to remain stable for a period of time prior to the start of the next fishing year so that NMFS can issue the corresponding QP and IBQ pounds in to the QS account (*see* Council's June 2010 meeting, Agenda Item B.6.b, Supplemental NMFS Report 3, #9). Upon further consideration and as the logical extension of what was proposed, NMFS has determined to apply a similar requirement to vessel accounts as that proposed for QS accounts. For vessel accounts, this prohibition is intended to allow time for the vessel account to remain stable in order to calculate any carryover provisions that would be applicable for the next fishing year. However, QP and IBQ pounds in vessel accounts need to be available as late as possible in the year to provide flexibility to fishermen fishing later in the year and to allow vessel account owners to cover deficits. Therefore, for vessel accounts, NMFS has adopted a shorter time for the agency to reconcile the account, approximately two weeks. With this final rule, regulations at § 660.140(e) have been revised to prohibit QP and IBQ pound transfers between vessel accounts from December 15 through 31 each year. This provision may be reviewed and revised through a future rulemaking based on experience during the first years of the program.

NMFS has clarified in this final rule at § 660.140(d)(3) and (e) that transactions in QS accounts or vessel accounts are final and permanent once the transaction is accepted by both parties. NMFS will not review or undo these transactions once they are accepted by both parties. If one of the parties feels the transaction was for the wrong amount, they would need to

resolve any dispute over the transaction on their own independently of NMFS, and if an adjustment is needed to resolve the dispute, would need to conduct another transfer. NMFS will only review transactions if an error is identified with NMFS' online system.

VII. Transfers of QS and/or IBQ

The proposed rule would prohibit transfer of QS or IBQ in the first two years of the program except under U.S. court order as approved by NMFS. NMFS recognizes, however, that there may be some circumstances where a court may authorize the distribution of assets, including QS or IBQ, without a specific court order. Such a circumstance may arise as a result of death or dissolution of a QS owner, such as in probate or in a bankruptcy action. Based on public comment received, the regulations at § 660.140(d)(3)(ii)(B)(*1*) have been revised in this final rule to allow QS and IBQ transfers during the first two years of the program under a U.S court order or authorization, to accommodate such circumstances (see Comment 29). Such transfers would still be subject to NMFS' approval, including a determination of the transferee's eligibility to own QS and a determination that the transferee's ownership interest would not exceed applicable control limits (see Comment 30).

VIII. Eligibility To Own a QS Permit

The August 31st proposed rule (75 FR 53380) included language that states that eligibility to own and control a U.S. fishing vessel with a fishery endorsement pursuant to 46 U.S.C. 12113 is required for U.S. citizens, permanent resident aliens, and for corporations, partnerships, or other entities, in order to be eligible to own a QS permit. However, application of Title 46 of the U.S. Code to U.S. citizens or permanent resident aliens in this context is confusing. Under 46 U.S.C. 12113, all U.S. citizens are automatically eligible to own and control a U.S. fishing vessel with a fishery endorsement, thus the additional language is redundant. Also, under 46 U.S.C. 12113, all permanent resident aliens are ineligible to own and control a U.S. fishing vessel with a fishery endorsement, thus the additional language appears to effectively bar permanent resident aliens from owning a QS permit. In this final rule, NMFS has retained the language deemed by the Council in the proposed rule. However, NMFS will continue to assess this issue, and if appropriate, may request further consideration by the Council.

IX. Carryover Provision

In the proposed rule, NMFS included a provision that would allow a vessel owner to cover a deficit in the vessel account with QP from the following year if the deficit is within the carryover limit and the vessel declares out of the IFQ fishery for the remainder of the year prior to the 30-day deadline by which a deficit would otherwise be required to be covered. The declaration by the vessel owner that the vessel opts out of the IFQ fishery for the remainder of the year would notify NMFS enforcement in order to delay opening an investigation for failure to cover the deficit within 30 days. The proposed regulation, however, did not specify how the vessel owner would be able to declare out of the fishery. In this final rule, NMFS has specified that the vessel owner could declare out of the IFQ fishery by a written letter to the NMFS Office of Law Enforcement declaring the vessel owner's intent to declare out of the Shorebased IFQ Program for the remainder of the year and invoke the carryover provision to cover the deficit. Because the declaration would provide evidence documenting the vessel owner's intent to remain out of the fishery for the remainder of the year, NMFS has determined that the letter from the vessel owner must be signed, dated, and notarized. If the deficit occurs less than 30 days before the end of the calendar year, declaring out of the Shorebased IFQ Program for the remainder of the year would not be required, however, the vessel owner must notify the NMFS Office of Law Enforcement of the owner's intent to invoke the carryover provision to cover the deficit. This final rule clarifies what would meet the carryover provision requirement for declaring out of the fishery for the remainder of the year.

X. IFQ First Receiver and First Receiver Site Licenses

NMFS is revising the final rule at § 660.140(j)(2)(i) and (j)(3) to change the regulations from "the owner of an IFQ first receiver must * * *" to "the IFQ first receiver must * * *." This change is being made to clarify that the obligation applies to the IFQ first receiver, and is being made after further consideration and review of the record and in response to public comment (see Comment 51).

In addition, NMFS is revising this final rule at § 660.140(f) to clarify the first receiver site license application process and to revise language to be clear that the non-interim site licenses are effective for one year from the date of issuance. A catch monitoring plan, including a written request for a site inspection, must be submitted with a first receiver site license application. Once NMFS receives the application package, NMFS will contact the applicant to arrange a site inspection.

C. At-Sea Coop Programs

Some changes from the August 31st proposed rule (75 FR 53380) for the At-sea Coop Programs, both the MS Coop Program and the C/P Coop Program, resulting from items disapproved in Amendment 20 were discussed previously in the preamble for this final rule under "A. All Trawl Programs, II. Changes due to Partial Disapproval of Amendment 20."

I. Effective Date of Permit Transfers and No Trip Limits

In the proposed rule (75 FR 53380), NMFS specifically requested comment on the effective date for an MS/CV-endorsed limited entry permit's second transfer within the same year. At the September 2010 Council meeting and in the Council's letter of public comment on the August 31st proposed rule, the Council stated that the second transfer of an MS/CV-endorsed limited entry permit should be effective immediately because trip limits will not apply to the at-sea sectors (MS or C/P) in 2011 and 2012. Based on the September 2010 Council meeting and on public comment received (see Comment 52), the regulations at § 660.25(b)(4)(vi)(C) have been revised in this final rule to make the second transfer of an MS/CV-endorsed limited entry permit effective immediately. In addition, the regulations at § 660.131(b)(3), Trip limits in the whiting fishery, have been clarified in this final rule to be clear that they only apply to the Shorebased IFQ Program.

II. At-Sea Sector Donation Program

In the proposed rule (75 FR 53380), NMFS specifically requested comment on the implications of removing or retaining the at-sea sector donation program and requested suggested language revisions. The at-sea sector donation program was an optional provision in the August 31st proposed rule regulations at § 660.131(g), where it was called the "bycatch reduction and full utilization program for at-sea processors." This program was previously established to allow vessels harvesting unsorted catch in the at-sea sectors to retain and donate amounts of groundfish that were in excess of trip limits. At the September 2010 Council meeting, the Council clarified that the at-sea sector regulations should not require vessels to be subject to trip

limits for bycatch of non-whiting groundfish species. Therefore, the donation program is no longer necessary. Based on the September 2010 Council meeting and on public comment received which supported removal of donation program (see Comment 53), the proposed rule regulations at § 660.131(g) have been removed in this final rule.

III. MS Coop Program Processor Obligation for 2011

In this final rule, NMFS is revising regulations for the timing of the processor obligation provision in the MS Coop Program for 2011. The regulations specifying coop agreement contents for the MS Coop Program include a clause stating that each MS/CV-endorsed permit must have notified a specific MS permit by September 1 of the previous year of that MS/CV-endorsed permit's intent to obligate its catch history assignment to that MS permit in that year. Because these regulations will not be effective until after September 1, 2010, this clause must be adjusted for application to the 2011 fishery. This final rule revises the regulations at § 660.150(d)(1)(iii)(A)(*1*)(*iii*) to require a coop agreement to include "[a] processor obligation clause indicating that each MS/CV-endorsed permit has notified a specific MS permit by September 1 of the previous year of that MS/CV-endorsed permit's intent to obligate its catch history assignment to that MS permit, except that for the 2011 fishery, such notification must have been made prior to submission of the MS coop permit application."

IV. Minor Edits

NMFS has made some minor edits to the regulations to make references in the regulatory text consistent. Specifically, this final rule revises language to make references in § 660.25(e)(1) and (2) consistent with the categories in the paragraph headers at § 660.150 for MS coop permits and § 660.160 for the C/P coop permit. The revised language removes references to "renewal" and "change of permit ownership" because these provisions do not apply to coop permits. In addition, the regulations at § 660.111, "accumulation limit" (2)(i), is revised to clarify that the MS permit usage limit only applies to a person "owning an MS permit."

Classification

The NMFS Assistant Administrator has determined that this final rule is consistent with the Pacific Coast Groundfish FMP, other provisions of the MSA, and other applicable law. To the extent that the regulations in this final rule differ from what was deemed by the Council, NMFS invokes its independent authority under 16 U.S.C. 1855(d).

NMFS and the Council prepared final environmental impact statements (EISs) for Amendment 20 and for Amendment 21 to the Pacific Coast Groundfish FMP. A notice of availability was published on June 25, 2010 (75 FR 36386). In partially approving FMP Amendments 20 and 21 on August 9, 2010, NMFS issued a Record of Decision (ROD) for each amendment identifying the selected alternatives. Copies of the RODs are available from NMFS (*see* **ADDRESSES**).

NMFS finds good cause to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(3), so that this final rule may become effective January 1, 2011. The trawl rationalization program has been developed through the public fishery management council process since 2003 and has culminated in multiple rulemakings over the fall of 2009 through 2010. NMFS announced through the Pacific Fishery Management Council process and through these rulemakings its intent to implement this program on January 1, 2011. The public has been aware of this implementation date. In addition, NMFS has conducted numerous outreach workshops along the West Coast over the fall of 2010 to assist the affected public in preparing for January 1, 2011 implementation (*see* response to comment 5 in the preamble). NMFS has also provided outreach specifically to the shorebased IFQ first receivers for the new requirements under the program and also provided an interim first receiver site license with a shortened issuance process in order to facilitate implementation on January 1. In addition, NMFS provided preliminary guidance during the fall of 2010 to assist first receivers in preparing their catch monitoring plans in anticipation of a January 1, 2011 implementation.

NMFS has determined it is critical to the fishery to implement this program on January 1, 2011, the start of the fishing year. The program creates a system where participants can choose when to fish during the year, giving them ample time to harvest their available catch and to come into compliance with these regulations. Under the Shorebased IFQ Program, fishermen can choose when to fish between January 1 and December 15 every year. Under the At-Sea Coop Programs, fishermen can choose when to fish after their season opens in the spring through December every year. Thus, the program provides fishermen with more individual choice on when to fish than the two-month cumulative limit system that was in place before the trawl rationalization program. Delaying the effectiveness of this rule and beginning January 1 with the two-month cumulative limit system in place prior to implementing the trawl rationalization program would be confusing to the public, would cause problems in the fishery, and would be contrary to the public good. If the trawl fishery starts the year with two-month cumulative limits, the fleet could catch up to the available trip limits for some groundfish species, which could create an incentive for participants to fish as much as possible at the start of the year, especially if the participant knew they did not receive much initial allocation of certain groundfish species. There would then be a lag time of up to several months before the landings data would be available to determine the remaining amount of catch available to the trawl fishery to start the trawl rationalization program. There is likelihood that some species could have little or no harvest remaining for the trawl rationalization program in 2011. Thus, a delay in the effectiveness of the program could require unnecessarily restrictive measures later in the year, including possible fishery closures, to make up for harvest that would be allowed under the two-month cumulative limits at the start of the year. In addition, it would be confusing to the public to have two different systems of regulations including, but not limited to, different harvest limits, observer requirements, permit requirements, and reporting requirements. These reasons constitute good cause under authority contained in 5 U.S.C. 553(d)(3), to establish an effective date less than 30 days after date of publication.

This final rule has been determined to be significant for purposes of Executive Order 12866.

The preamble to the proposed rule (75 FR 53380, August 31, 2010) included a detailed summary of the analyses contained in the IRFA. NMFS, pursuant to section 604 of the Regulatory Flexibility Act (RFA) prepared a FRFA in support of this rule. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS's responses to those comments. A copy of the FRFA is available from NMFS (*see* **ADDRESSES**) and a summary of the FRFA follows:

The Council prepared two EIS documents: Amendment 20—Rationalization of the Pacific Coast Groundfish Limited Entry Trawl Fishery, which creates the structure and management details of the trawl fishery

rationalization program; and Amendment 21—Allocation of Harvest Opportunity Between Sectors of the Pacific Coast Groundfish Fishery, which allocates the groundfish stocks between trawl and non-trawl fisheries. Each of the two EIS's prepared by the Council provide economic analyses of the Council's preferred alternatives and draft RIR and IRFAs (DEIS IRFAs). The DEIS IRFAs were updated and combined into a single RIR/IRFA for use with the "initial issuance" proposed rule that was published on June 10, 2010 (75 FR 32994) (June 10th PR IRFA). The June 10th PR IRFA reviewed and summarized the benefits and costs, and the economic effects of the Council's recommendations as presented in the two EIS's. In addition, the June 10th PR IRFA contained additional information on characterizing the participants in the fishery and on the tracking and monitoring costs associated with this program.

The June 10th PR IRFA analyzed the overall program as recommended by the Pacific Fishery Management Council. The analysis encompassed aspects of the initial issuance rule which establishes the allocations set forth under Amendment 21 and procedures for initial issuance of permits, endorsements, quota shares, and catch history assignments under the IFQ and coop programs. It also encompassed this rule—the "program components" rule which provides additional details, including: Program components applicable to IFQ gear switching, observer programs, retention requirements, equipment requirements, catch monitors, catch weighing requirements, coop permits/agreements, first receiver site licenses, quota share accounts, vessel accounts, further tracking and monitoring components, and economic data collection requirements. Revenue and landings data in the RIR/IRFA for the program components proposed rule (75 FR 53380, August 31, 2010) (August 31st PR IRFA) were updated based on recent analysis by the Council (Appendix F: Historical Landings and Revenue in Groundfish Fisheries; Agenda Item B.3.a, Attachment 3, June 2010). The Council analysis provided revenue trends based on inflation adjusted dollars where estimates are adjusted to current (2009) dollars. The August 31st PR IRFA was also revised based on comments received on the initial issuance rule and included a discussion of the other alternatives considered by the Council.

Although other alternatives were examined, the FRFA focused on the two key alternatives—the No-Action Alternative and the Preferred Alternative. The EISs include an economic analysis of the impacts of all the alternatives and the August 31st PR IRFA and the FRFA incorporate this analysis. For the Amendment 20 EIS, the alternatives ranged from status quo (no action), to IFQ for all trawl sectors, IFQ for the non-whiting sector and coops for all whiting sectors, and IFQ for the shorebased sector and coops for the at-sea sectors (preferred). Various elements were part of each of these alternatives and varied among them, including initial qualifications and allocations, accumulation limits, grandfathering, processor shares, species covered, number of sectors, adaptive management, area management, and carryover provisions. The preferred alternative was a blending of components from the other alternatives analyzed in the EIS. For the Amendment 21 EIS, alternatives were provided for 6 decision points: (1) Limited entry trawl allocations for Amendment 21 species, (2) shoreside trawl sector allocations, (3) trawl sector allocations of trawl-dominant overfished species, (4) at-sea whiting trawl sector set-asides, (5) Pacific halibut total bycatch limits, and (6) formal allocations in the FMP. For most of these decision points, the alternatives within them were crafted around approximately maintaining historical catch levels by the sectors or, in some cases, increasing opportunity for the non-trawl sector.

By focusing on the two key alternatives in the August 31st PR IRFA and in the FRFA (no action and preferred), it encompasses parts of the other alternatives and informs the reader of these regulations. The analysis of the no action alternative describes what is likely to occur in the absence of the proposed action. It provides a benchmark to compare the incremental effects of the action. Under the no action alternative, the current, primary management tool used to control the Pacific coast groundfish trawl catch includes a system of two month cumulative landing limits for most species and season closures for Pacific whiting. This management program would continue under the no action alternative. Only long-term, fixed allocations for Pacific whiting and sablefish north of 36° N. lat. would exist. All other groundfish species would not be formally allocated between the trawl and non-trawl sectors. Allocating the available harvest of groundfish species and species complexes would occur in the Council process of deciding biennial harvest specifications and management measures and, as such, would be considered short term allocations.

The analysis of the preferred alternative describes what is likely to occur as a result of the action. Under the preferred alternative, the existing shorebased whiting and shorebased non-whiting sectors of the Pacific Coast groundfish limited entry trawl fishery would be managed as one sector under a system of IFQs, and the at-sea whiting sectors of the fishery (i.e., catcher-processor sector and mothership sector, which includes motherships and catcher vessels) would be managed under a system of sector-specific harvesting cooperatives (coops). The catcher-processor sector would continue to operate under the existing, self-developed coop program entered into voluntarily by that sector. A distinct set of groundfish species and Pacific halibut would be covered by the rationalization program. Amendment 20 would include a tracking and monitoring program to assure that all catch (including discards) would be documented and matched against QP. The Council specified that observers would be required on all vessels and shorebased monitoring (catch monitors) would be required during all off-loading (100 percent coverage). Compared to status quo monitoring, this would be a monitoring and observer coverage level increase for a large portion of the trawl fleet, particularly for non-whiting shorebased vessels.

The limited entry trawl fishery is divided into two broad sectors: a multi-species trawl fishery, which most often uses bottom trawl gear (hereafter called the non-whiting fishery), and the Pacific whiting fishery, which uses midwater trawl gear. Over the 2005–2009 period, these fisheries when combined have average annual inflation adjusted revenues of about $57 million and total landings of about 215,000 tons. The non-whiting fishery has been principally managed through 2-month cumulative landing limits along with closed areas to limit overfished species bycatch. Fishery participants target the range of species described above with the exception of Pacific whiting. By weight, the vast majority of trawl vessel groundfish is caught in the Pacific whiting fishery. In contrast, the non-whiting fishery accounts for the majority of limited entry trawl fishery ex-vessel revenues. On average, for the period 2005–2009, Pacific whiting accounted for about 90 percent of the quantity of groundfish landed in the limited entry trawl fishery, but only 44 percent of the value due to their relatively low ex-vessel price.

Non-whiting trawl vessels deliver their catch to shoreside processors and buyers located along the coasts of Washington, Oregon, and California, and tend to have their homeports located in towns within the same general area where they make deliveries, though there are several cases of vessels delivering to multiple ports during a year. Some Pacific whiting trawl vessels are catcher-processors, which, as their name implies, process their catch on-board, while other vessels in this sector deliver their catch to shoreside processors or motherships that receive Pacific whiting for processing but do not directly harvest the fish.

Over time, landings in the limited entry trawl fishery have fluctuated, especially on a species-specific basis. Pacific whiting has grown in importance, especially in recent years. Through the 1990s, the volume of Pacific whiting landed in the fishery increased. In 2002 and 2003, landings of Pacific whiting declined due to information showing the stock was depleted and the subsequent regulations that restricted harvest in order to rebuild the species. Over the years 2005–2009, estimated Pacific whiting ex-vessel revenues averaged about $25 million (figures have been adjusted to 2009 dollars to account for inflation). In 2008, these participants harvested about 216,000 tons of whiting worth about $51 million in ex-vessel revenues, based on shorebased ex-vessel prices of $235 per ton, the highest ex-vessel revenues and prices on record. In comparison, the 2007 fishery harvested about 214,000 tons worth $29 million at an average ex-vessel price of about $137 per ton while the 2009 non-tribal fishery harvested about 99,000 tons worth about $12 million at a price of $120 per ton.

While the Pacific whiting fishery has grown in importance in recent years, harvests in the non-whiting component of the limited entry trawl fishery have declined steadily since the 1980s. Non-whiting trawl ex-vessel revenues (adjusted for inflation) in the fishery peaked in the mid 1990s at about $40 million. Following the passage of the Sustainable Fisheries Act (1996) and the listing of several species as overfished, harvests became increasingly restricted and landings and revenues declined steadily until 2002. Over the period 2005 to 2009, inflation adjusted ex-vessel revenues from groundfish in the non-whiting trawl sector have averaged $27 million annually; ranging from $24 million (2005) to $32 million (2008). The 2009 fishery earned $30 million in ex-vessel revenues. Under the trawl rationalization program, shorebased whiting sector will be joined with the shorebased non-whiting sector. For perspective, when these fisheries are combined, their total ex-vessel revenues have averaged about $36 million annually over the last five years.

Expected Effects of Amendment 21—Intersector Allocation

The allocation of harvest opportunity between sectors under the new regulations (75 FR 60868, October 1, 2010) does not differ significantly from the allocation made biennially under the no action alternative. The primary economic effect of the long-term allocation under the new regulations is to provide more certainty in future trawl harvest opportunities, which would enable better business planning for participants in the rationalized fishery. As described elsewhere, the trawl rationalization program could create an incentive structure and facilitate more comprehensive monitoring to allow bycatch reduction and effective management of the groundfish fisheries. In support of the trawl rationalization program, the main socioeconomic impact of Amendment 21 allocations is longer term stability for the trawl industry. While the preferred Amendment 21 allocations do not differ significantly from status quo ad hoc allocations made biennially, there is more certainty in future trawl harvest opportunities, which enables better business planning for participants in the rationalized fishery. This is the main purpose for the Amendment 21 actions. The economic effects of Amendment 21 arise from the impacts on current and future harvests. The need to constrain groundfish harvests to address overfishing has had substantial socioeconomic impacts. The groundfish limited entry trawl sector has experienced a large contraction, spurred in part by a partially federally-subsidized vessel and permit buyback program implemented in 2005. This $46 million buyback program was financed by a Congressional appropriation of $10 million and an industry loan of $36 million. Approximately 240 groundfish, crab, and shrimp permits were retired from state and federal fisheries, and there was a 35 percent reduction in the groundfish trawl permits. To repay the loan, groundfish, shrimp and crab fisheries are subject to landings fees. Follow-on effects of the buyback have been felt in coastal communities where groundfish trawlers comprise a large portion of the local fleet. As the fleet size shrinks and ex-vessel revenues decline, income and employment in these communities is affected. Fishery-related businesses in the community may cease operations because of lost business. This can affect non-groundfish fishery sectors that also depend on the services provided by these businesses, such as providing ice and buying fish. An objective to the trawl rationalization program is to mitigate some of these effects by increasing revenues and profits within the trawl sector. However, because further fleet consolidation is expected, the resulting benefits are likely to be unevenly distributed among coastal communities. Some communities may see their groundfish trawl fleet shrink further as the remaining vessels concentrate in a few major ports. Species subject to Amendment 21 allocations would be: lingcod, Pacific cod, sablefish south of 36° N. lat., Pacific ocean perch, widow rockfish, chilipepper rockfish, splitnose rockfish, yellowtail rockfish north of 40° 10′ N. lat., shortspine thornyhead (north and south of 34° 27′ N. lat.), longspine thornyhead north of 34° 27′ N. lat., darkblotched rockfish, minor slope rockfish (north and south of 40° 10′ N. lat.), Dover sole, English sole, petrale sole, arrowtooth flounder, starry flounder, and Other Flatfish. While the preferred Amendment 21 allocations of these species do not differ significantly from status quo ad hoc allocations made biennially, there is more certainty in future trawl harvest opportunities, which enables better business planning for participants in the rationalized fishery. This is the main purpose for the Amendment 21 actions.

Based on ex-vessel revenue projections, Table 4–18 (ISA DEIS) shows the potential 2010 yield to trawl and non-trawl (including recreational) sectors under the Amendment 21 alternatives and the potential 2010 value of alternative trawl allocations. Under the status quo option Alternative 1, the projected ex-vessel value of the trawl allocation is $56 million while the projected ex-vessel value of the Council's preferred alternative is $54 million, indicating a potential increase to the non-trawl sectors and a potential decrease to the trawl sector.

In addition to the species above, halibut would also be specifically allocated to the trawl fishery. The proposed regulations include a halibut trawl bycatch reduction program in phases to provide sufficient time to establish a baseline of trawl halibut bycatch and for harvesters to explore methods (*e.g.,* adjustments to time and/or area fished, gear modifications) to reduce halibut bycatch and bycatch mortality. Pacific halibut are currently not allowed to be retained in any U.S. or Canadian trawl fisheries per the policy of the IPHC. The Council's intent on setting a total catch limit of Pacific

halibut in Area 2A trawl fisheries is to limit the bycatch and progressively reduce the bycatch to provide more benefits to directed halibut fisheries. The program establishes a limit for total Pacific halibut bycatch mortality (legal-sized and sublegal fish) through the use of an individual bycatch quota in the trawl fishery. The initial amount for the first four years of the trawl rationalization program would be calculated by taking 15 percent of the Area 2A Total Constant Exploitation Yield (CEY) as set by the IPHC for the previous year, not to exceed 130,000 lbs per year for total mortality. For example, if the trawl rationalization program went into effect in 2013, the trawl halibut IBQ would be set at 15 percent of the Area 2A CEY adopted for 2012 or 130,000 lbs per year, whichever is less, for each year from 2013 through 2016 (years 1 through 4 of the program). Beginning with the fifth year of implementation, the maximum amount set aside for the trawl rationalization program would be reduced to 100,000 lbs per year for total mortality. This amount may be adjusted through the biennial specifications process for future years.

Currently there are no total catch limits of Pacific halibut specified for the west coast trawl fishery. Trawl bycatch of Pacific halibut, therefore, does not limit the trawl fishery. A phased in, halibut bycatch reduction program, would provide sufficient time to establish a baseline of trawl halibut bycatch under the new rationalization program and for harvesters to explore methods (*e.g.,* adjustments to time and/or area fished, gear modifications) to reduce both halibut bycatch and bycatch mortality. By limiting the bycatch of Pacific halibut in the LE trawl fisheries, Amendment 21 would control bycatch and could provide increased benefits to Washington, Oregon, and California fishermen targeting Pacific halibut. Reducing the trawl limit would also provide more halibut to those who participate in the directed tribal, commercial and recreational halibut fisheries.

Effects of Amendment 20—Trawl Rationalization

An overall comprehensive model that simultaneously captures changes in fishermens' behavior, changes in the markets, and changes in communities was not feasible because of lack of data and empirical analyses that show needed relationships. Instead, a set of models designed to focus on specific issues was developed. For example, models were used to: analyze the effects of the initial allocation of QS in the trawl IFQ program; project geographic shifts in fishery patterns; and illustrate the potential for reducing bycatch, increasing target catch, and increasing revenues. To illustrate the benefits of the IFQ program, a model projecting the expected amount of fleet consolidation in the shorebased non-whiting fishery was developed. This model illustrated the potential for the fleet to reduce bycatch and potentially increase the amount of target species harvested. This model was primarily based on bycatch reduction experiences in the Pacific whiting fishery and under an Exempted Fishing Permit carried out in the arrowtooth flounder fishery. The model accounted for the fact that trawlers harvest many species (multiple outputs). The model also used fish ticket data and the data from the recently completed West Coast Limited Entry Cost Earnings Survey sponsored by the NMFS Northwest Fisheries Science Center. (For the other sectors, similar models could not be developed because the appropriate cost data was unavailable.)

Estimates of potential economic benefits were generated based on the predicted harvesting practices from the first step analysis. Because the west coast non-whiting groundfish fishery is not a derby fishery, it is expected that economic benefits will come through cost reductions and increased access to target species that arise from modifications in fishing behavior (overfished species avoidance). The key output of this analysis was an estimate of post-rationalization equilibrium harvesting cost.

Changes in harvesting costs can arise from three sources. First, the total fixed costs incurred by the groundfish trawl fleet change as the size of the fleet changes. Since many limited entry trawlers incur annual fixed costs of at least $100,000, reductions in fleet size can result in substantial cost savings. In other words, a fewer number of vessels in the fishery will lead to decreased costs through a decrease in annual fixed costs. Second, costs may change as fishery participation changes and no longer incur diseconomies of scope (such as the costs of frequently switching gear for participating in multiple fisheries). Third, costs may change as vessels are able to buy and sell quota to take advantage of economies of scale and operate at the minimum point on their long-run average cost curve (i.e. the strategy that minimizes the cost of harvesting).

The major conclusions of this model suggested that (with landings held at 2004 levels), the current groundfish fleet (non-whiting component) which consisted of 117 vessels in 2004, will be reduced by roughly 50 percent to 66 percent, or 40–60 vessels under an IFQ program. The reduction in fleet size implies cost savings of $18–$22 million for the year 2004 (most recent year of the data). Vessels that remain active will, on average, be more cost efficient and will benefit from economies of scale that are currently unexploited under controlled access regulations in the fishery. The cost savings estimates are significant, amounting to approximately half of the costs incurred currently, suggesting that IFQ management may be an attractive option for the Pacific coast groundfish fishery. Assuming a 10 percent annual return to the vessel capital investment, estimates indicate that the 2004 groundfish fleet incurred a total cost of $39 million. The PacFIN data indicate fleetwide revenue (this includes groundfish, crab, and other species) at roughly $36 million in 2004, and, therefore, fleet wide losses of about $3 million occurred in 2004. Based on a lower 5 percent return to vessel capital, the results suggest that the groundfish fleet merely broke even in 2004; i.e., dockside revenues were offset by the fleetwide harvesting costs. The results also suggest a switch from the current controlled access management program to IFQs could yield a significant increase in resource rents in the Pacific coast groundfish fishery. For instance, the analysis finds that the 2004 groundfish catch generated zero resource rent. Instead, it could have yielded a substantial positive rent of about $14 million.

As the model was based on the 2004 fishery, it may be useful to show current trends in the fishery. In 2004, the shorebased non-whiting trawl fishery generated about $21 million in groundfish ex-vessel revenues (inflation adjusted). But according to cost estimates discussed above, this fishery was at best breaking even or perhaps suffering a loss of up to $2 million. Since 2004, shorebased non-whiting trawl fisheries have increased their revenues to about $30 million. The increase in shorebased revenues have come from increased landings of flatfish and sablefish and significant increase in sablefish ex-vessel prices. Sablefish now accounts for almost 40 percent of the trawl fleet's revenues. While revenues were increasing, so were fuel prices. Fuel costs now account for approximately 30 to 40 percent of the vessels' revenues. The average 2005–2009 revenues were about $27 million, or 29 percent greater than 2004. The average 2005–2009 fuel price was about $2.81 per gallon, 70 percent greater than

that of 2004. Therefore, it appears that the profitability of the 2009 fishery may not be that much improved over that of 2004.

Ex-vessel revenues for the non-whiting sector of the limited entry trawl fishery are projected to be approximately $30–40 million per year under the preferred alternative, compared to $22–25 million under the no action alternative. These projections yield a potential range in increased revenues of 20 to 80 percent. This revenue increase is expected to occur in a rationalized fishery, because target species quotas can be more fully utilized. Currently, in the non-whiting sector, cumulative landing limits for target species have to be set lower because the bycatch of overfished species cannot be directly controlled. Introducing accountability at the individual vessel level by means of IFQs provides a strong incentive for bycatch avoidance (because of the actual or implicit cost of quota needed to cover bycatch species) and prevents the bycatch of any one vessel from affecting the harvest opportunities of others. In addition, under the preferred alternative, the non-whiting sector would have control over harvest timing over the whole calendar year. Non-whiting harvesters currently operate under 2-month cumulative landing limits, which allow greater flexibility in terms of harvest timing between 2-month periods but less flexibility within periods (because any difference between actual limits and the period limit cannot be carried over to the next period). In contrast, under the IFQ program harvesters will have control over harvest timing over the whole calendar year. However, in terms of any influence on price, this increased flexibility is unlikely to have a noticeable effect. Finally, the ability for vessels managed under IFQs to use other types of legal groundfish gear could allow some increases in revenue by targeting higher-value line or pot gear caught fish. This opportunity would mainly relate to sablefish, which are caught in deeper water, rather than nearshore species where state level regulatory constraints apply.

Costs for the non-whiting sector of the limited entry trawl fishery are expected to decrease under the preferred alternative because of productivity gains related to fleet consolidation. Productivity gains would be achieved through lower capital requirements and a move to more efficient vessels. Operating costs for the non-whiting sector are predicted to decrease by as much as 60 percent annually. Based on estimates of current costs, this percentage decrease represents a $13.8 million cost reduction relative to the no action alternative.

The accumulation limits considered under the preferred alternative are not expected to introduce cost inefficiencies in the non-whiting sector, provided that current prices and harvest volumes do not decrease. However, the preferred alternative would impose new costs on the non-whiting sector that would not be incurred under the no action alternative. First, a landings fee of up to 3 percent of the ex-vessel value of fish harvested would be assessed under the preferred alternative to recover management costs, such as maintenance of the system of QS accounts. Second, new at-sea observer requirements would be introduced, and vessels would have to pay the costs of complying with these requirements, estimated at $500 a day if independent contractors are hired. The daily observer cost could place a disproportionate adverse economic burden on small businesses because such costs would comprise a larger portion of small vessels costs than that of larger vessels.

The increase in profits that commercial harvesters are expected to experience under the preferred alternative may render them better able to sustain the costs of complying with the new reporting and monitoring requirements. The improved harvesting cost efficiency under the preferred alternative may allow the non-whiting sector to realize profits of $14–23 million compared to $0 or less under the no action alternative. In addition, a provision that allows vessels managed under the IFQ program to use other legal gear (gear switching) would allow sablefish allocated to the trawl sector to be sold at a higher price per pound, possibly contributing to increased profits. The imposition of accumulation limits could reduce the expected increase in the profitability of the non-whiting sector by restricting the amount of expected cost savings, and the costs of at-sea observers may reduce profits by about $2.2 million, depending on the fee structure. However, the profits earned by the non-whiting sector would still be substantially higher under the preferred alternative than under the no action alternative.

New entrants are likely to face a barrier to entry in the Pacific coast groundfish limited entry trawl fishery in the form of the cost of acquiring QS (or a coop share in the case of the at-sea whiting sector). This disadvantages them in comparison to those entities that receive an initial allocation of harvest privileges. Small entities may be particularly disadvantaged to the degree that they may find it more difficult to finance such quota purchases. Among the goals the Council identified for the adaptive management program was to use the reserved non-whiting QS to facilitate new entry into the fishery. In addition, the Council identified, as a trailing action, a framework to allow the establishment and implementation of Community Fishing Associations as part of the adaptive management program. These entities could facilitate entry into the fishery by leasing QS at below market rates, thereby leveling the playing field in terms of costs between initial recipients of QS and new entrants.

The incremental effects of the preferred alternative on buyers and processors of trawl caught groundfish are detailed in Sections 4.9–4.10 of the Rationalization of the Amendment 20 Pacific Coast Groundfish Limited Entry Trawl Fishery DEIS. Even though processors may have to pay fishermen higher ex-vessel prices, processors may see cost savings under the preferred alternative to the degree that rationalization allows greater processors and fishermen greater ability to plan the timing, location, and species mix of landings. Processors could use current plant capacity more efficiently, because available information suggests that processing facilities are currently underutilized. Fleet consolidation in the non-whiting sector could also provide cost savings for processors if landings occur in fewer locations, thereby reducing the need for facilities and/or transport. The preferred alternative would also impose new costs on processors that would not be incurred under the no action alternative. Processors would be required to pay some or all of the costs of plant monitors, who would verify landings. Similar to at-sea observers, these monitors would be independent contractors rather than direct employees of the processing firm.

In the non-whiting processing industry, harvest volumes may increase because of a decrease in constraining species bycatch and a subsequent increase in under-utilized target species catch. This boost in target species catch may increase utilization of processing capital and processing activity. (It should be noted that if under the current system bycatch has been underreported, with 100 percent observer coverage under the new system, the gains in increased target catches may be less than expected.) Consequently, the possibility of capital consolidation in the non-whiting shorebased sector may be less than in the shore-based whiting sector.

However, shifts in the distribution of landings across ports as a result of fleet consolidation, industry agglomeration, and the comparative advantage of ports (a function of bycatch rates in the waters constituting the operational area for the port, differences in infrastructure, and other factors) could lead to consolidation in processing activity at a localized or regional scale and an expansion in processing activity elsewhere. To mitigate harm to adversely impacted non-whiting shoreside processors, the adaptive management program provides a mechanism to distribute non-whiting QS to processors, thereby ensuring that some processors receive greater landings of groundfish than would otherwise be the case.

As noted above, the preferred alternative may reduce the power of non-whiting shoreside processors to negotiate ex-vessel prices with harvesters. The larger harvest volume due to bycatch avoidance may lower processor average costs, which could offset the negative effects on non-whiting shoreside processors of a shift in bargaining power. In addition, QS could be purchased by processors over the long term, thereby increasing processors' negotiation power. However, the accumulation limits included in the preferred alternative would limit the ability of processors to purchase substantial quantities of QS. Alternatively, the adaptive management provision could be used to allocate QS to non-whiting shoreside processors, thereby providing them additional leverage when negotiating terms with harvesters.

The allocation of 20 percent of the initial shorebased whiting QS to the shoreside processor portion of the groundfish fishery would give these processors more influence in negotiations over ex-vessel prices and would tend to offset the gains in bargaining power for harvesters. For example, a processor could use QS to induce a harvester that is short of quota pounds for a Pacific whiting trip to make deliveries under specified conditions and prices. However, because of a reduction in peak harvest volume, fewer processing companies and/or facilities may be necessary to handle harvest volumes of Pacific whiting, meaning some companies may find themselves without enough product to continue justifying processing operations of Pacific whiting. Revenues from harvesting and processing trawl-caught groundfish are expected to increase. Revenues in the non-whiting trawl sector are projected to increase by 20 to 80 percent in a rationalized fishery, depending on bycatch rate reductions and stock status. Revenue increases are mainly expected because under rationalized fisheries, target species quotas can be more fully utilized. Currently, in the non-whiting sector, cumulative landing limits for target species have to be set lower because the bycatch of overfished species cannot be directly controlled. Introducing accountability at the individual vessel level provides a strong incentive for bycatch avoidance (because of the actual or implicit cost of quota needed to cover bycatch species) and prevents the bycatch of any one vessel from affecting the harvest opportunity of others. Whiting fisheries are more directly managed through quotas, and in recent years, by limits on bycatch. Beginning in 2009, bycatch limits have been established for each of the three whiting sectors. For the shore-based and mothership whiting sectors, the fishery can potentially close before the whiting allocation is fully harvested because a bycatch cap is reached. (The catcher-processor sector currently operates as a voluntary co-op and is therefore better able to coordinate harvest strategy to avoid reaching bycatch limits.) However, in general, the whiting sectors have been able to harvest their sector allocations. Whiting vessels could increase revenues due to improved product recovery as a result of the ability to better control harvest timing. As mentioned above, the ability for vessels managed under IFQs to use other types of legal groundfish gear could allow some increases in revenue by targeting higher-value line or pot gear caught fish.

Harvester and possibly processor costs are expected to decrease because of productivity gains related to fleet consolidation. Cost savings would be due to lower capital requirements and a move to more efficient vessels in the non-whiting sector. Costs are predicted to decrease by as much as 60 percent annually, which based on estimates of current operating costs would represent a $13.8 million decrease. Similar levels of consolidation are expected for shorebased and mothership catcher vessels. Proposed mitigation measures could reduce these costs savings. For example, a 1 percent quota share accumulation limit could reduce cost savings by as much as 20 percent. But the accumulation limits considered in the alternatives are not expected to introduce higher costs at current prices and harvest volume. The proposed action would introduce some new costs. First, up to 3 percent of the value of landings may be assessed to cover administrative and management costs. Second, new at-sea observer requirements would be introduced and vessels would have to pay the cost, estimated at $350–$500 a day.

Processors may see cost-savings to the degree that rationalization allows greater control over the timing and location of landings. Processors could use current plant capacity more efficiently, because available information suggests that processing facilities are currently underutilized. Fleet consolidation could also drive some cost savings on the part of processors if landings occur in fewer locations. This would reduce the need for facilities and/or transport. Under the proposed action, processors would be required to pay the costs of plant monitors, who would verify landings. These monitors would not be directly employed by the processing firm but, similar to at-sea observers, be independent contractors.

Rationalization of the groundfish trawl sector is expected to free up capital and labor because of increases in productivity. (Since the basic input, trawl-caught fish, is subject to an underlying constraint due to biological productivity, increases in labor and capital productivity are expected to reduce the amount of those inputs needed.) However, from a national net benefit perspective these effects are neutral since capital and labor can be put to some productive use elsewhere in the broader economy. Also, current groundfish fishery participants that receive QS (trawl limited entry trawl permit holders and eligible shoreside processors) are compensated to the degree that the asset value of the QS covers capital losses.

The Amendment 20 DEIS IRFA presents an explicit range of costs based on different daily observer cost rates. What follows is a summary of those estimates—these estimates are focused on the shorebased non-whiting fishery so that it is compared to the results of the NWFSC economic model of this fishery. After a transition period, for the shorebased fishery, the initial estimates of the annual federal and state agency costs to run this program are about $5 million; and after the transition period, these costs could fall to $4.0 million. Based on the observer cost of $500 per day, the annual costs to the vessel of observer monitoring is about $4 million. Based on $350 per day, the annual costs of compliance monitors is just over $1 million. These figures add up to about $10 million. From a cost-benefit viewpoint, if consolidation leads to $14 million savings from reduced harvesting costs and the new program

increases the tracking and monitoring costs of $10 million, there is a projected net gain of about $4 million. These estimates do not take into account expectations that agency, observer and compliance costs are likely to be reduced due to consolidation or the expected increases in revenues discussed above. Better planning by the industry and companies that provide the observers and compliance monitors should further reduce costs. Recent analyses developed for the North Pacific Fishery Management Council and for the New England Fishery Management Council were reviewed. The New England Council analysis includes observer cost estimates associated with the Canadian Pacific Groundfish fishery. Based on a review of these analyses, a daily observer rate of $350 a day is feasible. If so, the annual shoreside non-whiting costs of observers and catch monitors will add up to about $3.5 million. (For purposes of implementing the observer and catch monitoring reimbursement program, NMFS is continuing to research what is the appropriate daily rate.)

In contrast to the shoreside non-whiting fishery, the effect of the preferred alternative on revenues and costs in the whiting sector of the limited entry trawl fishery can only be discussed qualitatively, as there is no economic model because of lack of cost data. The lower motivation to "race for fish" due to coop harvest privileges is expected to result in improved product quality, slower-paced harvest activity, increased yield (which should increase ex-vessel prices), and enhanced flexibility and ability for business planning. The overall effect of these changes would be higher revenues and profits for harvesters in the shoreside and mothership portions of the whiting fishery in comparison to the no action alternative. Under the preferred alternative, some consolidation may occur in the shoreside and mothership sectors of the Pacific whiting fishery, though the magnitude of consolidation is expected to be less than in the non-whiting sector. The existing catcher-processor coop would continue under the preferred alternative, with effects on the catcher-processor sector that look similar, or identical, to those of the no action alternative. However, the change from a vessel-based limit under Amendment 15 to the permit-based limit of Amendment 21 will provide additional flexibility that currently does not exist in the catcher-processor fishery. Using estimates of $350 per day for observers and compliance monitors, the total annual costs of observers and catch monitors for the whiting sector (shoreside harvesters, processors, mothership processors, mothership catcher vessels, and catcher-processors) is about $1.5 million. Additional agency costs associated with managing these whiting fisheries are included in the estimates provided in the above discussion on shorebased non-whiting costs.

This rule regulates businesses that harvest groundfish and processors that wish to process limited entry trawl groundfish. Under the RFA, the term "small entities" includes small businesses, small organizations, and small governmental jurisdictions. For small businesses, the SBA has established size criteria for all major industry sectors in the U.S., including fish harvesting and fish processing businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts not in excess of $4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the $4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. For marinas and charter/party boats, a small business is one with annual receipts not in excess of $7.0 million. The RFA defines a small organization as any nonprofit enterprise that is independently owned and operated and is not dominant in its field. The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.

NMFS makes the following conclusions based primarily on analyses associated with fish ticket data and limited entry permit data, available employment data provided by processors, information on the charterboat and tribal fleets, and available industry responses to on-going surveys on ownership. Entities were analyzed as to whether they were only affected by the Amendment 21 allocation processes (non-trawl), or if they were affected by both Amendments 20 and 21 (trawl).

The non-trawl businesses are associated with the following fleets: Limited entry fixed gear (approximately 150 companies), open access groundfish (1,100), charterboats (465), and the tribal fleet (four tribes with 66 vessels). Available information on average revenue per vessel suggests that all the entities in this group can be considered small.

For the trawl sector, there are 177 permit holders. Nine limited entry trawl permits are associated with the catcher-processing vessels which are considered "large" companies. Of the remaining 168 limited entry permits, 25 limited entry trawl permits are either owned or closely associated with a "large" shore-based processing company or with a non-profit organization who considers itself a "large" organization. Nine other permit owners indicated that they were large "companies." Almost all of these companies are associated with the shorebased and mothership whiting fisheries. The remaining 134 limited entry trawl permits are projected to be held by "small" companies. Three of the six mothership processors are "large" companies. Within the 14 shorebased whiting first receivers/processors, there are four "large" companies. Including the shorebased whiting first receivers, in 2008, there were 75 first receivers that purchased limited entry trawl groundfish. There were 36 small purchasers (less than $150,000); 26 medium purchasers (purchases greater than $150,000 but less than $1,000,000); and 13 large purchasers (purchases greater than $1.0 million). Because of the costs of obtaining a "processor site license," procuring and scheduling a catch monitor, and installing and using the electronic fish ticket software, these "small" purchasers will likely opt out of buying groundfish, or make arrangements to purchase fish from another company that has obtained a processing site license.

NMFS received several comments that concerned the burdens and effects on small businesses and on small communities, but not specifically on the IRFA. These include comments about the burden of paperwork and costs of the program on small businesses and small communities; that NMFS should minimize and mitigate impacts on small businesses and small communities; that the program should not result in an unfair allocation between the states; that the program should be designed to result in an even consolidation between states and between the sectors (non-whiting shorebased IFQ, whiting shorebased IFQ, mothership sector, and

catcher/processor sector) and that the program should not benefit large businesses at the expense of small businesses.

NMFS responded to similar comments in the final initial issuance rule (75 FR 60868, October 1, 2010) on the impacts on small businesses. In particular, concerns were raised about negative impacts on smaller boats, deckhands, and smaller boats; that program costs to fishermen, including the costs of entering the fishery and the costs of observers and monitoring are too high; that observer rules need to change for trawl and small boats to reflect the vastly different bycatch which occurs when mistakes are made; about the impact of the allocation formulas on Fort Bragg fishermen; concern that average fishermen will not be able to afford to participate and that this will lead to increased consolidation and leave many ports no longer viable; about negative impacts on processors, that small processors will be driven out of business due to consolidation; and that it will eliminate the "mom and pop businesses."

NMFS has responded to these comments in detail in the final initial issuance rule. The overall general nature of NMFS' response is applicable to the comments associated with this rule. In terms of impacts on small businesses, the trawl rationalization program is intended to increase net economic benefits, create economic stability, provide full utilization of the trawl sector allocation, consider environmental impacts, and promote conservation through individual accountability for catch and bycatch. The allocations of quota under the new program do not differ significantly from status quo allocations made biennially in terms of total allocations. However, instead of fleetwide quotas, there will now be individual allocations of quota shares and quota pounds to permit owners. Allocations of overfished species constrain all groundfish fishermen, for both large and small operations. In some cases, smaller operators may be constrained to a greater extent. This was recognized in development of the program, and operators are encouraged to work together cooperatively, through mechanisms like combining and sharing quota amounts. The program provides for leasing of additional quota as needed to facilitate operations. The program includes provisions that would have a beneficial impact on small entities. It would create a management program under which most recent participants in the Pacific Coast groundfish limited entry trawl fishery (many of which are small entities) would be eligible to continue participating in the fishery and under which the fishery itself would experience an increase in economic profitability. Small entities choosing to exit the fishery should receive financial compensation from selling their permit or share of the resource. To prevent a particular individual, corporation, or other entity from acquiring an excessive share of the total harvest privileges in the program, accumulation limits would restrict the amount of harvest privileges that can be held, acquired, or used by individuals and vessels. In addition, for the shoreside sector of the fishery, an AMP was created to mitigate any adverse impacts, including impacts on small entities and communities that might result from the program.

It is expected that the shorebased IFQ fishery will lead to consolidation and this may affect small processors, particularly if they are in disadvantaged ports. Chapter 4 of the FEIS analyzed the effects on processors from various perspectives: The distribution of landings across west coast ports may change as a result of fleet consolidation, industry agglomeration, and the comparative advantage of ports (a function of bycatch rates in the waters constituting the operational area for the port, differences in infrastructure, and other factors). In particular, the Council analysis indicated that processors associated with disadvantaged communities may see trawl groundfish volumes decline. The analysis highlights that those processors receiving landings from Central California or Neah Bay may see a reduction in trawl caught groundfish if the market is able to redirect activity toward more efficient and advantaged ports. However, in addition to increased landings that are expected to result from the IFQ program, small processors and disadvantaged communities may benefit from the control limits, vessel limits, and adaptive management policies. Control limits will limit the ability of large processors to obtain shares of the fisheries while the adaptive management processes will allow the Council to consider the impacts on small processors, and disadvantaged communities when allocating the adaptive management quota (10 percent of the total non-whiting trawl quotas). Although vessel accumulation limits tend to lower economic efficiency and restrict profitability for the average vessel, they could help retain vessels in communities because more vessels would remain.

Another process by which small processors and disadvantaged communities may benefit from will be the future development of CFAs. Some of the potential benefits of CFAs include: Ensuring access to the fishery resource in a particular area or community to benefit the local fishing economy; enabling the formation of risk pools and sharing monitoring and other costs; ensuring that fish delivered to a local area will benefit local processors and businesses; providing a local source of QSs for new entrants and others wanting to increase their participation in the fishery; increasing local accountability and responsibility for the resource; and benefiting other providers and users of local fishery infrastructure.

In summary, the primary impacts of this rule appear to be on shoreside processors which are a mix of large and small processors, and on shorebased trawlers which are also a mix of large and small companies. The non-whiting shorebased trawlers are currently operating at a loss or at best are "breaking even." The new rationalization program would lead to profitability, but only with a reduction of about 50 percent of the fleet. This program would lead to major changes in the fishery. To help mitigate against these changes, as discussed above, the agency has announced its intent, subject to available Federal funding, that participants would initially be responsible for 10 percent of the cost of hiring observers and catch monitors. The industry proportion of the costs of hiring observers and catch monitors would be increased every year so that by 2014, once the fishery has transitioned to the rationalization program, the industry would be responsible for 100 percent of the cost of hiring the observers and catch monitors. NMFS believes that an incrementally reduced subsidy to industry funding would enhance the observer and catch monitor program's stability, ensure 100 percent observer and catch monitor coverage, and facilitate the industries' successful transition to the new quota system. In addition, to help mitigate against negative impacts of this program, the Council has adopted an Adaptive Management Program where starting in year 3 of the program, 10 percent of non-whiting QS would be set aside every year to address community impacts and industry transition needs. After reviewing the initial effects of IFQ programs in other parts of the world, the council had placed a short term QS trading prohibition so that fishermen can learn from their experiences and not make premature sales of their QS. The Council is also envisioning future regulatory processes that would allow community fisheries associations to be

established to help aid communities and fishermen.

NMFS has taken a hard look at the reporting burden of the program and we believe we have reduced the burden on small businesses to the extent possible. The reporting requirements are necessary. With respect to the effects on the States including industry consolidation effects, NMFS acknowledges that this program has different impacts on different states and on different communities. This rulemaking does not set up an allocation scheme. As mentioned above, one of the potential purposes of the Adaptive Management Program is to address differential impacts upon communities and thus the states.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the Northwest Regional Office and the guide will be sent to all permit owners for the fishery. The guide and this final rule will also be available on the Northwest Regional Office Web site (*see* **ADDRESSES**) and upon request.

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by the Office of Management and Budget (OMB) under control numbers 0648–0271 (Northwest Region Logbook Family of Forms), 0648–0573 (Expanded Vessel Monitoring System Requirement for the Pacific Coast Groundfish Fishery), 0648–0593 (NMFS Observer Programs' Information That Can be Gathered Only Through Questions), 0648–0618 (West Coast Groundfish Trawl Economic Data), 0648–0620 (Pacific Coast Groundfish Trawl—permits and licenses), and 0648–0619 (Northwest Region Groundfish Trawl Fishery Monitoring and Catch Accounting Program). Public reporting burden for the Economic Data Collection survey is estimated to average 8 hours per response (268 responses). Public reporting burden for QS Permit Renewal Application is estimated to average 0.33 hours per response (120 responses), First Receiver Site License Initial Issuance/Renewal Application is estimated to average 0.5 hours per response (80 responses), MS Renewal Application is estimated to average 0.33 hours per response (6 responses), MS Transfer Application is estimated to average 0.5 hours per response (3 responses), C/P Coop Permit Transfer Application is estimated to average 3 hours per response (1 response), MS Coop Permit Application is estimated to average 3 hours per response (1 response), Change in vessel fishing for coop form is estimated to average 0.33 hours per response (3 responses), Material Change form is estimated to average 2 hours per response (3 responses), MS Withdrawal/Mutual Exception form is estimated to average 2 hours per response (2 responses), Ownership Interest Form Renewal is estimated to average 0.5 hours per response (156 responses), Ownership Interest Form Transfer, is estimated to average 0.5 hours per response (20 responses), Vessel Account Registration (Initial) is estimated to average 0.5 hours per response (120 responses), Vessel Account Registration (ongoing) is estimated to average 0.5 hours per response (10 responses), Vessel Account Renewal (annual) is estimated to average 0.33 hour per response (30 responses), QS Account Registration is estimated to average 1 hour per response (1 response), QS/QP transfer from QS account to vessel account is estimated to average 0.25 hours per response (180 responses), QP Transfer from vessel account to vessel account is estimated to average 0.25 hours per response (600 responses), Transaction Dispute Request is estimated to average 1 hour per response (10 responses). Public reporting burden for the catch monitor providers, Application preparation & submission is estimated to average 10 hours per response (3 responses), Training registration is estimated to average 1 hour per response (3 responses), Exit Interview registration is estimated to average 10 minutes per response (3 responses), Appeals—written response and submission is estimated to average 4 hours per response (1 response). Public reporting burden for the catch monitors application appeals—written response & submission is estimated to average 4 hours per response (5 responses). Public reporting burden for the catch monitoring plans, Preparation & submission is estimated to average 4 hours per response (80 responses), Inspection is estimated to average 2 hours per response (80 response), inseason scale testing is estimated to average 1 hour per response (80 responses), reports are estimated to average 10 minutes per response (2,400 responses). Public reporting burden for electronic fish tickets is estimated to average 10 minutes per response (400 responses). Public reporting burden for the changes to the declaration reporting system (OMB Control No. 0648–0573) and the changes to the observer program (OMB Control No. 0648–0593) are not expected to change the public reporting burden. Public reporting burden for the changes to the cease fishing report for the at-sea whiting fisheries (OMB Control No. 0648–0271) will reduce the public reporting burden. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Send comments on these or any other aspects of the collection of information to NMFS, Northwest Region, at the **ADDRESSES** section above; and to OMB by e-mail to *OIRA_Submission@omb.eop.gov;* or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

NMFS issued Biological Opinions under the Endangered Species Act (ESA) on August 10, 1990, November 26, 1991, August 28, 1992, September 27, 1993, May 14, 1996, and December 15, 1999 pertaining to the effects of the Pacific Coast groundfish FMP fisheries on Chinook salmon (Puget Sound, Snake River spring/summer, Snake River fall, upper Columbia River spring, lower Columbia River, upper Willamette River, Sacramento River winter, Central Valley spring, California coastal), coho salmon (Central California coastal, southern Oregon/northern California coastal), chum salmon (Hood Canal summer, Columbia River), sockeye salmon (Snake River, Ozette Lake), and steelhead (upper, middle and lower Columbia River, Snake River Basin, upper Willamette River, central California coast, California Central Valley, south/central California, northern California, southern California). These biological opinions have concluded that implementation of the FMP for the Pacific Coast groundfish fishery was not expected to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS, or result in the destruction or adverse modification of critical habitat.

NMFS reinitiated a formal section 7 consultation under the ESA in 2005 for both the Pacific whiting midwater trawl fishery and the groundfish bottom trawl fishery. The December 19, 1999, Biological Opinion had defined an 11,000 Chinook incidental take threshold for the Pacific whiting fishery. During the 2005 Pacific whiting season, the 11,000 fish Chinook incidental take threshold was exceeded, triggering reinitiation. Also in 2005, new data from the West Coast Groundfish Observer Program became available, allowing NMFS to complete an analysis of salmon take in the bottom trawl fishery.

NMFS prepared a Supplemental Biological Opinion dated March 11, 2006, which addressed salmon take in both the Pacific whiting midwater trawl and groundfish bottom trawl fisheries. In its 2006 Supplemental Biological Opinion, NMFS concluded that catch rates of salmon in the 2005 whiting fishery were consistent with expectations considered during prior consultations. Chinook bycatch has averaged about 7,300 fish over the last 15 years and has only occasionally exceeded the reinitiation trigger of 11,000 fish.

Since 1999, annual Chinook bycatch has averaged about 8,450 fish. The Chinook ESUs most likely affected by the whiting fishery has generally improved in status since the 1999 section 7 consultation. Although these species remain at risk, as indicated by their ESA listing, NMFS concluded that the higher observed bycatch in 2005 does not require a reconsideration of its prior "no jeopardy" conclusion with respect to the fishery. For the groundfish bottom trawl fishery, NMFS concluded that incidental take in the groundfish fisheries is within the overall limits articulated in the Incidental Take Statement of the 1999 Biological Opinion. The groundfish bottom trawl limit from that opinion was 9,000 fish annually. NMFS will continue to monitor and collect data to analyze take levels. NMFS also reaffirmed its prior determination that implementation of the Groundfish FMP is not likely to jeopardize the continued existence of any of the affected ESUs.

Lower Columbia River coho (70 FR 37160, June 28, 2005) were recently listed and Oregon Coastal coho (73 FR 7816, February 11, 2008) were recently relisted as threatened under the ESA. The 1999 biological opinion concluded that the bycatch of salmonids in the Pacific whiting fishery were almost entirely Chinook salmon, with little or no bycatch of coho, chum, sockeye, and steelhead.

The Southern Distinct Population Segment (DPS) of green sturgeon was listed as threatened under the ESA (71 FR 17757, April 7, 2006). The southern DPS of Pacific eulachon was listed as threatened on March 18, 2010, under the ESA (75 FR 13012). NMFS has reinitiated consultation on the fishery, including impacts on green sturgeon, eulachon, marine mammals, and turtles. After reviewing the available information, NMFS has concluded that, consistent with Sections 7(a)(2) and 7(d) of the ESA, the proposed action would not jeopardize any listed species, would not adversely modify any designated critical habitat, and would not result in any irreversible or irretrievable commitment of resources that would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.

Amendments 20 and 21 to the FMP were developed after meaningful consultation and collaboration, through the Council process, with the tribal representative on the Council. The Amendments have no direct effect on tribes; these proposed regulations were deemed by the Council as "necessary or appropriate" to implement the FMP as amended.

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 660

Fisheries, Fishing, and Indian fisheries.

Dated: December 1, 2010.

Samuel D. Rauch III,

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

■ For the reasons set out in the preamble, 15 CFR chapter IX and 50 CFR chapter VI are amended as follows:

15 CFR Chapter IX

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1(b), in the table under the entry "50 CFR", add new entries and corresponding OMB numbers for §§ 660.13, 660.14, 660.16, 660.17, 660.114, 660.140, 660.150, 660.160, 660.216, and 660.316; and revise the entries for §§ 660.25 and 660.113.

The additions and revisions read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648–)
* * * * *	
50 CFR	
* * * * *	
660.13	–0573
660.14	–0573
660.16	–0593
660.17	–0619
660.25	–0203, –0620
660.113	–0271, –0573, –0618, –0619
660.114	–0618
660.140	–0593, –0619, –0620
660.150	–0593, –0620
660.160	–0593, –0620
660.216	–0593
* * * * *	
660.316	–0593
* * * * *	

50 CFR Chapter VI

PART 660—FISHERIES OFF WEST COAST STATES

■ 3. The authority citation for part 660 is revised to read as follows:

Authority: 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

■ 4. In § 660.11, the definitions for "Processing or to process" and "Processor" are revised to read as follows:

§ 660.11 General definitions.

* * * * *

Processing or to process means the preparation or packaging of groundfish to render it suitable for human consumption, retail sale, industrial uses or long-term storage, including, but not limited to, cooking, canning, smoking, salting, drying, filleting, freezing, or rendering into meal or oil, but does not

mean heading and gutting unless additional preparation is done. (Also see an exception to certain requirements at § 660.131(a), subpart D pertaining to Pacific whiting shoreside vessels 75-ft (23-m) or less LOA that, in addition to heading and gutting, remove the tails and freeze catch at sea.)

(1) At-sea processing means processing that takes place on a vessel or other platform that floats and is capable of being moved from one location to another, whether shore-based or on the water.

(2) Shorebased processing or processing means processing that takes place at a facility that is permanently fixed to land. (Also see the definition for shoreside processing at § 660.140, subpart D which defines shoreside processing for the purposes of qualifying for a Shorebased IFQ Program QS permit.) For the purposes of economic data collection in the Shorebased IFQ Program, shorebased processing means either of the following:

(i) Any activity that takes place shoreside; and that involves: Cutting groundfish into smaller portions; or freezing, cooking, smoking, drying groundfish; or packaging that groundfish for resale into 100 pound units or smaller; for sale or distribution into a wholesale or retail market.

(ii) The purchase and redistribution in to a wholesale or retail market of live groundfish from a harvesting vessel.

Processor means a person, vessel, or facility that engages in commercial processing; or receives live groundfish directly from a fishing vessel for retail sale without further processing. (Also see the definition for processors at § 660.140, subpart D which defines processor for the purposes of qualifying for initial issuance of QS in the Shorebased IFQ Program.)

(1) For the purposes of economic data collection in the Shorebased IFQ Program, shorebased processor means a person that engages in commercial processing, that is an operation working on U.S. soil or permanently fixed to land, that takes delivery of fish that has not been subject to at-sea processing or shorebased processing; and that thereafter engages that particular fish in shorebased processing; and excludes retailers, such as grocery stores and markets, which receive whole or headed and gutted fish that are then filleted and packaged for retail sale. At § 660.114(b), trawl fishery—economic data collection program, the definition of processor is further refined to describe which shorebased processors are required to submit their economic data collection forms.

(2) [Reserved]

* * * * *

■ 5. In § 660.12, paragraph (e)(7) and (e)(8) are revised, paragraph (f) is redesignated as paragraph (g), and a new paragraph (f) is added to read as follows:

§ 660.12 General groundfish prohibitions.

* * * * *

(e) * * *

(7) Fail to provide departure or cease fishing reports specified at §§ 660.140, 660.150, 660.160, subpart D; § 660.216, subpart E; or § 660.316, subpart F.

(8) Fail to meet the vessel responsibilities specified at §§ 660.140, 660.150, 660.160, subpart D; § 660.216, subpart E; or § 660.316, subpart F.

(9) Fail to meet the observer provider responsibilities specified at §§ 660.140, 660.150, 660.160, subpart D.

(f) *Groundfish catch monitor program.* (1) Forcibly assault, resist, oppose, impede, intimidate, harass, sexually harass, bribe, or interfere with a catch monitor.

(2) Interfere with or bias the monitoring procedure employed by a catch monitor, including either mechanically or manually sorting or discarding catch before it's monitored.

(3) Tamper with, destroy, or discard a catch monitor's collected samples, equipment, records, photographic film, papers, or personal effects.

(4) Harass a catch monitor by conduct that:

(i) Has sexual connotations,

(ii) Has the purpose or effect of interfering with the catch monitor's work performance, and/or

(iii) Otherwise creates an intimidating, hostile, or offensive environment. In determining whether conduct constitutes harassment, the totality of the circumstances, including the nature of the conduct and the context in which it occurred, will be considered. The determination of the legality of a particular action will be made from the facts on a case-by-case basis.

(5) Receive, purchase, or take custody, control, or possession of a delivery without catch monitor coverage when such coverage is required under § 660.140, subpart D.

(6) Fail to allow the catch monitor unobstructed access to catch sorting, processing, catch counting, catch weighing, or electronic or paper fish tickets.

(7) Fail to provide reasonable assistance to the catch monitor.

(8) Require, pressure, coerce, or threaten a catch monitor to perform duties normally performed by employees of the first receiver, including, but not limited to duties associated with the receiving of landing, processing of fish, sorting of catch, or the storage of the finished product.

(9) Fail to meet the catch monitor provider responsibilities specified at § 660.140, subpart D.

* * * * *

■ 6. In § 660.13, paragraph (d)(5)(iv) introductory text, paragraph (d)(5)(iv)(A) introductory text, and paragraphs (d)(5)(iv)(A)(*1*) through (*4*), and (*6*) through (*8*) are revised to read as follows:

§ 660.13 Recordkeeping and reporting.

* * * * *

(d) * * *

(5) * * *

(iv) Declaration reports will include: The vessel name and/or identification number, and gear type (as defined in paragraph (d)(5)(iv)(A) of this section). Upon receipt of a declaration report, NMFS will provide a confirmation code or receipt to confirm that a valid declaration report was received for the vessel. Retention of the confirmation code or receipt to verify that a valid declaration report was filed and the declaration requirement was met is the responsibility of the vessel owner or operator. Vessels using nontrawl gear may declare more than one gear type with the exception of vessels participating in the Shorebased IFQ Program (i.e. gear switching), however, vessels using trawl gear may only declare one of the trawl gear types listed in paragraph (d)(5)(iv)(A) of this section on any trip and may not declare nontrawl gear on the same trip in which trawl gear is declared.

(A) One of the following gear types or sectors must be declared:

(*1*) Limited entry fixed gear, not including shorebased IFQ,

(*2*) Limited entry groundfish non-trawl, shorebased IFQ,

(*3*) Limited entry midwater trawl, non-whiting shorebased IFQ,

(*4*) Limited entry midwater trawl, Pacific whiting shorebased IFQ,

* * * * *

(*6*) Limited entry midwater trawl, Pacific whiting mothership sector (catcher vessel or mothership),

(*7*) Limited entry bottom trawl, shorebased IFQ, not including demersal trawl,

(*8*) Limited entry demersal trawl, shorebased IFQ,

* * * * *

■ 7. In § 660.14, paragraph (b)(1) is revised to read as follows:

§ 660.14 Vessel Monitoring System (VMS) requirements.

* * * * *

(b) * * *

(1) Any vessel registered for use with a limited entry "A" endorsed permit (i.e., not an MS permit) that fishes in state or Federal waters seaward of the baseline from which the territorial sea is measured off the States of Washington, Oregon or California (0–200 nm offshore).

* * * * *

■ 8. Section 660.15 is revised to read as follows:

§ 660.15 Equipment requirements.

(a) *Applicability.* This section contains the equipment and operational requirements for scales used to weigh catch at sea, scales used to weigh catch at IFQ first receivers, computer hardware for electronic fish ticket software, and computer hardware for electronic logbook software. Unless otherwise specified by regulation, the operator or manager must retain, for 3 years, a copy of all records described in this section and make available the records upon request of NMFS staff or authorized officer.

(b) *Scales used to weigh catch at sea—performance and technical requirements.* (1) *Scales approved by NMFS for MS and C/P Coop Programs.* A scale used to weigh catch in the MS and C/P Coop Programs must meet the type evaluation and initial inspection requirements set forth in 50 CFR 679.28(b)(1) and (2), and must be approved by NMFS.

(2) *Annual inspection.* Once a scale is installed on a vessel and approved by NMFS for use, it must be inspected annually as described in 50 CFR 679.28(b).

(3) *Daily testing.* Each scale must be tested daily and meet the maximum permissible error (MPE) requirements described at described at paragraph (b)(4) of this section.

(4) *At-sea scale tests.* To verify that the scale meets the maximum permissible errors (MPEs) specified in this paragraph, the vessel operator must ensure that vessel crew test each scale used to weigh catch at least one time during each 24-hour period when use of the scale is required. The vessel owner must ensure that these tests are performed in an accurate and timely manner.

(i) *Belt scales.* The MPE for the daily at-sea scale test is plus or minus 3 percent of the known weight of the test material. The scale must be tested by weighing at least 400 kg (882 lb) of fish or an alternative material supplied by the scale manufacturer on the scale under test. The known weight of the fish or test material must be determined by weighing it on a platform scale approved for use under 50 CFR 679.28(b)(7).

(ii) *Platform scales used for observer sampling on MSs and C/Ps.* A platform scale used for observer sampling must be tested at 10, 25, and 50 kg (or 20, 50, and 100 lb if the scale is denominated in pounds) using approved test weights. The MPE for the daily at-sea scale test is plus or minus 0.5 percent.

(iii) *Approved test weights.* Each test weight must have its weight stamped on or otherwise permanently affixed to it. The weight of each test weight must be annually certified by a National Institute of Standards and Technology approved metrology laboratory or approved for continued use by the NMFS authorized inspector at the time of the annual scale inspection.

(iv) *Requirements for all at-sea scale tests.* The vessel operator must ensure that vessel crew:

(A) Notify the observer at least 15 minutes before the time that the test will be conducted, and conduct the test while the observer is present.

(B) Conduct the scale test and record the following information on the at-sea scale test report form:

(*1*) Vessel name;

(*2*) Month, day, and year of test;

(*3*) Time test started to the nearest minute;

(*4*) Known weight of test weights;

(*5*) Weight of test weights recorded by scale;

(*6*) Percent error as determined by subtracting the known weight of the test weights from the weight recorded on the scale, dividing that amount by the known weight of the test weights, and multiplying by 100; and

(*7*) Sea conditions at the time of the scale test.

(C) Maintain the test report form on board the vessel until the end of the fishing year during which the tests were conducted, and make the report forms available to observers, NMFS staff, or authorized officers. In addition, the vessel owner must retain the scale test report forms for 3 years after the end of the fishing year during which the tests were performed. Each scale test report form must be signed by the vessel operator immediately following completion of each scale test.

(5) *Scale maintenance.* The vessel owner must ensure that the vessel operator maintains the scale in proper operating condition throughout its use, that adjustments made to the scale are made so as to bring the performance errors as close as practicable to a zero value, and that no adjustment is made that will cause the scale to weigh inaccurately.

(6) *Printed reports from the scale.* The vessel owner must ensure that the printed reports are provided to NMFS as required by this paragraph. Printed reports from the scale must be maintained on board the vessel until the end of the year during which the reports were made, and be made available to NMFS staff or authorized officers. In addition, the vessel owner must retain printed reports for 3 years after the end of the year during which the printouts were made.

(i) *Reports of catch weight and cumulative weight.* Reports must be printed at least once every 24 hours. Reports must also be printed before any information stored in the scale computer memory is replaced. Scale weights must not be adjusted by the scale operator to account for the perceived weight of water, slime, mud, debris, or other materials. Scale printouts must show:

(A) The vessel name and Federal vessel permit number;

(B) The date and time the information was printed;

(C) The haul number;

(D) The total weight of the haul; and

(E) The total cumulative weight of all fish and other material weighed on the scale since the last annual inspection.

(ii) *Printed report from the audit trail.* The printed report must include the information specified in sections 2.3.1.8, 3.3.1.7, and 4.3.1.8 of appendix A to 50 CFR part 679. The printed report must be provided to the authorized scale inspector at each scale inspection and must also be printed at any time upon request of NMFS staff or other authorized officer.

(iii) *Platform scales used for observer sampling.* A platform scale used for observer sampling is not required to produce a printed record.

(c) *Scales used to weigh catch at IFQ first receivers—performance and technical requirements.* Scale requirements in this paragraph are in addition to those requirements set forth by the State in which the scale is located, and nothing in this paragraph may be construed to reduce or supersede the authority of the State to regulate, test, or approve scales within the State. Scales used to weigh catch that are also required to be approved by the State must meet the following requirements:

(1) *Verification of approval.* The scale must display a valid sticker indicating that the scale is currently approved in accordance with the laws of the state where the scale is located.

(2) *Visibility.* NMFS staff, NMFS-authorized personnel, or authorized officers must be allowed to observe the

weighing of catch on the scale and be allowed to read the scale display at all times.

(3) *Printed scale weights.* (i) An IFQ first receiver must ensure that printouts of the scale weight of each delivery or offload are made available to NMFS staff, to NMFS-authorized personnel, or to authorized officers at the time printouts are generated. An IFQ first receiver must maintain printouts on site until the end of the fishing year during which the printouts were made and make them available upon request by NMFS staff, NMFS-authorized personnel, or authorized officers for 3 years after the end of the fishing year during which the printout was made.

(ii) All scales identified in a catch monitoring plan (see § 660.140(f)(3), subpart D) must produce a printed record for each delivery, or portion of a delivery, weighed on that scale, unless specifically exempted by NMFS. NMFS may exempt, as part of the NMFS-accepted catch monitoring plan, scales not designed for automatic bulk weighing from part or all of the printed record requirements. For scales that must produce a printed record, the printed record must include:

(A) The IFQ first receiver's name;

(B) The weight of each load in the weighing cycle;

(C) The total weight of fish in each landing, or portion of the landing that was weighed on that scale;

(D) The date the information is printed; and

(E) The name and vessel registration or documentation number of the vessel making the delivery. The scale operator may write this information on the scale printout in ink at the time of printing.

(4) *Inseason scale testing.* IFQ first receivers must allow, and provide reasonable assistance to NMFS staff, NMFS-authorized personnel, and authorized officers to test scales used to weigh IFQ catch. A scale that does not pass an inseason test may not be used to weigh IFQ catch until the scale passes an inseason test or is approved for continued use by the weights and measures authorities of the State in which the scale is located.

(i) *Inseason testing criteria.* To pass an inseason test, NMFS staff or authorized officers must be able to verify that:

(A) The scale display and printed information are clear and easily read under all conditions of normal operation;

(B) Weight values are visible on the display until the value is printed;

(C) The scale does not exceed the maximum permissible errors specified in the following table:

Test load in scale divisions	*Maximum error in scale divisions*
(*1*) 0–500	1
(*2*) 501–2,000	2
(*3*) 2,001–4,000	3
(*4*) >4,000	4

(D) *Automatic weighing systems.* An automatic weighing system must be provided and operational that will prevent fish from passing over the scale or entering any weighing hopper unless the following criteria are met:

(*1*) No catch may enter or leave a weighing hopper until the weighing cycle is complete;

(*2*) No product may be cycled and weighed if the weight recording element is not operational; and

(*3*) No product may enter a weighing hopper until the prior weighing cycle has been completed and the scale indicator has returned to a zero.

(ii) [Reserved]

(d) *Electronic fish tickets.* IFQ first receivers using the electronic fish ticket software provided by Pacific States Marine Fisheries Commission are required to meet the hardware and software requirements below. Those IFQ first receivers who have NMFS-approved software compatible with the standards specified by Pacific States Marine Fisheries Commission for electronic fish tickets are not subject to any specific hardware or software requirements.

(1) *Hardware and software requirements.* (i) A personal computer with Pentium 75-MHz or higher. Random Access Memory (RAM) must have sufficient megabyte (MB) space to run the operating system, plus an additional 8 MB for the software application and available hard disk space of 217 MB or greater. A CD–ROM drive with a Video Graphics Adapter (VGA) or higher resolution monitor (super VGA is recommended).

(ii) Microsoft Windows 2000 (64 MB or greater RAM required), Windows XP (128 MB or greater RAM required), or later operating system.

(iii) Microsoft Access 2003 or newer.

(2) *NMFS approved software standards and internet access.* The IFQ first receiver is responsible for obtaining, installing, and updating electronic fish tickets software either provided by Pacific States Marine Fisheries Commission, or compatible with the data export specifications specified by Pacific States Marine Fisheries Commission and for maintaining internet access sufficient to transmit data files via e-mail. Requests for data export specifications can be submitted to: Attn: Electronic Fish Ticket Monitoring, National Marine Fisheries Service, Northwest Region, Sustainable Fisheries Division, 7600 Sand Point Way, NE, Seattle, WA 98115.

(3) *Maintenance.* The IFQ first receiver is responsible for ensuring that all hardware and software required under this subsection are fully operational and functional whenever they receive, purchase, or take custody, control, or possession of an IFQ landing.

(4) *Improving data quality.* Vessel owners and operators, IFQ first receivers, or shoreside processor owners, or managers may contact NMFS in writing to request assistance in improving data quality and resolving issues. Requests may be submitted to: Attn: Electronic Fish Ticket Monitoring, National Marine Fisheries Service, Northwest Region, Sustainable Fisheries Division, 7600 Sand Point Way, NE, Seattle, WA 98115.

■ 9. Section 660.16 is revised to read as follows:

§ 660.16 Groundfish observer program.

(a) *General.* Vessel owners, operators, and managers are jointly and severally responsible for their vessel's compliance with observer requirements specified in this section and within §§ 660.140, 660.150, 660.160, subpart D; § 660.216, subpart E; § 660.316, subpart F; or subpart G.

(b) *Purpose.* The purpose of the Groundfish Observer Program is to collect fisheries data necessary and appropriate for, among other relevant purposes, management, compliance monitoring, and research in the groundfish fisheries and for the conservation of living marine resources.

(c) *Observer coverage requirements.* The following table provides references to the paragraphs in the Pacific coast groundfish subparts that contain fishery specific requirements. Observer coverage required for the Shorebased IFQ Program, MS Coop Program, or C/P Coop Program shall not be used to comply with observer coverage requirements for any other Pacific coast groundfish fishery in which that vessel may also participate.

West Coast Groundfish Fishery	Regulation section
(1) Shorebased IFQ Program—Trawl Fishery	§ 660.140, subpart D.

West Coast Groundfish Fishery	Regulation section
(2) MS Coop Program—Whiting At-sea Trawl Fishery	§ 660.150, subpart D.
(3) C/P Coop Program—Whiting At-sea Trawl Fishery	§ 660.160, subpart D.
(4) Fixed Gear Fisheries	§ 660.216, subpart E.
(5) Open Access Fisheries	§ 660.316, subpart F.

■ 10. Section 660.17 is added to read as follows:

§ 660.17 Catch monitors and catch monitor providers.

(a) *Catch monitor certification.* Catch monitor certification authorizes an individual to fulfill duties as specified by NMFS while under the employ of a certified catch monitor provider.

(b) *Catch monitor certification requirements.* NMFS may certify individuals who:

(1) Are employed by a certified catch monitor provider at the time of the issuance of the certification and qualified, as described at paragraph (e)(1)(i) through (viii) of this section and have provided proof of qualifications to NMFS, through the certified catch monitor provider.

(2) Have successfully completed NMFS-approved training.

(i) Successful completion of training by an applicant consists of meeting all attendance and conduct standards issued in writing at the start of training; meeting all performance standards issued in writing at the start of training for assignments, tests, and other evaluation tools; and completing all other training requirements established by NMFS.

(ii) If a candidate fails training, he or she will be notified in writing on or before the last day of training. The notification will indicate: The reasons the candidate failed the training; whether the candidate can retake the training, and under what conditions.

(3) Have not been decertified as an observer or catch monitor under provisions in §§ 660.18, 660.140(h)(6), 660.150(g)(6), and 660.160(g)(6).

(4) *Existing catch monitors as of 2010.* A catch monitor who has completed sampling or monitoring activities in 2010 in NMFS-managed West Coast groundfish fisheries, and has not had his or her certification revoked during or after that time, will be considered to have met his or her certification requirements under this section. These catch monitors will be issued a new catch monitor certification prior to their first deployment to a first receiver after December 31, 2010, unless NMFS determines that he or she has not completed any additional training required for this program.

(c) *Catch monitor standards of behavior.* Catch monitors must do the following:

(1) Perform authorized duties as described in training and instructional manuals or other written and oral instructions provided by NMFS.

(2) Accurately record and submit the required data, which includes fish species composition, identification, sorting, and weighing information.

(3) Write complete reports, and report accurately any observations of suspected violations of regulations.

(4) Keep confidential and not disclose data and observations collected at the first receiver to any person except, NMFS staff or authorized officers or others as specifically authorized by NMFS.

(d) *Catch monitor provider certification.* Persons seeking to provide catch monitor services under this section must obtain a catch monitor provider certification from NMFS.

(1) *Applications.* Persons seeking to provide catch monitor services must submit a completed application by mail to the NMFS Northwest Region, Permits Office, ATTN: Catch Monitor Coordinator, 7600 Sand Point Way, NE, Seattle, WA 98115. An application for a catch monitor provider permit shall consist of a narrative that contains the following:

(i) Identification of the management, organizational structure, and ownership structure of the applicant's business, including identification by name and general function of all controlling management interests in the company, including but not limited to owners, board members, officers, authorized agents, and staff. If the applicant is a corporation, the articles of incorporation must be provided. If the applicant is a partnership, the partnership agreement must be provided.

(ii) *Contact information.* (A) The owner's permanent mailing address, telephone, and fax numbers.

(B) The business mailing address, including the physical location, e-mail address, telephone and fax numbers.

(C) Any authorized agent's mailing address, physical location, e-mail address, telephone and fax numbers. An authorized agent means a person appointed and maintained within the United States who is authorized to receive and respond to any legal process issued in the United States to an owner or employee of a catch monitor provider.

(iii) *Prior experience.* A statement identifying prior relevant experience in recruiting, hiring, deploying, and providing support for individuals in marine work environments in the groundfish fishery or other fisheries of similar scale.

(iv) *Ability to perform or carry out responsibilities of a catch monitor provider.* A description of the applicant's ability to carry out the responsibilities of a catch monitor provider is set out under paragraph (e) of this section.

(v) A statement describing any criminal convictions of each owner and board member, officer, authorized agent, and staff; a list of Federal contracts held and related performance ratings; and, a description of any previous decertification actions that may have been taken while working as an observer or observer provider.

(vi) A statement describing each owner and board member, officer, authorized agent, and staff indicating that they are free from conflict of interest as described under § 660.18(d).

(2) *Application review.* (i) The certification official, described in § 660.18(a), may issue catch monitor provider certifications upon determination that the application submitted by the candidate meets all requirements specified in paragraph (d)(2)(ii) of this section.

(ii) Issuance of the certification will, at a minimum, be based on the completeness of the application, as well as the following criteria:

(A) The applicant's ability to carry out the responsibilities and relevant experience;

(B) Satisfactory performance ratings on any Federal contracts held by the applicant.

(C) Absence of a conflict of interest.

(D) Absence of relevant criminal convictions.

(3) *Agency determination.* The certification official will make a determination to approve or deny the application and notify the applicant by letter via certified return receipt mail, within 60 days of receipt of the application. Additional certification procedures are specified in § 660.18, subpart C.

(4) *Existing catch monitor providers as of 2010.* NMFS-certified providers who deployed catch monitors in a NMFS-managed West Coast groundfish fishery or observers under the North Pacific Groundfish Program in 2010, are exempt from the requirement to apply for a permit for 2011 and will be issued a catch monitor provider permit effective through December 31, 2011, except that a change in ownership of an existing catch monitor provider or observer provider after January 1, 2011, requires a new permit application under this section. To receive catch monitor certification for 2012 and beyond, these exempted catch monitor providers must follow application procedures otherwise set forth in this section.

(e) *Catch monitor provider responsibilities.* (1) *Provide qualified candidates to serve as catch monitors.* To be qualified a candidate must:

(i) Be a U.S. citizen or have authorization to work in the United States;

(ii) Be at least 18 years of age;

(iii) Have a high school diploma and;

(A) At least two years of study from an accredited college with a major study in natural resource management, natural sciences, earth sciences, natural resource anthropology, law enforcement/police science, criminal justice, public administration, behavioral sciences, environmental sociology, or other closely related subjects pertinent to the management and protection of natural resources, or;

(B) One year of specialized experience performing duties which involved communicating effectively and obtaining cooperation, identifying and reporting problems or apparent violations of regulations concerning the use of protected or public land areas, and carrying out policies and procedures within a recreational area or natural resource site.

(iv) Computer skills that enable the candidate to work competently with standard database software and computer hardware.

(v) Have a current and valid driver's license.

(vi) Have had a background investigation and been found to have had no criminal or civil convictions that would affect their performance or credibility as a catch monitor.

(vii) Have had health and physical fitness exams and been found to be fit for the job duties and work conditions;

(A) Physical fitness exams shall be conducted by a medical doctor who has been provided with a description of the job duties and work conditions and who provides a written conclusion regarding the candidate's fitness relative to the required duties and work conditions. A signed and dated statement from a licensed physician that he or she has physically examined a catch monitor or catch monitor candidate. The statement must confirm that, based on that physical examination, the catch monitor or catch monitor candidate does not have any health problems or conditions that would jeopardize that individual's safety or the safety of others while deployed, or prevent the catch monitor or catch monitor candidate from performing his or her duties satisfactorily. The physician's statement must be submitted to the catch monitor program office prior to certification of a catch monitor. The physical exam must have occurred during the 12 months prior to the catch monitor's or catch monitor candidate's deployment. The physician's statement will expire 12 months after the physical exam occurred. A new physical exam must be performed, and accompanying statement submitted, prior to any deployment occurring after the expiration of the statement.

(B) Physical exams may include testing for illegal drugs.

(C) Certificates of insurance. Copies of "certificates of insurance", that names the NMFS Catch Monitor Program leader as the "certificate holder", shall be submitted to the Catch Monitor Program Office by February 1 of each year. The certificates of insurance shall verify the following coverage provisions and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled.

(*1*) Coverage under the U.S. Longshore and Harbor Workers' Compensation Act ($1 million minimum).

(*2*) States Worker's Compensation as required.

(*3*) Commercial General Liability.

(viii) Have signed a statement indicating that they are free from conflict of interest as described under § 660.18(c).

(2) *Standards.* Provide to the candidate a copy of the standards of conduct, responsibilities, conflict of interest standards and drug and alcohol policy.

(3) *Contract.* Provide to the candidate a copy of a written contract signed by the catch monitor and catch monitor provider that shows among other factors the following provisions for employment:

(i) Compliance with the standards of conduct, responsibilities, conflict of interest standards and drug and alcohol policy;

(ii) Willingness to complete all responsibilities of current deployment prior to performing jobs or duties which are not part of the catch monitor responsibilities.

(iii) Commitment to return all sampling or safety equipment issued for the deployment.

(4) *Catch monitors provided to a first receiver.*

(i) Must have a valid catch monitor certification;

(ii) Must not have informed the provider prior to the time of assignment that he or she is experiencing a mental illness or a physical ailment or injury developed since submission of the physician's statement, as required in paragraph (e)(1)(vii)(A) of this section that would prevent him or her from performing his or her assigned duties; and

(iii) Must have successfully completed all NMFS required training and briefing before assignment.

(5) *Respond to industry requests for catch monitors.* A catch monitor provider must provide a catch monitor for assignment pursuant to the terms of the contractual relationship with the first receiver to fulfill first receiver requirements for catch monitor coverage under paragraph (e)(10)(i)(C)(*1*)(*ii*) of this section. An alternate catch monitor must be supplied in each case where injury or illness prevents the catch monitor from performing his or her duties or where the catch monitor resigns prior to completion of his or her duties. If the catch monitor provider is unable to respond to an industry request for catch monitor coverage from a first receiver for whom the provider is in a contractual relationship due to the lack of available catch monitors, the provider must report it to NMFS at least 4 hours prior to the expected assignment time.

(6) *Ensure that catch monitors complete duties in a timely manner.* Catch monitor providers must ensure that catch monitors employed by that provider do the following in a complete and timely manner:

(i) Submit to NMFS all data, logbooks and reports as required under the catch monitor program deadlines.

(ii) Report for his or her scheduled debriefing and complete all debriefing responsibilities.

(7) *Provide catch monitor salaries and benefits.* A catch monitor provider must provide to its catch monitor employees salaries and any other benefits and personnel services in accordance with the terms of each catch monitor's contract.

(8) *Provide catch monitor assignment logistics.*

(i) A catch monitor provider must ensure each of its catch monitors under contract:

(A) Has an individually assigned mobile or cell phones, in working order, for all necessary communication. A catch monitor provider may alternatively compensate catch monitors for the use of the catch monitor's personal cell phone or pager for communications made in support of, or necessary for, the catch monitor's duties.

(B) Has Internet access for catch monitor program communications and data submission

(C) Remains available to NOAA Office for Law Enforcement and the catch monitor program until the completion of the catch monitors' debriefing.

(D) Receives all necessary transportation, including arrangements and logistics, of catch monitors to the location of assignment, to all subsequent assignments during that assignment, and to the debriefing location when an assignment ends for any reason; and

(E) Receives lodging, per diem, and any other services necessary to catch monitors assigned to first receivers, as specified in the contract between the catch monitor and catch monitor provider.

(F) While under contract with a permitted catch monitor provider, catch monitor shall be provided with accommodations in accordance with the contract between the catch monitor and the catch monitor provider. If the catch monitor provider is responsible for providing accommodations under the contract with the catch monitor, the accommodations must be at a licensed hotel, motel, bed and breakfast, or other accommodations that have an assigned bed for each catch monitor that no other person may be assigned to for the duration of that catch monitor's stay.

(ii) [Reserved]

(9) *Catch monitor assignment limitations and workload.*

(i) Not assign a catch monitor to the same first receiver for more than 90 calendar days in a 12-month period, unless otherwise authorized by NMFS.

(ii) Not exceed catch monitor assignment limitations and workload as outlined in § 660.140(i)(3)(ii), subpart D.

(10) *Maintain communications with catch monitors.* A catch monitor provider must have an employee responsible for catch monitor activities on call 24 hours a day to handle emergencies involving catch monitors or problems concerning catch monitor logistics, whenever catch monitors are assigned, or in transit, or awaiting first receiver reassignment.

(11) *Maintain communications with the catch monitor program office.* A catch monitor provider must provide all of the following information by electronic transmission (e-mail), fax, or other method specified by NMFS.

(i) *Catch monitor training, briefing, and debriefing registration materials.* This information must be submitted to the catch monitor program at least 7 business days prior to the beginning of a scheduled catch monitor certification training or briefing session.

(A) Training registration materials consist of the following:

(*1*) Date of requested training;

(*2*) A list of catch monitor candidates that includes each candidate's full name (i.e., first, middle and last names), date of birth, and gender;

(*3*) A copy of each candidate's academic transcripts and resume;

(*4*) A statement signed by the candidate under penalty of perjury which discloses the candidate's criminal convictions;

(*5*) Projected candidate assignments. Prior to the completion of the training session, the catch monitor provider must submit to the catch monitor program a statement of projected catch monitor assignments that includes each catch monitor's name and length of catch monitors contract.

(B) Briefing registration materials consist of the following:

(*1*) Date and type of requested briefing session;

(*2*) List of catch monitors to attend the briefing session, that includes each catch monitor's full name (first, middle, and last names);

(*3*) Projected catch monitor assignments. Prior to the catch monitor's completion of the briefing session, the catch monitor provider must submit to the catch monitor program a statement of projected catch monitor assignments that includes each catch monitor's name and length of observer contract.

(C) *Debriefing.* The catch monitor program will notify the catch monitor provider which catch monitors require debriefing and the specific time period the provider has to schedule a date, time, and location for debriefing. The catch monitor provider must contact the catch monitor program within 5 business days by telephone to schedule debriefings.

(*1*) Catch monitor providers must immediately notify the catch monitor program when catch monitors end their contract earlier than anticipated.

(*2*) [Reserved]

(ii) *Catch monitor provider contracts.* If requested, catch monitor providers must submit to the catch monitor program a completed and unaltered copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the catch monitor provider and those entities requiring catch monitor services under § 660.140(i)(1), subpart D. Catch monitor providers must also submit to the catch monitor program upon request, a completed and unaltered copy of the current or most recent signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract and any agreements or policies with regard to catch monitor compensation or salary levels) between the catch monitor provider and the particular entity identified by the catch monitor program or with specific catch monitors. The copies must be submitted to the catch monitor program via e-mail, fax, or mail within 5 business days of the request. Signed and valid contracts include the contracts a catch monitor provider has with:

(A) First receivers required to have catch monitor coverage as specified at paragraph § 660.140(i)(1), subpart D; and

(B) Catch monitors.

(iii) *Change in catch monitor provider management and contact information.* A catch monitor provider must submit to the catch monitor program any change of management or contact information submitted on the provider's permit application under paragraphs (d)(1) of this section within 30 days of the effective date of such change.

(iv) *Catch monitor status report.* Each Tuesday, catch monitor providers must provide NMFS with an updated list of contact information for all catch monitors that includes the catch monitor's name, mailing address, e-mail address, phone numbers, first receiver assignment for the previous week and whether or not the catch monitor is "in service", indicating when the catch monitor has requested leave and/or is not currently working for the provider.

(v) *Informational materials.* Providers must submit to NMFS, if requested, copies of any information developed and used by the catch monitor providers and distributed to first receivers, including, but not limited to, informational pamphlets, payment notification, and description of catch monitor duties.

(vi) *Other reports.* Reports of the following must be submitted in writing to the catch monitor program by the catch monitor provider via fax or e-mail address designated by the catch monitor program within 24 hours after the catch monitor provider becomes aware of the information:

(A) Any information regarding possible catch monitor harassment;

(B) Any information regarding any action prohibited under § 660.12(f);

(C) Any catch monitor illness or injury that prevents the catch monitor from completing any of his or her duties described in the catch monitor manual; and

(D) Any information, allegations or reports regarding catch monitor conflict of interest or breach of the standards of behavior described in catch monitor provider policy.

(12) *Replace lost or damaged gear.* A catch monitor provider must replace all lost or damaged gear and equipment issued by NMFS to a catch monitor under contract to that provider.

(13) *Confidentiality of information.* A catch monitor provider must ensure that all records on individual catch monitor performance received from NMFS under the routine use provision of the Privacy Act or as otherwise required by law remain confidential and are not further released to anyone outside the employ of the catch monitor provider company to whom the catch monitor was contracted except with written permission of the catch monitor.

(14) *Catch monitor program training and certification*—(i) A training certification signifies the successful completion of the training course required to obtain catch monitor certification. This endorsement expires when the catch monitor has not been deployed and performed sampling duties as required by the catch monitor program office for a period of time, specified by the catch monitor program, after his or her most recent debriefing. The catch monitor can renew the certification by successfully completing training once more.

(ii) *Catch monitor program annual briefing.* Each catch monitor must attend an annual briefing prior to his or her first deployment within any calendar year subsequent to a year in which a training certification is obtained. To maintain certification, a catch monitor must successfully complete the annual briefing, as specified by the catch monitor program. All briefing attendance, performance, and conduct standards required by the catch monitor program must be met.

(iii) *Maintaining the validity of a catch monitor certification.* After initial issuance, a catch monitor must keep their certification valid by meeting all of the following requirements specified below:

(A) Successfully perform their assigned duties as described in the Catch Monitor Manual or other written instructions from the catch monitor program.

(B) Accurately record their data, write complete reports, and report accurately any observations of suspected violations of regulations relevant to conservation of marine resources or their environment.

(C) Not disclose collected data and observations made on board the vessel or in the first receiver facility to any person except the owner or operator of the observed vessel, first receiver management or an authorized officer or NMFS.

(D) Successfully complete NMFS-approved annual briefings as prescribed by the catch monitor program.

(E) Successful completion of a briefing by a catch monitor consists of meeting all attendance and conduct standards issued in writing at the start of training; meeting all performance standards issued in writing at the start of training for assignments, tests, and other evaluation tools; and completing all other briefing requirements established by the catch monitor program.

(F) Successfully meet all expectations in all debriefings including reporting for assigned debriefings.

(G) Submit all data and information required by the catch monitor program within the program's stated guidelines.

■ 11. Section 660.18 is revised to read as follows:

§ 660.18 Certification and decertification procedures for catch monitors and catch monitor providers.

(a) *Certification official.* The Regional Administrator (or a designee) will designate a NMFS catch monitor certification official who will make decisions on whether to issue or deny catch monitor or catch monitor provider certification pursuant to the regulations at §§ 660.17 and 660.18, subpart C.

(b) *Agency determinations on certifications.* (1) *Issuance of certifications*—Certification may be issued upon determination by the certification official that the candidate has successfully met all requirements for certification as specified in:

(i) § 660.17(b) for catch monitors; and

(ii) § 660.17(d) for catch monitor providers.

(2) *Denial of a certification.* The NMFS certification official will issue a written determination identifying the reasons for denial of a certification.

(c) *Limitations on conflict of interest for catch monitors.* (1) Catch monitors must not have a direct financial interest, other than the provision of observer or catch monitor services, in a North Pacific fishery managed pursuant to an FMP for the waters off the coast of Alaska, Alaska state waters, or in a Pacific Coast fishery managed by either the state or Federal Governments in waters off Washington, Oregon, or California, including but not limited to:

(i) Any ownership, mortgage holder, or other secured interest in a vessel, shore-based or floating stationary processor facility involved in the catching, taking, harvesting or processing of fish,

(ii) Any business involved with selling supplies or services to any vessel, shore-based or floating stationary processing facility; or

(iii) Any business involved with purchasing raw or processed products from any vessel, shore-based or floating stationary processing facilities.

(2) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who either conducts activities that are regulated by NMFS or has interests that may be substantially affected by the performance or nonperformance of the catch monitor's official duties.

(3) May not serve as a catch monitor at any shoreside or floating stationary processing facility owned or operated where a person was previously employed in the last two years.

(4) May not solicit or accept employment as a crew member or an employee of a vessel, or shoreside processor while employed by a catch monitor provider.

(5) Provisions for remuneration of catch monitors under this section do not constitute a conflict of interest.

(d) *Limitations on conflict of interest for catch monitor providers.* Catch monitor providers must not have a direct financial interest, other than the provision of observer or catch monitor services, in a North Pacific fishery managed pursuant to an FMP for the waters off the coast of Alaska, Alaska state waters, or in a Pacific Coast fishery managed by either the state or Federal Governments in waters off Washington, Oregon, or California, including but not limited to:

(1) Any ownership, mortgage holder, or other secured interest in a vessel, shore-based or floating stationary processor facility involved in the catching, taking, harvesting or processing of fish,

(2) Any business involved with selling supplies or services to any vessel, shore-based or floating stationary processing facility; or

(3) Any business involved with purchasing raw or processed products from any vessel, shore-based or floating stationary processing facilities.

(e) *Decertification.* (1) *Decertification review official*—The Regional

Administrator (or a designee) will designate a decertification review official(s), who will have the authority to review certifications and issue IADs of decertification.

(2) *Causes for decertification.* The decertification official may initiate decertification proceedings when it is alleged that any of the following acts or omissions have been committed:

(i) Failed to satisfactorily perform the specified duties and responsibilities;

(ii) Failed to abide by the specified standards of conduct;

(iii) Upon conviction of a crime or upon entry of a civil judgment for:

(A) Commission of fraud or other violation in connection with obtaining or attempting to obtain certification, or in performing the duties and responsibilities specified in this section;

(B) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(C) Commission of any other offense indicating a lack of integrity or honesty that seriously and directly affects the fitness of catch monitors.

(3) *Issuance of IAD.* Upon determination that decertification is warranted under § 660.17(c) or (e), the decertification official will issue a written IAD. The IAD will identify the specific reasons for the action taken. Decertification is effective 30 calendar days after the date on the IAD, unless there is an appeal.

(4) *Appeals.* A certified catch monitor who receives an IAD that suspends or revokes his or her catch monitor certification may appeal the determination within 30 calendar days after the date on the IAD to the Office of Administrative Appeals pursuant to § 679.43.

■ 12. In § 660.25, paragraphs (b)(1)(i)(A) and (B) are removed; paragraph (b)(4)(i)(F) is added; the heading to paragraph (b)(4) and paragraphs (b)(4)(iv)(A), (b)(4)(v)(A) through (C), the heading to paragraph (b)(4)(vi), and paragraphs (b)(4)(vi)(A), (b)(4)(vi)(C), and (g)(4) are revised; and paragraph (e) is added to read as follows:

§ 660.25 Permits.

* * * * *

(b) * * *

(4) *Limited entry permit actions—renewal, combination, stacking, change of permit ownership or permit holdership, and change in vessel registration—*

(i) * * *

(F) A limited entry permit will not be renewed until a complete economic data collection form is submitted as required under § 660.113(b), (c) and (d), subpart D. The permit renewal will be marked incomplete until the required information is submitted.

* * * * *

(iv) *Changes in permit ownership and permit holder*—(A) *General.* The permit owner may convey the limited entry permit to a different person. The new permit owner will not be authorized to use the permit until the change in permit ownership has been registered with and approved by the SFD. The SFD will not approve a change in permit ownership for a limited entry permit with a sablefish endorsement that does not meet the ownership requirements for such permit described at paragraph (b)(3)(iv)(C) of this section. The SFD will not approve a change in permit ownership for a limited entry permit with an MS/CV endorsement or an MS permit that does not meet the ownership requirements for such permit described at § 660.150(g)(3), subpart D, and § 660.150(f)(3), subpart D, respectively. Change in permit owner and/or permit holder applications must be submitted to SFD with the appropriate documentation described at paragraph (b)(4)(vii) of this section.

(*1*) During the initial issuance application period for the trawl rationalization program, NMFS will not review or approve any request for a change in limited entry trawl permit owner, as specified at § 660.140(d)(8)(viii) for QS permit applicants, at § 660.150(g)(6)(vii) for MS/CV endorsement applicants, and at § 660.160(d)(7)(vii) for C/P endorsement applicants. The initial issuance application period for the trawl rationalization program will begin on either November 1, 2010, or the date upon which the application is received by NMFS, whichever occurs first.

(*2*) [Reserved]

* * * * *

(v) *Changes in vessel registration of limited entry permits and gear endorsements*—(A) *General.* A permit may not be used with any vessel other than the vessel registered to that permit. For purposes of this section, a permit change in vessel registration occurs when, through SFD, a permit owner registers a limited entry permit for use with a new vessel. Permit change in vessel registration applications must be submitted to SFD with the appropriate documentation described at paragraph (b)(4)(vii) of this section. Upon receipt of a complete application, and following review and approval of the application, the SFD will reissue the permit registered to the new vessel. Applications to change vessel registration on limited entry permits with sablefish endorsements will not be approved until SFD has received complete documentation of permit ownership as described at paragraph (b)(3)(iv)(C)(*4*) and as required under paragraph (b)(4)(vii) of this section. Applications to change vessel registration on limited entry permits with trawl endorsements or MS permits will not be approved until SFD has received complete EDC forms as required under § 660.114, subpart D.

(B) *Application.* A complete application must be submitted to SFD in order for SFD to review and approve a change in vessel registration. At a minimum, a permit owner seeking to change vessel registration of a limited entry permit shall submit to SFD a signed application form and his/her current limited entry permit before the first day of the cumulative limit period in which they wish to fish. If a permit owner provides a signed application and current limited entry permit after the first day of a cumulative limit period, the permit will not be effective until the succeeding cumulative limit period. SFD will not approve a change in vessel registration until it receives a complete application, the existing permit, a current copy of the USCG 1270, and other required documentation.

(C) *Effective date.* Changes in vessel registration on permits will take effect no sooner than the first day of the next major limited entry cumulative limit period following the date that SFD receives the signed permit change in vessel registration form and the original limited entry permit, except that changes in vessel registration on MS permits and C/P-endorsed permits will take effect immediately upon reissuance to the new vessel, and a change in vessel registration on MS/CV-endorsed permits will take effect immediately upon reissuance to the new vessel only on the second transfer for the year. No change in vessel registration is effective until the limited entry permit has been reissued as registered with the new vessel.

* * * * *

(vi) *Restriction on frequency of changes in vessel registration*—(A) *General.* A permit owner may designate the vessel registration for a permit as "unidentified," meaning that no vessel has been identified as registered for use with that permit. No vessel is authorized to use a permit with the vessel registration designated as "unidentified." A vessel owner who removes a permit from his vessel and registers that permit as "unidentified" is not exempt from VMS requirements at

§ 660.14, subpart C unless specifically authorized by that section. When a permit owner requests that the permit's vessel registration be designated as "unidentified," the transaction is not considered a change in vessel registration for purposes of this section. Any subsequent request by a permit owner to change from the "unidentified" status of the permit in order to register the permit with a specific vessel will be considered a change in vessel registration and subject to the restriction on frequency and timing of changes in vessel registration.

* * * * *

(C) *Limited entry MS permits and limited entry permits with an MS/CV or a C/P endorsement.* Limited entry MS permits and limited entry permits with an MS/CV or a C/P endorsement may be registered to another vessel up to two times during the fishing season as long as the second change in vessel registration is back to the original vessel. The original vessel is either the vessel registered to the permit as of January 1, or if no vessel is registered to the permit as of January 1, the original vessel is the first vessel to which the permit is registered after January 1. After the original vessel has been established, the first change in vessel registration would be to another vessel, but any second change in vessel registration must be back to the original vessel. For an MS/CV-endorsed permit on the second change in vessel registration back to the original vessel, that vessel must be used to fish exclusively in the MS Coop Program described § 660.150, and declare in to the limited entry mid water trawl, Pacific whiting mothership sector as specified at § 660.13(d)(5)(iv).

* * * * *

(e) *Coop permit*—(1) *MS coop permit.* An MS coop permit conveys a conditional privilege to an eligible coop entity to receive and manage a coop's allocation of designated species and species groups. An MS coop permit is not a limited entry permit. The provisions for the MS coop permit, including eligibility, annual registration, fees, and appeals are described in the MS Coop Program at § 660.150, subpart D.

(2) *C/P coop permit.* A C/P coop permit conveys a conditional privilege to an eligible coop entity to receive and manage a coop's allocation of designated species and species groups. A C/P coop permit is not a limited entry permit. The provisions for the C/P coop permit, including eligibility, annual registration, fees, and appeals are described in the C/P Coop Program at § 660.160, subpart D.

* * * * *

(g) * * *

(4) *Timing of appeals.* (i) For permit actions related to the application and initial issuance process for QS permits, MS permits, MS/CV endorsements, and C/P endorsements for the trawl rationalization program listed in subpart D of part 660, if an applicant appeals an IAD, the appeal must be postmarked, faxed, or hand delivered to NMFS no later than 60 calendar days after the date on the IAD. If the applicant does not appeal the IAD within 60 calendar days, the IAD becomes the final decision of the Regional Administrator acting on behalf of the Secretary of Commerce.

(ii) For all other permit actions, if an applicant appeals an IAD, the appeal must be postmarked, faxed, or hand delivered to NMFS no later than 30 calendar days after the date on the IAD. If the applicant does not appeal the IAD within 30 calendar days, the IAD becomes the final decision of the Regional Administrator acting on behalf of the Secretary of Commerce.

(iii) The time period to submit an appeal begins with the date on the IAD. If the last day of the time period is a Saturday, Sunday, or Federal holiday, the time period will extend to the close of business on the next business day.

* * * * *

§ 660.26 [Removed]

■ 13. Section 660.26 is removed.

■ 14. In § 660.55, paragraph (i)(2) is revised to read as follows:

§ 660.55 Allocations.

* * * * *

(i) * * *

(2) The commercial harvest guideline for Pacific whiting is allocated among three sectors, as follows: 34 percent for the C/P Coop Program; 24 percent for the MS Coop Program; and 42 percent for the Shore based IFQ Program. No more than 5 percent of the Shore based IFQ Program allocation may be taken and retained south of 42° N. lat. before the start of the primary Pacific whiting season north of 42° N. lat. Specific sector allocations for a given calendar year are found in Tables 1a and 2a of this subpart. Set asides for other species for the at-sea whiting fishery for a given calendar year are found in Tables 1d and 2d of this subpart.

* * * * *

■ 15. In § 660.60, paragraph (d)(1), paragraph (h)(2), and paragraph (h)(5)(ii) are revised; and paragraphs (h)(5)(iii) and (h)(5)(iv) are removed to read as follows:

§ 660.60 Specifications and management measures.

* * * * *

(d) * * *

(1) Automatic actions are used in the Pacific whiting fishery to:

(i) Close an at-sea sector of the fishery when that sector's Pacific whiting allocation is reached, or is projected to be reached;

(ii) Close all at-sea sectors or a single sector of the fishery when a non-whiting groundfish species with allocations is reached or projected to be reached;

(iii) Reapportion unused allocations of non-whiting groundfish species from one at-sea sector of the Pacific whiting fishery to another.

(iv) Implement the Ocean Salmon Conservation Zone, described at § 660.131(c)(3), subpart D, when NMFS projects the Pacific whiting fishery may take in excess of 11,000 Chinook within a calendar year.

(v) Implement Pacific Whiting Bycatch Reduction Areas, described at § 660.131(c)(4) Subpart D, when NMFS projects a sector-specific bycatch limit will be reached before the sector's whiting allocation.

* * * * *

(h) * * *

(2) *Landing.* As stated at § 660.11, subpart C (in the definition of "Landing"), once the offloading of any species begins, all fish aboard the vessel are counted as part of the landing and must be reported as such. All fish from an IFQ landing must be offloaded from the vessel before a new fishing trip begins. Transfer of fish at sea is prohibited under § 660.12, subpart C, unless a vessel is participating in the primary whiting fishery as part of the mothership or catcher/processor sectors, as described at § 660.131(a), subpart D. Catcher vessels in the mothership sector must transfer all catch from a haul to the same vessel registered to an MS permit prior to the gear being set for a subsequent haul. Catch may not be transferred to a tender vessel.

* * * * *

(5) * * *

(ii) *Weight limits and conversions.* To determine the round weight, multiply the processed weight times the conversion factor. Federal commercial groundfish regulations do not supersede more restrictive state commercial groundfish regulations, including landings requirements regarding groundfish species or the condition in which they may be landed.

(A) Limited entry fixed gear or open access fisheries. The weight limit conversion factor established by the state where the fish is or will be landed

will be used to convert the processed weight to round weight for purposes of applying the trip limit or other allocation. Weight conversions provided herein are those conversions currently in use by the States of Washington, Oregon, and California and may be subject to change by those states. Fishery participants should contact fishery enforcement officials in the state where the fish will be landed to determine that state's official conversion factor.

(*1*) *Sablefish.* The following conversion applies to both the limited entry fixed gear and open access fisheries when trip limits are in effect for those fisheries. For headed and gutted (eviscerated) sablefish the weight conversion factor is 1.6 (multiply the headed and gutted weight by 1.6 to determine the round weight).

(*2*) *Lingcod.* The following conversions apply in both limited entry fixed gear and open access fisheries.

(*i*) North of 42° N. lat., for lingcod with the head removed, the minimum size limit is 18 inches (46 cm), which corresponds to 22 inches (56 cm) total length for whole fish.

(*ii*) South of 42° N. lat., for lingcod with the head removed, the minimum size limit is 19.5 inches (49.5 cm), which corresponds to 24 inches (61 cm) total length for whole fish.

(*iii*) The weight conversion factor for headed and gutted lingcod is 1.5. The conversion factor for lingcod that has only been gutted with the head on is 1.1.

(B) *Shorebased IFQ Program.* For vessels landing sorted catch, the weight conversions for purposes of applying QP are provided below.

(*1*) *Sablefish.* The weight conversion factor for headed and gutted (eviscerated) sablefish is 1.6.

(*2*) *Lingcod.* The following conversions apply:

(*i*)The minimum size limit lingcod North of 42° N. lat., with the head removed, is 18 inches (46 cm), which corresponds to 22 inches (56 cm) total length for whole fish.

(*ii*) The minimum size limit for lingcod South of 42° N. lat., with the head removed, is 19.5 inches (49.5 cm), which corresponds to 24 inches (61 cm) total length for whole fish.

(*iii*) The weight conversion factor for headed and gutted (eviscerated) lingcod is 1.5; for lingcod that has only been gutted with the head on, the weight conversion factor is 1.1.

(*3*) *Pacific whiting.* For headed and gutted Pacific whiting (head removed just in front of the collar bone and viscera removed,) the weight conversion factor is 1.56; and for headed and gutted Pacific whiting with the tail removed the weight conversion factor is 2.0.

(*4*) *Rockfish (including thornyheads), except POP.* For headed and gutted (eviscerated), the weight conversion factor is 1.75; for headed and gutted, western cut (head removed just in front of the collar bone and viscera removed,) the weight conversion factor is 1.66; for headed and gutted, eastern cut (head removed just behind the collar bone and viscera removed,) the weight conversion factor is 2.0.

(*5*) *Pacific ocean perch (POP).* For headed and gutted (eviscerated), the weight conversion factor is 1.6.

(*6*) *Pacific cod.* For headed and gutted (eviscerated), the weight conversion factor is 1.58.

(*7*) *Dover sole, English sole, and* "*other flatfish*". For headed and gutted (eviscerated), the weight conversion factor is 1.53.

(*8*) *Petrale sole.* For headed and gutted (eviscerated), the weight conversion factor is 1.51.

(*9*) *Arrowtooth flounder.* For headed and gutted (eviscerated), the weight conversion factor is 1.35.

(*10*) *Starry flounder.* For headed and gutted (eviscerated), the weight conversion factor is 1.49.

* * * * *

■ 16. Section 660.100 is revised to read as follows:

§ 660.100 Purpose and scope.

This subpart covers the Pacific coast groundfish limited entry trawl fishery. Under the trawl rationalization program, the limited entry trawl fishery consists of the Shorebased IFQ Program, the MS Coop Program, and the C/P Coop Program. Nothing in these regulations shall be construed to modify, impair, or supersede the operation of any of the antitrust laws. The trawl rationalization program creates limited access privileges. These limited access privileges, including the QS or IBQ, QP or IBQ pounds, and catch history assignments, may be revoked, limited or modified at any time in accordance with the MSA—and do not create any right of compensation to the holder of the limited access privilege if it is revoked, limited, or modified. The trawl rationalization program does not create any right, title, or interest in or to any fish before the fish is harvested by the holder and shall be considered a grant of permission to the holder of the limited access privilege to engage in activities permitted by the trawl rationalization program.

■ 17. In § 660.111, the following definitions are removed: "Pacific whiting shoreside first receivers", "Pacific whiting shoreside or shore-based fishery", "Pacific whiting shoreside vessel," and "Vessel limits"; the definition of "Pacific whiting IFQ fishery" is revised; and new definitions are added in alphabetical order for: "Accumulation limits," "Charterer," "Complete economic data collection (EDC) form," "IFQ trip", "Lessee," and "Pacific whiting IFQ trip".

§ 660.111 Trawl fishery—definitions.

* * * * *

Accumulation limits mean the maximum extent of permissible ownership, control or use of a privilege within the trawl rationalization program, and include the following:

(1) *Shorebased IFQ Program.* (i) *Control limits* means the maximum amount of QS or IBQ that a person may own or control, as described at § 660.140(d)(4).

(ii) *Vessel limits* means the maximum amount of QP a vessel can hold, acquire, and/or use during a calendar year, and specify the maximum amount of QP that may be registered to a single vessel during the year (QP Vessel Limit) and, for some species, the maximum amount of unused QP registered to a vessel account at any one time (Unused QP Vessel Limit), as described at § 660.140(e)(4).

(2) *MS Coop Program.* (i) MS permit usage limit means the maximum amount of the annual mothership sector Pacific whiting allocation that a person owning an MS permit may cumulatively process, no more than 45 percent, as described at § 660.150(f)(3)(i).

(ii) MS/CV permit ownership limit means the maximum amount of catch history assignment that a person may own, no more than 20 percent of the MS sector's allocation of Pacific whiting, as described at § 660.150(g)(3)(i).

(iii) Catcher vessel usage limit means the maximum amount of the annual mothership sector Pacific whiting allocation that a vessel may catch, no more than 30 percent, as described at § 660.150(g)(3)(ii).

* * * * *

Charterer means, for the purpose of economic data collection program, a person, other than the owner of the vessel, who: entered in to any agreement or commitment by which the possession or services of the vessel are secured for a period of time for the purposes of commercially harvesting or processing fish. A long-term or exclusive contract for the sale of all or a portion of the vessel's catch or processed products is not considered a charter.

* * * * *

Complete economic data collection (EDC) form means that a response is

supplied for each question, sub-question, and answer-table cell. If particular question or sub-question is not applicable, "NA", must be entered in the appropriate space on the form. The form must also be signed and dated to certify that the information is true and complete to the best of the signatory's knowledge.

* * * * *

IFQ trip means a trip in which the vessel has a valid fishing declaration for any of the following: Limited entry midwater trawl, non-whiting shorebased IFQ; Limited entry midwater trawl, Pacific whiting shorebased IFQ; Limited entry bottom trawl, shorebased IFQ, not including demersal trawl; Limited entry demersal trawl, shorebased IFQ; or Limited entry groundfish non-trawl, shorebased IFQ.

* * * * *

Lessee means, for the purpose of economic data collection program, a person, other than the owner of the vessel or facility, who: was identified as the leaseholder, in a written lease, of the vessel or facility, or paid expenses of the vessel or facility, or claimed expenses for the vessel or facility as a business expense on a federal income tax return, or on a state income tax return.

* * * * *

Pacific whiting IFQ fishery means the Shorebased IFQ Program fishery composed of vessels making Pacific whiting IFQ trips pursuant to the requirements at § 660.131 during the primary whiting season fishery dates for the Shorebased IFQ Program.

Pacific whiting IFQ trip means a trip in which a vessel registered to a limited entry permit uses legal midwater groundfish trawl gear with a valid declaration for limited entry midwater trawl, Pacific whiting shorebased IFQ, as specified at § 660.13(d)(5)(iv)(A) during the dates for the Pacific whiting IFQ fishery primary season.

* * * * *

■ 18. In § 660.112:
■ a. Paragraph (f) is removed;
■ b. Paragraph (a)(2) is added;
■ c. Paragraph (a)(3)(iii) is added;
■ d. Paragraph (a)(4) is redesignated as paragraph (a)(5), and a new paragraph (a)(4) is added; and
■ e. Paragraphs (b) through (e) are added to read as follows:

§ 660.112 Trawl fishery—prohibitions.

* * * * *

(a) * * *

(2) *Sorting.* Fail to sort catch consistent with the requirements specified at § 660.130(d).

* * * * *

(3) * * *

(iii) Failure to submit a complete EDC form to NMFS as required by § 660.113.

* * * * *

(4) *Observers.*—(i) Fish (including processing, as defined at § 600.10 of this chapter) in the Shorebased IFQ Program, the MS Coop Program, or the C/P Coop Program if NMFS determines the vessel is unsafe for an observer.

(ii) Fish in the Shorebased IFQ Program, the MS Coop Program, or the C/P Coop Program without observer coverage.

* * * * *

(b) *Shorebased IFQ Program*—(1) *General.* (i) Own or control by any means whatsoever an amount of QS or IBQ that exceeds the Shorebased IFQ Program accumulation limits.

(ii) Fish in the Shorebased IFQ Program with a vessel that does not have a valid vessel account or that has a vessel account with a deficit (negative balance) for any species/species group.

(iii) Have any IFQ species/species group catch (landings and discards) from an IFQ trip not covered by QP for greater than 30 days from the date the deficit (negative balance) from that trip is documented, unless the deficit is within the limits of the carryover provision specified at § 660.140(e)(5), subpart D, in which case the vessel has 30 days after the QP for the following year are issued to eliminate the deficit.

(iv) Transfer the limited entry trawl endorsed permit to another vessel or sell the limited entry trawl endorsed permit to another owner if the vessel registered to the permit has an overage (catch not covered by QP), until the overage is covered, regardless of the amount of the overage.

(v) Use QP by vessels not registered to a limited entry trawl permit with a valid vessel account.

(vi) Use QP in an area or for species/species groups other than that for which it is designated.

(vii) Fish in more than one IFQ management area, specified at § 660.140(c)(2), on the same trip.

(viii) Fish on a Pacific whiting IFQ trip with a gear other than legal midwater groundfish trawl gear.

(ix) Fish on a Pacific whiting IFQ trip without a valid declaration for limited entry midwater trawl, Pacific whiting shorebased IFQ, as specified at § 660.13(d)(5)(iv)(A), subpart C.

(x) Use midwater trawl gear to fish for Pacific whiting within an RCA outside the Pacific whiting IFQ fishery primary season as specified at § 660.131(b)(2)(iii).

(xi) Bring a haul on board before all catch from the previous haul has been stowed.

(xii) Process groundfish at-sea ("at-sea processing") by vessels in the Shorebased IFQ Program regardless of the type of gear used, with the following exceptions:

(A) A vessel that is 75-ft (23-m) or less LOA that harvests whiting and, in addition to heading and gutting, cuts the tail off and freezes the whiting, is not considered to be a catcher/processor nor is it considered to be processing fish, and

(B) A vessel that has a sablefish at-sea processing exemption, defined at § 660.25(b)(3)(iv)(D), subpart C may process sablefish at-sea.

(xiii) Retain any IFQ species/species group onboard a vessel unless the vessel has observer coverage during the entire trip and until all IFQ species from the trip are offloaded. A vessel may deliver IFQ species/species groups to more than one IFQ first receiver, but must maintain observer coverage until all IFQ species from the trip are offloaded. Once transfer of fish begins, all fish aboard the vessel are counted as part of the same landing as defined at § 660.11.

(xiv) Discard IFQ species/species group at sea unless the observer has documented or estimated the discards.

(xv) Begin a new fishing trip until all fish from an IFQ landing have been offloaded from the vessel.

(2) *IFQ first receivers.* (i) Accept an IFQ landing without a valid first receiver site license.

(ii) Fail to sort fish received from a IFQ landing prior to first weighing after offloading as specified at § 660.130(d)(2) for the Shorebased IFQ Program, except the vessels declared in to the limited entry midwater trawl, Pacific whiting shorebased IFQ at § 660.13(d)(5)(iv)(A), subpart C may weigh catch on a bulk scale before sorting as described at § 660.140(j)(2).

(iii) Process, sell, or discard any groundfish received from an IFQ landing that has not been weighed on a scale that is in compliance with requirements at § 660.15, subpart C.

(iv) Transport catch away from the point of landing before that catch has been sorted and weighed by federal groundfish species or species group, and recorded for submission on an electronic fish ticket. (If fish will be transported to a different location for processing, all sorting and weighing to federal groundfish species groups must occur before transporting the catch away from the point of landing).

(v) Receive an IFQ landing without coverage by a catch monitor when one is required by regulations, unless NMFS has granted a written waiver exempting the IFQ first receiver from the catch monitor coverage requirements. On a

case-by-case basis, a temporary written waiver may be granted by the Assistant Regional Administrator or designee if he/she determines that the failure to obtain coverage of a catch monitor was due to circumstances beyond the control of the first receiver. The duration of the waiver will be determined on a case-by-case basis.

(vi) Receive an IFQ landing without a NMFS-accepted catch monitoring plan or not in accordance with their NMFS-accepted catch monitoring plan.

(vii) Mix catch from more than one IFQ landing prior to the catch being sorted and weighed.

(viii) Fail to comply with the IFQ first receiver responsibilities specified at § 660.140(b)(2).

(ix) Process, sell, or discard any groundfish received from an IFQ landing that has not been accounted for on an electronic fish ticket with the identification number for the vessel that delivered the fish.

(x) Fail to submit, or submit incomplete or inaccurate information on any report, application, or statement required under this part.

(c) *MS and C/P Coop Programs.* (1) Process Pacific whiting in the fishery management area during times or in areas where at-sea processing is prohibited for the sector in which the vessel fishes, unless:

(i) The fish are received from a member of a Pacific Coast treaty Indian tribe fishing under § 660.50, subpart C;

(ii) The fish are processed by a waste-processing vessel according to § 660.131(h), subpart D; or

(iii) The vessel is completing processing of Pacific whiting taken on board prior to the close of that vessel's primary season.

(2) During times or in areas where at-sea processing is prohibited, take and retain or receive Pacific whiting, except as cargo or fish waste, on a vessel in the fishery management area that already has processed Pacific whiting on board. An exception to this prohibition is provided if the fish are received within the tribal U&A from a member of a Pacific Coast treaty Indian tribe fishing under § 660.50, subpart C.

(3) Operate as a waste-processing vessel within 48 hours of a primary season for Pacific whiting in which that vessel operates as a catcher/processor or mothership, according to § 660.131(h), subpart D.

(4) On a vessel used to fish for Pacific whiting, fail to keep the trawl doors on board the vessel, when taking and retention is prohibited under § 660.131(b), subpart D.

(5) Sort or discard any portion of the catch taken by a catcher vessel in the mothership sector before the catcher vessel observer completes sampling of the catch, with the exception of minor amounts of catch that are lost when the codend is separated from the net and prepared for transfer.

(d) *MS Coop Program (coop and non-coop fisheries).* (1) Catch, take, or harvest fish in the mothership non-coop fishery with a vessel that is not registered to a current MS/CV-endorsed limited entry trawl permit.

(2) Receive catch, process catch, or otherwise fish as a mothership vessel if it is not registered to a current MS permit.

(3) Fish with a vessel in the mothership sector, if that vessel was used to fish in the C/P fishery in the same calendar year.

(4) Catch, take, or harvest fish in the MS Coop Program with a vessel that does not have a valid VMS declaration for limited entry midwater trawl, Pacific whiting mothership sector, as specified at § 660.13(d)(5)(iv)(A), subpart C.

(5) Transfer catch to a vessel that is not registered to an MS permit. (i.e. a tender vessel).

(6) Use a vessel registered to a limited entry permit with a trawl endorsement (with or without an MS/CV endorsement) to catch more than 30 percent of the Pacific whiting allocation for the mothership sector.

(7) Process more than 45 percent of the annual mothership sector's Pacific whiting allocation.

(8) Catch, take, or harvest fish before all catch from any previous haul has been transferred to a single vessel registered to an MS permit.

(9) Transfer catch from a single haul to more than one permitted MS vessel.

(10) Catch, take, or harvest fish for a MS coop with a vessel that has not been identified by the coop as a vessel authorized to harvest that coop's allocation.

(11) Catch, take, or harvest fish in the non-coop fishery with a vessel registered to an MS/CV-endorsed permit in the same year the MS/CV-endorsed permit was registered to a vessel that fished as a member of a coop in the MS Coop Program.

(12) Sort or discard any portion of the catch taken by a catcher vessel in the mothership sector before the catcher vessel observer completes sampling of the catch, except for minor operational amounts of catch lost by a catcher vessel provided the observer has accounted for the discard (i.e., a maximized retention fishery).

(13) Mix catch from more than one haul before the observer completes their collection of catch for sampling.

(14) Take deliveries without a valid scale inspection report signed by an authorized scale inspector on board the vessel.

(15) Sort, process, or discard catch delivered to a mothership before the catch is weighed on a scale that meets the requirements of § 660.15(b), including the daily test requirements.

(e) *C/P Coop Program.* (1) Fish with a vessel in the catcher/processor sector that is not registered to a current C/P-endorsed limited entry trawl permit.

(2) Fish as a catcher/processor vessel in the same year that the vessel fishes as a catcher vessel in the mothership fishery.

(3) Fish as a catcher/processor vessel in the same year that the vessel operates as a mothership in the mothership fishery.

(4) Fish in the C/P Coop Program with a vessel that does not have a valid VMS declaration for limited entry midwater trawl, Pacific whiting catcher/processor sector, as specified at § 660.13(d)(5)(iv)(A).

(5) Fish in the C/P Coop Program with a vessel that is not identified in the C/P coop agreement.

(6) Fish in the C/P Coop Program without a valid scale inspection report signed by an authorized scale inspector on board the vessel.

(7) Sort, process, or discard catch before the catch is weighed on a scale that meets the requirements of § 660.15(b), including the daily test requirements.

(8) Discard any catch from the codend or net (i.e. bleeding) before the observer has completed their data collection.

(9) Mix catch from more than one haul before the observer completes their collection of catch for sampling.

■ 19. In § 660.113, paragraphs (a) through (c) are added, and paragraph (d) is revised, to read as follows:

§ 660.113 Trawl fishery—recordkeeping and reporting.

* * * * *

(a) *General requirements.* (1) All records or reports required by this paragraph (a) must: be maintained in English, be accurate, be legible, be based on local time, and be submitted in a timely manner.

(2) *Retention of Records.* All records used in the preparation of records or reports specified in this section or corrections to these reports must be maintained for a period of not less than three years after the date of landing and must be immediately available upon request for inspection by NMFS or authorized officers or others as specifically authorized by NMFS. Records used in the preparation of

required reports specified in this section or corrections to these reports that are required to be kept include, but are not limited to, any written, recorded, graphic, electronic, or digital materials as well as other information stored in or accessible through a computer or other information retrieval system; worksheets; weight slips; preliminary, interim, and final tally sheets; receipts; checks; ledgers; notebooks; diaries; spreadsheets; diagrams; graphs; charts; tapes; disks; or computer printouts. All relevant records used in the preparation of electronic fish ticket reports or corrections to these reports must be maintained for a period of not less than three years after the date and must be immediately available upon request for inspection by NMFS or authorized officers or others as specifically authorized by NMFS.

(b) *Shorebased IFQ Program.* (1) *Economic data collection (EDC) program.* The following persons are required to submit an EDC form as specified at § 660.114:

(i) All owners, lessees, and charterers of a catcher vessel registered to a limited entry trawl endorsed permit.

(ii) All owners of a first receiver site license.

(iii) All owners and lessees of a shorebased processor.

(2) *Electronic vessel logbook.* [Reserved]

(3) *Gear switching declaration.* Any person with a limited entry trawl permit participating in the Shorebased IFQ Program using groundfish non-trawl gear (i.e., gear switching) must submit a valid gear declaration reporting such participation as specified in § 660.13(d)(5)(iv)(A).

(4) *Electronic fish ticket.* The IFQ first receiver is responsible for compliance with all reporting requirements described in this paragraph.

(i) *Required information.* All IFQ first receivers must provide the following types of information: Date of landing, vessel that made the delivery, vessel account number, gear type used, catch area, first receiver, actual weights of species landed listed by species or species group including species with no value, condition landed, number of salmon by species, number of Pacific halibut, and any other information deemed necessary by the Regional Administrator as specified on the appropriate electronic fish ticket form.

(ii) *Submissions.* The IFQ first receiver must:

(A) Include as part of each electronic fish ticket submission, the actual scale weight for each groundfish species as specified by requirements at § 660.15(c) and the vessel identification number.

(B) Use for the purpose of submitting electronic fish tickets, and maintain in good working order, computer equipment as specified at § 660.15(d)(1);

(C) Install, use, and update as necessary, any NMFS-approved software described at § 660.15(d)(3);

(D) Submit a completed electronic fish ticket for every IFQ landing no later than 24 hours after the date the fish are received, unless a waiver of this requirement has been granted under provisions specified at paragraph (b)(4)(iv) of this section.

(iii) *Revising a submission.* In the event that a data error is found, electronic fish ticket submissions may be revised by resubmitting the revised form. Electronic fish tickets are to be used for the submission of final data. Preliminary data, including estimates of fish weights or species composition, shall not be submitted on electronic fish tickets.

(iv) *Waivers for submission.* On a case-by-case basis, a temporary written waiver of the requirement to submit electronic fish tickets may be granted by the Assistant Regional Administrator or designee if he/she determines that circumstances beyond the control of a first receiver would result in inadequate data submissions using the electronic fish ticket system. The duration of the waiver will be determined on a case-by-case basis.

(v) *Reporting requirements when a temporary waiver has been granted.* IFQ First receivers that have been granted a temporary waiver from the requirement to submit electronic fish tickets must submit on paper the same data as is required on electronic fish tickets within 24 hours of the date received during the period that the waiver is in effect. Paper fish tickets must be sent by facsimile to NMFS, Northwest Region, Sustainable Fisheries Division, 206– 526– 6736 or by delivering it in person to 7600 Sand Point Way, NE., Seattle, WA 98115. The requirements for submissions of paper tickets in this paragraph are separate from, and in addition to existing state requirements for landing receipts or fish receiving tickets.

(c) *MS Coop Program (coop and non-coop fisheries)*—(1) *Economic data collection (EDC) program.* The following persons are required to submit a complete economic data collection form as specified at § 660.114.

(i) All owners, lessees, and charterers of a catcher vessel registered to a limited entry trawl MS/CV-endorsed permit.

(ii) All owners, lessees, and charterers of a vessel registered to an MS permit.

(2) *NMFS-approved scales*—(i) *Scale test report form.* Mothership vessel operators are responsible for conducting scale tests and for recording the scale test information on the at-sea scale test report form as specified at § 660.15(b), subpart C, for mothership vessels.

(ii) *Printed scale reports.* Specific requirements pertaining to printed scale reports and scale weight print outs are specified at § 660.15(b), subpart C, for mothership vessels.

(iii) *Retention of scale records and reports.* The vessel must maintain the test report form on board until the end of the fishing year during which the tests were conducted, and make the report forms available to observers, NMFS staff, or authorized officers. In addition, the vessel owner must retain the scale test report forms for 3 years after the end of the fishing year during which the tests were performed. All scale test report forms must be signed by the vessel operator.

(3) *Annual coop report*—(i) The designated coop manager for the mothership coop must submit an annual report to the Pacific Fishery Management Council for their November meeting each year. The annual coop report will contain information about the current year's fishery, including:

(A) The mothership sector's annual allocation of Pacific whiting and the permitted mothership coop allocation;

(B) The mothership coop's actual retained and discarded catch of Pacific whiting, salmon, Pacific halibut, rockfish, groundfish, and other species on a vessel-by-vessel basis;

(C) A description of the method used by the mothership coop to monitor performance of coop vessels that participated in the fishery;

(D) A description of any actions taken by the mothership coop in response to any vessels that exceed their allowed catch and bycatch; and

(E) Plans for the next year's mothership coop fishery, including the companies participating in the cooperative, the harvest agreement, and catch monitoring and reporting requirements.

(ii) The annual coop report submitted to the Pacific Fishery Management Council must be finalized to capture any additional fishing activity that year and submitted to NMFS by March 31 of the following year before a coop permit is issued for the following year.

(4) *Cease fishing report.* As specified at § 660.150(c)(4)(ii), the designated coop manager, or in the case of an inter-coop agreement, all of the designated coop managers must submit a cease fishing report to NMFS indicating that harvesting has concluded for the year.

(d) *C/P Coop Program*—(1) *Economic data collection (EDC) program.* All owners, lessees, and charterers of a vessel registered to a C/P-endorsed limited entry trawl permit are required to submit a complete economic data collection form as specified at § 660.114.

(2) *NMFS-approved scales*—(i) *Scale test report form.* Catcher/processor vessel operators are responsible for conducting scale tests and for recording the scale test information on the at-sea scale test report form as specified at § 660.15(b), subpart C, for C/P vessels.

(ii) *Printed scale reports.* Specific requirements pertaining to printed scale reports and scale weight print outs are specified at § 660.15(b), subpart C, for C/P vessels.

(iii) *Retention of scale records and reports.* The vessel must maintain the test report form on board until the end of the fishing year during which the tests were conducted, and make the report forms available to observers, NMFS staff, or authorized officers. In addition, the vessel owner must retain the scale test report forms for 3 years after the end of the fishing year during which the tests were performed. All scale test report forms must be signed by the vessel operator.

(3) *Annual coop report*—(i) The designated coop manager for the C/P coop must submit an annual report to the Pacific Fishery Management Council for their November meeting each year. The annual coop report will contain information about the current year's fishery, including:

(A) The C/P sector's annual allocation of Pacific whiting;

(B) The C/P coop's actual retained and discarded catch of Pacific whiting, salmon, Pacific halibut, rockfish, groundfish, and other species on a vessel-by-vessel basis;

(C) A description of the method used by the C/P coop to monitor performance of cooperative vessels that participated in the fishery;

(D) A description of any actions taken by the C/P coop in response to any vessels that exceed their allowed catch and bycatch; and

(E) Plans for the next year's C/P coop fishery, including the companies participating in the cooperative, the harvest agreement, and catch monitoring and reporting requirements.

(ii) The annual coop report submitted to the Pacific Fishery Management Council must be finalized to capture any additional fishing activity that year and submitted to NMFS by March 31 of the following year before a coop permit is issued for the following year.

(4) *Cease fishing report.* As specified at § 660.160(c)(5), the designated coop manager must submit a cease fishing report to NMFS indicating that harvesting has concluded for the year.

■ 20. Section 660.114 is added to read as follows:

§ 660.114 Trawl fishery—economic data collection program.

(a) *General.* The economic data collection (EDC) program collects mandatory economic data from participants in the trawl rationalization program. NMFS requires submission of an EDC form to gather ongoing, annual data for 2011 and beyond, as well as a onetime collection in 2011 of baseline economic data from 2009 through 2010.

(b) *Economic data collection program requirements.* The following fishery participants in the limited entry groundfish trawl fisheries are required to comply with the following EDC program requirements:

Fishery participant	Economic data collection	Who is required to submit an EDC?	Consequence for failure to submit (In addition to consequences listed below, failure to submit an EDC may be a violation of the MSA.)
(1) Limited entry trawl catcher vessels.	(i) Baseline (2009 and 2010) economic data.	All owners, lessees, and charterers of a catcher vessel registered to a limited entry trawl endorsed permit at any time in 2009 or 2010.	(A) For permit owner, a limited entry trawl permit application (including MS/CV-endorsed limited entry trawl permit) will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i), subpart C. (B) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration, vessel account actions, or if own QS permit, issuance of annual QP or IBQ pounds) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(v), subpart C and § 660.140(e), subpart D. (C) For a vessel lessee or charterer, participation in the groundfish fishery (including, but not limited to, issuance of annual QP or IBQ pounds if own QS or IBQ) will not be authorized, until the required EDC for their operation of that vessel is submitted.

Fishery participant	Economic data collection	Who is required to submit an EDC?	Consequence for failure to submit (In addition to consequences listed below, failure to submit an EDC may be a violation of the MSA.)
	(ii) Annual/ongoing (2011 and beyond) economic data.	All owners, lessees, and charterers of a catcher vessel registered to a limited entry trawl endorsed permit at any time in 2011 and beyond.	(A) For permit owner, a limited entry trawl permit application (including MS/CV-endorsed limited entry trawl permit) will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i), subpart C. (B) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration, vessel account actions, or if own QS permit, issuance of annual QP or IBQ pounds) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(v), subpart C and § 660.140(e), subpart D. (C) For a vessel lessee or charterer, participation in the groundfish fishery (including, but not limited to, issuance of annual QP or IBQ pounds if own QS or IBQ) will not be authorized, until the required EDC for their operation of that vessel is submitted.
(2) Motherships	(i) Baseline (2009 and 2010) economic data.	All owners, lessees, and charterers of a mothership vessel that received whiting in 2009 or 2010 as recorded in NMFS' NORPAC database.	(A) For permit owner, an MS permit application will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i), subpart C. (B) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(v), subpart C. (C) For a vessel lessee or charterer, participation in the groundfish fishery will not be authorized, until the required EDC for their operation of that vessel is submitted.
	(ii) Annual/ongoing (2011 and beyond) economic data.	All owners, lessees, and charterers of a mothership vessel registered to an MS permit at any time in 2011 and beyond.	(A) For permit owner, an MS permit application will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i), subpart C. (B) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(v), subpart C. (C) For a vessel lessee or charterer, participation in the groundfish fishery will not be authorized, until the required EDC for their operation of that vessel is submitted.
(3) Catcher processors	(i) Baseline (2009 and 2010) economic data.	All owners, lessees, and charterers of a catcher processor vessel that harvested whiting in 2009 or 2010 as recorded in NMFS' NORPAC database.	(A) For permit owner, a C/P-endorsed limited entry trawl permit application will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i), subpart C. (B) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(v), subpart C. (C) For a vessel lessee or charterer, participation in the groundfish fishery will not be authorized, until the required EDC for their operation of that vessel is submitted.

Fishery participant	Economic data collection	Who is required to submit an EDC?	Consequence for failure to submit (In addition to consequences listed below, failure to submit an EDC may be a violation of the MSA.)
	(ii) Annual/ongoing (2011 and beyond) economic data.	All owners, lessees, and charterers of a catcher processor vessel registered to a catcher processor permit at any time in 2011 and beyond.	(A) For permit owner, a C/P-endorsed limited entry trawl permit application will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i), subpart C. (B) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(v), subpart C. (C) For a vessel lessee or charterer, participation in the groundfish fishery will not be authorized, until the required EDC for their operation of that vessel is submitted.
(4) First receivers/ shorebased processors.	(i) Baseline (2009 and 2010) economic data.	All owners and lessees of a shorebased processor and all buyers that received groundfish or whiting harvested with a limited entry trawl permit as listed in the PacFIN database in 2009 or 2010.	A first receiver site license application for a particular physical location for processing and buying will not be considered complete until the required EDC for the applying processor or buyer is submitted, as specified at § 660.140(f)(3), subpart D.
	(ii) Annual/ongoing (2011 and beyond) economic data.	(A) All owners of a first receiver site license in 2011 and beyond. (B) All owners and lessees of a shore-based processor (as defined under "processor" at § 660.11, subpart C, for purposes of EDC) that received round or headed-and-gutted IFQ species groundfish or whiting from a first receiver in 2011 and beyond.	A first receiver site license application will not be considered complete until the required EDC for that license owner associated with that license is submitted, as specified at § 660.140(f)(3), subpart D. See paragraph (b)(4)(ii)(A) of this table.

(c) *Submission of the EDC form and deadline*—(1) *Submission of the EDC form.* The complete, certified EDC form must be submitted to ATTN: Economic Data Collection Program (FRAM Division), NMFS, Northwest Fisheries Science Center, 2725 Montlake Boulevard East, Seattle, WA 98112. A complete EDC form contains responses for all data fields, which include but are not limited to costs, labor, earnings, activity in a fishery, vessel or plant characteristics, value, quota, operational information, location of expenditures and earnings, ownership information and leasing information.

(2) *Deadline.* Complete, certified EDC forms must be mailed and postmarked by or hand-delivered to NMFS NWFSC no later than September 1, 2011, for baseline data, and, for the annual/ongoing data collection beginning September 1, 2012, September 1 each year for the prior year's data.

(d) *Confidentiality of information.* Information received on an EDC form will be considered confidential under applicable law and guidance.

(e) *EDC audit procedures*—(1) NMFS reserves the right to conduct verification of economic data with the submitter of the form. NMFS may employ a third party agent to conduct the audits.

(2) The submitter of the EDC form must respond to any inquiry by NMFS or a NMFS agent within 20 days of the date of issuance of the inquiry, unless an extension is granted by NMFS.

(3) The submitter of the form must provide copies of additional data to facilitate verification by NMFS or NMFS' agent upon request. The NMFS auditor may review and request copies of additional data provided by the submitter, including but not limited to, previously audited or reviewed financial statements, worksheets, tax returns, invoices, receipts, and other original documents substantiating the economic data submitted.

§ 660.116 [Removed]

■ 21. Section 660.116 is removed.

■ 22. In § 660.130, paragraphs (a) and (d) are revised to read as follows:

§ 660.130 Trawl fishery—management measures.

(a) *General.* Limited entry trawl vessels are those vessels registered to a limited entry permit with a trawl endorsement and those vessels registered to an MS permit. Most species taken in limited entry trawl fisheries will be managed with quotas (see § 660.140), allocations or set-asides (see § 660.150 or § 660.160), or cumulative trip limits (see trip limits in Tables 1 (North) and 1 (South) of this subpart), size limits (see § 660.60 (h)(5), subpart C), seasons (see Pacific whiting at § 660.131(b), subpart D), gear restrictions (see paragraph (b) of this section) and closed areas (see paragraph (e) of this section and §§ 660.70 through 660.79, subpart C). The trawl fishery has gear requirements and harvest limits that differ by the type of trawl gear on board and the area fished. Groundfish

vessels operating south of Point Conception must adhere to CCA restrictions (see paragraph (e)(1) of this section and § 660.70, subpart C). The trip limits in Tables 1 (North) and 1 (South) of this subpart apply to vessels participating in the limited entry groundfish trawl fishery and may not be exceeded. Federal commercial groundfish regulations are not intended to supersede any more restrictive state commercial groundfish regulations relating to federally-managed groundfish.

* * * * *

(d) *Sorting.* Under § 660.12(a)(8), subpart C, it is unlawful for any person to "fail to sort, prior to the first weighing after offloading, those groundfish species or species groups for which there is a trip limit, size limit, scientific sorting designation, quota, harvest guideline, or OY, if the vessel fished or landed in an area during a time when such trip limit, size limit, scientific sorting designation, quota, harvest guideline, or OY applied." The states of Washington, Oregon, and California may also require that vessels record their landings as sorted on their state landing receipt.

(1) *Species and areas*—(i) *Coastwide.* Widow rockfish, canary rockfish, darkblotched rockfish, yelloweye rockfish, shortbelly rockfish, black rockfish, blue rockfish, minor nearshore rockfish, minor shelf rockfish, minor slope rockfish, shortspine and longspine thornyhead, Dover sole, arrowtooth flounder, petrale sole, starry flounder, English sole, other flatfish, lingcod, sablefish, Pacific cod, spiny dogfish, other fish, longnose skate, and Pacific whiting;

(ii) *North of 40°10′ N. lat.* POP, yellowtail rockfish;

(iii) *South of 40°10′ N. lat.* Minor shallow nearshore rockfish, minor deeper nearshore rockfish, California scorpionfish, chilipepper rockfish, bocaccio rockfish, splitnose rockfish, Pacific sanddabs, cowcod, bronzespotted rockfish and cabezon.

(2) *Sorting requirements for the Shorebased IFQ Program*—(i) *First receivers.* Fish landed at IFQ first receivers (including shoreside processing facilities and buying stations that intend to transport catch for processing elsewhere) must be sorted, prior to first weighing after offloading from the vessel and prior to transport away from the point of landing, except the vessels declared in to the limited entry midwater trawl, Pacific whiting shorebased IFQ at § 660.13(d)(5)(iv)(A), subpart C, may weigh catch on a bulk scale before sorting as described at § 660.140(j)(2).

(ii) *Catcher vessels.* All catch must be sorted to the species groups specified in paragraph (d)(1) of this section for vessels with limited entry permits, except those retaining all catch during a Pacific whiting IFQ trip. The catch must not be discarded from the vessel and the vessel must not mix catch from hauls until the observer has sampled the catch. Prohibited species must be sorted according to the following species groups: Dungeness crab, Pacific halibut, Chinook salmon, other salmon. Non-groundfish species must be sorted as required by the state of landing.

(3) *Sorting requirements for the at-sea sectors of the Pacific whiting fishery.*

(i) Pacific whiting at-sea processing vessels may use an accurate in-line conveyor or hopper type scale to derive an accurate total catch weight prior to sorting. Immediately following weighing of the total catch, the catch must be sorted to the species groups specified in paragraph (d)(1) of this section and all incidental catch (groundfish and non-groundfish species) must be accurately accounted for and the weight of incidental catch deducted from the total catch weight to derive the weight of target species.

(ii) *Catcher vessels in the MS sector.* If sorting occurs on the catcher vessel, the catch must not be discarded from the vessel and the vessel must not mix catch from hauls until the observer has sampled the catch.

* * * * *

■ 23. In § 660.131:

■ a. Paragraphs (a) and (b), the introductory text of paragraph (c), and paragraphs (e) and (f) are revised;

■ b. Paragraphs (g), (h), (i) and (k) are removed;

■ c. Paragraph (j) is redesignated as paragraph (g) to read as follows:

§ 660.131 Pacific whiting fishery management measures.

* * * * *

(a) *Sectors*—(1) The catcher/processor sector, or C/P Coop Program, is composed of catcher/processors registered to a limited entry permit with a C/P endorsement.

(2) The mothership sector, or MS Coop Program, is composed of motherships and catcher vessels that harvest Pacific whiting for delivery to motherships. Motherships are vessels registered to an MS permit, and catcher vessels are vessels registered to a limited entry permit with an MS/CV endorsement or vessels registered to a limited entry permit without an MS/CV endorsement if the vessel is authorized to harvest the coop's allocation.

(3) The Pacific whiting IFQ fishery is composed of vessels that harvest Pacific whiting for delivery shoreside to IFQ first receivers during the primary season.

(b) *Pacific whiting seasons*—(1) *Primary seasons.* The primary seasons for the Pacific whiting fishery are:

(i) For the Shorebased IFQ Program, Pacific whiting IFQ fishery, the period(s) of the large-scale target fishery is conducted after the season start date;

(ii) For catcher/processors, the period(s) when catching and at-sea processing is allowed for the catcher/processor sector (after the season closes at-sea processing of any fish already on board the processing vessel is allowed to continue); and

(iii) For vessels delivering to motherships, the period(s) when catching and at-sea processing is allowed for the mothership sector (after the season closes at-sea processing of any fish already on board the processing vessel is allowed to continue).

(2) *Different primary season start dates.* North of 40°30′ N. lat., different starting dates may be established for the catcher/processor sector, the mothership sector, and in the Pacific whiting IFQ fishery for vessels delivering to IFQ first receivers north of 42° N. lat. and vessels delivering to IFQ first receivers between 42° through 40°30′ N. lat.

(i) *Procedures.* The primary seasons for the whiting fishery north of 40°3′ N. lat. generally will be established according to the procedures of the PCGFMP for developing and implementing harvest specifications and apportionments. The season opening dates remain in effect unless changed, generally with the harvest specifications and management measures.

(ii) *Criteria.* The start of a primary season may be changed based on a recommendation from the Council and consideration of the following factors, if applicable: Size of the harvest guidelines for whiting and bycatch species; age/size structure of the whiting population; expected harvest of bycatch and prohibited species; availability and stock status of prohibited species; expected participation by catchers and processors; the period between when catcher vessels make annual processor obligations and the start of the fishery; environmental conditions; timing of alternate or competing fisheries; industry agreement; fishing or processing rates; and other relevant information.

(iii) *Primary whiting season start dates and duration.* After the start of a primary season for a sector of the whiting fishery, the season remains open for that sector until the sector allocation of whiting or non-whiting groundfish (with allocations) is reached

or projected to be reached and the fishery season for that sector is closed by NMFS. The starting dates for the primary seasons for the whiting fishery are as follows:

(A) Catcher/processor sector—May 15.

(B) Mothership sector—May 15.

(C) Shorebased IFQ Program, Pacific whiting IFQ fishery.

(*1*) North of 42° N. lat.—June 15;

(*2*) Between 42°–40°30′ N. lat.—April 1; and

(*3*) South of 40°30′ N. lat.—April 15.

(3) *Trip limits in the whiting fishery.* The "per trip" limit for whiting before the regular (primary) season for the shorebased sector is announced in Table 1 of this subpart, and is a routine management measure under § 660.60(c). This trip limit includes any whiting caught shoreward of 100–fm (183–m) in the Eureka, CA area. The "per trip" limit for other groundfish species for the shorebased sector are announced in Table 1 (North) and Table 1 (South) of this subpart and apply as follows:

(i) During the groundfish cumulative limit periods both before and after the primary whiting season, vessels may use either small and/or large footrope gear, but are subject to the more restrictive trip limits for those entire cumulative periods.

(ii) If, during a primary whiting season, a whiting vessel harvests a groundfish species other than whiting for which there is a midwater trip limit, then that vessel may also harvest up to another footrope-specific limit for that species during any cumulative limit period that overlaps the start or end of the primary whiting season.

(c) *Closed areas.* Vessels fishing in the Pacific whiting primary seasons for the Shorebased IFQ Program, MS Coop Program, or C/P Coop Program shall not target Pacific whiting with midwater trawl gear in the following portions of the fishery management area:

* * * * *

(e) *At-sea processing.* Whiting may not be processed at sea south of 42°00′ N. lat. (Oregon-California border), unless by a waste-processing vessel as authorized under paragraph (g) of this section.

(f) *Time of day.* Vessels fishing in the Pacific whiting primary seasons for the Shorebased IFQ Program, MS Coop Program or C/P Coop Program shall not target Pacific whiting with midwater trawl gear in the fishery management area south of 42°00′ N. lat. between 0001 hours to one-half hour after official sunrise (local time). During this time south of 42°00′N. lat., trawl doors must be on board any vessel used to fish for whiting and the trawl must be attached to the trawl doors. Official sunrise is determined, to the nearest 5° lat., in The Nautical Almanac issued annually by the Nautical Almanac Office, U.S. Naval Observatory, and available from the U.S. Government Printing Office.

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■ 24. In § 660.140:

■ a. Paragraphs (a), (d)(1), (d)(4)(i)(C), (d)(4)(iv), and (d)(8)(ix) are revised;

■ b. The heading of paragraph (b) is revised, and text is added to paragraph (b).

■ c. The heading of paragraph (c) and paragraph (c)(1) are revised, paragraph (c)(2) is redesignated as paragraph (c)(3) and a new paragraph (c)(2) is added, and the newly redesignated paragraph (c)(3)(vi) is revised;

■ d. Paragraphs (c)(3)(vii), (d)(2), (d)(3), (d)(5), and (e) through (h) are added; and

■ e. Paragraphs (j) through (m) are redesignated as paragraphs (i) through (l), the headings of newly designated paragraphs (i) and (k) are revised, and text is added to the newly redesignated paragraphs (i) through (l) to read as follows:

§ 660.140 Shorebased IFQ Program.

* * * * *

(a) *General.* The Shorebased IFQ Program requirements in this section will be effective beginning January 1, 2011, except for paragraphs (d)(4), (d)(6), and (d)(8) of this section, which are effective immediately. The Shorebased IFQ Program applies to qualified participants in the Pacific Coast Groundfish fishery and includes a system of transferable QS for most groundfish species or species groups, IBQ for Pacific halibut, and trip limits or set-asides for the remaining groundfish species or species groups. NMFS will issue a QS permit to eligible participants and will establish a QS account for each QS permit owner to track the amount of QS or IBQ and QP or IBQ pounds owned by that owner. QS permit owners may own QS or IBQ for IFQ species, expressed as a percent of the allocation to the Shorebased IFQ Program for that species. NMFS will issue QP or IBQ pounds to QS permit owners, expressed in pounds, on an annual basis, to be deposited in the corresponding QS account. NMFS will establish a vessel account for each eligible vessel owner participating in the Shorebased IFQ Program, which is independent of the QS permit and QS account. In order to use QP or IBQ pounds, a QS permit owner must transfer the QP or IBQ pounds from the QS account into the vessel account for the vessel to which the QP or IBQ pounds is to be assigned. Harvests of IFQ species may only be delivered to an IFQ first receiver with a first receiver site license. In addition to the requirements of this section, the Shorebased IFQ Program is subject to the following groundfish regulations of subparts C and D:

(1) Regulations set out in the following sections of subpart C: § 660.11 Definitions, § 660.12 Prohibitions, § 660.13 Recordkeeping and reporting, § 660.14 VMS requirements, § 660.15 Equipment requirements, § 660.16 Groundfish observer program, § 660.20 Vessel and gear identification, § 660.25 Permits, § 660.55 Allocations, § 660.60 Specifications and management measures, § 660.65 Groundfish harvest specifications, and §§ 660.70 through 660.79 Closed areas.

(2) Regulations set out in the following sections of subpart D: § 660.111 Trawl fishery definitions, § 660.112 Trawl fishery prohibitions, § 660.113 Trawl fishery recordkeeping and reporting, § 660.120 Trawl fishery crossover provisions, § 660.130 Trawl fishery management measures, and § 660.131 Pacific whiting fishery management measures.

(3) The Shorebased IFQ Program may be restricted or closed as a result of projected overages within the Shorebased IFQ Program, the MS Coop Program, or the C/P Coop Program. As determined necessary by the Regional Administrator, area restrictions, season closures, or other measures will be used to prevent the trawl sector in aggregate or the individual trawl sectors (Shorebased IFQ, MS Coop, or C/P Coop) from exceeding an OY, or formal allocation specified in the PCGFMP or regulation at § 660.55, subpart C, or §§ 660.140, 660.150, or 660.160, subpart D.

(b) *Participation requirements and responsibilities*—(1) *IFQ vessels.* (i) Vessels must be registered to a groundfish limited entry permit, endorsed for trawl gear with no C/P endorsement.

(ii) To start a fishing trip in the Shorebased IFQ Program, a vessel and its owner(s) (as described on the USCG documentation or state registration document) must be registered to the same vessel account established by NMFS with no deficit (negative balance) for any species/species group.

(iii) All IFQ species/species group catch (landings and discards) must be covered by QP or IBQ pounds. Any deficit (negative balance in a vessel account) must be cured within 30 calendar days from the date the deficit from that trip is documented in the vessel account, unless the deficit is within the limits of the carryover

provision at paragraph (e)(5) of this section, in which case the vessel may declare out of the IFQ fishery for the remainder of the year in which the deficit occurred, and must cure the deficit within 30 days after the issuance of QP or IBQ pounds for the following year.

(iv) Any vessel with a deficit (negative balance) in its vessel account is prohibited from fishing that is within the scope of the Shorebased IFQ Program until sufficient QP or IBQ pounds are transferred into the vessel account to remove any deficit, regardless of the amount of the deficit.

(v) A vessel account may not have QP or IBQ pounds (used and unused combined) in excess of the QP Vessel Limit in any year, and for species covered by Unused QP Vessel Limit, may not have QP or IBQ pounds in excess of the Unused QP Vessel Limit at any time. These amounts are specified at paragraph (e)(4) of this section.

(vi) Vessels must use either trawl gear as specified at § 660.130(b), or a legal non-trawl groundfish gear under the gear switching provisions as specified at § 660.140(k).

(vii) Vessels that are registered to MS/CV-endorsed permits may be used to fish in the Shorebased IFQ Program provided that the vessel is registered to a valid Shorebased IFQ Program vessel account.

(viii) In the same calendar year, a vessel registered to a trawl endorsed limited entry permit with no MS/CV or C/P endorsements may be used to fish in the Shorebased IFQ Program if the vessel has a valid vessel account, and to fish in the mothership sector for a permitted MS coop as authorized by the MS coop.

(ix) Vessels that are registered to C/P-endorsed permits may not be used to fish in the Shorebased IFQ Program.

(2) *IFQ first receivers.* The IFQ first receiver must:

(i) Ensure that all catch removed from a vessel making an IFQ delivery is weighed on a scale or scales meeting the requirements described in § 660.15(c), subpart C;

(ii) Ensure that all catch is landed, sorted, and weighed in accordance with a valid catch monitoring plan as described in § 660.140(f)(3)(iii), subpart D.

(iii) Ensure that all catch is sorted, prior to first weighing, by species or species groups as specified at § 660.130(d), except the vessels declared in to the limited entry midwater trawl, Pacific whiting shorebased IFQ at § 660.13(d)(5)(iv)(A), subpart C may weigh catch on a before sorting as described at § 660.140(j)(2).

(iv) Provide uninhibited access to all areas where fish are or may be sorted or weighed to NMFS staff, NMFS-authorized personnel, or authorized officer at any time when a delivery of IFQ species, or the processing of those species, is taking place.

(v) Ensure that each scale produces a complete and accurate printed record of the weight of all catch in a delivery, unless exempted in the NMFS-accepted catch monitoring plan.

(vi) Retain and make available to NMFS staff, NMFS-authorized personnel, or an authorized officer, all printed output from any scale used to weigh catch, and any hand tally sheets, worksheets, or notes used to determine the total weight of any species.

(vii) Ensure that each delivery of IFQ catch is monitored by a catch monitor and that the catch monitor is on site the entire time the delivery is being weighed or sorted.

(viii) Ensure that sorting and weighing is completed prior to catch leaving the area that can be monitored from the observation area.

* * * * *

(c) *IFQ species, management areas, and allocations.*

(1) *IFQ species.* IFQ species are those groundfish species and Pacific halibut in the exclusive economic zone or adjacent state waters off Washington, Oregon and California, under the jurisdiction of the Pacific Fishery Management Council, for which QS and IBQ will be issued. Groupings and area subdivisions for IFQ species are those groupings and area subdivisions for which OYs are specified in the Tables 1a through 2d, subpart C, and those for which there is an area-specific precautionary harvest policy. The lists of individual groundfish species included in the minor shelf complex north of 40°10′ N. lat., minor shelf complex south of 40°10′ N. lat., minor slope complex north 40°10′ N. lat., minor slope complex south of 40°10′ N. lat., and in the other flatfish complex are specified under the definition of "groundfish" at § 660.11. The following are the IFQ species:

IFQ SPECIES

ROUNDFISH
Lingcod
Pacific cod
Pacific whiting
Sablefish N. of 36°
Sablefish S. of 36°
FLATFISH
Dover sole
English sole
Petrale sole
Arrowtooth flounder
Starry flounder
Other flatfish stock complex
Pacific halibut (IBQ) N. of 40°10′
ROCKFISH
Pacific ocean perch N. of 40°10′
Widow rockfish
Canary rockfish
Chilipepper rockfish S. of 40°10′
Bocaccio S. of 40°10′
Splitnose rockfish S. of 40°10′
Yellowtail rockfish N. of 40°10′
Shortspine thornyhead N. of 34°27′
Shortspine thornyhead S. of 34°27′
Longspine thornyhead N. of 34°27′
Cowcod S. of 40°10′
Darkblotched rockfish
Yelloweye rockfish
Minor shelf rockfish complex N. of 40°10′
Minor shelf rockfish complex S. of 40°10′
Minor slope rockfish complex N. of 40°10′
Minor slope rockfish complex S. of 40°10′

(2) *IFQ management areas.* A vessel participating in the Shorebased IFQ Program may not fish in more than one IFQ management area during a trip. IFQ management areas are as follows:

(i) Between the US/Canada border and 40°10′ N. lat.,

(ii) Between 40°10′ N. lat. and 36° N. lat.,

(iii) Between 36° N. lat. and 34°27′ N. lat., and

(iv) Between 34°27′ N. lat. and the US/Mexico border.

* * * * *

(3) * * *

(vi) For each IFQ species, NMFS will determine annual sub-allocations to individual QS accounts by multiplying the percent of QS or IBQ registered to the account by the amount of each respective IFQ species allocated to the Shorebased IFQ Program for that year. For each IFQ species, NMFS will deposit QP or IBQ pounds in the respective QS account in the amount of each sub-allocation determined.

(vii) *Reallocations*—(A) *Reallocation with changes in management areas.*

(*1*) *Area subdivision.* If at any time after the initial allocation, an IFQ species is geographically subdivided, those holding QS or IBQ for the IFQ species being subdivided will receive an amount of QS or IBQ for each newly created area that is equivalent to the amount they held for the area before it was subdivided.

(*2*) *Area recombination.* When two areas are combined for an IFQ species, the QS or IBQ held by individuals in each area will be adjusted proportionally such that:

(*i*) The total QS or IBQ for the area sums to 100 percent, and

(*ii*) A person holding QS or IBQ in the newly created area will receive the same amount of total QP or IBQ pounds as they would if the areas had not been combined.

(*3*) *Area line movement.* When a management area boundary line is moved for an IFQ species, the QS or IBQ held by individuals in each area will be adjusted proportionally such that they each maintain their same share of the trawl allocation on a coastwide basis (a fishing area may expand or decrease, but the individual's QP or IBQ pounds for both areas combined wouldn't change because of the change in areas). In order to achieve this end, the holders of QS or IBQ in the area being reduced will receive QS or IBQ for the area being expanded, such that the total QP or IBQ pounds they would be issued will not be reduced as a result of the area reduction. Those holding QS or IBQ in the area being expanded will have their QS or IBQ reduced such that the total QP or IBQ pounds they receive in the year of the line movement will not increase as a result of the expansion (nor will it be reduced).

(B) *Reallocation with subdivision of a species group.* If at any time after the initial allocation an IFQ species which is a species group is subdivided, each species or species group resulting from the subdivision will be an IFQ species. QS owners for the species group being subdivided will receive an amount of QS for each newly created IFQ species that is equivalent to the amount they held for the species group before it was subdivided. For example, if a person holds one percent of a species group before the subdivision, that person will hold one percent of the QS for each IFQ species resulting from the subdivision.

* * * * *

(d) *QS permits and QS accounts*—(1) *General.* In order to obtain QS and/or IBQ, a person must apply for a QS permit. NMFS will determine if the applicant is eligible to own QS and/or IBQ in accordance with paragraph (d)(2) of this section. If eligible, NMFS will issue a QS permit, and will establish a QS account to track QS and IBQ balances for all IFQ species identified at § 660.140(c)(1). NMFS will issue initial allocations of QS and IBQ in accordance with paragraph (d)(8) of this section. Transfers of QS and IBQ, and of QP or IBQ pounds, are subject to provisions at paragraph (d)(3) of this section. QS permit owners can monitor the status of their QS and IBQ, and associated QP and IBQ pounds, throughout the year in their QS account.

(i) *Annual QS adjustments.* On or about January 1 each year, QS permit owners will be notified, via the IFQ Web site and their QS account, of any adjustments to their QS and/or IBQ allocations, for each of the IFQ species. Updated QS and/or IBQ values, if applicable, will reflect the results of: any recalculation of initial allocation formulas resulting from changes in provisional OYs used in the allocation formulas or appeals, any redistribution of QS and IBQ (*e.g.,* resulting from permanent revocation of applicable permits, subject to accumulation limits), and any transfers of QS and/or IBQ made during the prior year.

(ii) *Annual QP and IBQ pound allocations.* QP and IBQ pounds will be deposited into QS accounts annually. QS permit owners will be notified of QP deposits via the IFQ Web site and their QS account. QP and IBQ pounds will be issued to the nearest whole pound using standard rounding rules (i.e. decimal amounts less than 0.5 round down and 0.5 and greater round up), except that in the first year of the Shorebased IFQ Program, issuance of QP for overfished species greater than zero but less than one pound will be rounded up to one pound. QS permit owners must transfer their QP and IBQ pounds from their QS account to a vessel account in order for those QP and IBQ pounds to be fished. QP and IBQ pounds must be transferred in whole pounds (i.e. no fraction of a QP or IBQ pound can be transferred). All QP and IBQ pounds in a QS account must be transferred to a vessel account by September 1 of each year in order to be fished.

(A) *Nonwhiting QP annual sub-allocations.* NMFS will issue QP for IFQ species other than Pacific whiting and Pacific halibut annually by multiplying the QS permit owner's QS for each such IFQ species by that year's shorebased trawl allocation for that IFQ species. Deposits to QS accounts for IFQ species other than Pacific whiting and Pacific halibut will be made on or about January 1 each year.

(B) *Pacific whiting QP annual allocation.* NMFS will issue QP for Pacific whiting annually by multiplying the QS permit owner's QS for Pacific whiting by that year's shorebased trawl allocation for Pacific whiting.

(*1*) In years where the Pacific whiting harvest specification is known by January 1, deposits to QS accounts for Pacific whiting will be made on or about January 1.

(*2*) In years where the Pacific whiting harvest specification is not known by January 1, NMFS will issue Pacific whiting QP in two parts. On or about January 1, NMFS will deposit Pacific whiting QP based on the shorebased trawl allocation multiplied by the lower end of the range of potential harvest specifications for Pacific whiting for that year. After the final Pacific whiting harvest specifications are established later in the year, NMFS will deposit additional QP to the QS account so that the total QP issued for that year is equal to the QS permit owner's QS for Pacific whiting multiplied by that year's shorebased trawl allocation for Pacific whiting.

(C) *Pacific halibut IBQ pounds annual allocation.* NMFS will issue IBQ pounds for Pacific halibut annually by multiplying the QS permit owner's IBQ percent by the shorebased component of the trawl mortality limit for that year (expressed in net weight), and dividing by 0.75 to convert to round weight pounds. Consistent with § 660.55(m), the shorebased component of the trawl mortality limit will be calculated by multiplying the total constant exploitation yield of the prior year by 15 percent, not to exceed 130,000 pounds in the first four years of the Shorebased IFQ Program and not to exceed 100,000 pounds starting in the fifth year of the Shorebased IFQ Program, less the set-aside amount of Pacific halibut to accommodate the incidental catch in the trawl fishery south of 40°10′ N. latitude and in the at-sea whiting fishery. Deposits to QS accounts for Pacific halibut IBQ pounds will be made on or about January 1 each year.

(D) [Reserved]

(2) *Eligibility and registration*—(i) *Eligibility.* Only the following persons are eligible to own QS permits:

(A) A United States citizen, that is eligible to own and control a U.S. fishing vessel with a fishery endorsement pursuant to 46 U.S.C. 12113 (general fishery endorsement requirements and 75 percent citizenship requirement for entities);

(B) A permanent resident alien, that is eligible to own and control a U.S. fishing vessel with a fishery endorsement pursuant to 46 U.S.C. 12113 (general fishery endorsement requirements and 75 percent citizenship requirement for entities); or

(C) A corporation, partnership, or other entity established under the laws of the United States or any State, that is eligible to own and control a U.S. fishing vessel with a fishery endorsement pursuant to 46 U.S.C. 12113 (general fishery endorsement requirements and 75 percent citizenship requirement for entities). However, there is an exception for any entity that owns a mothership that participated in the west coast groundfish fishery during the allocation period and is eligible to own or control that U.S. fishing vessel

with a fishery endorsement pursuant to sections 203(g) and 213(g) of the AFA.

(ii) *Registration.* A QS account will be established by NMFS with the issuance of a QS permit. The administrative functions associated with the Shorebased IFQ Program (e.g., account registration, landing transactions, and transfers) are designed to be accomplished online; therefore, a participant must have access to a computer with Internet access and must set up online access to their QS account to participate. The computer must have Internet browser software installed (e.g., Internet Explorer, Netscape, Mozilla Firefox); as well as the Adobe Flash Player software version 9.0 or greater. NMFS will mail initial QS permit owners instructions to set up online access to their QS account. NMFS may require QS account owners that are business entities to designate an account manager that may act on behalf of the entity and their contact information. NMFS will use the QS account to send messages to QS permit owners; it is important for QS permit owners to monitor their online QS account and all associated messages.

(3) *Renewal, change of permit ownership, and transfers*—(i) *Renewal.* (A) QS permits expire at the end of each calendar year, and must be renewed between October 1 and November 30 of each year in order to remain in force the following year. A complete QS permit renewal package must be received by SFD no later than November 30 to be accepted by NMFS.

(B) Notification to renew QS permits will be sent by SFD by September 1 each year to the QS permit owner's most recent address in the SFD record. The QS permit owner shall provide SFD with notice of any address change within 15 days of the change.

(C) Any QS permit for which SFD does not receive a QS permit renewal request by November 30 will have its QS account inactivated by NMFS at the end of the calendar year and the QS permit will not be renewed by NMFS for the following year. NMFS will not issue QP or IBQ pounds to the inactivated QS account associated with the non-renewed QS permit for that year. Any QP or IBQ pounds derived from the QS or IBQ in the inactivated QS account will be redistributed among all other QS permit owners that renewed their permit by the deadline. Redistribution of QP or IBQ pounds to QS permit owners will be proportional to the QS or IBQ for each IFQ species. A non-renewed QS permit may be renewed in a subsequent year by submission of a complete QS permit renewal package during the permit renewal period for that year, and NMFS will issue the associated QP or IBQ pounds for that year.

(D) QS permits will not be renewed until SFD has received a complete application for a QS permit renewal, which includes payment of required fees, complete documentation of QS permit ownership on the Trawl Identification of Ownership Interest Form as required under paragraph (d)(4)(iv) of this section, a complete economic data collection form if required under § 660.114, subpart D. The QS permit renewal will be considered incomplete until the required information is submitted. NMFS may require QS account owners that are business entities to designate an account manager and their contact information through the QS permit renewal process.

(E) *Effective Date.* A QS permit is effective on the date given on the permit and remains effective until the end of the calendar year.

(F) *IAD and appeals.* QS permit renewals are subject to the permit appeals process specified at § 660.25(g), subpart C.

(ii) *Change of permit ownership and transfer restrictions*—(A) *Restriction on the transfer of ownership for QS permits.* A QS permit cannot be transferred to another individual or entity. The QS permit owner cannot change or add additional individuals or entities as owners of the permit (i.e., cannot change the registered permit owners as given on the permit). Any change to the owner of the QS permit requires the new owner(s) to apply for a QS permit, and is subject to accumulation limits and approval by NMFS.

(B) *Transfers of QS or IBQ or QP or IBQ pounds.* (*1*) *General.* Transfers of QS or IBQ from one QS account to another QS account and transfers of QP or IBQ pounds from a QS account to a vessel account must be accomplished via the online QS account. During the year there may be situations where NMFS deems it necessary to prohibit transfers (i.e., account reconciliation, system maintenance, or for emergency fishery management reasons). To make a transfer, a QS permit owner must initiate a transfer request by logging onto the online QS account. Following the instructions provided on the Web site, the QS permit owner must enter pertinent information regarding the transfer request including, but not limited to: IFQ species, amount of QS, IBQ, QP, or IBQ pounds to be transferred for each IFQ species; name and any other identifier of the eligible transferee (e.g., QS permit number, vessel account number); and the value of the transferred QS, IBQ, QP, or IBQ pounds for each IFQ species. The online system will verify whether all information has been entered and whether the transfer complies with ownership limits or vessel limits, as applicable. If the information is not accepted, an electronic message will record as much in the transferor's QS account explaining the reason(s). If the information is accepted, the online system will record the pending transfer in both the transferor's QS account and the transferee's QS account or vessel account. The transferee must approve the transfer by electronic signature in order for the transfer to be completed. If the transferee accepts the transfer, the online system will record the transfer and confirm the transaction in both the transferor's QS account and the transferee's QS account or vessel account through a transaction confirmation notice. Once the transferee accepts the transaction, the transaction is final and permanent.

(*2*) *Transfer of QS or IBQ between QS accounts.* After the second year of the trawl rationalization program, QS permit owners may transfer QS or IBQ to another QS permit owner, subject to accumulation limits and approval by NMFS. QS or IBQ is transferred as a percent, divisible to one-thousandth of a percent (i.e., greater than or equal to 0.001%). During the first 2 years after implementation of the program, QS or IBQ cannot be transferred to another QS permit owner, except under U.S. court order or authorization and as approved by NMFS. QS or IBQ may not be transferred between December 1 through December 31 each year. QS or IBQ may not be transferred to a vessel account.

(*3*) *Transfer of QP or IBQ pounds from a QS account to a vessel account.* QP or IBQ pounds must be transferred in whole pounds (i.e. no fraction of a QP can be transferred). QP or IBQ pounds must be transferred to a vessel account in order to be used. Transfers of QP or IBQ pounds from a QS account to a vessel account are subject to vessel accumulation limits and NMFS' approval. All QP or IBQ pounds from a QS account must be transferred to one or more vessel accounts by September 1 each year. Once QP or IBQ pounds are transferred from a QS account to a vessel account (accepted by the transferee/vessel owner), they cannot be transferred back to a QS account and may only be transferred to another vessel account. QP or IBQ pounds may not be transferred from one QS account to another QS account.

(C) *Effective date*—(*1*) Transfer of QS or IBQ between QS accounts is effective on the date approved by NMFS.

(*2*) Transfer of QP or IBQ pounds from a QS account to a vessel account is effective on the date approved by NMFS.

(D) *IAD and appeals.* Transfers are subject to the permit appeals process specified at § 660.25 (g), subpart C.

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(4) * * *

(i) * * *

(C) The Shorebased IFQ Program accumulation limits are as follows:

Species category	QS and IBQ control limit (in percent)
Non-whiting groundfish species	2.7
Lingcod—coastwide	2.5
Pacific cod	12.0
Pacific whiting (shoreside)	10.0
Sablefish:	
N. of 36° (Monterey north)	3.0
S. of 36° (Conception area)	10.0
Pacific ocean perch N. of 40°10′	4.0
Widow rockfish	5.1
Canary rockfish	4.4
Chilipepper rockfish S. of 40°10′	10.0
Bocaccio S. of 40°10′	13.2
Splitnose rockfish S. of 40°10′	10.0
Yellowtail rockfish N. of 40°10′	5.0
Shortspine thornyhead:	
N. of 34°27′	6.0
S. of 34°27′	6.0
Longspine thornyhead:	
N. of 34°27′	6.0
Cowcod S. of 40°10′	17.7
Darkblotched rockfish	4.5
Yelloweye rockfish	5.7
Minor rockfish complex N. of 40°10′:	
Shelf species	5.0
Slope species	5.0
Minor rockfish complex S. of 40°10′:	
Shelf species	9.0
Slope species	6.0
Dover sole	2.6
English sole	5.0
Petrale sole	3.0
Arrowtooth flounder	10.0
Starry flounder	10.0
Other flatfish stock complex	10.0
Pacific halibut (IBQ) N. of 40°10′	5.4

* * * * *

(iv) *Trawl identification of ownership interest form.* Any person that owns a limited entry trawl permit and that is applying for or renewing a QS permit shall document those persons that have an ownership interest in the limited entry trawl or QS permit greater than or equal to 2 percent. This ownership interest must be documented with the SFD via the Trawl Identification of Ownership Interest Form. For renewal, if the limited entry trawl permit and QS permit have identical ownership interest, only one form need be submitted attesting to such ownership. SFD will not issue a QS permit unless the Trawl Identification of Ownership Interest Form has been completed. Further, if SFD discovers through review of the Trawl Identification of Ownership Interest Form that a person owns or controls more than the accumulation limits and is not authorized to do so under paragraph (d)(4)(v) of this section, the person will be notified and the QS permit will be issued up to the accumulation limit specified in the QS or IBQ control limit table from paragraph (d)(4)(i) of this section. NMFS may request additional information of the applicant as necessary to verify compliance with accumulation limits.

* * * * *

(5) *Appeals.* An appeal to a QS permit or QS account action follows the same process as the general permit appeals process as defined at § 660.25(g), subpart C.

* * * * *

(8) * * *

(ix) *Initial Administrative Determination (IAD).* NMFS will issue an IAD for all complete, certified applications received by the application deadline date. If NMFS approves an application for initial issuance of QS and IBQ, the applicant will receive a QS permit specifying the amounts of QS and IBQ for which the applicant has qualified and the applicant will be registered to a QS account. If NMFS disapproves or partially disapproves an application, the IAD will provide the reasons. As part of the IAD, NMFS will indicate whether the QS permit owner qualifies for QS or IBQ in amounts that exceed the accumulation limits and are subject to divestiture provisions given at paragraph (d)(4)(v) of this section, or whether the QS permit owner qualifies for QS or IBQ that exceed the accumulation limits and does not qualify to receive the excess under paragraph (d)(4)(v) of this section. If the applicant does not appeal the IAD within 60 calendar days of the date on the IAD, the IAD becomes the final decision of the Regional Administrator acting on behalf of the Secretary of Commerce.

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(e) *Vessel accounts*—(1) *General.* In order to participate in the Shorebased IFQ Program, a vessel must be registered to an eligible limited entry trawl permit. A vessel account will be established on request for an owner of a vessel registered to an eligible limited entry trawl permit in order to track QP and IBQ pounds. QP or IBQ pounds will have the same species/species groups and area designations as the QS or IBQ from which it was issued. Annually, QS or IBQ (expressed as a percent) are converted to QP or IBQ pounds (expressed as a weight) in a QS account. QP or IBQ pounds may be transferred from a QS account to a vessel account or from one vessel account to another vessel account. QP or IBQ pounds are required to cover catch (landings and discards) by limited entry trawl vessels of all IFQ species/species groups, except for:

(i) *Gear exception.* Vessels with a limited entry trawl permit using the following gears would not be required to cover groundfish catch with QP or Pacific halibut catch with IBQ pounds: Non-groundfish trawl, gear types defined in the coastal pelagic species FMP, gear types defined in the highly migratory species FMP, salmon troll, crab pot, and limited entry fixed gear when the vessel also has a limited entry permit endorsed for fixed gear and has declared that they are fishing in the limited entry fixed gear fishery.

(ii) *Species exception.* QP are not required for the following species: Longspine thornyheads south of 34°27′ N. lat., minor nearshore rockfish (north and south), black rockfish (coastwide), California scorpionfish, cabezon, kelp greenling, shortbelly rockfish, and "other fish" (as defined at § 660.11, subpart C, under the definition of "groundfish"). For these species, trip limits remain in place as specified in the trip limit tables at Table 1 (North) and Table 1 (South) of this subpart.

(2) *Eligibility and registration*—(i) *Eligibility.* To establish a registered vessel account, a person must own a vessel and that vessel must be registered to a groundfish limited entry permit endorsed for trawl gear.

(ii) *Registration.* A vessel account must be registered with the NMFS SFD Permits Office. A vessel account may be established at any time during the year. An eligible vessel owner must submit a request in writing to NMFS to establish a vessel account. The request must include the vessel name; USCG vessel registration number (as given on USCG Form 1270) or state registration number, if no USCG documentation; all vessel owner names (as given on USCG Form 1270, or on state registration, as applicable); and business contact information, including: Address, phone number, fax number, and e-mail. NMFS may require vessel account owners that are business entities to designate an account manager that may act on behalf of the entity and their contact

information. Requests for a vessel account must also include the following information: A complete economic data collection form as required under § 660.113(b), (c) and (d), subpart D, and a complete Trawl Identification of Ownership Interest Form as required under paragraph (e)(4)(ii) of this section. The request for a vessel account will be considered incomplete until the required information is submitted. Any change in the legal name of the vessel owner(s) will require the new owner to register with NMFS for a vessel account. A participant must have access to a computer with Internet access and must set up online access to their vessel account to participate. The computer must have Internet browser software installed (e.g., Internet Explorer, Netscape, Mozilla Firefox); as well as the Adobe Flash Player software version 9.0 or greater. NMFS will mail vessel account owners instructions to set up online access to their vessel account. NMFS may require vessel account owners that are business entities to designate an account manager that may act on behalf of the entity and their contact information. NMFS will use the vessel account to send messages to vessel owners in the Shorebased IFQ Program; it is important for vessel owners to monitor their online vessel account and all associated messages.

(3) *Renewal, change of account ownership, and transfer of QP or IBQ pounds*—(i) *Renewal.* (A) Vessel accounts expire at the end of each calendar year, and must be renewed between October 1 and November 30 of each year in order to ensure the vessel account is active on January 1 of the following year. A complete vessel account renewal package must be received by SFD no later than November 30 to be accepted by NMFS.

(B) Notification to renew vessel accounts will be issued by SFD prior to September 1 each year to the vessel account owner's most recent address in the SFD record. The vessel account owner shall provide SFD with notice of any address change within 15 days of the change.

(C) Any vessel account for which SFD does not receive a vessel account renewal request by November 30 will have its vessel account inactivated by NMFS at the end of the calendar year. NMFS will not issue QP or IBQ pounds to the inactivated vessel account. Any QP or IBQ pounds in the vessel account will expire and surplus QP or IBQ pounds will not be available for carryover. A non-renewed vessel account may be renewed in a subsequent year by submission of a complete vessel account renewal package.

(D) Vessel accounts will not be renewed until SFD has received a complete application for a vessel account renewal, which includes payment of required fees, a complete documentation of permit ownership on the Trawl Identification of Ownership Interest Form as required under (e)(4)(ii) of this section, and a complete economic data collection form as required under § 660.114, subpart D. The vessel account renewal will be considered incomplete until the required information is submitted. NMFS may require vessel account owners that are business entities to designate an account manager that may act on behalf of the entity and their contact information.

(E) *Effective Date.* A vessel account is effective on the date issued by NMFS and remains effective until the end of the calendar year.

(F) *IAD and appeals.* Vessel account renewals are subject to the appeals process specified at § 660.25(g), subpart C.

(ii) *Change in vessel account ownership.* Vessel accounts are non-transferable and ownership of a vessel account cannot change. If the ownership of a vessel changes, then a new vessel account must be opened by the new owner in order for the vessel to participate in the Shorebased IFQ Program.

(iii) *Transfer of QP or IBQ pounds*—(A) *General.* QP or IBQ pounds may only be transferred from a QS account to a vessel account or between vessel accounts. QP or IBQ pounds cannot be transferred from a vessel account to a QS account. Transfers of QP or IBQ pounds are subject to accumulation limits. QP or IBQ pounds in a vessel account may only be transferred to another vessel account. QP or IBQ pounds must be transferred in whole pounds (i.e., no fraction of a QP or IBQ pound can be transferred). During the year there may be situations where NMFS deems it necessary to prohibit transfers (i.e., account reconciliation, system maintenance, or for emergency fishery management reasons).

(B) *Transfer procedures.* QP or IBQ pound transfers from one vessel account to another vessel account must be accomplished via the online vessel account. To make a transfer, a vessel account owner must initiate a transfer request by logging onto the online vessel account. Following the instructions provided on the Web site, the vessel account owner must enter pertinent information regarding the transfer request including, but not limited to: IFQ species, amount of QP or IBQ pounds to be transferred for each IFQ species (in whole pound increments); name and any other identifier of the eligible transferee (e.g., USCG documentation number or state registration number, as applicable) of the eligible vessel account receiving the transfer; and the value of the transferred QP or IBQ pounds. The online system will verify whether all information has been entered and whether the transfer complies with vessel limits, as applicable. If the information is not accepted, an electronic message will record as much in the transferor's vessel account explaining the reason(s). If the information is accepted, the online system will record the pending transfer in both the transferor's and the transferee's vessel accounts. The transferee must approve the transfer by electronic signature. If the transferee accepts the transfer, the online system will record the transfer and confirm the transaction in both accounts through a transaction confirmation notice. Once the transferee accepts the transaction, the transaction is final and permanent. QP or IBQ pounds may be transferred to vessel accounts at any time during January 1 through December 14 each year unless otherwise notified by NMFS. QP or IBQ pounds may not be transferred between December 15 and December 31 each year.

(4) *Accumulation limits*—(i) *Vessel limits.* Vessel accounts may not have QP or IBQ pounds in excess of the QP Vessel Limit in any year, and, for species covered by Unused QP Vessel Limits, may not have QP or IBQ pounds in excess of the Unused QP Vessel Limit at any time. These amounts are as follows:

Species category	QP vessel limit (annual limit) (in percent)	Unused QP vessel limit (daily limit) (in percent)
Non-whiting groundfish species	3.2	

Species category	QP vessel limit (annual limit) (in percent)	Unused QP vessel limit (daily limit) (in percent)
Lingcod—coastwide	3.8	.....
Pacific cod	20.0	.....
Pacific whiting (shoreside)	15.0	.....
Sablefish:		
N. of 36° (Monterey north)	4.5	.....
S. of 36° (Conception area)	15.0	.....
Pacific ocean perch N. of 40°10′	6.0	4.0
Widow rockfish [1]	8.5	5.1
Canary rockfish	10.0	4.4
Chilipepper rockfish S. of 40°10′	15.0	.....
Bocaccio S. of 40°10′	15.4	13.2
Splitnose rockfish S. of 40°10′	15.0	.....
Yellowtail rockfish N. of 40°10′	7.5	.....
Shortspine thornyhead:		
N. of 34°27′	9.0	.....
S. of 34°27′	9.0	.....
Longspine thornyhead:		
N. of 34°27′	9.0	.....
Cowcod S. of 40°10′	17.7	17.7
Darkblotched rockfish	6.8	4.5
Yelloweye rockfish	11.4	5.7
Minor rockfish complex N. of 40°10′:		
Shelf species	7.5	.....
Slope species	7.5	.....
Minor rockfish complex S. of 40°10′:		
Shelf species	13.5	.....
Slope species	9.0	.....
Dover sole	3.9	.....
English sole	7.5	.....
Petrale sole	4.5	.....
Arrowtooth flounder	20.0	.....
Starry flounder	20.0	.....
Other flatfish stock complex	15.0	.....
Pacific halibut (IBQ) N. of 40°10′	14.4	5.4

[1] If widow rockfish is rebuilt before initial allocation of QS, the vessel limit will be set at 1.5 times the control limit.

(ii) *Trawl identification of ownership interest form.* Any person that owns a vessel registered to a limited entry trawl permit and that is applying for or renewing a vessel account shall document those persons that have an ownership interest in the vessel greater than or equal to 2 percent. This ownership interest must be documented with the SFD via the Trawl Identification of Ownership Interest Form. SFD will not issue a vessel account unless the Trawl Identification of Ownership Interest Form has been completed. NMFS may request additional information of the applicant as necessary to verify compliance with accumulation limits.

(5) *Carryover.* The carryover provision allows a limited amount of surplus QP or IBQ pounds in a vessel account to be carried over from one year to the next or allows a deficit in a vessel account in one year to be covered with QP or IBQ pounds from a subsequent year, up to a carryover limit. The carryover limit is calculated by multiplying the carryover percentage by the cumulative total of QP or IBQ pounds (used and unused) in a vessel account for the base year, less any transfers out of the vessel account or any previous carryover amounts. The percentage used for the carryover provision may be changed during the biennial specifications and management measures process.

(i) *Surplus QP or IBQ pounds.* A vessel account with a surplus of QP or IBQ pounds (unused QP or IBQ pounds) for any IFQ species at the end of the fishing year may carryover for use in the immediately following year an amount of unused QP or IBQ pounds up to its carryover limit. The carryover limit for the surplus is calculated as 10 percent of the cumulative total QP or IBQ pounds (used and unused, less any transfers or any previous carryover amounts) in the vessel account at the end of the year. NMFS will credit the carryover amount to the vessel account in the immediately following year. If there is a decline in the OY between the base year and the following year in which the QP or IBQ pounds would be carried over, the carryover amount will be reduced in proportion to the reduction in the OY. Surplus QP or IBQ pounds may not be carried over for more than one year. Any amount of QP or IBQ pounds in a vessel account and in excess of the carryover amount will expire on December 31 each year and will not be available for any future use.

(ii) *Deficit QP or IBQ pounds.* A vessel account with a deficit (negative balance) of QP or IBQ pounds for any IFQ species in the current year may cover that deficit with QP or IBQ pounds from the following year without incurring a violation if all of the following conditions are met:

(A) The vessel declares out of the Shorebased IFQ Program for the year in which the deficit occurred. To declare out of the Shorebased IFQ Program, the vessel owner must submit a signed, dated, and notarized letter to the NMFS Office of Law Enforcement, declaring the vessel owner's intent to declare out of the Shorebased IFQ Program for the remainder of the year and invoke the carryover provision to cover the deficit. (If the deficit occurs less than 30 days before the end of the calendar year, declaring out of the Shorebased IFQ Program for the remainder of the year is

not required, however, the vessel owner must notify the NMFS Office of Law Enforcement of the owner's intent to invoke the carryover provision to cover the deficit.)

(B) The amount of QP or IBQ pounds required to cover the deficit from the current fishing year is less than or equal to the vessel's carryover limit for a deficit. The carryover limit for a deficit is calculated as 10 percent of the total cumulative QP or IBQ pounds (used and unused, less any transfers or any previous carryover amounts) in the vessel account 30 days after the date the deficit is documented; and

(C) Sufficient QP or IBQ pounds are transferred in to the vessel account to cure the deficit within 30 days of NMFS' issuance of QP or IBQ pounds to QS accounts in the following year.

(6) *Appeals.* An appeal to a vessel account action follows the appeals process defined at § 660.25(g), subpart C.

(7) *Fees.* The Regional Administrator is authorized to charge fees for administrative costs associated with the vessel accounts consistent with the provisions given at § 660.25(f), subpart C.

(8) *Cost recovery.* [Reserved]

(f) *First receiver site license*—(1) *General.* Any IFQ first receiver that receives IFQ landings must hold a valid first receiver site license. The first receiver site license authorizes the holder to receive, purchase, or take custody, control, or possession of an IFQ landing at a specific physical site onshore directly from a vessel. Once the trawl rationalization program is implemented, a temporary, interim first receiver site license will be available by application to NMFS and will be valid until June 30, 2011, or until an application for a first receiver site license as specified in paragraph (f)(3) of this section is approved by NMFS, whichever comes first. An application for an interim first receiver site license is subject to all of the requirements in this paragraph (f) including the submission of a catch monitoring plan, except that the catch monitoring plan in paragraph (f)(3)(iii) does not have to have been previously accepted by NMFS and the site does not have to have been previously inspected.

(2) *Issuance.* (i) First receiver site licenses will only be issued to a person registered to a valid license issued by the state of Washington, Oregon, or California, and that authorizes the person to receive fish from a catcher vessel.

(ii) A first receiver may apply for a first receiver site license at any time during the calendar year.

(iii) A first receiver site license is valid for one year from the date it was issued by NMFS, or until the state license required by paragraph (f)(2)(i) of this section is no longer effective, whichever occurs first. IFQ first receivers must reapply for a first receiver site license each year and whenever a change in the ownership occurs.

(3) *Application process.* Persons interested in being licensed as an IFQ first receiver must submit a complete application for a first receiver site license to NMFS, Northwest Region, Permits Office, ATTN: Catch Monitor Coordinator, Bldg. 1, 7600 Sand Point Way NE, Seattle, WA 98115. NMFS will only consider complete applications for approval. A complete application includes:

(i) *State license.* A copy of a valid license issued by the state in which they operate which allows the person to receive fish from a catcher vessel.

(ii) *Contact information.* (A) The name of the first receiver,

(B) The physical location of the first receiver, including the street address where the IFQ landings will be received and/or processed.

(C) The name and phone number of the plant manager and any other authorized representative who will serve as a point of contact with NMFS.

(iii) *A NMFS-accepted catch monitoring plan.* All IFQ first receivers must prepare and operate under a NMFS-accepted catch monitoring plan. NMFS will not issue a first receiver site license to a processor that does not have a current, NMFS-accepted catch monitoring plan.

(A) *Catch monitoring plan review process.* NMFS will accept a catch monitoring plan if it meets all the requirements specified in paragraph (f)(3)(iii)(C) of this section. The site must be inspected by NMFS staff or a NMFS designated inspector prior to acceptance to ensure that the first receiver conforms to the elements addressed in the catch monitoring plan. If NMFS does not accept a catch monitoring plan for any reason, a new or revised catch monitoring plan may be submitted.

(B) *Arranging an inspection.* The time and place of a monitoring plan inspection must be arranged by submitting a written request for an inspection as part of the application for a first receiver site license. After receiving a complete application for a first receiver site license, NMFS will contact the applicant to schedule a site inspection. The inspection request must include:

(*1*) Name and signature of the person submitting the application and the date of the application;

(*2*) Address, telephone number, fax number, and email address (if available) of the person submitting the application;

(*3*) A proposed catch monitoring plan detailing how the IFQ first receiver will meet each of the performance standards in paragraph (f)(3)(iii)(C) of this section.

(C) *Contents of a catch monitoring plan.* The catch monitoring plan must:

(*1*) *Catch sorting.* Describe the amount and location of all space used for sorting catch, the number of staff assigned to catch sorting, and the maximum rate that catch will flow through the sorting area.

(*2*) *Monitoring for complete sorting.* Detail how IFQ first receiver staff will ensure that sorting is complete; what steps will be taken to prevent unsorted catch from entering the factory or other areas beyond the location where catch sorting and weighing can be monitored from the observation area; and what steps will be taken if unsorted catch enters the factory or other areas beyond the location where catch sorting and weighing can be monitored from the observation area.

(*3*) *Scales used for weighing IFQ landings.* Identify each scale that will be used to weigh IFQ landings by the type and capacity and describe where it is located and what it will be used for. Each scale must be appropriate for its intended use.

(*4*) *Printed record.* Identify all scales that will be used to weigh IFQ landings that cannot produce a complete printed record as specified at § 660.15(c), subpart C. State how the scale will be used, and how the plant intends to produce a complete and accurate record of the total weight of each delivery.

(*5*) *Weight monitoring.* Detail how the IFQ first receiver will ensure that all catch is weighed and the process used to meet the catch weighing requirements specified at paragraph (j) of this section. If a catch monitoring plan proposes the use of totes in which IFQ species will be weighed, or a deduction for the weight of ice, the catch monitoring plan must detail how the process will accurately account for the weight of ice and/or totes.

(*6*) *Delivery points.* Identify specific delivery points where catch is removed from an IFQ vessel. The delivery point is the first location where fish removed from a delivering catcher vessel can be sorted or diverted to more than one location. If the catch is pumped from the hold of a catcher vessel or a codend, the delivery point will be the location where the pump first discharges the

catch. If catch is removed from a vessel by brailing, the delivery point normally will be the bin or belt where the brailer discharges the catch.

(*7*) *Observation area.* Designate and describe the observation area. The observation area is a location where a catch monitor may monitor the flow of fish during a delivery, including: Access to the observation area, the flow of fish, and lighting used during periods of limited visibility. Standards for the observation area are specified at paragraph (i)(4)(ii) of this section.

(*8*) *Lockable cabinet.* Identify the location of a secure, dry, and lockable cabinet or locker with the minimum interior dimensions of two feet wide by two feet tall by two feet deep for the exclusive use of the catch monitor, NMFS staff, or authorized officers.

(*9*) *Plant liaison.* Identify the designated plant liaison. The plant liaison responsibilities are specified at paragraph (i)(6) of this section.

(*10*) *First receiver diagram.* The catch monitoring plan must be accompanied by a diagram of the plant showing:

(*i*) The delivery point(s);

(*ii*) The observation area;

(*iii*) The lockable cabinet;

(*iv*) The location of each scale used to weigh catch; and

(*v*) Each location where catch is sorted.

(D) *Catch monitoring plan acceptance period and changes.* NMFS will accept a catch monitoring plan if it meets the performance standards specified in paragraph (f)(3)(iii)(C) of this section. For the first receiver site license to remain in effect, an owner or manager must notify NMFS in writing of any and all changes made in IFQ first receiver operations or layout that do not conform to the catch monitoring plan.

(E) *Changing a NMFS-accepted catch monitoring plan.* An owner and manager may change an accepted catch monitoring plan by submitting a plan addendum to NMFS. NMFS will accept the modified catch monitoring plan if it continues to meet the performance standards specified in paragraph (f)(3)(iii)(C) of this section. Depending on the nature and magnitude of the change requested, NMFS may require an additional catch monitoring plan inspection. A catch monitoring plan addendum must contain:

(*1*) Name and signature of the person submitting the addendum;

(*2*) Address, telephone number, fax number and email address (if available) of the person submitting the addendum;

(*3*) A complete description of the proposed catch monitoring plan change.

(iv) *Completed EDC form.* A first receiver site license application must include a complete economic data collection form as required under § 660.113(b), subpart D. The application for a first receiver site license will be marked incomplete until the required information is submitted.

(4) *Initial administrative determination.* For all complete applications, NMFS will issue an IAD that either approves or disapproves the application. If approved, the IAD will include a first receiver site license. If disapproved, the IAD will provide the reasons for this determination.

(5) *Effective date.* The first receiver site license is effective upon approval and issuance by NMFS and will be effective for one year from the date of NMFS issuance.

(6) *Reissuance in subsequent years.* Existing license holders must reapply annually. If the existing license holder fails to reapply, the first receiver's site license will expire one year from the date of NMFS issuance of the license. The first receiver will not be authorized to receive or process groundfish IFQ species if their first receiver site license has expired.

(7) *Change in ownership of an IFQ first receiver.* If there are any changes to the owner of a first receiver registered to a first receiver site license during a calendar year, the first receiver site license is void. The new owner of the first receiver must apply to NMFS for a first receiver site license. A first receiver site license is not transferrable by the license holder to any other person.

(8) *Fees.* The Regional Administrator is authorized to charge fees for administrative costs associated with processing the application consistent with the provisions given at § 660.25(f), subpart C.

(9) *Appeals.* If NMFS does not accept the first receiver site license application through an IAD, the applicant may appeal the IAD consistent with the general permit appeals process defined at § 660.25(g), subpart C.

(g) *Retention requirements (whiting and non-whiting vessels)*—(1) *Non-whiting vessels.* Vessels participating in the Shoreside IFQ Program other than vessels participating in the Pacific whiting IFQ fishery (non-whiting vessels) may discard IFQ species/species groups, provided such discards are accounted for and deducted from QP in the vessel account. Non-whiting vessels must discard Pacific halibut and the discard mortality must be accounted for and deducted from IBQ pounds in the vessel account. Non-whiting vessels may discard non-IFQ species and non-groundfish species. The sorting of catch, the weighing and discarding of any IBQ and IFQ species, and the retention of IFQ species must be monitored by the observer.

(2) *Whiting maximized retention vessels.* Maximized retention vessels participating in the Pacific whiting IFQ fishery may discard minor operational amounts of catch at sea if the observer has accounted for the discard (i.e., a maximized retention fishery).

(3) *Whiting vessels sorting at-sea.* Vessels participating in the Pacific whiting IFQ fishery that sort their catch at sea (whiting vessels sorting at-sea) may discard IFQ species/species groups, provided such discards are accounted for and deducted from QP in the vessel account. Whiting vessels sorting at sea must discard Pacific halibut and such discard mortality must be accounted for and deducted from IBQ pounds in the vessel account. Whiting vessels sorting at-sea may discard non-IFQ species and non-groundfish species. The sorting of catch, weighing and discarding of any IFQ or IBQ species must be monitored by the observer.

(h) *Observer requirements*—(1) *Observer coverage requirements.* (i) Any vessel participating in the Shorebased IFQ Program must carry a NMFS-certified observer during any trip until all fish from that trip have been offloaded. If a vessel delivers fish from an IFQ trip to more than one IFQ first receiver, the observer must remain onboard the vessel during any transit between delivery points.

(ii) *Observer deployment limitations and workload.* Observer must not be deployed for more than 22 calendar days in a calendar month. The observer program may issue waivers to allow observers to work more than 22 calendar days per month when it's anticipated one trip will last over 20 days or for issues with observer availability due illness or injury of other observers.

(A) If an observer is unable to perform their duties for any reason, the vessel is required to be in port within 36 hours of the last haul sampled by the observer.

(B) [Reserved]

(iii) *Refusal to board.* Any boarding refusal on the part of the observer or vessel must be immediately reported to the observer program and NOAA OLE by the observer provider. The observer must be available for an interview with the observer program or NOAA OLE if necessary.

(2) *Vessel responsibilities.* An operator and/or crew of a vessel required to carry an observer must provide:

(i) *Accommodations and food.* (A) Accommodations and food for trips less than 24 hours must be equivalent to those provided for the crew.

(B) Accommodations and food for trips of 24 hours or more must be equivalent to those provided for the crew and must include berthing space, a space that is intended to be used for sleeping and is provided with installed bunks and mattresses. A mattress or futon on the floor or a cot is not acceptable if a regular bunk is provided to any crew member, unless other arrangements are approved in advance by the Regional Administrator or their designee.

(ii) *Safe conditions.* (A) Maintain safe conditions on the vessel for the protection of observers including adherence to all U.S. Coast Guard and other applicable rules, regulations, statutes, and guidelines pertaining to safe operation of the vessel, including, but not limited to rules of the road, vessel stability, emergency drills, emergency equipment, vessel maintenance, vessel general condition and port bar crossings. An observer may refuse boarding or reboarding a vessel and may request a vessel to return to port if operated in an unsafe manner or if unsafe conditions are identified.

(B) Have on board a valid Commercial Fishing Vessel Safety Decal that certifies compliance with regulations found in 33 CFR Chapter I and 46 CFR Chapter I, a certificate of compliance issued pursuant to 46 CFR 28.710 or a valid certificate of inspection pursuant to 46 U.S.C. 3311.

(iii) *Computer hardware and software.* [Reserved]

(iv) *Vessel position.* Allow observer(s) access to the vessel's navigation equipment and personnel, on request, to determine the vessel's position.

(v) *Access.* Allow observer(s) free and unobstructed access to the vessel's bridge, trawl or working deck, holding bins, sorting areas, cargo hold, and any other space that may be used to hold, process, weigh, or store fish at any time.

(vi) *Prior notification.* Notify observer(s) at least 15 minutes before fish are brought on board to allow sampling the catch.

(vii) *Records.* Allow observer(s) to inspect and copy any state or Federal logbook maintained voluntarily or as required by regulation.

(viii) *Assistance.* Provide all other reasonable assistance to enable observer(s) to carry out their duties, including, but not limited to:

(A) Measuring decks, codends, and holding bins.

(B) Providing a designated working area on deck for the observer(s) to collect, sort and store catch samples.

(C) Collecting samples of catch.

(D) Collecting and carrying baskets of fish.

(E) Allowing the observer(s) to collect biological data and samples.

(F) Providing adequate space for storage of biological samples.

(G) Providing time between hauls to sample and record all catch.

(H) Sorting retained and discarded catch into quota pound groupings.

(I) Stowing all catch from a haul before the next haul is brought aboard.

(ix) *Sampling station.* To allow the observer to carry out the required duties, the vessel owner must provide an observer sampling station that is:

(A) *Accessible.* The observer sampling station must be available to the observer at all times.

(B) *Limits hazards.* To the extent possible, the area should be free and clear of hazards including, but not limited to, moving fishing gear, stored fishing gear, inclement weather conditions, and open hatches.

(x) *Transfers at sea.* Transfers at-sea are prohibited.

(3) *Procurement of observer services*—(i) Owners of vessels required to carry observers under paragraph (a)(1) of this section must arrange for observer services from a permitted observer provider, except that:

(A) Vessels are required to procure observer services directly from NMFS when NMFS has determined and given notification that the vessel must carry NMFS staff or an individual authorized by NMFS in lieu of an observer provided by a permitted observer provider.

(B) Vessels are required to procure observer services directly from NMFS and a permitted observer provider when NMFS has determined and given notification that the vessel must carry NMFS staff and/or individuals authorized by NMFS, in addition to an observer provided by a permitted observer provider.

(ii) [Reserved]

(4) *Application to become an observer provider.* Any observer provider holding a valid permit issued by the North Pacific observer program in 2010 can supply observer services to the west coast trawl fishery and will be issued a West Coast Groundfish Observer Program permit.

(5) *Observer provider responsibilities.*

(i) *Provide qualified candidates to serve as observers.* Observer providers must provide qualified candidates to serve as observers. To be qualified, a candidate must have:

(A) A Bachelor's degree or higher from an accredited college or university with a major in one of the natural sciences;

(B) Successfully completed a minimum of 30 semester hours or equivalent in applicable biological sciences with extensive use of dichotomous keys in at least one course;

(C) Successfully completed at least one undergraduate course each in math and statistics with a minimum of 5 semester hours total for both; and

(D) Computer skills that enable the candidate to work competently with standard database software and computer hardware.

(ii) *Hiring an observer candidate*—(A) The observer provider must provide the candidate a copy of NMFS-provided pamphlets, information and other literature describing observer duties, for example, the West Coast Groundfish Observer Program's sampling manual. Observer job information is available from the Observer Program Office's web site at *http://www.nwfsc.noaa.gov/research/divisions/fram/observer/index.cfm*.

(B) *Observer contracts.* The observer provider must have a written contract or a written contract addendum signed by the observer and observer provider prior to the observer's deployment with the following clauses:

(*1*) That all the observer's in-season messages and catch reports required to be sent while deployed are delivered to the Observer Program Office as specified by written Observer Program instructions;

(*2*) That the observer inform the observer provider prior to the time of embarkation if he or she is experiencing any new mental illness or physical ailments or injury since submission of the physician's statement as required as a qualified observer candidate that would prevent him or her from performing their assigned duties; and

(*3*) That every observer completes a basic cardiopulmonary resuscitation/first aid course prior to the end of the NMFS West Coast Groundfish Observer Training class.

(iii) *Ensure that observers complete duties in a timely manner.* An observer provider must ensure that observers employed by that observer provider do the following in a complete and timely manner:

(A) Submit to NMFS all data, logbooks and reports and biological samples as required under the observer program policy deadlines.

(B) Report for his or her scheduled debriefing and complete all debriefing responsibilities; and

(C) Return all sampling and safety gear to the Observer Program Office at the termination of their contract.

(D) Immediately report to the Observer Program Office and the NOAA OLE any refusal to board an assigned vessel.

(iv) *Observers provided to vessel.* (A) Must have a valid West Coast Groundfish observer certification endorsement;

(B) Must not have informed the provider prior to the time of embarkation that he or she is experiencing a mental illness or a physical ailment or injury developed since submission of the physician's statement, as required in paragraph (h)(5)(xi)(B) of this section that would prevent him or her from performing his or her assigned duties; and

(C) Must have successfully completed all NMFS required training and briefing before deployment.

(v) *Respond to industry requests for observers.* An observer provider must provide an observer for deployment pursuant to the terms of the contractual relationship with the vessel to fulfill vessel requirements for observer coverage under paragraphs (h)(5)(xi)(D) of this section. An alternate observer must be supplied in each case where injury or illness prevents the observer from performing his or her duties or where the observer resigns prior to completion of his or her duties. If the observer provider is unable to respond to an industry request for observer coverage from a vessel for whom the provider is in a contractual relationship due to the lack of available observers by the estimated embarking time of the vessel, the provider must report it to NMFS at least 4 hours prior to the vessel's estimated embarking time.

(vi) *Provide observer salaries and benefits.* An observer provider must provide to its observer employees salaries and any other benefits and personnel services in accordance with the terms of each observer's contract.

(vii) *Provide observer deployment logistics.* (A) An observer provider must ensure each of its observers under contract:

(*1*) Has an individually assigned mobile or cell phones, in working order, for all necessary communication. An observer provider may alternatively compensate observers for the use of the observer's personal cell phone or pager for communications made in support of, or necessary for, the observer's duties.

(*2*) Calls into the NMFS deployment hotline upon departing and arriving into port for each trip to leave the following information: observer name, phone number, vessel departing on, expected trip end date and time.

(*3*) Remains available to NOAA Office for Law Enforcement and the Observer Program until the conclusion of debriefing.

(*4*) Receives all necessary transportation, including arrangements and logistics, of observers to the initial location of deployment, to all subsequent vessel assignments during that deployment, and to the debriefing location when a deployment ends for any reason; and

(*5*) Receives lodging, per diem, and any other services necessary to observers assigned to fishing vessels.

(*i*) An observer under contract may be housed on a vessel to which he or she is assigned: Prior to their vessel's initial departure from port; for a period not to exceed twenty-four hours following the completion of an offload when the observer has duties and is scheduled to disembark; or for a period not to exceed twenty-four hours following the vessel's arrival in port when the observer is scheduled to disembark.

(*ii*) During all periods an observer is housed on a vessel, the observer provider must ensure that the vessel operator or at least one crew member is aboard.

(*iii*) Otherwise, each observer between vessels, while still under contract with a permitted observer provider, shall be provided with accommodations in accordance with the contract between the observer and the observer provider. If the observer provider is responsible for providing accommodations under the contract with the observer, the accommodations must be at a licensed hotel, motel, bed and breakfast, or other shoreside accommodations that has an assigned bed for each observer that no other person may be assigned to for the duration of that observer's stay. Additionally, no more than four beds may be in any room housing observers at accommodations meeting the requirements of this section.

(viii) *Observer deployment limitations and workload.* (A) Not deploy an observer on the same vessel more than 90 calendar days in a 12-month period, unless otherwise authorized by NMFS.

(B) Not exceed observer deployment limitations and workload as outlined in paragraph (h)(1)(ii) of this section.

(ix) *Verify vessel's safety decal.* An observer provider must verify that a vessel has a valid USCG safety decal as required under paragraph (h)(2)(ii)(B) of this section before an observer may get underway aboard the vessel. One of the following acceptable means of verification must be used to verify the decal validity:

(A) An employee of the observer provider, including the observer, visually inspects the decal aboard the vessel and confirms that the decal is valid according to the decal date of issuance; or

(B) The observer provider receives a hard copy of the USCG documentation of the decal issuance from the vessel owner or operator.

(x) *Maintain communications with observers.* An observer provider must have an employee responsible for observer activities on call 24 hours a day to handle emergencies involving observers or problems concerning observer logistics, whenever observers are at sea, in transit, or in port awaiting vessel reassignment.

(xi) *Maintain communications with the Observer Program Office.* An observer provider must provide all of the following information by electronic transmission (e-mail), fax, or other method specified by NMFS.

(A) *Observer training, briefing, and debriefing registration materials.* This information must be submitted to the Observer Program Office at least 7 business days prior to the beginning of a scheduled West Coast groundfish observer certification training or briefing session.

(*1*) Training registration materials consist of the following:

(*i*) Date of requested training;

(*ii*) A list of observer candidates that includes each candidate's full name (*i.e.,* first, middle and last names), date of birth, and gender;

(*iii*) A copy of each candidate's academic transcripts and resume;

(*iv*) A statement signed by the candidate under penalty of perjury which discloses the candidate's criminal convictions;

(*v*) Projected observer assignments. Prior to the observer's completion of the training or briefing session, the observer provider must submit to the Observer Program Office a statement of projected observer assignments that includes each observer's name, current mailing address, e-mail address, phone numbers and port of embarkation ("home port"); and

(*vi*) Length of each observer's contract.

(*2*) Briefing registration materials consist of the following:

(*i*) Date and type of requested briefing session;

(*ii*) List of observers to attend the briefing session, that includes each observer's full name (first, middle, and last names);

(*iii*) Projected observer assignments. Prior to the observer's completion of the training or briefing session, the observer provider must submit to the Observer Program Office a statement of projected observer assignments that includes each observer's name, current mailing address, e-mail address, phone numbers and port of embarkation ("home port"); and

(*iv*) Length of each observer's contract.

(*3*) *Debriefing.* The West Coast Groundfish Observer Program will

notify the observer provider which observers require debriefing and the specific time period the provider has to schedule a date, time, and location for debriefing. The observer provider must contact the West Coast Groundfish Observer program within 5 business days by telephone to schedule debriefings.

(*i*) Observer providers must immediately notify the observer program when observers end their contract earlier than anticipated.

(*ii*) [Reserved]

(B) *Physical examination.* A signed and dated statement from a licensed physician that he or she has physically examined an observer or observer candidate. The statement must confirm that, based on that physical examination, the observer or observer candidate does not have any health problems or conditions that would jeopardize that individual's safety or the safety of others while deployed, or prevent the observer or observer candidate from performing his or her duties satisfactorily. The statement must declare that, prior to the examination, the physician was made aware of the duties of the observer and the dangerous, remote, and rigorous nature of the work by reading the NMFS-prepared information. The physician's statement must be submitted to the Observer Program Office prior to certification of an observer. The physical exam must have occurred during the 12 months prior to the observer's or observer candidate's deployment. The physician's statement will expire 12 months after the physical exam occurred. A new physical exam must be performed, and accompanying statement submitted, prior to any deployment occurring after the expiration of the statement.

(C) *Certificates of insurance.* Copies of "certificates of insurance", that name the NMFS Observer Program leader as the "certificate holder", shall be submitted to the Observer Program Office by February 1 of each year. The certificates of insurance shall verify the following coverage provisions and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled.

(*1*) Maritime Liability to cover "seamen's" claims under the Merchant Marine Act (Jones Act) and General Maritime Law ($1 million minimum).

(*2*) Coverage under the U.S. Longshore and Harbor Workers' Compensation Act ($1 million minimum).

(*3*) States Worker's Compensation as required.

(*4*) Commercial General Liability.

(D) *Observer provider contracts.* If requested, observer providers must submit to the Observer Program Office a completed and unaltered copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and those entities requiring observer services under paragraph (h)(1)(i) of this section. Observer providers must also submit to the Observer Program Office upon request, a completed and unaltered copy of the current or most recent signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract and any agreements or policies with regard to observer compensation or salary levels) between the observer provider and the particular entity identified by the Observer Program or with specific observers. The copies must be submitted to the Observer Program Office via e-mail, fax, or mail within 5 business days of the request. Signed and valid contracts include the contracts an observer provider has with:

(*1*) Vessels required to have observer coverage as specified at paragraph (h)(1)(i) of this section; and

(*2*) Observers.

(E) *Change in observer provider management and contact information.* An observer provider must submit to the Observer Program Office any change of management or contact information submitted on the provider's permit application under paragraph (h)(4) of this section within 30 days of the effective date of such change.

(F) *Biological samples.* The observer provider must ensure that biological samples are stored/handled properly prior to delivery/transport to NMFS.

(G) *Observer status report.* Each Tuesday, observer providers must provide NMFS with an updated list of contact information for all observers that includes the observer's name, mailing address, e-mail address, phone numbers, port of embarkation ("home port"), fishery deployed the previous week and whether or not the observer is "in service", indicating when the observer has requested leave and/or is not currently working for the provider.

(H) Providers must submit to NMFS, if requested, copies of any information developed and used by the observer providers distributed to vessels, such as informational pamphlets, payment notification, description of observer duties, etc.

(I) *Other reports.* Reports of the following must be submitted in writing to the West Coast Groundfish Observer Program Office by the observer provider via fax or e-mail address designated by the Observer Program Office within 24 hours after the observer provider becomes aware of the information:

(*1*) Any information regarding possible observer harassment;

(*2*) Any information regarding any action prohibited under § 660.112 or § 600.725(o), (t) and (u);

(*3*) Any concerns about vessel safety or marine casualty under 46 CFR 4.05–1(a)(1) through (7);

(*4*) Any observer illness or injury that prevents the observer from completing any of his or her duties described in the observer manual; and

(*5*) Any information, allegations or reports regarding observer conflict of interest or breach of the standards of behavior described in observer provider policy.

(xii) *Replace lost or damaged gear.* An observer provider must replace all lost or damaged gear and equipment issued by NMFS to an observer under contract to that provider. All replacements must be in accordance with requirements and procedures identified in writing by the Observer Program Office.

(xiii) *Maintain confidentiality of information.* An observer provider must ensure that all records on individual observer performance received from NMFS under the routine use provision of the Privacy Act or as otherwise required by law remain confidential and are not further released to anyone outside the employ of the observer provider company to whom the observer was contracted except with written permission of the observer.

(xiv) *Limitations on conflict of interest.* Observer providers:

(A) Must not have a direct financial interest, other than the provision of observer services, in the North Pacific or Pacific coast fishery managed under an FMP for the waters off the coasts of Alaska, Washington, Oregon, and California, including, but not limited to:

(*1*) Any ownership, mortgage holder, or other secured interest in a vessel or shoreside processor facility involved in the catching, taking, harvesting or processing of fish,

(*2*) Any business involved with selling supplies or services to any vessel or shoreside processors participating in a fishery managed pursuant to an FMP in the waters off the coasts of Alaska, California, Oregon, and Washington, or

(*3*) Any business involved with purchasing raw or processed products from any vessel or shoreside processor participating in a fishery managed pursuant to an FMP in the waters off the coasts of Alaska, California, Oregon, and Washington.

(B) Must assign observers without regard to any preference by representatives of vessels other than when an observer will be deployed.

(C) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value except for compensation for providing observer services from anyone who conducts fishing or fish processing activities that are regulated by NMFS in the Pacific coast or North Pacific regions, or who has interests that may be substantially affected by the performance or non-performance of the official duties of observer providers.

(xv) *Observer conduct and behavior.* An observer provider must develop and maintain a policy addressing observer conduct and behavior for their employees that serve as observers.

(A) The policy shall address the following behavior and conduct regarding:

(*1*) Observer use of alcohol;

(*2*) Observer use, possession, or distribution of illegal drugs; and;

(*3*) Sexual contact with personnel of the vessel or processing facility to which the observer is assigned, or with any vessel or processing plant personnel who may be substantially affected by the performance or non-performance of the observer's official duties.

(B) An observer provider shall provide a copy of its conduct and behavior policy to each observer candidate and to the Observer Program by February 1 of each year.

(xvi) *Refusal to deploy an observer.* Observer providers may refuse to deploy an observer on a requesting vessel if the observer provider has determined that the requesting vessel is inadequate or unsafe pursuant to those described at § 600.746 or U.S. Coast Guard and other applicable rules, regulations, statutes, or guidelines pertaining to safe operation of the vessel.

(6) *Observer certification and responsibilities*—(i) *Applicability.* Observer certification authorizes an individual to fulfill duties as specified in writing by the NMFS Observer Program Office while under the employ of a NMFS-permitted observer provider and according to certification requirements as designated under paragraph (h)(6)(iii) of this section.

(ii) *Observer certification official.* The Regional Administrator will designate a NMFS observer certification official who will make decisions for the Observer Program Office on whether to issue or deny observer certification.

(iii) *Certification requirements*—(A) *Initial certification.* NMFS may certify individuals who, in addition to any other relevant considerations:

(*1*) Are employed by an observer provider company permitted pursuant to § 660.140(h) at the time of the issuance of the certification;

(*2*) Have provided, through their observer provider:

(*i*) Information identified by NMFS at § 679.50 regarding an observer candidate's health and physical fitness for the job;

(*ii*) Meet all observer candidate education and health standards as specified in § 679.50; and

(*iii*) Have successfully completed NMFS-approved training as prescribed by the At-Sea Hake and/or West Coast Groundfish Observer Program. Successful completion of training by an observer applicant consists of meeting all attendance and conduct standards issued in writing at the start of training; meeting all performance standards issued in writing at the start of training for assignments, tests, and other evaluation tools; and completing all other training requirements established by the Observer Program.

(*iv*) Have not been decertified under paragraph (h)(6)(ix) of this section, or pursuant to § 679.50.

(B) [Reserved]

(iv) *Denial of a certification.* The NMFS observer certification official will issue a written determination denying observer certification if the candidate fails to successfully complete training, or does not meet the qualifications for certification for any other relevant reason.

(v) *Issuance of an observer certification.* An observer certification may be issued upon determination by the observer certification official that the candidate has successfully met all requirements for certification as specified at paragraph (h)(6)(iii) of this section. The following endorsements must be obtained in addition to observer certification, in order for an observer to deploy.

(A) *West Coast Groundfish Observer Program training certification endorsement.* A training certification endorsement signifies the successful completion of the training course required to obtain observer certification. This endorsement expires when the observer has not been deployed and performed sampling duties as required by the Observer Program Office for a period of time, specified by the Observer Program, after his or her most recent debriefing. The Observer can renew the endorsement by successfully completing training once more.

(B) *West Coast Groundfish Observer Program annual general endorsement.* Each observer must obtain an annual general endorsement to their certification prior to his or her first deployment within any calendar year subsequent to a year in which a training certification endorsement is obtained. To obtain an annual general endorsement, an observer must successfully complete the annual briefing, as specified by the Observer Program. All briefing attendance, performance, and conduct standards required by the Observer Program must be met.

(C) *West Coast Groundfish Observer Program deployment endorsement.* Each observer who has completed an initial deployment after their certification or annual briefing must receive a deployment endorsement to their certification prior to any subsequent deployments for the remainder of that year. An observer may obtain a deployment endorsement by successfully completing all briefing requirements, when applicable. The type of briefing the observer must attend and successfully complete will be specified in writing by the Observer Program during the observer's most recent debriefing.

(vi) *Maintaining the validity of an observer certification.* After initial issuance, an observer must keep their certification valid by meeting all of the following requirements specified below:

(A) Successfully perform their assigned duties as described in the Observer Manual or other written instructions from the Observer Program Office including calling in to the NMFS deployment hotline upon departing and arriving in to port each trip to leave the following information: Observer name, phone number, vessel name departing on, date and time of departure and date and time of expected return.

(B) Accurately record their sampling data, write complete reports, and report accurately any observations of suspected violations of regulations relevant to conservation of marine resources or their environment.

(C) Not disclose collected data and observations made on board the vessel or in the processing facility to any person except the owner or operator of the observed vessel or an authorized officer or NMFS.

(D) Successfully complete NMFS-approved annual briefings as prescribed by the West Coast Groundfish Observer Program.

(E) Successful completion of briefing by an observer applicant consists of meeting all attendance and conduct standards issued in writing at the start of training; meeting all performance standards issued in writing at the start of training for assignments, tests, and other evaluation tools; and completing

all other briefing requirements established by the Observer Program.

(F) Hold current basic cardiopulmonary resuscitation/first aid certification as per American Red Cross Standards.

(G) Successfully meet all expectations in all debriefings including reporting for assigned debriefings.

(H) Submit all data and information required by the Observer Program within the program's stated guidelines.

(I) Meet the minimum annual deployment period of 3 months at least once every 12 months.

(vii) *Limitations on conflict of interest.* Observers:

(A) Must not have a direct financial interest, other than the provision of observer services, in a fishery managed pursuant to an FMP for the waters off the coast of Alaska, or in a Pacific Coast fishery managed by either the state or Federal Governments in waters off Washington, Oregon, or California, including but not limited to:

(*1*) Any ownership, mortgage holder, or other secured interest in a vessel, shore-based or floating stationary processor facility involved in the catching, taking, harvesting or processing of fish,

(*2*) Any business involved with selling supplies or services to any vessel, shore-based or floating stationary processing facility; or

(*3*) Any business involved with purchasing raw or processed products from any vessel, shore-based or floating stationary processing facilities.

(B) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who either conducts activities that are regulated by NMFS in the Pacific coast or North Pacific regions or has interests that may be substantially affected by the performance or nonperformance of the observers' official duties.

(C) May not serve as observers on any vessel or at any shore-based owned or operated by a person who employed the observer in the last two years.

(D) May not solicit or accept employment as a crew member or an employee of a vessel or shore-based processor while employed by an observer provider.

(E) Provisions for remuneration of observers under this section do not constitute a conflict of interest.

(viii) *Standards of behavior.* Observers must:

(A) Perform their duties as described in the Observer Manual or other written instructions from the Observer Program Office.

(B) Immediately report to the Observer Program Office and the NOAA OLE any time they refuse to board a vessel.

(C) Accurately record their sampling data, write complete reports, and report accurately any observations of suspected violations of regulations relevant to the conservation of marine resources of their environment.

(D) Not disclose collected data and observations made on board the vessel to any person except the owner or operator of the observed vessel, an authorized officer, or NMFS.

(ix) *Suspension and decertification*—(A) *Suspension and decertification review official.* The Regional Administrator (or a designee) will designate an observer suspension and decertification review official(s), who will have the authority to review observer certifications and issue initial administrative determinations of observer certification suspension and/or decertification.

(B) *Causes for suspension or decertification.* The suspension and decertification official may initiate suspension or decertification proceedings against an observer:

(*1*) When it is alleged that the observer has not met applicable standards, including any of the following:

(*i*) Failed to satisfactorily perform duties as described or directed by the observer program; or

(*ii*) Failed to abide by the standards of conduct for observers, including conflicts of interest;

(*2*) Upon conviction of a crime or upon entry of a civil judgment for:

(*i*) Commission of fraud or other violation in connection with obtaining or attempting to obtain certification, or in performing the duties as specified in writing by the NMFS Observer Program;

(*ii*) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(*iii*) Commission of any other offense indicating a lack of integrity or honesty that seriously and directly affects the fitness of observers.

(C) *Issuance of initial administrative determination.* Upon determination that suspension or decertification is warranted, the suspension/decertification official will issue a written IAD to the observer via certified mail at the observer's most current address provided to NMFS. The IAD will identify whether a certification is suspended or revoked and will identify the specific reasons for the action taken. Decertification is effective 30 calendar days after the date on the IAD, unless there is an appeal.

(D) *Appeals.* A certified observer who receives an IAD that suspends or revokes his or her observer certification may appeal the determination within 30 calendar days after the date on the IAD to the Office of Administrative Appeals pursuant to § 679.43.

(i) *Catch monitor requirements for IFQ first receivers*—(1) *Catch monitor coverage requirements.* A catch monitor is required be present at each IFQ first receiver whenever an IFQ landing is received, unless the first receiver has been granted a written waiver from the catch monitor requirements by NMFS.

(2) *Procurement of catch monitor services.* Owners or managers of each IFQ first receiver must arrange for catch monitor services from a certified catch monitor provider prior to accepting IFQ landings.

(3) *Catch monitor safety.* (i) Each IFQ first receiver must adhere to all applicable rules, regulations, or statutes pertaining to safe operation and maintenance of a processing and/or receiving facility.

(ii) The working hours of each individual catch monitor will be limited as follows:

(A) An individual catch monitor shall not be required or permitted to work more than 16 hours per calendar day, with maximum of 14 hours being work other than the summary and submission of catch monitor data.

(B) Following monitoring shift of more than 10 hours, each catch monitor must be provided with a minimum 6 hours break before they may resume monitoring.

(4) *Catch monitor access.* (i) Each IFQ first receiver must allow catch monitors free and unobstructed access to the catch throughout the sorting process and the weighing process.

(ii) The IFQ first receiver must ensure that there is an observation area available to the catch monitor that meets the following standards:

(A) *Access to the observation area.* The observation area must be freely accessible to NMFS staff, NMFS-authorized personnel, or authorized officers at any time a valid catch monitoring plan is required.

(B) *Monitoring the flow of fish.* The catch monitor must have an unobstructed view or otherwise be able to monitor the entire flow of fish between the delivery point and a location where all sorting has takes place and each species has been weighed.

(C) *Adequate lighting.* Adequate lighting must be provided during periods of limited visibility.

(iii) Each IFQ first receiver must allow catch monitors free and unobstructed

access to any documentation required by regulation including fish tickets, scale printouts and scale test results.

(5) *Lockable cabinet.* Each IFQ first receiver must provide a secure, dry, and lockable cabinet or locker with the minimum interior dimensions of two feet wide by two feet tall by two feet deep for the exclusive use the catch monitor and NMFS staff or NMFS-authorized agents.

(6) *Plant liaison for the catch monitor.* Each IFQ first receiver must designate a plant liaison. The plant liaison is responsible for:

(i) Orienting new catch monitors to the facility;

(ii) Assisting in the resolution of catch monitoring concerns; and

(iii) Informing NMFS if changes must be made to the catch monitoring plan.

(7) *Reasonable assistance.* Each IFQ first receiver must provide reasonable assistance to the catch monitors to enable each catch monitor to carry out his or her duties. Reasonable assistance includes, but is not limited to: informing the monitor when bycatch species will be weighed, and providing a secure place to store equipment and gear.

(j) *Catch weighing requirements*—(1) *Catch monitoring plan.* All first receivers must operate under a NMFS-accepted catch monitoring plan.

(2) *Sorting and weighing IFQ landings*—(i) *Approved scales.* The IFQ first receiver must ensure that all IFQ species received from a vessel making an IFQ landing are weighed on a scale(s) that meets the requirements specified at § 660.15(c).

(ii) *Printed record.* All scales identified in the catch monitoring plan accepted by NMFS during the first receiver site license application process, must produce a printed record for each delivery, or portion of a delivery, weighed on that scale, with the following exception: If approved by NMFS as part of the catch monitoring plan, scales not designed for automatic bulk weighing may be exempted from part or all of the printed record requirements. The printed record must include:

(A) The first receiver's name;

(B) The weight of each load in the weighing cycle;

(C) The total weight of fish in each landing, or portion of the landing that was weighed on that scale;

(D) The date the information is printed; and

(E) The name and vessel registration or documentation number of the vessel making the delivery. The scale operator may write this information on the scale printout in ink at the time of printing.

(iii) *Scales that may be exempt from printed report.* An IFQ first receiver that receives no more than 200,000 pounds of groundfish in any calendar month will be exempt from the requirement to produce a printed record provided that:

(A) The first receiver has not previously operated under a catch monitoring plan where a printed record was required;

(B) The first receiver ensures that all catch is weighed; and

(C) The catch monitor, NMFS staff, or authorized officer can verify that all catch is weighed.

(iv) *Retention of printed records.* An IFQ first receiver must maintain printouts on site until the end of the fishing year during which the printouts were made and make them available upon request by NMFS staff or an authorized officer for 3 years after the end of the fishing year during which the printout was made.

(v) *Weight monitoring.* An IFQ first receiver must ensure that it is possible for the catch monitor, NMFS staff, or authorized officer to verify the weighing of all catch.

(vi) *Catch sorting.* All fish delivered to the plant must be sorted and weighed by species as specified at § 660.130(d).

(vii) *Complete sorting.* Sorting and weighing must be completed prior to catch leaving the area that can be monitored from the catch monitor's observation area.

(viii) *Pacific whiting.* For Pacific Whiting taken with midwater trawl gear, IFQ first receivers may use an in-line conveyor or hopper type scale to derive an accurate total catch weight prior to sorting. Immediately following weighing of the total catch and prior to processing or transport away from the point of landing, the catch must be sorted to the species groups specified at § 660.130(d) and all incidental catch (groundfish and non groundfish species) must be accurately weighed and the weight of incidental catch deducted from the total catch weight to derive the weight of target species.

(ix) For all other IFQ landings the following weighing standards apply:

(A) A belt or automatic hopper scale may be used to weigh all of the catch prior to sorting. All but a single predominant species must then be reweighed.

(B) An in-line conveyor or automatic hopper scale may be used to weigh the predominant species after catch has been sorted. Other species must be weighed in a manner that facilitates tracking of the weights of those species.

(C) IFQ species or species group may be weighed in totes on a platform scale capable of printing a label or tag and recording the label or tag information to memory for printing a report as specified at § 660.15. The label or tag must remain affixed to the tote until the tote is emptied. The label or tag must show the following information:

(*1*) The species or species group;

(*2*) The weight of the fish in the tote;

(*3*) The date the label or tag was printed; and

(*4*) The vessel name.

(D) *Totes and ice.* If a catch monitoring plan proposes the use of totes in which fish will be weighed, or a deduction for the weight of ice, the deduction must be accurately accounted for. No deduction may be made for the weight of water or slime. This standard may be met by:

(*1*) Taring the empty or pre-iced tote on the scale prior to filling with fish;

(*2*) Labeling each tote with an individual tare weight. This weight must be accurate within 500 grams (1 pound if scale is denominated in pounds) for any given tote and the average error for all totes may not exceed 200 grams (8 ounces for scales denominated in pounds);

(*3*) An alternate approach accepted by NMFS. NMFS will only accept approaches that do not involve the estimation of the weight of ice or the weight of totes and allow NMFS staff or an authorized officer to verify that the deduction or tare weight is accurate.

(E) An alternate approach accepted by NMFS in the catch monitoring plan.

(3) *IFQ first receiver responsibilities relative to catch weighing and monitoring of catch weighing.* The IFQ first receiver must:

(i) *General.* (A) Ensure that all IFQ landings are sorted and weighed as specified at § 660.130(d) and in accordance with an approved catch monitoring plan.

(B) [Reserved]

(ii) *Catch monitors, NMFS staff, and authorized officers.* (A) Have a catch monitor on site the entire time an IFQ landing is being offloaded, sorted, or weighed.

(B) Notify the catch monitor of the offloading schedule.

(C) Provide catch monitors, NMFS staff, or an authorized officer with unobstructed access to any areas where IFQ species are or may be sorted or weighed at any time IFQ species are being landed or processed.

(D) Ensure that catch monitors, NMFS staff, or an authorized officer are able to simultaneously observe the weighing of catch on the scale and read the scale display at any time.

(E) Ensure that printouts of the scale weight of each delivery or offload are made available to catch monitors, NMFS

staff, or an authorized officer at the time printouts are generated.

(4) *Scale tests.* (i) All testing must meet the scale test standards specified at § 660.15(c).

(ii) *Inseason scale testing.* First receivers must allow, and provide reasonable assistance to a catch monitor, NMFS staff or an authorized officer to test scales used to weigh IFQ catch. A scale that does not pass an inseason test may not be used to weigh IFQ catch until the scale passes an inseason test or is approved for continued use by the weights and measures authorities of the state in which the scale is located.

(k) *Gear switching.* (1) Participants in the Shorebased IFQ Program may take IFQ species using any legal groundfish non-trawl gear (i.e., gear switching) and are exempt from the gear endorsements at § 660.25(b)(3) for limited entry fixed gear permits, provided the following requirements are met:

(i) The vessel must be registered to a limited entry trawl permit.

(ii) The vessel must be registered to a vessel account that is not in deficit on any IFQ species.

(iii) The vessel operator must have submitted a valid gear declaration for the trip that declares "Limited entry groundfish non-trawl, shorebased IFQ," as specified in § 660.13(d)(5)(iv)(A), and does not declare any other designation (a Shorebased IFQ Program trip may not be combined with any other designation).

(iv) The vessel must comply with prohibitions applicable to limited entry fixed gear fishery as specified at § 660.212, gear restrictions applicable to limited entry fixed gear as specified in §§ 660.219 and 660.230(b), and management measures specified in § 660.230(d), including restrictions on the fixed gear allowed onboard, its usage, and applicable fixed gear groundfish conservation area restrictions, except that the vessel will not be subject to limited entry fixed gear trip limits when fishing in the Shorebased IFQ Program.

(v) The vessel must comply with the limited entry trawl trip limits for species/species groups not covered under the Shorebased IFQ Program or whiting trip limits outside the primary season.

(vi) The vessel must comply with recordkeeping and reporting requirements applicable to limited entry trawl gear as specified in § 660.113.

(vii) The vessel must comply with and observer requirements and all other provisions of the Shoreside IFQ Program as specified in this section.

(2) [Reserved]

(l) *Adaptive management program*—(1) *General.* The adaptive management program (AMP) is a set-aside of 10 percent of the non-whiting QS to address the following objectives:

(i) Community stability;

(ii) Processor stability;

(iii) Conservation;

(iv) Unintended/unforeseen consequences of IFQ management; or

(v) Facilitating new entrants.

(2) *Years one and two.* The 10 percent of non-whiting QS will be reserved for the AMP during years one and two of the Shorebased IFQ Program, but the resulting AMP QP will be issued to all QS permit owners in proportion to their non-whiting QS during years one and two.

■ 25. In § 660.150;

■ a. Paragraph (a) introductory text and paragraphs (a)(3), (a)(4), (d), (f)(3), (f)(6)(vi), (g)(3)(i)(C), and (g)(6)(viii) are revised;

■ b. The headings of paragraphs (b), (c), (e), (g)(1)(iv), (g)(2), and (k) are revised, and text is added to paragraphs (b), (c), (e), (g)(1)(iv), (g)(2), and (k).

■ c. Paragraphs (f)(2), (f)(4), (g)(3)(ii), (g)(4), and (h) through (j) are added; and

■ d. Paragraph (g)(1) introductory text is revised, and paragraph (g)(1)(v) is removed;

■ e. Paragraph (l) is removed to read as follows:

§ 660.150 Mothership (MS) Coop Program.

(a) *General.* The MS Coop Program requirements in this section will be effective beginning January 1, 2011. The MS Coop Program is a general term to describe the limited access program that applies to eligible harvesters and processors in the mothership sector of the Pacific whiting at-sea trawl fishery. Eligible harvesters and processors, including coop and non-coop fishery participants, must meet the requirements set forth in this section of the Pacific Coast groundfish regulations. Each year a vessel registered to an MS/CV-endorsed permit may fish in either the coop or non-coop portion of the MS Coop Program, but not both. In addition to the requirements of this section, the MS Coop Program is subject to the following groundfish regulations of subparts C and D of this part:

* * * * *

(3) Regulations set out in the following sections of subpart C: § 660.11 Definitions, § 660.12 Prohibitions, § 660.13 Recordkeeping and reporting, § 660.14 VMS requirements, § 660.15 Equipment requirements, § 660.16 Groundfish Observer Program, § 660.20 Vessel and gear identification, § 660.25 Permits, § 660.55 Allocations, § 660.60 Specifications and management measures, § 660.65 Groundfish harvest specifications, and §§ 660.70 through 660.79 Closed areas.

(4) Regulations set out in the following sections of subpart D: § 660.111 Trawl fishery definitions, § 660.112 Trawl fishery prohibitions, § 660.113 Trawl fishery recordkeeping and reporting, § 660.120 Trawl fishery crossover provisions, § 660.130 Trawl fishery management measures, and § 660.131 Pacific whiting fishery management measures.

* * * * *

(b) *Participation requirements and responsibilities*—(1) *Mothership vessels.* (i) *Mothership vessel participation requirements.* A vessel is eligible to receive and process catch as a mothership in the MS Coop Program if:

(A) The vessel is registered to an MS permit;

(B) The vessel is not used to fish as a catcher vessel in the mothership sector of the Pacific whiting fishery in the same calendar year; and

(C) The vessel is not used to fish as a C/P in the Pacific whiting fishery in the same calendar year.

(ii) *Mothership vessel responsibilities.* The owner and operator of a mothership vessel must:

(A) *Recordkeeping and reporting.* Maintain a valid declaration as specified at § 660.13(d), subpart C; and, maintain and submit all records and reports specified at § 660.113(c) including, economic data, scale tests records, and cease fishing reports.

(B) *Observers.* As specified at paragraph (j) of this section, procure observer services, maintain the appropriate level of coverage, and meet the vessel responsibilities.

(C) *Catch weighing requirements.* The owner and operator of a MS vessel must:

(*1*) Ensure that all catch is weighed in its round form on a NMFS-approved scale that meets the requirements described in section § 660.15(b), subpart C;

(*2*) Provide a NMFS-approved platform scale, belt scale, and test weights that meet the requirements described in section § 660.15(b), subpart C.

(2) *Mothership catcher vessels*—(i) *Mothership catcher vessel participation requirements*—(A) A vessel is eligible to harvest in the MS Coop Program if the following conditions are met:

(*1*) If the vessel is used to fish as a mothership catcher vessel for a permitted MS coop, the vessel is registered to a limited entry permit with a trawl endorsement and NMFS has been notified that the vessel is authorized to fish for the coop.

(*2*) If the vessel is used to harvest fish in the non-coop fishery, the vessel is registered to an MS/CV-endorsed limited entry permit.

(*3*) The vessel is not used to harvest fish or process as a mothership or catcher/processor vessel in the same calendar year.

(*4*) The vessel does not catch more than 30 percent of the Pacific whiting allocation for the mothership sector.

(B) [Reserved]

(ii) *Mothership catcher vessel responsibilities*—(A) *Observers.* As specified at paragraph (j) of this section, procure observer services, maintain the appropriate level of coverage, and meet the vessel responsibilities.

(B) *Recordkeeping and reporting.* Maintain a valid declaration as specified at § 660.13(d), subpart C; and, maintain and submit all records and reports specified at § 660.113(c) including, economic data and scale tests records, if applicable.

(3) *MS coops*—(i) *MS coop participation requirements.* For a MS coop to participate in the Pacific whiting mothership sector fishery it must:

(A) Be issued a MS coop permit;

(B) Be composed of MS/CV-endorsed limited entry permit owners;

(C) Be formed voluntarily;

(D) Be a legally recognized entity that represents its members;

(E) Designate an individual as a coop manager; and

(F) Include at least 20 percent of all MS/CV-endorsed permits as members. The coop membership percentage will be interpreted by rounding to the nearest whole permit (i.e. less than 0.5 rounds down and 0.5 and greater rounds up).

(ii) *MS coop responsibilities.* A MS coop is responsible for:

(A) Applying for and being registered to a MS coop permit;

(B) Organizing and coordinating harvest activities of vessels authorized to fish for the coop;

(C) Reassigning catch history assignments for use by coop members;

(D) Organizing and coordinating the transfer and leasing of catch allocations with other permitted coops through inter-coop agreements;

(E) Monitoring harvest activities and enforcing the catch limits of coop members;

(F) Submitting an annual report.

(G) Having a designated coop manager. The designated coop manager must:

(*1*) Serve as the contact person between NMFS, the Council, and other coops;

(*2*) Be responsible for the annual distribution of catch and bycatch allocations among coop members;

(*3*) Oversee reassignment of catch allocations within the coop;

(*4*) Oversee inter-coop catch allocation reassignments;

(*5*) Prepare and submit an annual report on behalf of the coop;

(*6*) Be authorized to receive or respond to any legal process in which the coop is involved; and

(*7*) Notify NMFS if the coop dissolves.

(iii) *MS coop compliance and joint/several liability.* An MS coop must comply with the provisions of this section. The MS coop, member limited entry permit owners, and owners and operators of vessels registered to member limited entry permits, are jointly and severally responsible for compliance with the provisions of this section. Pursuant to 15 CFR part 904, each MS coop, member permit owner, and owner and operator of a vessel registered to a coop member permit may be charged jointly and severally for violations of the provisions of this section. For purposes of enforcement, an MS coop is a legal entity that can be subject to NOAA enforcement action for violations of the provisions of this section.

(c) *MS Coop Program species and allocations*—(1) *MS Coop Program species.* MS Coop Program species are as follows:

(i) Species with formal allocations to the MS Coop Program are Pacific whiting, canary rockfish, darkblotched rockfish, Pacific Ocean perch, and widow rockfish;

(ii) Species with set-asides for the MS and C/P Coop Programs combined, as described in Tables 1d and 2d, subpart C.

(2) *Annual mothership sector sub-allocations.* Annual allocation amount(s) will be determined using the following procedure:

(i) *MS/CV catch history assignments.* Catch history assignments will be based on catch history using the following methodology:

(A) *Pacific whiting catch history assignment.* For each MS/CV-endorsed limited entry permit, the permit's entire catch history assignment of Pacific whiting will be annually allocated to a single permitted MS coop or to the non-coop fishery. An MS/CV-endorsed permit owner cannot divide the permit's catch history assignment between more than one MS coop or between a coop and the non-coop fishery for that year. Once assigned to a permitted MS coop or to the non-coop fishery, the permit's catch history assignment remains with that permitted MS coop or non-coop fishery for that calendar year. When the mothership sector allocation is established through the final Pacific whiting specifications, the information for the conversion of catch history assignment to pounds will be made available to the public through a **Federal Register** announcement and/or public notice and/or the NMFS Web site. The amount of whiting from the catch history assignment will be issued to the nearest whole pound using standard rounding rules (i.e. less than 0.5 rounds down and 0.5 and greater rounds up).

(B) *Non-whiting groundfish species catch*—(*1*) Non-whiting groundfish species with a mothership sector allocation will be divided annually between the permitted coops and the non-coop fishery. The pounds associated with each permitted MS coop will be provided when the coop permit is issued.

(*2*) Groundfish species with at-sea sector set-asides will be managed on an annual basis unless there is a risk of a harvest specification being exceeded, unforeseen impact on another fisheries, or conservation concerns in which case inseason action may be taken. Set asides may be adjusted through the biennial specifications and management measures process as necessary.

(*3*) Groundfish species not addressed in paragraph (*1*) or (*2*) above, will be managed on an annual basis unless there is a risk of a harvest specification being exceeded, unforeseen impact on another fisheries, or conservation concerns in which case inseason action may be taken.

(*4*) *Halibut set-asides.* Annually a specified amount of the Pacific halibut will be held in reserve as a shared set-aside for bycatch in the at-sea Pacific whiting fisheries and the shorebased trawl sector south of 40°10′ N. lat.

(ii) *Annual coop allocations*—(A) *Pacific whiting.* Each permitted MS coop is authorized to harvest a quantity of Pacific whiting that is based on the sum of the catch history assignments for each member MS/CV-endorsed permit identified in the NMFS-accepted coop agreement for a given calendar year. Other limited entry permits registered to vessels that will fish for the coop do not bring catch allocation to a permitted MS coop.

(B) *Non-whiting groundfish with allocations.* Sub-allocations of non-whiting groundfish species with allocations to permitted MS coops will be in proportion to the Pacific whiting catch history assignments assigned to each permitted MS coop.

(iii) *Annual non-coop allocation*—(A) *Pacific whiting.* The non-coop whiting

fishery is authorized to harvest a quantity of Pacific whiting that is remaining in the mothership sector annual allocation after the deduction of all coop allocations.

(B) *Non-whiting groundfish with allocations.* The sub-allocation to the non-coop fishery will be in proportion to the mothership catcher vessel Pacific whiting catch history assignments for the non-coop fishery.

(C) *Announcement of the non-coop fishery allocations.* Information on the amount of Pacific whiting and non-whiting groundfish with allocations that will be made available to the non-coop fishery when the final Pacific whiting specifications for the mothership sector is established and will be announced to the public through a **Federal Register** announcement and/or public notice and/or the NMFS Web site.

(3) *Reaching an allocation or sub-allocation.* When the mothership sector Pacific whiting allocation, Pacific whiting sub-allocation, or non-whiting groundfish catch allocation is reached or is projected to be reached, the following action may be taken:

(i) Further harvesting, receiving or at-sea processing by a mothership or catcher vessel in the mothership sector is prohibited when the mothership sector Pacific whiting allocation or non-whiting groundfish allocation is projected to be reached. No additional unprocessed groundfish may be brought on board after at-sea processing is prohibited, but a mothership may continue to process catch that was on board before at-sea processing was prohibited. Pacific whiting may not be taken and retained, possessed, or landed by a catcher vessel participating in the mothership sector.

(ii) When a permitted MS coop sub-allocation of Pacific whiting or non-whiting groundfish species is reached, further harvesting or receiving of groundfish by vessels fishing in the permitted MS coop must cease, unless the permitted MS coop is operating under an NMFS-accepted inter-coop agreement.

(iii) When the non-coop fishery sub-allocation of Pacific whiting or non-whiting groundfish species is projected to be reached, further harvesting or receiving of groundfish by vessels fishing in under the non-coop fishery must cease.

(4) *Non-whiting groundfish species reapportionment.* This paragraph (c)(4) describes the process for reapportioning non-whiting groundfish species with allocations between permitted MS coops and the catcher/processor sector. Reapportionment of mothership sector allocations to the catcher/processor will not occur until all permitted MS coops and the non-coop fishery have been closed by NMFS or have informed NMFS that they have ceased operations for the remainder of the calendar year.

(i) *Within the mothership sector.* The Regional Administrator may make available for harvest to permitted coops and the non-coop fishery that have not notified NMFS that they have ceased fishing for the year, the amounts of a permitted MS coop's non-whiting catch allocation remaining when a coop reaches its Pacific whiting allocation or when the designated coop manager notifies NMFS that a permitted coop has ceased fishing for the year. The reapportioned allocations will be in proportion to their original allocations.

(ii) *Between the mothership and catcher/processor sectors.* The Regional Administrator may make available for harvest to the catcher/processor sector of the Pacific whiting fishery, the amounts of the mothership sector's non-whiting catch allocation remaining when the Pacific whiting allocation is reached or participants in the sector do not intend to harvest the remaining allocation. The designated coop manager, or in the case of an inter-coop, all of the designated coop managers must submit a cease fishing report to NMFS indicating that harvesting has concluded for the year. At any time after greater than 80 percent of the Mothership sector Pacific whiting allocation has been harvested, the Regional Administrator may contact designated coop managers to determine whether they intend to continue fishing. When considering redistribution of non-whiting catch allocation, the Regional Administrator will take in to consideration the best available data on total projected fishing impacts. Reapportionment between permitted MS coops and the non-coop fishery within the mothership sector will be in proportion to their original coop allocations for the calendar year.

(iii) *Set-aside species.* No inseason management actions are associated with set asides.

(5) *Announcements.* The Regional Administrator will announce in the **Federal Register** when the mothership sector or the allocation of Pacific whiting or non-whiting groundfish with an allocation is reached, or is projected to be reached, and specify the appropriate action. In order to prevent exceeding an allocation and to avoid underutilizing the resource, prohibitions against further taking and retaining, receiving, or at-sea processing of Pacific whiting, or reapportionment of non-whiting groundfish with allocations may be made effective immediately by actual notice to fishers and processors, by e-mail, internet (*www.nwr.noaa.gov/Groundfish-Halibut/Groundfish-Fishery-Management/Whiting-Management/index.cfm*), phone, fax, letter, press release, and/or USCG Notice to Mariners (monitor channel 16 VHF), followed by publication in the **Federal Register,** in which instance public comment will be sought for a reasonable period of time thereafter.

(6) *Redistribution of annual allocation*—(i) *Between permitted MS coops (inter-coop).* (A) Through an inter-coop agreement, the designated coop managers of permitted MS coops may distribute Pacific whiting and non-whiting groundfish allocations among one or more permitted MS coops, provided the processor obligations at paragraph (c)(7) of this section have been met or a mutual agreement exception at paragraph (c)(7)(iv) of this section has been submitted to NMFS.

(B) In the case of a MS coop failure during the Pacific whiting primary season for the mothership sector, unused allocation associated with the catch history will not be available for harvest by the coop that failed, by any former members of the coop that failed, or any other MS coop for the remainder of that calendar year.

(ii) *Between the MS coop and non-coop fisheries.* Pacific whiting may not be redistributed between the coop and non-coop fisheries.

(ii) *Between Pacific whiting sectors.* Pacific whiting may not be redistributed between the mothership sector and catcher/processor sector. Whiting may not be redistributed to the Shorebased IFQ Program.

(7) *Processor obligation and mutual agreement exceptions*—(i) *Processor obligation.* Through the annual MS/CV-endorsed limited entry permit renewal process, the MS/CV-endorsed permit owner must identify to NMFS to which MS permit the MS/CV permit owner intends to obligate the catch history assignment associated with that permit if they are participating in the MS coop fishery. Only one MS permit may be designated (the obligation may not be split among MS permits).

(ii) *Expiration of a processor obligation.* Processor obligations expire at the end of each calendar year when the MS Coop Permit expires.

(iii) *Processor obligation when MS coop allocation is redistributed.* When a permitted MS coop redistributes Pacific whiting allocation within the permitted MS coop or from one permitted MS coop to another permitted MS coop through an inter-coop agreement, such allocations must be delivered to the

mothership registered to the MS permit to which the allocation was obligated under the processor obligation submitted to NMFS, unless a mutual agreement exception has been submitted to NMFS.

(iv) *Mutual agreement exception.* An MS/CV-endorsed permit's catch history assignment can be released from a processor obligation through a mutual agreement exception. The MS/CV-endorsed permit owner must submit a copy to NMFS of the written agreement that includes the initial MS permit owner's acknowledgment of the release of the MS/CV-endorsed permit owner's processor obligation and the MS/CV-endorsed permit owner must identify a processor obligation for a new MS permit.

(v) *MS permit withdrawal.* If an MS permit withdraws from the mothership fishery before the resulting amounts of catch history assignment have been announced by NMFS, any MS/CV-endorsed permit obligated to the MS permit may elect to participate in the coop or non-coop fishery. In such an event, the MS permit owner must provide written notification of its withdrawal to NMFS and all MS/CV-endorsed permits that are obligated to the MS permit, and the owner of each MS/CV-endorsed permit obligated to the MS permit must provide written notification to NMFS of their intent to either participate in the non-coop fishery or the coop fishery, and if participating in the coop fishery must identify a processor obligation for a new MS permit.

(vi) *Submission of a mutual agreement exception or MS permit withdrawal.* Written notification of a mutual exception agreement or MS permit withdrawal must be submitted to NMFS, Northwest Region, Permits Office, Bldg. 1, 7600 Sand Point Way, NE., Seattle, WA 98115.

(d) *MS coop permit and agreement*—(1) *Eligibility and registration.* (i) *Eligibility.* To be an eligible coop entity a group of MS/CV-endorsed permit owners (coop members) must be a recognized entity under the laws of the United States or the laws of a State and represent all of the coop members.

(ii) *Annual registration and deadline.* Each year, a coop entity intending to participate as a coop under the MS Coop Program must submit an application for a MS coop permit between February 1 and March 31 of the year in which it intends to fish. NMFS will not consider any applications received after March 31. A MS coop permit expires on December 31 of the year in which it was issued.

(iii) *Application for MS coop permit.* The designated coop manager, on behalf of the coop entity, must submit a complete application form and include each of the items listed in paragraph (d)(1)(iii)(A) of this section. Only complete applications will be considered for issuance of a MS coop permit. An application will not be considered complete if any required application fees and annual coop reports have not been received by NMFS. NMFS may request additional supplemental documentation as necessary to make a determination of whether to approve or disapprove the application. Application forms and instruction are available on the NMFS NWR Web site (*http://www.nwr.noaa.gov*) or by request from NMFS. The designated coop manager must sign the application acknowledging the responsibilities of a designated coop manager defined in paragraph (b)(3) of this section.

(A) *Coop agreement.* Signed copies of the coop agreement must be submitted to NMFS before the coop is authorized to engage in fishing activities. A coop agreement must include all of the information listed in this paragraph to be considered a complete coop agreement. NMFS will only review complete coop agreements. A coop agreement will not be accepted unless it includes all of the required information; the descriptive items listed in this paragraph appear to meet the stated purpose; and information submitted is correct and accurate.

(*1*) *Coop agreement contents.* Each coop agreement must be signed by all of the coop members (MS/CV-endorsed permit owners) and include the following information:

(*i*) A list of all vessels, and permit holders participating in the coop and their share of the allocated catch which must match the amount distributed to individual permit owners by NMFS.

(*ii*) All MS/CV-endorsed limited entry member permits identified by permit number.

(*iii*) A processor obligation clause indicating that each MS/CV-endorsed permit has notified a specific MS permit by September 1 of the previous year of that MS/CV-endorsed permit's intent to obligate its catch history assignment to that MS permit, except that for the 2011 fishery, such notification must have been made prior to submission of the MS coop permit application.

(*iv*) A clause indicting that each member MS/CV-endorsed permit's catch history assignment is based on the catch history assignment calculation by NMFS used for distribution to the coop.

(*v*) A description of the coop's plan to adequately monitor and account for the catch of Pacific whiting and non-whiting groundfish allocations, and to monitor and account for the catch of prohibited species.

(*vi*) A clause stating that if a permit is transferred during the effective period of the coop agreement, any new owners of that member permit would be coop members required to comply with membership restrictions in the coop agreement.

(*vii*) A description of the coop's enforcement and penalty provisions adequate to maintain catch of Pacific whiting and non-whiting groundfish within the allocations.

(*viii*) A description of measures to reduce catch of overfished species.

(*ix*) A clause describing the co-op manager's responsibility for managing inter-coop reassignments of catch history assignment, should any occur.

(*x*) A clause describing how the annual report will be produced to document the coop's catch, bycatch data, inseason catch history reassignments and any other significant activities undertaken by the coop during the year, and the submission deadlines for that report.

(*xi*) Identification of the designated coop manager.

(*xii*) Provisions that prohibit member permit owners that have incurred legal sanctions that prevent them from fishing groundfish in the Council region from fishing in the coop.

(*2*) *Inter-coop agreement.* The coop entity must provide, at the time of annual application, copies of any inter-coop agreement(s) into which the coop has entered. Such agreements must incorporate and honor the provisions of the individual coop agreements for each coop that is a party to the inter-coop agreement. Inter-coop agreements are specified at paragraph (e) of this section.

(B) *Acceptance of a coop agreement*—(*1*) If NMFS does not accept the coop agreement, the coop permit application will be returned to the applicant with a letter stating the reasons the coop agreement was not accepted by NMFS.

(*2*) Coop agreements that are not accepted may be resubmitted for review by sufficiently addressing the deficiencies identified in the NMFS letter and resubmitting the entire coop permit application by the date specified in the NMFS letter.

(*3*) An accepted coop agreement that was submitted with the MS coop permit application and for which a MS coop permit was issued will remain in place through the end of the calendar year. The designated coop manager must resubmit a complete coop agreement to

NMFS consistent with the coop agreement contents described in paragraph (d)(1)(iii)(A)(*1*) of this section if there is a material change to the coop agreement.

(*4*) Within 7 calendar days following a material change, the designated coop manager must notify NMFS of the material change. Within 30 calendar days, the designated coop manger must submit to NMFS the revised coop agreement with a letter that describes such changes. NMFS will review the material changes and provide a letter to the coop manager that either accepts the changes as given or does not accept the revised coop agreement with a letter stating the reasons that it was not accepted by NMFS. The coop may resubmit the coop agreement with further revisions to the material changes responding to NMFS concerns.

(iv) *Effective date of MS coop permit.* A MS coop permit will be effective upon the date approved by NMFS and will allow fishing from the start of the MS sector primary whiting season until the end of the calendar year or until one or more of the following events occur, whichever comes first:

(A) NMFS permanently closes the mothership sector fishing season for the year or a specific MS coop or the designated coop manager notifies NMFS that the coop has completed fishing for the calendar year,

(B) The coop has reached its Pacific whiting allocation,

(C) A material change to the coop agreement has occurred and the designated coop manager failed to notify NMFS within 7 calendar days of the material change and submit to NMFS the revised coop agreement with a letter that describes such changes within 30 calendar days, or

(D) NMFS has determined that a coop failure occurred.

(2) *Initial administrative determination.* For all complete applications, NMFS will issue an IAD that either approves or disapproves the application. If approved, the IAD will include a MS coop permit. If disapproved, the IAD will provide the reasons for this determination.

(3) *Appeals.* An appeal to a MS coop permit action follows the same process as the general permit appeals process defined at § 660.25(g), subpart C.

(4) *Fees.* The Regional Administrator is authorized to charge fees for administrative costs associated with the issuance of a MS coop permit consistent with the provisions given at § 660.25(f), subpart C.

(5) *Cost recovery.* [Reserved]

(e) *Inter-coop agreements*—(1) *General.* Permitted MS coops may voluntarily enter into inter-coop agreements for the purpose of sharing permitted MS coop allocations of Pacific whiting and allocated non-whiting groundfish. If two or more permitted MS coops enter into an inter-coop agreement, the inter-coop agreement must incorporate and honor the provisions of each permitted MS coop subject to the inter-coop agreement.

(2) *Submission of inter-coop agreements.* Inter-coop agreements must be submitted to NMFS for acceptance.

(3) *Inter-coop agreement review process.* Each designated coop manager must submit a copy of the inter-coop agreement signed by both designated coop managers for review. Complete coop agreements containing all items listed under paragraph (d)(1)(iii)(A)(*1*) will be reviewed by NMFS.

* * * * *

(f) * * *

(2) *Renewal, change of permit ownership, or vessel registration*—(i) *Renewal.* An MS permit must be renewed annually consistent with the limited entry permit regulations given at § 660.25(b)(4), subpart C. If a vessel registered to the MS permit will operate as a mothership in the year for which the permit is renewed, the permit owner must make a declaration as part of the permit renewal that while participating in the whiting fishery it will operate solely as a mothership during the calendar year to which its limited entry permit applies. Any such declaration is binding on the vessel for the calendar year, even if the permit is transferred during the year, unless it is rescinded in response to a written request from the permit owner. Any request to rescind a declaration must be made by the permit holder and granted in writing by the Regional Administrator before any unprocessed whiting has been taken on board the vessel that calendar year.

(ii) *Change of permit ownership.* An MS permit is subject to the limited entry permit change in permit ownership regulations given at § 660.25(b)(4), subpart C.

(iii) *Change of vessel registration.* An MS permit is subject to the limited entry permit change of vessel registration regulations given at § 660.25(b)(4), subpart C.

(3) *Accumulation limits*—(i) *MS permit usage limit.* No person who owns an MS permit(s) may register the MS permit(s) to vessels that cumulatively process more than 45 percent of the annual mothership sector Pacific whiting allocation. For purposes of determining accumulation limits, NMFS requires that permit owners submit a complete trawl ownership interest form for the permit owner as part of annual renewal for the MS permit. An ownership interest form will also be required whenever a new permit owner obtains an MS permit as part of a permit transfer request. Accumulation limits will be determined by calculating the percentage of ownership interest a person has in any MS permit. Determination of ownership interest will subject to the individual and collective rule.

(ii) *Ownership—individual and collective rule.* The ownership that counts toward a person's accumulation limit will include:

(A) Any MS permit owned by that person, and

(B) A portion of any MS permit owned by an entity in which that person has an interest, where the person's share of interest in that entity will determine the portion of that entity's ownership that counts toward the person's limit.

(iii) *[Reserved]*

(iv) *Trawl identification of ownership interest form.* Any person that is applying for or renewing an MS permit shall document those persons that have an ownership interest in the permit greater than or equal to 2 percent. This ownership interest must be documented with the SFD via the Trawl Identification of Ownership Interest Form. SFD will not issue an MS Permit unless the Trawl Identification of Ownership Interest Form has been completed. NMFS may request additional information of the applicant as necessary to verify compliance with accumulation limits.

(4) *Appeals.* An appeal to an MS permit action follows the same process as the general permit appeals process defined at § 660.25(g), subpart C.

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(6) * * *

(vi) *Initial administrative determination (IAD).* NMFS will issue an IAD for all complete, certified applications received by the application deadline date. If NMFS approves an application for initial issuance of an MS permit, the applicant will receive an MS permit. If NMFS disapproves an application, the IAD will provide the reasons. If the applicant does not appeal the IAD within 60 calendar days of the date on the IAD, the IAD becomes the final decision of the Regional Administrator acting on behalf of the Secretary of Commerce.

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(g) *Mothership catcher vessel (MS/CV)—endorsed permit*—(1) *General.* Any vessel that delivers whiting to a mothership processor in the Pacific whiting fishery mothership sector must

be registered to an MS/CV-endorsed permit, except that a vessel registered to limited entry trawl permit without an MS/CV or C/P endorsement may fish for a coop if authorized by the coop. Within the MS Coop Program, an MS/CV-endorsed permit may participate in an MS coop or in the non-coop fishery. An MS/CV-endorsed permit is a limited entry permit and is subject to the limited entry permit provisions given at § 660.25(b), subpart C.

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(iv) *Restrictions on processing for MS/CV-endorsed permits.* A vessel registered to an MS/CV-endorsed permit in a given year shall not engage in processing of Pacific whiting during that year.

* * * * *

(2) *Renewal, change of permit owner, vessel registration, or combination*—(i) *Renewal.* An MS/CV-endorsed permit must be renewed annually consistent with the limited entry permit regulations given at § 660.25(b)(4), subpart C. During renewal, all MS/CV-endorsed limited entry permit owners must make a preliminary declaration regarding their intent to participate in the coop or non-coop portion of the MS Coop Program for the following year. If the owner of the MS/CV-endorsed permit intends to participate in the coop portion of the MS Coop Program, they must also declare which MS vessel to which they intend to obligate the permit's catch history assignment. MS/CV-endorsed permits not obligated to a permitted MS coop by March 31 of the fishing year will be assigned to the non-coop fishery. For an MS/CV-endorsed permit that is not renewed, the following occurs:

(A) For the first year after the permit is not renewed, the permit will be extinguished, and the catch history assignment from that permit will be assigned to the non-coop fishery.

(B) In the year after the permit is extinguished (the second year after the permit is not renewed), the catch history assignment from that permit will be redistributed proportionally to all valid MS/CV-endorsed permits.

(ii) *Change of permit ownership.* An MS/CV-endorsed permit is subject to the limited entry permit change in permit ownership regulations given at § 660.25(b)(4), subpart C.

(iii) *Change of vessel registration.* An MS/CV-endorsed permit is subject to the limited entry permit change of vessel registration regulations given at § 660.25(b)(4), subpart C.

(iv) *Combination.* An MS/CV-endorsed permit may be combined with one or more other limited entry trawl permits; the resulting permit will be a single permit with an increased size endorsement. If the MS/CV-endorsed permit is combined with another limited entry trawl-endorsed permit other than a C/P-endorsed permit, the resulting permit will be MS/CV-endorsed. If an MS/CV-endorsed permit is combined with a C/P-endorsed permit, the resulting permit will be exclusively a C/P-endorsed permit, and will not have an MS/CV endorsement. If an MS/CV-endorsed permit is combined with another MS/CV-endorsed permit, the combined catch history assignment of the permit(s) will be added to the active permit (the permit remaining after combination) and the other permit will be retired. NMFS will not approve a permit combination if it results in a person exceeding the accumulation limits specified at paragraph (g)(3) of this section. Any request to combine permits is subject to the provision provided at § 660.25(b), including the combination formula for resulting size endorsements.

* * * * *

(3) * * *

(i) * * *

(C) *Trawl identification of ownership interest form.* Any person that owns a limited entry trawl permit and that is applying for or renewing an MS/CV endorsement shall document those persons that have an ownership interest in the permit greater than or equal to 2 percent. This ownership interest must be documented with the SFD via the Trawl Identification of Ownership Interest Form. SFD will not issue an MS/CV endorsement unless the Trawl Identification of Ownership Interest Form has been completed. NMFS may request additional information of the applicant as necessary to verify compliance with accumulation limits. Further, if SFD discovers through review of the Trawl Identification of Ownership Interest Form that a person owns or controls more than the accumulation limits, the person will be subject to divestiture provisions specified in paragraph (g)(3)(i)(D) of this section.

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(ii) *Catcher vessel usage limit.* No vessel may catch more than 30 percent of the mothership sector's whiting allocation.

(4) *Appeals.* An appeal to an MS/CV-endorsed permit action follows the same process as the general permit appeals process defined at § 660.25(g), subpart C.

* * * * *

(6) * * *

(viii) *Initial Administrative Determination (IAD).* NMFS will issue an IAD for all complete, certified applications received by the application deadline date. If NMFS approves an application for initial issuance of an MS/CV-endorsed permit and associated catch history assignment, the applicant will receive an MS/CV endorsement on a limited entry trawl permit specifying the amounts of catch history assignment for which the applicant has qualified. If NMFS disapproves an application, the IAD will provide the reasons. If known at the time of the IAD, NMFS will indicate if the owner of the MS/CV-endorsed permit has ownership interest in catch history assignments that exceed the accumulation limits and are subject to divestiture provisions given at paragraph (g)(3)(i)(D) of this section. If the applicant does not appeal the IAD within 60 calendar days of the date on the IAD, the IAD becomes the final decision of the Regional Administrator acting on behalf of the Secretary of Commerce.

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(h) *Non-coop fishery*—(1) *Access to non-coop fishery allocation.* All vessels registered to the MS/CV-endorsed permits assigned to the non-coop fishery will have access to harvest and deliver the aggregate catch history assignment of all MS/CV permits assigned to the non-coop fishery.

(2) *Non-coop fishery closure.* The non-coop fishery will be closed by automatic action as specified at § 660.60(d) when the Pacific whiting or non-whiting allocations to the non-coop fishery have been reached or are projected to be reached.

(i) *Retention requirements.* Catcher vessels participating in the MS Coop Program may discard minor operational amounts of catch at sea if the observer has accounted for the discard (i.e., a maximized retention fishery).

(j) *Observer requirements*—(1) *Observer coverage requirements.* (i) *Coverage.* (A) *Motherships.* Any vessel registered to an MS permit 125 ft (38.1 m) LOA or longer must carry two NMFS-certified observers, and any vessel registered to an MS permit shorter than 125 ft (38.1 m) LOA must carry one NMFS-certified observer, each day that the vessel is used to take, retain, receive, land, process, or transport groundfish.

(B) *Catcher vessels.* Any vessel delivering catch to any mothership must carry one NMFS-certified observer each day that the vessel is used to take groundfish.

(ii) *Observer workload*—(A) *Motherships.* The time required for the

observer to complete sampling duties must not exceed 12 consecutive hours in each 24-hour period.

(B) *Catcher vessels.* If an observer is unable to perform their duties for any reason, the vessel is required to be in port within 36 hours of the last haul sampled by the observer.

(iii) *Refusal to board.* Any boarding refusal on the part of the observer or vessel must be reported to the observer program and NOAA OLE by the observer provider. The observer must be available for an interview with the observer program or NOAA OLE if necessary.

(2) *Vessel responsibilities.* An operator and/or crew of a vessel required to carry an observer must provide:

(i) *Accommodations and food*—(A) *Motherships.* Provide accommodations and food that are equivalent to those provided for officers, engineers, foremen, deck-bosses or other management level personnel of the vessel.

(B) *Catcher vessels*—(*1*) Accommodations and food for trips less than 24 hours must be equivalent to those provided for the crew.

(*2*) Accommodations and food for trips of 24 hours or more must be equivalent to those provided for the crew and must include berthing space, a space that is intended to be used for sleeping and is provided with installed bunks and mattresses. A mattress or futon on the floor or a cot is not acceptable if a regular bunk is provided to any crew member, unless other arrangements are approved in advance by the Regional Administrator or their designee.

(ii) *Safe conditions.* Motherships and Catcher Vessels must:

(A) Maintain safe conditions on the vessel for the protection of observers including adherence to all U.S. Coast Guard and other applicable rules, regulations, or statutes pertaining to safe operation of the vessel including, but not limited to, rules of the road, vessel stability, emergency drills, emergency equipment, vessel maintenance, vessel general condition, and port bar crossings. An observer may refuse boarding or reboarding a vessel and may request a vessel return to port if operated in an unsafe manner or if unsafe conditions are indentified.

(B) Have on board a valid Commercial Fishing Vessel Safety Decal that certifies compliance with regulations found in 33 CFR chapter I and 46 CFR Chapter I, a certificate of compliance issued pursuant to 46 CFR 28.710 or a valid certificate of inspection pursuant to 46 U.S.C. 3311.

(iii) *Computer hardware and software*—(A) Motherships must:

(*1*) Provide hardware and software pursuant to regulations at §§ 679.50(g)(1)(iii)(B)(1) through 679.50(g)(1)(iii)(B)(3).

(*2*) Provide the observer(s) access to a computer required under paragraph (j)(2)(iii)(A) of this section, and that is connected to a communication device that provides a point-to-point connection to the NMFS host computer.

(*3*) Ensure that the mothership has installed the most recent release of NMFS data entry software provided by the Regional Administrator, or other approved software prior to the vessel receiving, catching or processing IFQ species.

(*4*) Ensure that the communication equipment required in paragraph (j)(2)(iii) of this section and that is used by observers to enter and transmit data, is fully functional and operational. "Functional" means that all the tasks and components of the NMFS supplied, or other approved, software described at paragraph (j)(2)(iii) of this section and the data transmissions to NMFS can be executed effectively aboard the vessel by the communications equipment.

(B) *Catcher vessels.* [Reserved]

(iv) *Vessel position.* Allow observer(s) access to the vessel's navigation equipment and personnel, on request, to determine the vessel's position.

(v) *Access.* Allow observer(s) free and unobstructed access to the vessel's bridge, trawl or working decks, holding bins, processing areas, freezer spaces, weight scales, cargo holds, and any other space that may be used to hold, process, weigh, or store fish or fish products at any time.

(vi) *Prior notification.* Notify observer(s) at least 15 minutes before fish are brought on board, or fish and fish products are transferred from the vessel, to allow sampling the catch or observing the transfer.

(vii) *Records.* Allow observer(s) to inspect and copy any state or Federal logbook maintained voluntarily or as required by regulation.

(viii) *Assistance.* Provide all other reasonable assistance to enable observer(s) to carry out their duties, including, but not limited to:

(A) Measuring decks, codends, and holding bins.

(B) Providing the observer(s) with a safe work area.

(C) Collecting samples of catch.

(D) Collecting and carrying baskets of fish.

(E) Allowing the observer(s) to collect biological data and samples.

(F) Providing adequate space for storage of biological samples.

(ix) *Sample station and operational requirements.*

(A) *Motherships.* To allow the observer to carry out required duties, the vessel owner must provide an observer sampling station that meets the following requirements:

(*1*) *Accessibility.* The observer sampling station must be available to the observer at all times.

(*2*) *Location.* The observer sampling station must be located within 4 m of the location from which the observer samples unsorted catch.

(*3*) *Access.* Unobstructed passage must be provided between the observer sampling station and the location where the observer collects sample catch.

(*4*) *Minimum work space.* The observer must have a working area of at least 4.5 square meters, including the observer's sampling table, for sampling and storage of fish to be sampled. The observer must be able to stand upright and have a work area at least 0.9 m deep in the area in front of the table and scale.

(*5*) *Table.* The observer sampling station must include a table at least 0.6 m deep, 1.2 m wide and 0.9 m high and no more than 1.1 m high. The entire surface area of the table must be available for use by the observer. Any area for the observer sampling scale is in addition to the minimum space requirements for the table. The observer's sampling table must be secured to the floor or wall.

(*6*) *Diverter board.* The conveyor belt conveying unsorted catch must have a removable board ("diverter board") to allow all fish to be diverted from the belt directly into the observer's sampling baskets. The diverter board must be located downstream of the scale used to weigh total catch. At least 1 m of accessible belt space, located downstream of the scale used to weigh total catch, must be available for the observer's use when sampling.

(*7*) *Other requirements.* The sampling station must be in a well-drained area that includes floor grating (or other material that prevents slipping), lighting adequate for day or night sampling, and a hose that supplies fresh or sea water to the observer.

(*8*) *Observer sampling scale.* The observer sample station must include a NMFS-approved platform scale (pursuant to requirements at § 679.28(j)(2)) with a capacity of at least 50 kg located within 1 m of the observer's sampling table. The scale must be mounted so that the weighing surface is no more than 0.7 m above the floor.

(B) *Catcher vessels.* To allow the observer to carry out the required

duties, the vessel owner must provide an observer sampling station that is:

(*1*) *Accessible.* The observer sampling station must be available to the observer at all times.

(*2*) *Limits hazards.* To the extent possible, the area should be free and clear of hazards including, but not limited to, moving fishing gear, stored fishing gear, inclement weather conditions, and open hatches.

(x) *Transfer at sea.* Observers may be transferred at-sea between motherships, between motherships and catcher-processors, or between a mothership and a catcher vessel. Transfers at-sea between catcher vessels is prohibited. For transfers, both vessels must:

(A) Ensure that transfers of observers at sea via small boat under its own power are carried out during daylight hours, under safe conditions, and with the agreement of observers involved.

(B) Notify observers at least 3 hours before observers are transferred, such that the observers can finish any sampling work, collect personal belongings, equipment, and scientific samples.

(C) Provide a safe pilot ladder and conduct the transfer to ensure the safety of observers during transfers.

(D) Provide an experienced crew member to assist observers in the small boat in which any transfer is made.

(3) *Procurement of observer services*—(i) *Motherships*—(A) Owners of vessels required to carry observers under paragraph (j)(1)(i) of this section must arrange for observer services from a permitted observer provider, except that:

(*1*) Vessels are required to procure observer services directly from NMFS when NMFS has determined and given notification that the vessel must carry NMFS staff or an individual authorized by NMFS in lieu of an observer provided by a permitted observer provider.

(*2*) Vessels are required to procure observer services directly from NMFS and a permitted observer provider when NMFS has determined and given notification that the vessel must carry NMFS staff and/or individuals authorized by NMFS, in addition to an observer provided by a permitted observer provider.

(B) [Reserved]

(ii) *Catcher vessels*—(A) Owners of vessels required to carry observers under paragraph (j)(1)(i) of this section must arrange for observer services from a permitted observer provider, except that:

(*1*) Vessels are required to procure observer services directly from NMFS when NMFS has determined and given notification that the vessel must carry NMFS staff or an individual authorized by NMFS in lieu of an observer provided by a permitted observer provider.

(*2*) Vessels are required to procure observer services directly from NMFS and a permitted observer provider when NMFS has determined and given notification that the vessel must carry NMFS staff and/or individuals authorized by NMFS, in addition to an observer provided by a permitted observer provider.

(B) [Reserved]

(4) *Application to become an observer provider*—(i) *Motherships.* Any observer provider holding a valid permit issued by the North Pacific Groundfish Observer Program in 2010 can supply observer services and will be issued a West Coast Groundfish Observer Program permit.

(ii) *Catcher vessels.* [Reserved]

(5) *Observer provider responsibilities*—(i) *Provide qualified candidates to serve as observers.* Observer providers must provide qualified candidates to serve as observers. To be qualified, a candidate must have:

(A) A Bachelor's degree or higher from an accredited college or university with a major in one of the natural sciences;

(B) Successfully completed a minimum of 30 semester hours or equivalent in applicable biological sciences with extensive use of dichotomous keys in at least one course;

(C) Successfully completed at least one undergraduate course each in math and statistics with a minimum of 5 semester hours total for both; and

(D) Computer skills that enable the candidate to work competently with standard database software and computer hardware.

(ii) *Hiring an observer candidate*—(A) *Motherships.*

(*1*) The observer provider must provide the candidate a copy of NMFS-provided pamphlets, information and other literature describing observer duties (*i.e.* The At-Sea Hake Observer Program's Observer Manual) prior to hiring the candidate. Observer job information is available from the Observer Program Office's Web site at *http://www.nwfsc.noaa.gov/research/divisions/fram/observer/atseahake.cfm.*

(*2*) *Observer contracts.* The observer provider must have a written contract or a written contract addendum that is signed by the observer and observer provider prior to the observer's deployment with the following clauses:

(*i*) That all the observer's in-season messages and catch reports required to be sent while deployed are delivered to the Observer Program Office as specified by written Observer Program instructions;

(*ii*) That the observer inform the observer provider prior to the time of embarkation if he or she is experiencing any new mental illness or physical ailments or injury since submission of the physician's statement as required as a qualified observer candidate that would prevent him or her from performing their assigned duties.

(B) *Catcher vessels*—(*1*) Provide the candidate a copy of NMFS-provided pamphlets, information and other literature describing observer duties, for example, the West Coast Groundfish Observer Program's sampling manual. Observer job information is available from the Observer Program Office's Web site at *http://www.nwfsc.noaa.gov/research/divisions/fram/observer/index.cfm.*

(*2*) *Observer contracts.* The observer provider must have a written contract or a written contract addendum that is signed by the observer and observer provider prior to the observer's deployment with the following clauses:

(*i*) That all the observer's in-season messages and catch reports required to be sent while deployed are delivered to the Observer Program Office as specified by written Observer Program instructions;

(*ii*) That the observer inform the observer provider prior to the time of embarkation if he or she is experiencing any new mental illness or physical ailments or injury since submission of the physician's statement as required as a qualified observer candidate that would prevent him or her from performing their assigned duties; and

(*iii*) That the observer completes a basic cardiopulmonary resuscitation/first aid course prior to the end of the NMFS West Coast Groundfish Observer Training class.

(iii) *Ensure that observers complete duties in a timely manner*—(A) *Motherships.* An observer provider must ensure that observers employed by that observer provider do the following in a complete and timely manner:

(*1*) Submit to NMFS all data, logbooks, and reports as required by the Observer Manual;

(*2*) Report for his or her scheduled debriefing and complete all debriefing responsibilities;

(*3*) Return all sampling and safety gear to the Observer Program Office;

(*4*) Submit all biological samples from the observer's deployment by the completion of the electronic vessel and/or processor survey(s); and

(*5*) Immediately report to the Observer Program Office and the NOAA OLE any refusal to board an assigned vessel.

(B) *Catcher vessels.* An observer provider must ensure that observers employed by that observer provider do the following in a complete and timely manner:

(*1*) Submit to NMFS all data, logbooks, and reports as required by the Observer Manual;

(*2*) Report for his or her scheduled debriefing and complete all debriefing responsibilities; and

(*3*) Return all sampling and safety gear to the Observer Program Office.

(*4*) Immediately report to the Observer Program Office and the NOAA OLE any refusal to board an assigned vessel.

(iv) *Observers provided to vessel*—(A) *Motherships.* Observers provided to mothership vessels:

(*1*) Must have a valid North Pacific groundfish observer certification endorsement and an At-Sea Hake Observer Program certification;

(*2*) Must not have not informed the provider prior to the time of embarkation that he or she is experiencing a mental illness or a physical ailment or injury developed since submission of the physician's statement that would prevent him or her from performing his or her assigned duties; and

(*3*) Must have successfully completed all NMFS required training and briefing before deployment.

(B) *Catcher vessels.* Observers provided to catcher vessels:

(*1*) Must have a valid West Coast Groundfish observer certification;

(*2*) Must have not informed the provider prior to the time of embarkation that he or she is experiencing a mental illness or a physical ailment or injury developed since submission of the physician's statement, as required in paragraph (j)(5)(x)(B)(*2*) of this section that would prevent him or her from performing his or her assigned duties; and

(*3*) Must have successfully completed all NMFS required training and briefing before deployment.

(v) *Respond to industry requests for observers.* An observer provider must provide an observer for deployment pursuant to the terms of the contractual relationship with the vessel to fulfill vessel requirements for observer coverage specified at paragraph (j)(1)(i) of this section. An alternate observer must be supplied in each case where injury or illness prevents the observer from performing his or her duties or where the observer resigns prior to completion of his or her duties. If the observer provider is unable to respond to an industry request for observer coverage from a vessel for whom the provider is in a contractual relationship due to lack of available observers by the estimated embarking time of the vessel, the provider must report it to the observer program at least 4 hours prior to the vessel's estimated embarking time.

(vi) *Provide observer salaries and benefits.* An observer provider must provide to its observer employees salaries and any other benefits and personnel services in accordance with the terms of each observer's contract.

(vii) *Provide observer deployment logistics*—(A) *Motherships.* An observer provider must provide to each of its observers under contract:

(*1*) All necessary transportation, including arrangements and logistics, of observers to the initial location of deployment, to all subsequent vessel assignments during that deployment, and to the debriefing location when a deployment ends for any reason; and

(*2*) Lodging, per diem, and any other services necessary to observers assigned to fishing vessels.

(*3*) An observer under contract may be housed on a vessel to which he or she is assigned:

(*i*) Prior to their vessel's initial departure from port;

(*ii*) For a period not to exceed twenty-four hours following the completion of an offload when the observer has duties and is scheduled to disembark; or

(*iii*) For a period not to exceed twenty-four hours following the vessel's arrival in port when the observer is scheduled to disembark.

(*iv*) During all periods an observer is housed on a vessel, the observer provider must ensure that the vessel operator or at least one crew member is aboard.

(*v*) An observer under contract who is between vessel assignments must be provided with shoreside accommodations pursuant to the terms of the contract between the observer provider and the observers. If the observer provider is responsible for providing accommodations under the contract with the observer, the accommodations must be at a licensed hotel, motel, bed and breakfast, or other shoreside accommodations for the duration of each period between vessel or shoreside assignments. Such accommodations must include an assigned bed for each observer and no other person may be assigned that bed for the duration of that observer's stay. Additionally, no more than four beds may be in any room housing observers at accommodations meeting the requirements of this section.

(B) *Catcher vessels.* An observer provider must ensure each of its observers under contract:

(*1*) Has an individually assigned mobile or cell phones, in working order, for all necessary communication. An observer provider may alternatively compensate observers for the use of the observer's personal cell phone or pager for communications made in support of, or necessary for, the observer's duties.

(*2*) Calls into the NMFS deployment hotline upon departing and arriving into port for each trip to leave the following information: Observer name, phone number, vessel departing on, expected trip end date and time.

(*3*) Remains available to NOAA OLE and the Observer Program until the conclusion of debriefing.

(*4*) Receives all necessary transportation, including arrangements and logistics, of observers to the initial location of deployment, to all subsequent vessel assignments during that deployment, and to the debriefing location when a deployment ends for any reason; and

(*5*) Receives lodging, per diem, and any other services necessary to observers assigned to fishing vessels.

(*i*) An observer under contract may be housed on a vessel to which he or she is assigned: Prior to their vessel's initial departure from port; for a period not to exceed 24 hours following the completion of an offload when the observer has duties and is scheduled to disembark; or for a period not to exceed twenty-four hours following the vessel's arrival in port when the observer is scheduled to disembark.

(*ii*) During all periods an observer is housed on a vessel, the observer provider must ensure that the vessel operator or at least one crew member is aboard.

(*iii*) Otherwise, each observer between vessels, while still under contract with a permitted observer provider, shall be provided with accommodations in accordance with the contract between the observer and the observer provider. If the observer provider is responsible for providing accommodations under the contract with the observer, the accommodations must be at a licensed hotel, motel, bed and breakfast, or other shoreside accommodations that has an assigned bed for each observer that no other person may be assigned to for the duration of that observer's stay. Additionally, no more than four beds may be in any room housing observers at accommodations meeting the requirements of this section.

(viii) *Observer deployment limitations*—(A) *Motherships.* Unless alternative arrangements are approved

by the Observer Program Office, an observer provider must not:

(*1*) Deploy an observer on the same vessel more than 90 days in a 12-month period;

(*2*) Deploy an observer for more than 90 days in a single deployment;

(*3*) Include more than four vessels assignments in a single deployment, or

(*4*) Disembark an observer from a vessel before that observer has completed his or her sampling or data transmission duties.

(B) *Catcher vessels.* Not deploy an observer on the same vessel more than 90 calendar days in a 12-month period.

(ix) *Verify vessel's safety decal.* An observer provider must verify that a vessel has a valid USCG safety decal as required under paragraph (j)(2)(ii)(B) of this section before an observer may get underway aboard the vessel. One of the following acceptable means of verification must be used to verify the decal validity:

(A) The observer provider or employee of the observer provider, including the observer, visually inspects the decal aboard the vessel and confirms that the decal is valid according to the decal date of issuance; or

(B) The observer provider receives a hard copy of the USCG documentation of the decal issuance from the vessel owner or operator.

(x) *Maintain communications with observers.* An observer provider must have an employee responsible for observer activities on call 24 hours a day to handle emergencies involving observers or problems concerning observer logistics, whenever observers are at sea, in transit, or in port awaiting vessel reassignment.

(xi) *Maintain communications with the Observer Program Office.* An observer provider must provide all of the following information by electronic transmission (e-mail), fax, or other method specified by NMFS.

(A) *Motherships*—(*1*) *Training and briefing registration materials.* The observer provider must submit training and briefing registration materials to the Observer Program Office at least 5 business days prior to the beginning of a scheduled observer at-sea hake training or briefing session.

(*i*) Registration materials consist of the date of requested training or briefing with a list of observers including each observer's full name (i.e., first, middle and last names).

(*ii*) *Projected observer assignments.* Prior to the observer's completion of the training or briefing session, the observer provider must submit to the Observer Program Office a statement of projected observer assignments that include the observer's name; vessel, gear type, and vessel/processor code; port of embarkation; and area of fishing.

(*2*) *Observer debriefing registration.* The observer provider must contact the At-Sea Hake Observer Program within 5 business days after the completion of an observer's deployment to schedule a date, time and location for debriefing. Observer debriefing registration information must be provided at the time of debriefing scheduling and must include the observer's name, cruise number, vessel name(s) and code(s), and requested debriefing date.

(*3*) *Observer provider contracts.* If requested, observer providers must submit to the Observer Program Office a completed and unaltered copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and those entities requiring observer services under paragraph (j)(1)(i) of this section. Observer providers must also submit to the Observer Program Office upon request, a completed and unaltered copy of the current or most recent signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract and any agreements or policies with regard to observer compensation or salary levels) between the observer provider and the particular entity identified by the Observer Program or with specific observers. The copies must be submitted to the Observer Program Office via fax or mail within 5 business days of the request. Signed and valid contracts include the contracts an observer provider has with:

(*i*) Vessels required to have observer coverage as specified at paragraph (j)(1)(i) of this section; and

(*ii*) Observers.

(*4*) *Change in observer provider management and contact information.* Observer providers must submit notification of any other change to provider contact information, including but not limited to, changes in contact name, phone number, email address, and address.

(*5*) *Other reports.* Reports of the following must be submitted in writing to the At-Sea Hake Observer Program Office by the observer provider via fax or email address designated by the Observer Program Office within 24 hours after the observer provider becomes aware of the information:

(*i*) Any information regarding possible observer harassment;

(*ii*) Any information regarding any action prohibited under §§ 660.112 or 600.725(o), (t) and (u);

(*iii*) Any concerns about vessel safety or marine casualty under 46 CFR 4.05–1(a)(1) through (7);

(*iv*) Any observer illness or injury that prevents the observer from completing any of his or her duties described in the observer manual; and

(*v*) Any information, allegations or reports regarding observer conflict of interest or breach of the standards of behavior described in observer provider policy.

(B) *Catcher vessels.* An observer provider must provide all of the following information by electronic transmission (e-mail), fax, or other method specified by NMFS.

(*1*) *Observer training, briefing, and debriefing registration materials.* This information must be submitted to the Observer Program Office at least 7 business days prior to the beginning of a scheduled West Coast groundfish observer certification training or briefing session.

(*i*) Training registration materials consist of the following: Date of requested training; a list of observer candidates that includes each candidate's full name (i.e., first, middle and last names), date of birth, and gender; a copy of each candidate's academic transcripts and resume; a statement signed by the candidate under penalty of perjury which discloses the candidate's criminal convictions; projected observer assignments—Prior to the observer's completion of the training or briefing session, the observer provider must submit to the Observer Program Office a statement of projected observer assignments that include that includes each observer's name, current mailing address, e-mail address, phone numbers and port of embarkation ("home port"); and length of observers contract.

(*ii*) Briefing registration materials consist of the following: Date and type of requested briefing session; list of observers to attend the briefing session, that includes each observer's full name (first, middle, and last names); projected observer assignments—Prior to the observer's completion of the training or briefing session, the observer provider must submit to the Observer Program Office a statement of projected observer assignments that include that includes each observer's name, current mailing address, e-mail address, phone numbers and port of embarkation ("home port"); and length of observer contract.

(*iii*) *Debriefing.* The West Coast Groundfish Observer Program will notify the observer provider which observers require debriefing and the specific time period the provider has to schedule a date, time, and location for

debriefing. The observer provider must contact the West Coast Groundfish Observer program within 5 business days by telephone to schedule debriefings. Observer providers must immediately notify the observer program when observers end their contract earlier than anticipated.

(*2*) *Physical examination.* A signed and dated statement from a licensed physician that he or she has physically examined an observer or observer candidate. The statement must confirm that, based on that physical examination, the observer or observer candidate does not have any health problems or conditions that would jeopardize that individual's safety or the safety of others while deployed, or prevent the observer or observer candidate from performing his or her duties satisfactorily. The statement must declare that, prior to the examination, the physician was made aware of the duties of the observer and the dangerous, remote, and rigorous nature of the work by reading the NMFS-prepared information. The physician's statement must be submitted to the Observer Program Office prior to certification of an observer. The physical exam must have occurred during the 12 months prior to the observer's or observer candidate's deployment. The physician's statement will expire 12 months after the physical exam occurred. A new physical exam must be performed, and accompanying statement submitted, prior to any deployment occurring after the expiration of the statement.

(*3*) *Certificates of insurance.* Copies of "certificates of insurance", that names the NMFS Observer Program leader as the "certificate holder", shall be submitted to the Observer Program Office by February 1 of each year. The certificates of insurance shall verify the following coverage provisions and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled.

(*i*) Maritime Liability to cover "seamen's" claims under the Merchant Marine Act (Jones Act) and General Maritime Law ($1 million minimum).

(*ii*) Coverage under the U.S. Longshore and Harbor Workers' Compensation Act ($1 million minimum).

(*iii*) States Worker's Compensation as required.

(*iv*) Commercial General Liability.

(*4*) *Observer provider contracts.* If requested, observer providers must submit to the Observer Program Office a completed and unaltered copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and those entities requiring observer services under paragraph (j)(1)(i) of this section. Observer providers must also submit to the Observer Program Office upon request, a completed and unaltered copy of the current or most recent signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract and any agreements or policies with regard to observer compensation or salary levels) between the observer provider and the particular entity identified by the Observer Program or with specific observers. The copies must be submitted to the Observer Program Office via fax or mail within 5 business days of the request. Signed and valid contracts include the contracts an observer provider has with:

(*i*) Vessels required to have observer coverage as specified at paragraph (j)(1)(i) of this section; and

(*ii*) Observers.

(*5*) *Change in observer provider management and contact information.* An observer provider must submit to the Observer Program office any change of management or contact information submitted on the provider's permit application under paragraphs (j)(4) of this section within 30 days of the effective date of such change.

(*6*) *Boarding refusals.* The observer provider must report to NMFS any trip that has been refused by an observer within 24 hours of the refusal.

(*7*) *Biological samples.* The observer provider must ensure that biological samples are stored/handled properly prior to delivery/transport to NMFS.

(*8*) *Observer status report.* Each Tuesday, observer providers must provide NMFS with an updated list of contact information for all observers that includes the observer's name, mailing address, e-mail address, phone numbers, port of embarkation ("home port"), fishery deployed the previous week and whether or not the observer is "in service", indicating when the observer has requested leave and/or is not currently working for the provider.

(*9*) Providers must submit to NMFS, if requested, copies of any information developed and used by the observer providers distributed to vessels, such as informational pamphlets, payment notification, description of observer duties, etc.

(*10*) *Other reports.* Reports of the following must be submitted in writing to the At-Sea Hake or West Coast Groundfish Observer Program Office by the observer provider via fax or email address designated by the Observer Program Office within 24 hours after the observer provider becomes aware of the information:

(*i*) Any information regarding possible observer harassment;

(*ii*) Any information regarding any action prohibited under §§ 660.112 or 600.725(o), (t) and (u);

(*iii*) Any concerns about vessel safety or marine casualty under 46 CFR 4.05–1(a)(1) through (7);

(*iv*) Any observer illness or injury that prevents the observer from completing any of his or her duties described in the observer manual; and

(*v*) Any information, allegations or reports regarding observer conflict of interest or breach of the standards of behavior described in observer provider policy.

(xii) *Replace lost or damaged gear.* An observer provider must replace all lost or damaged gear and equipment issued by NMFS to an observer under contract to that provider. All replacements must be in accordance with requirements and procedures identified in writing by the Observer Program Office.

(xiii) *Maintain confidentiality of information.* An observer provider must ensure that all records on individual observer performance received from NMFS under the routine use provision of the Privacy Act or as otherwise required by law remain confidential and are not further released to anyone outside the employ of the observer provider company to whom the observer was contracted except with written permission of the observer.

(xiv) *Limitations on conflict of interest.* Observer providers must meet limitations on conflict of interest. Observer providers:

(A) Must not have a direct financial interest, other than the provision of observer services, in the North Pacific or Pacific Coast Groundfish fishery managed under an FMP for the waters off the coasts of Alaska, Washington, Oregon, and California, including, but not limited to,

(*1*) Any ownership, mortgage holder, or other secured interest in a vessel, or shoreside processor facility involved in the catching, taking, harvesting or processing of fish,

(*2*) Any business involved with selling supplies or services to any vessel or shoreside processors participating in a fishery managed pursuant to an FMP in the waters off the coasts of Alaska, California, Oregon, and Washington, or

(*3*) Any business involved with purchasing raw or processed products from any vessel or shoreside processor participating in a fishery managed pursuant to an FMP in the waters off the

coasts of Alaska, California, Oregon, and Washington.

(B) Must assign observers without regard to any preference by representatives of vessels other than when an observer will be deployed.

(C) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value except for compensation for providing observer services from anyone who conducts fishing or fish processing activities that are regulated by NMFS, or who has interests that may be substantially affected by the performance or nonperformance of the official duties of observer providers.

(xv) *Observer conduct and behavior.* Observer providers must develop and maintain a policy addressing observer conduct and behavior for their employees that serve as observers. The policy shall address the following behavior and conduct regarding:

(A) Observer use of alcohol;

(B) Observer use, possession, or distribution of illegal drugs and;

(C) Sexual contact with personnel of the vessel or processing facility to which the observer is assigned, or with any vessel or processing plant personnel who may be substantially affected by the performance or non-performance of the observer's official duties.

(D) An observer provider shall provide a copy of its conduct and behavior policy by February 1 of each year, to: Observers, observer candidates and; the Observer Program Office.

(xvi) *Refusal to deploy an observer.* Observer providers may refuse to deploy an observer on a requesting vessel if the observer provider has determined that the requesting vessel is inadequate or unsafe pursuant to those regulations described at § 600.746 or U.S. Coast Guard and other applicable rules, regulations, statutes, or guidelines pertaining to safe operation of the vessel.

(6) *Observer certification and responsibilities*—(i) *Applicability.* Observer certification authorizes an individual to fulfill duties as specified in writing by the NMFS Observer Program Office while under the employ of a NMFS-permitted observer provider and according to certification endorsements as designated under paragraph (j)(6)(iii) of this section.

(ii) *Observer certification official.* The Regional Administrator will designate a NMFS observer certification official who will make decisions for the Observer Program Office on whether to issue or deny observer certification.

(iii) *Certification requirements*—(A) *Initial certification.* NMFS may certify individuals who, in addition to any other relevant considerations:

(*1*) Are employed by an observer provider company permitted pursuant to § 679.50 at the time of the issuance of the certification;

(*2*) Have provided, through their observer provider:

(*i*) Information identified by NMFS at § 679.50 regarding an observer candidate's health and physical fitness for the job;

(*ii*) Meet all observer education and health standards as specified in § 679.50 and

(*iii*) Have successfully completed NMFS-approved training as prescribed by the At-Sea Hake and/or the West Coast Groundfish Observer Program. Successful completion of training by an observer applicant consists of meeting all attendance and conduct standards issued in writing at the start of training; meeting all performance standards issued in writing at the start of training for assignments, tests, and other evaluation tools; and completing all other training requirements established by the Observer Program.

(*iv*) Have not been decertified under paragraph (j)(6)(ix) of this section, or pursuant to § 679.50.

(B) [Reserved]

(iv) *Denial of a certification.* The NMFS observer certification official will issue a written determination denying observer certification if the candidate fails to successfully complete training, or does not meet the qualifications for certification for any other relevant reason.

(v) *Issuance of an observer certification.* An observer certification will be issued upon determination by the observer certification official that the candidate has successfully met all requirements for certification as specified at paragraph (j)(6)(iii) of this section. The following endorsements must be obtained, in addition to observer certification, in order for an observer to deploy.

(A) *Motherships*—(*1*) *North Pacific Groundfish Observer Program certification training endorsement.* A certification training endorsement signifies the successful completion of the training course required to obtain observer certification. This endorsement expires when the observer has not been deployed and performed sampling duties as required by the Observer Program Office for a period of time, specified by the Observer Program, after his or her most recent debriefing. The observer can renew the endorsement by successfully completing certification training once more.

(*2*) *North Pacific Groundfish Observer Program annual general endorsements.* Each observer must obtain an annual general endorsement to their certification prior to his or her first deployment within any calendar year subsequent to a year in which a certification training endorsement is obtained. To obtain an annual general endorsement, an observer must successfully complete the annual briefing, as specified by the Observer Program. All briefing attendance, performance, and conduct standards required by the Observer Program must be met.

(*3*) *North Pacific Groundfish Observer Program deployment endorsements.* Each observer who has completed an initial deployment after certification or annual briefing must receive a deployment endorsement to their certification prior to any subsequent deployments for the remainder of that year. An observer may obtain a deployment endorsement by successfully completing all pre-cruise briefing requirements. The type of briefing the observer must attend and successfully complete will be specified in writing by the Observer Program during the observer's most recent debriefing.

(*4*) *At-Sea Hake Observer Program endorsements.* A Pacific hake fishery endorsement is required for purposes of performing observer duties aboard vessels that process groundfish at sea in the Pacific whiting fishery. A Pacific whiting fishery endorsement to an observer's certification may be obtained by meeting the following requirements:

(*i*) Be a prior NMFS-certified observer in the groundfish fisheries off Alaska;

(*ii*) Receive an evaluation by NMFS for his or her most recent deployment that indicated that the observer's performance met Observer Program expectations for that deployment; successfully complete a NMFS-approved observer training and/or Pacific whiting briefing as prescribed by the Observer Program; and comply with all of the other requirements of this section.

(B) *Catcher vessels.* The following endorsements must be obtained in addition to observer certification, in order for an observer to deploy.

(*1*) *West Coast Groundfish Observer Program training certification endorsement.* A training certification endorsement signifies the successful completion of the training course required to obtain observer certification. This endorsement expires when the observer has not been deployed and performed sampling duties as required by the observer Program office for a

period of time, specified by the Observer Program, after his or her most recent debriefing. The observer can renew the endorsement by successfully completing training once more.

(*2*) *West Coast Groundfish Observer Program annual general endorsement.* Each observer must obtain an annual general endorsement to their certification prior to his or her first deployment within any calendar year subsequent to a year in which a training certification endorsement is obtained. To obtain an annual general endorsement, an observer must successfully complete the annual briefing, as specified by the Observer Program. All briefing attendance, performance, and conduct standards required by the Observer Program must be met.

(*3*) *West Coast Groundfish Observer Program deployment endorsement.* Each observer who has completed an initial deployment after their certification or annual briefing must receive a deployment endorsement to their certification prior to any subsequent deployments for the remainder of that year. An observer may obtain a deployment endorsement by successfully completing all briefing requirements, when applicable. The type of briefing the observer must attend and successfully complete will be specified in writing by the Observer Program during the observer's most recent debriefing.

(vi) *Maintaining the validity of an observer certification.* After initial issuance, an observer must keep their certification valid by meeting all of the following requirements specified below:

(A) *Motherships*—(*1*) Successfully perform their assigned duties as described in the Observer Manual or other written instructions from the Observer Program Office including calling into the NMFS deployment hotline upon departing and arriving into port each trip to leave the following information: Observer name, phone number, vessel name departing on, date and time of departure and date and time of expected return.

(*2*) Accurately record their sampling data, write complete reports, and report accurately any observations of suspected violations of regulations relevant to conservation of marine resources or their environment.

(*3*) Not disclose collected data and observations made on board the vessel or in the processing facility to any person except the owner or operator of the observed vessel or an authorized officer or NMFS.

(*4*) Successfully complete NMFS-approved annual briefings as prescribed by the At-Sea Hake Observer Program.

(*5*) Successful completion of briefing by an observer applicant consists of meeting all attendance and conduct standards issued in writing at the start of training; meeting all performance standards issued in writing at the start of training for assignments, tests, and other evaluation tools; and completing all other briefing requirements established by the Observer Program.

(*6*) Successfully meet all expectations in all debriefings including reporting for assigned debriefings.

(*7*) Submit all data and information required by the observer program within the program's stated guidelines.

(B) *Catcher vessels.* After initial issuance, an observer must keep their certification valid by meeting all of the following requirements specified below:

(*1*) Successfully perform their assigned duties as described in the Observer Manual or other written instructions from the Observer Program Office including calling into the NMFS deployment hotline upon departing and arriving into port each trip to leave the following information: Observer name, phone number, vessel name departing on, date and time of departure and date and time of expected return.

(*2*) Accurately record their sampling data, write complete reports, and report accurately any observations of suspected violations of regulations relevant to conservation of marine resources or their environment.

(*3*) Not disclose collected data and observations made on board the vessel or in the processing facility to any person except the owner or operator of the observed vessel or an authorized officer or NMFS.

(*4*) Successfully complete NMFS-approved annual briefings as prescribed by the West Coast Groundfish Observer Program.

(*5*) Successful completion of briefing by an observer applicant consists of meeting all attendance and conduct standards issued in writing at the start of training; meeting all performance standards issued in writing at the start of training for assignments, tests, and other evaluation tools; and completing all other briefing requirements established by the Observer Program.

(*6*) Hold current basic cardiopulmonary resuscitation/first aid certification as per American Red Cross Standards.

(*7*) Successfully meet all expectations in all debriefings including reporting for assigned debriefings.

(*8*) Submit all data and information required by the observer program within the program's stated guidelines.

(*9*) Meet the minimum annual deployment period of 3 months at least once every 12 months.

(vii) *Limitations on conflict of interest.* Observers:

(A) Must not have a direct financial interest, other than the provision of observer services, in a fishery managed pursuant to an FMP for the waters off the coast of Alaska, or in a Pacific Coast fishery managed by either the State or Federal Governments in waters off Washington, Oregon, or California, including but not limited to:

(*1*) Any ownership, mortgage holder, or other secured interest in a vessel, shore-based or floating stationary processor facility involved in the catching, taking, harvesting or processing of fish,

(*2*) Any business involved with selling supplies or services to any vessel, shore-based or floating stationary processing facility; or

(*3*) Any business involved with purchasing raw or processed products from any vessel, shore-based or floating stationary processing facilities.

(B) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who either conducts activities that are regulated by NMFS in the Pacific coast or North Pacific regions or has interests that may be substantially affected by the performance or nonperformance of the observers' official duties.

(C) May not serve as observers on any vessel or at any shore-based owned or operated by a person who employed the observer in the last two years.

(D) May not solicit or accept employment as a crew member or an employee of a vessel or shore-based processor while employed by an observer provider.

(E) Provisions for remuneration of observers under this section do not constitute a conflict of interest.

(viii) *Standards of behavior.* Observers must:

(A) Perform their assigned duties as described in the Observer Manual or other written instructions from the Observer Program Office.

(B) Immediately report to the observer program office and the NMFS OLE any time they refuse to board.

(C) Accurately record their sampling data, write complete reports, and report accurately any observations of suspected violations of regulations relevant to conservation of marine resources or their environment.

(D) Not disclose collected data and observations made on board the vessel to any person except the owner or operator of the observed vessel, an authorized officer, or NMFS.

(ix) *Suspension and decertification*—(A) *Suspension and decertification review official.* The Regional Administrator (or a designee) will designate an observer suspension and decertification review official(s), who will have the authority to review observer certifications and issue initial administrative determinations of observer certification suspension and/or decertification.

(B) *Causes for suspension or decertification.* The suspension/decertification official may initiate suspension or decertification proceedings against an observer:

(*1*) When it is alleged that the observer has not met applicable standards, including any of the following:

(*i*) Failed to satisfactorily perform duties of observers as specified in writing by the NMFS Observer Program; or

(*ii*) Failed to abide by the standards of conduct for observers, including conflicts of interest;

(*2*) Upon conviction of a crime or upon entry of a civil judgment for:

(*i*) Commission of fraud or other violation in connection with obtaining or attempting to obtain certification, or in performing the duties as specified in writing by the NMFS Observer Program;

(*ii*) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(*iii*) Commission of any other offense indicating a lack of integrity or honesty that seriously and directly affects the fitness of observers.

(C) *Issuance of initial administrative determination.* Upon determination that suspension or decertification is warranted, the suspension/decertification official will issue a written IAD to the observer via certified mail at the observer's most current address provided to NMFS. The IAD will identify whether a certification is suspended or revoked and will identify the specific reasons for the action taken. Decertification is effective 30 calendar days after the date on the IAD, unless there is an appeal.

(D) *Appeals.* A certified observer who receives an IAD that suspends or revokes his or her observer certification may appeal the determination within 30 calendar days after the date on the IAD to the Office of Administrative Appeals pursuant to § 679.43.

(k) *MS coop failure*—(1) The Regional Administrator will determine that a permitted MS coop is considered to have failed if:

(i) The coop members dissolve the coop, or

(ii) The coop membership falls below 20 percent of the MS/CV-endorsed limited entry permits, or

(iii) The coop agreement is no longer valid.

(2) If a permitted MS coop dissolves, the designated coop manager must notify NMFS SFD in writing of the dissolution of the coop.

(3) In the event of a NMFS determined coop failure, or reported failure, the designated coop manager will be notified in writing about NMFS' determination. Upon notification of a coop failure, fishing under the MS coop permit will no longer be allowed. Should a coop failure determination be made during the Pacific whiting primary season for the mothership sector, unused allocation associated with the catch history will not be available for harvest by the coop that failed, by any former members of the coop that failed, or any other MS coop for the remainder of that calendar year.

■ 26. In § 660.160:

■ a. Paragraphs (a)(3) and (a)(4) are revised;

■ b. Paragraphs (g) and (h) are removed;

■ c. Paragraphs (b) through (f) are redesignated as paragraphs (c) through (g);

■ d. A new paragraph (b) is added;

■ e. Text is added to the newly designated paragraph (c)(2) and (d);

■ f. The headings of newly designated paragraphs (e)(2) through (e)(4) are revised;

■ g. New paragraphs (c)(3) through (c)(7) are added, and text is added to newly designated paragraphs (e)(2) through (e)(4);

■ h. The newly designated paragraph (e)(1) introductory text is revised, and newly designated paragraph (e)(5) is removed and reserved;

■ i. The newly designated paragraph (e)(7) is redesignated as paragraph (e)(6) and newly designated paragraph (e)(6)(vii) is revised;

■ j. Text is added to the newly designated paragraph (g); and

■ k. A new paragraph (h) is added to read as follows:

§ 660.160 Catcher/processor (C/P) Coop Program.

* * * * *

(a) * * *

(3) Regulations set out in the following sections of subpart C: § 660.11 Definitions, § 660.12 Prohibitions, § 660.13 Recordkeeping and reporting, § 660.14 VMS requirements, § 660.15 Equipment requirements, § 660.16 Groundfish Observer Program, § 660.20 Vessel and gear identification, § 660.25 Permits, § 660.55 Allocations, § 660.60 Specifications and management measures, § 660.65 Groundfish harvest specifications, and §§ 660.70 through 660.79 Closed areas.

(4) Regulations set out in the following sections of subpart D: § 660.111 Trawl fishery definitions, § 660.112 Trawl fishery prohibitions, § 660.113 Trawl fishery recordkeeping and reporting, § 660.120 Trawl fishery crossover provisions, § 660.130 Trawl fishery management measures, and § 660.131 Pacific whiting fishery management measures.

* * * * *

(b) *Participation requirements and responsibilities*—(1) *C/P vessels*—(i) *C/P vessel participation requirements.* A vessel is eligible to fish as a catcher/processor in the C/P Coop Program if:

(A) The vessel is registered to a C/P-endorsed limited entry trawl permit.

(B) The vessel is not used to harvest fish as a catcher vessel in the mothership coop program in the same calendar year.

(C) The vessel is not used to fish as a mothership in the MS Coop Program in the same calendar year.

(ii) *C/P vessel responsibilities.* The owner and operator of a catcher/processor vessel must:

(A) *Recordkeeping and reporting.* Maintain a valid declaration as specified at § 660.13(d), subpart C; and maintain and submit all records and reports specified at § 660.113(d) including, economic data, scale tests records, and cease fishing reports.

(B) *Observers.* As specified at paragraph (g) of this section, procure observer services, maintain the appropriate level of coverage, and meet the vessel responsibilities.

(C) *Catch weighing requirements.* The owner and operator of a C/P vessel must:

(*1*) Ensure that all catch is weighed in its round form on a NMFS-approved scale that meets the requirements described in § 660.15(b), subpart C;

(*2*) Provide a NMFS-approved platform scale, belt scale, and test weights that meet the requirements described in § 660.15(b), subpart C.

(2) *C/P coops*—(i) *C/P coop participation requirements.* For a C/P coop to participate in the catcher/processor sector of the Pacific whiting fishery, the C/P coop must:

(A) Be issued a C/P coop permit;

(B) Be composed of all C/P-endorsed limited entry permits and their owners;

(C) Be formed voluntarily;

(D) Be a legally recognized entity that represents its members; and

(E) Designate an individual as a coop manager.

(ii) *C/P coop responsibilities.* A C/P coop is responsible for:

(A) Applying for and being registered to a C/P coop permit;

(B) Organizing and coordinating harvest activities of vessels that fish for the coop;

(C) Allocating catch for use by specific coop members;

(D) Monitoring harvest activities and enforcing the catch limits of coop members;

(E) Submitting an annual report.

(F) Having a designated coop manager. The designated coop manager must:

(*1*) Serve as the contact person with NMFS and the Council;

(*2*) Be responsible for the annual distribution of catch and bycatch allocations among coop members;

(*3*) Prepare and submit an annual report on behalf of the coop; and

(*4*) Be authorized to receive or respond to any legal process in which the coop is involved; and

(*5*) Notify NMFS if the coop dissolves.

(iii) *C/P coop compliance and joint/several liability.* A C/P coop must comply with the provisions of this section. The C/P coop, member limited entry permit owners, and owners and operators of vessels registered to member limited entry permits, are jointly and severally responsible for compliance with the provisions of this section. Pursuant to 15 CFR part 904, each C/P coop, member permit owner, and owner and operator of a vessel registered to a coop member permit may be charged jointly and severally for violations of the provisions of this section. For purposes of enforcement, a C/P coop is a legal entity that can be subject to NOAA enforcement action for violations of the provisions of this section.

* * * * *

(c) * * *

(2) *C/P Coop Program annual allocations.* The C/P Coop Program allocation of Pacific whiting is equal to the catcher/processor sector allocation. Only a single coop may be formed in the catcher/processor sector with the one permitted coop receiving the catcher/processor sector allocation.

(3) *Non-whiting groundfish species*—(i) Non-whiting groundfish species with a catcher/processor sector allocation are established in accordance with regulation at § 660.55(i). The pounds associated with each species will be provided when the coop permit is issued.

(ii) Groundfish species with at-sea sector set-asides will be managed on an annual basis unless there is a risk of a harvest specification being exceeded, unforeseen impact on another fisheries, or conservation concerns in which case inseason action may be taken. Set asides may be adjusted through the biennial specifications and management measures process as necessary.

(iii) Groundfish species not addressed under paragraph (i) or (ii) above, will be managed on an annual basis unless there is a risk of a harvest specification being exceeded, unforeseen impact on another fisheries, or conservation concerns in which case inseason action may be taken.

(4) *Halibut set-asides.* Annually a specified amount of the Pacific halibut will be held in reserve as a shared set-aside for bycatch in the at-sea Pacific whiting fisheries and the shorebased trawl sector south of 40°10′ N lat.

(5) *Non-whiting groundfish species reapportionment.* The Regional Administrator may make available for harvest to the mothership sector of the Pacific whiting fishery, the amounts of the catcher/processor sector's non-whiting catch allocation remaining when the catcher/processor sector reaches its Pacific whiting allocation or participants in the catcher/processor sector do not intend to harvest the remaining sector allocation. The designated coop manager must submit a cease fishing report to NMFS indicating that harvesting has concluded for the year. At any time after greater than 80 percent of the catcher/processor sector Pacific whiting allocation has been harvested, the Regional Administrator may contact the designated coop manager to determine whether they intend to continue fishing. When considering redistribution of non-whiting catch allocation, the Regional Administrator will take into consideration the best available data on total projected fishing impacts.

(6) *Reaching the catcher/processor sector allocation.* When the catcher/processor sector allocation of Pacific whiting or non-whiting groundfish catch allocation is reached or is projected to be reached, further taking and retaining, receiving, or at-sea processing by a catcher/processor is prohibited. No additional unprocessed groundfish may be brought on board after at-sea processing is prohibited, but a catcher/processor may continue to process catch that was on board before at-sea processing was prohibited. The catcher/processor sector will close when the allocation of any one species is reached or projected to be reached.

(7) *Announcements.* The Regional Administrator will announce in the **Federal Register** when the catcher/processor sector allocation of Pacific whiting or non-whiting groundfish with an allocation is reached, or is projected to be reached, and specify the appropriate action. In order to prevent exceeding an allocation and to avoid underutilizing the resource, prohibitions against further taking and retaining, receiving, or at-sea processing of Pacific whiting, or reapportionment of non-whiting groundfish with allocations may be made effective immediately by actual notice to fishers and processors, by e-mail, Internet (*http://www.nwr.noaa.gov/Groundfish-Halibut/Groundfish-Fishery-Management/Whiting-Management/index.cfm*), phone, fax, letter, press release, and/or USCG Notice to Mariners (monitor channel 16 VHF), followed by publication in the **Federal Register,** in which instance public comment will be sought for a reasonable period of time thereafter.

(d) *C/P coop permit and agreement*—(1) *Eligibility and registration*—(i) *Eligibility.* To be an eligible coop entity a group of C/P-endorsed permit owners (coop members) must be a recognized entity under the laws of the United States or the laws of a State and that represents all of the coop members.

(ii) *Annual registration and deadline.* Each year, the coop entity must submit a complete application to NMFS for a C/P coop permit. The application must be submitted to NMFS by between February 1 and March 31 of the year in which it intends to participate. NMFS will not consider any applications received after March 31. A C/P coop permit expires on December 31 of the year in which it was issued.

(iii) *Application for a C/P coop permit.* The designated coop manager, on behalf of the coop entity, must submit a complete application form and include each of the items listed in paragraph (d)(1)(iii)(A) of this section. Only complete applications will be considered for issuance of a C/P coop permit. An application will not be considered complete if any required application fees and annual coop reports have not been received by NMFS. NMFS may request additional supplemental documentation as necessary to make a determination of whether to approve or disapprove the application. Application forms and instruction are available on the NMFS NWR Web site (*http://www.nwr.noaa.gov*) or by request from NMFS. The designated coop manager

must sign the application acknowledging the responsibilities of a designated coop manager defined in paragraph (b)(2) of this section.

(A) *Coop agreement.* Signed copies of the coop agreement must be submitted to NMFS before the coop is authorized to engage in fishing activities. A coop agreement must include all of the information listed in this paragraph to be considered a complete coop agreement. NMFS will only review complete coop agreements. A coop agreement will not be accepted unless it includes all of the required information; the descriptive items listed in this paragraph appear to meet the stated purpose; and information submitted is correct and accurate.

(*1*) *Coop agreement contents.* The coop agreement must be signed by the coop members (C/P-endorsed permit owners) and include the following information:

(*i*) A list of all vessels registered to C/P-endorsed permits that the member permit owners intend to use for fishing under the C/P coop permit.

(*ii*) All C/P-endorsed limited entry member permits identified by permit number.

(*iii*) A description of the coop's plan to adequately monitor and account for the catch of Pacific whiting and non-whiting groundfish allocations, and to monitor and account for the catch of prohibited species.

(*iv*) A clause stating that if a permit is transferred during the effective period of the co-op agreement, any new owners of that member permit would be coop members and are required to comply with membership restrictions in the coop agreement.

(*v*) A description of the coop's enforcement and penalty provisions adequate to maintain catch of Pacific whiting and non-whiting groundfish within the allocations.

(*vi*) A description of measures to reduce catch of overfished species.

(*vii*) A clause describing how the annual report will be produced to document the coop's catch, bycatch data, and any other significant activities undertaken by the coop during the year, and the submission deadlines for that report.

(*viii*) Identification of the designated coop manager.

(*2*) [Reserved]

(B) *Acceptance of a coop agreement*—(*1*) If NMFS does not accept the coop agreement, the coop permit application will be returned to the applicant with a letter stating the reasons the coop agreement was not accepted by NMFS.

(*2*) Coop agreements that are not accepted may be resubmitted for review by sufficiently addressing the deficiencies identified in the NMFS letter and resubmitting the entire coop permit application by the date specified in the NMFS letter.

(*3*) An accepted coop agreement that was submitted with the C/P coop permit application and for which a C/P coop permit was issued will remain in place through the end of the calendar year. The designated coop manager must resubmit a complete coop agreement to NMFS consistent with the coop agreement contents described in this paragraph if there is a material change to the coop agreement.

(*4*) Within 7 calendar days following a material change, the designated coop manager must notify NMFS of the material change. Within 30 calendar days, the designated coop manger must submit to NMFS the revised coop agreement with a letter that describes such changes. NMFS will review the material changes and provide a letter to the coop manager that either accepts the changes as given or does not accept the revised coop agreement with a letter stating the reasons that it was not accepted by NMFS. The coop may resubmit the coop agreement with further revisions to the material changes responding to NMFS concerns.

(iv) *Effective date of C/P coop permit.* A C/P coop permit will be effective on the date approved by NMFS and will allow fishing from the start of the C/P sector primary whiting season until the end of the calendar year or until one or more of the following events occur, whichever comes first:

(A) NMFS closes the C/P sector fishing season for the year or the designated coop manager notifies NMFS that the coop has completed fishing for the calendar year,

(B) The C/P coop has reached its Pacific whiting allocation,

(C) A material change to the coop agreement has occurred and the designated coop manager failed to notify NMFS within 7 calendar days of the material change and submit to NMFS the revised coop agreement with a letter that describes such changes within 30 calendar days, or

(D) NMFS has determined that a coop failure occurred.

(2) *Initial administrative determination.* For all complete applications, NMFS will issue an IAD that either approves or disapproves the application. If approved, the IAD will include a C/P coop permit. If disapproved, the IAD will provide the reasons for this determination.

(3) *Appeals.* An appeal to a C/P coop permit action follows the same process as the general permit appeals process defined at § 660.25(g), subpart C.

(4) *Fees.* The Regional Administrator is authorized to charge fees for administrative costs associated with the issuance of a C/P coop permit consistent with the provisions given at § 660.25(f), subpart C.

(5) *Cost recovery.* [Reserved]

(e) *C/P-endorsed permit*—(1) *General.* Any vessel participating in the C/P sector of the non-tribal primary Pacific whiting fishery during the season described at § 660.131(b) of this subpart must be registered to a valid limited entry permit with a C/P endorsement. A C/P-endorsed permit is a limited entry permit and is subject to the limited entry permit provisions given at § 660.25(b), subpart C.

* * * * *

(2) *Renewal, change in permit ownership, vessel registration, or combination.*

(i) *Renewal.* A C/P-endorsed permit must be renewed annually consistent with the limited entry permit regulations given at § 660.25(b)(4), subpart C. If a vessel registered to the C/P-endorsed permit will operate as a mothership in the year for which the permit is renewed, the permit owner must make a declaration as part of the permit renewal that while participating in the whiting fishery they will operate solely as a mothership during the calendar year to which its limited entry permit applies. Any such declaration is binding on the vessel for the calendar year, even if the permit is transferred during the year, unless it is rescinded in response to a written request from the permit owner. Any request to rescind a declaration must be made by the permit holder and granted in writing by the Regional Administrator before any unprocessed whiting has been taken on board the vessel that calendar year.

(ii) *Change of permit ownership.* A C/P-endorsed permit is subject to the limited entry permit change in permit ownership regulations given at § 660.25(b)(4), subpart C.

(iii) *Change of vessel registration.* A C/P-endorsed permit is subject to the limited entry permit change of vessel registration regulations given at § 660.25(b)(4), subpart C.

(iv) *Combination.* If two or more permits are combined, the resulting permit is one permit with an increased size endorsement. A C/P-endorsed permit that is combined with another limited entry trawl-endorsed permit that does not have a C/P endorsement will result in a single trawl limited entry permit with a C/P endorsement with a larger size endorsement. Any request to

combine permits is subject to the provisions provided at § 660.25(b), including the combination formula for resulting size endorsements.

(3) *Appeals.* An appeal to a C/P-endorsed permit action follows the same process as the general permit appeals process defined at § 660.25(g), subpart C.

(4) *Fees.* The Regional Administrator is authorized to charge fees for the administrative costs associated with review and issuance of a C/P endorsement consistent with the provisions at § 660.25(f), subpart C.

(5) [Reserved]

* * * * *

(6) * * *

(vii) *Initial Administrative Determination (IAD).* NMFS will issue an IAD for all complete, certified applications received by the application deadline date. If NMFS approves an application, the applicant will receive a C/P endorsement on a limited entry trawl permit. If NMFS disapproves an application, the IAD will provide the reasons. If the applicant does not appeal the IAD within 60 calendar days of the date on the IAD, the IAD becomes the final decision of the Regional Administrator acting on behalf of the Secretary of Commerce.

* * * * *

(g) *Observer requirements*—(1) *Observer coverage requirements*—(i) *Coverage.* Any vessel registered to a C/P-endorsed limited entry trawl permit that is 125 ft (38.1 m) LOA or longer must carry two NMFS-certified observers, and any vessel registered to a C/P-endorsed limited entry trawl permit that is shorter than 125 ft (38.1 m) LOA must carry one NMFS-certified observer, each day that the vessel is used to take, retain, receive, land, process, or transport groundfish.

(ii) *Observer workload.* The time required for the observer to complete sampling duties must not exceed 12 consecutive hours in each 24-hour period.

(iii) *Refusal to board.* Any boarding refusal on the part of the observer or vessel must be reported to the observer program and NOAA OLE by the observer provider. The observer must be available for an interview with the observer program or NOAA OLE if necessary.

(2) *Vessel responsibilities.* An operator and/or crew of a vessel required to carry an observer must provide:

(i) *Accommodations and food.* Provide accommodations and food that are equivalent to those provided for officers, engineers, foremen, deck-bosses or other management level personnel of the vessel.

(ii) *Safe conditions*—(A) Maintain safe conditions on the vessel for the protection of observers including adherence to all U.S. Coast Guard and other applicable rules, regulations, or statutes pertaining to safe operation of the vessel, including but not limited to, rules of the road, vessel stability, emergency drills, emergency equipment, vessel maintenance, vessel general condition, and port bar crossings. An observer may refuse boarding or reboarding a vessel and may request a vessel to return to port if operated in an unsafe manner or if unsafe conditions are identified.

(B) Have on board a valid Commercial Fishing Vessel Safety Decal that certifies compliance with regulations found in 33 CFR chapter I and 46 CFR chapter I, a certificate of compliance issued pursuant to 46 CFR 28.710 or a valid certificate of inspection pursuant to 46 U.S.C. 3311.

(iii) *Computer hardware and software.* Catcher/processor vessels must:

(A) Provide hardware and software pursuant to regulations at §§ 679.50(g)(1)(iii)(B)(1) through 679.50(g)(1)(iii)(B)(3).

(B) Provide the observer(s) access to a computer required under paragraph (g)(2)(iii) of this section that is connected to a communication device that provides a point-to-point connection to the NMFS host computer.

(C) Ensure that the catcher/processor has installed the most recent release of NMFS data entry software provided by the Regional Administrator, or other approved software prior to the vessel receiving, catching or processing IFQ species.

(D) Ensure that the communication equipment required in paragraph (g)(2)(iii) of this section and used by observers to enter and transmit data, is fully functional and operational. "Functional" means that all the tasks and components of the NMFS supplied, or other approved, software described at paragraph (g)(2)(iii) of this section and the data transmissions to NMFS can be executed effectively aboard the vessel by the communications equipment.

(iv) *Vessel position.* Allow observer(s) access to, the vessel's navigation equipment and personnel, on request, to determine the vessel's position.

(v) *Access.* Allow observer(s) free and unobstructed access to the vessel's bridge, trawl or working decks, holding bins, processing areas, freezer spaces, weight scales, cargo holds, and any other space that may be used to hold, process, weigh, or store fish or fish products at any time.

(vi) *Prior notification.* Notify observer(s) at least 15 minutes before fish are brought on board, or fish and fish products are transferred from the vessel, to allow sampling the catch or observing the transfer.

(vii) *Records.* Allow observer(s) to inspect and copy any State or Federal logbook maintained voluntarily or as required by regulation.

(viii) *Assistance.* Provide all other reasonable assistance to enable observer(s) to carry out their duties, including, but not limited to:

(A) Measuring decks, codends, and holding bins.

(B) Providing the observer(s) with a safe work area.

(C) Collecting samples of catch.

(D) Collecting and carrying baskets of fish.

(E) Allowing the observer(s) to collect biological data and samples.

(F) Providing adequate space for storage of biological samples.

(ix) *Sampling station and operational requirements for catcher/processor vessels.* This paragraph contains the requirements for observer sampling stations. To allow the observer to carry out the required duties, the vessel owner must provide an observer sampling station that meets the following requirements:

(A) *Accessibility.* The observer sampling station must be available to the observer at all times.

(B) *Location.* The observer sampling station must be located within 4 m of the location from which the observer samples unsorted catch.

(C) *Access.* Unobstructed passage must be provided between the observer sampling station and the location where the observer collects sample catch.

(D) *Minimum work space.* The observer must have a working area of at least 4.5 square meters, including the observer's sampling table, for sampling and storage of fish to be sampled. The observer must be able to stand upright and have a work area at least 0.9 m deep in the area in front of the table and scale.

(E) *Table.* The observer sampling station must include a table at least 0.6 m deep, 1.2 m wide and 0.9 m high and no more than 1.1 m high. The entire surface area of the table must be available for use by the observer. Any area for the observer sampling scale is in addition to the minimum space requirements for the table. The observer's sampling table must be secured to the floor or wall.

(F) *Diverter board.* The conveyor belt conveying unsorted catch must have a removable board ("diverter board") to allow all fish to be diverted from the

belt directly into the observer's sampling baskets. The diverter board must be located downstream of the scale used to weigh total catch. At least 1 m of accessible belt space, located downstream of the scale used to weight total catch, must be available for the observer's use when sampling.

(G) *Other requirements.* The sampling station must be in a well-drained area that includes floor grating (or other material that prevents slipping), lighting adequate for day or night sampling, and a hose that supplies fresh or sea water to the observer.

(H) *Observer sampling scale.* The observer sample station must include a NMFS-approved platform scale (pursuant to requirements at § 679.28(d)(5)) with a capacity of at least 50 kg located within 1 m of the observer's sampling table. The scale must be mounted so that the weighing surface is no more than 0.7 m above the floor.

(x) *Transfer at sea.* Observers may be transferred at-sea between catcher-processors, between catcher-processors and motherships, or between a catcher-processor and a catcher vessel. Transfers at-sea between catcher vessels is prohibited. For transfers, both vessels must:

(A) Ensure that transfers of observers at sea via small boat under its own power are carried out during daylight hours, under safe conditions, and with the agreement of observers involved.

(B) Notify observers at least 3 hours before observers are transferred, such that the observers can finish any sampling work, collect personal belongings, equipment, and scientific samples.

(C) Provide a safe pilot ladder and conduct the transfer to ensure the safety of observers during transfers.

(D) Provide an experienced crew member to assist observers in the small boat in which any transfer is made.

(3) *Procurement of observer services*—(i) Owners of vessels required to carry observers under paragraph (g)(1) of this section must arrange for observer services from a permitted observer provider, except that:

(A) Vessels are required to procure observer services directly from NMFS when NMFS has determined and given notification that the vessel must carry NMFS staff or an individual authorized by NMFS in lieu of an observer provided by a permitted observer provider.

(B) Vessels are required to procure observer services directly from NMFS and a permitted observer provider when NMFS has determined and given notification that the vessel must carry NMFS staff and/or individuals authorized by NMFS, in addition to an observer provided by a permitted observer provider.

(ii) [Reserved]

(4) *Application to become an observer provider.* Any observer provider holding a valid permit issued by the North Pacific Groundfish Observer Program in 2010 can supply observer services and will be issued a West Coast Groundfish Observer Program permit.

(5) *Observer provider responsibilities*—(i) *Provide qualified candidates to serve as observers.* Observer providers must provide qualified candidates to serve as observers. To be qualified, a candidate must have:

(A) A Bachelor's degree or higher from an accredited college or university with a major in one of the natural sciences;

(B) Successfully completed a minimum of 30 semester hours or equivalent in applicable biological sciences with extensive use of dichotomous keys in at least one course;

(C) Successfully completed at least one undergraduate course each in math and statistics with a minimum of 5 semester hours total for both; and

(D) Computer skills that enable the candidate to work competently with standard database software and computer hardware.

(ii) *Hiring an observer candidate*—(A) The observer provider must provide the candidate a copy of NMFS-provided pamphlets, information and other literature describing observer duties (*i.e.* The At-Sea Hake Observer Program's Observer Manual) prior to hiring an observer candidate. Observer job information is available from the Observer Program Office's Web site at *www.nwfsc.noaa.gov/research/divisions/fram/observer/atseahake.cfm.*

(B) *Observer contracts.* The observer provider must have a written contract or a written contract addendum that is signed by the observer and observer provider prior to the observer's deployment with the following clauses:

(*1*) That all the observer's in-season messages and catch reports required to be sent while deployed are delivered to the Observer Program Office as specified by written Observer Program instructions;

(*2*) That the observer inform the observer provider prior to the time of embarkation if he or she is experiencing any new mental illness or physical ailments or injury since submission of the physician's statement as required as a qualified observer candidate that would prevent him or her from performing their assigned duties.

(iii) *Ensure that observers complete duties in a timely manner.* An observer provider must ensure that observers employed by that observer provider do the following in a complete and timely manner:

(A) Submit to NMFS all data, logbooks and reports as required by the Observer Manual;

(B) Report for his or her scheduled debriefing and complete all debriefing responsibilities;

(C) Return all sampling and safety gear to the Observer Program Office;

(D) Submit all biological samples from the observer's deployment by the completion of the electronic vessel and/or processor survey(s); and

(E) Immediately report to the Observer Program Office and the NOAA OLE any refusal to board an assigned vessel.

(iv) *Observers provided to vessel.* Observers provided to catcher processors:

(A) Must have a valid North Pacific groundfish observer certification endorsements and an At-Sea Hake Observer Program certification;

(B) Must not have informed the provider prior to the time of embarkation that he or she is experiencing a mental illness or a physical ailment or injury developed since submission of the physician's statement that would prevent him or her from performing his or her assigned duties; and

(C) Must have successfully completed all NMFS required training and briefing before deployment.

(v) *Respond to industry requests for observers.* An observer provider must provide an observer for deployment as requested pursuant to the contractual relationship with the vessel to fulfill vessel requirements for observer coverage specified under paragraph (g)(1) of this section. An alternate observer must be supplied in each case where injury or illness prevents the observer from performing his or her duties or where the observer resigns prior to completion of his or her duties. If the observer provider is unable to respond to an industry request for observer coverage from a vessel for whom the provider is in a contractual relationship due to lack of available observers by the estimated embarking time of the vessel, the provider must report it to the observer program at least 4 hours prior to the vessel's estimated embarking time.

(vi) *Provide observer salaries and benefits.* An observer provider must provide to its observer employees salaries and any other benefits and personnel services in accordance with the terms of each observer's contract.

(vii) *Provide observer deployment logistics.* An observer provider must provide to each of its observers under contract:

(A) All necessary transportation, including arrangements and logistics, of observers to the initial location of deployment, to all subsequent vessel assignments during that deployment, and to the debriefing location when a deployment ends for any reason; and

(B) Lodging, per diem, and any other services necessary to observers assigned to fishing vessels.

(*1*) An observer under contract may be housed on a vessel to which he or she is assigned:

(*i*) Prior to their vessel's initial departure from port;

(*ii*) For a period not to exceed 24 hours following the completion of an offload when the observer has duties and is scheduled to disembark; or

(*iii*) For a period not to exceed twenty-four hours following the vessel's arrival in port when the observer is scheduled to disembark.

(*2*) [Reserved]

(C) During all periods an observer is housed on a vessel, the observer provider must ensure that the vessel operator or at least one crew member is aboard.

(D) An observer under contract who is between vessel assignments must be provided with shoreside accommodations in accordance with the contract between the observer and the observer provider. If the provider is providing accommodations, it must be at a licensed hotel, motel, bed and breakfast, or other shoreside accommodations for the duration of each period between vessel or shoreside assignments. Such accommodations must include an assigned bed for each observer and no other person may be assigned that bed for the duration of that observer's stay. Additionally, no more than four beds may be in any room housing observers at accommodations meeting the requirements of this section.

(viii) *Observer deployment limitations.* An observer provider must not exceed observer deployment limitations specified in this paragraph unless alternative arrangements are approved by the Observer Program Office. An observer provider must not:

(A) Deploy an observer on the same vessel for more than 90 days in a 12-month period;

(B) Deploy an observer for more than 90 days in a single deployment;

(C) Include more than four vessel assignments in a single deployment, or

(D) Disembark an observer from a vessel before that observer has completed his or her sampling or data transmission duties.

(ix) *Verify vessel's safety decal.* An observer provider must verify that a vessel has a valid USCG safety decal as required under paragraph (g)(2)(ii)(B) of this section before an observer may get underway aboard the vessel. One of the following acceptable means of verification must be used to verify the decal validity:

(A) The observer provider or employee of the observer provider, including the observer, visually inspects the decal aboard the vessel and confirms that the decal is valid according to the decal date of issuance; or

(B) The observer provider receives a hard copy of the USCG documentation of the decal issuance from the vessel owner or operator.

(x) *Maintain communications with observers.* An observer provider must have an employee responsible for observer activities on call 24 hours a day to handle emergencies involving observers or problems concerning observer logistics, whenever observers are at sea, in transit, or in port awaiting vessel reassignment.

(xi) *Maintain communications with the Observer Program Office.* An observer provider must provide all of the following information by electronic transmission (e-mail), fax, or other method specified by NMFS.

(A) *Observer training and briefing.* Observer training and briefing registration materials must be submitted to the Observer Program Office at least 5 business days prior to the beginning of a scheduled observer at-sea hake training or briefing session. Registration materials consist of the following: The date of requested training or briefing with a list of observers including each observer's full name (i.e., first, middle and last names).

(B) *Projected observer assignments.* Prior to the observer's completion of the training or briefing session, the observer provider must submit to the Observer Program Office a statement of projected observer assignments that include the observer's name; vessel, gear type, and vessel/processor code; port of embarkation; and area of fishing.

(C) *Observer debriefing registration.* The observer provider must contact the At-Sea Hake Observer Program within 5 business days after the completion of an observer's deployment to schedule a date, time and location for debriefing. Observer debriefing registration information must be provided at the time of debriefing scheduling and must include the observer's name, cruise number, vessel name(s) and code(s), and requested debriefing date.

(D) *Observer provider contracts.* If requested, observer providers must submit to the Observer Program Office a completed and unaltered copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and those entities requiring observer services under paragraph (g)(1) of this section. Observer providers must also submit to the Observer Program Office upon request, a completed and unaltered copy of the current or most recent signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract and any agreements or policies with regard to observer compensation or salary levels) between the observer provider and the particular entity identified by the Observer Program or with specific observers. The copies must be submitted to the Observer Program Office via fax or mail within 5 business days of the request. Signed and valid contracts include the contracts an observer provider has with:

(*1*) Vessels required to have observer coverage as specified at paragraph (g)(1) of this section; and

(*2*) Observers.

(E) *Change in observer provider management and contact information.* Observer providers must submit notification of any other change to provider contact information, including but not limited to, changes in contact name, phone number, e-mail address, and address.

(F) *Other reports.* Reports of the following must be submitted in writing to the At-Sea Hake Observer Program Office by the observer provider via fax or e-mail address designated by the Observer Program Office within 24 hours after the observer provider becomes aware of the information:

(*1*) Any information regarding possible observer harassment;

(*2*) Any information regarding any action prohibited under §§ 660.112 or 600.725(o), (t) and (u);

(*3*) Any concerns about vessel safety or marine casualty under 46 CFR 4.05–1(a)(1) through (7);

(*4*) Any observer illness or injury that prevents the observer from completing any of his or her duties described in the observer manual; and

(*5*) Any information, allegations or reports regarding observer conflict of interest or breach of the standards of behavior described in observer provider policy.

(xii) *Replace lost or damaged gear.* An observer provider must replace all lost or damaged gear and equipment issued by NMFS to an observer under contract

to that provider. All replacements must be in accordance with requirements and procedures identified in writing by the Observer Program Office.

(xiii) *Maintain confidentiality of information.* An observer provider must ensure that all records on individual observer performance received from NMFS under the routine use provision of the Privacy Act or other applicable law remain confidential and are not further released to anyone outside the employ of the observer provider company to whom the observer was contracted except with written permission of the observer.

(xiv) *Limitations on conflict of interest.* An observer provider must meet limitations on conflict of interest. Observer providers:

(A) Must not have a direct financial interest, other than the provision of observer services, in a fishery managed under an FMP for the waters off the coasts of Alaska, Washington, Oregon, and California, including, but not limited to:

(*1*) Any ownership, mortgage holder, or other secured interest in a vessel or shoreside processor facility involved in the catching, taking, harvesting or processing of fish,

(*2*) Any business involved with selling supplies or services to any vessel or shoreside processors participating in a fishery managed pursuant to an FMP in the waters off the coasts of Alaska, California, Oregon, and Washington, or

(*3*) Any business involved with purchasing raw or processed products from any vessel or shoreside processor participating in a fishery managed pursuant to an FMP in the waters off the coasts of Alaska, California, Oregon, and Washington.

(B) Must assign observers without regard to any preference by representatives of vessels other than when an observer will be deployed.

(C) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value except for compensation for providing observer services from anyone who conducts fishing or fish processing activities that are regulated by NMFS in the Pacific coast or North Pacific regions, or who has interests that may be substantially affected by the performance or nonperformance of the official duties of observer providers.

(xv) *Observer conduct and behavior.* An observer provider must develop and maintain a policy addressing observer conduct and behavior for their employees that serve as observers. The policy shall address the following behavior and conduct:

(A) Observer use of alcohol;

(B) Observer use, possession, or distribution of illegal drugs; and

(C) Sexual contact with personnel of the vessel or processing facility to which the observer is assigned, or with any vessel or processing plant personnel who may be substantially affected by the performance or non-performance of the observer's official duties.

(D) An observer provider shall provide a copy of its conduct and behavior policy by February 1 of each year, to observers, observer candidates, and the Observer Program Office.

(xvi) *Refusal to deploy an observer.* Observer providers may refuse to deploy an observer on a requesting vessel if the observer provider has determined that the requesting vessel is inadequate or unsafe pursuant to those regulations described at § 600.746 or U.S. Coast Guard and other applicable rules, regulations, statutes, or guidelines pertaining to safe operation of the vessel.

(6) *Observer certification and responsibilities*—(i) *Applicability.* Observer certification authorizes an individual to fulfill duties as specified in writing by the NMFS Observer Program Office while under the employ of a NMFS-permitted observer provider and according to certification endorsements as designated under paragraph (g)(6)(iii) of this section.

(ii) *Observer certification official.* The Regional Administrator will designate a NMFS observer certification official who will make decisions for the Observer Program Office on whether to issue or deny observer certification.

(iii) *Certification requirements*—(A) *Initial certification.* NMFS may certify individuals who, in addition to any other relevant considerations:

(*1*) Are employed by an observer provider company holding a valid North Pacific Groundfish Observer Program permit at the time of the issuance of the certification to the observer;

(*2*) Have provided, through their observer provider:

(*i*) Information set forth at § 679.50 regarding an observer candidate's health and physical fitness for the job;

(*ii*) Meet all observer education and health standards as specified in § 679.50; and

(*iii*) Have successfully completed NMFS-approved training as prescribed by the At-Sea Hake Observer Program and/or the West Coast Groundfish Observer Program. Successful completion of training by an observer applicant consists of meeting all attendance and conduct standards issued in writing at the start of training; meeting all performance standards issued in writing at the start of training for assignments, tests, and other evaluation tools; and completing all other training requirements established by the Observer Program.

(*iv*) Have not been decertified under paragraph (g)(6)(ix) of this section, or pursuant to § 679.50.

(B) [Reserved]

(iv) *Denial of a certification.* The NMFS observer certification official will issue a written determination denying observer certification if the candidate fails to successfully complete training, or does not meet the qualifications for certification for any other relevant reason.

(v) *Issuance of an observer certification.* An observer certification may be issued upon determination by the observer certification official that the candidate has successfully met all requirements for certification as specified in paragraph (g)(6)(iii) of this section. The following endorsements must be obtained, in addition to observer certification, in order for an observer to deploy.

(A) *North Pacific Groundfish Observer Program certification training endorsement.* A certification training endorsement signifies the successful completion of the training course required to obtain observer certification. This endorsement expires when the observer has not been deployed and performed sampling duties as required by the Observer Program Office for a period of time, specified by the Observer Program, after his or her most recent debriefing. The observer can renew the endorsement by successfully completing certification training once more.

(B) *North Pacific Groundfish Observer Program annual general endorsements.* Each observer must obtain an annual general endorsement to their certification prior to his or her first deployment within any calendar year subsequent to a year in which a certification training endorsement is obtained. To obtain an annual general endorsement, an observer must successfully complete the annual briefing, as specified by the Observer Program. All briefing attendance, performance, and conduct standards required by the Observer Program must be met.

(C) *North Pacific Groundfish Observer Program deployment endorsements.* Each observer who has completed an initial deployment after certification or annual briefing must receive a deployment endorsement to their certification prior to any subsequent deployments for the remainder of that year. An observer may obtain a deployment endorsement by

successfully completing all pre-cruise briefing requirements. The type of briefing the observer must attend and successfully complete will be specified in writing by the Observer Program during the observer's most recent debriefing.

(D) *At-Sea Hake Observer Program endorsements.* A Pacific hake fishery endorsement is required for purposes of performing observer duties aboard vessels that process groundfish at sea in the Pacific whiting fishery. A Pacific whiting fishery endorsement to an observer's certification may be obtained by meeting the following requirements:

(*1*) Be a prior NMFS-certified observer in the groundfish fisheries off Alaska, unless an individual with this qualification is not available;

(*2*) Receive an evaluation by NMFS for his or her most recent deployment that indicated that the observer's performance met Observer Program expectations for that deployment;

(*3*) Successfully complete a NMFS-approved observer training and/or Pacific whiting briefing as prescribed by the Observer Program; and

(*4*) Comply with all of the other requirements of this section.

(vi) *Maintaining the validity of an observer certification.* After initial issuance, an observer must keep their certification valid by meeting all of the following requirements specified below:

(A) Successfully perform their assigned duties as described in the Observer Manual or other written instructions from the Observer Program Office including calling into the NMFS deployment hotline upon departing and arriving into port each trip to leave the following information: Observer name, phone number, vessel name departing on, date and time of departure and date and time of expected return.

(B) Accurately record their sampling data, write complete reports, and report accurately any observations of suspected violations of regulations relevant to conservation of marine resources or their environment.

(C) Not disclose collected data and observations made on board the vessel or in the processing facility to any person except the owner or operator of the observed vessel or an authorized officer or NMFS.

(D) Successfully complete NMFS-approved annual briefings as prescribed by the At-Sea Hake Observer Program.

(E) Successful completion of briefing by an observer applicant consists of meeting all attendance and conduct standards issued in writing at the start of training; meeting all performance standards issued in writing at the start of training for assignments, tests, and other evaluation tools; and completing all other briefing requirements established by the Observer Program.

(F) Successfully meet all expectations in all debriefings including reporting for assigned debriefings.

(G) Submit all data and information required by the observer program within the program's stated guidelines.

(vii) *Limitations on conflict of interest.* Observers:

(A) Must not have a direct financial interest, other than the provision of observer services, in a fishery managed pursuant to an FMP for the waters off the coast of Alaska, or in a Pacific Coast fishery managed by either the state or Federal Governments in waters off Washington, Oregon, or California, including but not limited to:

(*1*) Any ownership, mortgage holder, or other secured interest in a vessel, shore-based or floating stationary processor facility involved in the catching, taking, harvesting or processing of fish,

(*2*) Any business involved with selling supplies or services to any vessel, shore-based or floating stationary processing facility; or

(*3*) Any business involved with purchasing raw or processed products from any vessel, shore-based or floating stationary processing facilities.

(B) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who either conducts activities that are regulated by NMFS in the Pacific coast or North Pacific regions or has interests that may be substantially affected by the performance or nonperformance of the observers' official duties.

(C) May not serve as observers on any vessel or at any shore-based owned or operated by a person who employed the observer in the last two years.

(D) May not solicit or accept employment as a crew member or an employee of a vessel or shore-based processor while employed by an observer provider.

(E) Provisions for remuneration of observers under this section do not constitute a conflict of interest.

(viii) *Standards of behavior.* Observers must:

(A) Perform their assigned duties as described in the Observer Manual or other written instructions from the Observer Program Office.

(B) Immediately report to the observer program office and the NOAA Office of Law Enforcement any time they refuse to board a vessel.

(C) Accurately record their sampling data, write complete reports, and report accurately any observations of suspected violations of regulations relevant to conservation of marine resources or their environment.

(D) Not disclose collected data and observations made on board the vessel to any person except the owner or operator of the observed vessel, an authorized officer, or NMFS.

(ix) *Suspension and decertification*—(A) *Suspension and decertification review official.* The Regional Administrator (or a designee) will designate an observer suspension and decertification review official(s), who will have the authority to review observer certifications and issue initial administrative determinations of observer certification suspension and/or decertification.

(B) *Causes for suspension or decertification.* The suspension/decertification official may initiate suspension or decertification proceedings against an observer:

(*1*) When it is alleged that the observer has committed any acts or omissions of any of the following: Failed to satisfactorily perform the duties of observers as specified in writing by the NMFS Observer Program; or failed to abide by the standards of conduct for observers (including conflicts of interest);

(*2*) Upon conviction of a crime or upon entry of a civil judgment for: Commission of fraud or other violation in connection with obtaining or attempting to obtain certification, or in performing the duties as specified in writing by the NMFS Observer Program; commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or commission of any other offense indicating a lack of integrity or honesty that seriously and directly affects the fitness of observers.

(C) *Issuance of initial administrative determination.* Upon determination that suspension or decertification is warranted, the suspension/decertification official will issue a written IAD to the observer via certified mail at the observer's most current address provided to NMFS. The IAD will identify whether a certification is suspended or revoked and will identify the specific reasons for the action taken. Decertification is effective 30 calendar days after the date on the IAD, unless there is an appeal.

(D) *Appeals.* A certified observer who receives an IAD that suspends or revokes the observer certification may appeal the determination within 30 calendar days after the date on the IAD to the Office of Administrative Appeals pursuant to § 679.43.

(h) *C/P coop failure*—(1) The Regional Administrator will determine that a permitted C/P coop is considered to have failed if any one of the following occurs:

(i) Any current C/P-endorsed limited entry trawl permit is not identified as a C/P coop member in the coop agreement submitted to NMFS during the C/P coop permit application process;

(ii) Any current C/P-endorsed permit withdraws from the C/P coop agreement;

(iii) The coop members voluntarily dissolve the coop; or

(iv) The coop agreement is no longer valid.

(2) If the permitted C/P coop dissolves, the designated coop manager must notify NMFS SFD in writing of the dissolution of the coop.

(3) The Regional Administrator may make an independent determination of a coop failure based on factual information collected by or provided to NMFS.

(4) In the event of a NMFS-determined coop failure, or reported failure, the designated coop manager will be notified in writing about NMFS' determination.

(i) Upon notification of a coop failure, the C/P coop permit will no longer be in effect.

(ii) The C/P sector will convert to an IFQ-based fishery beginning the following calendar year after a coop failure, or a soon as practicable thereafter. NMFS will develop additional regulations, as necessary to implement an IFQ fishery for the C/P sector. Each C/P-endorsed permit would receive an equal distribution of QS from the total IFQ for the catcher/processor sector allocation.

■ 27. In § 660.212, the introductory text, and paragraphs (a)(2) and (c)(1), are revised to read as follows:

§ 660.212 Fixed gear fishery—prohibitions.

These prohibitions are specific to the limited entry fixed gear fisheries and to the limited entry trawl fishery Shorebased IFQ Program under gear switching. General groundfish prohibitions are found at § 660.12, subpart C. In addition to the general groundfish prohibitions specified in § 660.12, subpart C, it is unlawful for any person to:

(a) * * *

(2) Take, retain, possess, or land more than a single cumulative limit of a particular species, per vessel, per applicable cumulative limit period, except for sablefish taken in the limited entry, fixed gear sablefish primary season from a vessel authorized to fish in that season, as described at § 660.231, subpart E and except for IFQ species taken in the Shorebased IFQ Program from a vessel authorized under gear switching provisions as described at § 660.140.

* * * * *

(c) *Fishing in conservation areas*—(1) Operate a vessel registered to a limited entry permit with a longline, trap (pot), or trawl endorsement and longline and/or trap gear onboard in an applicable GCA (as defined at § 660.230(d)), except for purposes of continuous transiting, with all groundfish longline and/or trap gear stowed in accordance with § 660.212(a) or except as authorized in the groundfish management measures at § 660.230.

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[FR Doc. 2010–30527 Filed 12–7–10; 11:15 am]

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Federal Register

Wednesday,
December 15, 2010

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Preble's Meadow Jumping Mouse in Colorado; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2009–0013; MO 92210–0–0009]

RIN 1018–AW45

Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Preble's Meadow Jumping Mouse in Colorado

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate revised critical habitat for the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) (PMJM) in Colorado, where it is listed as threatened in a Significant Portion of the Range (SPR) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 411 miles (mi) (662 kilometers (km)) of rivers and streams and 34,935 acres (ac) (14,138 hectares (ha)) fall within the boundaries of revised critical habitat in Boulder, Broomfield, Douglas, El Paso, Jefferson, Larimer, and Teller Counties.

DATES: This rule becomes effective on January 14, 2011.

ADDRESSES: This final rule, the economic analysis, the environmental assessment, comments and materials received, and supporting documentation we used in preparing this final rule, are available for viewing on the Internet at *http://www.regulations.gov* (*see* Docket No. FWS–R6–ES–2009–0013) and also by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Colorado Ecological Services Office, 134 Union Boulevard, Suite 670, Lakewood, CO 80225; telephone 303–236–4773; facsimile 303–236–4005.

FOR FURTHER INFORMATION CONTACT: Susan Linner, Field Supervisor, U.S. Fish and Wildlife Service, Colorado Ecological Services Office (*see* **ADDRESSES**). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

It is our intent to discuss only those topics relevant to the designation of revised critical habitat in this final rule. For additional information on the biology of this subspecies, see our October 8, 2009, proposed rule to revise the designation of critical habitat for the PMJM (74 FR 52066); our July 10, 2008, final rule to amend the listing for the PMJM to specify over what portion of its range the subspecies is threatened (73 FR 39789); and our May 13, 1998, final rule to list the PMJM as threatened (63 FR 26517).

Previous Federal Actions

On August 22, 2003, the City of Greeley filed a complaint in the U.S. District Court for the District of Colorado challenging our June 23, 2003, designation of critical habitat for the PMJM (68 FR 37275) (*City of Greeley, Colorado* v. *United States Fish and Wildlife Service et al.,* Case No. 03–CV–01607–AP). On December 9, 2003, the Mountain States Legal Foundation filed a complaint in the U.S. District Court for the District of Wyoming challenging our 1998 listing of the PMJM and designation of critical habitat for the PMJM (*Mountain States Legal Foundation* v. *Gale E. Norton et al.,* Case No. 03–cv–250–J). That complaint was later expanded to include our July 10, 2008, final rule to amend the listing for the PMJM to specify over what portion of its range the subspecies is threatened (73 FR 39789) and transferred to the U.S. District Court for the District of Colorado (*Mountain States Legal Foundation* v. *Ken Salazar et al.,* Case No. 1:08–cv–2775–JLK). These lawsuits challenged the validity of the information and reasoning we used to designate critical habitat for the PMJM.

On July 20, 2007, we announced that we would review our June 23, 2003, designation of critical habitat for the PMJM (68 FR 37275) after questions were raised about the integrity of scientific information we used and whether the decision we made was consistent with the appropriate legal standards (Service 2007a). Based on our review of the previous critical habitat designation, we determined that it was necessary to revise critical habitat. This rule incorporates those revisions that we found appropriate.

On July 10, 2008, we amended the listing for the PMJM to specify over what portion of its range the subspecies is threatened (73 FR 39789), and determined that the listing of the PMJM is limited to the SPR in Colorado. Upon that determination, all critical habitat designated in 2003 within the State of Wyoming was removed from the regulations at 50 CFR 17.95 for this species.

On April 16, 2009, we reached a settlement agreement with the City of Greeley in which we agreed to reconsider our critical habitat designation for the PMJM. The settlement stipulated that we submit to the **Federal Register** a proposed rule for revised critical habitat by September 30, 2009, and a final rule for revised critical habitat by September 30, 2010 (U.S. District Court, District of Colorado 2009a). On June 16, 2009, an order was issued granting Mountain States Legal Foundation a motion to dismiss their claims on the 1998 listing and 2008 final determination without prejudice, and stayed their challenge to the 2003 critical habitat designation pursuant to the City of Greeley settlement (U.S. District Court, District of Colorado 2009b).

On October 8, 2009, we published a proposed rule in the **Federal Register** to revise the designation of critical habitat for the PMJM (74 FR 52066), and accepted public comments for 60 days (from October 8 to December 7, 2009). On May 27, 2010, we opened a second comment period of 30 days (from May 27 to June 28, 2010) and requested comments on our draft economic analysis (DEA) (Industrial Economics 2010a), draft environmental assessment, amended Required Determinations section of the proposed rule, and any other part of our proposed revised critical habitat designation (75 FR 29700). On August 9, 2010, an agreement with the City of Greeley extended the date for submission of the final rule for revised critical habitat to the **Federal Register** to December 1, 2010 (U.S. District Court, District of Colorado 2010).

For additional information about previous Federal actions concerning the PMJM, see our July 10, 2008, rule for the PMJM to specify over what portion of its range the subspecies is threatened (73 FR 39789).

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of revised critical habitat for the PMJM during the two comment periods. The first comment period, associated with the publication of the proposed rule to revise the designation of critical habitat for the PMJM (74 FR 52066) opened on October 8, 2009, and closed on December 7, 2009. We opened a second comment period on our DEA, draft environmental assessment, amended Required Determinations section of the proposed rule, and any other part of our proposed revised critical habitat designation (75 FR 29700) on May 27, 2010, and closed it on June 28, 2010. We also contacted peer reviewers; appropriate Federal, State, and local agencies; scientific organizations; and other interested parties, and invited

them to comment on the proposed rule and supporting documents.

We received 45 comments in response to the proposed rule. Comments were received from 2 peer reviewers, 1 Federal agency, 1 State agency, and 8 local governmental entities, 7 non-government organizations, and 18 private individuals (including 14 via similar post cards). Thirty-seven comments were received during the October 8 to December 7, 2009, comment period. Eight comments were received during the May 27 to June 28, 2010, comment period, all but one from entities that had commented previously. We received no requests for public hearings. All substantive comments have been either incorporated into the final determination or are addressed below.

Peer Review

In accordance with our policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we solicited expert opinions from three knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from two of the peer reviewers that we contacted. The peer reviewers generally agreed that we relied on the best scientific information available, accurately described the species and its habitat requirements, and concurred that our critical habitat proposal was well supported. The peer reviewers provided additional suggestions to improve the final critical habitat rule. Recommended editorial revisions and clarifications have been incorporated into the final rule as appropriate. We respond to all substantive comments below.

Comments From Peer Reviewers

(1) *Comment:* One peer reviewer commented that upstream and adjacent habitat, beyond designated critical habitat, requires management to decrease potential for catastrophic wildfire and flooding, and to maintain appropriate stream flow and channel integrity.

Our Response: We agree. Federal agencies are directed, under section 7(a)(1) of the Act (16 U.S.C. 1531 *et seq.*), to utilize their authorities to carry out programs for the conservation of endangered and threatened species. Proactive management on U.S. Forest Service (USFS) and other Federal lands upstream or outward from designated critical habitat should consider implications to the PMJM and its critical habitat. In addition, section 7(a)(2) of the Act requires every Federal agency to insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. The activity does not have to take place within PMJM habitat or critical habitat to be subject to section 7 consultation. In considering the effects of a proposed action, the Federal agency looks at both the direct and indirect effects of an action on the species or critical habitat. Indirect effects are caused by the proposed action, are later in time, and are reasonably certain to occur. If, for example, management activities on Federal land, or a Federal permit or Federal funding for an activity upstream of critical habitat, may result in increased runoff, sedimentation, or channel alteration within critical habitat, those effects must be considered by the Federal agency. Outside of Federal lands and when no Federal nexus is present, cooperative conservation efforts with State and local government, and private property owners are the most effective means of addressing appropriate land management.

(2) *Comment:* One peer reviewer commented that we should have emphasized the relationship of "subshrub cover" (low-growing woody shrubs or perennial plants with a woody base) and plant species richness with the presence of PMJM.

Our Response: We agree that these concepts are important to PMJM habitat. Low shrub cover and species richness are correlated with occupancy of riparian corridors by the PMJM. These relationships may be significant and are described in Clippinger (2002, p. 73). The primary constituent elements (PCEs) of critical habitat for the PMJM are described more broadly and include riparian corridors, in part, "containing dense, riparian vegetation consisting of grasses, forbs, or shrubs, or any combination thereof." We believe that this final rule appropriately captures the importance of the low, diverse vegetative cover essential to the conservation of PMJM.

(3) *Comment:* One peer reviewer maintained that our explanation of why Buffalo Creek and Wigwam Creek (Jefferson County) were not included as proposed critical habitat should be better supported.

Our Response: Areas along both Buffalo Creek and Wigwam Creek have been subject to catastrophic fires. These events caused subsequent flooding and increased sedimentation of these streams. Trapping efforts targeting PMJM have not been conducted in these areas since the fires; however, it is unlikely that severely burned areas are currently occupied by the PMJM. The areas remain degraded and for at least the near future will not support the PCEs necessary for the conservation of the PMJM in the appropriate quantity and spatial arrangement to support inclusion as critical habitat. Given the extent of critical habitat proposed elsewhere in this subdrainage, we conclude that it is not necessary or appropriate to designate critical habitat in these degraded stream reaches.

(4) *Comment:* One peer reviewer suggested that our failure to propose critical habitat on the Big Thompson River, North Fork of the Big Thompson River, and Little Thompson River was based more on issues of land ownership than on science.

Our Response: All three of these rivers are within the Big Thompson River subdrainage (subdrainages equate to U.S. Geological Survey 8-digit hydrological unit boundaries and are hereafter referred to as HUCs). Within this HUC we are designating Buckhorn Creek (Unit 3) and Cedar Creek (Unit 4) as critical habitat, but we identified no other areas that merited designation. Public lands, especially undeveloped Federal lands and other public lands currently devoted to conservation, are more likely to support viable PMJM populations, both currently and in the future. We made our determinations after examining both quality of existing habitat and land ownership, and prioritized designation of Federal lands within this HUC.

Public Comments

Biological Concerns and Methodology

(5) *Comment:* One commenter stated that proposed critical habitat should be expanded to reflect understanding of genetic diversity within the PMJM.

Our Response: Our designation of revised critical habitat incorporates current knowledge of genetic diversity in the PMJM. Genetic analysis has revealed significant differences between PMJM populations in northern and southern portions of the range (King *et al.* 2006, pp. 4337–4338). The Preble's Meadow Jumping Mouse Recovery Team (Jackson 2009, pers. comm.) concluded that recovery populations outlined in the Working Draft of a Recovery Plan (PMJM Recovery Team 2003), and included in the Preliminary Draft Recovery Plan (Draft Plan) (Service 2003a), were spread north and south to provide adequate representation of the genetic differences in northern and

southern portions of the range examined in King *et al.* (2006). This same approximate distribution in populations north and south is reflected in this revised critical habitat designation.

(6) *Comment:* One commenter urged the Service to consider the value of expanding proposed critical habitat to provide habitat linkage for PMJM populations north and south of Denver, and among other drainages where critical habitat was proposed.

Our Response: Potential connectivity of critical habitat was considered consistent with our conservation strategy and that proposed in the Draft Plan. In most cases, revised critical habitat units exceed minimum reach lengths for large, medium, and small populations proposed in the Draft Plan. All designated critical habitat units and subunits exceed 3 mi (5 km) in stream length, the minimum length of stream the Draft Plan prescribes for a small recovery population. In some cases, we chose not to link stream reaches through the designation of marginal habitat, or not to substantially extend critical habitat to encompass a larger PMJM population, where multiple smaller recovery populations are consistent with our conservation strategy.

(7) *Comment:* One commenter requested that, before designating revised critical habitat, the Service should consult with scientists regarding how climate change may affect PMJM movement, habitat needs, and habitat connectivity. For example, it was suggested that we should consider potential effects of changes in precipitation and earlier spring runoff.

Our Response: Variability in existing climate models suggests uncertainty as to future climate change and potential effects in Colorado, where the PMJM is listed. We have considered the potential impact of future climate change on the PMJM, and we believe that our revised designation adequately addresses likely climate change scenarios by designating critical habitat areas throughout the north-south range of the PMJM in Colorado that vary in elevation and in stream size (*see Climate Change,* below). In the Big Thompson River and Upper South Platte River drainages, we are designating critical habitat units in excess of those recovery populations called for in the Draft Plan to provide resilience, should climate change reduce the value of lower elevation habitats currently occupied by the PMJM. These units, the Cache La Poudre Unit (Unit 2) and the Upper South Platte Unit (Unit 11), are centered on Federal lands and include reaches extending to the highest elevation the PMJM is currently known to occupy in Colorado. If, in the future, a clearer picture of the effects of climate change on the PMJM is developed, further revision of critical habitat may be appropriate (*see also Climate Change,* below).

(8) *Comment:* One commenter stated that both sites where trapping has documented PMJM presence since 2003, and sites of earlier captures, should be included in designated critical habitat.

Our Response: Not all areas where the PMJM is known to occur in Colorado are being designated as revised critical habitat. See our response to comment 44. We incorporated the best scientific and commercial information available into this final rule, including information regarding all locations where PMJM have been trapped since our 2003 final rule. These more recent capture locations did not significantly expand the known distribution of the PMJM in Colorado. However, we did consider each new capture location and its potential significance prior to our proposing revised critical habitat for the PMJM.

(9) *Comment:* One commenter stated that the Draft Plan for the PMJM, which was cited as a basis for the Service's conservation strategy and certain decisions regarding proposed designation of revised critical habitat, is 6 years old and does not include current data.

Our Response: The 2003 Draft Plan (Service 2003a) provides a conservation strategy for the PMJM. It was developed primarily by the PMJM Recovery Team and refined through comments and additional information we received. Information on range, occupancy, populations, and habitat characteristics were used in developing the Draft Plan. Recent review by the current PMJM Recovery Team has verified that concepts and strategies incorporated into the Draft Plan remain appropriate (Jackson 2010, pers. comm.). However, we also incorporated new data, as appropriate, in developing our proposal and this final rule, including trapping results, genetic and morphometric confirmation of species identification, and changes to habitat.

(10) *Comment:* One commenter pointed out that the Service has not proposed critical habitat to address all recovery populations called for in the Draft Plan, including HUCs where the PMJM is known to occur.

Our Response: While the conservation strategy underlying our proposed revision of critical habitat was informed by the Draft Plan and the ongoing recovery planning process, areas we are designating as revised critical habitat in this rule will not be identical to areas ultimately designated as recovery populations. The Draft Plan designated location of certain recovery populations in HUCs where PMJM are known to be present. However, in some HUCs within the likely range of the PMJM, there is little or no available information on the existence of PMJM populations or the extent of occupied habitat. In these cases, the Draft Plan only applied standard criteria to achieve recovery of the species. For example, the Draft Plan required, at minimum, three small recovery populations or one medium recovery population in several HUCs, but only if the HUC was found to be occupied by the PMJM. Since we have determined that the conservation of the PMJM can be achieved by designating critical habitat in areas that are known to support the species, rather than in areas with no confirmed occupancy by the species, we are designating no critical habitat in HUCs where occupancy has not been confirmed. In other cases, such as the Kiowa HUC in Elbert County, trapping efforts have been limited to sites of human development, and, while there is confirmed occurrence of the PMJM, it is not sufficient to inform us of distribution or abundance within the HUC. We exercised our professional judgment and determined that those limited areas of confirmed occurrence of the PMJM in and near human development are not essential to the conservation of the PMJM. We are not designating such sites as critical habitat.

(11) *Comment:* One commenter stated that areas of critical habitat should be designated in excess of recovery goals suggested in the Draft Plan.

Our Response: In two HUCs, we are designating critical habitat units beyond those recovery populations that the Draft Plan specifies. We are designating critical habitat capable of supporting a large PMJM population independent of, and in addition to, the large recovery populations proposed in the Draft Plan along the Cache la Poudre River (Unit 2) in the Cache La Poudre River HUC and designated reaches of the Upper South Platte River and its tributaries (Unit 10) in excess of recovery goals for the Upper South Platte River HUC. In other HUCs, we did not identify or designate additional areas that met the definition of critical habitat in excess of recovery goals stated in the Draft Plan.

(12) *Comment:* Multiple commenters stated that the outward extent of proposed critical habitat did not accurately reflect limits of PMJM habitat. One commenter stated that distance outward from riparian vegetation is a much better predictor of PMJM habitat than is our use of distance

from the stream edge, based on stream order (a classification of streams by relative size). Another commenter stated that floodplain plus 100 meters should be used as the outward boundary of critical habitat on reaches where floodplain mapping is available.

Our Response: We believe that the outward extent of critical habitat we are designating includes all PCEs required by the PMJM and effectively protects habitat essential to the conservation of the PMJM. We agree that site-specific assessment of habitat components, including extent of riparian vegetation, is a more precise method of designating critical habitat (*see* our response to comment 14 below). However, site-specific mapping of PMJM habitat in Colorado is not generally available. Land use and recent site history complicate efforts to accurately assess and map riparian habitat limits. Floodplain mapping is not available for most foothill streams designated as PMJM critical habitat. Where limits of the designated 100-year floodplain have been mapped, floodplain limits are often revised, especially in the Colorado Front Range development corridor, where filling of the floodplain may occur and flood levels are altered by development. We used the best available scientific and commercial information with respect to determining the outward extent of PMJM critical habitat.

(13) *Comment:* One commenter suggested that the Service should provide detail on the development of the average floodplain widths used to designate outward limits of critical habitat for streams of different order and stated that the calculation needs to be based on a sufficient sample of sites across PMJM range to be meaningful.

Our Response: The estimates of average floodplain width based on stream order that we use in this designation of critical habitat were previously developed in conjunction with our June 23, 2003, designation of critical habitat for the PMJM (68 FR 37275). We believe that a sufficient number of representative streams were examined to provide an appropriate estimation of average floodplain width as related to stream order.

(14) *Comment:* One commenter stated that the Riparian Conservation Zone (RCZ) mapping, developed as part of the approved Douglas County Habitat Conservation Plan (HCP), corresponds better to appropriate outward limits of critical habitat than do the boundaries that the Service proposed for revised critical habitat, and that critical habitat boundaries should align with county-wide HCP boundaries for consistency and to avoid confusion.

Our Response: We agree that it is preferable that critical habitat boundaries match HCP boundaries where HCP boundaries accurately reflect limits of habitat essential to the conservation of the PMJM. RCZ boundaries in the Douglas County HCP were developed based on conservation strategies for the PMJM provided in the Draft Plan. After consideration, we are designating the outward boundaries of revised critical habitat on non-Federal lands in Douglas County to correspond to the boundaries developed for RCZ (see the Delineation of Critical Habitat Boundaries section).

Procedural and Legal Issues

(15) *Comment:* Two commenters stated that the Service cannot propose a critical habitat revision prior to analysis of alternatives under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*), a draft economic analysis (DEA), and a Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) analysis. They stated that the environmental and economic impacts of the proposed action must be considered prior to the proposal.

Our Response: By Service policy, we draft and circulate the NEPA, DEA, and Regulatory Flexibility Act analyses between the proposed and final critical habitat designation. Comments on the entire proposal, including the draft environmental assessment, DEA, and Regulatory Flexibility Act analysis, were accepted for 30 days following the May 27, 2010, publication making available these documents (75 FR 29700). The information provided in these documents and comments regarding them were fully considered prior to this final rule, in accordance with applicable regulations and statutes.

(16) *Comment:* Two commenters stated that the Service inappropriately proposed critical habitat in areas where the PMJM was not known to exist at the time of listing.

Our Response: Section 3(5)(A) of the Act defines critical habitat, in part, as those specific areas within the geographic area occupied by the species at the time of listing, and specific areas outside the geographic area occupied by the species at the time of listing upon determination that such areas are essential for the conservation of the species. Our designation constitutes our best assessment of areas determined to be within the geographical area occupied at the time of listing that contain the physical and biological features essential to the conservation of the PMJM that may require special management, and those additional areas not occupied at the time of listing, but that have been determined to be essential to the conservation of the PMJM. Management and protection of all the areas is necessary to achieve the conservation of PMJM. Therefore, we are also designating areas that were not known to be occupied at the time of listing, but which were subsequently identified as being occupied, and which we have determined to be essential to the conservation of the PMJM in our Preliminary Draft Recovery Plan (Service 2003a). We have based our critical habitat designation on the best currently available scientific information.

(17) *Comment:* One commenter stated that only areas "indispensible and absolutely necessary" to the PMJM should be designated as critical habitat and that the Service should include only the "minimum amount of habitat needed to avoid short-term jeopardy" (citing *Middle Rio Grande Conservancy District* v. *Babbitt*). Based on this reasoning, they asserted that we could not tie critical habitat to the Draft Plan, which addresses long-term recovery.

Our Response: Within the range of the listed species, critical habitat is defined to include areas occupied at the time of listing on which are found those physical or biological features essential to the conservation of the species, and which may require special management considerations or protection, and those additional areas not occupied at the time of listing but that have been determined to be essential to the conservation of the species. Conservation is defined in the Act as the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Limiting designation of critical habitat to avoiding "short-term jeopardy" would not meet the Act's intent that critical habitat provide for the conservation (e.g., recovery) of the species.

(18) *Comment:* One commenter expressed the concern that details of all existing HCPs involving the PMJM were not readily available for public review and that all HCPs should be available on the Service's "ECOS" Web site and the Service's Mountain-Prairie Region Web site.

Our Response: Most HCPs that address the PMJM have been available to the public on our ECOS Web site. When we were made aware that certain HCPs were not posted, we provided the commenter the requested materials as expeditiously as possible.

(19) *Comment:* One commenter stated that Geographic Information System (GIS) data depicting proposed critical habitat boundaries should have been made available for public review.

Our Response: We provided GIS depictions of proposed critical habitat when requested. Additionally, we believe that the legal description of stream reaches and outward distances from streams that we provided in our proposal to revise the designation of critical habitat were adequate to identify the areas proposed.

(20) *Comment:* One commenter recommended that we incorporate a provision in our critical habitat designation that would exclude from critical habitat areas covered by future HCPs, when completed.

Our Response: The basis for exclusions from critical habitat under section 4(b)(2) of the Act is explained in "Exclusions" below. We cannot make a determination now to exclude areas covered by HCPs that may be developed sometime in the future, because we have no way to evaluate the effectiveness, and determine whether the benefits of exclusion outweigh the benefits of inclusion, of plans that do not yet exist and have not been implemented. If, in the future, we determine that changes in designated critical habitat for the PMJM are appropriate, we have the option to revise critical habitat.

(21) *Comment:* One commenter asked us to confirm that the existing special 4(d) rule, which exempts take of PMJM under section 9 of the Act for specified activities, including ditch maintenance and any continued use of perfected water rights, is not affected by the designation of critical habitat.

Our Response: The 4(d) rule for the PMJM (*see* 50 CFR 17.40 (l)) provides certain exemptions from the take prohibitions found in section 9 of the Act. Take prohibitions under section 9 are not affected by the designation of critical habitat. The primary regulatory effects of a critical habitat designation under the Act are triggered through the provisions of section 7 of the Act, which applies only to activities conducted, authorized, or funded by a Federal agency. In limited cases, an activity that is excluded from take provisions under the 4(d) rule may require a Federal permit or involve Federal funding. In these cases, while take would be exempted under the 4(d) rule, section 7 consultation would still occur to ensure that Federal actions would not jeopardize the PMJM or result in destruction or adverse modification of its critical habitat.

(22) *Comment:* One commenter stated that under the Act, the Service must re-consult on any projects within newly designated critical habitat that previously underwent section 7 consultation.

Our Response: For Federal actions, the lead Federal agency determines whether their action may affect designated PMJM critical habitat. This applies to projects previously consulted on under section 7 where the Federal agency has retained discretionary involvement or control over the action. Federal agencies may sometimes need to request reinitiation of consultation on actions for which formal consultation has been completed (*see* 50 CFR 402.16).

Comments on Specific Units

(23) *Comment:* One commenter requested us to connect critical habitat Units 1 (North Fork of the Cache la Poudre River) and 2 (Cache la Poudre River) in Larimer County.

Our Response: The Milton Seaman Reservoir at the downstream extent of Unit 1 is a barrier to PMJM movement and effectively prevents linking of the two units. We do not believe that it is biologically necessary or possible to link these two units. See also our response to Comment 6.

(24) *Comment:* One commenter called for us to exclude the area proposed as critical habitat in Unit 1 (North Fork of the Cache la Poudre River) on the mainstem of the North Fork of the Cache la Poudre River upstream of the Milton Seaman Reservoir and within the footprint of the proposed reservoir expansion.

Our Response: We have not excluded this reach from designated critical habitat. This area includes Federal and State property that would potentially be inundated by the City of Greeley's proposed expansion of the Milton Seaman Reservoir. Expansion under the currently proposed plan would inundate about 3 mi (5 km) of the river. In 2002, the City of Greeley contended that the reach in question supported only patches of willow shrub, had little habitat for the PMJM, and did not meet the definition of critical habitat (Kolanz 2003). In our on June 23, 2003, designation of critical habitat (68 FR 37275), we concluded the area in question supported those physical or biological features essential to the conservation of the species, and may require special management considerations or protection. We stated that, within the reach in question, some habitat components appeared discontinuous, and PMJM habitat was, at that time, of lower quality than habitat upstream of this reach, due to heavy grazing. However, we concluded that the area in question did include the requisite PCEs to support the PMJM, and its designation as critical habitat was essential for the conservation of the large PMJM population along the North Fork of the Cache la Poudre River. The Service chose not to exclude this reach from critical habitat in 2003. This prompted the legal actions by the City of Greeley addressed in "*Previous Federal Actions*" above.

The City of Greeley, in a letter dated May 20, 2009, outlined its concerns regarding designation of critical habitat in this area, and requested exclusion of the area from revised critical habitat under section 4(b)(2) of the Act (Kolanz 2009a). The City of Greeley also submitted a report by ERO Resources Corporation (ERO) assessing the area to be inundated by the proposed reservoir expansion (ERO 2008). ERO concluded that of the approximately 165 ac (66.8 ha) of designated critical habitat that would be inundated, only about 26 acres were of moderate to high quality for the PMJM. Non-habitat and low-quality habitat were attributed to the dominant upland vegetation and steep slopes, while the moderate- to high-quality habitat was associated with the narrow riparian corridor (ERO 2008, pp. 11–12). In our October 8, 2009, proposal to revise the designation of critical habitat for the PMJM (74 FR 52066), we again determined that the area met the definition of critical habitat, that it included physical and biological features that are essential to the conservation of the species and that may require special management considerations or protection. Three other letters from the City of Greeley followed, two within public comment periods for the proposed revised critical habitat, expanding on the City of Greeley's concerns (Kolanz, 2009b, 2009c, 2010).

Consistent with previously stated concerns over habitat quality, the City of Greeley contended that the area in question is not essential to the conservation of the PMJM. The City of Greeley pointed out that it was not mapped as PMJM habitat in our proposal to establish special regulations for the conservation of the PMJM (December 3, 1998, 63 FR 66777), and was not shown to be "occupied" by PMJM in a recent Colorado Division of Wildlife (CDOW) database. The reach in question is part of the USFS Greyrock Grazing Allotment, which extends from Milton Seaman Reservoir, approximately 3 mi (5 km) upstream, and includes lands owned primarily by the USFS (about 2 mi (3 km) of the stream), as well as State lands, City of Greeley lands, and private lands (USFS

2008). The USFS 2008 Biological Assessment for management of the Greyrock Grazing Allotment explains the history of the site and past habitat limitations (USFS 2008). Heavy livestock grazing for many decades drastically reduced riparian shrubs and trees. In the last 7 years, riparian habitat quality has significantly improved in the reach. Following removal of grazing along the North Fork of the Cache la Poudre River, a notable increase in willow growth and a tall, dense herbaceous component of the plant community was observed in the riparian zone in 2007. With no further livestock grazing in the reach through 2010, a lush riparian community has developed that provides PCEs essential to the support of the PMJM, in quantity and spatial arrangement that suggests riparian habitat is now of high quality. Upland habitat in the reach has been slower to recover following heavy grazing, and weed control efforts are needed. While the PMJM had been documented upstream in this drainage, the reach above Milton Seaman Reservoir had not been trapped to establish whether the PMJM was present until 2010, when a limited trapping effort by the USFS captured a jumping mouse within the proposed reservoir expansion area (USFS 2010). The CDOW database will be updated accordingly. Restoration of habitat in this reach has advanced to the point where grazing will again take place on the allotment. Carefully managed grazing will maintain or improve PMJM habitat in this allotment into the future. The USFS has informally consulted with the Service over management of this allotment and we have concluded that carefully managed grazing will maintain or improve PMJM habitat on the allotment into the future.

The City of Greeley also stated that designation of critical habitat in this area would create significant financial burden on the City. Our DEA (section 5.3) assigns a low incremental cost ($20,000 to $38,000) to the designation of critical habitat for the Halligan Reservoir and Milton Seaman Reservoir projects. However, additional costs could be incurred should designation of critical habitat affect regulatory approval of the proposed project, and cause the City of Greeley to pursue a more costly alternative. Because of their speculative nature, these costs were not included in the DEA (see our response to Comment 56), but we discuss them in the FEA and here. Under section 7 of the Act, the Service will evaluate whether any proposed alternative for Milton Seaman Reservoir expansion under permit review by the U.S. Army Corps of Engineers (Corps) will jeopardize the PMJM or result in destruction or adverse modification of its designated critical habitat. Under the City of Greeley's worst case scenario, our designation of critical habitat and subsequent consultation regarding the reservoir project could result in a finding of "destruction or adverse modification of critical habitat" by the Service, or could result in the Corps denying a permit under the Clean Water Act (33 U.S.C. 1251 *et seq.*), based on the proposed project not being the "least damaging practicable alternative." To be attributable to our designation of critical habitat, an outcome and any resultant costs would have to differ from the results of regulatory review of the same project with no critical habitat designation. For example, the outcome would have to differ from the result of Service consultation in the absence of critical habitat that results in a jeopardy determination, or in the absence of critical habitat, the Corps denying a permit based on the presence of the PMJM, combined with an array of other considerations. The question of whether regulatory review under scenarios with or without critical habitat would produce different results contributes to the speculative nature of costs attributable to critical habitat designation. Factors relevant to possible future Service and Corps regulatory determinations follow.

Substantial planning has taken place between the City of Greeley, the Service, The Nature Conservancy, and other entities, to address potential impacts to the PMJM and its habitat from the planned reservoir expansion. The City of Greeley has expressed an interest in implementing conservation measures to offset impact of the proposed project to the PMJM prior to project construction. Conservation measures have been identified that could serve to offset project impacts to the PMJM, should the planned project move forward. These conservation measures are targeted at PMJM populations and supporting ecological processes in critical habitat Unit 1, which includes the reservoir expansion area. Further development of conservation measures and their incorporation into plans for proposed reservoir expansion could help maintain the value of this critical habitat unit to the recovery of the PMJM and reduce or eliminate the possibility of a jeopardy or adverse modification determination by the Service.

Our designation of critical habitat for the PMJM should be considered by the Corps as indicative of the high natural resource value of the lands designated. A decision that the area does not meet the definition of critical habitat would imply a lesser resource value. However, if the Service were to exclude the reach in question from critical habitat for reasons of relevant non-biological factors (economic, social, etc.), it would not change our determination that the area meets the definition of critical habitat, nor would it change the inherent resource value of the reach or its contribution to the conservation and recovery of the PMJM. Therefore, from a resource perspective, the Corps' assessment of the value of this reach and its role in their consideration of issuing a permit to the City of Greeley may not differ between the cases of critical habitat designation and exclusion from designation based on non-biological factors.

Any future Milton Seaman Reservoir expansion may differ from the project currently proposed. The City of Greeley is an active participant in the Halligan-Seaman Water Management Project. To efficiently manage their supplies, the cities of Fort Collins and Greeley have proposed the Halligan-Seaman Water Management Project as a regional water storage and management project on the North Fork of the Cache la Poudre River. Both cities and their partners are working together to increase water storage capacity for their communities through coordinated enlargements of Halligan and Milton Seaman reservoirs. The participants are using an innovative Shared Vision Planning process, which brings together stakeholders in a collaborative planning and model building exercise. The Service is supportive of this process, has participated as resources allow, and anticipates that its results will inform the Halligan-Seaman Water Management Project. The eventual proposal for Milton Seaman Reservoir expansion may vary from the proposal currently envisioned, to facilitate coordinated management of these reservoirs.

Onsite alternatives to the project currently proposed by the City of Greeley may result from the Halligan-Seaman Water Management Project. Such alternatives could reduce the probability of a Service determination of adverse modification of critical habitat, or Corps permit denial based on presence of critical habitat. Any such alternatives could, however, also result in less water storage or storage at a higher cost.

The most costly possible result of our designation of critical habitat would be a case where the City of Greeley would have to abandon expansion plans for the Milton Seaman Reservoir, and develop

storage options at one or more alternate sites. Assuming a current estimated cost of $116 million for the proposed project (Kolanz 2010, p. 4) and the Corps' estimated costs of alternate storage cited in the DEA (up to 8 times the cost of storage through Milton Seaman Reservoir expansion), additional cost due to designation of critical habitat could range to $812 million. The Corps' estimates relate to comparative costs incurred by other Front Range Colorado water projects (Peter, pers. comm. 2010).

Under the scenarios above, the additional cost to the City of Greeley associated with critical habitat designation upstream of the Milton Seaman Reservoir could range from $20,000 to as high as $812 million. We have considered both the potential costs due to designation of critical habitat, and the relative likelihood of their occurrence, when evaluating the City of Greeley's request for exclusion.

The reach of river above the Milton Seaman Reservoir is part of critical habitat Unit 1, established to be consistent with a large recovery population along the North Fork of the Cache La Poudre River and its tributaries, as designated in the Draft Plan. The entire reach of the North Fork between the Halligan Reservoir to the north and Milton Seaman Reservoir to the south is within this unit. The two reservoirs create barriers to PMJM movement along the river, and the population of PMJM between the reservoirs and on adjoining tributaries is thought to be relatively isolated from populations elsewhere. The City of Greeley contends that loss of up to 3 mi (5 km) of the approximately 88 mi (140 km) in this critical habitat unit will have little relative impact on the unit's ability to conserve and recover the PMJM. We do not know the extent of habitat needed to support a large recovery population as described in the Draft Plan. At a minimum, a total of 50 mi (80 km) of connected streams and tributaries is suggested for a large PMJM population in the Draft Plan. But the Draft Plan bases size of PMJM recovery populations on the numbers of PMJM present, not the extent of habitat. Until such time as population estimates for the area are developed, we will not know whether 50 mi (80 km), or even 88 mi (140 km), of streams will be sufficient. In this context, loss of 3 of the 88 mi (5 of the 140 km) may significantly impact the ability of the critical habitat unit to support a large population and meet the recovery goal outlined in the Draft Plan.

The City of Greeley suggested that an exclusion would support ongoing Federal and local cooperation in the development of water resources in the drainage. Water use and storage issues continue to generate close scrutiny in Colorado. The Milton Seaman Reservoir expansion, Halligan Reservoir expansion, and other proposed projects have both their proponents and critics. While an exclusion could lead to the continuation and strengthening of partnerships between the City of Greeley, certain other public and private entities, and the Service, it would likely alienate others. Despite our decision not to exclude the area above Milton Seaman Reservoir from critical habitat designation, we anticipate a continued working relationship with the City of Greeley to address both their needs and those of the PMJM.

If approved, the proposed reservoir expansion would occur well in the future. The required review under NEPA and the permit issuance by the Corps under the section 404 of the Clean Water Act, necessary for reconstruction of the reservoir's dam, are likely to take years. Because of this, considerable uncertainty exists regarding when and in what form an expansion of Milton Seaman Reservoir might occur. Given the uncertainties regarding timing, design, and future conservation commitments associated with reservoir expansion, exclusion of the area, even if it should be determined to be appropriate someday in the future, is premature.

Exclusion of this reach from critical habitat would do little to relieve the costs of regulatory review and associated permitting (delays, administrative costs, consulting costs, and cost of developing additional conservation measures) for the City of Greeley. The area of the proposed expansion includes Federal land owned by the USFS. All alternatives impacting this land will involve USFS approval. In addition, any dam replacement or reconstruction would require a permit from the Corps under the Clean Water Act. Even without critical habitat, section 7 review appears unavoidable. Exclusion from critical habitat would not alleviate the need for section 7 consultation, or appreciably increase the administrative costs involved.

Designation of critical habitat (the identification of lands that are necessary for the conservation of the species) is beneficial in the recovery planning for a species. In this case, the Draft Plan has helped inform critical habitat designation by designating a large recovery population in this area. This final rule may, in turn, contribute to the development of a final recovery plan for the North Fork of the Cache La Poudre River.

We have determined that this portion of the North Fork of the Cache la Poudre River contains the physical and biological features essential to the conservation of the PMJM in accordance with 4(a)(3) of the Act. We conclude that it is inappropriate to exclude this reach from critical habitat under section 4(b)(2) of the Act.

(25) *Comment:* Two commenters pointed out that critical habitat proposed along Spring Brook and South Boulder Creek in Unit 5 (South Boulder Creek), Boulder County, is discontinuous as mapped.

Our Response: PMJM have been found on both Spring Brook and South Boulder Creek. Spring Brook has been diverted into a canal; therefore, it does not follow its historical course directly into South Boulder Creek. The limits of critical habitat we are designating for the two reaches are separated by approximately 100 ft (30 m) through a rural residential upland area which may not contain the physical and biological features essential for the conservation of PMJM, as defined. However, we do not believe that this discontinuity significantly affects the species' ability to move between these portions of this critical habitat unit.

(26) *Comment:* The City of Boulder requested that we coordinate with the City to "fine tune" the boundaries of Unit 5 (South Boulder Creek) to expedite regulatory review of future projects with a Federal nexus.

Our Response: As in other units, based on the scale of our mapping, there may be some areas within the general boundaries of designated critical habitat in Unit 5 that do not support PCEs required by the PMJM. For example, specific areas that support existing buildings, roads, and parking lots are not considered critical habitat. These areas are excluded by text in this rule. We will continue to be available to work with the City of Boulder to determine boundaries of areas that do not meet the definition of critical habitat.

(27) *Comment:* The U.S. Department of Energy (DOE) commented that it controls much of the "Rocky Flats Site," described by the Service as the Rocky Flats National Wildlife Refuge (NWR) (Unit 6), in Jefferson and Broomfield Counties, and noted that proposed critical habitat would include portions of DOE's Central Operable Unit (COU) of 1,300 ac (530 ha), where a former facility processed and manufactured nuclear weapons. Many DOE operational maintenance and monitoring activities continue to take place within the COU under closure and cleanup agreements. The DOE urged the Service to exclude the COU from

designation of critical habitat within this unit because designation could adversely impact actions required under these agreements.

Our Response: We have modified this final rule to more accurately reflect DOE presence on the Rocky Flats Site. The Rocky Flats Site (Unit 6) is managed by the Service (Rocky Flats NWR) and DOE (the Central Operating Unit and certain other lands). Buildings and other structures at the site have been decommissioned and demolished, and the disturbed areas have been restored, or are undergoing restoration. Clean-up and closure of the COU was completed in 2005. Many operational maintenance and monitoring activities continue to take place in the COU, to maintain the CERCLA (the Comprehensive Environmental Response, Compensation, and Liability Act, also known as Superfund, 42 U.S.C. 9601 *et seq.*) and RCRA (Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*) remedies implemented in accordance with the Rocky Flats Management Agreement.

The final Rocky Flats NWR Comprehensive Conservation Plan (CCP) was announced in the **Federal Register** on April 18, 2005 (70 FR 20164). The CCP outlines the management direction and strategies for NWR operations, habitat restoration, and visitor services, for a period of 15 years. The CCP provides a vision for the NWR; guidance for management decisions; and the goals, objectives, and strategies to achieve the NWR's vision and purpose. One objective of the CCP is to protect, maintain, and improve approximately 1,000 ac (400 ha) of PMJM habitat on the NWR. A programmatic section 7 consultation with DOE for their cleanup and maintenance activities was completed in 2004 (Service 2004c). This consultation addressed removal of manmade structures in and adjacent to PMJM habitat, and ongoing operations in the COU in support of the CERCLA/RCRA remedy.

We invited information and comments on potential exclusion of the Rocky Flats Site in part because of the previous exclusion of the site from critical habitat in our June 23, 2003, final rule (68 FR 37275). That exclusion appeared at odds with the recent interpretation of critical habitat designation on Federal lands. Federal agencies have an affirmative conservation mandate under section 7(a)(1) of the Act to contribute to the conservation of listed species. On the Rocky Flats Site, as with other Federal lands, we anticipate that effective land management strategies can and will be employed by Federal agencies to conserve PMJM populations. We have determined that lands on the Rocky Flats Site are essential to the conservation of the species. Designation of critical habitat on the Rocky Flats Site highlights the importance of the area to the PMJM, while encouraging the NWR and DOE to provide a consistent and effective approach to conserve the PMJM. These lands require special management considerations or protection, as evidenced by and incorporated in management plans and the programmatic consultation referenced above. Potential effects to habitat on the site that may be addressed under programs, practices, and activities within the authority and jurisdiction of Federal land management agencies include, but are not limited to, weed management, wildland fire management, recreation, construction and maintenance of roads and trails, and operational maintenance and monitoring activities within the COU. For the above reasons, we conclude that the entire Rocky Flats site, including the COU, contains the physical and biological features essential to the conservation of the PMJM and merits designation as critical habitat.

(28) *Comment:* One commenter requested that the easternmost portion of the Rocky Flats Site (Unit 6) in Jefferson and Broomfield Counties, the site of proposed roadway expansion along Indiana Street, be excluded from critical habitat, because it is planned for development. They cited the Rocky Flats National Wildlife Refuge Act of 2001, and Rocky Flats National Wildlife Refuge Comprehensive Conservation Plan and Environmental Impact Statement (CCP/EIS) as addressing the roadway expansion and anticipating its future construction in spite of potential PMJM presence. Two other commenters urged that the specific area in question be included in designated critical habitat.

Our Response: The areas in question contain the physical and biological features essential to conservation of the PMJM and have not been excluded from critical habitat. Should project plans for the road expansion go forward, the Service has concluded that subsequent environmental review, including compliance with the Act, will be required of any future project proponent to address any impacts to the PMJM, its habitat, and designated critical habitat. The Service has made no conclusions as to how any transfer of Federal land or roadway expansion would affect the PMJM. The Service only found that transfer of a corridor up to 300-ft (92-m) wide would not adversely affect management of the NWR (Service 2004, p. 191).

(29) *Comment:* Denver Water requested exclusion of their properties covered under the Denver Water HCP, provided maps of their properties, and pointed out apparent Service mapping errors.

Our Response: The eight properties in question include a total of approximately 250 ac (113 ha) in 4 critical habitat units (Units 5, 7, 9, and 10). We have excluded these properties from critical habitat designation under section 4(b)(2) of the Act (see the Exclusions section below), and corrected maps and acreages as appropriate.

(30) *Comment:* Douglas County requested exclusion of non-Federal lands within Douglas County based on their 2006 HCP.

Our Response: We have not excluded the non-Federal lands in Douglas County. On May 11, 2006, we issued a section 10 incidental take permit that covers the PMJM for the Douglas County HCP (Service 2006a). The Douglas County HCP addresses only specified activities conducted by Douglas County and the towns of Castle Rock and Parker, within Douglas County, Colorado, on private and other non-Federal lands within the RCZ, as mapped by Douglas County. Impacts to the RCZ associated with the covered activities are mitigated by the permanent protection of portions of the RCZ and the restoration of habitat from temporary impacts. Stream segments totaling 15 mi (24 km) in length and 1,132 ac (458 ha) of the RCZ have been permanently protected as part of the Douglas County HCP. Management plans exist or are in development for these protected properties (Dougherty 2009). The majority of proposed critical habitat in Units 8 and 9, and a small amount of non-Federal property in Unit 10 are within the boundaries of the Douglas County HCP.

While the Douglas County HCP includes the extensive mapped RCZ that encompasses areas believed to support the PMJM, the plan does not provide a means by which habitat within these zones will be effectively managed into the future. Only about 5 percent of the lands within the RCZ are set aside for conservation under the plan. The vast majority of lands in the RCZ receive no specific protection under the HCP. Potential impacts to physical and biological features essential to the PMJM from entities other than Douglas County and the cities of Parker and Castle Rock, including those by private landowners, are not addressed in the plan.

(31) *Comment:* One commenter proposed that we link the two subunits proposed in Unit 8 (Cherry Creek), Douglas County.

Our Response: The Draft Plan calls for a medium recovery population in Lower South Platte—Cherry Creek HUC. Each of the two subunits appears large enough to support a medium recovery population. We determined that linking them was not appropriate, after considering the variable quality of intervening habitat on private lands and determining that a much larger critical habitat unit with more reaches in low-quality habitat would not provide additional benefit to the PMJM.

(32) *Comment:* One commenter stated that we should limit the downstream extent of designated critical habitat along Plum Creek in Unit 9 (West Plum Creek), Douglas County, to the point of maximum reservoir storage under the U.S. Army Corps of Engineers' (Corps') Chatfield Reservoir Reauthorization Project preferred alternative (maximum storage at 5,444 feet (ft) (1,660 meters (m)) in elevation).

Our Response: The reach in question is federally owned, has been documented to support the PMJM, and has PCEs of appropriate quantity and spatial arrangement to qualify as critical habitat. We have determined that Plum Creek downstream to Chatfield Reservoir contains the physical and biological features essential to the conservation of the PMJM, and we have identified no basis to exclude this area from critical habitat under section 4(b)(2) of the Act. Substantial planning has taken place to address potential impacts to the PMJM should the reservoir expansion proceed, in part because proposed expansion of reservoir storage capacity would impact existing critical habitat on the Upper South Platte River (Unit 10). While designation of critical habitat along Plum Creek will provide additional regulatory protection to PMJM habitat in the area, the project sponsors are developing alternatives to address impacts to designated critical habitat on Plum Creek should the planned project move forward.

(33) *Comment:* One commenter stated that we should exclude the Penley Ranch property along Indian Creek, Unit 9 (West Plum Creek) from critical habitat, on the basis that trapping conducted in 2007 did not document the PMJM on the property and the Service agreed at the time the PMJM was "not likely to be present" on the site. The commenter further stated that if the property was not excluded, we should develop more appropriate (less extensive) site-specific boundaries of critical habitat on the site.

Our Response: While the PMJM was not captured during the 2007 trapping effort, habitat on the site appeared to support the physical and biological features essential to the conservation of the PMJM. We concurred in 2007 that the PMJM was not likely present and that a proposed rural residential development on the property would not be likely to adversely affect the PMJM. We stated that our concurrence was valid only for one year. The residential development proposed did not take place. Captures of the PMJM have occurred in areas of comparable or lower quality habitat downstream on Indian Creek. PCEs are present along this reach of Indian Creek. While no further trapping efforts have taken place, we believe that the PMJM likely uses the reach, at a minimum as a movement corridor, and may occupy portions of the property. We therefore conclude that this reach of Indian Creek is occupied and merits designation as critical habitat. Indian Creek on the Penley Ranch is within the RCZ established under the Douglas County HCP. Outward extent of critical habitat on the property is being designated consistent with the boundaries of the Douglas County RCZ (*see* the Delineation of Critical Habitat Boundaries section below). See also related comment 61 and our response.

(34) *Comment:* One commenter stated that the upstream extent of critical habitat along Bear Creek in Unit 9 (West Plum Creek) should terminate at the Lake Waconda Dam, as the lake and Perry Park Golf Course create a barrier to PMJM movement, and any PMJM population upstream from the golf course is isolated.

Our Response: After we considered the extent to which the dam, lake, adjacent golf course, and associated development form a barrier to PMJM movement up and down stream, and assessed the quantity and spatial arrangement of PCEs on the reach upstream of the lake, we elected to limit the upstream extent of designated critical habitat along Bear Creek to the base of the Lake Waconda Dam (see the Summary of Changes from the Proposed Rule section below). Based on review of aerial photographs, we determined that the area upstream of the dam does not contain the physical and biological features essential to the conservation of the PMJM in the necessary spatial arrangement and distribution.

(35) *Comment:* One commenter suggested that we designate critical habitat to link all four proposed subunits of Unit 10 (Upper South Platte River), Jefferson and Douglas Counties, and also designate their tributaries as critical habitat.

Our Response: The Service has determined that connecting these subunits to form one very large critical habitat unit is not necessary. Land ownership and land uses vary along the South Platte River and its tributaries. While areas designated as critical habitat largely consist of National Forest System lands, many of the intervening reaches do not. Quality of PMJM habitat is not consistent. Reaches of lesser quality that are not being designated as critical habitat generally correspond to those that are not federally owned. In addition, the large West Plum Creek Unit (Unit 9), which corresponds to a large recovery population required in the Draft Plan, is also being designated in the same HUC. Tributaries have been examined, and we are designating only those that we determined meet the definition of critical habitat based on occurrence of physical and biological features essential to the conservation of the PMJM and proximity to known PMJM occurrence. (*See also* our response to comment 6.)

(36) *Comment:* One commenter requested that we exclude critical habitat in Teller County because no PMJM have been documented there.

Our Response: The PMJM has been documented on Trout Creek, Unit 10 (South Platte River), at or very near the Douglas County–Teller County line (Service 2010). Based on contiguous habitat along Trout Creek in Teller County, we are designating critical habitat upstream to 7,600 ft (2,300 m) in elevation. We believe that this elevation provides a reasonable estimate of the upstream extent of habitat likely to be occupied by the PMJM in this reach.

(37) *Comment:* Two commenters requested exclusion of Unit 11 (Monument Creek), El Paso County, from critical habitat based on potential economic impacts and because protections for the PMJM are already in place as a result of the 1998 listing and local limits on development.

Our Response: Our DEA addressed the extent of economic impacts likely to occur in this unit as the result of critical habitat designation. The updated final economic analysis (FEA) (Industrial Economics 2010b) concludes that $10.4 million to $17.7 million in incremental impacts due to designation of critical habitat may occur in Unit 11 over the next 20 years, resulting almost entirely from increased costs associated with section 7 consultation on residential and commercial development. However, the FEA (Chapter 3) explains why these estimates may be higher than what will likely occur. Based on the results of the

FEA, we have not excluded any areas from designation of critical habitat based on economic impacts (see the Required Determinations section). Current protections afforded the PMJM by its threatened status under the Act and by local regulations have not protected the PMJM and its habitat from the cumulative impacts of development. Degradation of creeks and riparian vegetation in this unit from recent development and associated stormwater runoff presents an ongoing issue. This degradation and projected future development in the area indicate that the unit requires special management consideration and protection.

(38) *Comment:* One commenter urged us not to exclude El Paso County from critical habitat based on any countywide HCP not finalized.

Our Response: We have not excluded El Paso County from critical habitat. The county has been developing a countywide HCP for the PMJM in coordination with the Service for several years. A countywide plan would likely cover most or all of the area in critical habitat Unit 11 (Monument Creek). When we proposed revised critical habitat, we anticipated that we would receive a draft HCP prior to final revised critical habitat designation. To date, we have not received a draft of an HCP for our review, nor do we have any assurance as to if, when, or in what form, any countywide HCP will be submitted, or whether an incidental take permit for the PMJM under section 10 would be issued. Since any potential El Paso County plan remains in its formative stages, we have no basis to address possible benefits of exclusion.

Other Comments

(39) *Comment:* One commenter noted that we had no basis to revise the 2003 rule that designated critical habitat for the PMJM.

Our Response: We stand by our determination that revising critical habitat for PMJM is appropriate. Based on our review of the June 23, 2003, final rule to designate critical habitat for the PMJM (68 FR 37275), we determined that it is necessary to revise critical habitat. Our review found that we excluded three counties from critical habitat based on countywide HCPs under development. The 2003 rule stated, "If pending HCPs are not completed, we will determine whether areas designated in this final rule need further refinement" (68 FR 37290). Seven years later, only one of the three counties excluded from critical habitat has completed an HCP, and coverage under the Douglas County HCP is limited to actions by three local governments. Therefore, the basis upon which these exclusions were made, that countywide HCPs would be completed in the near future, was faulty, and revision is appropriate.

(40) *Comment:* Two commenters pointed out that our 2003 rule downplayed the value of critical habitat designation. One commenter stated critical habitat designation is unhelpful, duplicative, and unnecessary, and that it provides little additional value given that areas proposed are believed to be occupied and currently subject to section 7 review under the Act. Based on this, they contended that the value of including additional critical habitat through our revision was negligible.

Our Response: Designation of critical habitat is mandated by the Act. The purpose of critical habitat designation is to contribute to the conservation of endangered and threatened species and the ecosystems upon which they depend. It alerts Federal agencies and the public to areas essential for the conservation of the species and provides the species added regulatory protection under section 7 of the Act when Federal actions occur. (See *Benefits of Designating Critical Habitat,* below.)

(41) *Comment:* We received comments that critical habitat provides little additional protection for the PMJM over various layers of existing protections, including local land use regulations, and that this negates the need for critical habitat designation.

Our Response: Protections under the Act, including those afforded by designation of critical habitat, for the listed SPR of the PMJM in Colorado are necessary in part because local regulations and conservation efforts have proven insufficient to conserve the species. Our July 10, 2008, final rule that refined the listing of the PMJM (73 FR 39789) specifies over what portion of its range the subspecies is threatened.

(42) *Comment:* One commenter stated that designation of critical habitat should be limited to Federal lands.

Our Response: As defined, critical habitat is not limited by land ownership, but rather based on areas essential to the conservation of the species and in need of special management or protection. Federally owned lands are more likely to contribute to conservation of the PMJM than private lands that are not subject to the Act's affirmative conservation mandate of 7(a)(1), which imposes on Federal agencies a duty to conserve listed species. Therefore, we prioritized the inclusion of Federal lands when deciding what quantity and distribution of lands containing the physical and biological features essential to the conservation of the PMJM are necessary. However, even with this prioritization, the amount of Federal lands alone is insufficient to provide for the conservation of the PMJM, as these lands are limited in geographic location, size, and habitat quality within Colorado. We are designating both Federal lands and non-Federal land as critical habitat where they meet the definition of critical habitat.

(43) *Comment:* One commenter urged us not to exempt HCPs from critical habitat, based on the contentions that their purpose differs from that of critical habitat and that HCPs are less protective. The commenter suggested that the Service should conduct a detailed analysis of past protection of the PMJM afforded by HCPs, as opposed to that afforded by critical habitat designation, including the degree of habitat loss and take of the PMJM. The commenter added that exclusions based on HCPs would fragment habitat corridors otherwise designated as critical habitat.

Our Response: Critical habitat and HCPs differ in their purpose, but both have a similar role in conservation of the species. In general, critical habitat designation affords an added layer of regulatory protection with regard to Federal actions, while an HCP provides a mechanism to permit take caused by non-Federal entities. We exclude areas covered by HCPs from critical habitat when the benefits of exclusion are greater than the benefits of inclusion. As part of this determination, we analyzed whether the HCP in place affords equal or greater conservation of the species than critical habitat designation would afford. These HCPs were developed to address the conservation needs of the PMJM and maintain its habitat. Issuance of associated section 10 permits by the Service required section 7 consultations. Exclusion of these HCPs is not expected to affect movement corridors, because the HCPs were developed in coordination with the Service and address the conservation requirements of the PMJM.

(44) *Comment:* One commenter believed that, at a minimum, all habitat occupied by PMJM should be designated as critical habitat, and called on us to provide a rationale for any occupied areas not designated.

Our Response: The Act does not require that we designate critical habitat on all lands occupied by the species. We used the best scientific and commercial data available in our determination of this final designation of revised critical habitat. In addition, we considered peer review comments, public comments, and any additional information we

received. We determined a subset of all known occupied areas that contain PCEs is sufficient to provide for the conservation of the PMJM. This conclusion is based on the recommendations in the Draft Plan that a mix of small, medium, and large populations can conserve the species. We are designating all areas that we found to be essential.

(45) *Comment:* One commenter stated that the Service must consider whether habitat outside that occupied by the listed entity is justified for designation as critical habitat and stated the opinion that occupied habitat in Wyoming must be considered for inclusion.

Our Response: In accordance with section 3(5)(C) of the Act, not all areas that can be occupied by a species will be designated critical habitat. We designate as critical habitat areas outside the geographical area presently occupied by a listed species only when a designation limited to its present range would be inadequate to ensure the conservation of the species. Given the extent and distribution of known PMJM populations, we believe that protection within certain areas currently occupied will be sufficient to conserve the PMJM in Colorado, where the PMJM is listed under the Act.

(46) *Comment:* One commenter suggested that we should conduct research to prove that the PMJM can live in all 418 mi of stream proposed as critical habitat.

Our Response: We base our designation of critical habitat on the best scientific and commercial information available. The best information available to us indicates that the units we are designating as critical habitat are occupied. In addition, all PCEs upon which the PMJM depends are present within each unit of critical habitat. At any given site within a unit, one or more PCEs must be present for the site to qualify as critical habitat. For example, it may be determined that a reach qualifies as critical habitat based only on its ability to provide connectivity between more extensive habitat upstream and downstream. Determination of the limits of critical habitat at a specific site based on absence of any PCEs will be made by the Service on a site-by-site basis where needed.

(47) *Comment:* One commenter noted the potential impact of critical habitat designation to grazing on Federal lands, which the commenter stated has been shown to be compatible with maintenance of PMJM populations.

Our Response: The impact of the designation of critical habitat on Federal lands includes consultation under section 7 of the Act to determine if Federal actions would result in adverse modification of critical habitat. Where grazing is compatible with the maintenance and recovery of PMJM populations, we would determine that adverse modification would not be likely. Agriculture, including grazing, can be managed in many different ways, some of which may be beneficial to PMJM habitat, others harmful. Some PMJM habitat on Federal lands is currently grazed in a manner that appears to maintain good habitat for the PMJM. However, there may be areas managed in a manner that is not conducive to the development or maintenance of PMJM habitat. As defined, critical habitat is essential to conserve the species and may require special management considerations or protection. The areas designated as critical habitat have been determined to be essential to the conservation of the PMJM. During consultation required under section 7 of the Act, grazing practices on these areas would receive increased scrutiny by Federal land managing agencies and the Service. In those areas where current management results in maintenance of good PMJM habitat, there is a need to continue such practices, so future management considerations or protections may be required. In other instances, protections of designated critical habitat would help ensure that livestock management practices potentially harmful to the conservation of PMJM are not conducted without required consultation.

(48) *Comment:* One commenter stated that based on any future change to our definition of "adverse modification," third parties may mount legal challenges to Service consultations under section 7 of the Act and HCPs that address critical habitat.

Our Response: Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the Fifth and Ninth Circuits Court of Appeals 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 we do not rely on this regulatory definition when we analyze whether an action is likely to destroy or adversely modify critical habitat. In response to these decisions, we are reviewing the regulatory definition of adverse modification in relation to conservation. We cannot speculate about future change to the definition of adverse modification, how it may impact conservation of the PMJM, or litigation that could follow. Threat of future lawsuits should not influence our designation of appropriate critical habitat.

Comments on Economic Analysis and Environmental Assessment

(49) *Comment:* One commenter stated that providing only a "revision" of our 2003 economic analysis and environmental assessment, alluded to in our revised critical habitat proposal, is insufficient and circumvents NEPA.

Our Response: The DEA and NEPA analysis that we conducted for the 2009 proposed rule updated our 2003 analysis. Our FEA and final environmental assessment differ substantially from documents produced in support of our 2003 designation of critical habitat. As all address designation of critical habitat for the PMJM, there are similarities.

(50) *Comment:* One commenter indicated that the DEA underestimated the actual costs of critical habitat designation by applying an incremental approach to identify only those impacts attributable solely to the proposed rule. Because the SPR in Colorado, where the PMJM is listed, lies within the U.S. Tenth Circuit Court of Appeals, its ruling in *New Mexico Cattle Growers Association* v. *United States Fish and Wildlife Service,* 248 F.3d 1277 (10th Cir. 2001) should be followed. In this case, the court instructed the Service to conduct a full analysis of the economic impacts of proposed critical habitat, regardless of whether those impacts are attributable co-extensively to other causes.

Our Response: The economic analysis estimates the total cost of species conservation activities, without subtracting the impact of pre-existing baseline regulations (*i.e.,* the cost estimates are fully co-extensive). In addition, the economic analysis breaks the costs down into the baseline costs of all conservation activities resulting from the listing of PMJM under the Act, and the incremental costs of designation of critical habitat, which are above and additional to the baseline costs. We considered both the coextensive as well as the incremental costs when performing the 4(b)(2) exclusion analysis. In 2001, the U.S. 10th Circuit Court of Appeals instructed the Service to conduct a full analysis of all of the economic impacts of proposed critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes (*New*

Mexico Cattle Growers Ass'n v. *USFWS,* 248 F.3d 1277 (10th Cir. 2001)). The economic analysis for the PMJM complies with direction from the U.S. 10th Circuit Court of Appeals.

In developing this final rule, we considered our February 12, 2008, Draft Critical Habitat Exclusions Guidance. This guidance was developed by the Service in response to critical habitat case law, which documents the Courts' interpretations of the requirements of the Act. This rule is also consistent with the October 3, 2008, opinion from the Solicitor titled, "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act."

In this rule, the Service declines to exercise its discretion to exclude any areas based on co-extensive or incremental impacts in this rule. Two courts have found the Secretary's decision not to exclude is completely within the Service's discretion and is not reviewable by a court (*Home Builders Association of Northern California* v. *U.S. Fish & Wildlife Serv.,* 2006 U.S. Dist. Lexis 80255, *66 (E.D. Cal. 2006), *reconsideration granted in part on other grounds,* 2007 U.S. Dist. Lexis 5208 (Jan. 24, 2007); *Cape Hatteras Access Preservation Alliance* v. *DOI*, 2010 U.S. Dist. Lexis 84515 (D.D.C. Aug. 17, 2010).

(51) *Comment:* One commenter stated that the Service has not adequately quantified and analyzed the myriad potential economic benefits of critical habitat designation.

Our Response: The purpose of critical habitat is to support the conservation of the PMJM. Quantification and monetization of species' conservation benefits requires information on the incremental change in the probability of PMJM conservation that is expected to result from the designation. No studies exist that provide such information for this species. Even if this information existed, the published valuation literature does not support the monetization of incremental changes in conservation probability for this species. Therefore, the primary benefits of this rule cannot be quantified or monetized based on the best, readily available scientific and economic information. Depending on the project modifications ultimately implemented as a result of the regulation, other ancillary benefits that are not the stated objective of critical habitat may also be achieved. Chapter 9 of the DEA describes the categories of potential benefits, including improvements in the value of adjacent or proximate properties, improvements in water quality, aesthetic benefits, increased recreational opportunities, increased regional expenditures and employment resulting from increased visitation to the region, and educational benefits. Because these categories of benefits are not the primary intention of the rule, and quantification and monetization of these benefits would require significant effort and provide limited value to the Service's decision-making process, we provide only a qualitative discussion of these potential benefits.

(52) *Comment:* One commenter stated that the DEA underestimates the potential impacts in Unit 11 (Monument Creek), El Paso County, by excluding from analysis the following types of parcels not likely to require a section 7 consultation: (1) Those parcels under county or government ownership; (2) those parcels occupied by existing buildings; and (3) those parcels under 100 ac (40 ha) in area. Further, the commenter stated that this assumption is inconsistent with other conclusions reached by the DEA, where: (1) The costs to small governmental jurisdictions are analyzed and estimated in the initial regulatory flexibility analysis (IRFA), (2) cost impacts to parcels occupied by existing buildings as a result of building maintenance activities are considered, and (3) parcels under 100 ac (40 ha) have undergone section 7 consultations for PMJM.

Our Response: In section 3.6 of the DEA, the Service acknowledges that those parcels removed from further consideration could eventually be developed in such a way that would require a Federal permit or funding, resulting in a section 7 consultation and mitigation. However, the DEA focuses on estimating the potential economic impacts to new residential and commercial development on readily developable, private, and large open parcels of land. As evidenced by the Service's consultation history for the PMJM, such parcels are more likely to have a Federal nexus and undergo a section 7 consultation. As a result, parcels under government ownership were removed from further consideration. In Chapter 4 and Appendix A, the DEA estimates the impacts to governmental entities, including those that are small, and that are associated with other activities, namely road/bridge, utility, and bank stabilization construction and maintenance. These activities do not necessarily occur on parcels of land owned by the government.

With respect to maintenance activities at existing buildings, the Service's consultation history does not suggest such activity requires consultation for the PMJM. However, the Service recognizes that large parcels with existing buildings could eventually be redeveloped (e.g., large ranch parcels), and therefore these parcels were analyzed in Chapter 3 of the FEA. Finally, parcels under 100 ac (40 ha) in size were removed from further consideration in the analysis, because the smallest residential development project that required a formal section 7 consultation since 2003 was 173 units on a 107-ac parcel (Struthers Ranch). The Service's consultation record demonstrates that projects under 100 ac (40 ha) typically undergo informal section 7 consultations and technical assistance with the Service. In section 3.3.2, the DEA estimates the costs for these types of consultations.

(53) *Comment:* One commenter indicated that the DEA underestimates the true economic impact of the proposed rule on the residential sector by not considering the impacts to the local, State, and national economy.

Our Response: In section 3.5, the DEA estimates the regional economic impacts that may result from a potential reduction in residential home construction in Douglas and El Paso Counties due to the critical habitat designation. These regional impacts include estimates of the indirect (changes in output industries that supply goods and services to those directly affected), induced effects (changes in household consumption resulting from a change in employment), and job loss. To assess the potential impact of the proposed rule on the national economy, the FEA considers estimating the social welfare losses that result from changes in the price and quantity of available housing. However, such an analysis could not be conducted due to insufficient information to reliably model the markets for housing in areas affected by critical habitat. We assume these costs are in addition to the compliance costs incurred by developers or existing landowners or both.

(54) *Comment:* One commenter indicated that the DEA does not include consultation costs for 15 road, bridge, utility, and bank stabilization projects that may not be covered by the existing Douglas County HCP. If these projects occur outside of the RCZ established by the HCP, the commenter indicated that they would incur these costs in full (estimated $60,000 to $150,000), rather than just the incremental costs estimated in the DEA.

Our Response: As described in section 4 of the DEA, the projected number of road, bridge, utility, and bank stabilization projects potentially

impacted by the designation of critical habitat is based on estimates provided by the Colorado Department of Transportation and the consultation history provided by the Corps. Using this information, the DEA projects between approximately 21 and 24 formal consultations associated with these activities in Douglas County over the next 20 years. Because there was no available information that indicated specifically whether these projects would occur inside or outside the RCZ, the analysis calculates and applies unit-specific, area-based factors to estimate the probability that projects would occur outside the RCZ and within critical habitat, and would therefore require consultation as a result of the designation (see pages 2–15 through 2–17 of the DEA). For Douglas County, these factors are between 6 and 16 percent. Using this methodology, we estimate in the DEA that the total incremental consultation cost (undiscounted) for the 21 to 24 projects ranges between $119,000 and $135,000.

(55) *Comment:* Douglas County commented that the DEA does not account for the costs to purchase additional mitigation lands in Douglas County to support their HCP. Mitigation beyond that already established by the Douglas County HCP may be required for activities that occur in critical habitat. These costs could be significantly higher because the mitigation land already banked under the HCP would be exhausted more rapidly, the banked mitigation lands are unevenly distributed across critical habitat units, and land must be purchased in large blocks to acquire a relatively small percentage of PMJM habitat.

Our Response: As described in section 4.2.3 of the DEA, the estimated cost of mitigation ranges from $3,580 to $35,800 per ac. The Service believes this tenfold range in unit costs is likely sufficient to cover the costs of additional mitigation land purchases that may result from designation of critical habitat in Douglas County. Since we have adopted the RCZ developed for the Douglas County HCP as the outward extent of critical habitat, additional mitigation required for projects covered by the HCP is not likely to increase greatly in extent. Measures to offset impacts to critical habitat may be restricted to the same unit where impacts occur. Exhibit 3–13 of the DEA provides an assessment of the quantity of land available for mitigation within each unit.

(56) *Comment:* One commenter indicated that the DEA does not estimate a cost associated with the regulatory uncertainty created by the critical habitat label for the City of Greeley's proposed expansion at the Milton Seaman Reservoir.

Our Response: Because of data limitations, as well as factors other than the designation of critical habitat (such as political, financial, and general environmental impacts) that will influence the outcome of the proposed expansion project at the Milton Seaman Reservoir, the costs associated with regulatory uncertainty attributable to the presence of the PMJM or its designated critical habitat are difficult to quantify. As described in section 5.3.3 of the DEA, a representative of the Corps suggested that the cost to the City of Greeley to pursue an offsite alternative to the preferred Milton Seaman Reservoir project may be as much as three to eight times higher than that of the expansion project that is currently contemplated. This range of increased costs was provided by the Corps, based on their rough estimate of the costs to develop water supply (on a per ac-ft basis) in the study area. It was not intended to be used to quantify the cost impacts of regulation uncertainty due to critical habitat designation, but rather to qualitatively characterize the relative costs of water supply development alternatives. However, we address this issue further in our FEA, and our discussion of the proposed Milton Seaman Reservoir in comment 24, above.

(57) *Comment:* One commenter indicated that the DEA did not calculate the economic impact to the proposed Penley Reservoir (Unit 9) in Douglas County.

Our Response: The economic analysis focuses on an estimate of impacts to economic activities that are reasonably foreseeable. The DEA did not consider potential impacts to the Penley Reservoir because the project is in the very early stages of planning. Due to insufficient information about this project, and considerable uncertainty as to whether it will be constructed within the next 20 years, the FEA does not quantify the potential impacts to this project, but does acknowledge it as potentially affected by the designation.

(58) *Comment:* One commenter indicated that the DEA does not take into account the full range of activities required as part of the CERCLA and RCRA remedy for the DOE's COU on the Rocky Flats Site (Unit 6), Jefferson and Broomfield counties, and the costs to revise or develop a new programmatic biological assessment and an accompanying biological opinion.

Our Response: The FEA includes an extended list of the ongoing maintenance and monitoring activities required as part of the CERCLA/RCRA remedy for the COU. Costs to the DOE to initiate one new programmatic consultation with the Service to cover all of these recurring remedial activities within critical habitat are estimated in section 7.2.1.

(59) *Comment:* One commenter indicated that the DEA should recognize that the management and operations of the COU and Rocky Flats NWR areas on the Rocky Flats Site are conducted by two different Federal agencies with different and distinct regulatory requirements and objectives.

Our Response: In our FEA, we have revised section 7 to clarify and distinguish the respective management and operation of the two areas by the DOE Office of Legacy Management and the Service.

(60) *Comment:* Some commenters questioned the adequacy of the draft environmental assessment. Commenters either suggested that analysis of a wider range of alternatives was required or suggested detailed analysis of a specific alternative. Suggested alternatives included designation as critical habitat on all habitat occupied by the PMJM, designation of critical habitat consistent with all recovery populations called for in the Draft Plan, and designation of lesser amounts of critical habitat than proposed in our action alternative.

Our Response: Designation as critical habitat of all habitat occupied by the PMJM, and designation of critical habitat consistent with recovery populations called for in the Draft Plan, were alternatives considered but not fully evaluated in the draft environmental assessment. In the first case, based on the Draft Plan, our professional judgment, and the best science available, we determined that only a subset of all occupied habitat was required for conservation of the PMJM. As explained in our July 10, 2008, rule to specify over what portion of its range the PMJM is threatened (73 FR 39789), listing under the Act is largely based on widespread threats to PMJM's habitat from current and future human development. Current populations and distribution of PMJM are more than sufficient to maintain the species if threats are successfully addressed. Protecting all existing PMJM populations and their supporting habitat from development into the future is not required to conserve the species. In the second case, recovery populations specified in the Draft Plan do not necessarily equate to specific areas that meet the definition of critical habitat. For example, many proposed recovery populations were identified by HUC,

but not tied to a specific location. Recovery populations were also assigned to HUCs where the PMJM has not yet been verified as present. Insufficient information on PMJM presence and distribution is available to support designation of critical habitat in all HUCs addressed in the Draft Plan. See also our response to comments 10 and 11.

(61) *Comment:* One commenter believed that the proposed action merits an environmental impact statement (EIS).

Our Response: An EIS is required only in instances where a major Federal action is expected to have a significant impact on the human environment. Based on our draft environmental assessment, DEA, and the comments we received from the public, we prepared a final environmental assessment and determined that revised critical habitat for the PMJM does not constitute a major Federal action expected to have a significant impact on the human environment. That determination is documented in our Finding of No Significant Impact (FONSI). The final environmental assessment, FEA, and FONSI provide our rationale for our determination that this revised critical habitat designation will not have a significant impact on the human environment.

(62) *Comment:* One commenter urged us to address an alternative consistent with the use of the Douglas County RCZ boundaries as the outward extent of designated critical habitat in our environmental assessment.

Our Response: Our final environmental assessment addresses the RCZ boundaries as part of the preferred alternative. RCZ boundaries encompass slightly less area but more accurately define appropriate limits of critical habitat. The effects of using RCZ boundaries on three critical habitat units where such boundaries occur differ negligibly from effects of the action alternative in our draft environmental assessment.

(63) *Comment:* One commenter stated that under the NEPA cumulative impacts analysis, the Service should include effects from past permitted take of the PMJM.

Our Response: Under NEPA, cumulative impacts are impacts to the environment that result from the incremental effects of the action in question when added to past, present, and reasonably foreseeable future actions. Designation of revised critical habitat does not result in take of the PMJM, so evaluation of past, present, and future take is not required in our environmental assessment. Section 7 consultations involving the PMJM and its critical habitat will evaluate past impact and future take during the consultation process.

Summary of Changes From the Proposed Rule

Our final designation of revised critical habitat for the PMJM results in a decrease of 7 mi (11 km) of rivers and streams and a decrease of 4,207 ac (1,702 ha) of land area from what we proposed in our October 8, 2009, proposed rule to revise the designation of critical habitat (74 FR 52066). The following changes account for the difference.

(1) The areas designated as critical habitat in Units 1, 5, 7, 9, 10, and 11 have changed from those areas proposed. We excluded portions of these units from the final designation of critical habitat, because we believe that the benefits of excluding these specific areas from the designation outweigh the benefits of including these areas. We have also concluded that the exclusion of these areas from the final designation of critical habitat will not result in the extinction of the PMJM. These exclusions are discussed in detail in the Exclusions section below.

(2) In Unit 9 in Douglas County, we have reduced the extent of designated critical habitat from that proposed on Bear Creek, a tributary to West Plum Creek. The upstream terminus of designated critical habitat is located at the base of the Waconda Lake Dam, because Waconda Lake and surrounding development present a barrier to PMJM movement along Bear Creek.

(3) We have determined that it is appropriate to use boundaries of the RCZ mapped by Douglas County for their HCP as the outward boundary of revised critical habitat in portions of Units 8, 9, and 10. See the Delineation of Critical Habitat Boundaries section below for a discussion of this change.

(4) Area totals within various units have been recalculated. Area totals described in the proposed rule for various units included slight inaccuracies, which resulted from the GIS methodology that counted overlapping stream segments twice. Therefore, the area within some units has decreased.

(5) We agreed to modify the outward boundaries of proposed critical habitat within Douglas County's mapped RCZ boundaries (see the Delineation of Critical Habitat Boundaries section), as the RCZ represents a site-specific mapping of PMJM habitat boundaries.

Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing activities that are likely to result in the destruction or adverse modification of critical habitat. Section 7(a)(2) of the Act 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 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) of the Act 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 implement reasonable and prudent

alternatives 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 of listing must contain physical and biological features that are 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 supporting the essential physical or biological features that provide essential life cycle needs of the species; that is, areas on which are found the physical or biological features 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 is listed only when we determine 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. When the best available scientific data do not demonstrate that the conservation needs of the species require such additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but that was not occupied at the time of listing may, however, be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. Substantive comments we receive in response to proposed critical habitat designations are also considered.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that critical habitat is designated at a particular point in time; with changes in the future, we may find that the designation no longer includes all of the habitat areas necessary for the recovery of the species to respond to these changes. For these reasons, a critical habitat designation does not signal habitat outside the designated area is unimportant or may not be required for recovery of the species.

Areas that support occurrences, but are outside the critical habitat designation, will continue to be subject to conservation actions we and other Federal agencies implement under section 7(a)(1) of the Act. They are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, HCPs, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Climate Change

According to the Intergovernmental Panel on Climate Change (IPCC), "Warming of the climate system in recent decades is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global sea level" (IPCC 2007, p. 1). Climate change will be a particular challenge for biodiversity because the interaction of additional stressors associated with climate change and current stressors may push species beyond their ability to survive (Lovejoy and Hannah 2005, pp. 325–326). The synergistic implications of climate change and habitat fragmentation are the most threatening aspect of climate change for biodiversity (Hannah *et al.* 2005, p. 4).

For the southwestern region of the United States, which includes Colorado, warming is occurring more rapidly than elsewhere in the country (Karl *et al.* 2009, p. 129). In Colorado, Statewide temperatures have increased 2 °F (3.6 °C) over the past 30 years, but high variability in annual precipitation precludes the detection of long-term trends (Ray *et al.* 2008, p. 5).

While there is uncertainty about the exact nature and severity of climate change-related impacts anticipated within the Colorado range of the PMJM, a trend of climate change in the mountains of western North America is expected to decrease snowpack, hasten spring runoff, and reduce summer flows (IPCC 2007, p. 11). This could impact the PMJM habitat in a variety of direct and indirect ways. With increases in temperature, species' ranges are likely to move higher in elevation and northward (Karl *et al.* 2009, p. 132). Changes could cause a greater PMJM dependence on higher elevation, cooler, and potentially moister areas for survival in Colorado. The highest elevation at which the PMJM has been documented in Colorado is approximately 7,600 ft (2,317 m) (Service 2010). The preponderance of lands near to or higher than this elevation in the Colorado Front Range are in Federal ownership and are likely subject to fewer threats from human development than non-Federal lands. These Federal lands may serve as an important refuge should PMJM populations shift higher into the mountains.

Changes in stream flow intensity and timing may affect riparian habitats on which the PMJM depends. For example, earlier runoff could impact the smaller high-elevation streams within the upper reaches of drainages, which are maintained primarily by melted snow. Reduced or no flow during summer and fall could make these streams less hospitable to the PMJM and limit their seasonal use. Changes in timing and amount of runoff may also influence human diversion, storage, and conveyance of water (Ray *et al.* 2008, p. 41), which in turn could impact riparian habitats required by the PMJM.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and the regulations at 50 CFR 424.12(b), in determining which areas occupied at the time of listing to designate as critical habitat, we consider

the physical and biological features that are essential to the conservation of the species and that may require special management considerations or protection. These features are the primary constituent elements (PCEs), laid out in the appropriate quantity and spatial arrangement for conservation of the species. In general, physical and biological factors 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 historic, geographical, and ecological distributions of a species.

We derive the PCEs required for the PMJM from its biological needs. The areas included in this revised critical habitat designation for the species contain the essential features to fulfill the species life-history requirements. The PCEs and the resulting physical and biological features essential to the conservation of the PMJM are derived from studies of this species' habitat, ecology, and life history as described in our proposed rule to revise the designation of critical habitat for the PMJM, published in the **Federal Register** October 8, 2009 (74 FR 52066).

All units designated as critical habitat for the PMJM are currently believed to be occupied, are within the geographical area occupied by the species at the time of listing, and contain sufficient PCEs to support one or more life-history functions. Individual stream reaches within each unit contain at least one of the PCEs, and are either believed to be occupied by the PMJM, or provide crucial opportunities for connectivity to facilitate dispersal and genetic exchange within the unit.

Based on our current knowledge of the life history, biology, and ecology of the PMJM, and the requirements of the habitat to sustain the essential life-history functions of the species, we have determined that the PCEs specific to the PMJM are:

(1) Riparian corridors:

(A) Formed and maintained by normal, dynamic, geomorphological, and hydrological processes that create and maintain river and stream channels, floodplains, and floodplain benches and that promote patterns of vegetation favorable to the PMJM;

(B) Containing dense, riparian vegetation consisting of grasses, forbs, or shrubs, or any combination thereof, in areas along rivers and streams that normally provide open water through the PMJM's active season; and

(C) Including specific movement corridors that provide connectivity between and within populations. This may include river and stream reaches with minimal vegetative cover or that are armored for erosion control; travel ways beneath bridges, through culverts, along canals and ditches; and other areas that have experienced substantial human alteration or disturbance.

(2) Additional adjacent floodplain and upland habitat with limited human disturbance (including hayed fields, grazed pasture, other agricultural lands that are not plowed or disked regularly, areas that have been restored after past aggregate extraction, areas supporting recreational trails, and urban–wildland interfaces).

Existing human-created features and structures within the boundaries of the mapped units, such as buildings, roads, parking lots, other paved areas, manicured lawns, other urban and suburban landscaped areas, regularly plowed or disked agricultural areas, and other features not containing any of the PCEs that support the PMJM, are not considered critical habitat.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the occupied areas contain the physical and biological features that are essential to the conservation of the species, and whether these features may require special management considerations or protection. Special management considerations or protection means any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species. The areas we are designating as revised critical habitat will require some level of management to address the current and future threats to the physical and biological features essential to the conservation of the PMJM, and to ensure the recovery of the species. In all units, special management considerations or protection of the essential features may be required to provide for the sustained function of the riparian corridors on which the PMJM depends.

The PMJM is closely associated with riparian ecosystems that are relatively narrow and represent a small percentage of the landscape. Our July 10, 2008, final rule for the PMJM to specify over what portion of its range the subspecies is threatened (73 FR 39789) concluded that the decline in the extent and quality of PMJM habitat is the main factor that threatens the subspecies. Special management considerations and protection may be required to address the threats of habitat alteration, degradation, loss, and fragmentation that results from urban development, flood control, water development, agriculture, and other human land uses that adversely impact PMJM populations. Habitat destruction may affect the PMJM directly or by destroying nest sites, food resources, and hibernation sites; by disrupting behavior; or by forming a barrier to movement.

Criteria Used To Identify Critical Habitat

As required by section 4(b) of the Act, we used the best scientific and commercial data available to designate critical habitat. We are designating critical habitat in specific areas that include river and stream reaches, and their adjacent floodplains and uplands, that are within the known geographic and elevational range of the PMJM in the SPR in Colorado where it is listed and that contain the features essential to the conservation of the PMJM. All areas included in critical habitat contain at least one of the PCEs, and are currently occupied by the PMJM or provide crucial opportunities for connectivity to facilitate dispersal and genetic exchange.

Our critical habitat designation identifies the appropriate quantity and spatial arrangement of the requisite PCEs that we have determined to be essential to the conservation of the subspecies. We determined that there are more areas currently occupied by the PMJM than are necessary to conserve the subspecies within the SPR in Colorado. We base this on the known occurrence and distribution of the PMJM (Service 2010) and upon the conservation strategy in the Draft Plan, which indicates that when specified criteria are met for a subset of existing populations throughout the range of the PMJM, the subspecies can be delisted (Service 2003a, p. 19). To recover the PMJM to the point where it can be delisted, the Draft Plan identifies the need for a specified number, size, and distribution of wild, self-sustaining PMJM populations. On the basis of the above described criteria, we have chosen a subset of the areas occupied by the PMJM within the SPR in Colorado that have the physical and biological features essential to the PMJM for inclusion in critical habitat.

We only consider including unoccupied areas within critical habitat designations if they are essential to the conservation of the species, and we determine that we cannot conserve the species by only including occupied areas in the critical habitat. Because we have determined that the conservation of the PMJM can be achieved through the designation of currently occupied lands, we find that no unoccupied areas are essential at this time. The subspecies was listed primarily due to the threat of impending development to the existing remaining habitat for the species within the Front Range of Colorado. We have determined that recovery of the subspecies can be achieved by protecting a subset of the currently occupied habitat from the threat of development. Recolonization of former parts of the range, while beneficial to the subspecies, is not currently believed to be necessary to conserve the PMJM in the long term.

When determining critical habitat boundaries within this final 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 PMJM. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the PCEs in the adjacent critical habitat.

Available Information

Our June 23, 2003, final rule designating critical habitat for the PMJM (68 FR 37275) cited the March 11, 2003, Working Draft of a Recovery Plan for the PMJM, and the concepts described within (PMJM Recovery Team 2003), as a source of the best scientific and commercial data available on the PMJM. For designating revised critical habitat, we relied heavily on the information, concepts, and conservation recommendations contained in the Working Draft and the slightly modified Draft Plan (Service 2003a), as well as the current efforts of the recently formed Recovery Team. We used these as a starting point for identifying those areas for inclusion in critical habitat that contain the requisite PCEs in the appropriate quantity and spatial arrangement that are essential for the conservation of the PMJM. The Draft Plan is based on the work of scientists and stakeholders who met regularly over a period of more than 3 years. The plan was developed by incorporating principles of conservation biology and all available knowledge regarding the PMJM. Recovery Team meetings were open to the public, and drafts of the plan were discussed in public meetings held in Colorado and Wyoming. We forwarded a draft of the Draft Plan to species experts for review, and their comments (Armstrong 2003, pers. comm.; Hafner 2003, pers. comm.) were considered prior to the Draft Plan being made available on the Service Web site.

We also have incorporated all new information received since 2003, including:

- Data in reports submitted by researchers holding recovery permits under section 10(a)(1)(A) of the Act;
- Research published in peer-reviewed articles and presented in academic theses, agency reports, and unpublished data; and
- Various Geographic Information System (GIS) data layers and cover type information, including land ownership information, topographic information, locations of the PMJM obtained from radio-collars, and locations of the PMJM confirmed to the species level via deoxyribonucleic acid (DNA) analysis, morphological analysis, and other verified records.

We also received information from Federal, State, and local governmental agencies, and from academia and private organizations that have collected scientific data on the PMJM.

The Draft Plan identifies specific criteria for reaching recovery and the delisting of the PMJM. An important change since our 2003 designation of critical habitat was the 2008 final rule limiting the listing of the PMJM to the SPR in Colorado. The Draft Plan identified areas as necessary for recovery throughout the range of the PMJM, including areas in Wyoming where the PMJM was listed at the time. Identified areas within the SPR in Colorado were based on the best available information and continue to reflect our best judgment of what we believe to be necessary for recovery. While elements of the Draft Plan may change prior to finalization of a recovery plan, our review of the Draft Plan and the ongoing Recovery Team review leads us to conclude that the concepts described within it continue to represent the best scientific and commercial data available regarding steps needed for the recovery of the PMJM.

The Draft Plan provides a review of conservation biology theory regarding population viability (Service 2003a, p. 21). To recover the PMJM to the point where it can be delisted, the Draft Plan identifies the need for a specified number, size, and distribution of wild, self-sustaining PMJM populations across the known range of the PMJM. It defines large populations as maintaining 2,500 mice, and usually including at least 50 mi (80 km) of rivers and streams. It defines medium populations as maintaining 500 mice, and usually including at least 10 mi (16 km) of rivers and streams. The average number of PMJM per stream mile was derived from site-specific studies and used to approximate minimum occupied stream miles required to support recovery populations of appropriate size (Service 2003a, p. 21).

The distribution of these recovery populations is intended both to reduce the risk of multiple PMJM populations being negatively affected by natural or manmade events at any one time, and to preserve the existing genetic variation within the PMJM. The Draft Plan states, "species well-distributed across their historical range are less susceptible to extinction and more likely to reach recovery than species confined to a small portion of their range." The document also states that "spreading the recovery populations across hydrologic units throughout the range of the subspecies also preserves the greatest amount of the remaining genetic variation, and may provide some genetic security to the range-wide population" (Service 2003a, p. 20). The Draft Plan emphasizes the value of retaining disjunct or peripheral populations that may be important to recovery (Lomolino and Channell 1995, p. 481) and may have diverged genetically from more central populations due to isolation, genetic drift, and adaptation to local environments (Lesica and Allendorf 1995, pp. 754–755).

While the Draft Plan addresses the entire range of the PMJM, the SPR in Colorado where the PMJM remains listed includes multiple subdrainages that are addressed individually in the Draft Plan (Figure 1). Within Colorado, the Draft Plan identifies recovery criteria for the two major river drainages where the PMJM occurs (the South Platte River drainage and the Arkansas River drainage), and for each subdrainage judged likely to support the PMJM. In some cases, the Draft Plan identifies recovery criteria for subdrainages where limited trapping has not confirmed the presence of the PMJM. Boundaries of drainages and subdrainages have been mapped by the

USGS. For the Draft Plan, 8-digit hydrologic unit boundaries were selected to define subdrainages. A total of 13 HUCs in the SPR of PMJM in Colorado are identified in the Plan as occupied or potentially occupied by the PMJM. Ten are identified in the South Platte River drainage and three in the Arkansas River drainage.

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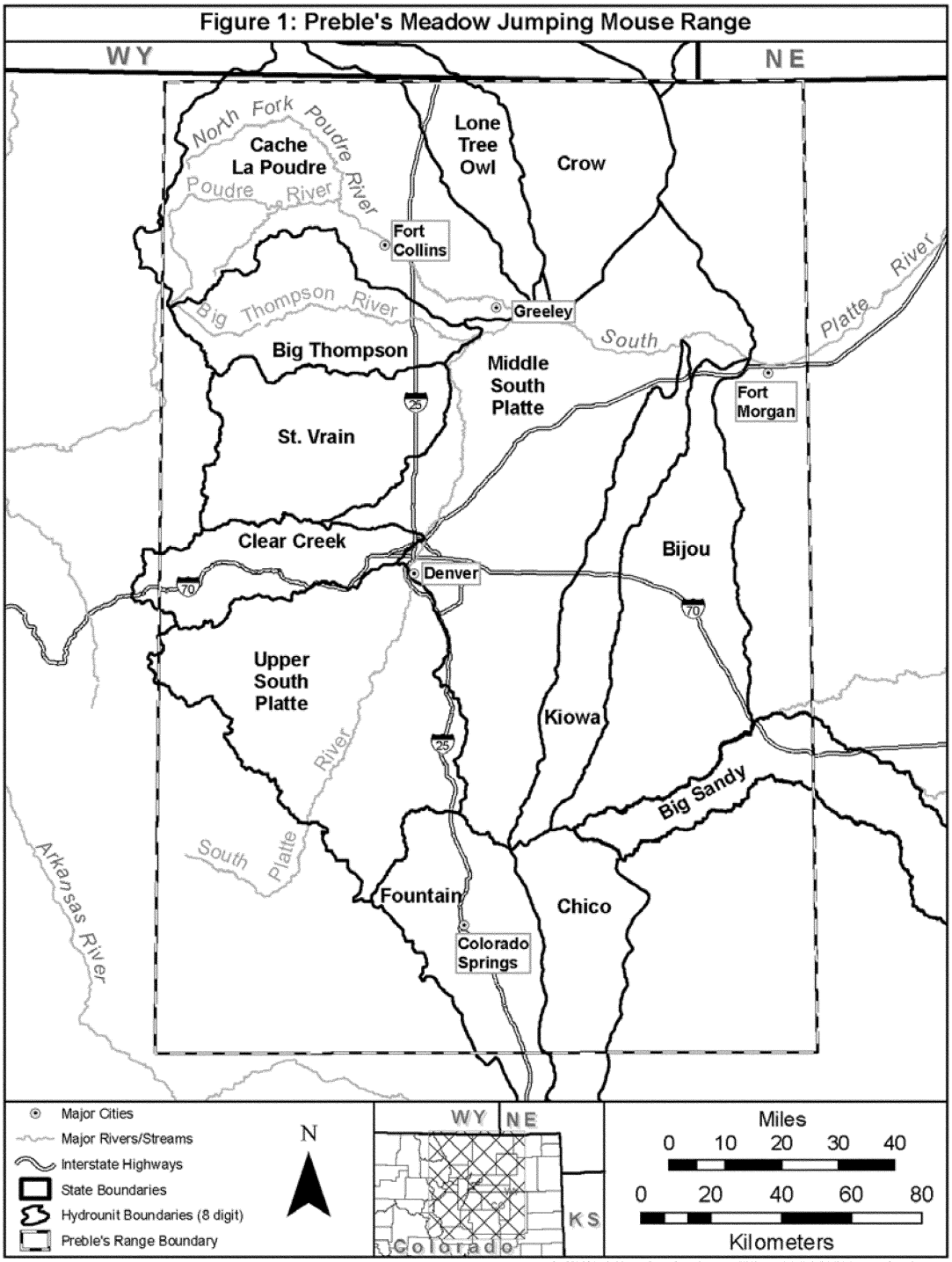

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One issue raised by the Recovery Team was whether the conservation strategy that specified the number, size, and distribution of PMJM recovery populations in Colorado remained valid despite the 2008 removal of the Wyoming portion of PMJM's range from listing. In Colorado, the strategy has been to establish at least three large populations and three medium populations spread over six subdrainages. Recovery of the PMJM would require these populations to be protected from threats. Additionally, the Plan suggests establishing at least three small populations or one medium population in seven other subdrainages, if the PMJM is present. Another issue

raised was whether the strategy required modification based on DNA testing that revealed that the PMJM in northern and southern areas of the subspecies' range (Wyoming and Larimer County in Colorado vs. Douglas and El Paso Counties in Colorado) exhibited significant genetic differences (King *et al.* 2006, pp. 4337–4338). The Recovery Team concluded (Jackson 2009, pers. comm.) that the 2003 conservation strategy adequately addresses recovery across the PMJM's range in Colorado, and would maintain the genetic diversity reported by King *et al.* (2006).

Biological Factors

Presence of the PMJM was determined based largely on the results of trapping surveys, the vast majority of which were conducted in the 12 years since listing the PMJM under the Act. Consistent with our July 10, 2008, final rule to amend the listing for the PMJM (73 FR 39789), subdrainages judged to be occupied by the PMJM in Colorado include those that: (1) Have recently been documented to support jumping mice identified by genetic or morphological examination as the PMJM; or (2) have recently been documented to support jumping mice not identified to the species level, but occurring at elevations below 6,700 ft (2,050 m), where western jumping mice have infrequently been documented. In our July 17, 2002, proposal (67 FR 47154) and our June 23, 2003, designation of critical habitat (68 FR 37275), we summarized trapping results and means of positive identification for each unit. See our 2003 rule designating critical habitat and our 2008 final rule to amend the listing for the PMJM for more information on our determinations regarding presence of the PMJM in various subdrainages.

Boundaries of some critical habitat units extend beyond capture locations to include those reaches that we believe to be occupied by the PMJM, based on the best scientific data available regarding capture sites, the known mobility of the PMJM, and the quality and continuity of habitat components along stream reaches. Where appropriate, we include details on the known status of the PMJM within specific subdrainages in the "Revised Critical Habitat Designation" section of this rule.

Despite numerous surveys, the PMJM has not been found in the Denver metropolitan area since well before its 1998 listing, and is believed to be extirpated from much of the Front Range urban corridor as a result of extensive urban development. The area does not support the spatial arrangement and quantity of requisite PCEs to support PMJM populations, and, as a consequence, we have determined that this area does not contain the features essential to the conservation of the species.

Additional Factors Considered

Based on the Draft Plan, we believe that we can achieve conservation of the PMJM with only a subset of areas currently occupied or containing essential features. To identify the specific subset of areas for inclusion in critical habitat, we considered several qualitative criteria in addition to the presence of the PCEs. These criteria were used to judge the current status, conservation needs, and probable persistence of the essential features of PMJM populations in specific areas, and included: (1) The quality, continuity, and extent of habitat components present; (2) the presence of lands devoted to conservation (either public lands such as parks, wildlife management areas, and dedicated open space, or private lands under conservation easements); and (3) the landscape context of the site, including the overall degree of current human disturbance and presence, and likelihood of future development based on local planning and zoning.

Where specific areas met the definition of critical habitat under section 3 of the Act (within the geographical area occupied by the species and containing features essential to the conservation of the species which may require special management considerations or protection) and other criteria were comparable, we evaluated land ownership as a selection criterion for inclusion in critical habitat. Consistent with the Draft Plan (Service 2003, p. 52), we first selected Federal lands where effective land management strategies can be employed by Federal agencies to conserve PMJM populations. Federal agencies already have an affirmative conservation mandate under the Act to contribute to the conservation of listed species. Therefore, we determined that federally owned lands are more likely to meet the requirements for recovery of the species than private lands that are not subject to the Act's affirmative conservation mandate. However, we cannot depend solely on federally owned lands for critical habitat, as these lands are limited in geographic location, size, and habitat quality within the SPR in Colorado where the PMJM is listed. In addition to the federally owned lands, we included some non-Federal public lands, including lands owned by the State of Colorado or by local governments, and some privately owned lands.

This revised designation of critical habitat in Colorado consists of 11 units, 6 of which are designed to support three large and three medium PMJM recovery populations, corresponding to those designated in the Draft Plan. While the Draft Plan designates the approximate location of these large and medium recovery populations, it does not delineate specific boundaries.

In addition, the Draft Plan establishes a goal of three small recovery populations (including at least 3 mi (5 km) of rivers or streams) or one medium recovery population in seven other HUCs within the PMJM's range in Colorado. The Draft Plan does not identify the locations of recovery populations within these remaining seven HUCs. It also provides an exception to the above goal; no recovery populations are required in those HUCs that, when adequately surveyed, are found to have no PMJM populations. In some HUCs, presence of the PMJM has not been confirmed and the quality, continuity, and extent of physical and biological features essential to the PMJM appear lacking. In others, insufficient surveys have been conducted to establish distribution of PMJM populations or to determine where recovery populations should be located. Due to insufficient information, we are unable to designate critical habitat units corresponding to Draft Plan requirements in all of these remaining seven HUCs.

The Draft Plan anticipates that, in the future, the locations of these remaining recovery populations will be designated and specific boundaries of all recovery populations (large, medium, and small) will be delineated by State and local governments, and other interested parties, working in coordination with the Service. In contrast to the Draft Plan, this revised designation of critical habitat required delineation of specific boundaries for all critical habitat areas in order to meet the requirements of the Act and our implementing regulations. As a result, any future recovery plan developed for the PMJM may designate recovery populations or delineate their boundaries in a manner inconsistent with the critical habitat units we are designating. This may occur if future information changes our understanding of the occurrence and distribution of PMJM populations.

In some HUCs identified in the Draft Plan, little is known regarding the status of the PMJM. For example, PMJM has not been confirmed to occur in the Crow Creek, Lone Tree, and Bijou HUCs within the South Platte River drainage

in Colorado or in the Big Sandy HUC in the Arkansas River drainage. If the PMJM is not present, designation of recovery populations in these HUCs may not be necessary, and these HUCs may be deleted from any future recovery plan. We do not believe that these areas contain features that are essential to the conservation of the species, so we are not designating critical habitat within these four HUCs.

The conservation strategy employed in the Draft Plan emphasizes the importance of protecting additional PMJM populations beyond those designated as recovery populations, to provide insurance for the PMJM in the event that designated recovery populations cannot be effectively managed or protected as envisioned or in the event that populations are decimated by rare but uncontrollable events, such as catastrophic fires or flooding. The Plan recommends directing recovery efforts toward public lands, rather than private lands, where possible, and calls upon all Federal agencies to protect and manage for the PMJM wherever it occurs on Federal lands. However, Federal lands alone cannot fully provide for the conservation of the species. Therefore, we included non-Federal lands when we found those lands contained the PCEs in the appropriate quantity and spatial arrangement to provide the physical and biological features essential to the conservation of the species.

We believe that the designation of areas of critical habitat outside of those areas identified for recovery populations, on both non-Federal and additional Federal lands, is essential for the conservation of the PMJM. Should unforeseen events cause the continued decline of PMJM populations throughout the SPR in Colorado, PMJM populations and the PCEs on which they depend are more likely to persist and remain viable on Federal lands, where consistent and effective land management strategies can be more easily employed. These additional PMJM populations on Federal lands could serve as substitute recovery populations should designated recovery populations decline or fail to meet recovery goals. In addition, some PMJM populations on Federal lands have been the subject of ongoing research that could prove vital to the conservation of the PMJM. Therefore, in addition to designating critical habitat for sites consistent with those listed in the Draft Plan, we reviewed other sites of PMJM occurrence, especially Federal lands, and are designating certain additional units as critical habitat that include the requisite PCEs and are known to support the PMJM.

Based on this conservation strategy, we are designating critical habitat preferentially on certain Federal lands that support required PCEs in the appropriate spatial arrangement and quantity and are occupied by the PMJM, where Federal property extends along stream reaches at least 3 mi (5 km). This length corresponds to the minimum size of small recovery populations as defined by the Draft Plan. These areas of critical habitat may include intervening non-Federal lands, that in some cases support all PCEs needed by the PMJM or, if fragmented by human development, contain at least one of the PCEs and are at least likely to provide connectivity between areas of PMJM habitat on adjacent Federal lands.

Delineation of Critical Habitat Boundaries

We are designating revised critical habitat for the PMJM based on the interpretation of multiple sources used during our June 23, 2003, designation of critical habitat (68 FR 37275); new information developed in the preparation of our October 8, 2009, proposed rule (74 FR 52066); and information we received in response to our request for public comments on our October 8, 2009, proposed rule (74 FR 52066) and our May 27, 2010, publication (75 FR 29700). For this rule, we used GIS-based mapping using ESRI ArcGIS software incorporating USGS National Hydrography Dataset streams along with stream order (by Strahler code), Colorado Department of Transportation roads, U.S. Census Bureau cities, USGS topographic maps, 2005 Farm Service Agency, National Agricultural Inventory Program 1m color imagery, and the COMaP dataset (Theobald *et al.* 2008). We divided lands we are designating as critical habitat into specific mapping units, i.e., critical habitat units, often corresponding to individual HUCs. For the purposes of this rule, these units are described primarily by latitude and longitude, and by Public Land Survey, Township, Section, and Range, to mark the upstream and the downstream extent of critical habitat along rivers and streams.

As in 2003, we were faced with making a decision concerning the outward extent of critical habitat into uplands. Studies suggest that the PMJM uses uplands at least as far out as 328 ft (100 m) beyond the 100-year floodplain (Shenk and Sivert 1999a, p. 11; Ryon 1999, p. 12; Schorr 2001, p. 14; Shenk 2004; Service 2003a, p. 26). Apparent hibernacula (wintering chambers) have been documented outward to 335 ft (102 m) of a perennial stream bed or intermittent tributary (Ruggles *et al.* 2003, p. 19). We have typically described potential PMJM habitat as extending outward 300 ft (90 m) from the 100-year floodplain of rivers and streams (Service 2004a, p. 5). The Draft Plan (Service 2003a, p. 26) defines PMJM habitat as the 100-year floodplain plus 328 ft (100 m) outward on both sides, but allows for alternative delineations that provide for all the needs of the PMJM and include the alluvial floodplain, transition slopes, and appropriate upland habitat.

To allow normal behavior and to ensure that the PMJM and the PCEs on which it depends are protected, we believe that the outward extent of critical habitat should at least approximate the outward distances described above in relation to the 100-year floodplain. Unfortunately, floodplains have not been mapped for many streams within the PMJM's range. Where floodplain mapping is available, we have found that it may include local inaccuracies. While alternative delineation of critical habitat based on geomorphology and existing vegetation could accurately portray the presence and extent of required habitat components, we lack an explicit data layer that could support such a delineation of critical habitat.

In 2003, we also considered determining the outward extent of critical habitat based on a distance outward from features such as the stream edge, associated wetlands, or riparian areas. We judged wetlands an inconsistent indicator of habitat extent and found no consistent source of riparian mapping available across the SPR of Colorado where the PMJM is listed. We also considered using an outward extent of critical habitat established by a vertical distance above the elevation of the river or stream to approximate the floodplain and adjacent uplands likely to be used by the PMJM. This proved unacceptable over the diverse topography that surrounds stream reaches occupied by the PMJM.

For this revised designation, we generally maintain consistency with our 2003 designation of critical habitat in delineating the upland extent of critical habitat boundaries as a set distance outward from the river or stream edge (as defined by the ordinary high water mark) varying with the size (order) of a river or stream. We compared known floodplain widths to stream order over a series of sites and approximated average floodplain width for various orders of streams. To that average we added 328 ft (100 m) outward on each

side. For example, this analysis determined the average floodplain for streams of order 1 and 2 (the smallest streams) is approximately 33 ft (10 m). Based on this calculation, for streams of order 1 and 2, we are designating critical habitat as 361 ft (110 m) outward from the stream edge; for streams of order 3 and 4, we are designating critical habitat as 394 ft (120 m) outward from the stream edge; and for stream orders 5 and above (the largest streams and rivers), we are designating critical habitat as 459 ft (140 m) outward from the stream edge. In each case we are approximating average floodplain width plus 328 ft (100 m). While critical habitat will not extend outward to all areas used by individual mice over time, we believe that these corridors of critical habitat ranging from 722 ft (220 m) to 918 ft (280 m) in width (plus the river or stream width) will support the full range of PCEs essential for conservation of PMJM populations in these reaches, and should help protect the PMJM and its habitat from secondary impacts of nearby disturbance.

Following both our July 17, 2002, proposal of critical habitat (67 FR 47154), and our October 8, 2009, proposal to revise critical habitat (74 FR 52066), we received comments regarding the appropriate outward limits of critical habitat and means of establishing them. Most comments suggested one of two alternative methods: (1) Site-specific mapping of critical habitat for each reach; or (2) one outward limit for all rivers and streams. We determined that the first alternative was not feasible with the resources available to us, and that the second alternative less accurately reflected limits of habitat than the methodology employed above.

An exception is our delineation of the outward boundary of designated critical habitat in those portions of Units 8, 9, and 10, where a Riparian Conservation Zone has been mapped in conjunction with development of the Douglas County HCP and delineates the limits of PMJM habitat. The RCZ depicts known or potential PMJM habitat over 283 stream mi (456 km) and over 18,000 ac (7,000 ha) in Douglas County. Mapping of the RCZ relied on geomorphology and existing vegetation to assess presence and extent of required habitat components (i.e., those physical and biological features essential for the conservation of the PMJM). It followed the alternative habitat delineation suggested in the Draft Plan (Service 2003a), and provides for the needs of the PMJM by including the alluvial floodplain, transition slopes, and appropriate upland habitat along stream reaches. When we approved the Douglas County HCP, we reviewed the methodology and concluded that the RCZ reflected the best information available for establishing the limits of PMJM habitat.

Beyond the conclusion that the RCZ boundary provides a more accurate depiction of the appropriate boundary of critical habitat than what we proposed, we also considered the potential confusion that designation of critical habitat that differs from the established RCZ boundary might cause. The RCZ has been widely publicized in Douglas County and is used as a guide to help avoid impacts to PMJM and its habitat. Establishing critical habitat through standard setbacks from streams would have created a confusing pattern of dual lines that depict PMJM habitat limits. For these reasons we are designating the outward boundary of critical habitat on non-Federal lands in Units 8, 9, and 10 to correspond to the boundaries set by the RCZ, where the RCZ is present. In some instances this increases the width of critical habitat designated; in others it decreases the width. Overall, it results in a decrease in critical habitat than that which would otherwise have been designated, but it more accurately reflects on-site habitat conditions. On Federal properties designated as revised critical habitat in Douglas County, and on a very few non-Federal properties not included in the RCZ, outward boundaries of critical habitat units include standard distances from streams based on stream order.

Revised Critical Habitat Designation

We are designating 11 units that total approximately 411 mi (662 km) of rivers and streams and 34,935 ac (14,138 ha) of lands in Colorado, including land under Federal, State, local government, and private ownership. No lands designated as critical habitat are under tribal ownership. The areas we describe below constitute our best assessment at this time of areas that meet the definition of critical habitat for the PMJM. The units are those areas that are most likely to substantially contribute to conservation of the PMJM, will contribute to the long-term survival and recovery of the species, and require special management considerations or protection. These units, in many cases, correspond to the same geographic area of the units in Colorado delineated in the 2003 designation. However, there are multiple revisions and unit additions. This designation of revised critical habitat replaces the former critical habitat designation for the PMJM in 50 CFR 17.95(a).

Table 1 shows each unit, approximate area, and land ownership. Estimates reflect the total river or stream length and area of lands within critical habitat unit boundaries. Limited areas within these boundaries may not include any of the requisite PCEs. Any such developed areas or other areas not supporting any of the requisite PCEs are excluded by text of this rule, and the total area we are designating may, therefore, be less than what is indicated in Table 1.

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TABLE 1. Critical Habitat Units Designated for the Preble's Meadow Jumping Mouse by Stream Length and Area, and Land Ownership by Area.

Unit	Stream Length, Area	Federal Area	State Area	Local Municipal Area	Other Area
1. N. Fork of the Cache la Poudre River	87 mi (140 km) 8,365 ac (3,385 ha)	1,244 ac (503 ha)	3,457 ac (1,399 ha)	57 ac (23 ha)	3,607 ac (1,460 ha)
2. Cache la Poudre River	51 mi (82 km) 4,929 ac (1,995 ha)	4,702 ac (1,903 ha)	83 ac (34 ha)	12 ac (5 ha)	132 ac (53 ha)
3. Buckhorn Creek	45 mi (73 km) 3,912 ac (1,583 ha)	1,346 ac (545 ha)	54 ac (21 ha)	0	2,512 ac (1,017 ha)
4. Cedar Creek	8 mi (12 km) 641 ac (259 ha)	510 ac (207 ha)	0	0	131 ac (53 ha)
5. South Boulder Creek	8 mi (12 km) 798 ac (323 ha)	0	0	512 ac (207 ha)	286 ac (116 ha)
6. Rocky Flats Site	12 mi (20 km) 1,108 ac (448 ha)	1,094 ac (443 ha)	0	3 ac (1 ha)	11 ac (5 ha)
7. Ralston Creek	9 mi (14 km) 773 ac (313 ha)	0	57 ac (23 ha)	308 ac (125 ha)	408 ac (165 ha)
8. Cherry Creek	30 mi (48 km) 2,536 ac (1,026 ha)	0	126 ac (51 ha)	175 ac (71 ha)	2,235 ac (905 ha)
9. West Plum Creek	90 mi (145 km) 5,518 ac (2,233 ha)	802 ac (325 ha)	330 ac (133 ha)	375 ac (152 ha)	4,012 ac (1,623 ha)
10. Upper South Platte River	34 mi (54 km) 3,060 ac (1,238 ha)	2,674 ac (1,082 ha)	282 ac (114 ha)	0	105 ac (42 ha)
11. Monument Creek	38 mi. (61 km) 3,295 ac (1,333 ha)	59 ac (24 ha)	0	160 ac (65 ha)	3,067 ac (1,245 ha)
Total	411 mi (662 km) 34,935 ac (14,138 ha)	12,432 ac (5,031 ha)	4,388 ac (1,776 ha)	1,602 ac (648 ha)	16,513 ac (6,682 ha)

(Note: Some columns and rows may not add exactly, due to rounding.)

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Lands that we are designating as revised critical habitat are divided into 11 critical habitat units that contain all of the PCEs necessary to meet the essential biological needs of the PMJM throughout the SPR in Colorado, where PMJM is listed.

We present a brief description of each unit, and reasons why it meets the definition of critical habitat for the PMJM, below. The units are generally based on geographically distinct river drainages and subdrainages (HUCs). These units have been subject to, or are threatened by, varying degrees of degradation from human use and development. For these reasons, the essential features within each of the specific areas we are designating as critical habitat may require special management considerations or protection. Management may include measures in addition to those that may already be in place to preserve such areas to avoid, reduce, or offset human-induced and natural impacts, and to restore such areas following unavoidable adverse impacts, including fire and flooding.

South Platte River Drainage—North of Denver

Unit 1: North Fork of the Cache la Poudre River, Larimer County

Unit 1 encompasses approximately 8,365 ac (3,385 ha) on 87 mi (140 km) of streams within the North Fork of the Cache la Poudre River HUC. We are designating critical habitat along the lower portions of the North Fork of the Cache la Poudre River and its tributaries, to provide for the large recovery population specified in the Draft Plan. The unit includes the North Fork of the Cache la Poudre River from the Milton Seaman Reservoir upstream to the Halligan Reservoir. Major tributaries within the unit include Stonewall Creek, Rabbit Creek (including its North Fork, Middle Fork, and South Fork), and Lone Pine Creek. The Eagle's Nest Open Space area, proposed as critical habitat within Unit 1, has been excluded from this critical habitat designation (see the Exclusions section below). Much of the unit is covered by the 2006 Livermore Area HCP (Service 2006b). The HCP covers certain incidental take of the PMJM related to ongoing agriculture and compatible activities, and conservation and stewardship activities in the Livermore area. However, the HCP does not address take resulting from most development.

The unit includes both public and private lands. It includes portions of the Arapaho-Roosevelt National Forest, as well as Lone Pine State Wildlife Area. In the Cache la Poudre HUC, stream reaches that contain requisite PCEs are widespread. The area remains largely rural and agricultural with habitat components likely to support relatively high densities of the PMJM.

Pressure for residential development is increasing within the area. Management of livestock grazing in the unit is often, but not in all cases, compatible with maintenance of quality PMJM habitat. Proposed reservoir projects and associated water management may impact portions of this unit but may also present conservation opportunities. Based on these and other threats, special management considerations and protection are needed. This unit is essential to the conservation of the PMJM because it contains habitat essential to a population of the PMJM that supports the conservation principles of redundancy and resiliency throughout the SPR in Colorado where the PMJM is listed.

Unit 2: Cache la Poudre River, Larimer County

Unit 2 encompasses approximately 4,929 ac (1,995 ha) on 51 mi (82 km) of streams within the Cache la Poudre River watershed. This unit is within the Cache la Poudre HUC and south of Unit 1. It includes the Cache la Poudre River from Poudre Park upstream to the 7,600 ft (2,317 m) elevation below Rustic. Major tributaries within the unit include Hewlett Gulch, Young Gulch, Skin Gulch, Poverty Gulch, Elkhorn Creek, Pendergrass Creek, and Bennett Creek. The unit is primarily composed of Federal lands of the Arapaho-Roosevelt National Forest, including portions of the Cache la Poudre Wilderness, but includes limited non-Federal lands as well. The unit supports the appropriate spatial arrangement of the requisite PCEs to ensure the conservation of the PMJM. Since this unit is located in the same Cache la Poudre HUC as Unit 1, it is unlikely to serve as an initial recovery population. However, it encompasses a significant area of habitat likely to support a sizeable population of the PMJM. Due to Federal ownership, residential or commercial development pressure is minimal; however, the area is subject to substantial recreational use (rafting, kayaking, fishing) in the Cache la Poudre River corridor. Non-Federal lands include existing development that may limit the habitat components present. Such reaches may serve the PMJM mostly as connectors between areas that contain all of the necessary PCEs. Maintenance of connectivity for PMJM movement through such areas is important. Based on these and other threats, special management considerations and protection are needed. This unit is essential to the conservation of the PMJM because it contains habitat essential to a population of the subspecies that supports the conservation principles of redundancy and resiliency throughout the SPR in Colorado where the PMJM is listed.

Unit 3: Buckhorn Creek, Larimer County

Unit 3 encompasses approximately 3,912 ac (1,583 ha) on 45 mi (73 km) of streams within the Buckhorn Creek watershed. It includes Buckhorn Creek from just west of Masonville, upstream to the 7,600-ft (2,317-m) elevation. Major tributaries within the unit include Little Bear Gulch, Bear Gulch, Stringtown Gulch, Fish Creek, and Stove Prairie Creek. The unit is located in the Big Thompson HUC, and we are designating it as critical habitat to address the medium recovery population called for this area in the Draft Plan (Service 2003a). The unit includes both public lands, mostly on portions of the Arapaho-Roosevelt National Forest, and private lands. Requisite PCEs are present. Pressure for expanded rural development exists on non-Federal lands within the unit while recreational use is centered on public lands. Based on these and other development pressures, special management considerations and protection are needed. This unit is essential to the conservation of the PMJM because it contains habitat essential to a population of the subspecies that supports the conservation principles of redundancy and resiliency throughout the SPR in Colorado where the PMJM is listed.

Unit 4: Cedar Creek, Larimer County

Unit 4 encompasses approximately 641 ac (259 ha) on 8 mi (12 km) of streams within the Cedar Creek watershed, including Dry Creek and Jug Gulch. Cedar Creek is a tributary of the Big Thompson River and enters the Big Thompson River at Cedar Cove. The unit is centered on Federal lands of the Arapaho-Roosevelt National Forest, but includes some stream reaches on non-Federal lands. This unit is located in the Big Thompson HUC and, while unlikely to serve as an initial recovery population, it supports a population on mostly Federal lands of the upper Big Thompson River. Requisite PCEs are present, but the unit is isolated, at least in terms of riparian connection, from the PMJM population on nearby Buckhorn Creek drainage (Unit 3) to the north. This site is upstream of The Narrows of the Big Thompson Canyon, a barrier to PMJM movement, while the confluence of the Big Thompson River and Buckhorn Creek is downstream from The Narrows. However, the close proximity of the headwaters of Jug Gulch within this unit to the headwaters

of Bear Gulch within the Buckhorn Creek critical habitat unit suggests that some PMJM may pass between the two populations and thus between the two significant watersheds within this HUC. Non-Federal lands within this unit support existing development and will likely experience continued residential development pressure. Therefore, special management considerations and protection are needed. This unit is essential to the conservation of the PMJM because it contains habitat essential to a population of the subspecies that supports the conservation principles of redundancy and resiliency throughout the SPR in Colorado where the PMJM is listed.

Unit 5: South Boulder Creek, Boulder County

Unit 5 encompasses approximately 798 ac (323 ha) on 8 mi (12 km) of streams within the South Boulder Creek watershed. It includes South Boulder Creek from Baseline Road upstream to Eldorado Springs, and includes the Spring Brook tributary. Denver Water lands proposed as critical habitat within Unit 5 have been excluded from this critical habitat designation (see the Exclusions section). The unit includes both public and private lands. It includes substantial lands owned by the City of Boulder Open Space and Mountain Parks.

This unit is located in the St. Vrain HUC, and we are designating it as critical habitat to address the medium recovery population designated for this area in the Draft Plan (Service 2003a). Requisite PCEs are present, and portions of the area have been the subject of PMJM research funded by the City of Boulder. At some sites high densities of the PMJM have been documented (Meaney et al. 2003, pp. 616–617). A wide floodplain, complex ditch system, and the irrigation of pastures make habitat within the lower portions of this unit unique. Pressure for expanded development is occurring on the limited private, undeveloped land within the unit. Recreational use of the City of Boulder lands is considerable and could adversely impact the PMJM if not properly managed. Based on these and other threats, special management considerations and protection are needed. This unit is essential to the conservation of the PMJM because it contains habitat essential to a population of the subspecies that supports the conservation principles of redundancy and resiliency throughout the SPR in Colorado where the PMJM is listed.

Unit 6: Rocky Flats Site, Jefferson, Boulder, and Broomfield Counties

Unit 6 encompasses approximately 1,108 ac (448 ha) on 12 mi (20 km) of streams, and includes the Rock Creek Subunit, Woman Creek Subunit, and Walnut Creek Subunit. Greater than 99 percent of Unit 6 is within the Rocky Flats Site and consists of Federal lands managed by the Service and DOE. The Rocky Flats Site was a nuclear industrial facility for the DOE between 1951 and the end of the Cold War. Later it became the DOE Environmental Technology Site. Much of the Rocky Flats Site became the Rocky Flats NWR in 2005, but DOE maintains control over the Central Operable Unit (1,300 ac, 530 ha) and other lands near the western boundary of the site.

The Rock Creek Subunit is located in the St. Vrain HUC, and the Woman Creek and Walnut Creek subunits are in the Middle South Platte-Cherry Creek HUC. Since the unit includes portions of two HUCs, both of which support designated critical habitat corresponding with recovery populations designated elsewhere in the Draft Plan, this unit is unlikely to serve as an initial recovery population. However, this unit is unique and important because it is limited almost entirely to Federal lands of the Rocky Flats Site, and populations on the site have been the subject of the longest span of research of any PMJM populations.

This unit is essential to the conservation of the PMJM because requisite PCEs are present and the site supports small streams largely unimpacted by human development. This unit is essential to the conservation of the PMJM because it contains habitat essential to a population of the subspecies that supports the conservation principles of redundancy and resiliency throughout the SPR in Colorado where the PMJM is listed. In addition, the site presents an opportunity to study small populations and their viability over time. However, the small populations present and their apparent isolation suggest that the PMJM population on the unit may be vulnerable. Continuation of existing management and adapting future management to support conservation of the PMJM on site is necessary on both NWR and DOE lands.

Unit 7: Ralston Creek, Jefferson County

Unit 7 encompasses approximately 773 ac (313 ha) on 9 mi (14 km) of streams within the Ralston Creek watershed. It includes Ralston Creek from Ralston Reservoir upstream to the 7,600-ft (2,317-m) elevation. Denver Water lands proposed as critical habitat within Unit 7 have been excluded from this critical habitat designation (see the Exclusions section). The unit includes both public and private lands including lands in Golden Gate Canyon State Park and White Ranch County Park.

This unit is located in the Clear Creek HUC, and we are designating it as critical habitat to partially address the criteria of three small recovery populations or one medium recovery population called for in this area in the Draft Plan (Service 2003a). The segment of Ralston Creek that passes through the Cotter Corporation's existing Schwartzwalder Mine serves as a connector between areas that support all requisite PCEs required by the PMJM located upstream and downstream. Protection and management considerations are required for both the mine area and public lands within the unit. This unit is essential to the conservation of the PMJM because it contains habitat essential to a population of the subspecies that supports the conservation principles of redundancy and resiliency throughout the SPR in Colorado where the PMJM is listed.

South Platte River Drainage—South of Denver

Unit 8: Cherry Creek, Douglas County

Unit 8 encompasses approximately 2,536 ac (1,026 ha) on 30 mi (48 km) of streams within the Cherry Creek watershed. Unit 8 includes two subunits. The first, the Lake Gulch Subunit, includes Cherry Creek from the downstream boundary of the Castlewood Canyon State Recreation Area, upstream to its confluence with Lake Gulch. Tributaries within the subunit include Lake Gulch and Upper Lake Gulch. It includes portions of the Castlewood Canyon State Recreation Area, as well as portions of Douglas County's Green Mountain Ranch property. The second, the Antelope Creek Subunit, includes Antelope Creek from its confluence with West Cherry Creek upstream and a tributary, Haskel Creek. The outward boundaries of critical habitat in this subunit have been modified from those proposed to conform to boundaries of the Douglas County RCZ on non-Federal lands where the RCZ has been mapped (see the Delineation of Critical Habitat Boundaries section above). The two subunits include both public and private lands. These subunits are located in the Middle South Platte-Cherry Creek HUC and address the medium recovery population designated

for this area in the Draft Plan (Service 2003a). PCEs essential to the conservation of the PMJM in the upper reaches of the Cherry Creek basin appear widespread, and there are multiple options as to where we could designate critical habitat for a medium recovery population. This unit is also essential to the conservation of the PMJM because it provides critical habitat to support populations of the subspecies to meet the conservation principles of redundancy and resiliency throughout the SPR in Colorado where the PMJM is listed. Some development pressure is occurring from expanding rural development on private lands within these areas. Management considerations are required for development within this unit, as well as for grazing and recreational activities.

Unit 9: West Plum Creek, Douglas County

Unit 9 encompasses approximately 5,518 ac (2,233 ha) on 90 mi (145 km) of streams within the Plum Creek watershed. It includes Plum Creek from Chatfield Reservoir upstream to the confluence with West Plum Creek then continues upstream on West Plum Creek to its headwaters. Major tributaries within the unit include Indian Creek, Jarre Creek, Garber Creek (including North, Middle, and South Garber Creek), Jackson Creek, Spring Creek, Dry Gulch, Bear Creek, Starr Canyon, Gove Creek, and Metz Canyon. We have reduced the extent of final critical habitat on Bear Creek from that proposed, ending it at the base of the Waconda Lake Dam (see the Summary of Changes from the Proposed Rule section above). Denver Water lands proposed as critical habitat within Unit 9 have been excluded from this critical habitat designation (see the Exclusions section below). The outward boundaries of critical habitat in this unit have been modified from those proposed to conform to boundaries of the Douglas County RCZ on non-Federal lands where the RCZ has been mapped (see the Delineation of Critical Habitat Boundaries section above).

The unit encompasses both public and private lands. It includes portions of the Pike-San Isabel National Forest, as well as Chatfield State Recreation Area (Corps property), and Colorado Division of Wildlife's Woodhouse Ranch property. This unit is located in the Upper South Platte HUC, and it addresses the large recovery population designated for this area in the Draft Plan (Service 2003a). Aside from a portion of lower Plum Creek, the unit remains rather rural, requisite PCEs are present, and it includes habitat components likely to support relatively high densities of the PMJM. Pressure for expanded suburban and rural development is occurring within the area. On some private and public lands, management considerations are required for livestock grazing. This unit is essential to the conservation of the PMJM because it contains habitat essential to a population of the subspecies that supports the conservation principles of redundancy and resiliency throughout the SPR in Colorado where the PMJM is listed.

Unit 10: Upper South Platte River, Douglas, Jefferson, and Teller Counties

Unit 10 encompasses approximately 3,060 ac (1,238 ha) on 34 mi (54 km) of streams within the South Platte River watershed. It includes four subunits. The Chatfield Subunit includes a section of the South Platte River upstream of Chatfield Reservoir within Chatfield State Recreation Area (Corps property). The Bear Creek Subunit includes Bear Creek and West Bear Creek, tributaries to the South Platte River. The South Platte Subunit includes a segment of the South Platte River upstream from Nighthawk, including the tributaries Gunbarrel Creek and Sugar Creek. This subunit is centered on Federal lands of the Pike-San Isabel National Forest but includes some intervening non-Federal lands. The Trout Creek Subunit includes portions of Trout Creek, a tributary to Horse Creek, and also portions of Eagle Creek, Long Hollow, Fern Creek, Illinois Gulch, and Missouri Gulch. This subunit is centered on Federal lands of the Pike-San Isabel National Forest but includes some intervening non-Federal lands along Trout Creek. Denver Water lands proposed as critical habitat within Unit 10 have been excluded from this critical habitat designation (see the Exclusions section below). The outward boundaries of critical habitat in this unit have been modified from those proposed to conform to boundaries of the Douglas County RCZ on non-Federal lands in Douglas County where the RCZ has been mapped (see the Delineation of Critical Habitat Boundaries section above).

This unit is located in the same Upper South Platte HUC as West Plum Creek, where the Draft Plan designated a large recovery population and, therefore, is unlikely to serve as an initial recovery population. The unit encompasses four areas of primarily Federal land spread through the drainage, three within the Pike-San Isabel National Forest boundary. While requisite PCEs are present, habitat components present and the likely density of PMJM populations vary. The Trout Creek Subunit appears to have high quality PMJM habitat and may provide a continued opportunity to research relationships between the PMJM and the western jumping mouse *(Z. princeps*), both of which have been verified from the same trapping effort on Trout Creek. The four subunit areas should ensure that populations of the PMJM sufficient for its conservation are maintained in the portion of this HUC upstream of Chatfield Reservoir on the South Platte River and its tributaries. This unit is essential to the conservation of the PMJM because it contains habitat essential to populations of the subspecies that supports the conservation principles of redundancy and resiliency throughout the SPR in Colorado where the PMJM is listed. Due to Federal ownership, residential or commercial development pressure is minimal; however, the area is subject to substantial recreational use. Proposed reservoir projects may impact portions of this unit. Based on these and other development pressures, special management considerations and protection are needed.

Arkansas River Drainage

Unit 11: Monument Creek, El Paso County

Unit 11 is located in the Arkansas River drainage. It encompasses approximately 3,295 ac (1,333 ha) on 38 mi (61 km) of streams within the Monument Creek watershed. It includes Monument Creek from the confluence of Cottonwood Creek upstream to the southern boundary of the U.S. Air Force (USAF) Academy (Academy) and from the northern boundary of the Academy upstream to the dam at Monument Lake. Major tributaries within the unit include Kettle Creek, Black Squirrel Creek, Monument Branch, Middle Tributary, Smith Creek, Jackson Creek, Beaver Creek, Teachout Creek, and Dirty Woman Creek. The unit is primarily on private lands. It includes a small portion of the Pike-San Isabel National Forest. Lands within the Struthers Ranch, Dahle Property, and Lefever Property HCPs, which were proposed as critical habitat within this unit, have been excluded from this critical habitat designation (see Exclusions, below).

This unit is located in the Fountain Creek HUC, and we are designating it as critical habitat to address part of the large recovery population designated for this area in the Draft Plan (Service 2003a). The area is unique in that it represents the only known PMJM population of significant size within the Arkansas River drainage and the southernmost known occurrence of the PMJM. The Draft Plan (Service 2003a)

specifies a large recovery population along Monument Creek and its tributaries including lands within the Academy. While the Academy lands support the requisite PCEs, support a significant PMJM population, and are essential to maintenance of this proposed recovery population, we determined that the Academy lands merit exemption under section 4(a)(3) of the Act because an integrated natural resources management plan is in place that addresses conservation of the PMJM.

Requisite PCEs are present throughout this unit, but development pressure is extremely high on some private lands within the unit. Development has resulted in changes in base flows and increased stormwater runoff, and has adversely impacted stream channels and associated riparian systems (Mihlbachler 2007). Comprehensive management measures to address habitat degradation are needed.

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 fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the Fifth and Ninth Circuits Court of Appeals 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 we do not rely on this regulatory definition when we analyze 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 physical and biological features that relate to the ability of the area to periodically support the subspecies) to serve its intended conservation role for the subspecies.

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 concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

An exception to the concurrence process referred to in (1) above occurs in consultations that involve National Fire Plan projects, known as Section 7 Counterpart Regulations for National Fire Plan Projects. In 2004, the USFS and the Bureau of Land Management (BLM) reached agreements with us to streamline a portion of the section 7 consultation process (BLM 2004, pp. 1–8; USFS 2004, pp. 1–8). Under these regulations Alternative Consultation Agreements allow the USFS and the BLM the opportunity to make "not likely to adversely affect" determinations for projects that implement the National Fire Plan, and do not need to submit these projects for concurrence. Such projects include prescribed fire, mechanical fuels treatments (thinning and removal of fuels to prescribed objectives), emergency stabilization, burned area rehabilitation, road maintenance and operation activities, ecosystem restoration, and culvert replacement actions. The USFS and the BLM must ensure staffs are properly trained, and both agencies must submit monitoring reports to us to determine if the procedures are being implemented properly and that effects on endangered species and their habitats are being properly evaluated.

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. We define reasonable and prudent alternatives at 50 CFR 402.02 as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action;

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction;

(3) Are economically and technologically feasible; and

(4) Would, in the Director's opinion, avoid 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 PMJM or its designated 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 Corps 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 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 funded, authorized, or permitted, do not require section 7 consultations.

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 PMJM. Federal actions that may affect areas outside of critical habitat, such as development, agricultural activities, and road construction, are still subject to review under section 7 of the Act if they may affect the PMJM, because Federal agencies must consider both effects to the species and effects to critical habitat independently. The prohibitions of section 9 of the Act applicable to the PMJM under 50 CFR 17.31 also continue to apply both inside and outside of designated critical habitat.

Application of the Jeopardy and Adverse Modification Standards

Jeopardy Standard

Currently, the Service applies an analytical framework for PMJM jeopardy analyses that relies heavily on the importance of known populations to the species' survival and recovery. The analysis required by section 7(a)(2) of the Act is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of the PMJM in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, the jeopardy analysis focuses on the rangewide status of the SPR where the PMJM is threatened, the factors responsible for that condition, and what is necessary for this species to survive and recover. An emphasis is also placed on characterizing the condition of the PMJM in the area affected by the proposed Federal action and the role of affected populations in the survival and recovery of the PMJM. That context is then used to determine the significance of adverse and beneficial effects of the proposed Federal action and any cumulative effects for purposes of making the jeopardy determination.

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 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 PMJM. 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.

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 adversely affect critical habitat and, therefore, should result in consultation for the PMJM include, but are not limited to, the following:

(1) Any activity that results in development or alteration of the landscape within a unit, including: land clearing; activities associated with construction for urban and industrial development, roads, bridges, pipelines, or bank stabilization; agricultural activities such as plowing, disking, haying, or intensive grazing; off-road vehicle activity; and mining or drilling of wells.

(2) Any activity that results in changes in the hydrology of the unit, including: construction, operation, and maintenance of levees, dams, berms, and channels; activities associated with flow control, such as releases, diversions, and related operations; irrigation; sediment, sand, or gravel removal; and other activities resulting in the draining or inundation of a unit.

(3) Any sale, exchange, or lease of Federal land that is likely to result in the habitat in a unit being destroyed or appreciably degraded.

(4) Any activity that detrimentally alters natural processes in a unit, including changes to inputs of water, sediment and nutrients, or any activity that significantly and detrimentally alters water quantity in the unit.

(5) Any activity that could lead to the introduction, expansion, or increased density of an exotic plant or animal species that is detrimental to the PMJM and to its habitat.

Note that the scale of these activities would be a crucial factor in determining whether, in any instance, they would directly or indirectly alter critical habitat to the extent that the value of the critical habitat for the survival and recovery of the PMJM would be appreciably diminished.

We consider all of the units we are designating as critical habitat to contain features essential to the conservation of the PMJM and which require special management. All of the units are within the geographic range of the species and the SPR in Colorado where it is listed, and they are believed to be currently occupied. To ensure that their actions do not jeopardize the continued existence of the PMJM, Federal agencies already consult with us on activities in areas currently occupied by the PMJM, or in unoccupied areas if the species may be affected by the action. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded or permitted do not require section 7 consultation.

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."

We consult with the military on the development and implementation of INRMPs for installations with federally listed species. We analyzed INRMPs developed by military installations that are located within the SPR in Colorado where the PMJM is listed and that contain those features essential to the species' conservation to determine if they are exempt under the authority of section 4(a)(3)(B) of the Act.

U.S. Air Force Academy

The Academy, in El Paso County, is the lone Department of Defense property that supports a population of the PMJM in habitat that we determined contains physical and biological features that are essential to the conservation of the

species. The Academy completed an INRMP in 1998, and updated it in 2008 (USAF 1998, 2008). The Academy's INRMP describes habitats found at the Academy, including habitats used by the PMJM (USAF 1998, 2008). It addresses management concerns, provides goals and objectives regarding the PMJM, and describes management actions designed to accomplish those objectives. The INRMP also requires monitoring, evaluation of the plan's effectiveness, and modification of management actions when appropriate.

The Academy also developed a Conservation Agreement with the Service and an accompanying "Conservation and Management Plan for the Preble's Meadow Jumping Mouse at the U.S. Air Force Academy" in 1999 (USAF 1999). The Conservation agreement was extended for 5 years in 2009. The plan provides guidance for USAF management decisions. In addition, the Service completed a programmatic section 7 consultation in 2000, addressing certain activities at the Academy that may affect the PMJM (Service 2000), and concurred with 2008 changes to the INRMP.

We have reviewed these measures and have concluded the INRMP addresses the four criteria identified above. As a result, we did not propose Academy lands as critical habitat and have not included Academy lands in this final designation. Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the Academy lands are subject to the Academy's INRMP, and that conservation efforts identified in the INRMP will provide a benefit to PMJM occurring in habitats within or adjacent to these facilities. Therefore, lands within this installation are exempt from critical habitat designation under section 4(a)(3) of the Act. As a result, we are not including a total of approximately 3,300 ac (1,300 ha) of habitat in this Department of Defense installation in this final critical habitat designation.

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 statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

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, the Secretary makes this determination, then he can exercise his discretion to 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 under section 7 of the Act that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan that provides equal to or more conservation that a critical habitat designation would provide.

In the case of PMJM, the benefits of critical habitat include public awareness of PMJM presence and the importance of habitat protection, and in cases where a Federal nexus exists, increased habitat protection for PMJM due to the protection from adverse modification or destruction of critical habitat.

In evaluating 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, the two sides are carefully weighed to determine whether the benefits of exclusion outweigh those of inclusion. If they do, we then determine whether exclusion of the particular area would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, that area will not be excluded from the designation.

Based on the information provided by entities seeking exclusion, as well as additional public comments we received, we evaluated whether certain lands in the proposed critical habitat were appropriate for exclusion from this final designation. We considered the areas discussed below for exclusion under section 4(b)(2) of the Act, and present our detailed analysis below. For those areas in which the Secretary has exercised his discretion to exclude, we believe that:

(1) Their value for conservation will be preserved for the foreseeable future by existing protective actions, or

(2) The benefits of excluding the particular area outweigh the benefits of their inclusion, based on the "other relevant factor" provisions of section 4(b)(2) of the Act.

Exclusions Based on Economic Analysis

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared a DEA, based on the October 8, 2009, proposed rule (74 FR 52066), which we made available for public review on May 27, 2010 (75 FR 29700). We opened a comment period on the DEA for 30 days, until June 28, 2010. Following the close of the comment period, an FEA of the potential economic effects of the designation was developed, taking into consideration these comments and any new information.

The intent of the FEA is to identify and analyze the potential economic impacts associated with the final revised critical habitat designation for the PMJM in the SPR in Colorado where it is listed under the Act. The FEA quantifies the economic impacts of all potential conservation efforts for the PMJM, which are the co-extensive costs. The majority of these costs will likely be

incurred regardless of whether or not we designate revised critical habitat. The economic impact of the revised critical habitat designation is analyzed by comparing scenarios both "with critical habitat" and "without critical habitat." The "without critical habitat" scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations), but not including critical habitat designated in 2003. Therefore, the baseline represents the costs incurred regardless of whether critical habitat is designated. The "with critical habitat" scenario describes the incremental impacts associated specifically with the proposed designation of revised critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we considered in the final designation of revised critical habitat. The analysis looked retrospectively at baseline impacts incurred since the species was listed, and forecasted both baseline and incremental impacts likely to occur with the final revised critical habitat designation.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency associated with residential and commercial development, public projects, and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA looks retrospectively at costs that have been incurred since May 13, 1998, when the PMJM was listed under the Act (63 FR 26517), and considers those costs that may occur in the 20 years following the designation of critical habitat, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe. The FEA quantifies economic impacts from PMJM conservation efforts associated with the following categories of activity: residential and commercial development; roads/bridges, utilities, and bank stabilization projects; water supply development; USFS land management; Rocky Flats Site land management; and gravel mining.

Based on the FEA, co-extensive costs (the economic impacts of all potential conservation efforts for the PMJM) are expected to be from $89 million to $202 million, assuming a 7 percent discount rate, over the next 20 years. Potential incremental impacts associated with the revised critical habitat designation are estimated to be $28.2 million to $63.4 million (approximately $2.66 million to $5.98 million on an annualized basis), assuming a 7 percent discount rate, over the next 20 years. These incremental impacts generally consist of those incremental administrative costs of conducting section 7 consultations with the Service, and additional costs of project modifications undertaken to avoid adverse modification of critical habitat and avoid or minimize adverse impacts to critical habitat. In the high-end scenario, potential impacts to residential and commercial development represent 92 percent of the co-extensive costs and 96 percent of the incremental impacts, assuming a 7 percent discount rate. The largest contributor to incremental costs is residential and commercial development in Unit 9 (West Plum Creek), Unit 10 (Upper South Platte), and Unit 11 (Monument Creek). The following table provides estimates of co-extensive impacts and those attributable to designation of critical habitat, by activity, over the next 20 years. Table 2 (below) gives a comparison and summary of both the total (co-extensive) costs estimated for all PMJM conservation activities, and the incremental costs resulting from the revised designation of critical habitat for the PMJM, projected over 20 years, at a 7 percent discount rate.

TABLE 2—ESTIMATED POST-DESIGNATION, CO-EXTENSIVE, AND INCREMENTAL IMPACTS OVER 20 YEARS, BY ACTIVITY (PRESENT VALUE, 2009 DOLLARS), SHOWING HIGH AND LOW ESTIMATES, ASSUMING A 7 PERCENT DISCOUNT RATE.

Activity	Co-extensive high	Co-extensive low	Incremental high	Incremental low
Residential and Commercial Development	$186,000,000	$82,000,000	$61,100,000	$26,900,000
Road/Bridge, Utility, and Bank Stabilization	2,910,000	1,500,000	946,000	497,000
Water Supply Development	11,500,000	3,890,000	937,000	323,000
USFS Lands Management	977,000	977,000	357,000	357,000
Rocky Flats Site	149,000	149,000	70,800	70,800
Total	201,536,000	88,516,000	63,410,800	28,147,800

Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary has determined not to exert his discretion to exclude any areas from this designation of critical habitat for the PMJM based on economic impacts. A copy of the FEA with supporting documents may be obtained by contacting the Colorado Ecological Services Office (see **ADDRESSES**) or by downloading from the Internet at *http://www.regulations.gov.*

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense (DOD) where the designation of critical habitat might present an impact to national security. In preparing this final rule, we have determined that the lands within the revised designation of critical habitat for the PMJM are not owned or managed by the DOD, and, therefore, we anticipate no impact to national security. The Secretary has determined not to exert his discretion to exclude any areas from this final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether landowners have developed any HCPs or other resource management plans for the areas proposed for designation, 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.

Our NEPA analysis may also disclose impacts we may consider in our analysis under section 4(b)(2) of the Act. In order to consider environmental impacts of the designation of critical habitat, we prepared a draft environmental assessment, based on the October 8, 2009, proposed rule (74 FR 52066), and made it available for public review on May 27, 2010, (75 FR 29700). We opened a comment period on the draft environmental assessment for 30 days, until June 28, 2010. Following the close of the comment period, a final environmental assessment of the potential environmental effects of the designation was developed, taking into consideration comments and any new information. A copy of the final environmental assessment and Finding of No Significant Impact (FONSI) may be obtained by contacting the Colorado Ecological Services Office (see **ADDRESSES**), or by downloading from the Internet at *http://www.regulations.gov*.

In order 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 determine that the benefits of exclusion outweigh the benefits of inclusion, then we can exclude the area only if such exclusion would not result in the extinction of the species.

Benefits of Designating Critical Habitat

Regulatory Benefits

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. Prior to our designation of critical habitat, Federal agencies consult with us on actions that may affect a listed species and must refrain from undertaking actions that are likely to jeopardize the continued existence of the species. Thus, the analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. The difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some species, and in some locations, the outcome of these analyses will be similar, because effects on habitat will often result in effects on the species. However, the regulatory standard is different: the jeopardy analysis looks at the action's impact on survival and recovery of the species, while the adverse modification analysis looks at the action's effects on the designated habitat's contribution to the species' conservation. This will, in many instances, lead to different results and different regulatory requirements.

Once an agency determines that consultation under section 7 of the Act is necessary, the process may conclude informally when we concur in writing that the proposed Federal action is not likely to adversely affect critical habitat. However, if we determine through informal consultation that adverse impacts are likely to occur, then we would initiate formal consultation, which would conclude when we issue a biological opinion on whether the proposed Federal action is likely to result in destruction or adverse modification of critical habitat.

For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to PCEs, but it would not contain any mandatory reasonable and prudent measures or terms and conditions. We suggest reasonable and prudent alternatives to the proposed Federal action only when our biological opinion results in an adverse modification conclusion.

In providing the framework for the consultation process, the previous section applies to all the following discussions of benefits of inclusion or exclusion of critical habitat.

The process of designating critical habitat as described in the Act requires that the Service identify those lands on which are found the physical or biological features essential to the conservation of the species which may require special management considerations or protection. In identifying those lands, the Service must consider the recovery needs of the species, such that the habitat that is identified, if managed, could provide for the survival and recovery of the species. Furthermore, once critical habitat has been designated, Federal agencies must consult with the Service under section 7(a)(2) of the Act to ensure that their actions will not adversely modify designated critical habitat or jeopardize the continued existence of the species. As noted in the Ninth Circuit's *Gifford Pinchot* decision, the Court ruled that the jeopardy and adverse modification standards are distinct, and that adverse modification evaluations require consideration of impacts to the recovery of species. Thus, through the section 7(a)(2) consultation process, critical habitat designations provide recovery benefits to species by ensuring that Federal actions will not destroy or adversely modify designated critical habitat.

The identification of lands that are necessary for the conservation of the species can assist in the recovery planning for a species, and therefore is beneficial. In this case the Draft Plan has helped inform critical habitat designation, and this final rule may, in turn, contribute to development of a final recovery plan. The process of proposing and finalizing a critical habitat rule provides the Service with the opportunity to determine lands essential for conservation as well as identify the physical and biological features essential for conservation on those lands. The designation process includes peer review and public comment on the identified features and lands. This process is valuable to land owners and managers in developing conservation management plans for identified lands, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat.

However, 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 and adverse modification of its critical habitat, but not specifically to manage remaining lands or institute recovery actions on remaining lands. Conversely, management plans institute intentional, proactive actions over the lands they encompass to remove or reduce known threats to a species or its habitat and, therefore, implement recovery actions. We believe that the

conservation of a species and its habitat that could be achieved through the designation of critical habitat, in some cases, is less than the conservation that could be achieved through the implementation of a management plan that includes species-specific provisions and considers enhancement or recovery of listed species as the management standard over the same lands. Consequently, implementation of any HCP or management plan that considers enhancement or recovery as the management standard will often provide as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision.

Educational Benefits

A benefit of including lands in critical habitat is that designation of critical habitat 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 PMJM. Because the critical habitat process includes a public comment period, opportunities for public hearings, and announcements through local venues, including radio and other news sources, the designation of critical habitat provides numerous occasions for public education and involvement. Through these outreach opportunities, land owners, State agencies, and local governments can become more aware of the plight of listed species and conservation actions needed to aid in species recovery. Through the critical habitat process, State agencies and local governments may become aware of areas that could be conserved under State laws, local ordinances, or specific management plans.

Benefits of Exclusion

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide.

When we evaluate the existence of a conservation plan to consider 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 would result in extinction, we will not exclude it from the designation.

Conservation Partnerships on Non-Federal Lands

Most federally listed species in the United States will not recover without cooperation of non-Federal landowners. More than 60 percent of the United States is privately owned (National Wilderness Institute 1995), 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.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners (Wilcove and Chen 1998, p. 1407; Crouse *et al.* 2002, p. 720; James 2002, p. 271). Building partnerships and promoting voluntary cooperation of landowners are essential to understanding the status of species on non-Federal lands, and are necessary to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection.

Many non-Federal landowners derive satisfaction from contributing to endangered species recovery. We promote these private-sector efforts through the Department of the Interior's Cooperative Conservation philosophy. Conservation agreements with non-Federal landowners (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 consultations. We encourage non-Federal landowners to enter into conservation agreements, based on a view that we can achieve greater species conservation on non-Federal land through such partnerships than we can through regulatory methods (December 2, 1996; 61 FR 63854).

As discussed above, consultation under section 7(a)(2) of the Act, and the duty to avoid jeopardy to a listed species and adverse modification of designated critical habitat, is only triggered where Federal agency action is involved. In the absence of Federal agency action, the primary regulatory restriction applicable to non-Federal landowners is the prohibition against take of listed animal species under section 9 of the Act. In order to take listed animal species where no independent Federal action is involved that would trigger section 7 consultation, a private landowner must obtain an incidental take permit under section 10 of the Act.

However, many private landowners are wary of possible consequences of encouraging 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; Brook *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 endangered or threatened species are found. Consequently, harboring endangered species is viewed by many landowners as a liability. This holds true for PMJM presence on private lands in Colorado. 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). We attempt to ease these concerns through communication and outreach with landowners; however, we recognize that these efforts are not always successful.

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 funded, authorized, 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. In cases where conservation actions are currently employed but anxiety regarding the potential impacts of critical habitat designation exists, we may find that excluding non-Federal lands from critical habitat designation results in improved partnerships and conservation efforts.

Benefits of Excluding Lands With Habitat Conservation Plans

The benefits of excluding lands with approved HCPs from critical habitat designation, such as HCPs that cover the PMJM, include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed as a result of the critical habitat designation. Many HCPs take years to develop, and upon completion, are consistent with the recovery objectives for listed species that are covered within the plan area. Many HCPs also provide conservation benefits to unlisted sensitive species.

A related benefit of excluding lands covered by approved HCPs from critical habitat designation is the unhindered, continued ability it gives us to seek new partnerships with future plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. The HCPs often cover a wide range of species, including listed plant species and species that are not State or federally listed and would otherwise receive little protection from development. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

We also note that permit issuance in association with HCP applications requires consultation under section 7(a)(2) of the Act, which would include the review of the effects of all HCP-covered activities that might adversely impact the species under a jeopardy standard, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3), even without the critical habitat designation. In addition, all other Federal actions that may affect the listed species would still require consultation under section 7(a)(2) of the Act, and we would review these actions for possibly significant habitat modification in accordance with the definition of harm referenced above.

Habitat Conservation Plans Evaluated for Exclusion

The information provided in the previous section applies to the following analysis of exclusions under section (4)(b)(2) of the Act. Portions of the revised critical habitat units and their subunits warrant exclusion from the designation of revised critical habitat under section 4(b)(2) of the Act based on the partnerships, management, and protection afforded under these approved and legally operative HCPs.

We consider a current plan (HCPs as well as other types) to provide adequate management or protection for PMJM and its habitat if it meets the following criteria:

(1) The plan is complete and provides the same or better level of protection from adverse modification or destruction than that provided through a consultation under section 7 of the Act;

(2) There is a reasonable expectation that the conservation management strategies and actions will be implemented for the foreseeable future and be effective, based on past practices, written guidance, or regulations; and

(3) The plan provides adaptive management and conservation strategies and measures consistent with currently accepted principles of conservation biology.

Section 10(a)(1)(B) of the Act authorizes us to issue to non-Federal entities a permit for the incidental take of endangered and threatened species. This permit allows a non-Federal landowner to proceed with an activity that is legal in all other respects, but that results in the incidental taking of a listed species (i.e., take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). The Act specifies that an application for an incidental take permit must be accompanied by a habitat conservation plan (HCP), and specifies the content of such a plan. The purpose of conservation agreements is to describe and ensure that the effects of the permitted action on covered species are adequately minimized and mitigated, and that the action does not appreciably reduce the survival and recovery of the species. In our assessment of conservation agreements associated with this final rulemaking, the analysis required for these types of exclusions involves careful consideration of the benefits of designation versus the benefits of exclusion. The benefits of designation typically arise from additional section 7 protections, as well as enhanced public awareness once specific areas are identified as critical habitat. The benefits of exclusion generally relate to relieving regulatory burdens on existing conservation partners, maintaining good working relationships with them, and encouraging the development of new partnerships.

We have weighed the benefits of excluding lands in the following HCPs from critical habitat against the benefits of inclusion. We determined that the benefits of excluding the lands covered by the Denver Water HCP, Struthers Ranch HCP, Eagle's Nest Open Space HCP, the Lefever Property HCP, and the Dahle Property HCP from designation as PMJM critical habitat outweigh the benefits of including these areas and that these exclusions would not result in extinction of the PMJM. Thus, as allowed by section 4(b)(2) of the Act, we have excluded them from the critical habitat designation.

Denver Water Habitat Conservation Plan

On May 1, 2003, we issued a section 10 incidental take permit to Denver Water for the Denver Water HCP (Service 2003b). This permit covers the PMJM. Denver Water owns various properties (including easements), facilities, and infrastructure within the SPR in Colorado where the PMJM is listed. The Denver Water HCP covers the water facilities and infrastructure owned and operated by Denver Water, including: The Foothills, Marston, and Moffat treatment plants; 17 pump stations; 29 treated water storage reservoirs; and 2,464 mi (3,968 km) of pipe. The permit area includes approximately 6,000 ac (2,700 ha) of occupied and potential PMJM habitat on Denver Water properties in Boulder, Jefferson, and Douglas Counties. Denver Water properties covered by the HCP include portions of Units 5, 7, 9, and 10 proposed as revised critical habitat.

The HCP promotes implementation of applicable best management practices to benefit the PMJM that avoid, minimize, and eliminate impacts to occupied and potential PMJM habitat. Where unavoidable impacts occur, Denver Water conducts mitigation as required in the HCP. Denver Water is authorized to take up to 25 ac (10 ha) of occupied and potential habitat through impacts from the covered activities at any one time with a maximum of 75 ac (30 ha) total disturbed over the 30-year term of the HCP.

This HCP provides long-term assurances that Denver Water's covered activities are permitted and in compliance with the Act and provides the Service with a tool to minimize and

mitigate take on occupied and potential habitat. To accomplish these goals, the plan requires the following special management and protection:

(a) Before conducting a covered activity (principally operations and maintenance activities) on occupied and potential habitat, Denver Water will determine whether avoidance and minimization efforts are applicable, practicable, and can be used to avoid, reduce, or eliminate take. Generally, the use of best management practices will be the most practicable avoidance or minimization tool. Appendix 5 of the HCP lists best management practices that may be applicable to Denver Water's routine operation and maintenance activities and projects. In some cases, the use of best management practices will avoid take. In other situations, best management practices will minimize take. Where take still results, mitigation will be used to offset the impacts.

(b) As required by section 10 regulations (50 CFR 17.22), the HCP requires Denver Water to perform compliance monitoring and effectiveness monitoring to determine whether the terms and conditions of the HCP are being met. Monitoring activities include: Document pre- and post-impact site conditions; determine the extent of take of occupied and potential habitat; determine the success of PMJM habitat revegetation efforts; report on additional Denver Water actions, including initiation of mitigation, discussion of best management practices utilized, if any, and other management decisions that address implementation of the HCP; hold an annual meeting between Denver Water and the Service; and prepare an annual monitoring report.

(c) Adaptive management will be employed to gain new data, or research new information regarding the biology of the PMJM. The use of adaptive management in areas of questionable PMJM habitat suitability, PMJM use, or PMJM presence will likely increase the potential for success within the HCP and increase the potential for new and useful information on PMJM biology to be acquired.

(d) The HCP will result in the protection of over 6,000 ac (2,400 ha) of potential and occupied habitat. Denver Water must limit temporary impacts to 25 ac (10 ha) of occupied and potential habitat at any one time. Temporary impacts will not exceed 75 ac (30 ha) over the term of the HCP. Denver Water will also track all impacts, restore disturbed vegetation, and track all successful restorations to ensure the above limits are not exceeded.

(e) To offset foreseeable permanent impacts to 1 ac (0.4 ha) of habitat, Denver Water will create 0.25 ac (0.10 ha) of riparian shrub, create 2.25 ac (0.91 ha) of upland occupied and potential habitat, and revegetate a number of trails and dirt roads. Should permanent impacts exceed the 1.0 ac (0.4 ha) (this HCP covers a maximum of 10 ac (4 ha) of permanent impacts), Denver Water will mitigate this through: A conservation easement at a ratio of 8:1; by enhancements at a ratio of 2:1; or a combination of preservation at 6:1 and enhancements at 1:1.

(f) Other mitigation includes: Weed management; education, training, and the distribution of information to Denver Water employees to promote avoidance, minimization, or best management practices as applicable and practicable; restoration of habitat linkage corridors; population monitoring and research; and provision of trapping data to the Service.

Denver Water provides annual reports to the Service of activities conducted under the HCP. These reports document that conservation and management have been effective and consistent with provisions of the HCP. We believe that the Denver Water HCP is protective of the PMJM, is likely to be effective into the future, and is consistent with our regulatory objectives for protection of PMJM.

Section 4(b)(2) Weighing Analysis

Denver Water controls a large complex of treatment plants, pump stations, pipelines, and reservoirs, some including habitat occupied by the PMJM. Through their HCP, Denver Water agreed to follow best management practices to benefit the PMJM on 6,000 ac (2,700 ha) of potential PMJM habitat, whether the PMJM is present or not. The principal benefit of any designated critical habitat is that Federal activities that may affect critical habitat require consultation under section 7 of the Act. There is little benefit to designating critical habitat on Denver Water properties because: (a) Denver Water has an HCP in place covering the same properties proposed for designation; (b) Denver Water is a private landowner conducting primarily private (non-Federal) actions in these areas; (c) less than 240 ac (100 ha) of the Denver Water HCP overlaps with areas proposed as critical habitat (the HCP covers a much larger area than would have been covered on Denver Water lands by the proposed critical habitat); (d) educational benefits from designation of critical habitat on areas within the Denver Water HCP (through mapping of essential habitat) would be minimal, as the areas in question are owned or leased by Denver Water, and Denver Water is well aware of the value to the PMJM of those areas proposed as critical habitat; (e) designation of critical habitat on private property may discourage private landowners from participating in an HCP; and (f) beyond regulatory benefits of critical habitat designation, we know of no additional protections (such as additional Federal or State laws or regulations) that would be triggered by critical habitat designation.

The benefits of exclusion on Denver water properties, however, are that: (a) Denver Water's HCP will provide greater assurances and conservation benefits to the PMJM than critical habitat designation, because the HCP will assure the long-term protection (totaling 30 years, after which it may be extended) and management of the species and its habitat, with funding, through the standards in the HCP; (b) exclusion of properties within Denver Water's HCP reduces the requirements for additional regulatory review and associated permitting costs (delays, administrative costs, consulting costs, and costs of developing additional conservation measures); (c) exclusion of critical habitat will allow more flexibility to a municipal water supplier with private lands and privately owned facilities to operate as needed in order to meet its mission of supplying water to its customers; and (d) Denver Water's HCP provides an integrated and comprehensive approach to species conservation, rather than the piecemeal approach of multiple section 7 consultations that only address activities with a Federal nexus.

Development and implementation of this HCP has promoted a conservation partnership between Denver Water and the Service and benefitted the PMJM. Exclusion of areas within the HCP from proposed critical habitat would preserve this current partnership and encourage future cooperation on projects and programs effecting the PMJM, other listed species, and a broad array of fish and wildlife resources.

After evaluating the benefits of exclusion and the benefits of inclusion, we have determined that the benefits of exclusion outweigh those of inclusion.

Exclusion Will Not Result in Extinction of the Species

The HCP covers only small portions of four proposed critical habitat units that total over 10,000 ac (4,000 ha). The HCP allows, at maximum, 10 ac (4 ha) of permanent impacts through the 30-year life of the permit. Both permanent and temporary impacts will be mitigated

as discussed above. We conclude that exclusion will not result in extinction of the PMJM, nor will it preclude conservation or recovery of the species.

Struthers Ranch Habitat Conservation Plan

On December 12, 2003, we issued a section 10 incidental take permit covering the PMJM for the Struthers Ranch residential development along Black Forest Creek, El Paso County, consistent with the Struthers Ranch HCP (Service 2003c). The site supported approximately 49 ac (20 ha) of PMJM habitat. Parts of the Struthers Ranch property are within Unit 11 of the area proposed as revised critical habitat. Flooding has heavily impacted the middle and upper portions of Black Forest Creek. A 1999 flood event inundated the middle fork and deposited a large amount of sand and silt downstream. The HCP was designed to minimize the possibility of future severe flooding events, substantially improve remaining PMJM habitat, and minimize adverse effects resulting from developed areas nearby. Under the HCP, approximately 35.5 ac (14.4 ha) of undeveloped land along Black Forest Creek was withdrawn from cattle grazing, was returned to a more natural condition, and is maintained as a preserve with conservation measures to restore and enhance vegetation for wildlife. An adaptive management strategy was addressed in the HCP. Monitoring has documented the successful restoration of the property in accordance with provisions of the HCP. Lands preserved as PMJM habitat are deed-restricted and managed for the PMJM. The deed restriction prohibits any activities that would adversely impact PMJM habitat. Conservation and management has been effective and consistent with provisions of the HCP. We conclude that the HCP is protective of the PMJM, is likely to be effective into the future, and is consistent with our regulatory objectives.

Section 4(b)(2) Weighing Analysis

Through their HCP, Struther's Ranch agreed to follow best management practices to benefit the PMJM on 35.5 ac (14.4 ha) of PMJM habitat. The principal benefit of any designated critical habitat is that Federal activities that may affect the habitat require consultation under section 7 of the Act. There is little benefit to designating critical habitat on Struther's Ranch property because: (a) An HCP is in place covering the same area proposed for designation; (b) Struther's Ranch is private land with primarily private (non-Federal) actions in this area; (c) the area covered by the HCP encompasses only a small fraction of a unit (i.e., most of the designation in this unit will remain intact); (d) educational benefits from designation of critical habitat on areas within the Struther's Ranch HCP (through mapping of essential habitat) would be minimal, as the owners of the area in question are well aware of the value to the PMJM of the area proposed as critical habitat; (e) designation of critical habitat on private property may discourage private landowners from participating in an HCP; and (f) beyond regulatory benefits of critical habitat designation, we know of no additional protections (such as additional Federal or State laws or regulations) that would be triggered by critical habitat designation.

The benefits of exclusion of the Struther's Ranch HCP land are: (a) The Struther's Ranch HCP will provide greater assurances and conservation benefits to the PMJM than critical habitat designation, because the HCP assures the area is deed restricted and managed for the PMJM; and (b) The Struther's Ranch HCP provides an integrated and comprehensive approach to species conservation on site rather than the piecemeal approaches of section 7 consultation that only addresses activities with a Federal nexus.

After evaluating the benefits of exclusion and the benefits of inclusion, we have determined that the benefits of exclusion outweigh those of inclusion.

Exclusion Will Not Result in Extinction of the Species

Habitat impacts allowed under this HCP have already occurred. We conclude that exclusion will not result in extinction of the PMJM, nor will it preclude conservation or recovery of the species.

Eagle's Nest Open Space Habitat Conservation Plan

On August 5, 2004, we issued Larimer County a section 10 incidental take permit covering the PMJM consistent with the county's HCP for their Eagle's Nest Open Space (ENOS) property, located in the Laramie Foothills region of Larimer County (Service 2004b). The ENOS is partially within Unit 1 of the area that was proposed as revised critical habitat. The ENOS encompasses 755 ac (306 ha) of rolling foothills and steep slopes and includes 1.0 mi (1.6 km) of the North Fork of the Cache la Poudre River. There are approximately 261 ac (106 ha) of PMJM habitat on the ENOS, the vast majority of which is managed for PMJM conservation under the HCP. Less than 3 ac (1 ha) can be permanently affected under the ENOS HCP for a natural-surface hiking and equestrian trail, and cattle access to the river. Agreed-upon habitat improvement for the PMJM included fencing off of riparian areas to control cattle grazing, shrub planting, limiting management activities during the PMJM active season, and control of public access and allowed activities. This area is protected as open space by the Larimer County Open Lands program. The protection and enhancement of wildlife habitat is one of the primary goals on ENOS. The area is used for educational programs by the county, demonstrating PMJM and riparian habitat management. Mitigation is paid for through the county's Help Preserve Open Space Sales Tax revenues guaranteed through 2018. Success criteria, monitoring, and a process to address unforeseeable events are addressed in the HCP. Monitoring reports submitted from 2004 through 2008 documented the success of mitigation efforts.

Section 4(b)(2) Weighing Analysis

Through their HCP, Larimer County agreed to follow best management practices to benefit the PMJM through protection and management of 261 ac (106 ha) of PMJM habitat. The principal benefit of any designated critical habitat is that Federal activities that may affect the habitat require consultation under section 7 of the Act. There is little benefit to designating critical habitat on ENOS property because: (a) An HCP is in place covering the same area proposed for designation; (b) ENOS is owned by Larimer County with primarily private (non-Federal) actions in this area; (c) the area covered by the HCP encompasses only a small fraction of Unit 1; (d) educational benefits from designation of critical habitat on areas within the ENOS HCP (through mapping of essential habitat) would be minimal, as Larimer County is aware of the value to the PMJM of the area proposed as critical habitat and is using it to educate the public about PMJM and its habitat; (e) designation of critical habitat on non-Federal property may discourage local government from participating in an HCP; and (f) beyond regulatory benefits of critical habitat designation, we know of no additional protections (such as additional Federal or State laws or regulations) that would be triggered by critical habitat designation.

The benefits of exclusion of the ENOS HCP land, however, are that: (a) The ENOS HCP will provide greater assurances and conservation benefits to the PMJM than critical habitat designation because the HCP will assure the area is managed for the PMJM; (b)

The ENOS HCP provides an integrated and comprehensive approach to species conservation rather than the piecemeal approach of section 7 consultations that only addresses activities with a Federal nexus; and (c) development and implementation of this HCP has promoted a conservation partnership between Larimer County and the Service, and has benefitted the PMJM. Exclusion of areas within the HCP from proposed critical habitat would preserve this current partnership and encourage future cooperation on projects and programs effecting the PMJM, other listed species, and a broad array of fish and wildlife resources.

After evaluating the benefits of exclusion and the benefits of inclusion, we have determined that the benefits of exclusion outweigh those of inclusion.

Exclusion Will Not Result in Extinction of the Species

Impacts to habitat (3 ac (1 ha)) allowed by the ENOS HCP have already occurred. Remaining PMJM habitat is managed as described above. We conclude that exclusion will not result in extinction of the PMJM, nor will it preclude conservation or recovery of the species.

Other Habitat Conservation Plan Lands

On November 19, 2002, we approved an HCP, and we issued a section 10 incidental take permit covering the PMJM for a single family residence on the Lefever Property along Black Squirrel Creek in Black Forest, El Paso County (Service 2002b). The Lefever Property is within Unit 11 of the area proposed as revised critical habitat. Under the HCP, 0.56 ac (0.25 ha) of PMJM habitat was permitted to be disturbed, and 4.52 ac (1.83 ha) of the property was placed in a conservation easement and deeded to El Paso County, to be managed as foraging habitat for the PMJM according to specific requirements laid out in the HCP. The following activities are expressly prohibited by the property easement: Construction or reconstruction of any building or other structure or improvement on portions of the property; any division or subdivision of the title to the property; commercial timber harvesting; mining or extraction of soil, sand, gravel, rock, oil, natural gas, fuel, or any other mineral substance; paving or otherwise covering with concrete, asphalt, or any other paving material; and the dumping or uncontained accumulation of any trash, refuse, or debris on the property. As further compensation for the impacted habitat, 0.89 ac (0.36 ha) of the 4.52 ac (1.83 ha) were planted with 100 shrubs to enhance PMJM habitat. Three years of monitoring demonstrated success of the planting effort. The permit expires November 19, 2012, but the conservation easement and requirements of the HCP call for the property to be managed consistent with the needs of the PMJM in perpetuity.

On July 23, 2002, we approved a low-effect HCP, and we issued a section 10 incidental take permit covering the PMJM for a single family residence on the Dahle Property, Thunderbird Estates, near Monument Creek in Colorado Springs, El Paso County (Service 2002c). The Dahle Property is within Unit 11 of the area proposed as revised critical habitat. Under the HCP, 0.15 ac (0.060 ha) of upland PMJM habitat was permitted to be disturbed for the construction of a single-family residence and 0.5 ac (0.2 ha) of the property was preserved in a native and unmowed condition and enhanced through weed control and *Salix* (willow) planting. Required monitoring has documented success of these measures. The take permit expired July 29, 2007; however, preservation of PMJM habitat continues in perpetuity.

Section 4(b)(2) Weighing Analysis

The Lefever Property and Dahle Property HCPs address single residences on small properties. The applicants expended significant resources to develop these HCPs. Relieving these landowners of any real or perceived regulatory burden that might accompany designation of critical habitat supports partnerships between the private property owners and the Service. The principal benefit of any designated critical habitat is that Federal activities that may affect the habitat require consultation under section 7 of the Act. There is little benefit to designating critical habitat on properties covered by these two HCPs because: (a) The HCPs cover the same area proposed for designation; (b) it is unlikely that future Federal actions will occur on these small private areas; (c) the areas covered by the HCPs encompass a small fraction of Unit 11; (d) educational benefits from designation of critical habitat on areas within the HCPs (through mapping of essential habitat) would be minimal, as the two single landowners are aware of the value to the PMJM of the area proposed as critical habitat; (e) designation of critical habitat on non-Federal property may discourage private entities from participating in an HCP; and (f) beyond regulatory benefits of critical habitat designation, we know of no additional protections (such as additional Federal or State laws or regulations) that would be triggered by critical habitat designation.

The benefits of exclusion of land in these two HCPs, however, are that: (a) The HCPs will provide greater assurances and conservation benefits to the PMJM than critical habitat designation because the HCPs assure the areas are managed to preserve habitat for the PMJM; and (b) development and implementation of these HCPs has promoted a conservation partnership between private landowners and the Service, and has benefitted the PMJM. Exclusion of areas within the HCPs from proposed critical habitat may serve as an example to private landowners and encourage future cooperation on projects and programs effecting the PMJM, other listed species, and other fish and wildlife resources.

After evaluating the benefits of exclusion and the benefits of inclusion, we have determined that the benefits of exclusion outweigh those of inclusion.

Exclusion Will Not Result in Extinction of the Species

The Lefever Property and Dahle Property HCP permits allowed 0.71 ac (0.31 ha) of permanent habitat impacts, which have already occurred. Offsets and mitigation included additional lands that have been set aside for the PMJM, with habitat improvement and conservation easement, as described above. We conclude that exclusion of the lands in these HCPs will not result in extinction of the PMJM, nor will it preclude conservation or recovery of the species.

Summary of Habitat Conservation Plan Lands Excluded

Based on our evaluation of special management considerations and protection provided by the Denver Water HCP, the Struthers Ranch HCP, the Eagle's Nest Open Space HCP, the Lefever Property HCP, and the Dahle Property HCP, and in light of the definition of critical habitat in section 3(5)(A) of the Act, we have considered, but are not, designating these areas as revised critical habitat. We believe that these HCPs meet the criteria used by the Service to determine whether a plan provides adequate special management or protection to a listed species. The conservation strategies and measures are likely to be effective, because they were developed based on the best scientific data available and they required monitoring and reporting to ensure compliance and success. The lands excluded total 6,315.73 ac (2,328.34 ha), in portions of Units 1, 5, 7, 9, 10, and 11.

Required Determinations

Regulatory Planning and Review—Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant. OMB bases its determination upon the following four criteria:

(1) 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.

(2) Whether the rule will create inconsistencies with other Federal agencies' actions.

(3) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(4) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA, 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. As part of our DEA for the proposed designation, we provided our initial regulatory flexibility analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we received, we have revised the FEA and finalized our regulatory flexibility analysis (FRFA), as part of our final rulemaking. In this final rule, we are certifying that the critical habitat designation for the PMJM will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under the rule, as well as the types of project modifications that may result. In general, the term "significant economic impact" is meant to apply to a typical small business firm's business operations.

To determine if the final designation of revised critical habitat for the PMJM would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (e.g., housing development, grazing, oil and gas production, timber harvesting). In order to determine whether it is appropriate for our agency to certify that this rule will not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. However, the SBREFA does not explicitly define substantial number or significant economic impact. Consequently, to assess whether a substantial number of small entities is affected by this revised designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, permitted, or authorized by Federal agencies.

Under the Act, designation of critical habitat only affects activities carried out, funded, or permitted by Federal agencies. Following this revised critical habitat designation, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat will be incorporated into the existing consultation process.

Some kinds of activities are unlikely to have any Federal involvement and so will not result in any additional effects under the Act. However, there are some State laws that limit activities in designated critical habitat even where there is no Federal nexus. If there is a Federal nexus, Federal agencies will be required to consult with us under section 7 of the Act on activities they fund, permit, or carry out that may affect critical habitat. If we conclude, in a biological opinion, that a proposed action is likely to destroy or adversely modify critical habitat, we can offer "reasonable and prudent alternatives." Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid destroying or adversely modifying critical habitat.

Within the revised critical habitat designation, the types of actions or authorized activities that we have identified as potential concerns and that may be subject to consultation under section 7 if there is a Federal nexus are: Residential and commercial development; roads/bridges, utilities, and bank stabilization projects; water supply development; USFS land management practices; Rocky Flats Site management practices; and gravel mining. As discussed in Appendix A of the FEA, of the activities addressed in the analysis, only residential and commercial development, and construction and maintenance of roads/bridges, utilities, and bank stabilization projects, are expected to experience incremental, administrative consultation costs that may be borne by small businesses.

Any existing and planned projects, land uses, and activities that could affect the revised critical habitat but have no Federal involvement would not require section 7 consultation with the Service, so they are not restricted by the requirements of the Act. Federal agencies may need to reinitiate a previous consultation if discretionary involvement or control over the Federal

action has been retained or is authorized by law and the activities may affect critical habitat.

In the FEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the designation of critical habitat for the PMJM. Please refer to our FEA of the revised critical habitat designation for a more detailed discussion of potential economic impacts; we will summarize key points of the analysis below.

The FEA, and its associated FRFA, estimate that total potential incremental economic impacts in areas designated as revised critical habitat over the next 20 years will be $2.66 million to $5.98 million annually, assuming a 7-percent discount rate. Approximately 96 percent of the incremental impacts attributed to the designation of critical habitat are expected to be related to section 7 consultations with Federal agencies for residential and commercial development. Expected impacts to residential and commercial development include added costs primarily due to administrative consultations and required modifications to development project scope or design, including mitigation (or setting aside conservation lands), habitat restoration and enhancement, and project delays. Small entities represent 97 percent of all entities in the residential and commercial development industry that may be affected. Incremental costs also are expected related to road/bridge, utility, and bank stabilization construction and maintenance activities throughout the revised critical habitat. Small entities represent 90 percent of all entities in the road/bridge, utility, and bank stabilization construction and maintenance industries that may be affected. The Small Business Size Standard for the industry sectors that could potentially be affected by the revised critical habitat designation are as follows:

- New Housing Operative Builders—$33.5 million in annual receipts.
- Land Subdivision—$7 million in annual receipts.
- Natural Gas Distribution—500 employees.
- Water Supply and Irrigation Systems—$7 million annual receipts.
- Pipeline Transportation of Natural Gas—$7 million annual receipts.

In addition, government entities in the area may be affected. Of these, approximately 70 percent are small government jurisdictions (i.e., cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000).

Of principal interest is residential and commercial development, and associated land subdivision, as an estimated 96 percent of potential incremental impacts may affect that industry sector. The small businesses in this industry sector may bear a total of $26.2 to $60.3 million (at a 7-percent discount rate) in incremental impacts related to section 7 consultations over the next 20 years (through 2029). However, when expressed as a percentage of a small developer's annual sales revenue, assuming that one small developer is required for each of the development projects, these monetary incremental impacts are likely to be small. The incremental impact due to revised critical habitat designation is estimated to range from $171,000 to $393,000 per project. An average of eight projects is anticipated to occur in critical habitat per year. For new home builders, estimated annual sales in 2007 per developer in Colorado were $6.51 million. Therefore, in years where a developer has a project in critical habitat, the estimated incremental impact represents 2.6 to 6.0 percent of that developer's annual sales in this industry. However, we expect these costs to be incurred over a period of more than one year, as most developments will take longer than one year to complete (i.e., if a project takes 2 or more years to complete, the impact as a proportion of revenue in any one year will be substantially less).

For land subdividers, the FEA assumes that annual sales per establishment are limited to the small business threshold of $7 million annually. The estimated annual incremental impact therefore represents 2.4 to 4.6 percent of a subdivider's annual sales. As discussed above, the incremental impact associated with each project is expected to be incurred over a period of more than one year. Thus, this analysis overstates the actual annual impact on a small entity.

There are additional factors that may cause this analysis to overstate the actual impact on small residential and commercial developers, and on land subdividers. First, it is likely that a portion of the impact will be realized by landowners in the form of higher housing prices. The proportion of the total impact borne by landowners is unknown. We believe the analysis gives a high estimate of possible development and that it is likely the actual amount of development will be less. As described in Chapter 3 of the FEA, the analysis likely overstates the amount of development activity and, therefore, the total incremental impact associated with residential and commercial development. Lastly, anecdotal evidence and existing county building restrictions suggest that fewer properties within revised critical habitat are being developed than are quantified by the FEA. This will likely further reduce the annual incremental impact borne per small entity.

For road/bridge, utility, and bank stabilization construction and maintenance, the FEA estimates that incremental impacts will range from $322,000 to $748,000 over 20 years, or $30,400 to $76,000 annually. Given an estimated average of four projects impacting critical habitat and requiring section 7 consultation each year, and assuming one small entity (municipality, wastewater district, etc.) conducts each activity, the impact to each small government entity involved would be $7,600 to $17,700.

In summary, we have considered whether this revised designation will result in a significant economic impact on a substantial number of small entities. Given the analysis above, the expected annual impacts to small businesses in the affected industries are significantly less than the annual revenues that could be garnered by a single small operator in those industries, and as such, impacts are low relative to potential revenues. Based on the above reasoning and currently available information, we conclude that this rule will not have a significant economic impact on a substantial number of small business entities. Therefore, we are certifying that the revised designation of critical habitat for the PMJM will not have a significant economic impact on a substantial number of small entities.

Energy Supply, Distribution, and Use—Executive Order 13211

On May 18, 2001, the President issued E.O. 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The Office of Management and Budget's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. The only criterion that may be relevant to this analysis is increases in the cost of energy distribution in excess of one percent. As described in the FEA, constructing and maintaining electrical and natural gas distribution and transmission systems is a type of utility project potentially occurring in the

revised critical habitat. The FEA concludes that incremental impacts may be incurred; however, they are unlikely to reach the threshold of one percent. Therefore, designation of revised critical habitat is not expected to lead to any adverse outcomes (such as a reduction in electricity production or an increase in the cost of energy production or distribution), and a Statement of Energy Effects is not required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments," with two exceptions. First, it excludes "a condition of federal assistance." Second, it excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(2) As discussed in the FEA of the designation of revised critical habitat for the PMJM, we do not believe that the rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The FEA concludes that incremental impacts may occur due to project modifications that may need to be made for development activities; however, these are not expected to affect small governments to the extent described above. Consequently, we do not believe that this final revised critical habitat designation will significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the PMJM in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for the PMJM does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132, this 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, our revised critical habitat designation with appropriate State resource agencies in Colorado. We received no comments from the State of Colorado or State resource agencies in Colorado. The designation of critical habitat in areas currently occupied by the PMJM may impose nominal additional regulatory restrictions to those currently in place and, therefore, may have little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments, in that the areas that contain the physical and biological 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).

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), this rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the physical and biological features essential to the conservation of the subspecies within the designated areas to assist the public in understanding the habitat needs of the PMJM.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We completed a NEPA analysis for this revised critical habitat designation. We notified the public of availability of the draft environmental assessment for the proposed rule on May 27, 2010 (75 FR 29700. The final environmental assessment, as well as the Finding of No Significant Impact, is available upon request from the Field Supervisor, Colorado Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT** section) or on our Web site at *http://mountain-prairie.fws.gov/species/mammals/preble/*

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, the Department of the Interior's manual at 512 DM 2, and Secretarial Order 3206, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We determined that there are no Tribal lands in Colorado occupied at the time of listing that contain the features essential for the conservation of the PMJM, and no unoccupied Tribal lands that are essential for the conservation of the PMJM. Therefore, we are not designating critical habitat for the PMJM on Tribal lands.

References Cited

A complete list of all references cited in this rulemaking is available online at *http://mountain-prairie.fws.gov/species/mammals/preble*, or upon request from the Field Supervisor, Colorado Ecological Services Office (see **ADDRESSES**).

Authors

The primary authors of this package are the staff members of the Colorado Ecological Services Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, for the reasons we have stated in the preamble, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.95(a), revise the entry for "Preble's Meadow Jumping Mouse *(Zapus hudsonius preblei*)" to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

(a) *Mammals.*

* * * * *

Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*)

(1) Critical habitat units are depicted for Boulder, Broomfield, Douglas, El Paso, Jefferson, Larimer, and Teller Counties in Colorado on the maps below.

(2) The primary constituent elements of critical habitat for the Preble's meadow jumping mouse are:

(i) Riparian corridors:

(A) Formed and maintained by normal, dynamic, geomorphological, and hydrological processes that create and maintain river and stream channels, floodplains, and floodplain benches and that promote patterns of vegetation favorable to the Preble's meadow jumping mouse;

(B) Containing dense, riparian vegetation consisting of grasses, forbs, or shrubs, or any combination thereof, in areas along rivers and streams that normally provide open water through the Preble's meadow jumping mouse's active season; and

(C) Including specific movement corridors that provide connectivity between and within populations. This may include river and stream reaches with minimal vegetative cover or that are armored for erosion control; travel ways beneath bridges, through culverts, along canals and ditches; and other areas that have experienced substantial human alteration or disturbance.

(ii) Additional adjacent floodplain and upland habitat with limited human disturbance (including hayed fields, grazed pasture, other agricultural lands that are not plowed or disked regularly, areas that have been restored after past aggregate extraction, areas supporting recreational trails, and urban–wildland interfaces).

(3) Critical habitat does not include buildings, roads, parking lots, other paved areas, lawns, other urban and suburban landscaped areas, regularly plowed or disked agricultural 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 digital ortho-photo quarter-quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) Zone 15N coordinates.

(5) *Note:* Index map of critical habitat for the Preble's meadow jumping mouse follows:

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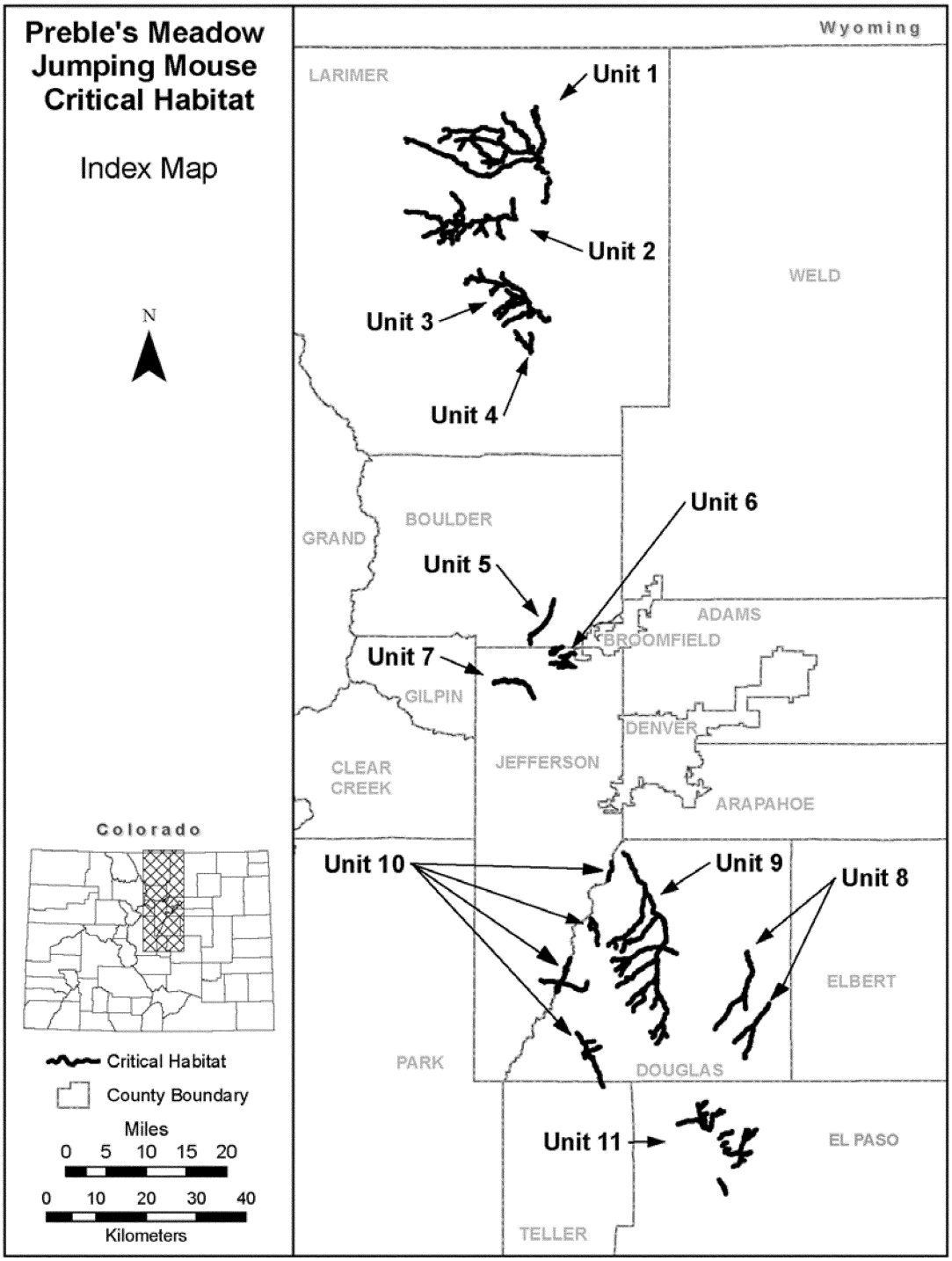
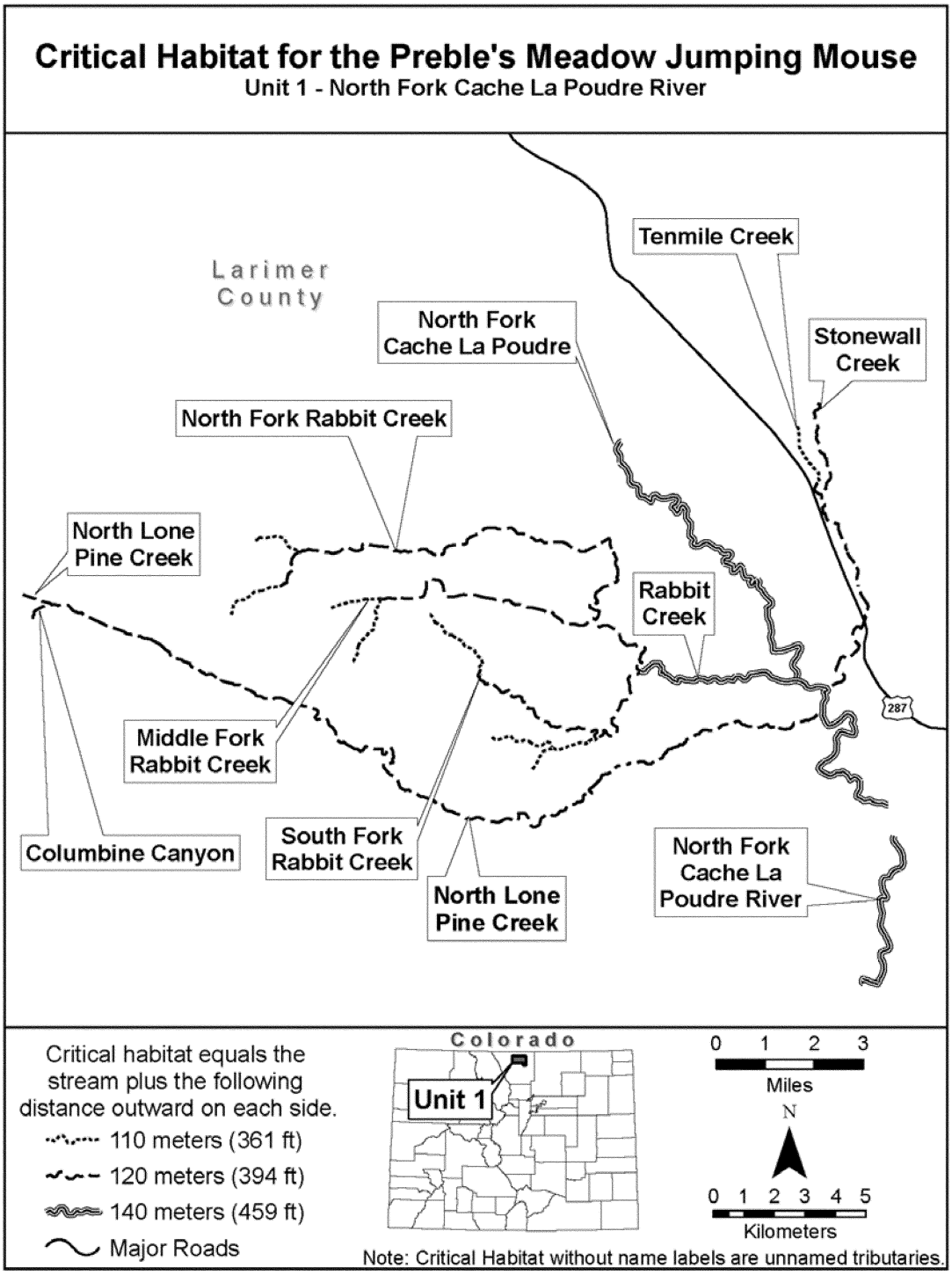

Preble's Meadow Jumping Mouse Critical Habitat
Index Map
N
Wyoming
LARIMER
WELD
Unit 1
Unit 2
Unit 3
Unit 4
BOULDER
GRAND
Unit 5
Unit 6
ADAMS
BROOMFIELD
Unit 7
GILPIN
DENVER
JEFFERSON
CLEAR CREEK
ARAPAHOE
Unit 10
Unit 9
Unit 8
ELBERT
PARK
DOUGLAS
Unit 11
EL PASO
TELLER
Colorado
Critical Habitat
County Boundary
Miles
0 5 10 15 20
0 10 20 30 40
Kilometers

(6) Unit 1: North Fork Cache la Poudre River, Larimer County, Colorado.

(i) This unit consists of 87.2 mi (140.4 km) of streams and rivers. North Fork Cache la Poudre River from Seaman Reservoir (40 43 7N 105 14 32W, T.9N., R.70W., Sec. 28) upstream to Halligan Reservoir spillway (40 52 44N 105 20 15W, T.11N., R.71W., Sec. 34) excluding 1.06 mi (1.71 km) of the North Fork Cache la Poudre River within the Eagles Nest Open Space (from 40 45 44N 105 13 50W, T. 9N, R.70W., Sec. 9 to 40 46 17N 105 13 59W, T. 9N, R.70W., Sec. 4). Includes Lone Pine Creek from its confluence North Fork Cache la Poudre River (40 47 54N 105 15 30W, T.10N., R.70W., Sec. 32) upstream and continuing upstream into North Lone Pine Creek to 7,600 ft (2,317 m) elevation (40 49 58N 105 34 09W, T.10N., R.73W., Sec. 15). Includes Columbine Canyon from its confluence with North Lone Pine Creek (40 49 47N 105 33 31W, T.10N., R.73W., Sec. 15) upstream to 7,600 ft (2,317 m) elevation (40 49 32N 105 33 58W, T.10N., R.73W., Sec. 15). Also includes Stonewall Creek from its confluence with North Fork Cache la Poudre River (40 48 19N 105 15 21W, T.10N., R.70W., Sec. 29) upstream to (40 53 26N 105 15 40W, T.11N., R.70W., Sec. 29). Includes Tenmile Creek from its confluence with Stonewall Creek (40 51 49N 105 15 32W, T.10N., R.70W., Sec. 5) upstream to Red Mountain Road (40 53 00N 105 16 09W, T.11N., R.70W., Sec. 31). Also includes Rabbit Creek from its confluence with North Fork Cache la Poudre River (40 48 30N 105 16 07W, T.10N., R.70W., Sec. 30) upstream to the confluence with North and Middle Forks of Rabbit Creek (40 49 34N 105 20 49W, T.10N., R 71W., Sec. 21). Also includes South Fork Rabbit Creek from its confluence with Rabbit Creek (40 48 39N 105 19 45W, T.10N., R.71W., Sec. 27) upstream to (40 49 39N 105 24 40W, T.10N., R.72W., north boundary Sec. 24). Includes an unnamed tributary from its confluence with South Fork Rabbit Creek (40 47 28N 105 20 47W, T.10N., R.71W., Sec. 33) upstream to (40 47 28N 105 23 12W, T.10N., R.71W., Sec. 31). Which in turn has an unnamed tributary from their confluence at (40 47 17N 105 21 48W, T.10N., R.71W., east boundary Sec. 32) upstream to (40 46 55N 105 22 16W, T.9N., R.71W., Sec. 5). Also includes Middle Fork Rabbit Creek from its confluence with Rabbit Creek (40 49 34N 105 20 49W, T.10N., R 71W., Sec. 21) upstream to 7,600 ft (2,317 m) elevation (40 49 46N 105 26 59W, T.10N., R.72W., Sec. 15). This includes an unnamed tributary from its confluence with Middle Fork Rabbit Creek (40 49 56N 105 25 51W, T.10N., R.72W., Sec. 14) upstream to 7,600 ft (2,317 m) elevation (40 48 48N 105 26 29W, T.10N., R.72W., Sec. 23). This unit includes North Fork Rabbit Creek from its confluence with Rabbit Creek (40 49 34N 105 20 49W, T.10N., R.71W., Sec. 21) upstream to 7,600 ft (2,317 m) elevation (40 49 38N 105 29 19W, T.10N., R.72W., Sec. 17). Includes an unnamed tributary from its confluence with North Fork Rabbit Creek (40 50 45N 105 27 44W, T.10N., R.72W., Sec. 9) upstream to 7,600 ft (2,317 m) elevation (40 50 57N 105 28 46W, T.10N., R.72W., Sec. 9).

(ii) *Note:* Map of Unit 1 follows:



(7) Unit 2: Cache la Poudre River, Larimer County, Colorado.

(i) This unit consists of 50.8 mi (81.7 km) of streams and rivers. Cache la Poudre River from Poudre Park (40 41 16N 10 18 2W, T.8N., R.71W., Sec. 2) upstream to (40 42 02N 105 34 04W, T.9N., R.73W., west boundary Sec. 34). Includes Hewlett Gulch from its confluence with Cache la Poudre River (40 41 16N 105 18 24W, T.8N., R.71W., Sec. 2) upstream to the boundary of Arapahoe-Roosevelt National Forest (40 43 29N 105 18 51W, T.9N., R.71W., Sec. 23). Also includes Young Gulch from its confluence with Cache la Poudre River (40 41 25N 105 20 57W, T.8N., R.71W., Sec. 4) upstream to (40 39 14N 105 20 13W, T.8N., R.71W., south boundary Sec. 15). Also includes an unnamed tributary from its confluence with Cache la Poudre River at Stove Prairie Landing (40 40 58N 105 23 23W, T.8N., R.71W., Sec. 6) upstream to (40 39 31N 105 22 34W, T.8N., R.71W., Sec. 17). Includes Skin Gulch from its confluence with the aforementioned unnamed tributary at (40 40 33N 105 23 16W, T.8N., R.71W., Sec. 7) upstream to (40 39 40N 105 24 16W, T.8N., R.72W., Sec. 13). Unit 2 also includes Poverty Gulch from its confluence with Cache la Poudre River (40 40 28N 105 25 44W, T.8N., R.72W., Sec. 11) upstream to 7,600 ft (2,317 m) elevation (40 39 01N 105 26 40W, T.8N., R.72W., Sec. 22). Also includes Elkhorn

Creek from its confluence with Cache la Poudre River (40 41 50N 105 26 24W, T.9N., R.72W., Sec. 34) upstream to (40 44 03N 105 27 34W, T.9N., R.72W., Sec. 21). Also includes South Fork Cache la Poudre River from its confluence with Cache la Poudre River (40 41 11N 105 26 50W, T.8N., R.72W., Sec. 3) upstream to 7,600 ft (2,317 m) elevation (40 38 48N 105 29 22W, T.8N., R.72W., Sec. 20). Includes Pendergrass Creek from its confluence with South Fork Cache la Poudre River (40 39 56N 105 27 30W, T.8N., R.72W., Sec. 15) upstream to 7,600 ft (2,317 m) elevation (40 38 34N 105 27 28W, T.8N., R.72W., Sec. 22). Also included in the unit is Bennett Creek from its confluence with Cache la Poudre River (40 40 26N 105 28 41W, T.8N., R.72W., Sec. 9) upstream to 7,600 ft (2,317 m) elevation (40 39 19N 105 31 29W, T.8N., R.73W., Sec. 13).

(ii) *Note:* Map of Unit 2 follows:

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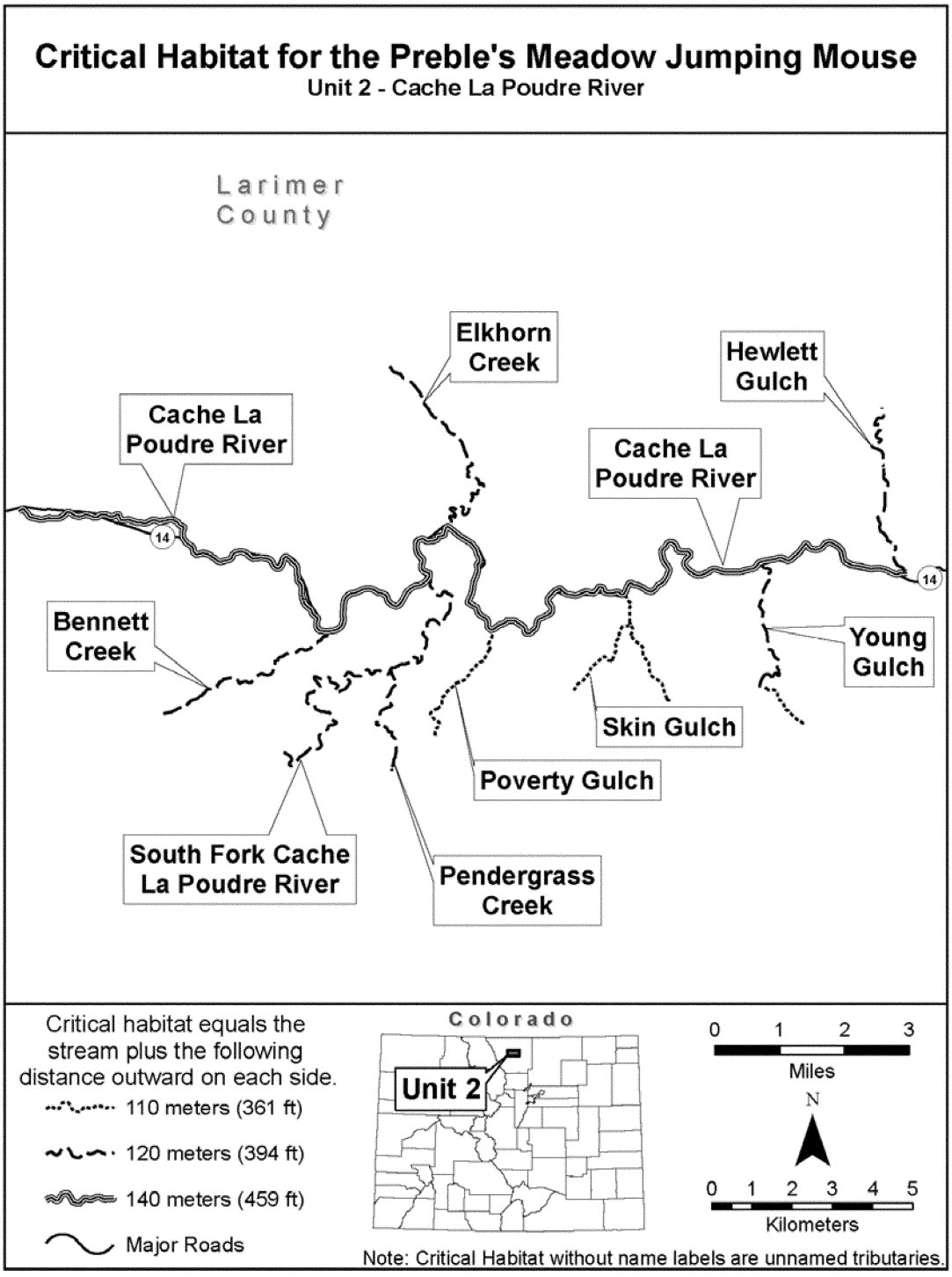
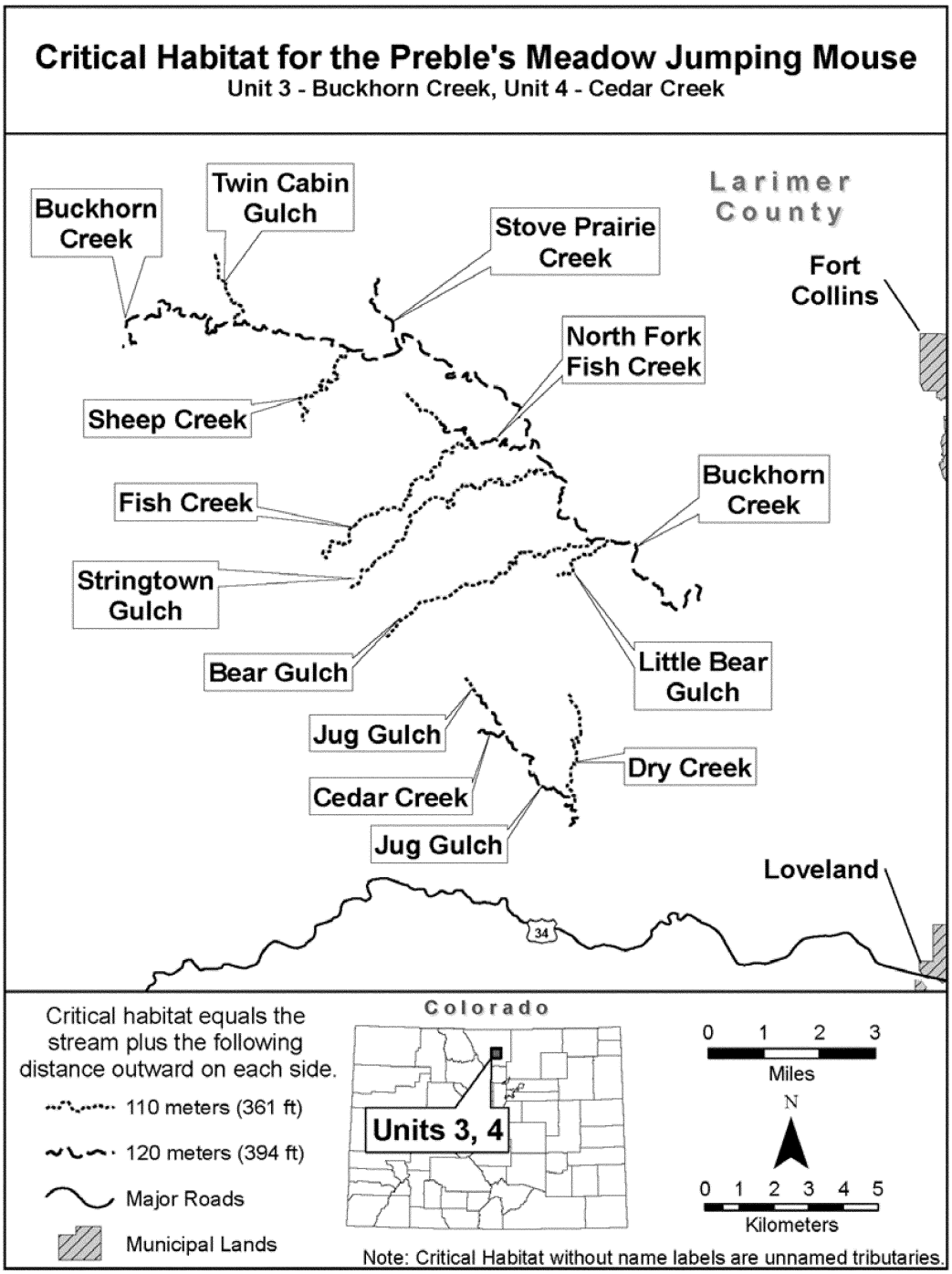


(8) Unit 3: Buckhorn Creek, Larimer County, Colorado.

(i) This unit consists of 45.5 mi (73.2 km) of streams. Buckhorn Creek from (40 30 20N 105 13 39W, T.6N., R.70W., east boundary Sec. 9) upstream to 7,600 ft (2,317 m) elevation (40 34 17N 105 25 31W, T.7N., R.72W., Sec. 14). Includes Little Bear Gulch from its confluence with Buckhorn Creek (40 31 17N 105 15 33W, T.6N., R.70W., Sec. 5) upstream to (40 30 43N 105 16 35W, T.6N., R.70W., Sec. 6). Also includes Bear Gulch from its confluence with Buckhorn Creek (40 31 16N 105 15 52W, T.6N., R.70W., Sec. 5) upstream to 7,600 ft (2,317 m) elevation (40 29 45N 105 20 4W, T.6N., R.71W., Sec. 10). Also includes Stringtown Gulch from its confluence with Buckhorn Creek (40 32 21N 105 16 42W, T.7N., R.70W., Sec. 30) upstream to 7,600 ft (2,317 m) elevation (40 30 30N 105 20 50W, T.6N., R.71W., Sec. 4). Also includes Fish Creek from its confluence with Buckhorn Creek (40 32 48N 105 18 20W, T.7N., R.70W., Sec. 30) upstream to 7,600 ft (2,317 m) elevation (40 30 56N 105 21 20W, T.6N., R.71W., Sec. 4). Includes North Fork Fish Creek from its confluence with Fish Creek (40 32 48N 105 18 20W, T.7N., R.71W., west boundary Sec. 25) upstream and following the first unnamed tributary northwest to (40 33 34N 105 19 45W, T.7N., R.71W., Sec. 22). Also includes Stove Prairie Creek from its confluence with Buckhorn Creek (40 34 16N 105 19 48W, T.7N., R.71W., Sec. 15) upstream to the dirt road crossing at (40 35 22N 105 20 17W, T.7N., R.71W., Sec. 10). Also includes Sheep Creek from its confluence with Buckhorn Creek (40 34 15N 105 20 53W, T.7N., R.71W., Sec. 16) upstream to 7,600 ft (2,317 m) elevation (40 33 08N 105 21 47W, T.7N., R.71W., Sec. 20). Also includes Twin Cabin Gulch from its confluence with Buckhorn Creek (40 34 38N 105 23 13W, T.7N., R.71W., Sec. 18) upstream to 7,600 ft (2,317 m) elevation (40 35 45N 105 23 36W, T.7N., R.71W., Sec. 6).

(ii) *Note:* Map of Units 3 and 4 follows:



(9) Unit 4: Cedar Creek, Larimer County, Colorado.

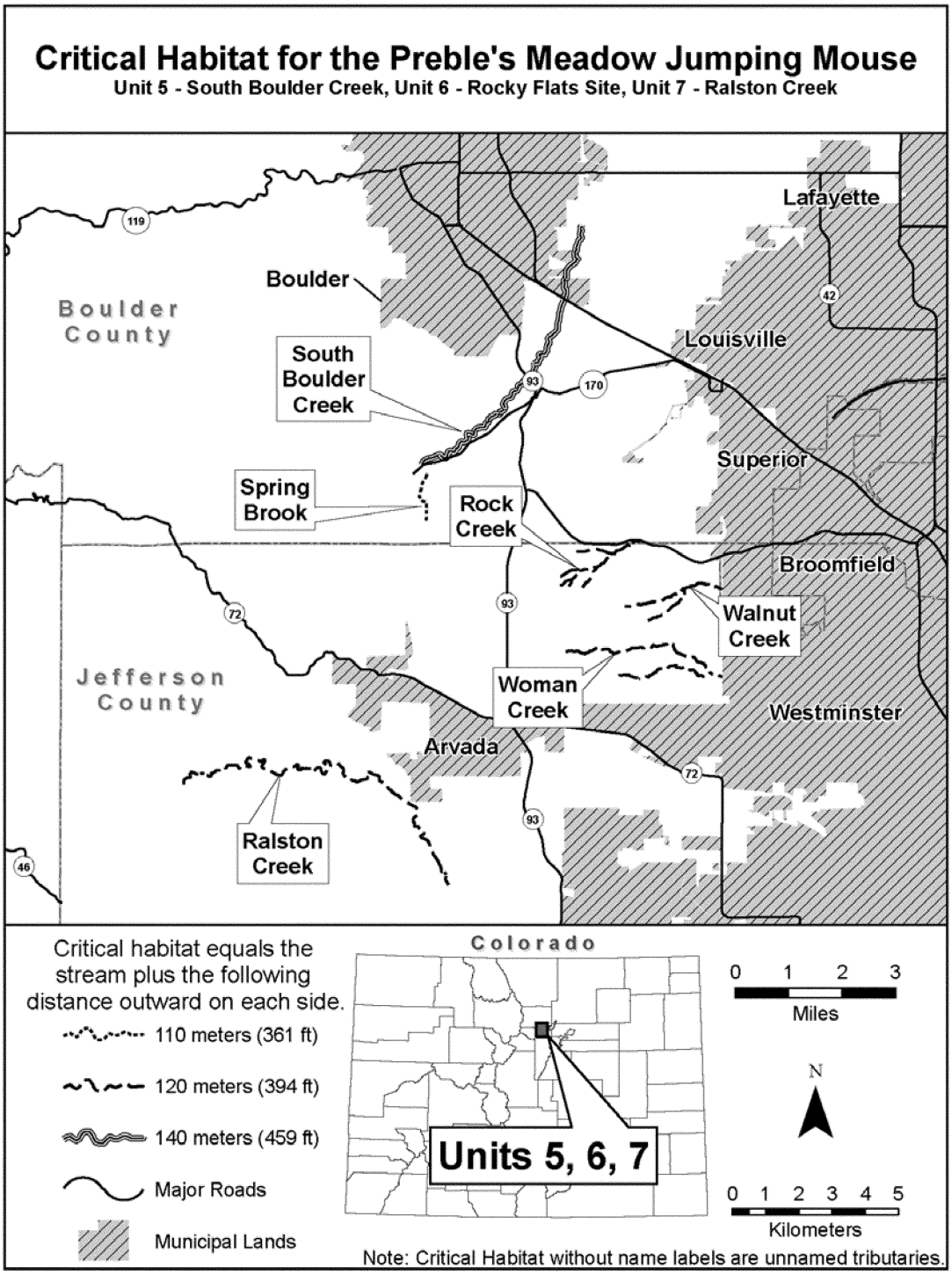
(i) This unit consists of 7.5 mi (12.1 km) of streams. Cedar Creek from the boundary of Federal land (40 26 46N 105 16 17W, T.6N., R.70W., Sec. 31) upstream to the boundary of Federal land (40 28 15N 105 18 11W, T.6N., R.71W., Sec. 24). Includes Dry Creek from its confluence with Cedar Creek (40 27 07N 105 16 16W, T.6N., R.70W., Sec. 30) upstream to the boundary of Federal land (40 28 52N 105 16 21W, T.6N., R.70W., Sec. 18). Also includes Jug Gulch from its confluence with Cedar Creek (40 28 15N 105 17 41W, T.6N., R.71W., Sec. 24) upstream to the boundary of Federal land (40 29 07N 105 18 28W, T.6N., R.71W., Sec. 14).

(ii) *Note:* Map of Unit 4 appears at paragraph (8)(ii) of this entry.

(10) Unit 5: South Boulder Creek, Boulder County, Colorado.

(i) This unit consists of 7.6 mi (12.2 km) of streams. Including South Boulder Creek from Baseline Road (40 0 0N 105 12 55W, T.1S., R.70W., Sec. 3) upstream to near Eldorado Springs, Colorado (39 56 7N 105 16 16W, T.1S., R.70W., Sec. 30). Unit 5 also includes Spring Brook from the Community Ditch near Eldorado Springs (39 55 59N 105 16 10W, T.1S., R.70W., Sec. 30) upstream to the Denver Water boundary at the South Boulder Diversion Canal (39 55 13N 105 16 12W, T.1S., R.70W., Sec. 31).

(ii) *Note:* Map of Units 5, 6, and 7 follows:


Critical Habitat for the Preble's Meadow Jumping Mouse
Unit 5 - South Boulder Creek, Unit 6 - Rocky Flats Site, Unit 7 - Ralston Creek
Lafayette
Boulder
Boulder County
Louisville
South Boulder Creek
Superior
Spring Brook
Rock Creek
Broomfield
Walnut Creek
Jefferson County
Woman Creek
Westminster
Arvada
Ralston Creek
119
42
93
170
72
46
Critical habitat equals the stream plus the following distance outward on each side.
110 meters (361 ft)
120 meters (394 ft)
140 meters (459 ft)
Major Roads
Municipal Lands
Colorado
Units 5, 6, 7
0 1 2 3
Miles
N
0 1 2 3 4 5
Kilometers
Note: Critical Habitat without name labels are unnamed tributaries.

(11) Unit 6: Rocky Flats Site, Jefferson County and Broomfield Counties, Colorado.

(i) This unit consists of three subunits including 12.5 mi (20.1 km) of streams as follows:

(A) The Woman Creek Subunit from Indiana Street (39 52 40N 105 9 55W, T.2S., R.70W., east boundary Sec. 13) upstream to (39 53 3N 105 13 20W, T.2S., R.70W., west boundary Sec. 15). Includes unnamed tributary from confluence with Woman Creek (39 52 43N 105 10 11W, T.2S., R.70W., Sec. 13) upstream to (39 52 39N 105 12 11W, T.2S., R.70W., west boundary Sec. 14).

(B) The Walnut Creek Subunit from Indiana Street (39 54 5N 105 9 55W, T.2S., R.70W., east boundary Sec. 1) upstream to (39 53 49N 105 11 59W, T.2S., R.70W., Sec. 11). Includes unnamed tributary from its confluence with Walnut Creek (39 54 6N 105 10 42W, T.2S., R.70W., Sec. 1) upstream to (39 53 35N 105 11 29W, T.2S., R.70W., Sec. 11).

(C) The Rock Creek Subunit from State Highway 128 (39 54 53N 105 11 40W, T.1S., R.70W., Sec. 35) upstream to (39 54 17N 105 13 20W, T.2S., R.70W., west boundary Sec. 3). Includes an unnamed tributary from its confluence with Rock Creek (39 54 40N 105 12 11W, T.2S., R.70W., east boundary Sec. 3) upstream to (39 54 42 N 105 13 00W, T.2S., R.70W., Sec. 3). Also includes an unnamed tributary from its confluence with Rock Creek at (39 54 26N 105 12 34W, T.2S., R.70W., Sec. 3) upstream to (39 54 7N 105 12 52W, T.2S., R.70W., Sec. 3). Includes another unnamed tributary from its confluence with Rock Creek at (39 54 23N 105 12 56W, T.2S., R.70W., Sec. 3) upstream to (39 54 8N 105 13 20W, T.2S., R.70W., west boundary Sec. 3. Includes another unnamed tributary from its confluence with Rock Creek at (39 54 15N 105 13 5W, T.2S., R.70W., Sec. 3) upstream to (39 54 08N 105 13 09W, T.2S., R.70W., Sec. 3).

(ii) *Note:* Map of Unit 6 appears at paragraph (10)(ii) of this entry.

(12) Unit 7: Ralston Creek, Jefferson County, Colorado.

(i) This unit consists of 8.5 mi (13.7 km) of streams. Ralston Creek from 6,065 ft (1,849 m) elevation at the northern edge of Denver Water property just upstream of Ralston Reservoir (39 49 12N 105 15 35W, T.3S., R.70W., Sec. 6) upstream into Golden Gate Canyon State Park to 7,600 ft (2,300 m) elevation (39 50 53 105 21 16W, T.2S., R.71W., Sec. 29).

(ii) *Note:* Map of Unit 7 appears at paragraph (10)(ii) of this entry.

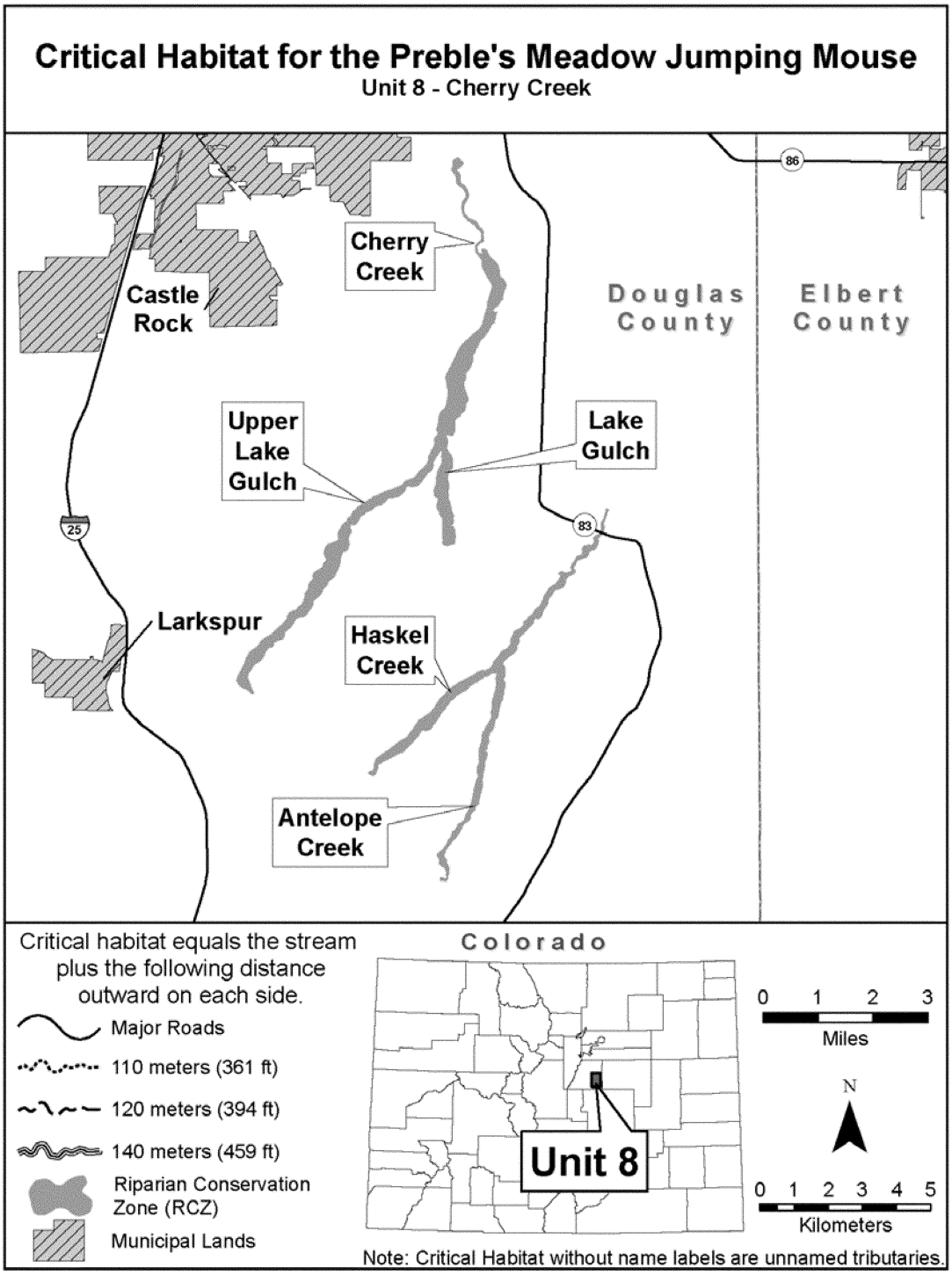
(13) Unit 8: Cherry Creek, Douglas County, Colorado.

(i) This unit consists of two subunits including 29.8 mi (47.9 km) of streams as follows:

(A) The Lake Gulch Subunit including Cherry Creek from the northern boundary of Castlewood Canyon State Recreation Area (39 21 44N 104 45 39W, T.8S., R.66W., south boundary Sec. 10) upstream to the confluence with Lake Gulch (39 20 24N 104 45 36W, T.8S., R.66W., Sec. 23). Lake Gulch from the aforementioned confluence upstream to (39 15 37N 104 46 05W, T.9S., R.66W., south boundary Sec. 15). Includes Upper Lake Gulch from its confluence with Lake Gulch (39 17 24N 104 46 11W, T.9S., R.66W., Sec. 3) upstream to (39 13 24N 104 50 21W, T.9S., R.67W., mid-point Sec. 36).

(B) The Antelope Creek Subunit from its confluence with West Cherry Creek (39 16 11N 104 42 49W, T.9S R.65W., S18) upstream to the Franktown Parker Reservoir (39 10 20N 104 46 16W, T.10S R.66W., S22). It also includes Haskel Creek from its confluence with Antelope Creek (39 13 43N, 104 45 5W, T.9S R.66W., S35) upstream to the Haskel Creek Spring Pond at 7,000 ft (2,134 m) elevation (39 11 60N 104 47 40N, T.10S R.66W., S8).

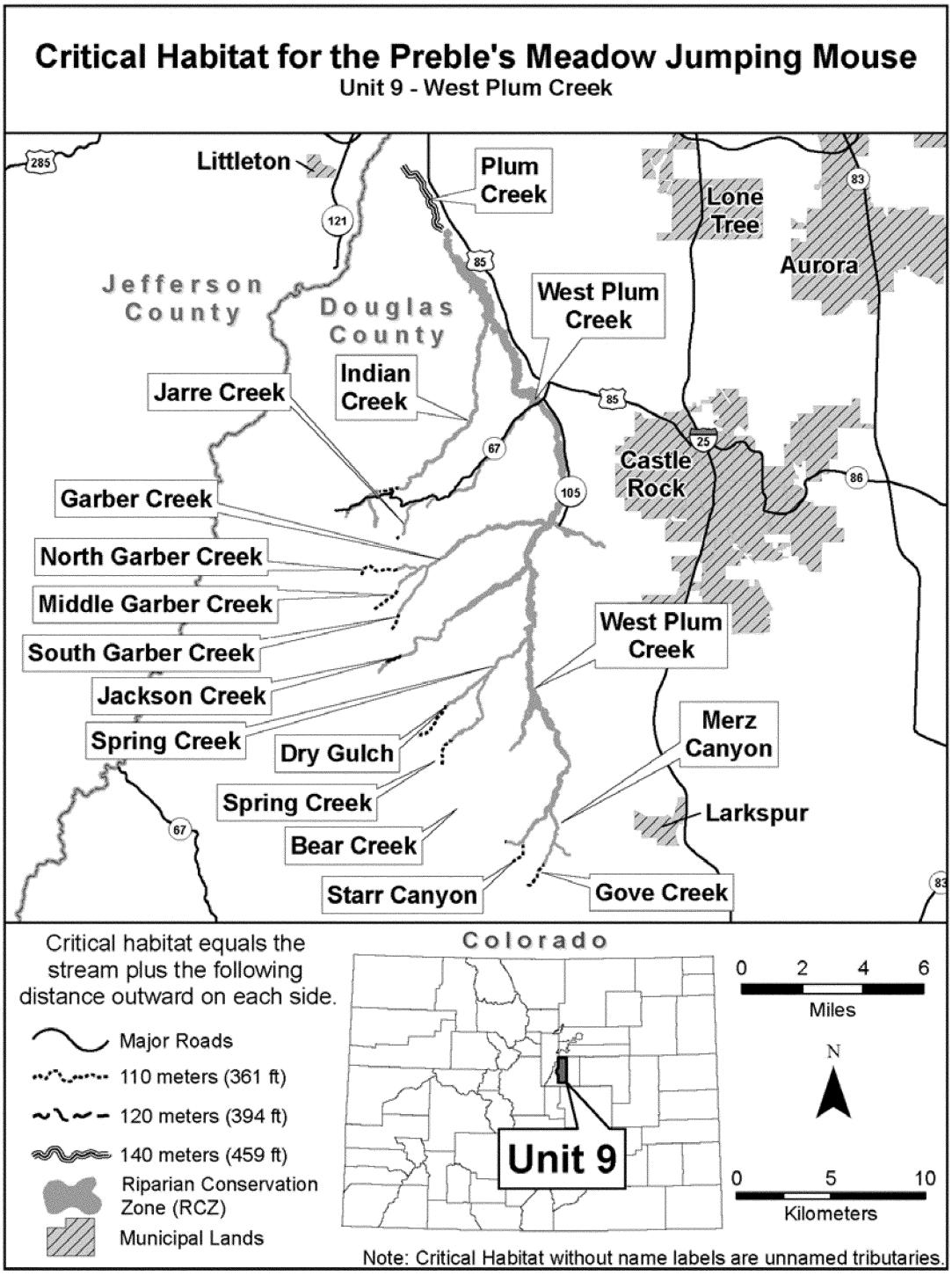
(ii) *Note:* Map of Unit 8 follows:


Critical Habitat for the Preble's Meadow Jumping Mouse
Unit 8 - Cherry Creek
Cherry Creek
Castle Rock
Douglas County
Elbert County
Upper Lake Gulch
Lake Gulch
Larkspur
Haskel Creek
Antelope Creek
86
25
83
Critical habitat equals the stream plus the following distance outward on each side.
Major Roads
110 meters (361 ft)
120 meters (394 ft)
140 meters (459 ft)
Riparian Conservation Zone (RCZ)
Municipal Lands
Colorado
Unit 8
0 1 2 3
Miles
N
0 1 2 3 4 5
Kilometers
Note: Critical Habitat without name labels are unnamed tributaries.

(14) Unit 9: West Plum Creek, Douglas County, Colorado.

(i) This unit consists of 90.3 mi (145.3 km) of streams. Plum Creek from Chatfield Lake (39 32 35N 105 03 07W, T.6S., R.68W., Sec. 7) upstream to its confluence with West Plum Creek and East Plum Creek (39 25 49N 104 58 8W, T.7S., R.68W., Sec. 23), excluding 0.14 mi (0.23 km) of Plum Creek owned by Denver Water at the Highline Canal crossing (excluding from 39 30 44N 105 01 41W, T.6S., R.68W., Sec. 20 downstream to 39 30 41N 105 01 32W, T.6S., R.68W., Sec. 20). West Plum Creek from the aforementioned confluence (39 25 49N 104 58 8W, T.7S., R.68W., Sec. 23) upstream to the boundary of Pike-San Isabel National Forest and 7,600 ft (2,317 m) elevation (39 13 07N 104 59 20W, T.9S., R.68W., Sec. 34). Includes Indian Creek from its confluence with Plum Creek (39 28 22N 104 59 57W, T.7S., R.68W., Sec. 4) upstream to Silver State Youth Camp (39 22 24N 105 05 13W, T.8S., R.69W., Sec. 11). Indian Creek includes an unnamed tributary from its confluence with Indian Creek at Pine Nook (39 23 01N 105 04 24W, T.8S., R.69W., Sec. 2) upstream to (39 22 10N 105 04 08W, T.8S., R.69W., Sec. 12). Also includes Jarre Creek from its confluence with Plum Creek (39 25 50N 104 58 15W, T.7S., R.68W., Sec. 23) upstream to 7,600 ft (2,317 m) elevation (39 21 50N 105 03 20W, T.8S., R.69W., Sec. 12). Jarre Creek includes an unnamed tributary from its confluence with Jarre Creek (39 22 58N 105 01 52W, T.8S., R.68W., Sec. 5) upstream to (39 22 44N 105 02 14W, T.8S., R.68W., Sec. 8). Also includes an unnamed tributary from its confluence with West Plum Creek (39 22 20N 104 57 39W, T.8S., R.68W., Sec. 11) upstream to (39 21 36N 104 55 40W, T.8S, R67W., Sec.18). Unit 9 also includes Garber Creek from its confluence with Plum Creek (39 22 10N 104 57 49W, T.8S., R.68W., Sec. 11) upstream to its confluence with South Garber Creek and Middle Garber Creek (39 21 02N 105 02 13W, T.8S., R.68W., Sec. 18). Including South Garber Creek from its confluence with Garber Creek (39 21 02N 105 02 13W, T.8S., R.68W., Sec. 18) upstream to 7,600 ft (2,317 m) elevation (39 19 14N 105 03 13W, T.8S., R.69W., Sec. 25). Including Middle Garber Creek from its confluence with Garber Creek (39 20 55N 105 02 35W, T.8S., R.68W., Sec. 18) upstream to (39 19 48N 105 04 09W, T.8S., R.69W., west boundary Sec. 25). Including North Garber Creek from its confluence with Middle Garber Creek (39 20 55N 105 02 35W, T.8S., R.68W., Sec. 18) upstream to 7,600 ft (2,317 m) elevation (39 20 47N 105 04 37W, T.8S., R.69W., Sec. 23). Includes Jackson Creek from its confluence with Plum Creek (39 21 02N 104 58 30W, T.8S., R.68W., Sec. 14) upstream to 7,600 ft (2,317 m) elevation (39 17 59N 105 03 57W, T.9S., R.69W., Sec. 1). Includes Spring Creek from its confluence with West Plum Creek at (39 19 04N 104 58 26W, T.8S., R.68W., Sec. 35) upstream to (39 15 21N 105 01 40W, T.9S., R.68W., Sec. 20). Including Dry Gulch from its confluence with Spring Creek (39 17 54N 104 59 58W, T.9S., R.68W., Sec. 4) upstream to 7,600 ft (2,317 m) elevation (39 16 07N 105 02 33W, T.9S., R.68W., Sec. 18). Including Bear Creek from its confluence with West Plum Creek (39 17 30N 104 58 25W, T.9S., R.68W., Sec. 2) upstream to the base of the Waconda Lake dam (39 15 43 N, 104 59 09 W, T.9S, R.68W, Sec.15). Including Gove Creek from its confluence with West Plum Creek (39 14 07N 104 57 42W, T.9S., R.68W., Sec. 26) upstream to 7,600 ft (2,317 m) elevation (39 11 50N 104 58 32W, T.10S., R.68W., Sec. 11). Includes Merz Canyon stream from its confluence with Gove Creek (39 13 05N 104 57 33W, T.9S., R.68W., Sec. 36) upstream to (39 12 39N 104 57 04 W, T.10S., R.68W., Sec.1). Includes Starr Canyon stream from its confluence with West Plum Creek (39 13 07N 104 58 41W, T.9S., R.68W., Sec. 35) upstream to 7,600 ft (2,317 m) elevation (39 12 32N 104 59 01W, T.10S., R.68W., Sec. 3).

(ii) *Note:* Map of Unit 9 follows:


Critical Habitat for the Preble's Meadow Jumping Mouse
Unit 9 - West Plum Creek
Littleton
Plum Creek
Lone Tree
Aurora
Jefferson County
Douglas County
West Plum Creek
Indian Creek
Jarre Creek
Castle Rock
Garber Creek
North Garber Creek
Middle Garber Creek
South Garber Creek
Jackson Creek
Spring Creek
Dry Gulch
West Plum Creek
Merz Canyon
Spring Creek
Larkspur
Bear Creek
Starr Canyon
Gove Creek
285
121
85
83
67
105
25
86
Critical habitat equals the stream plus the following distance outward on each side.
Major Roads
110 meters (361 ft)
120 meters (394 ft)
140 meters (459 ft)
Riparian Conservation Zone (RCZ)
Municipal Lands
Colorado
Unit 9
0 2 4 6
Miles
N
0 5 10
Kilometers
Note: Critical Habitat without name labels are unnamed tributaries.

(15) Unit 10: Upper South Platte River, Douglas, Jefferson, and Teller Counties, Colorado.

(i) This unit consists of four subunits including 33.6 mi (54.1 km) of rivers and streams as follows:

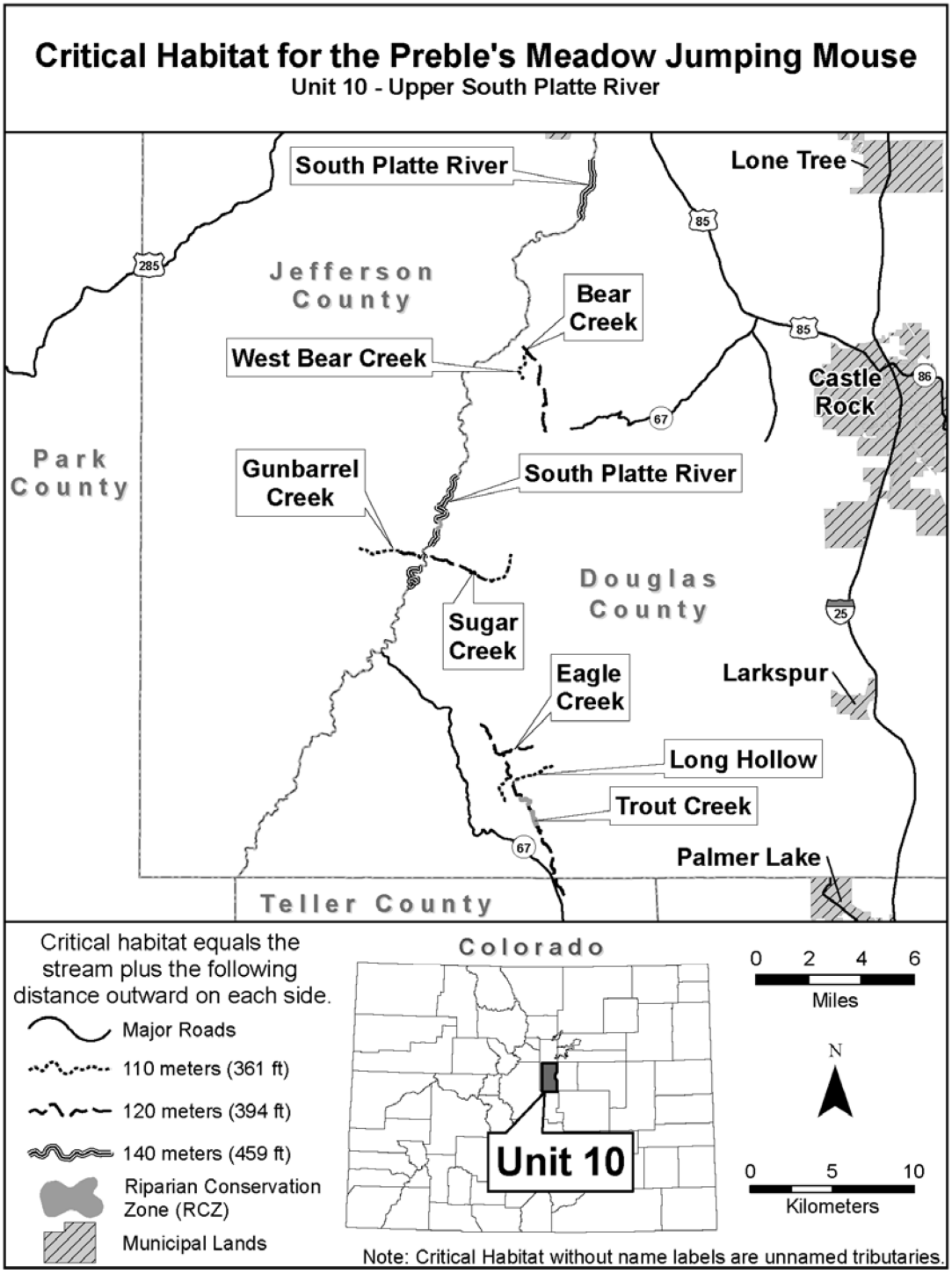
(A) The Chatfield Subunit, on the border of Jefferson County and Douglas County entirely within Chatfield State Park from Chatfield Lake (39 31 32N 105 04 45W, T.6S., R.69W., Sec. 14) upstream to the northern boundary of the Kassler Center land owned by Denver Water (39 29 35N 105 05 14W, T.6S., R.69W., Sec. 26).

(B) The Bear Creek Subunit, Douglas County from Pike–San Isabel National Forest boundary (39 25 27N 105 07 40W, T.7S., R.69W., west boundary Sec. 21) upstream to (39 22 32N 105 06 40W, T.8S., R.69W., south boundary Sec. 4). Includes West Bear Creek from its confluence with Bear Creek (39 25 15N 105 07 30W, T.7S., R.69W., Sec. 21) upstream to a confluence with an unnamed tributary (39 24 17N 105 07 38W, T.7S., R.69W., Sec. 33).

(C) The South Platte River Subunit, on the border of Jefferson County and Douglas County from the southern boundary of Denver Water land near Nighthawk (39 21 04N 105 10 28W, T.8S., R.70W., Sec. 13) upstream to the north eastern boundary of Denver Water land at (39 18 47N 105 11 33W, T.8S., R.70W., Sec. 35), excluding Denver Water lands along this stretch (39 19 10N 105 11 17W, T.8S., R.70W., Sec. 26), and utilizing the Douglas County Riparian Conservation Zones on non-Federal lands. Also included in this subunit from the southwestern boundary of Denver Water property at (39 18 04N 105 12 03W, T.9S., R.70W., Sec. 2) to the north eastern boundary of Denver Water property at (39 17 27N 105 12 24W, T.9S., R.70W., Sec. 3). Includes Sugar Creek, within Douglas County from the eastern boundary of Denver Water land near Oxyoke (39 18 24N 105 11 32W, T.8S., R.70W., Sec. 35) upstream to 7,600 ft (2,317 m) elevation (39 18 31N 105 08 09W, T.8S., R.69W., Sec. 32). Includes Gunbarrel Creek, within Jefferson County from the western boundary of Denver Water land near Oxyoke (39 18 27N 105 12 06W, T.8S., R.70W., Sec. 34) upstream to (39 18 41N 105 14 36W, T.8S., R.70W., Sec. 32).

(D) The Trout Creek Subunit, Douglas County upstream into Teller County from (39 13 02N 105 09 31W, T.9S., R.69W., Sec. 31) upstream to 7,600 ft (2,317 m) elevation which is 0.8 mi (1.3 km) into Teller County (39 07 13N 105 05 49W, T.11S., R.69W., Sec. 3). Includes Eagle Creek from its confluence with Trout Creek (39 11 52N 105 08 27W, T.10S., R.69W., Sec. 8) upstream to 7,600 ft (2,317 m) elevation (39 12 06N 105 07 12W, T.10S., R.69W., Sec. 9). Also including an unnamed tributary from its confluence with Trout Creek (39 11 07N 105 08 05W, T.10S., R.69W., Sec. 17) upstream to (39 10 18N 105 08 23W, T.10S., R.69W., Sec. 20). Also including Long Hollow from its confluence with Trout Creek (39 10 56N 105 08 01W, T.10S., R.69W., Sec. 17) upstream to 7,600 ft (2,317 m) elevation (39 11 30N 105 06 19W, T.10S., R.69W., Sec. 10).

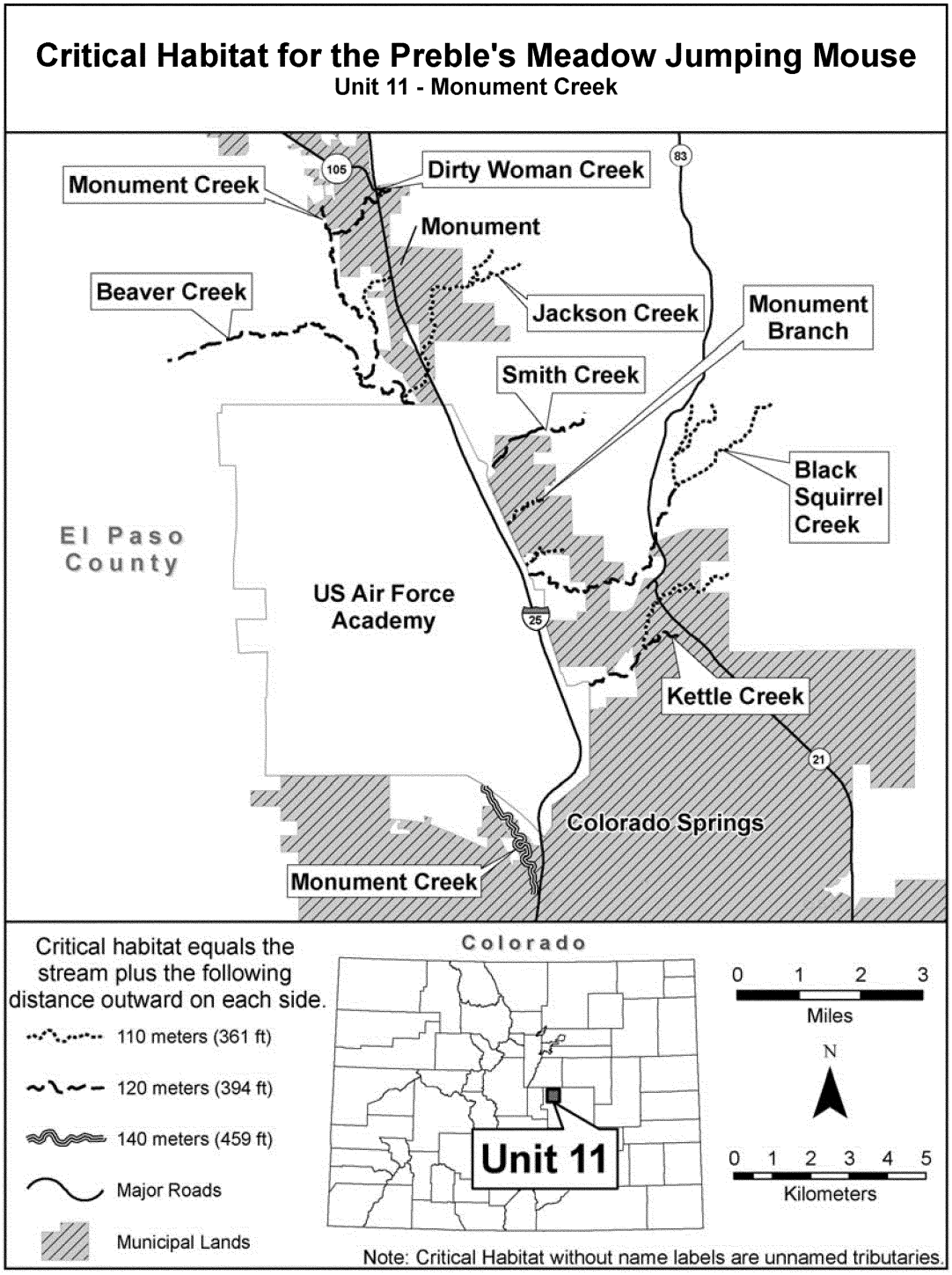
(ii) *Note:* Map of Unit 10 follows:


Critical Habitat for the Preble's Meadow Jumping Mouse
Unit 10 - Upper South Platte River
South Platte River
Lone Tree
85
285
Jefferson County
Bear Creek
West Bear Creek
85
Castle Rock
86
67
Park County
Gunbarrel Creek
South Platte River
Douglas County
25
Sugar Creek
Eagle Creek
Larkspur
Long Hollow
Trout Creek
67
Palmer Lake
Teller County
Critical habitat equals the stream plus the following distance outward on each side.
Major Roads
110 meters (361 ft)
120 meters (394 ft)
140 meters (459 ft)
Riparian Conservation Zone (RCZ)
Municipal Lands
Colorado
Unit 10
0 2 4 6
Miles
N
0 5 10
Kilometers
Note: Critical Habitat without name labels are unnamed tributaries.

(16) Unit 11: Monument Creek, El Paso County, Colorado.

(i) This unit consists of 38.0 mi (61.1 km) of streams. Monument Creek from its confluence with Cottonwood Creek (38 55 36N 104 48 55W, T.13S., R66W., Sec. 7) upstream to the southern property boundary of the U.S. Air Force Academy (38 57 08N 104 49 49W, T.13S., R.66W., Sec. 6), excluding 0.82 ac (0.33 ha) on the Dahle property (38 56 56N 104 49 39W, T.13S., R66W., Sec. 6). Then Monument Creek from the northern property boundary of the U.S. Air Force Academy (39 02 31N 104 51 05W, T.12S., R.67W., north boundary Sec. 2) upstream to Monument Lake (39 05 19N 104 52 43W, T.11S., R.67W., Sec. 15). Includes Kettle Creek from the property boundary of the U.S. Air Force Academy (38 58 33N 104 47 55W, T.12S., R.66W., Sec. 29) upstream to its intersection with a road at (39 00 07N 104 45 24W, T.12S., R.66W., east boundary Sec. 15). Which includes an unnamed tributary from its confluence with Kettle Creek (38 59 06N 104 46 55W, T.12S., R.66W., Sec. 21) upstream to (38 59 14N 104 46 19W, T.12S., R.66W., Sec. 22). Also includes Black Squirrel Creek from the property boundary of the U.S. Air Force Academy (39 00 06N 104 49 00W, T.12S., R.66W., Sec. 18) upstream to (39 02 30N 104 44 38W, T.12S., R.66W., north boundary Sec. 2). Including an unnamed tributary from its confluence with Black Squirrel Creek (39 01 19N 104 46 21W, T.12S., R.66W., Sec. 10) upstream to (39 02 30N 104 45 42W, T.12S., R.66W., north boundary Sec. 3). Which includes another unnamed tributary from (39 01 50N 104 46 20W, T.12S., R.66W., Sec. 3) upstream to (39 02 30N 104 46 03W, T.12S., R.66W., north boundary Sec. 3), excluding approximately 5 ac (2 ha) on the Lefever property (39 00 57N 104 46 33W, T.12S., R.66W., Sec. 9). Also includes an unnamed tributary from the property boundary of the U.S. Air Force Academy (39 00 14N 104 49 3W, T.12S., R.66W., Sec. 18) upstream to 6,700 ft (2,043 m) elevation (39 0 29N 104 48 24W, T.12S., R.66W., Sec. 17). Including an unnamed tributary from (39 0 19N 104 48 55W, T. 12S., R.66W., Sec. 18) upstream to (39 0 30N 104 48 48N, T. 12S., R.66W., Sec. 18). Unit 11 also includes Monument Branch from the property boundary of the U.S. Air Force Academy (39 00 50N 104 49 24W, T.12S., R.66W., Sec. 7) upstream to (39 01 10N 104 48 45W, T.12S., R.66W., east boundary Sec. 7). Also includes Smith Creek from the property boundary of the U.S. Air Force Academy (39 01 36N 104 49 46W, T.12S., R.66W., Sec. 7) upstream to (39 02 24N 104 48 00W, T.12S., R.66W., Sec. 5). Also includes Jackson Creek from its confluence with Monument Creek (39 02 33N 104 51 13W, T.11S., R.67W., Sec. 35) upstream to (39 04 30N 104 49 10W, T.11S., R.66W., Sec. 19). Includes an unnamed tributary from its confluence with Jackson Creek (39 04 12N 104 50 05W, T.11S., R.67W., Sec. 25) upstream to Higby Road (39 04 42N 104 49 40W, T.11S., R.66W., Sec. 19). Also includes Beaver Creek from its confluence with Monument Creek (39 02 52N 104 52 02W, T.11S., R.67W., Sec. 35) upstream to 7,600 ft (2,317 m) elevation (39 03 08N 104 55 32W, T.11S., R.67W., Sec. 31). Also includes Teachout Creek from its confluence with Monument Creek (39 03 44N 104 51 53W, T.11S., R.67W., Sec. 26) upstream to Interstate 25 (39 04 19N 104 51 29W, T.11S., R.67W., Sec. 23). Also includes Dirty Woman Creek from its confluence with Monument Creek (39 04 55N 104 52 34W, T.11S., R.67W., Sec. 22) upstream to Highway 105 (39 05 35N 104 51 28 W, T.11S., R.67W., Sec. 14).

(ii) *Note:* Map of Unit 11 follows:



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Dated: November 24, 2010.

Will Shafroth,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010–30571 Filed 12–14–10; 8:45 am]

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Federal Register

Wednesday,
December 15, 2010

Part IV

Department of Education

Supplemental Priorities for Discretionary Grant Programs; Notice

DEPARTMENT OF EDUCATION

[Docket ID ED–OS–2010–0011]

RIN 1894–AA00

Supplemental Priorities for Discretionary Grant Programs

AGENCY: Department of Education.

ACTION: Notice of final supplemental priorities and definitions for discretionary grant programs.

SUMMARY: The Secretary of Education announces priorities and definitions to be used for any appropriate discretionary grant program in fiscal year (FY) 2011 and future years. We take this action to focus Federal financial assistance on expanding the number of Department programs and projects that support activities in areas of greatest educational need. We are establishing these priorities on a Department-wide basis. This action permits the Department to use, as appropriate for particular discretionary grant programs, one or more of these priorities in any discretionary grant competition. We also announce definitions of key terms used in these priorities.

DATES: *Effective Date:* These priorities and definitions are effective January 14, 2011.

FOR FURTHER INFORMATION CONTACT: Margo Anderson, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W311, Washington, DC 20202–5910. *Telephone:* (202) 205–3010 or by *e-mail at: Margo.Anderson@ed.gov.*

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

SUPPLEMENTARY INFORMATION:

Background: The President has set a clear goal for our education system: By 2020, the United States will once again lead the world in the proportion of citizens holding college degrees or other postsecondary credentials. To support the national effort to meet this goal, the Secretary has outlined an ambitious, comprehensive education agenda that includes early learning programs that help ensure that children are ready to succeed in school, elementary and secondary schools that keep children on track to graduate from high school with the knowledge and skills needed for success in college and careers, and a higher education system that gives every individual the opportunity to attend and graduate from a postsecondary program. To ensure that the Department's discretionary grant programs effectively spur innovation, promote the development and implementation of effective and sustainable practices, and support adoption and implementation of necessary reforms, the Secretary announces priorities in three key areas: advancing key cradle-to-career educational reforms, addressing the needs of student subgroups, and building capacity for systemic continuous improvement.[1]

Program Authority: 20 U.S.C. 1221e–3, 3474.

We published a notice of proposed priorities and definitions (NPP) for the Department in the **Federal Register** on August 5, 2010 (75 FR 47284). That notice contained background information and our reasons for proposing the particular priorities and definitions. The Department has made several significant changes from the NPP. We explain these changes in the *Analysis of Comments and Changes* section elsewhere in this notice.

Public Comment: In response to our invitation in the NPP, approximately 150 parties submitted comments on the proposed priorities and definitions. We discuss substantive issues that pertain to all of the priorities generally under a "General Comments" section. We discuss substantive issues that are specific to a particular priority under the title of the priority to which those issues pertain. Generally, we do not address technical and other minor changes or comments that are outside of the scope of the proposed priorities and definitions.

Analysis of Comments and Changes: An analysis of the comments and of any changes in the priorities and definitions since publication of the NPP follows.

General Comments

Comment: We received a number of comments that appeared to reflect that commenters may have misunderstood the purpose and intended use of these priorities. One commenter stated that it was unclear how the priorities would "interact" with current and future discretionary grant programs. Another commenter asked whether the Department intended for these priorities to supersede authorizing language that establishes the purpose, eligibility, and use of funds that Congress typically includes in legislation. Some commenters asked whether the discretionary grant programs funded under Part D of the Individuals with Disabilities Education Act (IDEA) would be superseded by the priorities and argued that the IDEA Part D programs should remain as separate discretionary grant programs to ensure that the unique needs of students with disabilities are met. Other commenters asked how the Department would select the programs that would be subject to these priorities.

Discussion: We want to be clear that the focus of any discretionary grant program is established by its authorizing legislation. Congress, through its actions, determines how funds are to be used, and the Department develops application notices and awards grants in a manner consistent with the authorizing statute and Congressional intent. Within the parameters of the authorizing statute, the Department often has flexibility in shaping the uses of funds for a specific discretionary grant program or in targeting funds for specific entities or needs and may, and often does, exercise that discretion by choosing to issue regulations for an individual program. The Department also has the flexibility under its general rulemaking authority to establish more general priorities that could apply to a number of different programs, and the Department has chosen to take that path with the establishment of these priorities. In any given discretionary program, the Department may decide to include one or more of these priorities in a notice inviting applications for a grant competition, but only if doing so is consistent with the program statute and applicable regulations. When a priority includes several priority areas, the Department may choose to include all of the priority areas or select those that are most appropriate and

[1] Reminder of Accountability Requirements: We remind potential applicants that in reviewing applications in any discretionary grant competition, under 34 CFR 75.217(d)(3), the Secretary may consider the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds and its compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a performance report or submitted a report of unacceptable quality.

Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR part 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made "substantial progress toward meeting the objectives in its approved application." This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a competitive grant award, the Secretary also requires various assurances and, in making a continuation award, considers whether the grantee is operating in compliance with its current assurances, including those under applicable Federal civil rights laws and the regulations in 34 CFR parts 100 through 110 that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education.

applicable, consistent with the program statute and applicable regulations. For example, Priority 1 (Improving Early Learning Outcomes) includes the following five priority areas: (a) Physical well-being and motor development; (b) social-emotional development; (c) language and literacy development; (d) cognition and general knowledge, including early numeracy and literacy development; and (e) cognition and general knowledge, including numeracy and early scientific development. The Department could select all or some of the priority areas (a) through (e) to include in a given notice, assuming that doing so would be consistent with the program statute and applicable regulations.

These priorities will not supersede the discretionary grant programs authorized under Part D of the IDEA. Rather, in administering competitions for particular discretionary grant programs, including those authorized under Part D of the IDEA (*e.g.,* teacher preparation programs, technical assistance programs), the Department may use one or more of these priorities to focus the competition on a particular area consistent with the overall intent and the applicable statutory parameters of the program. The Department will select the programs that will use these priorities based on this framework.

Changes: None.

Comment: Several commenters requested clarification regarding how the Department decides whether to designate a priority as an absolute, competitive preference, or invitational priority.

Discussion: Under the Department's regulations (34 CFR 75.105), the Department has the authority to select the programs that would be subject to these priorities and to designate each priority as an absolute, competitive preference, or invitational priority, consistent with the authorizing statute that establishes the program. The Department considers the relative importance, appropriateness, and significance of a priority in determining whether to consider only applications that meet the priority (*i.e.,* an absolute priority); to award additional points to an application meeting the priority or to select an application that meets the priority over an application of comparable merit that does not meet the priority (*i.e.,* a competitive preference priority); or to encourage applications that address the priority, but to give no preference to applications that do so (*i.e.,* an invitational priority).

Changes: None.

Comment: One commenter expressed concern that issuing these priorities as final would preempt the opportunity for the public to comment on how the priorities will be used in particular programs and urged the Department to clarify whether there will be opportunities for the public to comment on how the priorities will be used on a program-by-program basis. Several commenters expressed concern that the priorities appear to effectively create and implement education policy outside of the legislative process and without the involvement of stakeholders and elected officials. One commenter recommended that there be a more complete and open review of the proposed priorities and that Congressional hearings be held to review the notice before it is finalized; absent such hearings, the commenter recommended that the Department provide Congressional committees with periodic reports or appear at oversight hearings to review the impact of these priorities and definitions on education.

Discussion: As stated in the NPP, the purpose of establishing these priorities is to permit the Department to use, as appropriate for particular discretionary grant programs, one or more of these priorities in any discretionary grant competition. Establishing these final priorities will permit the Department to include one or more of them in a notice inviting applications without having to go through a public notice-and-comment process each time the Department wishes to use one or more of these priorities in a discretionary grant program. This action, therefore, generally will allow the Department to conduct grant competitions and make awards in a timelier manner and thereby better serve States, districts, institutions, and other grantees. The Secretary is not establishing these priorities outside of the legislative process but rather pursuant to his general authority to promulgate regulations (20 U.S.C. 1221e–3, 3474).

We disagree that stakeholders have not had the opportunity to provide sufficient input. Approximately 150 commenters offered feedback and recommendations on the proposed priorities. We received valuable input from the public and took commenters' recommendations into account in drafting these final priorities and definitions. Indeed, as explained elsewhere in this notice, we are making several changes to the final priorities and definitions to address commenters' feedback, as well as adding several priorities in response to comments received.

Changes: None.

Comment: We received several comments from individuals who construed the priorities to be part of the Department's Elementary and Secondary Education Act (ESEA) reauthorization proposal and objected to what they believed was the consolidation and conversion of existing formula grant programs into competitive grants.

Discussion: These priorities will provide flexibility for the Department to include one or more of these priorities in a notice inviting applications for existing competitive grant programs if doing so is consistent with the program statute and regulations. With these priorities, we do not intend to consolidate or convert existing ESEA formula grant programs into competitive grant programs.

Changes: None.

Comments: Several commenters expressed concern that projects proposing to serve students with disabilities were not proposed as a separate priority. Other commenters stated that the needs of students with disabilities should be addressed in all of the proposed priorities, not just in a few.

Discussion: These priorities serve all students, including students with disabilities. Additionally, students with disabilities are specifically referred to in several of the priorities. For example, new Priority 9 (proposed Priority 6) (Improving Achievement and High School Graduation Rates) specifically focuses on projects that accelerate learning and help improve high school graduation rates and college enrollment rates for students with disabilities. New Priority 10 (proposed Priority 7) (Promoting Science, Technology, Engineering, and Mathematics (STEM) Education) specifically refers to individuals with disabilities as one of the groups that are traditionally underrepresented in STEM careers and for which this priority could be used to increase the number of such students that have access to rigorous and engaging coursework in STEM and are prepared for postsecondary or graduate study and careers in STEM. In addition, we have included a specific reference to students with disabilities in the definition of *high-need children and high-need students,* which is used in Priority 1 (Improving Early Learning Outcomes), new Priority 8 (proposed Priority 5) (Increasing Postsecondary Success), and new Priority 9 (proposed Priority 6) (Improving Achievement and High School Graduation Rates). In sum, we believe that we have included specific references to students with disabilities where such references are most appropriate and would be most helpful in targeting funds on activities

that would improve services to, and outcomes for, such students.

Changes: None.

Comment: One commenter expressed concern that only Priority 1 (Improving Early Learning Outcomes) included a focus on literacy. The commenter stated that literacy instruction is a fundamental instructional priority for elementary and secondary students and recommended that literacy instruction and professional development be added as a separate priority or integrated throughout the priorities.

Discussion: We agree that literacy is essential to students' success in school. Although literacy instruction is not specifically referenced in every priority, the purpose of these priorities is to help improve student achievement and ensure that all children are ready to succeed in school and are on track to graduate from high school with the knowledge and skills needed for success in college and careers. Thus, we think that literacy instruction is encompassed within the priorities. We, therefore, do not believe that a separate priority with a specific focus on literacy instruction is needed.

Changes: None.

Comment: One commenter expressed concern about using any of the priorities for the Federal TRIO Programs authorized by Title IV of the Higher Education Act of 1965, as amended (HEA). The commenter recommended that these priorities be incorporated into separate, specialized competitions that would provide supplemental funds to currently-funded TRIO grantees. The commenter stated that imposing these priorities could potentially deny services to students who are otherwise eligible to participate in TRIO programs and that the legislative history of TRIO clearly rejects the use of any priorities other than those that promote continuity of student services through the consideration of the prior experience of grant applications in successfully providing TRIO services.

Discussion: These priorities are not intended to replace the priorities applicable to the TRIO programs under Title IV of the HEA. As mentioned earlier, this action will provide flexibility for the Department to include one or more of these priorities in a notice inviting applications if doing so is consistent with the authorizing statute. We do not agree with the commenter's suggestion that these priorities should not be applied to the TRIO programs. The Department has the authority to establish appropriate priorities for the TRIO programs and has done so in the past. We believe that certain of these priorities are fully consistent with and will contribute to achieving the goals of the TRIO programs and accordingly may apply the priorities to one or more of the TRIO programs, as appropriate.

Changes: None.

Comment: One commenter stated that new Priority 11 (proposed Priority 8) (Promoting Diversity), which focuses on projects that are designed to promote student diversity, including racial and ethnic diversity, will provide significant educational benefits to all students. However, the commenter expressed concern about the absence of a priority on achieving gender equity.

Discussion: We agree that all students should have equal access to high-quality education programs and have made this explicit in new Priority 10 (proposed Priority 7) (Promoting STEM Education), which specifically refers to groups traditionally underrepresented in STEM careers, including minorities, individuals with disabilities, and women. Given this priority and new Priority 11 (proposed Priority 8) (Promoting Diversity), we do not believe it is necessary to have a separate priority on gender equity.

Changes: None.

Comment: We received a number of recommendations to add other priorities to this notice. One commenter recommended including in all of the priorities a requirement that applicants use "universal design for learning" in their projects. Another commenter stated that the priorities lack a substantive focus on the arts, history, social science, and physical education. One commenter recommended adding a priority that focuses on increasing and protecting the rights of young people by ending domestic and dating violence.

Discussion: While we appreciate the commenters' recommendations for additional priorities, we believe that the priorities included in this notice have the greatest potential to significantly improve student achievement and student outcomes, and to ensure that the Department's discretionary grant programs effectively spur innovation and promote the development and implementation of effective and sustainable practices. In addition, we believe these priorities support adoption of the reforms needed to meet the President's goal for the U.S. by 2020 to once again lead the world in the proportion of citizens holding college degrees or other postsecondary credentials.

Changes: None.

Comment: One commenter expressed concern that the Department did not provide sufficient time for public comment on the proposed priorities. This commenter also stated that because the Department published the proposed priorities at the beginning of the school year, school leaders and educators did not have enough time to provide meaningful feedback on the proposed priorities. The commenter requested that the Department provide an additional 30 days for comment on the proposed priorities.

Discussion: As we stated earlier, we believe the 30-day comment period was sufficient to ensure timely and meaningful comment on the proposed priorities. We understand that the timing of Department notices may not always be optimal for all education stakeholders. The Department strives to balance the needs of our stakeholders with our desire for public input. In addition, we take into consideration our need to publish discretionary grant notices in a timely manner so that applicants have sufficient time to prepare their applications and the Department has sufficient time to conduct a thorough peer review of those applications. We decline to provide an additional 30 days for public comment because to do so would limit our ability to use these priorities in our notices inviting applications for discretionary grants as early as possible in FY 2011, while also making timely awards.

Changes: None.

Priority 1—Improving Early Learning Outcomes

Comment: One commenter expressed concern that Priority 1 could be used for projects that are focused solely on children in the early elementary years rather than on projects that address the needs of early learners from birth through third grade. Another commenter stated that rather than focusing on the entire birth-through-third grade continuum, the priority should focus on distinct age groups within the continuum (*i.e.,* infants and toddlers, three- and four-year old children, and primary-grade children).

Discussion: Our intent is to use this priority across a number of different programs. Therefore, we do not want to unnecessarily limit its focus by requiring all projects to address the entire birth-through-third grade continuum. We are adding language to make this clear.

Changes: We have added the parenthetical, "(or for any age group of high-need children within this range)" following "birth through third grade." The introduction to Priority 1 now reads: "Projects that are designed to improve school readiness and success for high-need children (as defined in this notice) from birth through third

grade (or for any age group of high-need children within this range) through a focus on one or more of the following priority areas."

Comment: One commenter expressed concern with the priority's option for projects to address one or more of the priority areas (*e.g.,* physical well-being and motor development, social-emotional development, language and literacy development), rather than requiring projects to address all of the priority areas. The commenter stated that projects focusing on only one of the priority areas might not improve school readiness for high-need children.

Discussion: The focus of each of the Department's discretionary grant programs is determined by the program's authorizing statute that directs, and generally determines, how funds can be used. For example, there are discretionary grant funds that can only be used to support literacy activities but cannot be used for activities focused on physical well-being and motor development. We intend to ensure that Priority 1 can be used in a range of Department programs. Therefore, we have chosen to allow programs to select one or more of the priority areas under Priority 1 and decline to make the change requested by the commenter.

Changes: None.

Comment: Several commenters recommended that Priority 1 include topics that are the subject of other proposed priorities. One commenter recommended adding a focus on improving the effectiveness of teachers who teach young children. Another commenter recommended adding a focus on the needs of young children with parents who are serving in the military. One commenter recommended including a focus on improving and aligning State standards in all early learning domains and ensuring that curricula and instructional assessments are consistent with expert recommendations. Another commenter recommended including a focus on effective collaboration, coordination, and data-based decision-making.

Discussion: The priority does not preclude applicants from proposing the projects suggested by the commenters, so long as the proposals address one or more of the priority areas identified and comply with the applicable statute and program regulations. We believe that it is unnecessary to add a focus in Priority 1 on areas that are the same as those covered in other priorities because the Department can use more than one priority for a particular discretionary grant program competition. For example, if the Department wishes to focus a competition on improving the effectiveness of teachers who teach young children, it can include both Priority 1 (Improving Early Learning Outcomes) and Priority 3 (Improving the Effectiveness and Distribution of Effective Teachers and Principals) in its notice inviting applications. On the other hand, in some competitions it might not be appropriate or legally allowable to focus Priority 1 on specific issues or populations; framing the priority in a flexible manner, as we have done, would allow the Department to use it in such a context.

Changes: None.

Comment: Several commenters recommended that language be added to the priority to emphasize meeting the diverse needs of children, including those who exhibit early signs of disabilities or giftedness. Another commenter stated that Priority 1 should address the special needs of English learners.

Discussion: Priority 1 focuses on high-need children from birth through third grade. As defined in this notice, the term *high-need children and high-need students* includes children and students at risk of educational failure, and specifically refers to English learners and children and students with disabilities as examples of high-need children. As written, the definition would also encompass children who are gifted if those children are at risk of educational failure. Therefore, we have concluded that it is unnecessary to include the additional language suggested by the commenters.

Changes: None.

Comment: One commenter recommended replacing "education" with "early learning and education" to emphasize the importance of improving the quality of education from "cradle to career."

Discussion: In this priority, we believe "education" broadly includes "early learning" and, therefore, decline to make the change suggested by the commenter.

Changes: None.

Comment: One commenter stated that children participating in camp programs show significant growth in such areas as self-esteem, independence, and leadership, and recommended that outcome-based camp programs be deemed eligible recipients of funds under any of the Department's discretionary grant programs that use Priority 1. Another commenter stated that Priority 1 should be an absolute priority or a competitive preference priority in all Department discretionary grant programs in order to emphasize the importance of investments in young children. One commenter recommended that reviewers of proposals submitted in competitions that apply Priority 1 should include professionals with expertise in each phase of child development, including the development of infants and toddlers.

Discussion: This notice does not address the issue of who is eligible to apply for particular grants or whether a priority is designated as an absolute priority, competitive preference priority, or invitational priority. Those decisions are determined by the authorizing legislation and by the Department in announcing individual competitions. In addition, it would not be appropriate to apply Priority 1 to every Department competition as many of our competitive programs (such as those in the areas of higher education and vocational rehabilitation) have no real connection to early learning. Similarly, we will not address the peer review process here, other than to reassure the commenter that as part of the Department's competitive grant process, the Department selects reviewers based on their expertise in the area or areas to be addressed in each discretionary grant program.

Changes: None.

Comment: One commenter recommended adding "creative arts" to the priority areas included in Priority 1. The commenter stated that engaging children in creative arts can improve their learning in other developmental areas. Another commenter recommended including a priority area that focuses on curricula that encourage communication and reasoning and provide children with an "atmosphere of respect, encouragement, and enthusiasm for learning."

Discussion: We do not believe it is necessary to make the changes requested by the commenters because the priority areas in Priority 1 already include "approaches toward learning," which refers to a child's disposition over a range of attitudes, habits, and learning styles, including the capacity for invention, creativity, and imagination. These are demonstrated through all domains, including creative arts. Priority 1 could, therefore, be used to fund projects that use creative arts or other curricula in order to improve school readiness and success for high-need children, provided such a focus was supported by the program statute and regulations.

Changes: None.

Comment: One commenter recommended that the Department add "early career exploration" as a priority area to Priority 1. The commenter stated that it is important to expose children to role models early in life and to avoid

the development of biases and stereotypes that could possibly evolve into barriers for students' success in their careers and life in general.

Discussion: We believe that adding language on early career exploration to Priority 1 would unnecessarily limit the focus of the priority. However, a project that focuses on early career exploration for high-need children from birth through third grade could be responsive to priority area (d) if the project used early career exploration as an approach to learning that would improve school readiness and success for high-need children, and if such a focus was authorized by the program statute and regulations.

Changes: None.

Comment: One commenter recommended revising Priority 1 to emphasize alignment and coordination with existing early childhood programs that are serving infants, toddlers, and young children (*e.g.,* programs under the IDEA).

Discussion: While we agree that early childhood programs should coordinate with each other, we decline to make the suggested change because the priority focuses on the outcomes to be achieved—improving school readiness and success—rather than on the specific strategies that an applicant may choose for attaining an outcome.

Changes: None.

Priority 2—Implementing Internationally Benchmarked, College- and Career-Ready Elementary and Secondary Academic Standards

Comment: We received several comments regarding the content and nature of the academic standards supported by projects under this priority. One commenter expressed concern that the priority would support projects using only academic standards developed under the Common Core State Standards initiative; this commenter recommended that the Department use the priority to support implementation of other rigorous academic standards commonly used in States, such as standards for Advanced Placement and International Baccalaureate courses. Two commenters suggested that the Department revise the priority to include support for projects using academic standards that are rigorous but might not be common among multiple States; one of these commenters expressed concern that, with this priority, the Department is advocating for national academic standards that might not be suitable in all States or regions of the country.

Discussion: The Department does not require that any specific academic standards be supported to meet this priority, only that they be internationally benchmarked, ensure that students graduate from high school college- and career-ready, and be held in common by multiple States. While we are not mandating the use of specific academic standards, and will not apply Priority 2 to restrict applicants to using only one set of standards, the Department believes strongly that adoption of common K–12 academic standards by States will provide a foundation for more efficient and effective creation of the assessment, instructional, and professional development resources needed to implement a coherent system of teaching and learning. The Department intends to use this priority to support the implementation of academic standards that are common among multiple States and are adopted voluntarily by States and their local educational agencies (LEAs).

Changes: None.

Comment: A number of commenters recommended that the Department revise the priority to include support for projects advancing the implementation of a broader range of standards. Commenters recommended standards in the following areas: social, emotional, cultural, vocational, physical skills, civics, and health and sexuality. In addition, one commenter recommended that the Department revise the priority to include support for "21st Century skills" standards, including critical thinking and other skills relating to employment. Some of these commenters argued that mastery of these standards is also needed if students are to be career-ready.

Discussion: The Department recognizes that development of standards in many of the areas mentioned by the commenters is important, and we commend the work that States and other stakeholders may be undertaking to develop common and rigorous standards in these areas. This priority could be used to support implementation of those standards as well, if they are internationally benchmarked, college- and career-ready, and held in common by multiple States.

Changes: None.

Comment: We received several comments recommending that the Department provide greater specificity in terms of the projects that the priority could support. One commenter recommended that the Department revise the priority to mention specifically that projects in career and technical education may support the implementation of college- and career-ready standards. Another commenter suggested that the Department revise paragraph (a) of the priority to support the development and implementation of specific types of assessments including: Longitudinal assessments (*i.e.,* assessments that measure student growth over time); assessments that include performance tasks; portfolio assessments; and assessments that incorporate classroom-based observations. Another commenter recommended that the Department revise paragraph (c) of the priority to specify the types of professional development or preparation programs that may be used to meet the priority; the commenter recommended that only programs that are research-based and include clinical experiences (such as teacher residency programs) be permitted under the priority.

We also received several comments recommending that we provide greater specificity on the types of student subgroups that projects under the priority should serve. Several commenters recommended that we revise the priority to include a focus on projects implementing college- and career-ready academic standards for students with diverse learning needs, including gifted, talented, and other advanced students, as well as students with disabilities. Another commenter recommended that we revise the priority to include a focus on projects implementing standards for highly mobile students.

Discussion: We decline to revise the priority in the manner recommended by the commenters as such changes could unnecessarily limit the applicability of the priority across Department programs. We note that the types of projects mentioned by the commenters would not be prohibited under this priority and that, in a program using the priority, such projects may be allowable provided they comply with applicable program statutes and regulations.

Changes: None.

Comment: One commenter recommended that the Department revise paragraph (a) of the priority to support the development and implementation of assessments that are both aligned with college- and career-ready academic standards and designed to improve teaching and learning. The commenter asserted that this revision would help clarify that assessments can be used for instructional improvement as well as for accountability purposes.

Discussion: We agree with the commenter on the importance of supporting projects that improve instruction and learning. To promote this goal, we are revising the priority so that the goal of improved instruction

and learning applies to all projects covered by the priority.

Changes: We have revised the introduction to Priority 2 by adding "and to improve instruction and learning" following "held in common by multiple States." With this revision, the introduction reads as follows: "Projects that are designed to support the implementation of internationally benchmarked, college- and career-ready academic standards held in common by multiple States and to improve instruction and learning, including projects in one or more of the following priority areas."

Comment: One commenter recommended that the Department revise paragraph (b) of the priority to include support for the development and implementation of curricula as well as instructional materials. The commenter asserted that more attention should be paid to the development of curricula aligned with new college- and career-ready standards.

Discussion: We agree with the commenter and are revising this paragraph of the priority to include support for the development and implementation of curricula aligned with college- and career-ready standards.

Changes: We have added "curriculum or" before "instructional materials" in paragraph (b) of this priority. With this revision, paragraph (b) reads as follows: "The development or implementation of curriculum or instructional materials aligned with those standards."

Comment: One commenter recommended that the Department revise paragraph (d) of the priority to include support for ongoing school-level support systems, as well as strategies that translate standards into classroom practice. The commenter asserted that more attention should be paid to the support structures needed to implement new college- and career-ready academic standards with fidelity.

Discussion: We appreciate the commenter's concerns; however, we do not believe we should specify the strategies that may be used under paragraph (d) as this could limit the applicability of the priority across Department programs. Further, we believe that implementing school-level support systems is a strategy for translating standards into classroom practice and, therefore, is already covered under the priority.

Changes: None.

Comment: One commenter recommended that the Department revise the priority to include an additional paragraph promoting equity of conditions and resources for implementing college- and career-ready academic standards across schools.

Discussion: We believe that funding projects through programs using this priority promotes equity in schools' abilities to implement college- and career-ready academic standards and, accordingly, that the revision recommended by the commenter is unnecessary.

Changes: None.

Priority 3—Improving the Effectiveness and Distribution of Effective Teachers or Principals

Comment: Several commenters recommended that we revise this priority to include preparation, recruitment, retention, professional development, and increasing salaries as ways of improving teacher and principal effectiveness or ensuring the equitable distribution of teachers and principals. Other commenters suggested more specific methods for improving the effectiveness of teachers and principals, such as: Providing teachers with opportunities to mentor each other to prevent isolation; training teachers and principals to identify and address unique learning needs; supporting professional development programs; providing teachers with a daily planning period; supporting teacher preparation programs; and requiring teachers to acquire different credentials for different geographic areas.

Discussion: The Department agrees that improving the preparation, recruitment, retention, and professional development of teachers and principals, and improving their compensation systems can be effective methods for improving teacher and principal effectiveness and the equitable distribution of teachers and principals. We also believe that improving the evaluation of teachers and principals and implementing performance-based certification and retention systems can improve the effectiveness and distribution of teachers and principals. Therefore, we are revising the priority to include these activities as examples of methods that a project might use under this priority. However, we do not believe it is necessary to reference the more specific activities suggested by the commenters as this level of specificity may inadvertently limit the focus of the priority. We note that this priority would not preclude an applicant from focusing its project on these specific activities, provided such a focus was authorized by the program statute and regulations.

Changes: We have added "improving the preparation, recruitment, development, and evaluation of teachers and principals; implementing performance-based certification and retention systems; and reforming compensation and advancement systems" as examples of the types of methods that might be used to improve teacher and principal effectiveness.

Comment: Several commenters suggested that we revise the priority to clarify how States and school districts should evaluate teachers and principals. A number of these commenters expressed concern that student test scores would be the only evaluation measure that would be supported under the priority. One commenter recommended that continued and sustained growth in student achievement is the best way to evaluate teachers and principals. Several commenters suggested that the Department provide more flexibility in the definitions of *effective teacher* and *effective principal* to take into account different State and local contexts. Other commenters suggested that the Department revise the priority to include the use of positive learning conditions as an example of a supplemental evaluation measure.

A number of commenters expressed concerns regarding the proposed definitions of *effective principal, effective teacher, highly effective principal,* and *highly effective teacher.* Several commenters objected to assessing principal and teacher effectiveness based in significant part on student achievement on standardized tests and questioned the validity and reliability of "value-added" measures. Others stated that measures of growth in student achievement have not been adequately studied for the purposes of evaluating teachers and principals and expressed concerns about implementing such systems in a manner that is fair, reliable, and valid.

Discussion: We agree that the priority should take into account the varied contexts of States and districts, including the fact that some States have made great strides toward establishing high-quality teacher and principal evaluation systems that take into account student growth, in significant part, along with multiple measures of effectiveness, while other States have not yet progressed to that point. Thus, to clarify the Department's intent, we are revising the priority to ensure that the priority is applicable to States and districts that have in place high-quality teacher and principal evaluation systems, as well as States and districts where such systems are not yet established. The new language focuses on measuring teacher and principal effectiveness using data that include

student growth in significant part, but does not require student achievement or student growth data to be the only measure of teacher or principal effectiveness; other measures, such as those proposed by the commenters, could be included as measures of effectiveness under this priority. Given these changes, the definitions of *effective principal, effective teacher, highly effective principal,* and *highly effective teacher* are no longer needed and we are removing them from this priority.

Changes: We have revised Priority 3 to read as follows: "Projects that are designed to address one or more of the following priority areas:

(a) Increasing the number or percentage of teachers or principals who are effective or reducing the number or percentage of teachers or principals who are ineffective, particularly in high-poverty schools (as defined in this notice) including through such activities as improving the preparation, recruitment, development, and evaluation of teachers and principals; implementing performance-based certification and retention systems; and reforming compensation and advancement systems.

(b) Increasing the retention, particularly in high-poverty schools (as defined in this notice), and equitable distribution of teachers or principals who are effective.

For the purposes of this priority, teacher and principal effectiveness should be measured using:

(1) Teacher or principal evaluation data, in States or local educational agencies that have in place a high-quality teacher or principal evaluation system that takes into account student growth (as defined in this notice) in significant part and uses multiple measures that, in the case of teachers, may include observations for determining teacher effectiveness (such as systems that meet the criteria for evaluation systems under the Race to the Top program as described in criterion (D)(2)(ii) of the Race to the Top notice inviting applications (74 FR 59803)); or

(2) Data that include, in significant part, student achievement (as defined in this notice) or student growth (as defined in this notice) data and may include multiple measures in States or local educational agencies that do not have the teacher or principal evaluation systems described in paragraph (1)."

Comment: Two commenters recommended that the Department revise the priority to identify other types of educational support staff, such as administrators, therapists, and early learning practitioners.

Discussion: We agree that a wide array of educators and school personnel is critical to student success. However we have decided to focus this priority on improving the effectiveness of classroom teachers and principals because of their critical importance in raising student achievement.

Changes: None.

Comment: One commenter recommended that the priority be revised to take into consideration applicable negotiated labor agreements and other legal obligations.

Discussion: It is the responsibility of each applicant to ensure that its proposed project under this or any other priority takes into consideration any applicable Federal, State, or local legal obligations. It is also the responsibility of each applicant to ensure that its proposal abides by any applicable labor agreements.

Changes: None.

Comment: None.

Discussion: In reviewing the proposed priorities, we noticed that paragraph (b) of this priority regarding the retention and equitable distribution of teachers or principals who are effective should have included a reference to the retention of such teachers and principals in high-poverty schools. We are including this reference in the final priority.

Changes: We have revised paragraph (b) of the priority to add,"particularly in high-poverty schools (as defined in this notice)," after the word "retention."

Priority 4—Turning Around Persistently Lowest-Achieving Schools

Comment: A number of commenters recommended that we revise the priority to include specific strategies to turn around persistently lowest-achieving schools. Many commenters recommended that the priority mention expanded learning time, including after-school and summer programs, as an acceptable approach to turning around schools. One commenter recommended revising the priority to provide support for career and technical education as a strategy to improve student achievement and increase graduation rates. Another commenter suggested that the Department revise the priority to encourage the use of technology to increase the capacity of schools to improve student achievement and graduation rates. One commenter expressed concern that the proposed priority did not mention "response to intervention" as a successful strategy for improving results for at-risk students. Another commenter recommended that the Department add language to specify that services be aligned with the efforts of other agencies in order to create a coordinated system of supports.

Discussion: We appreciate commenters' suggestions of promising strategies to turn around persistently lowest-achieving schools, but we are intentionally allowing flexibility in the possible approaches that could be used under this priority. Therefore, we decline to include the recommended strategies in this priority. This priority would not preclude an applicant from including in its proposal the suggested strategies provided that such strategies are authorized by the applicable program statute and regulations.

Changes: None.

Comment: Two commenters expressed concern that the four turnaround models required under the School Improvement Grants (SIG) program would be required in order for an applicant to meet this priority. These commenters recommended that a fifth option be added to provide more flexibility on the strategies that can be used in turning around persistently lowest-achieving schools.

Discussion: Priority 4 does not require implementation of the four SIG models (*i.e.,* school turnaround, school transformation, school closure, restart), nor does it specify any strategies that must be used for turning around persistently lowest-achieving schools. As noted previously, this priority is focused on the outcomes listed in the priority, not on prescribing specific strategies for achieving those outcomes.

Changes: None.

Comment: One commenter recommended that the Department revise the priority to include support specifically for school turnaround efforts that are sustainable. The commenter stated that this change would help ensure that successful turnaround efforts will be rewarded with additional funding.

Discussion: We decline to make the change recommended by the commenter because the likelihood that a particular model or strategy would be sustainable in a given school is a factor that school officials must necessarily consider in making decisions about the model or strategies to implement in a school in need of improvement. It is unclear how selecting a sustainable model or strategies would necessarily lead to additional funding, as stated by the commenter.

Changes: None.

Comment: One commenter requested that the Department add a focus in Priority 4 on providing services to support military-connected students.

Discussion: Priority 4 is focused on the outcomes listed in the priority, not on specific subgroups of students. Therefore, we decline to make the change requested by the commenter. We note that new Priority 12 (proposed Priority 9) specifically focuses on support for military-connected students and their families.

Changes: None.

Comment: One commenter suggested that the priority be revised to require projects to focus on narrowing achievement gaps for all subgroups of students in persistently lowest-achieving schools. The commenter stated that the success of the whole school relies on the achievement of all students.

Discussion: We agree that narrowing the achievement gap for subgroups is an important goal for all schools, including persistently lowest-achieving schools. However, we decline to revise the priority because we believe that in persistently lowest-achieving schools, which are among the lowest-achieving schools in each State, the primary focus should be on improving student achievement for all students in the school.

Changes: None.

Comment: One commenter recommended that the Department revise paragraph (b) of this priority to include a focus on increasing graduation rates of students with disabilities. The commenter also recommended that the Department revise paragraph (c) to ensure that services provided to students are available and adequate for students with disabilities.

Discussion: We agree that it is important to include a focus on improving student achievement and increasing the graduation rates of students with disabilities. For this reason, we included a specific provision in new Priority 9 (proposed Priority 6) (Improving Achievement and High School Graduation Rates) that focuses on projects that accelerate learning and help improve high school graduation rates and college enrollment rates for students with disabilities. However, we decline to modify Priority 4 in the manner suggested by the commenter because the focus of this priority is on improving student achievement for all students in persistently lowest-achieving schools.

Changes: None.

Comment: Two commenters expressed concern that this priority's focus on schools meeting the definition of *persistently lowest-achieving schools* is too narrow. The commenters recommended that the priority be expanded to include support for other low-performing schools and for schools at risk of becoming low performing.

Discussion: We appreciate the commenters' concern about serving low-performing schools other than those that are persistently lowest-achieving. However, our intention with this priority is to focus specifically on the schools most in need of improvement, which are the persistently lowest-achieving schools, as defined in this notice. Accordingly, we decline to expand the scope of this priority.

Changes: None.

New Priority 5—Improving School Engagement, School Environment, and School Safety and Improving Family and Community Engagement

Comment: Numerous commenters suggested that the Department modify the proposed priorities to include support for projects that create safe and supportive schools and engage communities and families to improve student achievement.

Safe and Supportive Schools

Many commenters expressed support for the Department's discussion of school culture and climate in the background for proposed Priority 4 (Turning Around Persistently Lowest-Achieving Schools), and proposed Priority 10 (Data-Based Decision Making). Several commenters suggested that the Department add a separate priority that would support projects designed to improve school climate. For example, numerous commenters noted that a positive and supportive school climate and culture can help to improve students' academic achievement, especially for those students most at risk of not succeeding academically and for students attending persistently lowest-achieving schools. Several commenters articulated concerns about the negative impact that bullying and harassment can have on students, including lesbian, gay, bisexual, and transgender (LGBT) students, and these students' ability to achieve academic success. Commenters noted that bullying and harassment can lead to poor learning environments where students feel unsafe or in danger of physical harm, negatively affecting a student's ability to successfully complete high school and pursue postsecondary education. Multiple commenters cited research demonstrating that school environments influence student achievement. For example, one commenter described evidence showing that bullying, harassment, and unduly harsh disciplinary practices have serious academic consequences, including decreased interest in school, increased absences, decreased concentration levels, lower grades, and higher dropout rates. Multiple commenters also noted how important school climate is for military-connected students and, in particular, the need for schools to provide mental health support for students with deployed parents.

Family and Community Engagement

Numerous commenters urged the Department to establish a separate priority for projects that would focus on enhancing family engagement in students' learning. Commenters cited research showing that family engagement is a significant factor in student success, including in ensuring that students meet high academic standards and are college- and career-ready when they graduate from high school. Several commenters also noted how important it is to support parents' involvement in their children's education, particularly for children from low-income families, young children who participate in early learning programs, and children with disabilities. Multiple commenters emphasized the importance of engaging families as key partners in their children's education, working hand in hand with them in schools and ensuring that parents and families understand data and information on student performance. Another commenter recommended that if the Department establishes a priority focusing on family engagement, the priority should include support for projects that provide technical assistance to families of high-need students to support higher education and postsecondary success.

Multiple commenters suggested that the Department add a new priority that would support projects designed to promote community engagement in students' education. One commenter observed that family-led and community-based organizations can play a key role in implementing education reforms. Another commenter stated that for education reforms to be successful, there needs to be a strong relationship among communities, schools, and families at the very beginning of the reform process. Specifically, the commenter stated that community schools are the best vehicles to encourage and ensure high school completion and postsecondary success. These commenters also provided definitions for "community engagement" and "family engagement" and recommended that definitions of these terms be added to the final notice along with the new priority.

Discussion: The Department agrees that safe and supportive schools are

critical to improving students' learning and enhancing teacher effectiveness. Students learn best when they are in a school environment with, among other things, positive relationships between adults and students; the absence of violence, bullying, harassment, and substance abuse; and readily available physical and mental health supports and services. The Department has been clear that preparing students for success requires learning environments that help all students to be safe, healthy, and supported in their classrooms, schools, and communities. For example, on July 9, 2010, the Department published a notice inviting applications for the Safe and Supportive Schools program to support statewide measurement of, and targeted interventions to improve, conditions for learning, and provided definitions of "school engagement," "school environment," and "school safety" (*see* 75 FR 39504). The Department also has been clear that bullying and harassing students, including LGBT students, is damaging to those students and unacceptable (*see* the guidance the Department provided on October 26, 2010, available at: *http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf).*

Similarly, the Department is committed to improving family and community engagement as part of its comprehensive approach to improving student achievement. Preparing students for success requires greater opportunities to engage families in their children's education and strengthening the role of schools as centers of communities. For example, the Department's Promise Neighborhoods program encourages robust development and implementation of a continuum of effective community services, strong family supports, and comprehensive education reforms to improve education and life outcomes for children and youth in high-need communities. In addition, in May, 2010, the Department proposed doubling funding (through the ESEA reauthorization) for activities promoting family engagement from 1 percent to 2 percent of Title I dollars and proposes to ask LEAs to use these funds in a more systemic and comprehensive way.

Based on the many informative comments we received and our strong belief in the need to promote safe and supportive school environments and enhanced family and community engagement in students' learning, we are adding a priority that would support projects designed to improve school environment and safety, and projects designed to improve parent and family and community engagement. We are establishing a separate priority rather than modifying each individual priority to ensure that there is appropriate focus on these important issues. We also believe this priority will be broad enough for many of our programs to use within the parameters of their authorizing program statutes and regulations and, thereby, will support many of the types of strategies and supports mentioned by the commenters. Programs also will be able to use this priority in conjunction with one or more of the other priorities established in this notice.

Changes: The Department has added a new priority, Priority 5—School Engagement, School Environment, and School Safety and Family and Community Engagement, that reads as follows:

"Projects that are designed to improve student outcomes through one or more of the following priority areas:

(a) Improving school engagement, which may include increasing the quality of relationships between and among administrators, teachers, families, and students and increasing participation in school-related activities.

(b) Improving the school environment, which may include improving the school setting related to student learning, safety, and health.

(c) Improving school safety, which may include decreasing the incidence of harassment, bullying, violence, and substance use.

(d) Improving parent and family engagement (as defined in this notice).

(e) Improving community engagement (as defined in this notice) by supporting partnerships between local educational agencies, school staff, and one or more of the following:

(i) Faith- or community-based organizations.

(ii) Institutions of higher education.

(iii) Minority-serving institutions or historically black colleges and universities.

(iv) Business or industry.

(v) Other Federal, State, or local government entities."

We have also added to this notice definitions for *community engagement* and *parent and family engagement* that read as follows:

"*Community engagement* means the systematic inclusion of community organizations as partners with local educational agencies and school staff. These organizations may include faith- and community-based organizations, institutions of higher education (including minority-serving institutions and historically black colleges and universities), business and industry, or other Federal, State, and local government entities."

"*Parent and family engagement* means the systematic inclusion of parents and families, working in partnership with local educational agencies and school staff, in their child's education, which may include strengthening the ability of (a) parents and families to support their child's education and (b) school staff to work with parents and families."

New Priority 6—Technology

Comment: We received a number of comments requesting that the Department add a priority that recognizes the role that educational technology can play in increasing student achievement, implementing school reforms, and improving teacher effectiveness. Commenters also suggested that we include language focused on education technology in the individual priorities. Several commenters stated that in its FY 2011 budget request, the Department emphasized the importance of integrating technology into instruction and using technology to drive improvements in teaching and learning. Commenters also noted that the Department's Blueprint for the ESEA reauthorization highlighted the necessity of supporting projects that leverage technological tools, including digital information and communications technologies. These commenters stated that these priorities should similarly reflect a significant level of support for the use of technology in education.

Commenters recommended that the Department support projects that are designed to use technology to raise student achievement, to develop student skills in the effective use of technology, and to use technology to support individualized instruction. One commenter specifically noted the role that technology will play in the assessments to be developed by State consortia under the Race to the Top Assessment program. Commenters also encouraged the Department to support projects that use technology to provide professional development to teachers.

Several commenters recommended that a priority on education technology focus on several areas, including transitioning from print to digital instructional materials (including open educational resources); accelerating the adoption of high-quality formative and summative assessments; and increasing the availability of online and blended opportunities for students, especially where students' opportunities are limited by geography or personal circumstance. Other areas the commenters suggested should be

included in such a priority are the fostering of 21st century, personalized learning environments centered on improving student achievement in the core subject areas and providing professional development to educators and school leaders to assist them in effectively selecting, using, and evaluating the effectiveness of technology tools and information systems.

Discussion: We agree with the commenters that technology can play a vital role in improving student achievement, increasing students' access to instructional content, and increasing teacher and school leader effectiveness through enhanced professional development. As several commenters noted, we have recognized the critical role of technology in education in our Blueprint for the ESEA reauthorization and in our FY 2011 budget request. We agree with those commenters that these final priorities should reflect a similar emphasis on educational technology.

Rather than modify each individual priority, we have decided to establish a new priority focused solely on educational technology. Under this new priority, the Department would support projects that are designed to improve student achievement or teacher effectiveness through the use of high-quality digital tools and materials. We believe this priority will be broad enough for many of our programs to use within the parameters of their authorizing program statute and regulations and, thereby, will support many of the types of innovative uses of technology mentioned by the commenters, while ensuring that the development and implementation of these new approaches are based on data demonstrating the effectiveness of the technology in improving student achievement or teacher effectiveness. Programs will be able to use this priority in conjunction with one or more of the other priorities established in this notice.

Changes: We have established a new priority, Priority 6—Technology, that reads as follows: "Projects that are designed to improve student achievement or teacher effectiveness through the use of high-quality digital tools or materials, which may include preparing teachers to use the technology to improve instruction, as well as developing, implementing, or evaluating digital tools or materials."

New Priority 7—Core Reforms

Comment: A number of commenters strongly supported the adoption of college- and career-ready standards and stated that implementation of such standards can serve as a catalyst for education reform. Other commenters noted the importance of effectively evaluating teachers and principals, and implementing statewide longitudinal data systems that provide educators and families the data they need to increase student achievement. One commenter stated that statewide longitudinal data systems are the foundation for successfully implementing other education reforms. Several commenters supported the Department's efforts to outline a comprehensive reform agenda and to better allocate limited Federal resources to areas of significant need. One commenter recommended that the Department consider ways in which it could encourage applicants for discretionary grant programs to continue their comprehensive reform efforts.

Discussion: We agree with the commenters that implementing college- and career-ready standards and increasing data-based decision making are key drivers of comprehensive reform. Given the critical role that teachers and principals play in improving student learning, we believe that teacher and principal evaluation systems are another key driver of reform. We appreciate the commenters' support for the Department's comprehensive reform efforts and agree that the Department should support and encourage States to continue implementing comprehensive reforms that result in improved student achievement, narrowed achievement gaps, and increased high school graduation and college enrollment rates. Therefore, we are adding a new Priority 7 to support projects in States, LEAs, or schools where core reforms are being implemented. This priority focuses on projects conducted in a State that has adopted K–12 academic standards that build toward college- and career-readiness; in a State that has implemented a statewide longitudinal data system; and is in an LEA or school that provides student growth (as defined in this notice) data to teachers.

Changes: The Department has added a new priority, Priority 7—Core Reforms, that reads as follows:

"Projects conducted in States, local educational agencies, or schools where core reforms are being implemented. Such a project is one that is conducted—

(a) In a State that has adopted K–12 State academic standards in English language arts and mathematics that build towards college- and career-readiness;

(b) In a State that has implemented a statewide longitudinal data system that meets all the requirements of the America COMPETES Act; and

(c) In a local educational agency or school in which teachers receive student growth (as defined in this notice) data on their current students and the students they taught in the previous year and these data are provided, at a minimum, to teachers of reading/language arts and mathematics in grades in which the State administers assessments in those subjects."

New Priority 8 (Proposed Priority 5)—Increasing Postsecondary Success

Comment: Two commenters stated that one of the biggest challenges faced by those who are unemployed is that a majority of the fastest-growing industries require postsecondary education. The commenters noted that rigorous career and technical education programs play a significant role in preparing individuals with the skills they need to succeed in today's workforce. Another commenter recommended revising the language in this priority to emphasize the importance of ensuring that postsecondary education has value in the labor market. The commenter recommended that the language in the priority be changed to focus not only on students who are in the education pipeline, but also young adults who need to receive additional training to be successfully employed. One commenter recommended that the priority specifically reference current military service members and veterans who have served in the military since the September 11, 2001 terrorist attacks.

Other commenters stated that while academic standards are important, the Department should consider ways to encourage a broader definition of what it means to be successful in a global economy. The commenters noted that successful schools consider both "the context of learning and the full range of human development including civic standards and measures, learning and innovation skills, and other applied workplace skills." One commenter urged that we support the implementation of standards "in a broad range of subjects and competencies that address the needs of the whole student and prepare students to succeed in a modern, globally interdependent society."

Discussion: We agree that new Priority 8 (proposed Priority 5) should include a focus on completing college or other postsecondary training that leads to successful employment. While we agree that the labor market values the education and training provided by

postsecondary institutions, we do not believe that it is necessary to include this specific language in the priority. Therefore, we decline to make the change requested by the commenter.

With regard to the recommendation that the language in the priority be changed to focus not only on students who are in the education pipeline, but also young adults who need to receive additional training to be successfully employed, we note that paragraph (d) focuses on individuals who return to the educational system. However, we agree that the language in paragraph (d) could be strengthened to focus on college enrollment and success, similar to the focus in paragraphs (a), (b), and (c) for high-risk students, and we are adding language accordingly.

The Department agrees that it is important to increase the number of current service members and post-9/11 veterans who enroll in, persist in, and complete college or other postsecondary training. To ensure that this priority is as broad and inclusive as possible, and thereby could be used by multiple programs across the Department, we decline to reference in the priority specific groups within the military services. However, in order to reflect the importance of providing services to current service members and post-9/11 veterans, and as discussed later in this notice, we are revising the definition of *military-connected student* (used in new Priority 12 (proposed Priority 9)) to include a reference to current service members and veterans.

With regard to the commenters who recommended that this priority focus on the "whole student" and the knowledge and skills that are needed to compete successfully in the global economy, we believe that a high-quality education includes developing students who are well-rounded and well-prepared for the challenges and responsibilities they will confront throughout their lives. Preparation for a lifetime of learning experiences is necessary for effective participation in democratic society. We believe that these priorities, as written, encapsulate this idea; however, to clarify our commitment to the development of the whole student, we are adding a new paragraph (f) to this priority.

Changes: We have revised paragraph (d) of this priority, which reads as follows: Increasing the number of individuals who return to the educational system to obtain a high school diploma; to enroll in college or other postsecondary education or training; to obtain needed basic skills leading to success in college or other postsecondary education or the workforce; or to enter, persist in, and complete college or rigorous postsecondary career and technical training leading to a postsecondary degree, credential, or certificate."

We also have added new paragraph (f) to this priority, which reads as follows: "Increasing the number and proportion of postsecondary students who complete college or other postsecondary education and training and who are demonstrably prepared for successful employment, active participation in civic life, and lifelong learning."

Comment: One commenter expressed support for this priority's goal of preparing high-need students for postsecondary education and future careers. The commenter recommended using the definition of "postsecondary education" that is used in Department program statutes, and focusing the priority on a broad range of postsecondary options in order to convey that "college" is not limited to four-year baccalaureate degree programs. Similarly, one commenter recommended changing "increasing the number of students who are academically prepared" to "increasing the number of students who are prepared" in paragraph (a). Another commenter recommended that the priority refer to existing national programs and examinations, such as Advanced Placement, ACT, and International Baccalaureate courses and exams, as examples of ways to adequately prepare students for college-level coursework without the need for remediation.

Discussion: New Priority 8 (proposed Priority 5) includes specific references to training leading to a "degree, credential, or certificate," in order to make clear that the priority focuses on a broad range of postsecondary options and is not limited to four-year degree programs. Therefore, we believe it is unnecessary to add a definition of "postsecondary education" in this notice or to change the language in paragraph (a) in the manner suggested by the commenter. However, in order to make clear in paragraphs (c) and (d) that the outcome is a postsecondary degree, credential, or certificate, we are adding "postsecondary" before "degree, credential, or certificate." We decline to include in the priority the specific courses and exams recommended by the commenter because the priority focuses on the outcome of increasing postsecondary success rather than on the specific strategies for attaining that outcome. In fact, rather than focusing on completing specific courses that do not necessarily lead to a postsecondary degree, credential, or certificate, we believe the focus in paragraph (c) regarding career and technical education should be on programs of study (as defined in this notice). We are changing the language in paragraph (c) accordingly.

Changes: In paragraphs (c) and (d), we have added "postsecondary" before "degree." We also have removed "secondary or postsecondary career and technical courses or" in paragraph (c).

Comment: Two commenters recommended that we revise this priority to include a focus on increasing the rates at which high-need students enroll in and complete doctoral or other terminal degree (*i.e.,* the highest degree in a particular field of study) programs.

Discussion: This priority already focuses on increasing the number and proportion of high-need students who enroll in and complete graduate programs. This would encompass students enrolling in and completing doctoral or other terminal degree programs. We believe that adding specific references to doctoral or terminal degrees would unduly narrow the priority such that it could not be used across many of the Department's programs. We decline, therefore, to make the change recommended by the commenters.

Changes: None.

Comment: One commenter recommended that the priority include a specific focus on providing comprehensive guidance and advice to high-need students on applying for college and financial aid.

Discussion: As noted in a response to an earlier comment, this priority focuses on the outcome of increasing postsecondary success rather than the specific strategies for attaining that outcome. Therefore, we decline to make the change recommended by the commenter.

Changes: None.

Comment: One commenter recommended that this priority include a focus on recruiting and retaining high-quality educators to teach students in rural areas and high-need students.

Discussion: Paragraph (a) of the priority supports projects that increase the number and proportion of high-need students who are academically prepared for and enroll in college or other postsecondary education and training. This priority would not preclude an applicant from proposing a project that supports retaining high-quality educators in rural areas, so long as the project supports the goals of this priority and complies with the program statute and regulations. For this reason, the change recommended by the commenter is unnecessary.

Changes: None.

Comment: One commenter, while generally supportive of the priority, recommended that schools use open educational resources (OER) to improve and ensure postsecondary success. Another commenter recommended that products developed with discretionary grant funds be developed consistent with the requirements for OER.

Discussion: New Priority 16 (proposed Priority 13) (Improving Productivity) specifically refers to the use of OER to improve results and strategies. If the Department decides to focus a program competition on postsecondary success and the use of OER to increase productivity, and provided such a focus is authorized by the program statute and regulations, we will be able to include both priorities in the notice inviting applications. Therefore, we decline to make the change requested by the commenter.

Changes: None.

Comment: None.

Discussion: During the Department's review of this priority, we determined that it would be clearer to refer to the "number and proportion of high-need students" rather than to "rates" in paragraphs (a), (b), (c), and (e). We also are correcting an error in paragraph (d)—"career or technical training" in paragraph (d) should be "career and technical training. Therefore, we are making these changes in the priority.

Changes: We have revised new Priority 8 to read as follows:

Priority 8—Increasing Postsecondary Success

Projects that are designed to address one or more of the following priority areas:

(a) Increasing the number and proportion of high-need students (as defined in this notice) who are academically prepared for and enroll in college or other postsecondary education and training.

(b) Increasing the number and proportion of high-need students (as defined in this notice) who persist in and complete college or other postsecondary education and training.

(c) Increasing the number and proportion of high-need students (as defined in this notice) who enroll in and complete high-quality programs of study (as defined in this notice) designed to lead to a postsecondary degree, credential, or certificate.

(d) Increasing the number and proportion of individuals who return to the educational system to obtain a high school diploma; to enroll in college or other postsecondary education or training; to obtain needed basic skills leading to success in college or other postsecondary education or the workforce; or to enter, persist in, and complete college or rigorous postsecondary career and technical training leading to a postsecondary degree, credential, or certificate.

(e) Increasing the number and proportion of high-need students (as defined in this notice) who enroll in and complete graduate programs.

(f) Increasing the number and proportion of postsecondary students who complete college or other postsecondary education and training and who are demonstrably prepared for successful employment, active participation in civic life, and lifelong learning.

New Priority 9—Improving Achievement and High School Graduation Rates (Proposed Priority 6—Improving Achievement and High School Graduation Rates of Rural and High-Need Students)

Comment: One commenter expressed concern that the needs of urban students were not sufficiently addressed in proposed priority 6 and recommended that the Department revise it to focus on both urban and rural students.

Discussion: The intent of this priority is to focus on improving achievement and high school graduation rates and college enrollment rates of high-need students, in both urban and rural areas. We recognize that the title of the proposed priority may have incorrectly implied that this priority was exclusively focused on students in rural areas. Therefore, we are removing the reference to rural and high-need students from the title of the priority.

Changes: We have removed "of Rural and High-Need Students" from the title of the priority. Based on this change, the title of new Priority 9 now reads: "Improving Achievement and High School Graduation Rates."

Comment: One commenter recommended that this priority include a focus on students with disabilities, including students with disabilities who are also gifted. Another commenter recommended adding a focus on English learners, stating that these students need extra support to be successful because they must learn English at the same time they are trying to meet challenging student achievement standards.

Discussion: Although students with disabilities and English learners are included in the definition of *high-need children and high-need students* as examples of students who may be at risk of educational failure, we understand that there may be programs for which it would be appropriate to focus particularly on improving achievement and graduation rates of students with disabilities or English learners, and not a broader group of high-need students. Therefore, within this priority, we are adding a separate priority area for students with disabilities and a separate priority area for English learners.

Changes: We have added a new paragraph (b) to the priority, which reads as follows: "Accelerating learning and helping to improve high school graduation rates (as defined in this notice) and college enrollment rates for students with disabilities." We also have added a new paragraph (c), which reads as follows: "Accelerating learning and helping to improve high school graduation rates (as defined in this notice) and college enrollment rates for English learners." Subsequent paragraphs have been renumbered.

Comment: A number of commenters expressed support for this priority and recommended specific strategies to improve student achievement and graduation rates. One commenter suggested that the priority focus on physical education programs because students in schools with high poverty rates often do not have access to high-quality physical education programs. Several commenters recommended focusing on specific dropout prevention programs. One commenter requested that the priority focus on programs that support collaboration between education and juvenile and family justice systems to support students in juvenile detention centers and students in foster care. One commenter stated that summer learning programs play a critical role in accelerating learning for students in rural and high-poverty areas and should be included in this priority. Two commenters recommended adding language to provide incentives for schools and districts to implement initiatives that help high-need students stay in school, such as programs that provide multiple or alternative pathways to graduation. One commenter recommended that the Department revise the priority to support the development of data collection systems to help school districts report data, such as graduation rates, more effectively. Another commenter recommended adding a focus on systems that identify students at risk of dropping out of school.

Discussion: This priority focuses on outcomes—that is, improving student achievement and high school graduation rates and college enrollment rates for students in rural LEAs, students with disabilities, English learners, other high-need students, and students in high-poverty schools—rather than on the

specific strategies for attaining those outcomes. Many of the strategies proposed by the commenters may accelerate learning and improve graduation and college enrollment rates. However, we decline to reference specific strategies in this priority because it would limit the types of programs to which this priority could be applied. We do agree that this priority should include a focus on projects that meet the needs of all students, while ensuring that the specific needs of high-need students participating in such a project are met. Therefore, we are adding a new paragraph (f) to focus on projects that accelerate learning and improve high school graduation rates and college enrollment rates for all students in an inclusive manner while ensuring that the specific needs of high-need students are addressed.

Changes: We have added a new paragraph (f) that reads as follows: "Accelerating learning and helping to improve high school graduation rates (as defined in this notice) and college enrollment rates for all students in an inclusive manner that ensures that the specific needs of high-need students (as defined in this notice) participating in the project are addressed."

Comment: Two commenters recommended revising the priority to specifically support disadvantaged populations of gifted students.

Discussion: This priority already focuses on the needs of gifted students who are high-need students at risk of educational failure (paragraph (d)), as well as students who attend high-poverty schools (paragraph (e)), which may include gifted students. Therefore, we decline to make the change recommended by the commenters.

Changes: None.

Comment: One commenter recommended adding a priority to focus on schools located in areas of concentrated poverty and the students living in those areas.

Discussion: The groups of students and schools already included in this priority could encompass schools located in areas of concentrated poverty and students living in those areas. Because we intend to use this priority across a number of Department programs, we do not want to unnecessarily limit its scope by limiting its application to the specific schools and students suggested by the commenter. Therefore, we decline to make the change suggested by the commenters.

Changes: None.

New Priority 10 (Proposed Priority 7)—Promoting Science, Technology, Engineering, and Mathematics (STEM) Education

Comment: One commenter recommended that the Department support projects that include a focus on providing information to students about educational and career pathways into STEM fields. According to the commenter, students need better information about educational programs that can lead to careers in STEM fields.

Discussion: We agree that providing students with more information about STEM careers and the pathways to those careers would help increase students' level of interest in STEM coursework and careers. We do not think it is necessary to reference this type of activity in the text of the priority, however, because the priority focuses on the outcome of increased access to STEM coursework rather than specific strategies for attaining that outcome. Grant applicants could propose increasing the amount of information available to students about educational and career opportunities in the STEM fields as a strategy for achieving the goal of increased access to STEM coursework.

Changes: None.

Comment: One commenter recommended that we revise the priority to specifically support providing high school students with access to rigorous and engaging courses of study in STEM. Two commenters recommended that we revise paragraph (a) of the priority to specifically identify elementary, middle, and high school students, and another commenter recommended that we revise the priority to ensure that it supports early learning in STEM. These commenters stated that if students have access to STEM content early in their education, they are more likely to pursue STEM opportunities at the postsecondary level and STEM careers. Another commenter recommended that the Department revise the priority to support projects that provide gifted and talented students with access to rigorous and engaging STEM courses as soon as those students are academically ready for such coursework. The commenter stated that students should be permitted to take STEM-related coursework as early as possible in their education in order to ensure that the Nation has a sufficient number of STEM professionals in the future. Another commenter recommended that we revise the priority to reference underrepresented and high-need students.

Discussion: Our intent in paragraph (a) of this priority is to support access to rigorous and engaging courses of study in STEM for all students, including students in elementary, middle, and high schools; gifted and talented students; and high-need students. We agree that providing these students with access to STEM-related coursework is essential to increasing the number of students prepared for postsecondary or graduate study and careers in STEM fields. However, the Department plans to use these priorities across a number of its discretionary grant programs, and some of those programs may not support a focus on particular groups of students. Accordingly, we decline to narrow the scope of paragraph (a), as suggested by the commenters. The priority does not preclude an applicant from focusing its project on increasing access to STEM coursework for specific groups of students, provided such a focus is authorized by the program statute and regulations.

In reviewing these comments, however, we noted that our use of the term "courses of study" in paragraph (a) of the priority could be read to refer to STEM courses that are offered only after elementary school. Given that this is not our intention and to eliminate any confusion, we have revised the priority to refer to "coursework" rather than to "courses of study" to clarify that paragraph (a) refers to all students regardless of their level of education.

Changes: We have revised paragraph (a) of the priority to delete the reference to "courses of study" and replaced it with "coursework in STEM." Specifically, paragraph (a) reads: "Providing students with increased access to rigorous and engaging coursework in STEM."

Comment: Two commenters suggested that the Department revise paragraph (c) of the priority, which provides for increasing the opportunities for high-quality preparation of, or professional development for, teachers of STEM subjects, to refer to a broader group of education professionals who could benefit from professional development in this area. The commenters suggested that we use the term "educator" rather than "teacher."

Discussion: We agree that it is important to support all types of educators who work in STEM fields. Accordingly, we have revised the priority to include a reference to other educators in the STEM fields.

Changes: We have added "or other educators" following "teachers" in paragraph (c). Paragraph (c) of the priority reads as follows: "Increasing the

opportunities for high-quality preparation of, or professional development for, teachers or other educators of STEM subjects."

Comment: One commenter recommended that we add a priority area for increasing opportunities for collaboration related to STEM-focused initiatives, projects, and programs among military and civilian research centers, institutions of higher education, LEAs, non-profit organizations, museums, and other partners engaged in STEM fields.

Discussion: As stated in the NPP, we agree that such collaborations can be important and effective strategies for increasing the number of students prepared for postsecondary study in STEM and for assisting teachers in providing effective STEM instruction. We decline to make the suggested change, however, because the priority emphasizes the outcomes to be achieved rather than specific strategies for attaining those outcomes. We note that the priority does not preclude an applicant from proposing a project that focuses on these types of collaborations. Collaborations with STEM organizations could be proposed as a strategy for achieving the outcomes called for in the priority.

Changes: None.

Comment: Two commenters suggested that the Department revise the priority to include a specific reference to career and technical education courses. The commenters stated that many career and technical education programs include STEM-focused instruction and can be used to help students acquire knowledge and skills in a variety of STEM fields, including preparing students for postsecondary studies and careers in STEM fields. Another commenter recommended that we revise the priority to support career and technical education programs that encourage women to go into high-earning careers; the commenter stated that many women are directed to career and technical education professions that have been traditionally occupied by women, such as cosmetology and childcare, which also tend to be lower-paying professions.

Discussion: We agree that career and technical education courses can be instrumental in preparing students for postsecondary study and careers in STEM fields. However, we do not believe it is necessary to specifically mention career and technical education courses in the priority. As indicated earlier in this notice, our intent is to use this priority across a number of different Department programs, some of which may not permit a focus on career and technical education courses, and we do not wish to unnecessarily limit the scope of this priority and risk precluding applicants in some Department programs from addressing it.

We also agree that the underrepresentation of women and girls in certain STEM fields is a significant problem. Paragraph (b) of the priority was designed to address that concern by encouraging a focus on increasing the participation of students from groups traditionally underrepresented in STEM careers, including women. However, upon further reflection, we believe that, rather than focusing on increasing the number of students from groups traditionally underrepresented in STEM careers only in paragraph (b) (with regard to postsecondary and graduate study and careers in STEM), there should be a similar emphasis with regard to increasing access to rigorous and engaging coursework in STEM (paragraph (a)) and with regard to increasing opportunities for high-quality preparation of, or professional development for, teachers or other educators of STEM subjects (paragraph (c)). Therefore, we are adding two new paragraphs that focus on individuals from groups traditionally underrepresented in STEM careers, and removing the reference to such individuals in paragraph (b). New paragraph (d) focuses on increasing the number of students from groups traditionally underrepresented in STEM who are provided with access to rigorous and engaging coursework in STEM or who are prepared for postsecondary or graduate study and careers in STEM; and new paragraph (e) focuses on increasing the number of individuals from groups traditionally underrepresented in STEM who are teachers or educators of STEM subjects and who have increased opportunities for high-quality preparation or professional development.

Changes: We have added a new paragraph (d) to read as follows: "Increasing the number of individuals from groups traditionally underrepresented in STEM, including minorities, individuals with disabilities, and women, who are provided with access to rigorous and engaging coursework in STEM or who are prepared for postsecondary or graduate study and careers in STEM."

We have added a new paragraph (e) to read as follows: "Increasing the number of individuals from groups traditionally underrepresented in STEM, including minorities, individuals with disabilities, and women, who are teachers or educators of STEM subjects and have increased opportunities for high-quality preparation or professional development."

We have removed the following from paragraph (b): "With a specific focus on an increase in the number and proportion of students so prepared who are from groups traditionally underrepresented in STEM careers, including minorities, individuals with disabilities, and women."

Comment: While several commenters supported this priority and noted the importance of ensuring that students have access to STEM coursework well before entering college, one commenter recommended that the Department revise the priority to focus on both the preparation for and the completion of graduate degrees in STEM fields.

Discussion: The priority supports both the preparation and the completion of postsecondary or graduate study in STEM. Specifically, paragraph (b) of the priority emphasizes increasing the number of students prepared for postsecondary and graduate study *and* careers in STEM. Thus, the language supporting increasing the number of students prepared for careers in STEM already supports projects that are designed to increase the number of students completing their postgraduate studies in STEM.

During the Department's review of the NPP, we determined that the phrase "advanced postsecondary or graduate study" in paragraph (b) was vague and confusing. Therefore, we are removing the word "advanced" from paragraph (b). We also determined that, rather than focusing only on increasing the number of students prepared for postsecondary or graduate study and careers in STEM that the priority should also focus on increasing the proportion of those students. We are, therefore, making these changes in paragraph (b).

Changes: In paragraph (b), we have removed "advanced" before "postsecondary"; and added "and proportion" before "of students prepared for". With this change and the changes noted in response to an earlier comment, paragraph (b) now reads: "Increasing the number and proportion of students prepared for postsecondary or graduate study and careers in STEM."

Comment: One commenter applauded the Department's focus on issues affecting underrepresented students in STEM fields. The commenter suggested, however, that the Department narrow its focus to address specific achievement gaps between males and females in general, and between minority males and white males, in particular. The commenter stated that minority males in particular face access, academic success,

and persistence difficulties when they enter the STEM fields.

Discussion: We appreciate the commenter's support and recognize the seriousness of these achievement gaps. Our intent under paragraph (b) of the priority was to address those gaps by supporting projects that are designed to increase the representation of all students from groups traditionally underrepresented in STEM careers, including minorities, individuals with disabilities, and women. As noted in response to an earlier comment, we are removing the reference to increasing the number of students from groups traditionally underrepresented in STEM careers who are prepared for postsecondary or graduate study and careers in STEM in paragraph (b) and adding it in new paragraph (d). We think the priority, as we have revised it, addresses these gaps and do not believe it is necessary to identify achievement gaps involving specific populations in order to provide support for strategies that can serve to narrow these achievement gaps.

Changes: None.

Comment: Two commenters recommended that we revise the priority to include support for increasing the actual number of STEM teachers in addition to increasing the opportunities for the preparation of, or providing professional development for, teachers of STEM subjects. The commenters stated that STEM subjects are difficult to staff with qualified teachers and, therefore, there should be an emphasis on increasing the actual number of teachers in STEM fields.

Discussion: We recognize that some LEAs struggle to recruit and retain a sufficient number of teachers with the knowledge and skills required to teach STEM content. Paragraph (c) of the priority is designed to address that problem because it focuses on increasing the support provided to teachers of STEM subjects so that they are adequately prepared to provide effective instruction to students. We believe that increasing these types of opportunities for STEM teachers and other educators will lead to increases in the actual numbers of teachers and other educators prepared to teach and improve student achievement in STEM subjects.

We do not believe it is necessary, therefore, to revise the priority as suggested by the commenter.

Changes: None.

Comment: One commenter recommended that the Department revise paragraph (c) of the priority to specify that the opportunities for preparation of or professional development for teachers of STEM subjects be designed to equip teachers with the knowledge, skills, and abilities to address the diverse learning and support service needs of high-need students in teachers' classrooms.

Discussion: We agree that it is important that STEM teachers have the knowledge and skills needed to address the learning needs of high-need students, as well as the needs of all other students. However, as indicated earlier, because we plan to use these priorities across a number of our discretionary grant programs, it would not be appropriate to focus on a particular group of students or a particular type of activity. As written, the priority does not preclude an applicant from focusing its project on the type of professional development or teacher preparation mentioned by the commenter provided that this focus is authorized under the applicable program statute and regulations.

Changes: None.

Comment: One commenter suggested that the priority include a focus on improving online access to STEM courses. The commenter noted that providing online courses in STEM and improving access to those courses could provide a solution to the shortage of STEM teachers.

Discussion: We agree that the use of online STEM courses could be effective in increasing students' access to this coursework and that, at least in part the availability of these courses could address the challenges that certain LEAs face in recruiting and retaining STEM teachers. However, we do not believe it is necessary to include a separate priority area supporting online STEM courses since our intent under this priority is to support all types of strategies that may be effective in increasing student access to STEM instructional content.

Changes: None.

Comment: One commenter recommended that the Department revise the priority to promote increased access to the full range of tools and processes employed by STEM educators, including access to experts in STEM via online and distance learning coursework.

Discussion: We agree with the commenter that current and prospective STEM educators need a full range of resources and supports as they prepare for teaching STEM subjects or to enhance their teaching skills. We think this objective is addressed in the language in paragraph (c) and new paragraph (e) of the priority regarding increasing the opportunities for high-quality preparation of, or professional development for, teachers or other educators of STEM subjects.

Changes: None.

New Priority 11 (Proposed Priority 8)—Promoting Diversity

Comment: Multiple commenters expressed support for this priority, noting the importance of diversity generally and, more specifically, the educational benefits that inure to students in diverse learning environments. Several commenters recommended that the Department expand the definition of "diversity" or mention additional groups. For example, a number of these commenters suggested adding lesbian, gay, bisexual, and transgender students as examples of a diverse student body. Several commenters recommended that the Department include gender as an additional example of students within a diverse student body. One commenter recommended that the Department include gifted students as part of the priority. Another commenter recommended that the priority include students of different socioeconomic status. Two commenters recommended that the Department revise the priority to include students with disabilities and English learners.

Several commenters recommended that the Department expand the priority to include support for diversity among teachers and other school staff. One commenter recommended that the Department revise the priority to encourage diversity in early learning providers.

One commenter recommended that the Department revise the priority to require charter schools to promote student diversity. Another commenter suggested that the Department revise the priority to promote diversity in the academic and societal preparation of our youth. One commenter recommended that the Department revise the priority to provide examples of programs that would be supported under this priority.

Discussion: The Department agrees that school, teacher, and school staff diversity is important. The intent of this priority, however, is to focus on the racial and ethnic diversity of students in order to promote cross-racial understanding, break down racial stereotypes, and prepare students for an increasingly diverse workforce and society. Therefore, we decline to expand the definition of "diversity" or mention the additional groups that commenters recommended. The priority does not preclude programs that focus on teacher diversity, so long as they also focus on student diversity.

We intend to use this priority across a number of different Department programs. Therefore, we do not wish to unnecessarily narrow the focus of the priority or limit its applicability by adding specific age ranges or referring to specific types of schools or programs in the priority.

Changes: None.

New Priority 12 (Proposed Priority 9)—Support for Military Families

Comment: Many commenters expressed support for this priority. These commenters noted that the families of men and women in the military face unique challenges requiring specific types of support to ensure successful educational outcomes. Two commenters recommended including in the priority examples of strategies to support students whose parents are in the military. Many commenters noted that an effective strategy is creating a year-round program for military families. Another commenter suggested expanding the priority to include supports for students inside and outside of the classroom that are school- and community-based (*e.g.,* school health and counseling clinics, family resource centers, tutoring programs).

One commenter requested that the Department clarify whether the term *military-connected student* includes a student with at least one parent who is in the military, regardless of whether the student resides with the parent. Another commenter commended the Department for including a priority on military-connected students and recommended that the broadest definition of "pre-kindergarten" be applied to include children from birth through kindergarten.

Discussion: We recognize that military deployments place an enormous strain on military families and their children. However, we decline to make the changes recommended by the commenters because we do not want to unnecessarily limit the scope of this priority given our intent to use this priority across different Department programs. We note that this priority would not preclude an applicant from proposing the types of projects suggested by the commenters, provided that the proposal is authorized by the program statute and regulations.

With respect to the definition of *military-connected student,* we are making a number of changes based on the comments we received. We agree with the commenter that the definition of *military-connected student* should apply to children from birth through grade 12 and are adding language to refer to a child participating in an early learning program. We are also replacing "pre-kindergarten" with "preschool" in order to be more inclusive of a broader group of children; "pre-kindergarten" generally refers to children between four and six years of age, while "preschool" generally refers to children between infancy and school age. In response to comments regarding the unique challenges faced by the families of men and women in the military, we are adding the spouse of an active-duty service member to the definition of *military-connected student.* Finally, as described earlier in this notice, we agree with commenters that it is important to increase the number of current service members and post-9/11 veterans, who enroll in, persist in, and complete college or other postsecondary training and, therefore, are revising the definition of *military-connected students* to add this reference.

With regard to the commenter who asked for clarification regarding whether a student must reside with the parent who is in the military to be considered a "military-connected student," the definition of *military-connected student* does not require a student to reside with the parent who is on active duty in the military to be considered a "military-connected student."

Changes: We have revised the definition of *military-connected student* to read as follows: *Military-connected student* means (a) a child participating in an early learning program, a student in pre-school through grade 12, or a student enrolled in postsecondary education or training who has a parent or guardian on active duty in the uniformed services (as defined by 37 U.S.C. 101, in the Army, Navy, Air Force, Marine Corps, Coast Guard, National Guard, or the reserve component of any of the aforementioned services) or (b) a student who is a veteran of the uniformed services, who is on active duty, or who is the spouse of an active-duty service member.

New Priority 13 (Proposed Priority 10)—Enabling More Data-Based Decision-Making

Comment: While many commenters supported this priority, several commenters requested that the priority include the specific types of data to be collected and disaggregated. One commenter suggested collecting health outcomes data in addition to academic data. Many commenters stated that in order to make decisions about the best strategies for improving learning environments, demographic information about sexual orientation, gender identity, and student diversity should be collected. One commenter recommended collecting data on highly mobile students and military-connected students. Another commenter recommended collecting data on gifted and talented students. One commenter stated that the Department should provide a competitive preference for projects that collect and disaggregate data that can be used to address achievement gaps across student subgroups. Another commenter recommended adding language to the priority to highlight the need for high-quality, timely, and disaggregated data. Several commenters stated that having additional data on school climate issues, such as bullying, violence, and substance abuse, would help educators identify strategies to improve the school climate for all students.

Discussion: Our intent is to use this priority across a number of different Department programs to encourage applicants to think strategically and innovatively about what data are available to a specific project and how best to use those data to improve student outcomes. We decline to make the changes recommended by the commenters because doing so would unnecessarily limit the nature and scope of the priority.

Changes: None.

Comment: One commenter stated that the priority should emphasize the importance of protecting the privacy of student and educator data and recommended revising the definition of *privacy requirements* to include educator privacy in addition to student privacy.

Discussion: While we agree that the privacy of teachers and principals must be protected, we note that there are no Federal privacy requirements specifically targeted to teachers or principals that would apply to data collected through programs that are funded using these priorities. The definition of *privacy requirements* in this notice refers to the requirements of the Family Educational Rights and Privacy Act (FERPA), which apply to the disclosure of information from education records of students, the Privacy Act of 1974, and all applicable Federal, State, and local requirements regarding privacy. We expect all grantees to abide by all applicable Federal, State, or local laws and requirements regarding the privacy of educators.

Changes: None.

Comments: We received numerous comments recommending that the priority focus on collecting and analyzing data that can be used to support particular groups of

individuals. For example, several commenters emphasized the need for parents to have data that will help them make informed decisions about their child's education. Two commenters encouraged the Department to focus the priority on training for parents on how to effectively access and use data. Another commenter recommended revising the priority to include a focus on child and family outcomes and not just student outcomes.

We also received a number of comments requesting that the priority focus on collecting and analyzing data that will help teachers. Two commenters recommended that the priority support ongoing professional development for teachers on how to use research and data to improve practices and strategies in the classroom. One commenter recommended focusing the priority on projects that train teachers to use student outcomes as a measure of teacher effectiveness. Another commenter suggested that the priority be targeted to support training for school board members, administrators, and other school personnel.

Discussion: We believe that it is essential for parents to be involved with their child's education and to be aware of the data that are being collected and used by schools to make educational decisions. Likewise, the Department agrees that teachers need high-quality and timely data, and training on the use of that data, to help improve their instruction and student outcomes. We purposefully refer to "program participant outcomes" in the priority because we anticipate using this priority across a number of programs in the Department and do not want to limit the focus of this priority to student outcomes when we have a wide range of participants, including parents and teachers, involved in the Department's programs. Furthermore, program participants are generally defined in the authorizing legislation of a program; thus, Department officials who use this priority will define in their notices inviting applications the program participants for their particular grant program. Therefore, we decline to make the changes suggested by the commenters.

Changes: None.

Comments: Several commenters recommended that the priority focus on the various stakeholders that would be involved in the analysis of data to improve outcomes for participants. One commenter recommended that the priority provide support for intermediary organizations, such as research institutions, coalitions, community organizations, constituents, and peers, to collect, interpret, synthesize, and share research knowledge.

Discussion: The Department agrees with the commenters on the importance of promoting collaboration among education agencies, research institutions, community organizations, and other stakeholders. However, we decline to add the recommended language to this priority because we do not want to unnecessarily limit its scope. This priority would not preclude an applicant from proposing this type of collaboration among stakeholders provided that such collaboration was authorized by the program statute and regulations.

Changes: None.

Comments: Several commenters recommended that the Department provide specific performance metrics that would be used to judge the progress of grants awarded under this priority. Another commenter recommended requiring postsecondary grantees that receive awards under this priority to report on common metrics for the completion of postsecondary degrees.

Discussion: We appreciate the need for establishing metrics to measure the success of our programs and specific projects. However, under the Government Performance and Results Act of 1993, each of the Department's discretionary grant programs has already established performance measures for that purpose, which are specific to the goals of and activities supported by those programs. We believe that these program-specific measures will provide an appropriate means of analyzing the success of those programs.

Changes: None.

Comment: Several commenters recommended that the Department use this priority to emphasize the sharing of data between data systems at State agencies, institutions of higher education, and districts. The commenters argued this sharing would help to bring all stakeholders "to the table" to develop integrated data systems for students from pre-kindergarten through college. However, one commenter suggested refocusing the emphasis from State longitudinal data systems for accountability purposes to data for local classroom instructional purposes.

Discussion: We agree with the commenters that the sharing of data between data systems at State agencies, institutions of higher education, and districts is important in order to strengthen accountability and obtain the accurate and reliable data necessary to drive sound educational decisions. We believe that the focus on using data from State longitudinal data systems in paragraph (d) sufficiently emphasizes the importance of sharing data between these data systems and, therefore, decline to add the language recommended by the commenter. However, we agree that it would be appropriate to emphasize the use of data from State longitudinal data systems and are revising paragraph (d) accordingly.

With regard to the recommendation to refocus State longitudinal data systems for accountability purposes to data for instructional purposes, paragraph (d) specifically focuses on State-level data that would appropriately be provided by a State's longitudinal data system. Paragraphs (a) and (b) could be used for programs that focus on using data for instructional purposes.

Changes: We have revised paragraph (d), which reads as follows: "Providing reliable and comprehensive information on the implementation of Department of Education programs, and participant outcomes in these programs, by using data from State longitudinal data systems or by obtaining data from reliable third-party sources."

Comment: None.

Discussion: During our review of this notice, we identified several errors in this priority. In the introduction, we intended the priority to permit projects to focus on "one or more" of the priority areas (a) through (d), rather than on just one of the priority areas. Therefore, we are changing "one of the following priority areas" to "one or more of the following priority areas." In paragraph (a), which relates to early learning settings, we should have referred to "child outcomes" instead of "student outcomes," and are making this change accordingly. Finally, we intended paragraph (b) to provide the option for an applicant to focus on improving instructional practices, policies, and student outcomes in elementary *or* secondary schools, rather than elementary *and* secondary schools. Therefore, we are changing the "and" to an "or" in paragraph (b).

Changes: In the introduction to the priority, we have changed "one of the following priority areas" to "one or more of the following priority areas." In paragraph (a), we have changed "student outcomes" to "child outcomes." "Elementary and secondary schools" has been changed to "elementary or secondary schools" in paragraph (b).

With these changes and those noted earlier, priority 13 reads as follows:

"Priority 13—Enabling More Data-Based Decision-Making.

Projects that are designed to collect (or obtain), analyze, and use high-quality and timely data, including data on program participant outcomes, in accordance with privacy requirements (as defined in this notice), in one or more of the following priority areas:

(a) Improving instructional practices, policies, and child outcomes in early learning settings.

(b) Improving instructional practices, policies, and student outcomes in elementary or secondary schools.

(c) Improving postsecondary student outcomes relating to enrollment, persistence, and completion and leading to career success.

(d) Providing reliable and comprehensive information on the implementation of Department of Education programs, and participant outcomes in these programs by using data from State longitudinal data systems or by obtaining data from reliable third-party sources."

Priority 14 (Proposed Priority 11)—Building Evidence of Effectiveness

Comment: Many commenters expressed support for proposed Priority 11 (new Priority 14). One commenter suggested that this priority be used in all grant programs. Several commenters agreed with the Department's position that while experimental and quasi-experimental designs provide the most rigorous evidence of a program's impact and should be used when feasible, such research designs are not always feasible and other designs may be more appropriate for the question being asked. One commenter stated that this flexibility allows for smaller programs and projects to be evaluated even though they may not have the number of participants needed for a random assignment or quasi-experimental research design. One commenter recommended being more explicit in the priority regarding this flexibility. However, one commenter stated that the priority places too narrow an emphasis on analyses from a limited set of highly controlled experimental and quasi-experimental designed studies and as a result would not recognize the work of school-level practitioners and others. The commenter recommended revising proposed Priority 11 (new Priority 14) to include various measures of student achievement and require the use of readily available data in schools and districts. The commenter pointed to programs where a project would not meet the proposed definitions of *strong evidence* and *moderate evidence,* and concluded that the proposed priority failed to take into account many district and school practices, which would be counterproductive to the identification of effective techniques, strategies, and methods. The commenter proposed incorporating a new category of "Promising Evidence" that reflects various measures of student achievement and progress more readily available in schools and districts. Another commenter argued that experimental research design is not always conducive to studying complex educational issues or areas of innovation.

Discussion: We appreciate the commenters' support for the proposed priority and for using other rigorous evaluation methods when it is not feasible to use experimental and quasi-experimental research designs. We do not, however, agree with the one commenter's suggestion that we be more explicit in the priority regarding this "flexibility." Nor do we agree with the commenter that this priority is too narrow and restrictive.

When taken together, new Priorities, 13, 14, and 15 (proposed Priorities 10, 11, and 12, respectively), along with the Department's notice of final priority on scientifically based evaluation methods, published on January 25, 2005 in the **Federal Register** (70 FR 3586), provide an appropriate, flexible spectrum of approaches for taking into account evidence in competitive grant programs.

New Priority 15 (proposed Priority 12) (Supporting Programs, Practices, or Strategies for which there is Strong or Moderate Evidence of Effectiveness) asks applicants to provide strong or moderate evidence to support their proposals. By contrast, new Priorities 13 and 14 (proposed Priorities 10 and 11, respectively), and the Department's 2005 notice of final priority on scientifically based evaluation methods focus on developing and using evidence during the life of the project and beyond.

New Priority 13 (proposed Priority 10) (Enabling More Data-Based Decision-Making) encourages applicants to collect, analyze, and use data to improve practices, policies, and outcomes, and build evidence into program operations and improvement.

New Priority 14 (proposed Priority 11) (Building Evidence of Effectiveness) encourages applicants to evaluate their programs. Recognizing that it is not always feasible or appropriate to use experimental and quasi-experimental research designs, new Priority 14 encourages the use of methods likely to produce valid and reliable results, and requires, at a minimum, that the outcome of interest be measured multiple times before and after the treatment for project participants and, where feasible, for a comparison group of non-participants.

The Department expects that grants made pursuant to new Priority 14 will use the most rigorous evaluations feasible to provide the strongest available empirical evidence of the impact of programs. The Department considers random assignment and quasi-experimental designs to be the most defensible methods for addressing the question of project effectiveness in that they reliably produce an unbiased estimate of effectiveness and should be the preferred method of determining effectiveness when sufficient numbers of participants are available to support these designs. Random assignment and quasi-experimental designs are considered the most rigorous models for producing evidence of the impact of a program because they are best able to eliminate plausible competing explanations for observed results. The Department's notice of final priority on scientifically based evaluation methods allowed the Department to expand the number of programs and projects Department-wide that are evaluated using experimental and quasi-experimental designs. This priority remains in effect; however, acknowledging that the use of such research designs is not always feasible or appropriate, the Department would use Priority 14 to support studies using other rigorous evaluation methods consistent with the principles of scientific research. Given the spectrum of approaches for taking into account evidence across these priorities, we do not agree with the commenter's recommendation to incorporate a "Promising Evidence" category.

Changes: None.

Comment: One commenter applauded the inclusion of this priority but recommended that the Department reserve the highest percentage of available funds for grants to support programs that are evaluated through rigorous randomized control studies or high-quality comparison group studies.

Discussion: It would not be appropriate to use this notice to specify how the funds that are appropriated for a particular discretionary grant program will be spent; such decisions are made by the Department consistent with the statute and regulations under which a program is authorized.

Changes: None.

Comment: Several commenters asserted that the proposed priority was not specific enough and stated that we also should include references to using data to improve early learning, teacher effectiveness, sexuality education, or summer programs, and to evaluate

school-based delinquency, truancy, or bullying prevention programs. Another commenter requested further clarification on outcome measures because the priority did not seem to reference context, process, or formative data as components of an evaluation plan.

Discussion: We purposefully did not include in the priority the level of specificity suggested by the commenters because our intent is to use this priority across a number of different Department programs. By not defining the participants or strategies, we will be able to use this priority in programs across the Department. Each time we do so, we intend to provide further clarification to applicants about the expectations of the evaluation plan, including on data usage and program focus, and further clarification on how we will review those plans.

Changes: None.

Comment: One commenter requested defining the term "scientifically valid research" and recommended using the definition provided in the HEA.

Discussion: We do not believe it is necessary to include a definition of "scientifically valid research" as this term is not used in these priorities. We believe the definitions included in this notice, which are in the What Works Clearinghouse evidence standards (*see http://ies.ed.gov/ncee/wwc/references/idocviewer/doc.aspx?docid=19&tocid=1*), and the Department's notice of final priority on scientifically based evaluation methods provide sufficient guidance regarding the use of scientifically based research in evaluating whether a project produces meaningful effects on student achievement or teacher performance.

Changes: None.

New Priority 15 (Proposed Priority 12)—Supporting Programs, Practices, or Strategies for Which There Is Strong or Moderate Evidence of Effectiveness

Comment: Many commenters expressed support for this priority and the requirement for strong or moderate evidence of effectiveness. One commenter agreed with the Department's approach to award more points to a project supported by strong evidence when compared to a project supported by moderate evidence. One commenter recommended including guidance in the priority on how applicants should move from research to strategy implementation on a large scale.

Discussion: The Department appreciates this support from commenters. The intent of this priority, as one of several addressing levels of evidence, is to support projects that use moderate or strong levels of evidence. We believe that the field of education needs to use the best available evidence to inform policy and practices and, where strong evidence does not exist, to build evidence over time. This priority will be applied to programs where we believe that implementation of activities or strategies supported by strong and moderate evidence is possible.

Changes: None.

Comment: Two commenters expressed concern that small organizations and nonprofit organizations lack the evaluation resources to conduct studies that meet the threshold established for strong and moderate evidence, thereby resulting in an unfair advantage for larger school districts and organizations.

Discussion: While it is true that small organizations, nonprofit organizations, and school districts may not have the resources to conduct evaluation studies that meet the evidence threshold established in this priority, applicants may be able to satisfy this priority by using third-party studies to demonstrate that the program or strategies they are using are supported by moderate or strong evidence. The practice, strategy, or program does not have to be one that was developed by the district or nonprofit organization.

Changes: None.

Priority 16 (Proposed Priority 13)—Improving Productivity

Comment: Several commenters supported the inclusion of a priority focused on improving productivity and making more efficient use of time, money, and staff. One commenter recognized the importance of efficiency and effectiveness in all aspects of the education system and that improving productivity is an important goal in education. Several commenters suggested particular strategies for improving productivity that applicants should implement in order to meet the requirements of this priority. Two commenters stressed the importance of partnerships and collaboration in improving productivity and recommended including language encouraging partnerships with such entities as institutions of higher education, nonprofit organizations, city and county governments, businesses, parents, educators, and unions representing educators. One commenter suggested including "staff wellness/staff satisfaction" programs as a means of improving productivity. One commenter suggested that this priority be paired with broader values, such as improving teaching and learning conditions. Another commenter stated that summer school provides an ideal opportunity to test innovative practices in staffing, scheduling, and community partnering. Another commenter recommended adding specific performance benchmarks and indicators to the priority statement.

Discussion: We appreciate the support that commenters expressed for this priority. As previously stated in this notice, the intent of these priorities is to apply one or more of the priorities to various programs across the Department in order to encourage applicants to develop innovative strategies to meet the priority within the context of the program. Priorities will only be used for a program where the Department determines the priority to be consistent with the purpose of the program and permitted under the applicable statute and regulations. We choose not to restrict applicants to specific strategies, such as those suggested by the commenters, but encourage grantees to develop innovative practices that will best improve results and increase productivity for their unique educational situation. Each of the Department's discretionary grant programs is required to have specific performance measures and indicators that help determine the impact of the program. Because indicators are program specific, the Department does not believe it is necessary to include benchmarks in this priority.

During the Department's internal review of this notice, we determined that the focus of new Priority 16 could be stated more clearly. Therefore, we are making slight changes to the language in this priority and adding modification of teacher compensation systems as an example of a strategy to make more efficient use of time, money, and staff.

Changes: We have revised new Priority 16 to read as follows:

"Projects that are designed to significantly increase efficiency in the use of time, staff, money, or other resources in order to improve results and increase productivity. Such projects may include innovative and sustainable uses of technology, modification of school schedules and teacher compensation systems, and use of open educational resources (as defined in this notice), or other strategies."

Definitions

Graduation Rate

Comment: Several commenters expressed concern that the definition of *graduation rate* would not permit all States and districts to use an extended graduation rate for students who need

more than four years to graduate with a regular high school diploma.

Discussion: We believe it is important to be consistent with the definition of *graduation rate* in 34 CFR 200.19(b)(1), which permits the use of an extended-year adjusted cohort graduation rate if the State in which the proposed project is implemented has been approved by the Secretary pursuant to that regulation to use such a rate.

Changes: None.

High-Need Children and High-Need Students

Comment: The Department received numerous comments recommending that the definition of *high-need children and high-need students* include references to additional sub-groups of students. One commenter recommended adding Native American students and another commenter recommended adding students from racial minority groups with persistent achievement gaps and students who are new immigrants to the United States whose education has been inadequate or interrupted. Two commenters recommended adding highly mobile students and migratory students to this definition. Several commenters recommended including students who are gifted, especially those traditionally underrepresented in gifted education programs, such as students from low-socioeconomic backgrounds, students with disabilities, and English learners. Another commenter recommended adding students who are underrepresented in an academic program, such as minorities and women in STEM fields. One commenter recommended including students with parents who have the same characteristics as high-need children and students, for example, students with parents who are English learners or who are incarcerated. Another commenter recommended adding pregnant and parenting students because of the barriers they face in enrolling, attending, and succeeding in school.

Discussion: The groups identified in the definition of *high-need children and high-need students* are examples of children and students who may be at risk of educational failure. The examples are provided for illustrative purposes only and are not meant to exclude other subgroups of students who may be at risk of educational failure. It is not practical or possible to include in the definition all the subgroups of students recommended by the commenters. We believe that it is appropriate to add students who are pregnant or parenting teenagers and students who are new immigrants and migrant students to call attention to the needs of these particular groups of students. We also believe that many of the groups of students that commenters recommended including in the definition would fall into the category of students who are not on track to becoming college- or career-ready by graduation and are at risk of educational failure and are, therefore, adding language to that effect in the definition.

Changes: We have added students who are pregnant or parenting teenagers, students who are new immigrants, students who are migrant, and students who are not on track to becoming college- or career-ready by graduation to the definition. We are also changing "English language learners" to "English learners."

Comment: None.

Discussion: The proposed definition of *high-need children and high-need students* referred to children and students at risk of educational failure "or otherwise in need of special assistance and support." Upon further reflection, we believe that the phrase "or otherwise in need of special assistance and support" is confusing and detracts from the intended focus of the priority on children and students who are at risk of educational failure. Therefore, we are removing this phrase from the definition. We also are adding language to clarify that students who have left school include students who have left college before receiving a college degree or certificate.

Changes: We have removed the phrase "or otherwise in need of special assistance and support" from the definition of *high-need children and high-need students.* We have replaced "who have left school before receiving a regular high school diploma" to "who have left school or college before receiving, respectively, a regular high school diploma or a college degree or certificate."

High-Poverty School

Comment: One commenter expressed support for allowing middle and high schools to use data from feeder schools to demonstrate that they are high-poverty schools. The commenter noted that students in middle and high school are often reluctant to admit that they qualify for the free or reduced-price lunch program and that by defining a high-poverty school based on comparable data gathered at feeder schools, the Department would be able to reach more students in need. Several commenters requested that the definition of a *high-poverty school* be changed to mean a school with at least 40 percent of students eligible for the free or reduced-price lunch program, instead of 50 percent.

Discussion: We decline to change the definition of *high-poverty* school to mean a school with at least 40 percent of students eligible for the free or reduced-price lunch program. Changing the definition in this manner would greatly increase the number of schools designated as "high-poverty schools" and would be inconsistent with the intent of new Priority 9 (proposed priority 6), which is to target resources on a limited number of schools that have the greatest need. With regard to the recommendation to permit the poverty rate for middle and high schools to be based on school lunch data for their feeder elementary schools, the proposed priority specifically allowed the calculation to be made on that basis.

Changes: None.

Open Educational Resources

Comment: Many commenters supported including a reference to open educational resources in proposed Priority 13 (new Priority 16). Two commenters recommended revising the definition of this term to include language that makes clear that resources released under an intellectual property license should permit sharing, accessing, repurposing (including for commercial purposes), and collaborating with others.

Discussion: We appreciate the commenters' support for including open educational resources in proposed Priority 13 (new Priority 16). We believe that the proposed definition of *open educational resources* includes the characteristics of open educational resources that the commenters recommended including in the definition and, therefore, do not believe it is necessary to change the definition in the manner recommended by the commenter.

Changes: None.

Persistently Lowest-Achieving Schools

Comment: Several commenters recommended revising the definition of *persistently lowest-achieving schools* in ways that would expand the number of schools identified as persistently lowest-achieving. Two commenters recommended that the definition be expanded to include support for other low-performing schools and for schools at risk of becoming low-performing. One commenter recommended revising the definition to include schools that have a high rate of student or teacher turnover. Another commenter stated that States and LEAs should have the

flexibility to define persistently lowest-achieving schools.

Discussion: As stated earlier, our intention with Priority 4 is to support projects that will serve the lowest-achieving schools in our Nation. Accordingly, we used the definition of *persistently lowest-achieving schools* that is consistent with the definition used in the Department's SIG program authorized under section 1003(g) of the ESEA. Given this focus in Priority 4, we decline to make the changes recommended by the commenters.

Changes: None.

Rural Local Educational Agency

Comment: Several commenters noted that proposed Priority 6 (new Priority 9) (Improving Achievement and High School Graduation Rates) refers to students in rural communities and requested that the notice include a definition of "rural community."

Discussion: We have changed "rural community" to "rural local educational agency" in new Priority 9 (proposed Priority 6) in order to be clear about the focus of paragraph (a) in this priority on students attending schools in rural local educational agencies. We, therefore, are adding a definition of *rural local educational agency* that is based on the definitions under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program.

Changes: We have added the following definition: "*Rural local educational agency* means a local educational agency (LEA) that is eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the ESEA. Eligible applicants may determine whether a particular LEA is eligible for these programs by referring to information on the Department's Web site at: *http://www2.ed.gov/nclb/freedom/local/reap.html.*"

Strong Evidence

Comment: One commenter stated that additional language is needed in the definition of *strong evidence* to indicate that programs and projects that have been the subject of experimental and quasi-experimental studies with small sample sizes that limit generalizability, such as those potentially used in rural or remote areas, are considered to have strong evidence if they have been the subject of more than one well-designed and well-implemented study that supports the effectiveness of the practice, strategy, or program.

Discussion: We do not believe it is necessary to add language to the definition of *strong evidence* as recommended by the commenter. The definition of *strong evidence* includes evidence based on more than one well-designed and well-implemented experimental or quasi-experimental study that supports the effectiveness of the practice, strategy, or program. The language specifies that the "studies that in total include enough of the range of participants and settings to support "scaling up" to the State, regional, or national level (*i.e.,* studies with high external validity)" could include evaluations of a practice, strategy, or program in multiple rural sites even though each site may include small numbers of students. On this basis, an applicant could, for example, propose to scale up a practice, strategy, or program in rural settings within a State or region or at the national level.

Changes: None.

Student Achievement

Comment: We received a number of comments regarding the "other measures of learning" referenced in the proposed definition of *student achievement.* Some commenters recommended including references to advanced placement exam scores; others recommended using ACT or SAT scores, or scores on tests that result in the awarding of college credit. One commenter recommended that the definition include non-academic factors such as peer, parent, and student evaluations; attendance rates; and rates of participation in extracurricular activities.

Discussion: The proposed definition of *student achievement* already includes examples of other measures of student learning and performance measures. We, therefore, do not believe it is necessary to include the measures recommended by commenters. We also note that the nonacademic factors recommended by one commenter would generally not be acceptable measures of student learning as the definition requires that other measures of student achievement be rigorous and comparable across schools.

Changes: None.

Student Growth

Comment: One commenter stated that the definition of *student growth* should be changed to refer to students participating in academic programs where those individuals are from underrepresented groups.

Discussion: We disagree with the commenter. The definition of *student growth* applies to all students, not to any specific subgroups of students.

Changes: None.

Other Comments

Comment: One commenter recommended adding a definition of "disaggregated data" to focus on data that have been cross-tabulated by gender; race, ethnicity, or both; disability; socio-economic status; and other student demographic characteristics to enable the data to be used to identify where interventions need to be made to close gaps in performance among student subgroups.

Discussion: The term, "disaggregated data" is not used in any of the priority language; therefore, we decline to add a definition in this notice.

Changes: None.

Final Priorities

I. Advancing Key Cradle-to-Career Educational Reforms

Priority 1—Improving Early Learning Outcomes

Projects that are designed to improve school readiness and success for high-need children (as defined in this notice) from birth through third grade (or for any age group of high-need children within this range) through a focus on one or more of the following priority areas:

(a) Physical well-being and motor development.

(b) Social-emotional development.

(c) Language and literacy development.

(d) Cognition and general knowledge, including early numeracy and early scientific development.

(e) Approaches toward learning.

Priority 2—Implementing Internationally Benchmarked, College- and Career-Ready Elementary and Secondary Academic Standards

Projects that are designed to support the implementation of internationally benchmarked, college- and career-ready academic standards held in common by multiple States and to improve instruction and learning, including projects in one or more of the following priority areas:

(a) The development or implementation of assessments (*e.g.,* summative, formative, interim) aligned with those standards.

(b) The development or implementation of curriculum or instructional materials aligned with those standards.

(c) The development or implementation of professional development or preparation programs aligned with those standards.

(d) Strategies that translate the standards into classroom practice.

Priority 3—Improving the Effectiveness and Distribution of Effective Teachers or Principals

Projects that are designed to address one or more of the following priority areas:

(a) Increasing the number or percentage of teachers or principals who are effective or reducing the number or percentage of teachers or principals who are ineffective, particularly in high-poverty schools (as defined in this notice) including through such activities as improving the preparation, recruitment, development, and evaluation of teachers and principals; implementing performance-based certification and retention systems; and reforming compensation and advancement systems.

(b) Increasing the retention, particularly in high-poverty schools (as defined in this notice), and equitable distribution of teachers or principals who are effective.

For the purposes of this priority, teacher and principal effectiveness should be measured using:

(1) Teacher or principal evaluation data, in States or local educational agencies that have in place a high-quality teacher or principal evaluation system that takes into account student growth (as defined in this notice) in significant part and uses multiple measures, that, in the case of teachers, may include observations for determining teacher effectiveness (such as systems that meet the criteria for evaluation systems under the Race to the Top program as described in criterion (D)(2)(ii) of the Race to the Top notice inviting applications (74 FR 59803)); or

(2) Data that include, in significant part, student achievement (as defined in this notice) or student growth data (as defined in this notice) and may include multiple measures in States or local educational agencies that do not have the teacher or principal evaluation systems described in paragraph (1).

Priority 4—Turning Around Persistently Lowest-Achieving Schools

Projects that are designed to address one or more of the following priority areas:

(a) Improving student achievement (as defined in this notice) in persistently lowest-achieving schools (as defined in this notice).

(b) Increasing graduation rates (as defined in this notice) and college enrollment rates for students in persistently lowest-achieving schools (as defined in this notice).

(c) Providing services to students enrolled in persistently lowest-achieving schools (as defined in this notice).

Priority 5—Improving School Engagement, School Environment, and School Safety and Improving Family and Community Engagement

Projects that are designed to improve student outcomes through one or more of the following priority areas:

(a) Improving school engagement, which may include increasing the quality of relationships between and among administrators, teachers, families, and students and increasing participation in school-related activities.

(b) Improving the school environment, which may include improving the school setting related to student learning, safety, and health.

(c) Improving school safety, which may include decreasing the incidence of harassment, bullying, violence, and substance use.

(d) Improving parent and family engagement (as defined in this notice).

(e) Improving community engagement (as defined in this notice) by supporting partnerships between local educational agencies, school staff, and one or more of the following:

(i) Faith- or community-based organizations.

(ii) Institutions of higher education.

(iii) Minority-serving institutions or historically black colleges or universities.

(iv) Business or industry.

(v) Other Federal, State, or local government entities.

Priority 6—Technology

Projects that are designed to improve student achievement or teacher effectiveness through the use of high-quality digital tools or materials, which may include preparing teachers to use the technology to improve instruction, as well as developing, implementing, or evaluating digital tools or materials.

Priority 7—Core Reforms

Projects conducted in States, local educational agencies, or schools where core reforms are being implemented. Such a project is one that is conducted—

(a) In a State that has adopted K–12 State academic standards in English language arts and mathematics that build towards college- and career-readiness;

(b) In a State that has implemented a statewide longitudinal data system that meets all the requirements of the America COMPETES Act; and

(c) In a local educational agency or school in which teachers receive student growth (as defined in this notice) data on their current students and the students they taught in the previous year and these data are provided, at a minimum, to teachers of reading/language arts and mathematics in grades in which the State administers assessments in those subjects.

Priority 8—Increasing Postsecondary Success

Projects that are designed to address one or more of the following priority areas:

(a) Increasing the number and proportion of high-need students (as defined in this notice) who are academically prepared for and enroll in college or other postsecondary education and training.

(b) Increasing the number and proportion of high-need students (as defined in this notice) who persist in and complete college or other postsecondary education and training.

(c) Increasing the number and proportion of high-need students (as defined in this notice) who enroll in and complete high-quality programs of study (as defined in this notice) designed to lead to a postsecondary degree, credential, or certificate.

(d) Increasing the number of individuals who return to the educational system to obtain a high school diploma; to enroll in college or other postsecondary education or training; to obtain needed basic skills leading to success in college or other postsecondary education or the workforce; or to enter, persist in, and complete college or rigorous postsecondary career and technical training leading to a postsecondary degree, credential, or certificate.

(e) Increasing the number and proportion of high-need students (as defined in this notice) who enroll in and complete graduate programs.

(f) Increasing the number and proportion of postsecondary students who complete college or other postsecondary education and training and who are demonstrably prepared for successful employment, active participation in civic life, and lifelong learning.

II. Addressing Needs of Student Subgroups

Priority 9—Improving Achievement and High School Graduation Rates

Projects that are designed to address one or more of the following priority areas:

(a) Accelerating learning and helping to improve high school graduation rates (as defined in this notice) and college enrollment rates for students in rural

local educational agencies (as defined in this notice).

(b) Accelerating learning and helping to improve high school graduation rates (as defined in this notice) and college enrollment rates for students with disabilities.

(c) Accelerating learning and helping to improve high school graduation rates (as defined in this notice) and college enrollment rates for English learners.

(d) Accelerating learning and helping to improve high school graduation rates (as defined in this notice) and college enrollment rates for high-need students (as defined in this notice).

(e) Accelerating learning and helping to improve high school graduation rates (as defined in this notice) and college enrollment rates in high-poverty schools (as defined in this notice).

(f) Accelerating learning and helping to improve high school graduation rates (as defined in this notice) and college enrollment rates for all students in an inclusive manner that ensures that the specific needs of high-need students (as defined in this notice) participating in the project are addressed.

Priority 10—Promoting Science, Technology, Engineering, and Mathematics (STEM) Education

Projects that are designed to address one or more of the following priority areas:

(a) Providing students with increased access to rigorous and engaging coursework in STEM.

(b) Increasing the number and proportion of students prepared for postsecondary or graduate study and careers in STEM.

(c) Increasing the opportunities for high-quality preparation of, or professional development for, teachers or other educators of STEM subjects.

(d) Increasing the number of individuals from groups traditionally underrepresented in STEM, including minorities, individuals with disabilities, and women, who are provided with access to rigorous and engaging coursework in STEM or who are prepared for postsecondary or graduate study and careers in STEM.

(e) Increasing the number of individuals from groups traditionally underrepresented in STEM, including minorities, individuals with disabilities, and women, who are teachers or educators of STEM subjects and have increased opportunities for high-quality preparation or professional development.

Priority 11—Promoting Diversity

Projects that are designed to promote student diversity, including racial and ethnic diversity, or avoid racial isolation.

Priority 12—Support for Military Families

Projects that are designed to address the needs of military-connected students (as defined in this notice).

III. Building Capacity for Systemic Continuous Improvement

Priority 13—Enabling More Data-Based Decision-Making

Projects that are designed to collect (or obtain), analyze, and use high-quality and timely data, including data on program participant outcomes, in accordance with privacy requirements (as defined in this notice), in one or more of the following priority areas:

(a) Improving instructional practices, policies, and child outcomes in early learning settings.

(b) Improving instructional practices, policies, and student outcomes in elementary or secondary schools.

(c) Improving postsecondary student outcomes relating to enrollment, persistence, and completion and leading to career success.

(d) Providing reliable and comprehensive information on the implementation of Department of Education programs, and participant outcomes in these programs by using data from State longitudinal data systems or by obtaining data from reliable third-party sources.

Priority 14—Building Evidence of Effectiveness

Projects that propose evaluation plans that are likely to produce valid and reliable evidence in one or more of the following priority areas:

(a) Improving project design and implementation or designing more effective future projects to improve outcomes.

(b) Identifying and improving practices, strategies, and policies that may contribute to improving outcomes.

Under this priority, at a minimum, the outcome of interest is to be measured multiple times before and after the treatment for project participants and, where feasible, for a comparison group of non-participants.

Priority 15—Supporting Programs, Practices, or Strategies for which there is Strong or Moderate Evidence of Effectiveness

Projects that are supported by strong or moderate evidence (as defined in this notice). A project that is supported by strong evidence (as defined in this notice) will receive more points than a project that is supported by moderate evidence (as defined in this notice).

Priority 16—Improving Productivity

Projects that are designed to significantly increase efficiency in the use of time, staff, money, or other resources while improving student learning or other educational outcomes (*i.e.,* outcome per unit of resource). Such projects may include innovative and sustainable uses of technology, modification of school schedules and teacher compensation systems, use of open educational resources (as defined in this notice), or other strategies.

Types of Priorities

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by—

(1) Awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or

(2) Selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Definitions:

Carefully matched comparison group design means a type of quasi-experimental study (as defined in this notice) that attempts to approximate an experimental study (as defined in this notice). More specifically, it is a design in which project participants are matched with non-participants based on key characteristics that are thought to be related to the outcome. These characteristics include, but are not limited to:

(1) Prior test scores and other measures of academic achievement (preferably, the same measures that the study will use to evaluate outcomes for the two groups);

(2) Demographic characteristics, such as age, disability, gender, English proficiency, ethnicity, poverty level,

parents' educational attainment, and single- or two-parent family background;

(3) The time period in which the two groups are studied (*e.g.,* the two groups are children entering kindergarten in the same year as opposed to sequential years); and

(4) Methods used to collect outcome data (*e.g.,* the same test of reading skills administered in the same way to both groups).

Community engagement means the systematic inclusion of community organizations as partners with local educational agencies and school staff. These organizations may include faith- and community-based organizations, institutions of higher education (including minority-serving institutions and historically black colleges and universities), business and industry, or other Federal, State, and local government entities.

Experimental study means a study that employs random assignment of, for example, students, teachers, classrooms, schools, or districts to participate in a project being evaluated (treatment group) or not to participate in the project (control group). The effect of the project is the average difference in outcomes between the treatment and control groups.

Graduation rate means a four-year adjusted cohort graduation rate consistent with 34 CFR 200.19(b)(1) and may also include an extended-year adjusted cohort graduation rate consistent with 34 CFR 200.19(b)(1)(v) if the State in which the proposed project is implemented has been approved by the Secretary to use such a rate under Title I of the ESEA.

High-need children and high-need students means children and students at risk of educational failure, such as children and students who are living in poverty, who are English learners, who are far below grade level or who are not on track to becoming college- or career-ready by graduation, who have left school or college before receiving, respectively, a regular high school diploma or a college degree or certificate, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who are pregnant or parenting teenagers, who have been incarcerated, who are new immigrants, who are migrant, or who have disabilities.

High-poverty school means a school in which at least 50 percent of students are eligible for free or reduced-price lunches under the Richard B. Russell National School Lunch Act or in which at least 50 percent of students are from low-income families as determined using one of the criteria specified under section 1113(a)(5) of the Elementary and Secondary Education Act of 1965, as amended. For middle and high schools, eligibility may be calculated on the basis of comparable data from feeder schools. Eligibility as a high-poverty school under this definition is determined on the basis of the most currently available data.

Interrupted time series design means a type of quasi-experimental study (as defined in this notice) in which the outcome of interest is measured multiple times before and after the treatment for program participants only. If the program had an impact, the outcomes after treatment will have a different slope or level from those before treatment. That is, the series should show an "interruption" of the prior situation at the time when the program was implemented. Adding a comparison group time series, such as schools not participating in the program or schools participating in the program in a different geographic area, substantially increases the reliability of the findings.[2]

Military-connected student means (a) a child participating in an early learning program, a student in preschool through grade 12, or a student enrolled in postsecondary education or training who has a parent or guardian on active duty in the uniformed services (as defined by 37 U.S.C. 101, in the Army, Navy, Air Force, Marine Corps, Coast Guard, National Guard, or the reserve component of any of the aforementioned services) or (b) a student who is a veteran of the uniformed services, who is on active duty, or who is the spouse of an active-duty service member.

Moderate evidence means evidence from previous studies whose designs can support causal conclusions (*i.e.,* studies with high internal validity) but have limited generalizability (*i.e.,* moderate external validity), or studies with high external validity but moderate internal validity. The following would constitute moderate evidence:

(1) At least one well-designed and well-implemented (as defined in this notice) experimental or quasi-experimental study (as defined in this notice) supporting the effectiveness of the practice, strategy, or program, with small sample sizes or other conditions of implementation or analysis that limit generalizability;

(2) At least one well-designed and well-implemented (as defined in this notice) experimental or quasi-experimental study (as defined in this notice) that does not demonstrate equivalence between the intervention and comparison groups at program entry but that has no other major flaws related to internal validity; or

(3) Correlational research with strong statistical controls for selection bias and for discerning the influence of internal factors.

Open educational resources (OER) means teaching, learning, and research resources that reside in the public domain or have been released under an intellectual property license that permits their free use or repurposing by others.

Parent and family engagement means the systematic inclusion of parents and families, working in partnership with local educational agencies and school staff, in their child's education, which may include strengthening the ability of (a) parents and families to support their child's education and (b) school staff to work with parents and families.

Persistently lowest-achieving schools means, as determined by the State: (i) Any Title I school in improvement, corrective action, or restructuring that (a) is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or (b) is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years; and (ii) any secondary school that is eligible for, but does not receive, Title I funds that: (a) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or (b) is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

To identify the persistently lowest-achieving schools, a State must take into

[2] A single subject or single case design is an adaptation of an interrupted time series design that relies on the comparison of treatment effects on a single subject or group of single subjects. There is little confidence that findings based on this design would be the same for other members of the population. In some single subject designs, treatment reversal or multiple baseline designs are used to increase internal validity. In a treatment reversal design, after a pretreatment or baseline outcome measurement is compared with a post treatment measure, the treatment would then be stopped for a period of time; a second baseline measure of the outcome would be taken, followed by a second application of the treatment or a different treatment. A multiple baseline design addresses concerns about the effects of normal development, timing of the treatment, and amount of the treatment with treatment-reversal designs by using a varying time schedule for introduction of the treatment and/or treatments of different lengths or intensity.

account both: (i) The academic achievement of the "all students" group in a school in terms of proficiency on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (ii) the school's lack of progress on those assessments over a number of years in the "all students" group.

Privacy requirements means the requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and its implementing regulations in 34 CFR part 99, the Privacy Act, 5 U.S.C. 552a, as well as all applicable Federal, State and local requirements regarding privacy.

Programs of study means career and technical education programs of study, which may be offered as an option to students (and their parents as appropriate) when planning for and completing future coursework, for career and technical content areas, that—

(a) Incorporate secondary education and postsecondary education elements;

(b) Include coherent and rigorous content aligned with challenging academic standards and relevant career and technical content in a coordinated, non-duplicative progression of courses that align secondary education with postsecondary education to adequately prepare students to succeed in postsecondary education;

(c) May include the opportunity for secondary education students to participate in dual or concurrent enrollment programs or other ways to acquire postsecondary education credits; and

(d) Lead to an industry-recognized credential or certificate at the postsecondary level, or an associate or baccalaureate degree.

Quasi-experimental study means an evaluation design that attempts to approximate an experimental design (as defined in this notice) and can support causal conclusions (*i.e.,* minimizes threats to internal validity, such as selection bias, or allows them to be modeled). Well-designed and well-implemented (as defined in this notice) quasi-experimental studies (as defined in this notice) include carefully matched comparison group designs (as defined in this notice), interrupted time series designs (as defined in this notice), or regression discontinuity designs (as defined in this notice).

Regression discontinuity design study means, in part, a quasi-experimental study (as defined in this notice) design that closely approximates an experimental study (as defined in this notice). In a regression discontinuity design, participants are assigned to a treatment or comparison group based on a numerical rating or score of a variable unrelated to the treatment such as the rating of an application for funding. Another example would be assignment of eligible students, teachers, classrooms, or schools above a certain score ("cut score") to the treatment group and assignment of those below the score to the comparison group.

Rural local educational agency means a local educational agency (LEA) that is eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the ESEA. Eligible applicants may determine whether a particular LEA is eligible for these programs by referring to information on the Department's Web site at *http://www2.ed.gov/nclb/freedom/local/reap.html.*

Strong evidence means evidence from previous studies whose designs can support causal conclusions (*i.e.,* studies with high internal validity), and studies that in total include enough of the range of participants and settings to support scaling up to the State, regional, or national level (*i.e.,* studies with high external validity). The following are examples of strong evidence:

(1) More than one well-designed and well-implemented (as defined in this notice) experimental study (as defined in this notice) or well-designed and well-implemented (as defined in this notice) quasi-experimental study (as defined in this notice) that supports the effectiveness of the practice, strategy, or program; or

(2) One large, well-designed and well-implemented (as defined in this notice) randomized controlled, multisite trial that supports the effectiveness of the practice, strategy, or program.

Student achievement means—

(a) For tested grades and subjects: (1) A student's score on the State's assessments under the ESEA; and, as appropriate, (2) other measures of student learning, such as those described in paragraph (b) of this definition, provided they are rigorous and comparable across schools.

(b) For non-tested grades and subjects: alternative measures of student learning and performance, such as student scores on pre-tests and end-of-course tests; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across schools.

Student growth means the change in student achievement (as defined in this notice) for an individual student between two or more points in time. A State may also include other measures that are rigorous and comparable across classrooms.

Well-designed and well-implemented means, with respect to an experimental or quasi-experimental study (as defined in this notice), that the study meets the What Works Clearinghouse evidence standards, with or without reservations (*see http://ies.ed.gov/ncee/wwc/references/idocviewer/doc.aspx?docid=19&tocid=1* and in particular the description of "Reasons for Not Meeting Standards" at *http://ies.ed.gov/ncee/wwc/references/idocviewer/Doc.aspx?docId=19&tocId=4#reasons).*

This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria for a particular program, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose to use one or more of these priorities and definitions, we invite applications through a notice in the **Federal Register.**

Executive Order 12866: Under Executive Order 12866, the Secretary must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive order and subject to review by the Office of Management and Budget. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may (1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in a material way (also referred to as an "economically significant" rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or local programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. The Secretary has determined that this regulatory action is significant under section 3(f)(4) of the Executive order.

This notice 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 final regulatory action.

The potential costs associated with this final regulatory action are those resulting from statutory requirements

and those we have determined as necessary for administering the Department's discretionary grant programs effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this final regulatory action, we have determined that the benefits of the final priorities and definitions justify the costs.

We have determined, also, that this final regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Intergovernmental Review: Some of the programs affected by these final priorities are 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.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) 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: December 8, 2010.

Arne Duncan,

Secretary of Education.

[FR Doc. 2010–31189 Filed 12–14–10; 8:45 am]

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Federal Register

Wednesday,
December 15, 2010

Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List *Astragalus microcymbus* and *Astragalus schmolliae* as Endangered or Threatened; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R6–ES–2010–0080; MO 92210–0–0008–B2]

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List *Astragalus microcymbus* and *Astragalus schmolliae* as Endangered or Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service/USFWS), announce a 12-month finding on a petition to list *Astragalus microcymbus* (skiff milkvetch) and *Astragalus schmolliae* (Schmoll's milkvetch) as endangered or threatened, and to designate critical habitat under the Endangered Species Act of 1973, as amended (Act). After a review of all the available scientific and commercial information, we find that listing *A. microcymbus* and *A. schmolliae* is warranted. However, currently listing of *A. microcymbus* and *A. schmolliae* is precluded by higher priority actions to amend the Lists of Endangered and Threatened Wildlife and Plants. Upon publication of this 12-month petition finding, we will add *A. microcymbus* and *A. schmolliae* to our list of candidate species. We will make any determinations on critical habitat during development of the proposed listing rule. In any interim period, the status of the candidate taxon will be addressed through our annual Candidate Notice of Review.

DATES: The finding announced in this document was made on December 15, 2010.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R6–ES–2010–0080. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the Western Colorado Ecological Services Office, U.S. Fish and Wildlife Service, 764 Horizon Drive, Suite B, Grand Junction, CO 81506–3946. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

FOR FURTHER INFORMATION CONTACT: Al Pfister, Field Supervisor, Western Colorado Ecological Services Office (*see* **ADDRESSES**); by telephone, 970–243–2778; or by facsimile, 970–245–6933. Persons who use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*), requires that, for any petition to revise the Federal Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information that listing the species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we will determine that the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted, but immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are threatened or endangered, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register**.

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), Executive Order 13175, titled Consultation and Coordination with Indian Tribal Governments (65 FR 67249), and the Department of the Interior's manual on Departmental Responsibilities for Indian Trust Resources, at 512 DM 2, we acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with the Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. In fulfilling our trust responsibilities for government-to-government consultation with Tribes, we met with the Ute Mountain Ute Tribe regarding the process we would take to conduct a 12-month status review of *Astragalus schmolliae.* As an outcome of our government-to-government consultation, we recognize the sovereign right of the Ute Mountain Ute Tribe to manage the habitat for *A. schmolliae* on its tribal lands, and acknowledge that right in this 12-month finding.

Previous Federal Actions

Federal action for *Astragalus microcymbus* and *Astragalus schmolliae* (then *A. schmollae*) began as a result of section 12 of the Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), which directed the Secretary of the Smithsonian Institution to prepare a report on plants considered to be endangered, threatened, or extinct in the United States. This report, designated as House Document No. 94–51, was presented to Congress on January 9, 1975. In that document, both species were designated as endangered (House Document 94–51, pp. 57–58). On July 1, 1975, the Service published a notice in the **Federal Register** (40 FR 27823, p. 27847) of its acceptance of the Smithsonian report as a petition within the context of section 4(c)(2) (now section 4(b)(3)) of the Act, and giving notice of its intention to review the status of the plant taxa therein.

As a result of that review, the Service published a proposed rule on June 16, 1976, in the **Federal Register** (41 FR 24523, pp. 24543–24544) to determine endangered status pursuant to section 4 of the Act for approximately 1,700 vascular plant taxa, including *Astragalus microcymbus* and *Astragalus schmolliae.* The list of 1,700 plant taxa was assembled on the basis of comments and data received by the Smithsonian Institution, and the Service in response to House Document No. 94–51 and the July 1, 1975, **Federal Register** publication. General comments received in response to the 1976 proposal are summarized in an April 26, 1978, **Federal Register** publication (43 FR 17909). In 1978, amendments to the Act required that all proposals more than 2 years old be withdrawn. A 1-year grace period was given to proposals already more than 2 years old. On December 10, 1979, the Service published a notice in the **Federal Register** (44 FR 70796) withdrawing the portion of the June 16, 1976, proposal that had not been made final which removed both *A. microcymbus* and *A. schmolliae* from proposed status but retained both species as candidate plant

taxa that "may qualify for listing under the Act."

On December 15, 1980, the Service published a current list of those plant taxa native to the United States being considered for listing under the Act where *Astragalus microcymbus* and *Astragalus schmolliae* were identified as a category 2 taxon "currently under review" (45 FR 82479, pp. 82490–82491). On November 28, 1983, *A. schmolliae* was moved to the "taxa no longer under review" list, and given a 3C rank indicating the species was proven to be more abundant or widespread than previously believed or not subjected to an identifiable threat (48 FR 53640, pp. 53641, 53662). The two species also were included as a category 2 species (*A. schmolliae* was not included as a 3C species despite the conclusions of the 1983 review) on September 27, 1985 (50 FR 39525, p. 39533–39534), February 21, 1990 (55 FR 6184, p. 6190), and September 30, 1993 (58 FR 51144, pp. 51151–51152). The category 2 species designation was defined as having enough information to indicate that listing the species as an endangered or threatened species was possibly appropriate.

On October 22, 1993, we received a petition dated October 19, 1993, from the Biodiversity Legal Foundation and Lee Dyer requesting that *Astragalus microcymbus* be listed as endangered under the Act, and that critical habitat be designated (Carlton *et al.* 1993, pp. 1–11). The petition included biological information regarding the species and several scientific articles in support of the petition. After careful consideration, we did not issue a 90-day finding on the petition because the species was already included as a category 2 species (Spinks 1994, pp. 1–8).

On February 28, 1996, we proposed removing all category 2 species, including *Astragalus microcymbus* and *Astragalus schmolliae,* from our candidate species notice of review (61 FR 7596). This policy change was finalized on December 5, 1996, stating that the list was not needed because of other lists already maintained by other entities such as Federal and State agencies (61 FR 64481).

On July 30, 2007, we received a petition dated July 24, 2007, from Forest Guardians (now WildEarth Guardians) requesting that the Service: (1) Consider all full species in our Mountain Prairie Region ranked as G1 or G1G2 by the organization NatureServe, except those that are currently listed, proposed for listing, or candidates for listing; and (2) list each species as either endangered or threatened (Forest Guardians 2007, pp. 1–37). The petition incorporated all analyses, references, and documentation provided by NatureServe in its online database at *http://www.natureserve.org/* into the petition. We acknowledged the receipt of the petition in a letter to the Forest Guardians, dated August 24, 2007 (Slack 2007, p. 1). In that letter we stated that, based on preliminary review, we found no evidence to support an emergency listing for any of the species covered by the petition, and that we planned work on the petition in Fiscal Year (FY) 2008.

On March 19, 2008, WildEarth Guardians filed a complaint (1:08–CV–472–CKK) indicating that the Service failed to comply with its mandatory duty to make a preliminary 90-day finding on their two multiple species petitions—one for the Mountain-Prairie Region, and one for the Southwest Region (*WildEarth Guardians* v. *Kempthorne* 2008, case 1:08–CV–472–CKK). We subsequently published two 90-day findings on January 6, 2009 (74 FR 419), and February 5, 2009 (74 FR 6122), identifying species for which we were then making negative 90-day findings, and species for which we were still working on a determination. On March 13, 2009, the Service and WildEarth Guardians filed a stipulated settlement in the District of Columbia Court, agreeing that the Service would submit to the **Federal Register** a finding as to whether WildEarth Guardians' petition presents substantial information indicating that the petitioned action may be warranted for 38 Mountain-Prairie Region species by August 9, 2009 (*WildEarth Guardians* v. *Salazar* 2009, case 1:08–CV–472–CKK).

On August 18, 2009, we published a partial 90-day finding for the 38 Mountain-Prairie Region species, and found that the petition presented substantial information to indicate that listing of *Astragalus microcymbus* may be warranted based on threats from off-road vehicle use and drought; and that listing *Astragalus schmolliae* may be warranted based on threats from fire, nonnative species invasions, road construction, grazing, and drought; and went on to request further information from the public pertaining to both species (74 FR 41649, pp. 41655–41656).

This notice constitutes the 12-month finding on the July 24, 2007, petition to list *Astragalus microcymbus* and *Astragalus schmolliae* as threatened or endangered. Given that we are doing 12-month findings for 38 species from this petition, and 67 species from the Southwest Region multiple species petition (74 FR 419, January 6, 2009; 74 FR 66866, December 16, 2009), and given the amount of resources that it takes to complete a 12-month finding, we are unable to complete 12-month findings for all these species at this time.

Species Information—Astragalus Microcymbus

Species Description and Taxonomy

Astragalus microcymbus is a perennial forb (a plant that can live to more than 3 years of age and without grass-like, shrub-like, or tree-like vegetation) that dies back to the ground every year. The plant has slender stems that are sparsely branched with dark green pinnate leaves, with 9–15 leaflets arranged in an evenly spaced fashion along either side of a central axis. It is in the pea (Fabaceae) family. The spindly red to purple branches grow from 30–60 centimeters (cm) (12–24 inches (in.)) long to 30 cm (12 in.) high, and may trail along the ground, arch upwards, or stand upright, often being supported by neighboring shrubs. Flowers are small (0.5 cm (0.2 in.)), pea-like, are found at the end of branches in clusters of 7–14 flowers, and have white petals that are tinged with purple. Fruits are boat-shaped (hence the common name "skiff" and the Latin name *microcymbus* meaning "small boat"), grow to less than 1 cm (0.4 in.), are triangular in cross-section, and hang abruptly downward from the branches. These characteristics, particularly the plant's diffuse branching, small white-purple pea-like flowers, and boat-like fruit pods distinguish this species from other *Astragalus* species in the area (description adapted from Peterson *et al.* 1981, pp. 5–7; Heil and Porter 1990, pp. 5–6; Isley 1998, p. 349).

Astragalus microcymbus was discovered in 1945 by Rupert Barneby roughly 6 kilometers (km) (4 miles (mi)) west of Gunnison, Colorado (Barneby 1949, pp. 499–500). The species was not located again until 1955 by the Colorado botanical expert William Weber, who originally considered it to be nonnative because of its dissimilarity to the other numerous *Astragalus* species in the region (Barneby 1964, p. 193). Both of these early collections were from alongside Highway 50 near Gunnison, Colorado, at a location that has likely been destroyed. The plant was not located in its more intact and native habitat along South Beaver Creek until Joseph Barrell rediscovered the species in 1966 (Barrell 1969, p. 284; Colorado Natural Heritage Program (CNHP) 2010a, p. 14).

The *Astragalus* genus is large, with over 1,500 species that are found on all continents except Antarctica and Australia, and with almost 600 species

in the United States, primarily in the West (Isley 1998, p. 149). The genus is divided into many sections. *A. microcymbus* is not similar in appearance to other *Astragalus* species in the region. Its presumed closest relative (from the *Strigulosi* section of *Astragalus*) is found in New Mexico, with other relatives extending southward, and being found mostly in Mexico (Barneby 1964, p. 193; Isley 1998, pp. 349–350). The taxonomic status of *A. microcymbus* has not been disputed, although the monophyly (all members descended from a single common ancestor) of the *Strigulosi* section, and the placement of *A. microcymbus* within the section has been debated (Spellenberg 1974, pp. 394–395; Heil and Porter 1990, pp. 12–13). For the purposes of this finding, we consider *A. microcymbus* to represent a valid species and, therefore, a listable entity.

Biology and Life History

Astragalus microcymbus individuals live on average 2.2–3 years (with a range of 1–14 years). Most frequently, plants are alive for only 1 year (DePrenger-Levin 2010a, pers. comm.). The plant flowers from mid to late May into July (Heil and Porter 1990, p. 18; Japuntich 2010a, pers. comm.). There are more flowering plants in early June than at any other time, and flowering then drops off or stops, with a second bloom occurring in July (Japuntich 2010a, pers. comm.). The earlier flowering plants are reportedly larger and more vine-like, and later flowering plants are much smaller sized and less vine-like (Japuntich 2010a, pers. comm.).

Little is known of how *Astragalus microcymbus* reproduces. For example, we do not know if the plant requires pollinators, or what pollinators are important for reproduction. A single plant that was caged in 1980 did not produce fruit (Heil and Porter 1990, p. 18). Although this was suggested as evidence that the plant may require pollinators, we believe that this speculation is premature, because the study was completed for only one individual. Studies of other *Astragalus* species have found some species to be totally reliant on pollinators, and others to be somewhat self-compatible (able to produce seed without pollen from a different plant) but still relying on pollinators to some degree (Karron 1989, p. 337; Kaye 1999, p. 1254). *Astragalus* species with limited ranges are somewhat more self-compatible than wider ranging relatives (Karron 1989, p. 337).

Several pollinators have been observed visiting *Astragalus microcymbus,* suggesting that pollinators may be important for reproduction, but little is known about what pollinators these are (with the exception of the two listed below) and which are most important. Two insects that regularly visit the flowers of *A. microcymbus* were collected in 1989 (Heil and Porter 1990, pp. 18–19). One visitor was a small, black carpenter bee, *Ceratina nanula* that was collected from 3 sites (Heil and Porter 1990, pp. 18–19), and is known from at least 11 western States (Discover Life 2009, p. 1). The other visitor was a small, yellow and brown satyr butterfly, *Coenonympha ochracea* ssp. *ochracea,* a species of the Rocky Mountains (Heil and Porter 1990, p. 19). We expect there are more pollinators than these two species, based on the limited number of observations and collections to date (Heil and Porter 1990, pp. 6, 18–19; Sherwood 1994, p. 12), and because other *Astragalus* species are visited by many different pollinator species (Karron 1989, p. 322; Kaye 1999, pp. 1251–1252; Sugden 1985, p. 303).

Fruits of *Astragalus microcymbus* have been observed as early as late-May, are always present by mid-June, with peak fruiting occurring in mid-July, and all fruits falling off the plants by late-August (Heil and Porter 1990, p. 18). Fruit production varies greatly. For example, during a life-history study (discussed in further detail in Distribution and Abundance below), no fruits were counted in 2002, and 33,819 fruits were counted in 2008 (Denver Botanic Gardens [DBG] 2010a, p. 5). In the same 14-year life history study (1995–2009), fruit production was high in only 3 years: 1995, 1997, and 2008 (DBG 2010a, p. 5). This type of synchronous seeding is sometimes referred to as mast seeding or mast years. Mast seedings may be a strategy to release enough seeds to feed seed predators, that are kept at lower numbers in years with little or no seed production, and still allow other seeds to germinate. Alternatively, it may be a product of increased pollination success (Crone and Lesica 2004, p. 1945). We are unsure of the conditions that lead to good seed and fruit set; overall annual precipitation does not explain the variability (DBG 2010a, p. 12).

Seed dispersal mechanisms have not been researched, but wind and rain are considered candidates (Heil and Porter 1990, p. 19). Seed dormancy, seed survival, and seed longevity in the soil are unknown. We do not know if specific cues (*e.g.,* temperature, precipitation, or seed coat alterations) are needed to break seed dormancy. Seed bank studies for other *Astragalus* species indicate that the group generally possesses hard impermeable seed coats with a strong physical germination barrier. As a result, the seeds are generally long-lived in the soil, and only a small percentage of seeds germinate each year (summarized in Morris *et al.* 2002, p. 30). Conversely, the DBG looked at soil cores taken from *A. microcymbus* monitoring sites and found only one seed. The authors concluded that *A. microcymbus* does not have an active seed bank (DBG 2010a, p. 6). More research is needed to better understand the seed bank's role in the life history of the species.

Astragalus microcymbus individuals may exhibit prolonged dormancy (remaining underground throughout a growing season). This trait may help a species better cope with drought or resource-limiting conditions (Lesica and Steele 1994, pp. 209–210). Between 6 and 90 percent of *A. microcymbus* individuals are dormant in a given year (DBG 2008, pp. 6, 13, 18). Dormancy varies significantly from year to year and between plots (DBG 2010a, p. 15). Of the individuals that exhibited prolonged dormancy, 54 percent remained dormant for 1 year, 10 percent were dormant for 2 years, with a decreasing percentage of individuals remaining dormant for each successively longer time period to 11 years (DBG 2008, p. 6). These numbers for prolonged dormancy are not definitive because researchers are unable to say with certainty if a plant returning to a spot where an individual was previously found is a new individual or an individual returning from prolonged dormancy (DePrenger-Levin 2010a, pers. comm.).

Distribution and Abundance

We use several terms to discuss various sizes or groupings of *Astragalus microcymbus* individuals: Element Occurrence, site, polygon, point, and units. We consider the term Element Occurrence synonymous with population and it is further defined below. Within a population, various smaller "sites" have been hand drawn on maps between 1955 and 1994, and counted or tracked by site. To distinguish these older sites from more recent Global Positioning System (GPS) mapping efforts, we have used the term "polygon" (circles around clusters of individuals) or "point" (points representing one or a few plants within the immediate area) to describe data that was collected after 2003 with a GPS unit. Finally, we have taken the polygons and points and created "units" on which to conduct our spatial analyses for this 12-month finding. The

reasons for creating these units are described in further detail below.

The CNHP, the agency that tracks rare plant species in the State of Colorado, operates within the national NatureServe network and follows NatureServe protocols. NatureServe guidelines on designating Element Occurrences state they are to be designated to best represent individual populations, and are typically separated from each other by barriers to movement or dispersal (NatureServe 2002, p. 11). The CNHP assigns overall species ranks for rare plants within the State of Colorado. *Astragalus microcymbus* has a Global rank of G1 indicating the species is critically imperiled across its range, and a State rank of S1 indicating the species is critically imperiled within the State of Colorado (CNHP 2010b, pp. 1, 5). Since the species is known only from the State of Colorado, the State (S) and Global (G) ranks are the same.

Astragalus microcymbus has a very limited range. It is found in an area roughly 5.6 km (3.5 mi) from east to west and 10 km (6 mi) from north to south with a small, disjunct (widely separated) population found 17 km (10.5 mi) to the southwest on Cebolla Creek (Figure 1). The species is known primarily from Gunnison County with one site located in Saguache County. The majority of sites and individuals are along South Beaver Creek just southwest of Gunnison, Colorado. The species occurs on lands managed by the Bureau of Land Management (BLM) Gunnison Resource Area and adjacent private lands. Within known areas, *A. microcymbus* has a spotty distribution, most likely linked to the habitat being spotty on the landscape (Heil and Porter 1990, p. 16). Using the highest counts across years and across all sites, we estimate the total maximum historic population to be around 20,500 individuals in 5 populations (Table 1; USFWS 2010a, pp. 1–4). However, more recent counts indicate there are substantially fewer individuals than this today (DBG 2010a, p. 7; BLM 2010, p. 3). We estimate *A. microcymbus* occupied roughly 34 hectares (ha) (83 acres (ac)) in 2008 (BLM 2010, pp. 8–10). In previous hand-drawn estimates, *A. microcymbus* occupied roughly 131 ha (324 ac) (CNHP 2010a).

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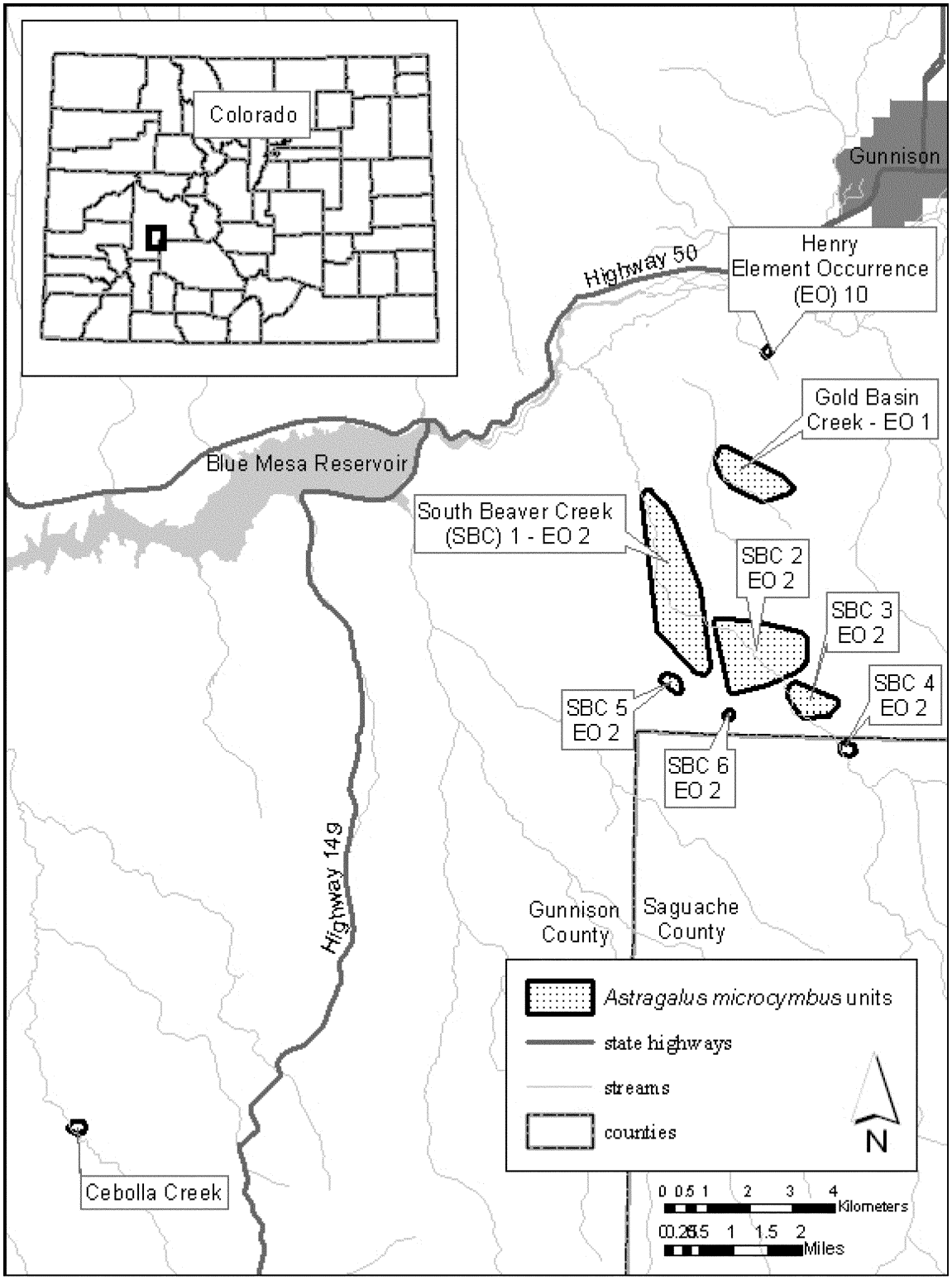

FIGURE 1. Current distribution of *Astragalus microcymbus* (BLM 2010, pp. 7-10; DePrenger-Levin 2010b, pers. comm.; 2010c, pers. comm.; 2010d, pers. comm.).

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TABLE 1—SUMMARY OF ASTRAGALUS MICROCYMBUS POPULATIONS (ELEMENT OCCURRENCES) (USFWS 2010a, PP. 1–4)

Population name	Population No.	Number of sites (pre-2004)	Estimated number of individuals	Ownership	Population rank
Beaver Creek SE	9	unknown	25	private	Historic
Henry	10	1	513	BLM	B
Gold Basin Creek	1	4	5,618	BLM	A
South Beaver Creek	2	39	14,317	BLM/private	A
Cebolla Creek	none	1	unknown	private	C or D
Total		45	20,473		

Population rankings are categorized from A through D, with "A" ranked occurrences generally representing higher numbers of individuals and higher quality habitat, and "D" ranked occurrences generally representing lower numbers of individuals and lower quality (or degraded) habitat. A historic rank (H) indicates an occurrence that has not been visited for more than 20 years.

The CNHP defines an Element Occurrence of *Astragalus microcymbus* as any naturally occurring population that is separated by a sufficient distance or barrier from a neighboring population. More specifically, for *A. microcymbus,* a population is separated by 1.6 km (1 mi) or more across unsuitable habitat, or 3.2 km (2 mi) across apparently suitable habitat (CNHP 2010b, p. 1). Given this definition, the CNHP has four populations of *A. microcymbus* in its database (CNHP 2010b, p. 2). Of these four populations, one (likely the type locality) has not been relocated since 1985 and is considered historic. This site was partially searched (because of private land access) in 1994 and not relocated, although there have not been subsequent visits. It is considered historic because it has not been seen in 20 years. The site along Cebolla Creek has not yet been incorporated into the CNHP's database, but when incorporated will comprise a separate population based on the separation distances described above.

While individuals of the species have been lost, we are unaware of the loss of any *Astragalus microcymbus* populations, although we are unsure of the status of Beaver Creek Southeast population. Two *A. microcymbus* populations comprise multiple sites (Gold Basin Creek and South Beaver Creek), and a few of these sites may have been extirpated (locally extinct). Site revisits using more accurate GPS mapping equipment from 2004–2008 generally re-located historical sites but decreased the overall footprint of most sites into smaller polygons and points. We roughly estimate the new mapping of polygons and points generally represents a reduction of about 75 percent in aerial extent from the original sites. We are unsure if the reduction of the site footprints is because of an actual contraction in the size of the sites, if the sites moved over time, or if it is an artifact of mapping efforts using improved technology. We expect it may be a combination of all three. At three sites in the South Beaver Creek area, no plants were re-located despite several survey efforts; these sites may have been extirpated (USFWS 2010a; pp. 1–4; BLM 2010, pp. 7–10; DePrenger-Levin 2010b, pers. comm.). In an extreme example, one site along South Beaver Creek (023–033–31975), was reduced from a larger 4-ha (10-ac) site to two small polygons that are 97 percent smaller than previously mapped (USFWS 2010a; pp. 1–4; BLM 2010, pp. 7–10).

The lumping of multiple sites into populations makes sense biologically because it generally represents areas where genetic exchange is possible (e.g., populations). However, past mapping efforts, site assessments, and count data have often been collected for smaller sites within a population (USFWS 2010a, pp. 1–4). The information gathered for these smaller sites is essential for tracking the status of the species but is somewhat problematic for an over-arching analysis for several reasons. First, the confusion between numbering protocols makes it difficult to ensure that particular counts, habitat specifics, or threats discussed by different sources are from the same sites. Second, mapping methodologies have resulted in varying delineations, especially with the advent of GPS technology.

For our analyses in this 12-month finding, we evaluated the sites, polygons, and points within *Astragalus microcymbus* populations, and created what we call units from which to conduct our analysis. We did this for several reasons: (1) To simplify the problems associated with tracking sites (i.e., different sources used different descriptors, making it difficult to ensure that they were talking about the same site); (2) to more broadly characterize and analyze the threats to the species' habitat (we believe that sites, polygons, and points are too fine scale); (3) because the polygons mapped in 2008 were on average much smaller than the original hand-drawn sites, we wanted to include more of the potential or previously occupied habitat rather than restricting our analysis to the 2008 mapped polygons; and (4) to provide for a more detailed analysis than would occur if we were to look at populations. To designate the units, we drew a perimeter around all GPS-derived polygons and points that were within 200 m (656 ft) of one another, and then buffered each perimeter by an additional 100 m (328 ft) (Figure 1; Table 2). This 100-m (328-ft) buffer was included so that previously occupied habitat, as drawn on maps, fell within the boundaries of these units. As a result of this exercise, all of the sites within the Gold Basin Creek population were lumped. As shown in Figure 1 above, this methodology divided the South Beaver Creek population into six separate units. The Beaver Creek Southeast population, located entirely on private land, is not included in our units because we are unsure of its exact location and current existence.

TABLE 2—ASTRAGALUS MICROCYMBUS UNITS FOR OUR SPATIAL ANALYSIS IN THIS 12-MONTH FINDING (USFWS 2010a, PP. 1–4; 2010b, PP. 1–3).

Unit name	Population No.	Est. number of individuals	Acres	Hectares	Ownership
Beaver Creek SE	9	25	Unknown	Unknown	private
Henry	10	513	10.8	4.4	BLM
Gold Basin Creek	1	5,618	315.1	127.5	BLM

TABLE 2—ASTRAGALUS MICROCYMBUS UNITS FOR OUR SPATIAL ANALYSIS IN THIS 12-MONTH FINDING (USFWS 2010a, PP. 1–4; 2010b, PP. 1–3).—Continued

Unit name	Population No.	Est. number of individuals	Acres	Hectares	Ownership
South Beaver Creek 1	2	6,136	918.5	371.7	70% BLM, 30% private
South Beaver Creek 2	2	3,667	684.5	277.0	68% BLM, 32% private
South Beaver Creek 3	2	2,464	163.6	66.2	96% BLM, 4% private
South Beaver Creek 4	2	778	24.1	9.75	70% BLM, 30% private
South Beaver Creek 5	2	1,232	38.3	15.5	BLM
South Beaver Creek 6	2	unknown	11.5	4.6	BLM
Cebolla Creek	none	unknown	24.6	9.9	6% BLM, 94% private
TOTAL		20,433*	2,190.8	886.6	75% BLM, 25% private

*Number is different from Table 1 above because the counts from two historical sites were excluded from the units.

Comprehensive surveys for *Astragalus microcymbus* were conducted in 1989 (BLM 1989a, pp. 1–31) and 1994 (Sherwood 1994, pp. 1–24). In 2008, the BLM conducted a comprehensive mapping effort without counts or population assessments (BLM 2010, p. 3). Several other efforts have counted individuals within certain sites (Japuntich 2010b, pers. comm.; DePrenger-Levin 2010b, pers. comm.; 2010c, pers. comm.; 2010d, pers. comm.; USFWS 2010a, pp. 1–4). Count data from various sites are difficult to compare because there is no way of knowing if two observers, during different years, travelled across similar areas, and if the effort between the two counts were similar. In general, counts in 1994 were higher than 1989 (Sherwood 1994, p. 13; USFWS 2010a, pp. 1–4). Several other observers have subsequently returned to these sites and found that *A. microcymbus* numbers in 2004, 2005, 2007, and 2008 were much lower than those of 1994 and the 1980s, with many sites shrinking from thousands to hundreds of individuals (DBG 2010a, p. 7; BLM 2010, p. 3; USFWS 2010a, pp. 1–4). Site counts and estimates from the 1980s and 1990s often reported the number of *A. microcymbus* individuals as more than 500, and sometimes as more than 2,000 individuals. Most counts in the last 5 years have been far less, generally under 150 individuals with only 1 count over 400 individuals (USFWS 2010a, pp. 1–4).

In 1989, the BLM developed a protocol to provide long-term trend data for selected populations of *Astragalus microcymbus* (BLM 1989b, pp. 1–4). They applied the protocol in select locations in 1990, 1994, and 2008. The number of individuals between 1990 and 2008 was not statistically different, and both years had similar low annual precipitation (20 cm (8 in.)) compared to the average of 25 cm (10 in.) (USFWS 2010c, pp. 1–8; DBG 2010a, p. 12; Western Regional Climate Center [WRCC] 2010a, pp. 1–8). However, there were significantly more plants in 1994 (three to four times) than either 1990 or 2008. Precipitation was higher in 1994, roughly 10 cm (4 in.) more than in 1990 or 2008 (USFWS 2010c, pp. 1–8). We conclude that there are more above-ground plants in years with more precipitation.

The DBG has been monitoring *Astragalus microcymbus* annually since 1995 (Carpenter 1995, pp. 1–7; DBG 2003, pp. 1–23; 2007, pp. 1–16; 2008, pp. 1–20; 2010a, pp. 1–17). The DBG found a decline in the number of *A. microcymbus* individuals from 1995–2009 (Figure 2), especially from 1995–2002 (DBG 2010a, p. 5). When comparing the first year of monitoring to the last, this decline is not statistically significant because of a partial rebound in the last few years (DBG 2010a, pp. 5, 10–11). This decline is apparent, although not significant, when considering only above-ground individuals ($p = 0.11$) as well as when combining above-ground individuals with dormant individuals ($p = 0.19$) (Figure 2). Dormant individuals are unknown for the first and last years of the study (1995 and 2008) because of problems associated with finding dormant individuals in the first year, and because dormant individuals cannot be distinguished from dead individuals in the last year.

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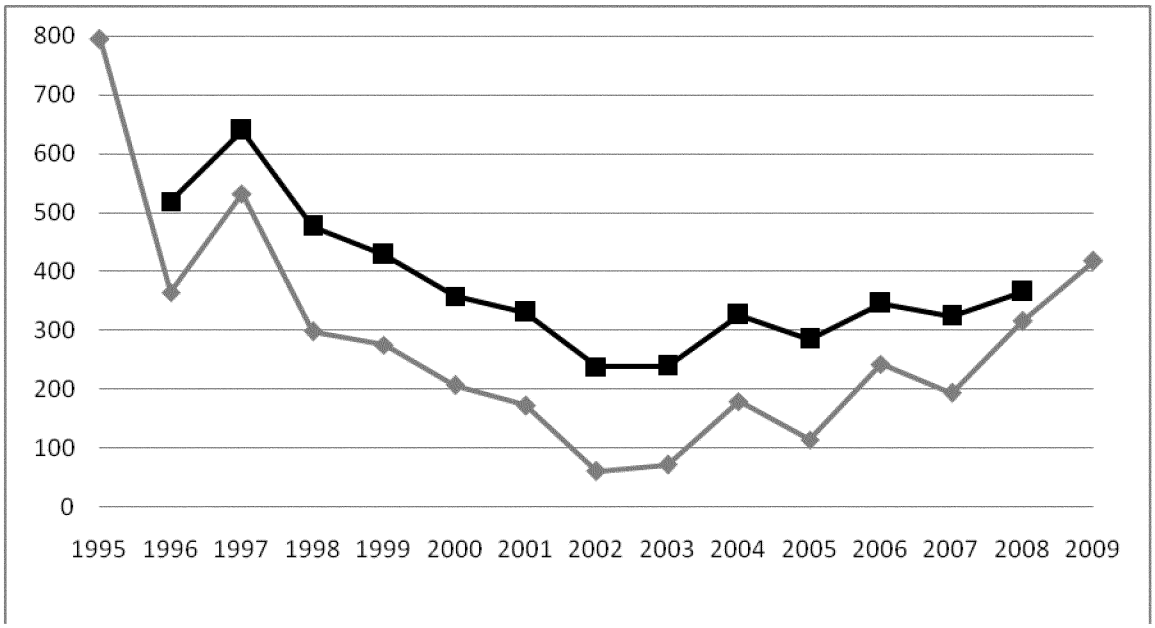

FIGURE 2. Total number of above-ground *Astragalus microcymbus* individuals from 1995-2009, and total number of above-ground and dormant *A. microcymbus* individuals from 1996-2008. Both are summed across four plots (DBG 2010a, p. 15).

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In conjunction with the life-history monitoring, the DBG conducted a population viability analysis using data from 1995–2006. They found that all monitored populations of *Astragalus microcymbus* were in rapid decline, and predicted that all populations will comprise 20 individuals or less—their definition of extinct—by 2030 (DBG 2010a, p. 10). This analysis has not been updated incorporating more recent monitoring data. However, a preliminary review for a subsequent population viability analysis has found still declining trends but with a more gradual decline that would likely delay the predicted extinction date (DePrenger-Levin 2010e, pers. comm.). Unfortunately, the population viability analysis including the 2007 and 2008 data has not been completed. The 2009 data cannot be used because of the problems associated with identifying dead or dormant individuals.

Astragalus microcymbus numbers are positively correlated with precipitation. In a statistical comparison, annual rainfall from August of the previous growing season to July of the current growing season positively influenced the number of *A. microcymbus* individuals, average maximum temperature in May and July negatively influenced the number of individuals, and rainfall in May and July positively influenced the number of individuals significantly (DBG 2010a, p. 6). In addition, rainfall in springtime months during the growing season was statistically correlated with more above-ground growth (DBG 2010a, p. 6).

Survey efforts, trend monitoring, life-history monitoring, and the corresponding population viability analysis all suggest that *Astragalus microcymbus* numbers are declining. In both of the more rigorous monitoring efforts, the decline seems to be correlated with precipitation. The drought in the early 2000s caused a huge decline in numbers, with a rebound in the later 2000s (DBG 2010a, p. 5). However, the very low survey numbers from this decade as compared to the 1980s and 1990s seem less correlated with precipitation (USFWS 2010a, pp. 1–4; WRCC 2010a, pp. 1–8). The reasons for these declines are not fully understood.

Habitat

Astragalus microcymbus is found in the sagebrush steppe ecosystem at elevations of 2,377–2,597 meters (m) (7,800–8,520 feet (ft)). The plant is most commonly found on rocky or cobbly, moderate to steep (9–38 degrees) slopes of hills and draws (Heil and Porter 1990, p. 16), although there are some sites that are flat. Plants are generally found on southeast to southwest aspects, but are occasionally found on northern exposures (Heil and Porter 1990, p. 13). The average annual precipitation is around 25 cm (10 in.) a year, and is fairly consistently spread across the year, except for July and August when roughly twice the precipitation falls compared to the other months (WRCC 2010b, pp. 3, 8). Snow falls in the winter and remains on the ground from November/December through March/April (WRCC 2010a, pp. 3, 8). Winters are cold with an average daily high in January of -3 °C (26.5 °F) and an average daily low of -20 °C (-4.0 °F). Summers are warmer. July is the hottest month with an average daily high of 27 °C (81 °F) and an average daily low of 6 °C (44 °F) (WRCC 2010b, pp. 3–8).

Astragalus microcymbus is found in open park-like landscapes dominated by several sagebrush species, cacti, sparse grasses, and other scattered shrubs. Shrubs are primarily represented by *Artemisia tridentata* ssp. *vaseyana* (mountain big sagebrush), *Artemisia tridentata* ssp. *wyomingensis* (Wyoming sagebrush), *Artemisia frigida* (fringed sagebrush or prairie sagewort), and *Artemisia nova* (black sagebrush); cacti include *Yucca harrimaniae* (Spanish bayonet), and *Opuntia polyacantha* (plains pricklypear); grasses most commonly include *Achnatherum hymenoides* (formerly *Oryzopsis hymenoides*—Indian ricegrass), *Elymus elymoides* (formerly *Sitanion hystrix*—squirreltail), *Hesperostipa comata* (formerly *Stipa comata*—needle and thread grass), and *Poa* sp. (fescue); and the most common forbs include *Cryptantha cinerea* (James' Cryptantha)

and *Penstemon teucrioides* (germander beardtongue). Other shrubs and small trees found within *A. microcymbus'* habitat include *Ribes cereum* (wax currant), *Symphoricarpos oreophilus* (mountain snowberry), and *Juniperus scopulorum* (Rocky Mountain juniper).

Soils are well drained and vary from sandy to rocky, but are primarily a thin cobble-clay loam (Heil and Porter 1990, p. 13). The primary soils within *Astragalus microcymbus* units are stony rock land (46 percent), Lucky-Cheadle gravelly sandy loams with 5–45 percent slopes (39 percent), alluvial land (8 percent), and Kezar-Cathedral gravelly sandy loams with 5–35 percent slopes (4 percent) (Natural Resource Conservation Service (NRCS) 2008; USFWS 2010b, pp. 12–13). Geologically, *A. microcymbus* is associated with: (1) Felsic and hornblendic gneiss (metamorphic from igneous) substrates; (2) granitic (igneous) rocks of 1,700 million-year age group; and (3) biotitic gneiss, schist, and migmatite (sedimentary) substrates with 52, 37, and 11 percent, respectively, in each geology (Knepper *et al.* 1999, pp. 21–22; USFWS 2010b, pp. 10–11).

The areas where *Astragalus microcymbus* is found are generally distinct from surrounding habitats. They are more sparsely vegetated, drier than surrounding areas, more heavily occupied by cacti, and appear to have some specific soil properties as described above. This habitat is limited and patchily distributed on the landscape.

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533) and implementing regulations (50 CFR 424) set forth procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In making this 12-month finding, we evaluated the best scientific and commercial information available. Our evaluation of this information is presented below.

In considering what factors might constitute threats to a species, we must look beyond the exposure of the species to a factor to evaluate whether the species may respond to the factor in a way that causes actual impacts to the species. If there is exposure to a factor and the species responds negatively, the factor may be a threat and we attempt to determine how significant a threat it is. The threat is significant if it drives, or contributes to, the risk of extinction of the species such that the species warrants listing as endangered or threatened as those terms are defined in the Act.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The following potential factors that may affect the habitat or range of *Astragalus microcymbus* are discussed in this section, including: (1) Residential and urban development; (2) recreation, roads, and trails; (3) utility corridors; (4) nonnative invasive plants; (5) wildfire; (6) contour plowing and nonnative seedings; (7) livestock, deer and elk use of habitat; (8) mining, oil and gas leasing; (9) climate change; and (10) habitat fragmentation and degradation.

Residential and Urban Development

The majority of *Astragalus microcymbus* is located between 3.2 and 11 km (2 and 7 mi) of the town of Gunnison, Colorado, the largest town in Gunnison County (Figure 1). Rapid population growth in the rural Rocky Mountains, including the Gunnison area, is being driven by the availability of natural amenities, recreational opportunities, aesthetically desirable settings, grandiose viewscapes, and perceived remoteness (Riebsame 1996, pp. 396, 402; Theobald *et al.* 1996, p. 408; Gosnell and Travis 2005, pp. 192–197; Mitchell *et al.* 2002, p. 6; Hansen *et al.* 2005, pp. 1899–1901). Gunnison County grew from 5,477 people in 1960 to 15,048 people in 2007, constituting a 300 percent increase in population in less than 50 years (CensusScope 2010, pp. 1–3; Colorado State Demography Office 2008, p. 1). The population of Gunnison County is predicted to more than double by 2050 to approximately 31,100 residents (Colorado Water Conservation Board 2009, p. 53).

Human population growth results in increased fragmentation of habitat (*see* Factor E below) (Theobald *et al.* 1996, pp. 410–412), increased recreation and more roads (*see* Recreation, Roads, and Trails below) (Mitchell *et al.* 2002, pp. 5–6; Hansen *et al.* 2005, p. 1899), more utility corridors (see Utility Corridors below), more nonnative invasive plants (see Nonnative Invasive Plants below) (Hansen *et al.* 2005, p. 1896), and changes to ecological processes (Hansen *et al.* 2005, p. 1901). A recent but common pattern of population growth in the Gunnison area is "exurban" or "ranchette" development. These ranchettes consist of larger lots (generally more than 14 ha (35 ac)) each with an isolated large house. This type of development, because of its location outside of urban footprints, may have more impacts to ecosystems and biodiversity than urban or urban fringe development (Hansen *et al.* 2005, p. 1903). Much of this development occurs on steeper slopes, like those where *Astragalus microcymbus* is found, where views are better.

To the best of our knowledge, residential and urban development (aside from roads) has impacted only one *Astragalus microcymbus* unit: the Beaver Creek Southeast Unit. The original type locality along Highway 50 may have been lost to highway activities, and the nearby private lands where the plant was located in the late 1970s and early 1980s may have been lost to a gravel pit (Sherwood 1994, pp. 18–19). No more than 30 plants were reported from this unit in any given year from 1955–1994 (USFWS 2010a, p. 1). Only two *A. microcymbus* sites are near buildings: There is a cabin near one of the larger *A. microcymbus* sites within the South Beaver Creek 1 Unit (BLM 1989a, p. 31), and there is a house within the Cebolla Creek Unit. We do not know if construction of either of these structures impacted *A. microcymbus.*

Twenty-five percent of the *Astragalus microcymbus* units are on private land, mostly along South Beaver Creek (Table 2). Five parcels of private land (with an additional parcel nearby) are currently within *A. microcymbus* units along South Beaver Creek ranging in size from 17 to 263 ha (43 to 650 ac), only one of which has any housing or agricultural developments. All of these parcels are used primarily for livestock ranching operations that have a much lower impact than urban or residential development.

These private land parcels bisect the South Beaver Creek 1 and South Beaver Creek 2 Units, and clip portions of the South Beaver Creek 3 and South Beaver Creek 4 Units (USFWS 2010b, pp. 2–3). Roughly half of the known *Astragalus microcymbus* individuals are within the South Beaver Creek 1, 2, and 4 Units (Table 2), making them especially important to the conservation of the species. These three units all have at least 30 percent of their area on private

lands (Table 2), more than the average across the units of 25 percent. Given their proximity to town, the rapid growth predicted for Gunnison County (Colorado Water Conservation Board 2009, p. 53), the lack of undeveloped parcels in desirable locations (Gunnison County 2005, p. 1), and their appealing views, these parcels are in a likely location for development and could be subdivided in the future. In addition, the Cebolla Creek Unit is located almost entirely on private land and is already partially developed.

Residential or urban development of these parcels would likely lead to the destruction of *Astragalus microcymbus* individuals, as well as fragment and alter the plants' habitat. In 2005, it was estimated that only 30 percent of the private lands in Gunnison County remained undeveloped (Gunnison County 2005, p. 1). Because only 30 percent of the private lands in Gunnison County remain undeveloped, and because the population of Gunnison County is expected to double by 2050, we conclude that the currently undeveloped private lands where *A. microcymbus* occurs are likely to be developed by 2050. The potential loss of up to 25 percent of the area (habitat) and even more of the individuals of *A. microcymbus* is a significant threat for a species with such limited numbers and a limited range (Table 2). This development also would fragment the habitat, potentially isolating small populations from one another leading to the further loss of individuals.

Currently, the impact of development on the species is relatively minor, consisting of the few examples provided above. Although 25 percent of *Astragalus microcymbus* individuals are on private lands with no protective mechanisms in place for the species, little development is currently occurring on these private lands. However, we believe that the threat of development to the species may increase in the foreseeable future based on future human population growth. Future development on these lands is likely, because of the rate of growth in the Gunnison area. Given that Gunnison County has seen a 300 percent increase in population in less than 50 years, that only 30 percent of the private lands remain undeveloped, and *A. microcymbus'* close proximity to the town of Gunnison, we expect that some of these private land parcels will be developed in the next several decades. Based on the population projections presented above, the foreseeable future for development is 40 years, as the population of Gunnison County is predicted to more than double by 2050. Based on the above information, we consider residential and urban development to be a threat to the species in the foreseeable future.

Recreation, Roads, and Trails

It is difficult to separate the effects of roads and trails from the effects of recreation where *Astragalus microcymbus* resides. Most forms of recreation within *A. microcymbus'* range include the use of roads and trails either as a form of recreation (*e.g.,* vehicle use, mountain biking, or hiking) or as a way to access recreation areas (*e.g.,* target shooting and rock climbing areas). For these reasons, we have chosen to address recreation, roads, and trails together in this section.

Roads cause habitat fragmentation because they create abrupt transitions in vegetation; add edge to adjacent patches; are sources of pollutants; and act as filters (allowing some species to cross but not others) and barriers (prohibiting movement) (Spellerberg 1998, pp. 317–333). Road networks contribute to exotic plant invasions via introduced road fill, vehicle transport of plant parts, and road maintenance activities (Forman and Alexander 1998, p. 210; Forman 2000, p. 32; Gelbard and Belnap 2003, p. 426). Many of these invasive species are not limited to roadsides, but also encroach into surrounding habitats (Forman and Alexander 1998, p. 210; Forman 2000, p. 33; Gelbard and Belnap 2003, p. 427).

Aside from the indirect effects discussed above, a road typically removes all vegetation from about 0.7 ha (1.7 ac) per 1.6 km (1 mi), while a single track trail removes all vegetation from about 0.1 ha (0.25 ac) per 1.6 km (1 mi) (BLM 2005a, p. 13). Roads also act as corridors that facilitate human interaction with species and increase the opportunities and the likelihood of travel across undisturbed (non-road) areas. The recreational use of roads is on the rise. From 1991 to 2006, off-highway vehicle registrations increased 937 percent (from 11,744 to 109,994 within the state), with an average annual increase of 16 percent (Summit County Off Road Riders 2009, p. 1). Recreational activities within the Gunnison Basin are widespread, occur during all seasons of the year (especially summer and hunting season), and have expanded as more people move to the area or come to recreate (BLM 2009a, pp. 7–8). Motorized and mechanized use has been increasing within the Gunnison Basin and is expected to increase in the future based on increased population (USFS and BLM 2010, pp. 5, 9, 85, 124–125, 136, 158, 177, 204, 244, 254, 269, 278).

Because *Astragalus microcymbus* generally occurs on slopes, it is somewhat protected from the further development of large roads. And many of the existing roads, although not all, run immediately along the bottom or top of sites instead of through the middle of sites. However, these slopes appear to be the preferred location for dirt bike and mountain bike trails, especially those that were user-created instead of formally designed. Many of the trails within the range of *A. microcymbus* are user-created and run across or up through the slopes where the plant is found (USFWS 2010, pers. comm.). These user-created trails, when redesigned, often require a series of switchbacks, which could increase the opportunity for impacts to the plant. Travel management (the allocation and utilization of motorized and nonmotorized use), and route designation and design, both within the Hartman Rocks Recreation Area and outside that area, are described in further detail below.

Except for the one disjunct population, all of the *Astragalus microcymbus* units are within 11 km (7 mi) of the town of Gunnison, the closest of which is 3.2 km (2 mi) away. This close proximity to an urban area makes the species more susceptible to recreational impacts than if it were located more remotely. The Hartman Rocks Recreation Area is a popular urban interface recreation area and contains roughly 40 percent of the *A. microcymbus* units (BLM 2005a, p. 3; USFWS 2010b, pp. 4–5). The Hartman Rocks Recreation Area is located between 3 and 10 km (2 and 6 mi) from the town of Gunnison on BLM lands (BLM 2005a, p. 3). The Hartman Rocks Recreation Area covers 3,380 ha (8,350 ac), but trails expand out onto adjacent lands. These lands also have *A. microcymbus* plants and habitat that are being impacted by these trails (BLM 2005a, p. 3).

We have no detailed information on how much use occurs, how this use is increasing, or when the use is occurring in the Hartman Rocks Recreation Area. In 2005, it was estimated that the Hartman Rocks Recreation Area received 15,000–20,000 user days each year (BLM 2005a, p. 3). Recreation activities within the Hartman Rocks Recreation Area include mountain biking, motorcycling, all-terrain vehicle riding, 4-wheeling, rock climbing, camping, trail running, horseback riding, cross country skiing, snowmobiling, dog sledding, hill parties, target shooting, hunting, paintball, and more (BLM 2005a, p. 3). We have seen most of these activities

occurring adjacent to or within *Astragalus microcymbus* sites (USFWS 2010, pers. comm.).

The BLM's Hartman Rocks Recreation Management Plan closed two trails and rerouted one trail to protect *Astragalus microcymbus* (BLM 2005a, p. 18; Japuntich 2010c, pers. comm.). These closures were for trails that were directly impacting *A. microcymbus* individuals. The Aberdeen Loop trail goes very close to several *A. microcymbus* sites within the South Beaver Creek 1, South Beaver Creek 5, and South Beaver Creek 6 Units. To protect Gunnison sage-grouse brood-rearing habitat, a reroute of this trail is planned in the next few years that will put the trail further from these *A. microcymbus* sites (Japuntich 2010d, pers. comm.). Many trails are open year-round in the Hartman Rocks Recreation Area, but with less use in the winter and early spring when trails are snow covered or muddy. Closures during *A. microcymbus'* growing season (likely late April through August) would benefit the species by reducing impacts to seedlings and plants, and by lessening disruptions to pollinators. The Aberdeen Loop trail that runs through the South Beaver Creek 1, South Beaver Creek 5, and South Beaver Creek 6 occupied *A. microcymbus* habitat is subject to seasonal closures for the Gunnison sage grouse from June 15 until August 31. This closure provides partial protection for *A. microcymbus* in the growing season.

The South Beaver Creek Area of Critical Environmental Concern (ACEC) (also a Colorado Natural Area) was designated in 1993 by the BLM with the intent of protecting and enhancing existing populations of *Astragalus microcymbus* (BLM 1993, pp. 2.18, 2.29; Colorado Natural Areas Program [CNAP] 1997, pp. 1–7). The South Beaver Creek ACEC is 1,847 ha (4,565 ac), and includes 60 percent of the *A. microcymbus* units rangewide (BLM 1993, p. 2.18; USFWS 2010b, pp. 8–9). Seventy percent of the South Beaver Creek ACEC is within the Hartman Rocks Recreation Area, although the South Beaver Creek ACEC was developed at least 8 years prior to the Hartman Rocks Recreation Area (BLM 2005a, p. 44). Because of its designation as a recreation area, the Hartman Rocks Recreation Area draws users to the area, which is in conflict with the ACEC's intent to protect and enhance *A. microcymbus.*

When the South Beaver Creek ACEC was designated, motorized vehicle traffic was limited to designated routes, whereas it had previously been open on all lands (BLM 1993, p. 2.30). Outside the South Beaver Creek ACEC, all lands within the range of *Astragalus microcymbus* remained open to motorized vehicle traffic. In 2001, mechanized travel, including mountain bikes, on all lands within the Gunnison Resource Area including the South Beaver Creek ACEC and the Hartman Rocks Recreation Area was limited to designated routes (U.S. Forest Service (USFS) and BLM 2001a, p. 3; 2001b, pp. 1–2; BLM 2005a, p. 14). This closure resulted in new protections for *A. microcymbus* from mountain bikes and vehicular use on BLM lands outside the South Beaver Creek ACEC, and from mountain bikes within the ACEC.

Enforcement of travel designations and trail closures is difficult given the large area of the BLM's Gunnison Resource Area and limited law enforcement personnel (USFS and BLM 2010, p. 259). Illegal trails are always an issue in well-used recreation areas (BLM 2010, p. 4). Furthermore, the open park-like habitat of *Astragalus microcymbus* makes it difficult to disguise trails that have been closed. Numerous undesignated trails running through *A. microcymbus* habitat are visible on satellite images (*see* below). Law enforcement with the Gunnison Resource Area is provided by the BLM's Montrose Area Office, which is located over 105 km (65 mi) away. Law enforcement within this area is intermittent, and tickets are rarely, if ever, issued for trespass use (USFS and BLM 2010, p. 259).

As an example, the Quarry Drop trail that runs through the South Beaver Creek 1 Unit was closed in 2005 with the Hartman Rocks Recreation Plan, because it ran directly through two *Astragalus microcymbus* sites (BLM 2010, p. 4). Although this trail is posted as closed, it was still in use during the summer of 2009, when rocks were placed to close the trail entrance (BLM 2010, p. 4). The Gunnison Trails group (a local non-profit trail-building group) and the BLM have increased their efforts on finding illegal trails and closing them before they become more established. Continued pressure from the recreation community for new trail construction is likely, as well as trespass use (BLM 2010, p. 4). In an effort to control illegal use, the BLM has put up educational signs where roads enter the South Beaver Creek ACEC explaining what *A. microcymbus* is and why the species and its habitat are important to preserve (BLM 2010, p. 6). Trails that have been closed are planned to be rehabilitated where they meet open trails during the summer of 2011 in an attempt to ensure they will no longer be used (Japuntich 2010d, pers. comm.).

The BLM and the USFS finalized a joint Environmental Impact Statement for a Gunnison Basin Federal Lands Travel Management Plan that includes areas on BLM lands outside the Hartman Rocks Recreation Area (USFS and BLM 2010, pp. 1–288). This plan builds upon the Gunnison Travel Interim Restrictions of 2001 by closing additional routes, mostly for resource-related reasons (USFS and BLM 2010, p. 1). *Astragalus microcymbus* is not considered in detail in this plan, nor does the plan designate roads be closed specifically to protect *A. microcymbus* (USFS and BLM 2010, pp. 47, 78–79). None of the closures proposed in the plan will benefit *A. microcymbus* nor do they address routes within the Hartman Rocks Recreation Area.

We have found roads, trails, and gravel parking areas atop *Astragalus microcymbus* individuals and polygons (USFWS 2010, pers. comm.). These roads, trails, and parking areas have no vegetation. *A. microcymbus* individuals can be found along the margins of these roads, trails, and parking areas, sometimes with tire tracks atop (USFWS 2010, pers. comm.). Cheatgrass is spreading from the old road bed upslope and into the one site where invasion is occurring (USFWS 2010, pers. comm.). Trails sometimes are deeply incised and eroded (USFWS 2010, pers. comm.).

We conducted a spatial analysis overlaying the distribution of *Astragalus microcymbus* units with designated routes within and near the Hartman Rocks Recreation Area. We found 8.8 km (5.5 mi) of roads (3.5 km (2.3 mi)) and trails (5.3 km (3.2 mi)) overlap with *A. microcymbus* units (Table 3) (BLM 2010; USFWS 2010b, pp. 14–15). Through this mapping effort, we found four of the polygons within the Gold Basin Creek Unit are being directly impacted by these roads and trails (USFWS 2010b, p. 16). We also are aware of at least three other polygons that are being directly impacted by roads and trails (USFWS 2010, pers. comm.). Estimating that a road typically removes all vegetation from about 0.7 ha (1.7 ac) per 1.6 km (1 mi) while a single track trail removes all vegetation from about 0.1 ha (0.25 ac) per 1.6 km (1 mi) (BLM 2005a, p. 13), designated roads directly impact 1.6 ha (3.9 ac) and designated trails directly impact 0.3 ha (0.8 ac) of habitat within *A. microcymbus* units.

TABLE 3—ROADS, TRAILS, AND PATHS WITHIN *Astragalus microcymbus* UNITS

[Designated routes are those included in the BLM's geospatial layers, undesignated are those located using satellite imagery]

Unit name	Designated		Undesignated			Total km (mi)
	Roads km (mi)	Trails km (mi)	Roads km (mi)	Trails km (mi)	Paths km (mi)	
Henry	0.1 (0.06)	.....	0.1 (0.06)	0.1 (0.06)	.....	0.3 (0.2)
Gold Basin Creek	2.2 (1.4)	1.4 (0.9)	0.1 (0.06)	0.4 (0.2)	1.3 (0.8)	5.4 (3.4)
South Beaver Creek 1	1.2 (0.7)	3.5 (2.2)	6.3 (3.9)	3.4 (2.1)	1.6 (1.0)	16.0 (9.9)
South Beaver Creek 2	.....	.....	2.4 (1.5)	0.3 (0.2)	3.6 (2.2)	6.3 (3.9)
South Beaver Creek 3	.....	.....	0.7 (0.4)	.....	.....	0.7 (0.4)
South Beaver Creek 4	.....	.....	.....	.....	.....	.....
South Beaver Creek 5	.....	0.2 (0.1)	.....	.....	.....	0.2 (0.1)
South Beaver Creek 6	.....	0.2 (0.1)	.....	.....	.....	0.2 (0.1)
Cebolla Creek	.....	.....	0.6 (0.4)	.....	.....	0.6 (0.4)
Total (km)	3.5 (2.2)	5.3 (3.3)	10.2 (6.4)	4.2 (2.6)	6.5 (4.0)	29.7 (18.5)

While travel is officially limited to designated routes only on BLM lands, there are numerous roads, trails, and paths that are not designated, with some receiving regular use. Some of these roads have been closed, but their footprint remains. Some of these roads are on private lands along South Beaver Creek, but many are trails or old roads on BLM lands that are undesignated, that either show evidence of use or could be receiving use. We used the NRCS' 2005 National Agriculture Imagery Program satellite imagery to look for roads, trails, and paths in occupied *Astragalus microcymbus* units additional to those BLM roads and trails included in the analysis above. We designated roads, trails, and paths based on the width of the disturbance. Roads were the widest, trails were narrower, and paths were the narrowest. We found almost 21 km (13 mi) of additional roads, trails, and paths, including: 10.2 km (6.3 mi) of roads, 4.2 km (2.6 mi) of trails, 6.5 km (4.0 mi) of paths (Table 3) (USFWS 2010b, pp. 21–22). Using the BLM's estimates of direct impacts (BLM 2005a, p. 13), undesignated roads directly impact 4.4 ha (10.9 ac), undesignated trails directly impact 0.3 ha (0.8 ac), and undesignated paths directly impact less than 0.4 ha (1 ac) of *A. microcymbus* habitat. Because we were using satellite imagery, we cannot say for certain what the level of use is on the trails, or even say if they are still in use. Some of the paths may have been livestock trails. Livestock trails may receive more or less use than other trails, but the effects are likely similar.

All units except the South Beaver Creek 4 Unit have roads and trails. Designated and undesignated roads denude about 5.7 ha (14.1 ac), designated and undesignated trails denude about 0.6 ha (1.6 ac), and undesignated paths denude less than 0.4 ha (1 ac) within *Astragalus microcymbus* units, or less than 0.8 percent (Table 4). To estimate the indirect effects of roads and trails, we used a 20-m (66-ft) buffer on either side of roads and trails. This distance represents the area where invasive nonnative species are most likely to invade, pollinators may be impacted or disturbed by passing vehicles, off-trail use is most likely, and impacts from dust may occur. This distance results in a conservative estimate of impacts, as it is probably more accurate for trails than roads (summarized in DBG 2010b, p. 1). Using this buffer distance, we estimate that roughly 14.5 percent of *A. microcymbus'* total habitat may currently be impacted by roads and trails (Table 4) (USFWS 2010b, pp. 23–25). We expect our 15-percent estimate is low. For example, plumes of dust are known to travel hundreds of meters, especially in arid climates (Gilles *et al.* 2005, p. 2346). Also, we expect that the two known pollinators of *A. microcymbus* travel at least 100 m (328 ft) from their nests, and impacts within this area could impact the nests of these pollinators (Greenleaf *et al.* 2007, pp. 589–596). In the case of the *A. microcymbus* site with cheatgrass, we estimate that the cheatgrass invasion was facilitated by the road and has since moved roughly 20 m (66 ft) upslope into the site (USFWS 2010, pers. comm.). A 100-m (328-ft) buffer (that would better account for indirect dust and invasive nonnative species effects) on either side of these roads and trails would cover roughly 46 percent of the *A. microcymbus* units.

TABLE 4—DIRECT AND INDIRECT (20 METER (66 FOOT)) EFFECTS TO *Astragalus microcymbus* UNITS FROM ROADS, TRAILS, AND PATHS

Unit name	Road km (mi)	Trail and path km (mi)	Direct		20-m (66-ft) buffer	
			Area ha (ac)	% of unit	Area ha (ac)	% of unit
Henry	0.2 (0.1)	0.1 (0.06)	0.1 (0.2)	1.9	1.8 (4.6)	42.0
Gold Basin Creek	2.3 (1.4)	3.1 (1.9)	1.2 (3.0)	1.0	22.7 (56.0)	17.8
South Beaver Creek 1	7.5 (4.7)	8.5 (5.3)	3.8 (9.4)	1.0	69.7 (172.1)	18.7
South Beaver Creek 2	2.4 (1.5)	3.9 (2.4)	1.3 (3.2)	0.5	26.9 (66.3)	9.7
South Beaver Creek 3	0.7 (0.4)	.....	0.3 (0.7)	0.4	3.2 (7.9)	4.8
South Beaver Creek 4	.....	.....	.....	.....	.....	.....
South Beaver Creek 5	.....	0.2 (0.1)	0.01 (0.02)	0.05	0.9 (2.2)	5.8
South Beaver Creek 6	.....	0.2 (0.1)	0.01 (0.02)	0.2	0.9 (2.2)	19.4
Cebolla Creek	0.6 (0.4)	.....	0.3 (0.7)	2.8	2.7 (6.8)	27.7
Total (km)	13.7 (8.5)	16.0 (9.9)	6.9 (17.1)	0.8	128.7 (318.1)	14.5

Given the numerous roads and trails within *Astragalus microcymbus'* habitat (impacting between 15 and 46 percent of the units), the dispersed and bisecting nature of these roads and trails, the numerous trespass trails, the likely increase in nonnative invasive plants from road and trail use, and the fact that a recreation area was designated on 40 percent of the species habitat, we find the magnitude of the threat from recreation, roads, and trails to be high. The threat is ongoing with a high likelihood that it will continue to increase over time. Given that off-road vehicle use in Colorado is increasing 16 percent annually, that the population of Gunnison County is estimated to double by 2050, and that other recreational impacts also are increasing at a rapid pace, we expect a significant increase in the threat from recreation, roads, and trails in the next 40 years. The Hartman Rocks Recreation Area's Management Plan is applicable for 10–15 years from 1995, although there is no definitive expiration date (BLM 2005a, p. 7). We are unsure if and when an update is planned. The most recent Travel Management Plan (USFS and BLM 2010, entire) for the Gunnison Basin will have a similar lifespan. During this time period travel management is not likely to change while we anticipate use will increase. Based on the above information, we consider recreation, roads, and trails to be a significant threat to the species now and in the foreseeable future.

Utility Corridors

Utility corridors have similar effects to habitats as roads because both are linear disturbances (*see* Recreation, Roads, and Trails above for a review of effects). The impact from a utility corridor is greater than its actual footprint, because utility corridors fragment habitat and facilitate the invasion of nonnative invasive plants. We are aware of one large electrical transmission line in *Astragalus microcymbus* habitat. The Curecanti to Poncha 230-kilovolt electrical transmission line bisects the South Beaver Creek 1 Unit and was built in 1962 (Japuntich 2010e, pers. comm.). A 500-foot right-of-way (ROW) (largely not disturbed) is on both sides of the power line (Japuntich 2010e, pers. comm.), which overlays with about 38 ha (94 ac) or 10 percent of the South Beaver Creek 1 Unit and 4 percent of the total area of all *A. microcymbus* units. Only a small proportion of the 500-foot ROW is disturbed. We estimate 1.2 km (0.75 mi) of transmission line with at least six large structures (power poles) within the unit. Given the close proximity of *A. microcymbus* individuals to the transmission line, we assume some individuals were impacted during construction. At least one access road to a power pole also provides vehicular access to an *A. microcymbus* site where plants are being impacted by vehicles driving on them. This transmission line is used recreationally by snowmobile riders in the winter (BLM 2005a, p. 53). We do not know if there are any impacts to *A. microcymbus* from these snowmobiling activities. Direct impacts seem unlikely from the snowmobiling because the plants are dormant and under snow when the use is occurring. Compaction to the habitat is a possibility.

Future ROW developments are allowed in the South Beaver Creek ACEC provided that the surface disturbance does not impair or degrade *Astragalus microcymbus* sites (BLM 1993, p. 2.30). The one known utility corridor impacts only one *A. microcymbus* unit, representing 4 percent of the total rangewide area within units. Given the population growth in the area, we believe there is a moderate likelihood of additional utility corridors in the future. We are unaware of any plan to develop other utility corridors through *A. microcymbus* habitat. Although an existing utility corridor in *A. microcymbus* habitat may impact a small percentage of the overall range of the species, we have no information to indicate that utility corridors occur at a level that threatens the species now or in the foreseeable future.

Nonnative Invasive Plants

Nonnative invasive plants (weeds) invade and alter all types of plant communities, sometimes resulting in nonnative plant monocultures that support little wildlife or native plants. Many experts believe that, following habitat destruction, nonnative invasive plants are the next greatest threat to biodiversity (Randall 1996, pp. 370–383). Nonnative invasive plants alter different ecosystem attributes including geomorphology, fire regime, hydrology, microclimate, nutrient cycling, and productivity (Dukes and Mooney 2004, pp. 411–437). Nonnative invasive plants can detrimentally affect native plants through competitive exclusion, altered pollinator behaviors, niche displacement, hybridization, and changes in insect predation. Invasive grasses can replace native plants such as *Astragalus microcymbus* by outcompeting them for resources, such as soil nutrients or moisture (Brooks and Pyke 2001, p. 6). Examples are widespread among taxa and locations or ecosystems (D'Antonio and Vitousek 1992, pp. 63–87; Olson 1999, pp. 6–18; Mooney and Cleland 2001, pp. 5446–5451).

The only nonnative invasive plant species that has been documented impacting *Astragalus microcymbus* is cheatgrass or downy brome (*Bromus tectorum*). Cheatgrass has become dominant in many sagebrush areas during the last century, primarily from livestock use, agriculture, and wildfire impacts (Pickford 1932, p. 165; Piemeisel 1951, p. 71; Peters and Bunting 1994, p. 34; Vail 1994, pp. 3–4; Brooks and Pyke 2001, pp. 4–6; Menakis *et al.* 2003, p. 284). Cheatgrass displaces native plants by prolific seed production, early germination, and superior competitive abilities for the extraction of water and nutrients (Pellant 1996, pp. 3–4; Pyke 2007, pp. 1–2). Cheatgrass is capable of modifying ecosystems by altering the soil temperatures and soil water distribution (Pellant 1996, p. 4). In addition, the invasion of cheatgrass increases fire frequency within the sagebrush ecosystem (see Wildfire below) (Zouhar *et al.* 2008, p. 41; Miller *et al.* in press, p. 39).

In the mid to late 1980s, cheatgrass was seen in very small patches in the Gunnison Basin but can now be found in some abundance throughout the Basin (BLM 2009a, pp. 7–8). Cheatgrass is increasing in the South Beaver Creek drainage and has been identified as a major threat to *Astragalus microcymbus.* This threat assessment was made because of how cheatgrass is rapidly expanding elsewhere in the Gunnison Basin (BLM 2010, p. 5). Cheatgrass is moving upslope into *A. microcymbus* areas (BLM 2010, p. 5). In 2009, nine polygons within the South Beaver Creek 1 Unit were discovered with cheatgrass totaling 0.2 ha (0.6 ac) (USFWS 2010b, pp. 16–17). These polygons did not exist 4 years prior to their discovery (Japuntich 2010f, pers. comm.). In 2010, another small site of cheatgrass was mapped immediately adjacent to the South Beaver Creek 5 Unit, and a 9-ha (22-ac) site with cheatgrass was located 250 m (820 ft) away from the South Beaver Creek 4 Unit (Japuntich 2010f, pers. comm.).

Herbicide use to control cheatgrass in the South Beaver Creek is limited by the close proximity of South Beaver Creek, because chemical spraying within the South Beaver Creek ACEC is not allowed, and vegetative treatments in the South Beaver Creek ACEC must not adversely affect *Astragalus microcymbus* (BLM 1993, p. 2.29; BLM 2010, p. 6). In the spring of 2010, the BLM conducted a mechanical removal

effort for cheatgrass to protect *A. microcymbus* at the South Beaver Creek 1 Unit at the nine polygons mentioned above (BLM 2010, pers. comm.). A manual hand-pulling effort in 2010 that treated several acres of cheatgrass was partially successful (Japuntich 2010g, pers. comm.). Cheatgrass spread also may be affected by climate change (see Climate Change below).

Other nonnative invasive species known from the Hartman Rocks Recreation Area include: Canada thistle (*Cirsium arvense*), scentless chamomile (*Matriacaria perforata*), yellow toadflax (*Linaria vulgaris*), and Russian knapweed (*Acroptilon repens*) (BLM 2005a, p. 47). These species have not been reported from or near *Astragalus microcymbus* areas and are said to have been controlled (BLM 2005a, p. 47). We expect other nonnative invasive species are likely in the area. Other nonnative invasive species known from the Gunnison Resource Area that are reported to take over large areas include: spotted knapweed (*Centaurea maculosa*), oxeye daisy (*Leucanthemum vulgare),* and field bindweed (*Convolvulus arvensis)* (BLM 2009a, p. 7). The following weeds also are known from the Gunnison Basin, where they are currently limited in extent; however, they are known to cover large expanses in other parts of western North America: diffuse knapweed (*Centaurea diffusa*), and whitetop (*Cardaria draba*). Other invasive plant species present within the Gunnison Basin that are problematic yet less likely to overtake large areas include: musk thistle (*Carduus nutans*), bull thistle (*Cirsium vulgare*), black henbane (*Hyoscyamus niger),* kochia (*Kochia* sp.), common tansy *(Tanacetum vulgare*), and absinth wormwood (*Artemisia biennis*) (BLM 2009a, p. 7; Gunnison Watershed Weed Commission (GWWC) 2009, pp. 4–6).

We believe the invasion of nonnative invasive plants, particularly cheatgrass, is likely to be a threat to *A. microcymbus* in the near future because: (1) Cheatgrass appears to be quickly expanding into the habitat (it was unknown just 2 years ago and there are several cheatgrass sites nearby now); (2) the dry, sparsely-vegetated, south-facing slopes where *A. microcymbus* is found are the warmest sites with little competition from other native vegetation (Japuntich 2010h, pers. comm.) and, therefore, are inherently vulnerable to cheatgrass invasion; (3) cheatgrass likely competes with seedlings and resprouting adult plants for water and nutrients; (4) no landscape-scale successful control methods are available for cheatgrass; and (5) the proven ability of cheatgrass to increase fire frequency, thereby facilitating further rapid spread. We conclude that cheatgrass invasion is currently not a threat but we expect that the existing invasion will increase quickly in the near future, and will likely cause fire frequency to increase.

Wildfire

To date, we are aware of only one recent wildfire near *Astragalus microcymbus* habitat (BLM2009a, p. 6). The wildfire burned in 2007 and was 8.1 ha (20 ac) (BLM 2009a, p. 6) in size. The fire burned at a distance of 2–2.5 km (1.25–1.5 mi) away from two *A. microcymbus* units–Henry and Gold Basin Creek. This wildfire was just outside the northwest edge of the Hartman Rocks Recreation Area, adjacent to private land. Three wildfires have burned within the sagebrush of the Gunnison Basin in the last 15 years, the biggest was 200 ha (500 ac) (Japuntich 2010h, pers. comm.). To date there has not been a demonstrated change in the fire cycle where *A. microcymbus* is found, and fire frequency is low.

A common result of the invasion of cheatgrass is an increase in fire frequency within the sagebrush ecosystem (Whisenant 1990, pp. 4–10; D'Antonio and Vitousek 1992, pp. 63–87; Hilty *et al.* 2004, pp. 89–96; Zouhar *et al.* 2008, p. 41; Miller *et al.* in press, p. 39). Cheatgrass changes historical fire patterns by providing an abundant and easily ignitable fuel source that facilitates fire spread. While sagebrush is killed by fire and is slow to reestablish, cheatgrass recovers within 1–2 years of a fire event (Young and Evans 1978, p. 285). This annual recovery ultimately leads to a reoccurring fire cycle that prevents sagebrush reestablishment (Eiswerth *et al.* 2009, p. 1324). The highly invasive nature of cheatgrass poses increased risk of fire and permanent loss of sagebrush habitat, as areas disturbed by fire are highly susceptible to further invasion and ultimately habitat conversion to an altered community state. For example, Link *et al.* (2006, p. 116) show that risk of fire increases from approximately 46–100 percent when ground cover of cheatgrass increases from 12–45 percent or more. While cheatgrass cover is still very low within *Astragalus microcymbus* habitat, within the Intermountain West, invasion has occurred rapidly, especially after wildfire.

Organisms adapt to disturbances such as historical wildfire regimes (fire frequency, intensity, and seasonality) with which they have evolved (Landres *et al.* 1999, p. 1180), and different species respond differently to wildfire (Hessl and Spackman 1995, pp. 1–90). We do not know what *Astragalus microcymbus'* response to wildfire is at this time because none of the species' habitat has burned. Other *Astragalus* species have demonstrated varying responses to wildfire (see *A. schmolliae* below; and *A. anserinus* in 74 FR 46526–46529, September 10, 2009). If fire frequency increases in the area, we expect it would have deleterious effects to the habitat, given that big sagebrush recovers slowly, which would presumably affect the ecosystem, and cheatgrass tends to thrive after a wildfire.

We have no information to indicate that wildfires currently occur at levels that impact the species. No fires have burned *Astragalus microcymbus* habitat. However, wildfires have occurred in the area. Furthermore, we realize there is a strong relationship between cheatgrass invasions and fire frequency. If cheatgrass invasion continues to expand as discussed above, the threat of wildfire is likely to increase in the future. Given the small population size of *A. microcymbus* and the potential damage a wildfire could cause, we consider future wildfires to be a threat to the species.

Contour Plowing and Nonnative Seedings

Areas within the Hartman Rocks Recreation Areas (but largely outside of the *Astragalus microcymbus* units) have been subject to contour plowing and the subsequent seeding of nonnative species, as well as the development of silt and water impoundment structures (BLM 2005a, p. 57), which can destroy *A. microcymbus* habitat. Contour plowing is the past practice of plowing across a slope following elevation lines and is commonly done to prevent soil erosion. We are unsure why contour plowing and seeding efforts were undertaken near *A. microcymbus* habitat but expect that erosion control and improving livestock forage may have been the primary reasons for these efforts. We have no site-specific data regarding these activities, nor do we know when they occurred. We expect the contour plowing was done to improve range conditions by eliminating sagebrush and increasing grazing and drought-tolerant grasses for forage by livestock. The contour lines from these efforts can be seen through satellite imagery and occur largely on BLM-managed lands. Within the Hartman Rocks Recreation Area, we estimate that roughly 18 percent (617 ha (1,524 ac)) have been contour plowed. Only 1.2 percent (11 ha (27 ac)) of the *A. microcymbus* units have been

contour plowed and seeded, all within the Gold Basin Creek (USFWS 2010b, pp. 18–19). These contoured areas surround the Gold Basin Creek Unit, but there is very little overlap. We are unsure the impact that these contour efforts may have had on *A. microcymbus* in the past. We speculate there may have been an impact to the species from these seeding efforts in the past given that there is very little overlap between the Gold Basin Creek Unit and the contoured areas, despite the contoured areas surrounding the unit on the east, north and west sides (USFWS 2010b, p. 19).

These contoured areas were seeded with crested wheatgrass (*Agropyron cristatum*). Most areas where *Astragalus microcymbus* is found do not overlap with sites where crested wheatgrass is found in abundance (USFWS 2010b, pp. 18–19). Crested wheatgrass is commonly found outside the contoured areas at the Gold Basin Creek and Henry Units (USFWS 2010, pers. comm.), and we assume it has spread into these adjacent native habitats from the contoured areas. Crested wheatgrass is often used for rangeland seedings because seed is widely available, it establishes easily, provides suitable forage for livestock, provides some erosion control, and controls competition from other nonnative invasive plants (Walker and Shaw 2005, p. 56). Crested wheatgrass is extremely competitive and can out-compete other vegetation in several ways (Pellant and Lysne 2005, pp. 82–83). Grasses, such as crested wheatgrass, are wind pollinated and, therefore, do not provide resources such as nectar or edible pollen for pollinators.

The contour plowings and seedings of crested wheatgrass affect only a small proportion (1.2 percent) of the *Astragalus microcymbus* units. The likelihood of future seedings is low because vegetative treatments that would adversely affect *A. microcymbus* are no longer allowed (BLM 1993, p. 2.29). Because crested wheatgrass continues to invade native habitats from these seedings, and because the plowed areas may not provide good floral resources for pollinators, we find these continuing effects of past contour plowing and nonnative seeding to impact the species but not to the point where it poses a threat to the continued existence of the species. We expect crested wheatgrass and pollinator impacts to continue into the foreseeable future since it does not appear that the crested wheatgrass is disappearing.

Livestock, Deer, and Elk Use of Habitat

Livestock Use—Potential threats related to livestock, deer, and elk use include the eating of individual plants (included in Factor C below), physical effects from the trampling, and the indirect effects of habitat degradation. We are unaware of any research or monitoring that has evaluated the effects of livestock, deer, or elk use on *Astragalus microcymbus.* However, the deleterious effects of livestock on western arid ecosystems are well documented (Milchunas *et al.* 1992, pp. 520–531; Jones 2000, pp. 155–164). Some of the adverse effects from livestock include changes in the timing and availability of pollinator food plants (Kearns and Inouye 1997, pp. 298–299); changes to insect communities (Kearns and Inouye 1997, pp. 298–299; Debano 2006, pp. 2547–2564); damage to ground-nesting pollinators and their nests (Sugden 1985, p. 309); changes in water infiltration due to soil compaction (Jones 2000, Table 1); disturbance to soil microbiotic crusts (Belnap *et al.* 1999, p. 167; Jones 2000, Table 1); subsequent nonnative invasive plant invasions (Parker *et al.* 2006, pp. 1459–1461); and soil erosion from hoof action (Jones 2000, Table 1).

Without any species-specific research or monitoring of livestock use, our understanding of impacts to *Astragalus microcymbus* is limited and observational in nature. Little livestock grazing has been recorded within *A. microcymbus* areas; most plants are located on steep slopes with little vegetation that do not draw cows to them (BLM 2010, p. 4). We expect that the plant was always found primarily on slopes, but do not know if the current distribution has been influenced by increased livestock use in flatter areas. In 2008, after visiting all *A. microcymbus* sites, only one appeared to have been directly grazed by livestock (BLM 2010, p. 5). Several observers have attributed increased erosion within *A. microcymbus* sites to cattle use, but this impact also could be from deer or elk use (CNHP 2010a, pp. 12, 27, 32). Grazing utilization levels were reportedly low in 1994 but physical damage to *A. microcymbus* individuals from trampling at two sites was noted (Sherwood 1994, pp. 11, 17, 20). In another review, the authors speculated the periodicity and intensity of grazing may influence the success of *A. microcymbus* by the removal of individuals and ground cover, thereby influencing seedling success (Peterson *et al.* 1981, p. 16). Numerous livestock trails, feces, and tracks were found within most *A. microcymbus* sites visited in 2010 (USFWS 2010, pers. comm.). Within the Hartman Rocks Recreation Area, overall plant cover has been reduced by historic excessive livestock grazing, drought, grazing during the extreme drought years of 1990 through 1992, 2000, and 2001, and the physical impacts from roads and trails (BLM 2005a, p. 56).

Although grazing damage is minimal, all *Astragalus microcymbus* areas receive at least some livestock use. Aside from the Cebolla Creek Unit, all units on BLM lands are either in the Gold Basin or Iola grazing allotments and are actively grazed by cattle. Those units with private lands also are grazed on their private portions. In total, 56.1 percent of the *A. microcymbus* units fall within the Gold Basin allotment and 43.9 percent fall within the Iola allotment, with no ungrazed areas (BLM 2010; USFWS 2010b, pp. 6–7). Within the South Beaver Creek ACEC, no additional forage allocations, beyond those already authorized for the allotments will be made and domestic sheep grazing will not be authorized (BLM 2005a, pp. 2–29 to 2–30).

Fences and water developments have been constructed within the range of *Astragalus microcymbus* to help manage livestock grazing activities, increase the number of livestock that the landscape can support, keep animals in specific areas, and distribute grazing more evenly on the landscape (BLM 2005a, p. 12). All of the pastures are fenced, so the four *A. microcymbus* units with multiple pastures or allotments also have fences (Gold Basin Creek, South Beaver Creek 1, South Beaver Creek 2, and South Beaver Creek 3).

Water developments occur across the range of *Astragalus microcymbus* (Japuntich 2010i, pers. comm.). One water development is within 300 m (985 ft) of the Henry Unit: one is within and three are just outside the Gold Basin Creek Unit; and an additional three developments are just outside the unit: one within the South Beaver Creek 1 Unit; and one within 400 m (1,312 ft) of the South Beaver Creek 6 Unit (Japuntich 2010i, pers. comm.). Within the Henry Unit, several livestock trails run through the *A. microcymbus* site. We assume these trails are from livestock travelling to and from the water development 300 m (985 ft) away and expect that similar effects are occurring from the other water developments listed above. Water developments concentrate livestock use in areas near these developments, and fence lines often funnel livestock, and even deer and elk, into certain areas that will receive a disproportionate amount of use. We do not have further information regarding whether the close proximity of water developments or fence lines is causing increased impacts

to *A. microcymbus* habitat, but we expect this is the case because there are several fences running through sites and because livestock grazing is found atop all sites.

In addition, salt blocks draw livestock (and deer and elk) to the areas where they are placed. We know of one instance where a salt block has been placed within an *Astragalus microcymbus* site. This area was extensively trampled, there were fewer *A. microcymbus* individuals in trampled areas than surrounding polygons, and those plants that remained were located almost exclusively under shrubs (USFWS 2010, pers. comm.). Trails to and from the salt block were impacting adjacent *A. microcymbus* polygons (USFWS 2010, pers. comm.). We do not know of any protective mechanisms to prevent salt block placement within *A. microcymbus* sites and expect this may be occurring elsewhere.

The Gold Basin allotment is authorized for use between May 16 and September 30 each year, but is used from May 25–July 31, the time when *Astragalus microcymbus* is growing and reproducing, in most years (BLM 2010, p. 5). Pastures used by cow/calf pairs are generally used for 5–15 days a year and those used by yearlings are generally used for 15–30 days each year. Pastures are rested occasionally some years, although when and how often this occurs is unknown. The Gold Basin allotment is permitted for 4,253 animal unit months (AUMs) a year but has averaged 1,405 AUMs over the last 6 years. Approximately 30 percent of the AUMs are within the pastures where *A. microcymbus* units are located (BLM 2010, p. 5). In 2007, this allotment was found to have heavy use in some riparian areas and poor herbaceous cover in the lowest elevation uplands, where *A. microcymbus* would be found. These results were attributed to historic vegetation manipulation and livestock grazing practices (BLM 2009b, pp. 1–2). Given that damage is occurring at lower than permitted stocking rates and shorter than permitted periods of time, the potential for further damage exists.

The Iola allotment is authorized for use between May 15 and November 14 each year, but is used from late May/early June (sometimes late June/early July) generally 15–20 days in most years (BLM 2009b, pp. 1–2; BLM 2010, p. 5). These times again coincide with the time when *Astragalus microcymbus* is growing and reproducing. The permittee is authorized up to 1,258 AUMs in the pasture, but has used an average of 250 AUMs for the last 6 years (BLM 2010, p. 5). A new allotment management plan and grazing system was developed for this allotment in 2002. During this analysis, grass cover was below potential, and riparian vegetation was being consistently grazed to less than 10 cm (4 in.) (BLM 2009b, pp. 1–2). Again, given that damage is occurring at lower than permitted stocking rates and shorter than permitted periods of time, the potential for further damage exists.

Deer and Elk Use—Livestock impacts to the habitat are similar to those impacts to the habitat caused by excessive deer and elk use (Japuntich *et al.* in press, pp. 1–15). For example, Hobbs *et al.* (1996, pp. 200–217) documented a decline in available perennial grasses as elk densities increased. All *Astragalus microcymbus* areas are within areas that receive deer and elk use. Grazing and browsing by deer and elk occurs primarily during the winter months when there is less snow in the valley than the surrounding hills. Deer numbers have seen a strong increase in the Gunnison Basin since 1999 (Gunnison-Crested Butte 2010, p. 2). *A. microcymbus* is found within the Powderhorn Creek Game Management Unit (deer). In 2005, this unit had between 600 and 1,600 more deer than its objective of 4,500–5,500 individuals (Colorado Division of Wildlife (CDOW) 2006, p. 3). Since 1980, deer numbers within this unit have been as high as 8,000 individuals in 1993 and as low as 4,500 individuals in 1984; and averaging near 7,000 individuals from 2000 to 2005 (CDOW 2006, p. 3). From 1980 to 2000, elk numbers in the Lake Fork Managment Unit (where *A. microcymbus* is found) rose from 5,600 individuals to 9,256 individuals; both numbers are substantially greater than the 3,000–3,500 population objective (CDOW 2001, pp. 3, appendix A). Currently in the Gunnison Basin, deer and elk populations have 8,000 more individuals than the desired population objectives (Japuntich *et al.* in press, p. 4).

Excessive but localized deer and elk grazing has been documented in the Gunnison Basin (BLM 2005b, pp. 17–18). For example, drought and big game were having large impacts on the survivability and size of high-protein shrubs including mountain mahogany (*Cercocarpus utahensis*), bitterbrush (*Pushia tridentata*), and serviceberry (*Amelanchier alnifolia*) in the Gunnison Basin (Japuntich *et al.* in press, pp. 7–9). These shrub species are not the most common within *A. microcymbus* habitat but are generally found nearby. These authors raised concerns that observed reductions in shrub size and vigor will reduce drifting snow accumulation resulting in decreased moisture availability to grasses and forbs during the spring melt, affecting the overall composition of the plant community.

Impacts to *Astragalus microcymbus* habitat from deer and elk are occurring. For example, extensive moderate to severe hedging of shrubs, attributed to fairly heavy concentrations of wintering big game animals, has been documented at one *A. microcymbus* site in the South Beaver Creek 5 Unit (Sherwood 1994, p. 16). Deer and elk feces can be found at most *A. microcymbus* sites (USFWS 2010, pers. comm.). Deer and elk use occurs primarily in the winter when *A. microcymbus* is dormant, which minimizes some of the direct effects to the plants. However, deer and elk are more likely to spend time on steeper slopes than livestock and so may cause more direct trampling impacts to *A. microcymbus* habitat including soils, seed banks, and plant communities.

Summary of Livestock, Deer, and Elk Use—Describing livestock, deer, and elk use is complicated because the management of these animals is complicated. Although we lack good monitoring data, we find livestock, deer, and elk use of *Astragalus microcymbus* habitat to be a threat to the species. We have made this determination based upon observations that suggest moderate use levels from livestock and heavy deer and elk use in the winter. Use from livestock, deer, and elk is virtually ubiquitous across the range of the species, and habitat degradation is occurring, although we recognize that these indirect effects to *A. microcymbus* habitat are difficult to quantify. Authorized AUMs are significantly greater than those currently utilized. If livestock use were to increase, this threat would increase in the foreseeable future. The current number of deer and elk is above population objectives, and past fluctuations suggest that more animals are a possibility, which would also increase this threat in the foreseeable future. In addition, the accompanying habitat degradation with livestock, deer, and elk use makes this an increasing threat especially in light of the cheatgrass invasion.

Mining; Oil and Gas Leasing

The South Beaver Creek ACEC has one active lode claim and one active placer claim for mining. Lode claims are those which generally follow some deposited vein while placer mining is everything else and can include sand and gravel deposits. One of these active claims is within the Gold Basin Creek Unit, and the other is nearby. Neither of these claims have Notices of Intent or Plans of Operation that are required for most disturbances (BLM 2010, pp. 5–6).

On active claims, Notices of Intent are required for disturbances less than 2 ha (5 ac) at least 15 days prior to commencement of operation. A Plan of Operation, required for disturbances greater than 2 ha (5 ac), requires NEPA compliance and can take between 30 and 90 days to process. The transfer of these mineral claims to private entities is prohibited within the South Beaver Creek ACEC (BLM 1993, p. 2–29). A large gravel pit is at the northwest corner of the Hartman Rocks Recreation Area on BLM lands and is within 1.6 km (1 mi) of the Henry and Gold Basin Creek Units. Because of this distance, we expect there are probably no effects to *A. microcymbus* from this gravel operation. A gravel pit was said to be on private lands at the Beaver Creek Southeast Unit, but we have no further information and, based on our maps, do not make a similar conclusion (Sherwood 1994, p. 15).

No lands for oil and gas development have been leased by the BLM within the Gunnison Basin area (USFS and BLM 2010, pp. 272–273). All habitats where *Astragalus microcymbus* is currently found are mapped as having no potential for oil and gas development (Gunnison Sage-Grouse Resource Steering Committee 2005, p. 130). Despite this lack of potential, the entire Federal oil, gas, and geothermal estates in the South Beaver Creek ACEC are open to leasing but with a controlled surface use stipulation (BLM 1993, pp. 2.29, K.5). This stipulation requires that inventories be conducted prior to the approval of operations and relocations of operations. These inventories will be used to prepare mitigative measures to reduce the impacts of surface disturbance to the species (BLM 1993, p. K.5).

Given that there are only two existing active mining claims (but without current activity) within *Astragalus microcymbus* units and that there is no potential for oil and gas development in the area, we do not consider mining or oil and gas leases to threaten the species at this time nor do we expect these factors to pose a threat to the species in the foreseeable future.

Climate Change

According to the Intergovernmental Panel on Climate Change (IPCC), "Warming of the climate system in recent decades is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global sea level" (IPCC 2007, p. 1). Average Northern Hemisphere temperatures during the second half of the 20th century were very likely higher than during any other 50-year period in the last 500 years and likely the highest in at least the past 1,300 years (IPCC 2007, p. 30). Over the past 50 years, cold days, cold nights, and frosts have become less frequent over most land areas, and hot days and hot nights have become more frequent. Heat waves have become more frequent over most land areas, and the frequency of heavy precipitation events has increased over most areas (IPCC 2007, p. 30). For the southwestern region of the United States, including western Colorado, warming is occurring more rapidly than elsewhere in the country (Karl *et al.* 2009, p. 129). Annual average temperature in west-central Colorado increased 3.6 °C (2 °F) over the past 30 years, but high variability in annual precipitation precludes the detection of long-term trends (Ray *et al.* 2008, p. 5). At one weather station in Gunnison, Colorado, temperature has increased roughly 1.8 °C (1 °F) since 1900 (WRCC 2010c, pp. 1–9).

Future projections for the southwestern United States, including the Gunnison Basin, show increased probability of drought (Karl *et al.* 2009, pp. 129–134). Additionally, the number of days over 32 °C (90 °F) could double by the end of the century (Karl *et al.* 2009, p. 34). Annual temperature is predicted to increase approximately 2.2 °C (4 °F) in the southwest by 2050, with summers warming more than winters (Ray *et al.* 2008, p. 29). Projections also show declines in snowpack across the West with the most dramatic declines at lower elevations (below 2,500 m (8,200 ft)) (Ray *et al.* 2008, p. 29). Overall, future projections for the Southwest predict increased temperatures, more intense and longer-lasting heat waves, an increased probability of drought that are worsened by higher temperatures, heavier downpours, increased flooding, and increased erosion (Karl *et al.* 2009, pp. 129–134).

Colorado's complex, mountainous topography results in a high degree of spatial variability across the State. As a result, localized climate projections are problematic for mountainous areas because current global climate models are unable to capture this variability at local or regional scales (Ray *et al.* 2008, pp. 7, 20). To obtain climate projections specific to the range of *Astragalus microcymbus,* we used a statistically downscaled model from the National Center for Atmospheric Research for a region covering western Colorado. The resulting projections indicate that temperature could increase an average of 2.5 °C (4.5 °F) by 2050 with the following seasonal increases: summer (July through September) 2.8 °C (5.0 °F), fall (October through December) 2.2 °C (4.0 °F), winter (January through March) 2.3 °C (4.1 °F), and spring (April through June) 2.5 °C (4.5 °F) (University Corporation of Atmospheric Research (UCAR) 2009, pp. 1–14). This increase in temperature could be problematic for *A. microcymbus* because the species is negatively affected by warm temperatures during May and July (DBG 2010a, p. 6).

Annual mean precipitation projections for Colorado are unclear; however, multi-model averages show a shift toward increased winter precipitation and decreased spring and summer precipitation by the end of the century (Ray *et al.* 2008, p. 34; Karl *et al.* 2009, p. 30). Similarly, the National Center for Atmospheric Research results show the highest probability of a 7.5 percent increase in average winter (January through March) precipitation, an 11.4 percent decrease in average spring (April through June) precipitation, a 2.1 percent decrease in average summer (July through September) precipitation, and a 1.3 percent increase in average fall precipitation with an overall very slight decrease in 2050 (UCAR 2009, pp. 1–14). Seasonal trends from the past 100 years at a local weather station do not yet match this scenario, and overall precipitation has declined by roughly 2 cm (0.75 in.) or 10 percent (WRCC 2010a, pp. 1–8). This actual data is in contrast to regional maps that show precipitation has increased roughly 5 percent from 1958 to 2008 within the general area where *Astragalus microcymbus* resides (Karl *et al.* 2009, p. 30). *A. microcymbus* responds negatively to declines in overall precipitation and periods of drought, as well as declines in spring precipitation (May and July) (DBG 2010a, p. 6). Given the observed decline in precipitation at a local weather station, predictions of increased drought, and a predicted significant decline in spring precipitation, we expect *A. microcymbus* will be affected negatively by climate change effects to precipitation.

Climate change is likely to alter fire frequency, community assemblages, and the ability of nonnative species to proliferate. Increasing temperature as well as changes in the timing and amount of precipitation will alter the competitive advantage among plant species (Miller *et al.* in press, p. 44), and may shift individual species and ecosystem distributions (Bachelet *et al.* 2001, p. 174). Dominant plant species such as big sagebrush have a disproportionate control over resources

in ecosystems (Prevey *et al.* 2009, p. 1). For sagebrush communities, spring and summer precipitation comprises the majority of the moisture available to species; thus, the interaction between reduced precipitation in the spring-summer growing season and increased summer temperatures will likely decrease growth of big sagebrush and could result in a significant long-term reduction in the distribution and composition of sagebrush communities (Miller *et al.* in press, pp. 41–45). In the Gunnison Basin, increased summer temperature was strongly correlated with reduced growth of big sagebrush (Poore *et al.* 2009, p. 558). Although we do not fully understand how changes in plant communities will affect *Astragalus microcymbus,* we expect that a decrease in the dominant plant species will not be a benefit because it could drastically alter the way the ecosystem functions where *A. microcymbus* resides. In addition, changes in the plant community could likely influence wildfire frequency and erosion rates.

Temperature increases may increase the competitive advantage of cheatgrass in higher elevation areas where it is currently limited (Miller *et al.* in press, p. 47), like the Gunnison Basin. Decreased summer precipitation, as predicted in the model, reduces the competitive advantage of summer perennial grasses, reduces sagebrush cover, and subsequently increases the likelihood of cheatgrass invasion (Prevey *et al.* 2009, pp. 1–13). This impact could increase the susceptibility of areas within *Astragalus microcymbus'* range to cheatgrass invasion (Bradley 2009, p. 204). In addition, cheatgrass and other C3 grasses (C3 refers to one of three alternative photosynthetic pathways) are likely to thrive as atmospheric carbon dioxide increases (Mayeux *et al.* 1994, p. 98). An increase in cheatgrass would likely increase wildfire frequency. See Nonnative Invasive Plants above for a discussion of cheatgrass and effects to *A. microcymbus.*

Climate change predictions are based on models with assumptions, and are not absolute. In addition, we do not fully understand how climate change will affect the species or the habitat in which it resides. These factors make it difficult to predict the effects of climate change to *Astragalus microcymbus.* However, endemic species with limited ranges that are adapted to localized conditions, like *A. microcymbus,* are expected to be more severely impacted by climate change (Midgley *et al.* 2002, p. 448) than those considered habitat generalists. Furthermore, we expect the predicted increases in spring temperature, increased drought, and decreased spring precipitation will affect *A. microcymbus* negatively. Climate change has the potential to change the plant community, allow cheatgrass to increase, and potentially increase the risk of wildfire, which would likely have a negative effect to *A. microcymbus.* It is difficult to assess the threat of climate change to *A. microcymbus* given the uncertainties associated with future projections. However, based on the best available information on climate change projections into the next 40 years, we find climate change to be a threat to *A. microcymbus* based on how predicted changes could negatively influence the species. We recognize there are many uncertainties, and projections further into the future become even more uncertain, making it even more difficult to predict how climate change might affect the species.

Habitat Fragmentation and Degradation

Habitat fragmentation can have negative effects on biological populations. Often fragments are not of sufficient size to support the natural diversity prevalent in an area and so exhibit a decline in biodiversity (Noss and Cooperrider 1994, pp. 50–54). Habitat fragments are often functionally smaller than they appear because edge effects (such as increased nonnative species or wind speeds) impact the available habitat within the fragment (Lienert and Fischer 2003, p. 597). Habitat fragmentation has been shown to disrupt plant-pollinator interactions and predator-prey interactions (Steffan-Dewenter and Tscharntke 1999, pp. 432–440), alter seed germination percentages (Menges 1991, pp. 158–164), and result in low fruit set (Cunningham 2000, pp. 1149–1152). Extensive habitat fragmentation can result in dramatic fluxes in available solar radiation, water, and nutrients (Saunders *et al.* 1991, pp. 18–32).

Fragmentation within *Astragalus microcymbus* habitat is largely from linear features such as roads and utility corridors (see Recreation, Roads, and Trails and Utility Corridors above) that are pervasive at every *A. microcymbus* unit except the South Beaver Creek 4 Unit. In addition, past contour plowings and subsequent seeding efforts have created blocks of altered and degraded habitat around *A. microcymbus* units that may affect the overall plant community, nonnative invasive plants, and pollinator habitat and resources. This type of fragmentation does not carry the same negative consequences as that of more highly fragmented habitats impacted by agricultural or urban development because of its more limited extent.

However, the aforementioned type of fragmentation leads to habitat degradation. Habitat degradation, the gradual deterioration of habitat quality, can lead to a species decline, decrease, or loss of reproductive ability. Habitat degradation may be difficult to detect because it takes place over a long time period, and species with long life-cycles may continue to be present in an area even if they are unable to breed (Fisher and Lindenmayer 2007, pp. 268–269).

In the case of *Astragalus microcymbus,* habitat degradation is coming from multiple sources: Development; recreation, roads, and trails; utility corridors; nonnative invasive plants; contour plowing and nonnative seedings; and accentuated by periodic drought. In addition, wildfire and climate change will likely contribute to further habitat degradation. Detailed monitoring is needed to detect population changes and signal the need to implement conservation measures that could counteract habitat degradation, but this monitoring has not been done for *A. microcymbus.*

Habitat fragmentation and habitat degradation is occurring as a result of multiple sources including virtually all the threats and factors previously described in this document. As a result, we find habitat degradation to be a threat to *Astragalus microcymbus.* Habitat fragmentation is currently a lesser threat, but because it is so tightly linked with habitat degradation, we have treated them jointly.

Summary of Factor A

The biggest habitat-related threats to *Astragalus microcymbus* are recreation (including roads and trails); the potential for increases in nonnative invasive plants (especially cheatgrass); potential residential and urban development; livestock, deer, and elk use; and potential effects from climate change. In addition, the habitat degradation and fragmentation occurring from these stressors threatens *A. microcymbus.*

Recreational impacts are not likely to lessen given the close proximity of *Astragalus microcymbus* to the town of Gunnison and the increasing popularity of mountain biking, motorcycling, and all-terrain vehicles. The fact that the Hartman Rocks Recreation Area was designated on 40 percent of the *A. microcymbus* units will only serve to draw more users, and there is little enforcement to control trespass use.

Accordingly, we find the threat from recreation, roads, and trails to be high.

Although the impacts from nonnative invasive plants, and particularly cheatgrass, are low right now, we expect this factor to increase to the level of a serious threat in the near future. Cheatgrass is increasing in the South Beaver Creek drainage and has been identified as a major threat to *Astragalus microcymbus* (BLM 2010, p. 5). In the mid to late 1980s, cheatgrass was seen in very small patches in the Gunnison Basin but can now be found in some abundance throughout the Basin (BLM 2009a, pp. 7–8). *A. microcymbus* is found on warm, sparsely vegetated, and dry, south-facing slopes, which in the Gunnison Basin, are probably more vulnerable to cheatgrass invasion. We know that cheatgrass is already invading *A. microcymbus* sites. Cheatgrass has transformed millions of acres into monocultures in the Great Basin and has dramatically shortened the wildfire return interval. We believe the potential exists for a similar conversion in *A. microcymbus* habitat. Although we find the current invasion of cheatgrass into *A. microcymbus* habitat to be small and possess little threat, because of the high potential for further invasion, we find the overall threat is increasing.

It is difficult to assess the impact of climate change to *Astragalus microcymbus,* but we believe climate change may be a future threat given the predictions of increased springtime temperatures, decreased springtime precipitation, and increased drought.

Because a quarter of the *Astragalus microcymbus* units occur on private land, and given the rapid pace of development in the Gunnison Basin, we believe residential and urban development represent a moderate threat to *A. microcymbus.* Given that livestock, deer, and elk use occurs across the range of *A. microcymbus,* that *A. microcymbus* individuals are being lost from this use, and that this use is causing habitat degradation that could facilitate the spread of cheatgrass, we find this threat to be moderate.

We find the potential impact of future wildfire to be a threat to the species and recognize that wildfire risk may increase with further cheatgrass invasion. We do not find utility corridors to be a threat because they currently impact only 4 percent of the *A. microcymbus* units and we do not know of any further utility corridor plans. We do not find the continuing effects from past contour plowings and nonnative seedings to be a threat because the existing plowings only impact 1.2 percent of the *A. microcymbus* units and we do not expect these treatments to occur in the future. Because of the low potential for oil and gas development and because there are only two other active mining claims within the species' range, we do not find that these factors are threats to the species.

Based on threats from recreation; the potential for increases in nonnative invasive plants; potential residential and urban development; livestock, deer, and elk use; and potential effects from climate change, we find that *Astragalus microcymbus* is threatened by the present or threatened destruction, modification, or curtailment of its habitat or range now and these threats are expected to continue or increase in the foreseeable future.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

We are not aware of any threats involving the overutilization or collection of *Astragalus microcymbus* for any commercial, recreational, scientific, or educational purposes at this time. *A. microcymbus* is not particularly showy or of horticultural significance; therefore, we do not expect any overutilization in the foreseeable future. We find that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to *A. microcymbus* now or expected to become so in the foreseeable future.

Factor C. Disease or Predation

Astragalus microcymbus is subject to extensive herbivory, primarily from small mammals (Lyon 1990, pp. 2, 5; Dyer 1993, p. 2; Sherwood 1994, pp. 10–11; Japuntich 2010j, pers. comm.; DBG 2010a, pp. 6–7). On average, 26 percent of the plants have evidence of herbivory (ranging from 13 to 74 percent at a given plot) (DBG 2010a, p. 6). Browsing on the plants is very evident and in some areas, it is hard to find an *A. microcymbus* individual that has not had at least some portion eaten (Japuntich 2010j, pers. comm.). Some species of *Astragalus* are notoriously toxic to livestock, and presumably deer and elk. Often these toxic species are avoided by grazers and browsers. However, the high level of small mammal herbivory to *A. microcymbus* plants suggests the species is not overly toxic. We do not know if this toxicity would vary between livestock and rabbits.

Small Mammal Herbivory

Most herbivory of *Astragalus microcymbus* individuals is attributed to small mammals. Cottontail rabbits (*Sylvilagus audobonii*), small chipmunks (*Tamias* sp.), and ground squirrels (*Citellus lateralis* and others) graze on *A. microcymbus* (Japuntich 2010j, pers. comm.). Mice and voles also have been implicated as herbivores (Sherwood 1994, p. 11). Rabbits are generally considered the primary herbivores of *A. microcymbus,* and numerous observers have suggested they are in abundance within *A. microcymbus* habitat (Lyon 1990, p. 2; Dyer 1993, p. 2; Japuntich 2010j, pers. comm.).

The information we have regarding rabbit herbivory is mostly anecdotal in nature; however, taken in sum, we believe this information leads to a conclusion that rabbit herbivory impacts *Astragalus microcymbus* in years with high rabbit populations. During one survey effort, observers found six rabbits in one of the draws they visited (Lyon 1990, p. 5), and another observer visited 10 *A. microcymbus* sites in a day and said that rabbit damage was heavy at nine of those sites (Dyer 1993, p. 2).

Several observers have suggested that rabbit herbivory can result in the death of *Astragalus microcymbus.* One observer suggested that 2 years of heavy rabbit use was more than *A. microcymbus* could tolerate because of all the dead plants they encountered in a heavy rabbit year (Lyon 1990, p. 5). Those plants that were not dead had only a few green leaves, again attributed to rabbit herbivory (Lyon 1990, p. 2). After 2 years of consecutive transect counts at a site another observer stated that many plants had died and attributed that death to overuse by rabbits (Sherwood 1994, p. 10). Observations of small mammal herbivory being a significant impact to the species occurs across the years (USFWS 2010a, pp. 1–4).

Rabbit and small mammal populations fluctuate widely (Korpimäki and Krebs 1996, pp. 754–764; Hanski *et al.* 2001, pp. 1501–1520). We have little information on how small mammal populations have changed within the range of *Astragalus microcymbus* over time, but the variability in observations from year to year and between sites suggest there are significant fluctuations and spatial variations. For example in 1990, local authorities and those surveying for *A. microcymbus* stated the rabbit population was very large compared with other years; this year, herbivory of *A. microcymbus* was repeatedly observed (Lyon 1990, p. 2). Observations suggest that small mammal herbivory is impacting *A. microcymbus,* especially during years when small mammal populations are high.

Fencing to exclude small mammals was installed at monitoring plots in

2006 and 2007 (DBG 2010a, p. 6). After 2 years, the plants protected by fences were statistically longer at 31.4 cm (12.4 in.) than those outside the fence, which were 19.5 cm (7.7 in.) (DBG 2010a, p. 6). This difference could be related to a decrease in herbivory or increased moisture (from additional snow accumulations within the fence from wind loading) within the exclosures, or a combination of the two. In addition, mammal herbivory was less within the fenced areas, more individuals flowered within fenced areas, and more total fruit was produced per plant within fenced areas (DBG 2010a, p. 7). A weak statistical correlation was found between nonreproductive plants and evidence of mammalian browsing across all plots (DBG 2010a, p. 6). Although we do not understand how small mammal populations have changed over time, these impacts to fruit set are significant. Furthermore, these impacts are consistent with other observations of small mammal herbivory (USFWS 2010a, pp. 1–4).

Rabbit herbivory has been documented at several *Astragalus microcymbus* units, including Gold Basin Creek, South Beaver Creek 1, South Beaver Creek 2, and South Beaver Creek 3 (USFWS 2010a, pp. 1–4). Conversely, at several of the more isolated *A. microcymbus* units, Henry and South Beaver Creek 4, observers specifically mention the lack of rabbit herbivory relative to other areas (USFWS 2010a, pp. 1–4).

We are unsure of the long-term impact to *Astragalus microcymbus* over time from small mammal herbivory. Small mammal herbivory is significantly impacting seed set of *A. microcymbus.* Fewer seeds mean fewer opportunities for seedling and adult recruitment. In addition, small mammal herbivory occurs at most sites across the range of the species, and recent observations indicate that damage to plants is heavy. We have no information to either support or refute that rabbit herbivory levels are higher than historic levels; however, in light of other factors affecting the species and the limited range and small population level, impacts to *A. microcymbus* from herbivory can be large in years of high rabbit populations. Given this, we find small mammal herbivory to be a threat to the species.

Deer and Elk Herbivory

Like livestock use, overgrazing by deer and elk may cause local degradation of habitats (see "Livestock, Deer, and Elk Use of Habitat" above for a more thorough discussion). Here we address the actual eating of *Astragalus microcymbus* individuals as opposed to habitat degradation. We have little information on the impacts of deer and elk herbivory to *A. microcymbus.* Much of the deer and elk use of *A. microcymbus* habitat occurs during winter after the plants are no longer growing, thereby not affecting the plants, unless they are pulled up by the roots, which we assume would happen infrequently. One observer stated that the previous year's dried stalks of larger *A. microcymbus* plants showed almost universal use, and attributed this to wintering big game (Sherwood 1994, p. 17).

Although deer and elk use is high within *Astragalus microcymbus* habitat (see Deer and Elk Use above), most of the use occurs in the winter when *A. microcymbus* is dormant. We expect the effects of winter use to be minimal since, once dried, the previous year's growth is not important to an individual plant's success. We expect that some herbivory does occur since deer and elk will sometimes visit during the growing season. Because most use occurs in the winter when herbivory would not impact *A. microcymbus,* we do not consider deer and elk herbivory to be a threat now or in the foreseeable future.

Livestock Herbivory

Livestock use may cause local degradation of habitats (see "Livestock, Deer, and Elk Use of Habitat" above for a more thorough discussion). Here we address the actual eating of *Astragalus microcymbus* individuals as opposed to habitat degradation. Observations on direct grazing impacts to *Astragalus microcymbus* vary. Heil and Porter (1990, p. 21) state that grazing animals are known to occasionally use this species as a forage plant. One observer reported the plant shows some resistance to grazing (CNHP 2010a, pp. 5–6). Livestock presence is reportedly rare on the steeper slopes where *A. microcymbus* resides (BLM 2010, p. 4). We believe we have seen herbivory of individuals in areas near salt licks, although we cannot be sure this was not small mammal herbivory (USFWS 2010, pers. comm.). Therefore, we do not consider the livestock herbivory to be a threat to the species now or in the foreseeable future.

Insect Herbivory

Grasshoppers (Orthopterans in the Acrididae and Tettigoniidae families) have been implicated as herbivores of *Astragalus microcymbus* (Dyer 1993, p. 2). Aphids have been documented on the plants at one *A. microcymbus* site (CNHP 2010a, p. 22). A small number of *A. microcymbus* individuals have been documented with insect webs within Gold Basin Creek Unit (Sherwood 1994, p. 7). Insect herbivory was measured as part of the life-history monitoring study. This study found no significant effects from insect herbivory on flowering individuals (DBG 2010a, p. 6). Therefore, we find that insect herbivory does not constitute a threat to *A. microcymbus* now or in the foreseeable future.

Disease

A fungus has been documented on less than 10 percent of the *Astragalus microcymbus* individuals at one monitoring transect (Sherwood 1994, p. 11). No other instances of disease are known. Therefore, we find that disease does not constitute a threat to *A. microcymbus* now or in the foreseeable future.

Summary of Factor C

Various herbivores have been documented at *Astragalus microcymbus* sites. Small mammal herbivory, especially from rabbits, has been documented at fairly high levels, and appears to be the only type of herbivory that is impacting the species at a low to moderate level. Exclusion research has found that small mammal herbivory was less, more individuals flowered, and there were more total fruits within fenced areas (DBG 2010a, p. 7). We expect small mammal herbivory to continue into the foreseeable future and fluctuate with small mammal populations. We do not believe that deer and elk herbivory, livestock herbivory, and insect herbivory constitute threats because they are only occasionally or minorly affecting *A. microcymbus* and are not expected to increase into the foreseeable future. Finally, we do not consider disease to be a threat because it is so rare. However, we do find that *Astragalus microcymbus* is threatened by predation now and these threats are expected to continue or increase in the foreseeable future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

Under this factor, we examine whether threats to *Astragalus microcymbus* are adequately addressed by existing regulatory mechanisms. Existing regulatory mechanisms that could provide some protection for *A. microcymbus* include: (1) Local land use laws, processes, and ordinances; (2) State laws and regulations; and (3) Federal laws and regulations. Regulatory mechanisms, if they exist, may preclude listing if such mechanisms are judged to adequately

address the threat to the species such that listing is not warranted.

An example of a regulatory mechanism is the terms and conditions attached to a grazing permit that describe how a permittee will manage livestock on a BLM allotment. They are nondiscretionary and enforceable, and would be considered a regulatory mechanism under this analysis. Other examples include city or county ordinances, State governmental actions enforced under State statute regulations, or Federal action under statute or regulation. Actions adopted by local groups, States, or Federal entities that are discretionary or are not enforceable, including conservation strategies and guidance, are typically not regulatory mechanisms. In this section we review actions undertaken by local, State, and Federal entities designed to reduce or remove threats to *Astragalus microcymbus* and its habitat.

Local Land Use Laws and Ordinances

We are aware of no local land use laws or ordinances that offer protection to *Astragalus microcymbus.* Neither the city of Gunnison nor the counties of Gunnison or Saguache have guidelines, zoning, or other mechanisms to protect the species.

State Laws and Regulations

No State regulations in Colorado protect *Astragalus microcymbus.* The State of Colorado has no laws protecting any rare plant species. Plants also are not included in the Colorado Wildlife Action Plan and do not qualify for funding under State Wildlife Grants.

The State of Colorado's Natural Areas Program works to protect special resources in the State, although there are no regulatory enforcement mechanisms associated with the program. In 1997, the Colorado Natural Areas Program designated the South Beaver Creek Natural Area (CNAP 1997, pp. 1–7). The South Beaver Creek Natural Area was designated for all areas within the South Beaver Creek ACEC (CNAP 1997, p. 7). The Colorado Natural Areas Program provides a means by which Colorado's natural features and ecological phenomena can be identified, evaluated, and protected through a statewide system of natural areas (CNAP 1997, p. 1). The purpose of the South Beaver Creek Natural Area is to protect *Astragalus microcymbus* (CNAP 1997, p. 2).

Through this designation, the Colorado Natural Areas Program staff is entitled to visit the area at anytime and convey the results of these visits to the BLM, cooperate with the BLM on updating the Resource Management Activity Plan for the property, and provide a periodic report on the condition of the property (CNAP 1997, p. 3). In essence, this designation allows the Colorado Natural Areas Program to assist the BLM with its management. The Colorado Natural Areas Program has not been actively monitoring *Astragalus microcymbus* at the South Beaver Creek Natural Area. Therefore, this designation has, to-date, afforded little protection to the species. Given that the Colorado Natural Areas Program is increasing its conservation efforts, we expect the Natural Areas Program to become more active in the conservation of *A. microcymbus* in the future but have no way of predicting what this will mean to the species.

The State of Colorado requires private landowners to control noxious (nonnative invasive) weeds. Plants considered noxious by the State of Colorado that are within or near *Astragalus microcymbus'* habitat include: Cheatgrass (List C), Canada thistle (*Cirsium arvense*—List B), scentless chamomile (*Matriacaria perforata*—List B), yellow toadflax (*Linaria vulgaris*—List B), and Russian knapweed (*Acroptilon repens*—List B) (Colorado Department of Agriculture [CDA] 2010, pp. 2–3). List B species are noxious weeds for which management plans are or will be developed and implemented to stop their spread (CDA 2010, p. 2). List C species are noxious weeds for which management plans are or will be developed and implemented to provide additional education, research, and biological control resources but for which the continued spread will not be halted (CDA 2010, p. 2). We have no information on how the noxious weed law is being implemented within the range of *A. microcymbus.* We do know that the Gunnison Watershed Weed Commission has been actively working to control and eradicate noxious weeds in Gunnison County but we have few specifics from this work (GWWC 2010, pp. 1–8). Therefore, we cannot assess the benefits to *A. microcymbus.*

Deer and elk populations are managed by the CDOW. We have no information to suggest that deer and elk use is being regulated to ensure *Astragalus microcymbus* and its habitat is not impacted by this use.

Federal Laws and Regulations

The BLM has promulgated regulations, policies, and guidelines to protect sensitive species on Federal lands, control wildfire and rehabilitate burned areas, and implement rangeland assessments, standards, and guidelines to assess rangeland health.

Astragalus microcymbus is included on the Colorado BLM's sensitive species list (BLM 2009c, p. 3). The management guidance afforded sensitive species under BLM Manual 6840—Special Status Species Management (BLM 2008) states that "Bureau sensitive species will be managed consistent with species and habitat management objectives in land use and implementation plans to promote their conservation and to minimize the likelihood and need for listing under the ESA" (BLM 2008, p. .05V). The BLM Manual 6840 further requires that Resource Management Plans (RMPs) should address sensitive species, and that implementation "should consider all site-specific methods and procedures needed to bring species and their habitats to the condition under which management under the Bureau sensitive species policies would no longer be necessary" (BLM 2008, p. 2A1). *A. microcymbus* has received some protections because of its sensitive status, including the establishment of the South Beaver Creek ACEC and limited money for survey and monitoring efforts. However, part of this ACEC is overlapped by the Hartman Rocks Recreation Area, which is resulting in some habitat loss, fragmentation, and degradation.

The Federal Land Policy and Management Act of 1976 mandates Federal land managers to develop and revise land use plans. The RMPs are the basis for all actions and authorizations involving BLM-administered lands and resources. They establish allowable resource uses, resource condition goals and objectives to be attained, program constraints and general management practices needed to attain the goals and objectives, general implementation sequences, and intervals and standards for monitoring and evaluating the plan to determine its effectiveness and the need for amendment or revision (43 CFR 1601.0–5(k)).

The RMPs provide a framework and programmatic guidance for activity plans, which are site-specific plans written to implement the RMP. Examples of activity plans include Allotment Management Plans that address livestock grazing, or other activity plans for oil and gas field development, travel management, and wildlife habitat management. Activity plan decisions normally require additional planning and National Environmental Policy Act (NEPA) analysis. The Gunnison Resource Area's RMP represents an enforceable regulatory mechanism. *A. microcymbus* is not specifically protected in areas outside the South Beaver Creek ACEC within the RMP but is protected by the

Special Status Species Management guidance and general RMP guidance for the management of special status plants (BLM 1992, pp. 1–13; 1993, p. 2.4). Public scoping for the next RMP for the Gunnison Resource Area is estimated to begin in 2010 (Japuntich 2010d, pers. comm.). We expect that existing protections for the species will remain in place for the next RMP, but cannot predict if additional protections for *Astragalus microcymbus* will be developed.

As discussed above in Recreation, Roads, and Trails, *Astragalus microcymbus* was included in the Gunnison Resource District's RMP when the South Beaver Creek ACEC was designated. This area encompasses 60 percent of the *A. microcymbus* units (BLM 1993, pp. 2.29–2.30). The South Beaver Creek ACEC was designated specifically to protect and enhance existing *A. microcymbus* populations and habitat. Actions outlined for the South Beaver Creek ACEC, and their implementation, are included in Table 5 below.

TABLE 5—ACTIONS IDENTIFIED, WITH NOTES ON IMPLEMENTATION, FOR *Astragalus microcymbus* IN THE SOUTH BEAVER CREEK ACEC IN THE 1993 GUNNISON RESOURCE AREA'S RMP

Action	Implementation
Monitoring to determine population trends	Being done regularly at 4 plots by DBG & intermittently at 4 plots by BLM
Actions to improve habitat conditions	Few—2 trail closures, 1 reroute, cheatgrass control efforts
Minimization of surface disturbing conditions to protect species & its habitat.	Some control of vehicles
Development of management plan for *Astragalus microcymbus*	Not implemented
No chemical spraying	Likely implemented
No vegetative treatments	Implemented
No additional forage allocations	Unknown, especially as related to deer & elk
Controlled surface use stipulation	Implemented
No conflicting erosion control measures	Implemented, unsure about water bars
No domestic sheep grazing	Implemented
Limit motorized vehicular traffic to designated routes	Implemented although enforcement is problematic
Public lands with *A. microcymbus* will not be disposed	Implemented
Acquisition of non-Federal lands if available	Not implemented
ROW permitted without direct impacts to *A. microcymbus*	Implemented
Wildfire suppression	No wildfires to-date

The South Beaver Creek ACEC has resulted in some protections for *Astragalus microcymbus,* specifically: Monitoring, two surveys, two trail closures, one trail reroute, and some restrictions to herbicide use and livestock grazing. These protections are an improvement over more generally managed BLM lands. However, 70 percent of the South Beaver Creek ACEC is within the Hartman Rocks Recreation Area, even though the South Beaver Creek ACEC was developed at least 8 years prior to the Hartman Rocks Recreation Area (BLM 2005a, p. 44). Numerous trails are also designated through *A. microcymbus* units (see Recreation, Roads, and Trails above). The designation of this Recreation Area overlaying *A. microcymbus* demonstrates that these ACEC protections are not adequate to protect the species.

All *Astragalus microcymbus* units on public land are within active livestock grazing allotments. The BLM regulatory authority for grazing management is provided at 43 CFR Part 4100 (Regulations on Grazing Administration Exclusive of Alaska). Livestock grazing permits and leases contain terms and conditions, determined by BLM to be appropriate to achieve management and resource condition objectives and to ensure that habitats are, or are making, significant progress toward being restored or maintained for BLM special status species (43 CFR 4180.1(d)). The State or regional standards for grazing administration must address habitat for endangered, threatened, proposed, candidate, or special status species, and habitat quality for native plant and animal populations and communities (43 CFR 4180.2(d)(4) and (5)). The guidelines must address restoring, maintaining, or enhancing habitats of BLM special status species to promote their conservation, as well as maintaining or promoting the physical and biological conditions to sustain native populations and communities (43 CFR 4180.2(e)(9) and (10). The BLM is required to take appropriate action not later than the start of the next grazing year upon determining that existing grazing practices or levels of grazing use are significant factors in failing to achieve the standards and conform with the guidelines (43 CFR 4180.2(c)).

Livestock use specific to *Astragalus microcymbus* is discussed in further detail in Livestock, Deer, and Elk Use of Habitat above. Within the South Beaver Creek ACEC, no additional forage allocations will be made and domestic sheep grazing will not be authorized (BLM 2005a, pp. 2–29 to 2–30).

Despite management actions undertaken by BLM, grazing is impacting *Astragalus microcymbus* and its habitat. The BLM has no research or monitoring that specifically addresses the impacts to *A. microcymbus* or its habitat and the effects from ubiquitous livestock use. In addition, there is no research or monitoring that addresses how deer and elk utilization is being jointly considered (with livestock use) within the range of *A. microcymbus.* Therefore, we find the management of livestock, deer, and elk to be similar to our assessment of "Livestock, Deer, and Elk Use of Habitat" above and a threat to the species.

As discussed in "Recreation, Roads, and Trails" in Factor A above, based on the combination of the documented impacts resulting from recreational activities atop *Astragalus microcymbus* and its habitat and the designation of the Hartman Rock Recreation Area over the South Beaver Creek ACEC, we believe that existing Federal regulatory mechanisms are inadequate for protecting *A. microcymbus.* Management prescriptions or AUMs for livestock use are three to five times higher than current use levels. Because livestock impacts are occurring to *A. microcymbus* at current stocking rates, we expect if livestock were managed at these higher AUM levels, much more intense impacts would occur to the plant. In addition, the South Beaver

Creek ACEC designation, while providing limited protection for *A. microcymbus,* was not adequate to preclude the designation of a recreation area in the same location (70 percent of the ACEC). We cannot say what will happen with *A. microcymbus* in the upcoming RMP revision, but if we consider conservation efforts since the last RMP revision, we expect *A. microcymbus* and its habitat will continue to decline in the foreseeable future. We find that Federal laws and regulations are currently inadequate to protect the species from being threatened or endangered.

Summary of Factor D

Twenty-five percent of *Astragalus microcymbus* habitat occurs on private lands with no regulatory protections. No State laws protect the species. On Federal lands, the species is managed as a sensitive species but this designation has not adequately protected the species. Over 40 percent of the *A. microcymbus* habitat and 70 percent of the South Beaver Creek ACEC lies within the federally managed Hartman Rocks Recreation Area, which serves to focus human use in this area, a designation that runs counter to the protection of the species. For these reasons, we find the existing regulatory mechanisms to be inadequate because of increasing recreation and development potential on private land. We find that *Astragalus microcymbus* is threatened by the inadequacy of existing regulatory mechanisms now and these threats are expected to continue or increase in the foreseeable future.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Periodic Drought

Drought is a common occurrence within the range of *Astragalus microcymbus* (Braun 1998, p. 148; WRCC 2010a, p. 8). Infrequent, severe drought may cause local extinctions of annual forbs and grasses that have invaded stands of perennial species, and recolonization of these areas by native species may be slow (Tilman and El Haddi 1992, p. 263). Drought reduces vegetation cover (Milton *et al.* 1994, p. 75; Connelly *et al.* 2004, pp. 7–18), potentially resulting in increased soil erosion and subsequent reduced soil depths, decreased water infiltration, and reduced water storage capacity. Drought also can exacerbate other natural events such as defoliation of sagebrush by insects and the invasion of nonnative invasive plants. *A. microcymbus* responds negatively to declines in overall precipitation and periods of drought, as well as declines in spring precipitation (May and July) (DBG 2010a, p. 6). For example, during the drought of 2001 and 2002, *A. microcymbus* populations declined precipitously (DBG 2010a, p. 6). Because periodic drought will likely continue and could increase (see Climate Change in Factor A above) and because of the decline in population numbers associated with drought, we find drought to be a threat to the species (recognizing the uncertainty with climate change models).

Small Populations

Small populations and species with limited distributions, like those of *Astragalus microcymbus,* are vulnerable to relatively minor environmental disturbances such as recreational impacts, nonnative plant invasions, and wildfire (Given 1994, pp. 66–67), and are subject to the loss of genetic diversity from genetic drift, the random loss of genes, and inbreeding (Ellstrand and Elam 1993, pp. 217–237). Populations with lowered genetic diversity are more prone to local extinction (Barrett and Kohn 1991, pp. 4, 28). Smaller populations generally have lower genetic diversity, and lower genetic diversity may in turn lead to even smaller populations by decreasing the species' ability to adapt, thereby increasing the probability of population extinction (Newman and Pilson 1997, p. 360).

For plant populations that do not reproduce vegetatively, like *Astragalus microcymbus,* pollen exchange and seed dispersal are the only mechanisms for gene flow. Pollen dispersal is limited by the distance the pollinator can travel. Both pollen and seed dispersal can vary widely by species (Ellstrand 2003, p. 1164). We do not understand either pollen or seed dispersal capabilities for *A. microcymbus.* As our understanding of gene flow has improved, the distances scientists believe genes can travel also has increased (Ellstrand 2003, p. 1164). We believe that genetic exchange could be possible, although unlikely, between the Henry, Gold Basin Creek, and South Beaver Creek Units, and expect that genetic exchange does occur occasionally between the South Beaver Creek Units.

Most *Astragalus microcymbus* units comprise multiple sites with many individuals and genetic exchange should not be limited within units. However, two *A. microcymbus* units—Henry and Cebolla Creek—are located over 2.5 km (1.5 mi) away from any other units and have few individuals. For these two units in particular, small population size and a loss of genetic diversity may be a problem. Other *Astragalus* species with small populations have demonstrated lowered genetic diversity (Travis *et al.* 1996, pp. 735–745). The limited range of *A. microcymbus* makes the species more susceptible to being significantly impacted by stochastic (random) disturbances such as wildfire. Because stochastic threats such as wildfire are currently low, and because two *A. microcymbus* units are isolated and small, we find the overall effect from small populations to be low to the point where it is not a threat.

Summary of Factor E

Periodic drought is a threat to *Astragalus microcymbus.* We know that the species decreases during drought conditions, but we do not know how this influences long-term survivorship of the species, especially in light of climate change. We know the species has a limited distribution and two out of nine *A. microcymbus* units are small and isolated, but we do not understand how this is affecting the genetic diversity of the species nor do we consider small population size to be a threat. With such a limited range, the species is at risk from stochastic events but there is no way of predicting these events. Although there are many unknowns, we find the threat from periodic drought to be moderate at this time. Based on this, the overall threat from Factor E is low to moderate. We find that *Astragalus microcymbus* is threatened by other natural or manmade factors affecting its continued existence now and these threats are expected to continue or increase in the foreseeable future.

General Threats Summary

Table 6 below provides an overview of the threats to *Astragalus microcymbus.* Of these threats, we consider recreation, roads, and trails, the overall inadequacy of existing regulatory mechanisms, and habitat fragmentation and degradation to be the most significant threats (Table 6). Recreational impacts are likely to increase given the close proximity of *A. microcymbus* to the town of Gunnison and the increasing popularity of mountain biking, motorcycling, and all-terrain vehicles. Furthermore, the Hartman Rocks Recreation Area draws users and contains over 40 percent of the *A. microcymbus* units. The overall threat from a lack of existing regulatory mechanisms is high given that 25 percent of the habitat has no protections and that Federal protections allowed a recreation area to be developed on the

species' habitat. Recreation, as well as most of the other threats to *A. microcymbus,* leads to habitat fragmentation and degradation.

TABLE 6—THREAT SUMMARY FOR FACTORS AFFECTING *Astragalus Microcymbus*

Listing factor	Threat or impact	Scope of threat or impact	Intensity	Exposure (%)	Likelihood of exposure	Species' response	Foreseeable future	Overall threat
A	Residential & Urban Development.	Moderate	Moderate	25	Moderate	Loss of habitat, loss of sites, pollinator impacts.	Development within several decades.	Moderate.
A	Recreation, Roads, & Trails.	High	High	15 (20-m buffer) to 46 (100-m buffer).	High	Loss of sites & habitat, habitat degradation, nonnatives, pollinator impacts.	Significant increase (+20% annually) in users.	High.
A	Utility Corridors.	Low	Low	4	Moderate	Loss of sites & habitat, habitat degradation.	No immediate plans, limited in scope.	None, impact only.
A	Nonnative Invasive Plants.	Low	Low+	0.1+	High	Competition, wildfire, pollinator impacts.	Increasing with rapid increase possible.	None, but increasing quickly.
A	Wildfire	Low	None+	None but nearby.	Low+	Nonnatives, species' response to wildfire unknown.	Difficult to estimate, will relate to cheatgrass invasion.	Low+.
A	Contour Plowing & Nonnative Seedings.	Low	Low	1.2	Low	Presumable loss, habitat degradation, pollinator impacts.	Future seedings unlikely.	None, impact only.
A	Livestock, Deer, & Elk Use of Habitat.	Moderate	Low to Moderate	95+	Moderate	Habitat Degradation, trampling, pollinator impacts.	Permitted AUMs would increase impacts, deer & elk impacts could increase.	Moderate.
A	Mining; Oil & Gas Leasing.	Low	Low	none	Low	Loss if mining occurred.	Little activity, unlikely in the foreseeable future.	None+.
A	Climate Change.	Moderate?	Moderate?	100	Moderate	Unknown but would likely cause a decline.	Climate models predict 40-year changes.	Moderate?
A	Habitat Fragmentation & Degradation.	High	Low	100	High	Habitat degradation, genetic isolation.	A byproduct of other threats.	High.
B	None						not likely to change.	None.
C	Small Mammal Herbivory.	Moderate	Moderate+	~80, likely varies by year.	High	Affecting seed set.	Likely to continue & fluctuate with herbivore population.	Low to Moderate.
C	Deer & Elk Herbivory.	Low	Low	winter	Low	Minimal, could affect seed set.	Winter use makes herbivory less likely.	None+.
C	Livestock Herbivory.	Low	Low	occasional	Low	Could affect seed set.	Steep slopes makes herbivory less likely.	None.
C	Insect Herbivory.	Low	Low	3	Moderate	Could affect seed set.	No measureable impact.	None.

TABLE 6—THREAT SUMMARY FOR FACTORS AFFECTING ASTRAGALUS MICROCYMBUS—Continued

Listing factor	Threat or impact	Scope of threat or impact	Intensity	Exposure (%)	Likelihood of exposure	Species' response	Foreseeable future	Overall threat
C	Disease	Low	Low	trace	Low	Death?	Rare	None.
D	Local Land Use Laws, & Ordinances.	Moderate	Moderate	25	Moderate+	Loss of habitat, loss of sites, pollinator impacts.	Development within several decades.	Moderate.
D	State Laws & Regulations.	Moderate	Moderate	25+	Moderate+	Loss of habitat, loss of sites, pollinator impacts.	Development within several decades.	Moderate.
D	Federal Laws & Regulations.	Moderate	Moderate	75	Moderate+	Influenced by management actions.	Continued course will trend downward.	Moderate.
E	Periodic Drought.	Moderate	Moderate	100	High	Decline	Climate change models predict increasing drought.	Moderate.
E	Small Populations.	Low	Low	7	Low	Loss of genetic diversity.	Increase if wildfires & cheatgrass increase.	None, impact only

Listing factors include: (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.
+ indicates a possible increase in the future.
? indicates significant uncertainty.

Moderate threats to *Astragalus microcymbus* include: Residential and urban development; livestock, deer, and elk use; climate change; and increasing periodic drought. Of these, the threats from climate change are the most likely to increase in the future. In addition, we are particularly concerned about nonnative invasive plants, especially cheatgrass. Cheatgrass is expanding in the Gunnison Basin. Furthermore, the dry south-facing slopes where *A. microcymbus* is found are the warmest and, therefore, the most vulnerable to cheatgrass invasion in the Gunnison Basin.

Although wildfire is ranked as a low threat, this factor may increase in the future. Wildfire is likely to increase because of its link to nonnative invasive plants and habitat degradation. Small mammal herbivory, because of the significant effect to seed set, is considered a low to moderate threat. All other threats to *Astragalus microcymbus* are currently regarded as impacts and not threats to the species' continued existence.

While we have considered all the threats here separately, many are interrelated. For example, many of these threats contribute to habitat degradation. Cheatgrass seldom spreads without some sort of disturbance. Wildfire frequency does not increase without more people to start the fires, more lightning, or increases in nonnative invasive plants (especially cheatgrass) and may be exacerbated by climate change. We find the overall threat to *Astragalus microcymbus* from all of these threats to be moderate; although we carefully considered a high threat ranking when we considered the threats acting together.

Finding

As required by the Act, we considered the five factors in assessing whether *Astragalus microcymbus* is endangered or threatened throughout all or a significant portion of its range. We carefully examined the best scientific and commercial information available regarding the past, present, and future threats faced by the species. We reviewed the petition, information available in our files, other available published and unpublished information, and we consulted with *A. microcymbus* experts and other Federal and State agencies.

Astragalus microcymbus numbers are declining. The most recent population viability analysis predicts that all four life-history monitoring plots will be lost by the year 2030, although more recent data extends this date out into the future (DBG 2008, p. 9). Most counts in the last 5 years have been far less than they were in the 1980s and 1990s, generally fewer than 150 individuals with only 1 count over 400 individuals (USFWS 2010a, pp. 1–4).

We do not fully understand the reasons for the decline in *Astragalus microcymbus* numbers. Some of the variability in population counts can be explained by precipitation and temperature patterns (DBG 2010a, p. 6). However, these patterns do not explain all the variation. For example, we did not see *A. microcymbus* numbers increase substantially in 2005 when there was much more precipitation than average (DBG 2010a, pp. 11–12). Nor do these patterns explain why site counts continue to be much less than they were in the 1980s and 1990s. Sites do not appear to move significantly. Although the footprint of many sites has shrunk, the plants are still located in approximately the same areas as they were in the 1980s, suggesting that *A. microcymbus* locations are fairly static. This is not surprising given that *A. microcymbus* habitat seems to be somewhat limited on the landscape.

This status review identified threats to the *Astragalus microcymbus* rangewide attributable to Factors A, C, D, and E. The primary threats to the species include recreation, roads, and trails; and habitat fragmentation and degradation. Recreational use continues to increase. Habitat degradation, caused by all of the threats interacting together, poses a significant risk to the species. Moderate threats include residential and urban development; livestock, deer, and elk use; climate change; inadequate

regulatory mechanisms; and periodic drought. The threat from nonnative invasive plants is increasing quickly. Small mammal herbivory is considered a low to moderate threat, and wildfire is considered a low threat. All of these threats are impacting *A. microcymbus,* and could be contributing to the species' decline. The species' close proximity to the town of Gunnison and the fact that 25 percent of the species rangewide distribution is on private lands subject to development makes future development a very real threat. Cheatgrass will likely invade the hot dry habitats of *A. microcymbus* before any other habitats in the Gunnison Valley. Livestock, deer, and elk use are causing habitat degradation. Because we know *A. microcymbus* responds unfavorably to warmer spring temperatures and less spring precipitation—conditions that climate change models predict—we expect negative impacts similar to the declines we've seen with these climatic conditions in the long-term life history study. Small mammal herbivory affects seed production, and drought negatively affects population numbers. We acknowledge there are uncertainties regarding: (1) The reasons for the decline of *A. microcymbus,* (2) the rate of increase in future recreation and the management direction for the Hartman Rocks Recreation Area; (3) the rate and extent of cheatgrass' spread; (4) when and to what extent development will occur; (5) the return interval of future wildfires; and (6) the effects of increasing temperatures and changing precipitation patterns. Many of these uncertainties are temporal in nature.

On the basis of the best scientific and commercial information available, we find that listing of the *Astragalus microcymbus* as endangered or threatened is warranted. We will make a determination on the status of the species as endangered or threatened when we do a proposed listing determination. However, as explained in more detail below, an immediate proposal of a regulation implementing this action is precluded by higher priority listing actions, and progress is being made to add or remove qualified species from the Lists of Endangered and Threatened Wildlife and Plants.

We have reviewed the available information to determine if the existing and foreseeable threats render the species at risk of extinction now such that issuing an emergency regulation temporarily listing the species as per section 4(b)(7) of the Act is warranted. We determined that issuing an emergency regulation temporarily listing the species is not warranted for this species at this time because the threats acting on the species are not immediately impacting all the species across its range to the point where the species will be immediately lost. However, if at any time we determine that issuing an emergency regulation temporarily listing *Astragalus microcymbus* is warranted, we will initiate this action at that time.

Listing Priority Number

The Service adopted guidelines on September 21, 1983 (48 FR 43098), to establish a rational system for utilizing available resources for the highest priority species when adding species to the Lists of Endangered or Threatened Wildlife and Plants or reclassifying species listed as threatened to endangered status. These guidelines, titled "Endangered and Threatened Species Listing and Recovery Priority Guidelines" address the immediacy and magnitude of threats, and the level of taxonomic distinctiveness by assigning priority in descending order to monotypic genera (genus with one species), full species, and subspecies (or equivalently, distinct population segments of vertebrates).

As a result of our analysis of the best available scientific and commercial information, we assigned *Astragalus microcymbus* a Listing Priority Number (LPN) of 8, based on threats that are of moderate magnitude and are imminent. These threats include the present or threatened destruction, modification, or curtailment of its habitat; predation; the inadequacy of existing regulatory mechanisms; and other natural or man-made factors affecting its continued existence. We consider the threats that *A. microcymbus* faces to be moderate in magnitude because the major threats (recreation, roads, and trails; inadequacy of existing regulatory mechanisms; and habitat fragmentation and degradation), while serious and occurring rangewide, do not collectively rise to the level of high magnitude. For example, the last known populations are not about to be completely lost to development. These threats are not likely to eliminate the species in the immediate future. The threats the species faces are, however, significant. Recreational impacts are likely to increase given the close proximity of *A. microcymbus* to the town of Gunnison and the increasing popularity of mountain biking, motorcycling, and all-terrain vehicles. Furthermore, the Hartman Rocks Recreation Area draws users and was designated atop 40 percent of the *A. microcymbus* "units". The overall threat from the inadequacy of existing regulatory mechanisms is high given that 25 percent of the habitat has no protections and that Federal regulations allowed a recreation area to be developed atop the species. Recreation, as well as most of the other threats to *A. microcymbus,* leads to habitat fragmentation and degradation. These threats are ongoing and, in some cases (such as invasive nonnative species), are considered irreversible because large-scale invasions cannot be recovered to a native functioning ecosystem given current management efforts. Our rationale for assigning *A. microcymbus* an LPN of 8 is outlined below.

Under the Service's guidelines, the magnitude of threat is the first criterion we look at when establishing a listing priority. The guidance indicates that species with the highest magnitude of threat are those species facing the greatest threats to their continued existence. These species receive the highest listing priority. We consider the threats that *A. microcymbus* faces to be moderate in magnitude because the major threats (recreation, roads, and trails; inadequacy of existing regulatory mechanisms; and habitat fragmentation and degradation), while serious and occurring rangewide, do not collectively rise to the level of high magnitude. For example, the last known populations are not about to be completely lost to development.

Under our LPN guidelines, the second criterion we consider in assigning a listing priority is the immediacy of threats. This criterion is intended to ensure that the species facing actual, identifiable threats are given priority over those species facing potential threats or species that are intrinsically vulnerable but are not known to be presently facing such threats. We consider the threats imminent because we have factual information that the threats are identifiable and that the species is currently facing them in many portions of its range. These actual, identifiable threats are covered in great detail in Factors A, C, D, and E of this finding. Almost all of the threats are ongoing and, therefore, are imminent, although the likelihood varies (Table 4). In addition to their current existence, we expect these threats to continue and likely intensify in the foreseeable future.

The third criterion in our LPN guidelines is intended to devote resources to those species representing highly distinctive or isolated gene pools as reflected by taxonomy. *Astragalus microcymbus* is a valid taxon at the species level and, therefore, receives a higher priority than subspecies, but a lower priority than species in a monotypic genus. Therefore, we

assigned *Astragalus microcymbus* an LPN of 8.

We will continue to monitor the threats to *Astragalus microcymbus,* and the species' status on an annual basis, and should the magnitude or the imminence of the threats change, we will re-visit our assessment of LPN.

Because we have assigned *Astragalus microcymbus* an LPN of 8, work on a proposed listing determination for *A. microcymbus* is precluded by work on higher priority listing actions with absolute statutory, court-ordered, or court-approved deadlines and final listing determinations for those species that were proposed for listing with funds from FY 2010. This work includes all the actions listed in the tables below under expeditious progress (*see* Tables 9 and 10).

Species Information—*Astragalus schmolliae*

Taxonomy and Species Description

Astragalus schmolliae was first collected in Montezuma County, southwestern Colorado, in 1890. It was formally described as a species in 1945, when C.L. Porter named it after Dr. Hazel Marguerite Schmoll (Porter 1945, pp. 100–102; Barneby 1964, pp. 277–278; Isely 1998, p. 417). *Astragalus schmolliae* is a member of the family Fabaceae (legume family). The perennial plants are upright, 30 to 60 cm (12 to 24 in.) tall with one to several stems branching from an underground root crown. Its leaves are typical of many of the legumes, with 11 to 20 small leaflets on a stem. Leaves and stems are ash-colored due to a covering of short hairs. Flowers are creamy white and borne on upright stalks that extend above the leafy stems. The fruit is a pod, 3 to 4 cm (1 to 1.5 in.) long, covered with flat, stiff hairs, pendulous and curving downward (Barneby 1964, pp. 277–278). The deep taproot grows to 40 cm (16 in.) or more (Friedlander 1980, pp. 59–62).

Biology, Distribution, and Abundance

Astragalus schmolliae plants emerge in early spring and usually begin flowering in late April or early May. Flowering continues into early or mid-June (Friedlander 1980, p. 63, Peterson 1981, p. 14). Fruit set begins in late May and occurs through June, and by late June most fruits have opened and released their seeds, while still attached to the plant. The typical plant lifespan of *A. schmolliae* is unknown, but individuals are thought to live up to 20 years (Colyer 2002 in Anderson 2004, p. 11). During very dry years, as observed in 2002, the plants can remain dormant with no above-ground growth (Colyer 2003 in Anderson 2004, p. 11). Most of the plants produce above-ground shoots and flower profusely during growing seasons following wet winters.

Astragalus schmolliae requires pollination by insects to set fruit. Flowers require a strong insect for pollination, such as a bumblebee, because the insect must force itself between the petals of the butterfly-shaped flowers. Pollinators observed on *A. schmolliae* include several species of bumblebees (*Bombus* spp.) and beeflies (*Bombylius* spp.) (Friedlander 1980, p. 63).

The habitat for *Astragalus schmolliae* is mature pinyon-juniper woodland of mesa tops in the Mesa Verde National Park (MEVE) area at elevations between 1,981 to 2,286 meters (6,500 to 7,500 feet) (Anderson 2004, p. ii). The plants are found in both sunny and shaded locations (Peterson 1981, p. 12), primarily on deep, reddish loess soils, and are generally less common near cliff edges and in ravines where the soil is shallower. No *A. schmolliae* plants are found in the mountain shrublands at the upper elevations on MEVE.

The CNHP prepared a population status survey of *Astragalus schmolliae* in 2004 for MEVE. The report is based on field surveys in 2001 and 2003 of the distribution, density, soil characteristics, seed viability and germinability, and recruitment in burned and unburned areas of MEVE. This study provides the primary source of information for our evaluation of the status and threats to *A. schmolliae,* and is cited throughout this finding as Anderson (2004).

Astragalus schmolliae habitat collectively occupies approximately 1,619 ha (4,000 ac) in MEVE and on the Ute Mountain Ute Tribal Park (Tribal Park). About 809 ha (2,000 ac) are in MEVE on Chapin Mesa including Fewkes and Spruce Canyons, on the West Chapin Spur, and on Park Mesa (CNHP 2010, pp. 12–19; Anderson 2004, p. 25, 30; MEVE 2010, p.1). Occupied habitat on Chapin Mesa in the Tribal Park south of MEVE probably covers another 809 ha (2,000 ac), where surveys have not been done (Anderson 2004, p. 6; Friedlander 1980, p. 53; CNHP 2010, pp. 20–21). Abundant plants were observed on the tribal land in 1987 (Colyer 2002, in Anderson 2004, p. 4; CNHP 2010, p. 21). The total number and average density of plants on the Tribal Park are not known, because no inventories have been completed (Clow 2010, pers. comm.).

TABLE 7—*Astragalus schmolliae* OCCURRENCES

[CNHP 2010, pp. 1–21; Anderson 2004, p. 6, 30]

Occurrence	Ha (Ac)	Plants 2001	Plants 2003	Density 2001	Density 2003	CNHP Rank*
Chapin Mesa, Fewkes & Spruce Canyons (MEVE).	785 (1,939)	454,733	277,462	.06 per sq meter	.037 per sq meter	A
Park Mesa (MEVE)	3.3 (8)	3,605	2,199	.110	.067	B
West Chapin Spur (MEVE).	21 (52)	24,448	14,913	.117	.071	B
MEVE totals	809 (2,000)	482,786	294,499	.....	.....	
Ute Mtn. Ute Tribal Park	809 (2,000) est.	NA	NA	NA	.....	H
Total range	1,619 (4,000)	.....	.....	.....	.....	

*Occurrence rankings are categorized from A through D, with "A" ranked occurrences generally representing higher numbers of individuals and higher quality habitat, and "D" ranked occurrences generally representing lower numbers of individuals and lower quality (or degraded) habitat. A historical rank (H) indicates an occurrence that has not been visited for more than 20 years.

The distribution of *Astragalus schmolliae* is typical of narrow endemics, which are often common within their narrow range on a specific habitat type (Rabinowitz 1981 in Anderson 2004, p. 3). However, *A. schmolliae* is unusual because similar habitat is widespread on nearby mesas where the species has not been found. Thus, the causes of its rarity are unknown. Its distribution may be limited by habitat variables that are not yet understood (Anderson 2004, p. 8).

Astragalus schmolliae is considered critically imperiled globally (G1) by the CNHP, a rank used for species with a restricted range, a global distribution consisting of less than five occurrences, a limited population size, or significant threats (CNHP 2006, p. 1).

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533) and implementing regulations (50 CFR 424) set forth procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In making this 12-month finding, we evaluated the best scientific and commercial information available, including information acquired during the status review. Our evaluation of this information is presented below.

In considering what factors might constitute threats to a species, we must look beyond the exposure of the species to a factor to evaluate whether the species may respond to the factor in a way that causes actual impacts to the species. If there is exposure to a factor and the species responds negatively, the factor may be a threat and we attempt to determine how significant a threat it is. The threat is significant if it drives, or contributes to, the risk of extinction of the species such that the species warrants listing as endangered or threatened as those terms are defined in the Act.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The following potential factors that may affect the habitat or range of *Astragalus schmolliae* are discussed in this section, including: (1) Wildfire; (2) invasive nonnative plants; (3) post-fire mitigation; (4) wildfire and fuels management; (5) development of infrastructure; (6) drought and climate change.

Wildfire

Six large wildfires burned within MEVE between 1989 and 2003, and extensive portions of those burned areas have been invaded by nonnative plant species (weeds) (Floyd *et al.* 2006, p. 247). Small, lightning-caused fires are frequent in MEVE. The annual average number of fire starts between 1926 and 1969 was 5 per year, which increased to 18 per year between 1970 and 1997. Most of the fires started in the pinyon-juniper woodlands and burned less than 1 ha (2.5 ac). The southern half of MEVE was covered with dense, old-growth pinyon-juniper woodlands that had not burned for several centuries. However, the 20th century has seen several spectacular wildfires that burned extensive portions of these pinyon-juniper woodlands (Floyd *et al.* 1999, p. 149). Best estimates for "natural" fire turnover times in MEVE are about 100 years for shrubland vegetation and about 400 years for pinyon-juniper vegetation. Although the disturbance regime for this system apparently remains within the historical range of variability, the recovery processes following fire have been dramatically altered from historical processes (Floyd *et al.* 2006, p. 248). Recurrent fires favor clonal, resprouting shrub species such as *Quercus gambelii* (gambel oak), *Amelanchier utahensis* (Utah serviceberry), *Symphoricarpos oreophilus* (mountain snowberry), *Fendlera rupicola* (cliff fendlerbush), and *Rhus trilobata* (three-leaf sumac), and gradually eliminate the fire-sensitive pinyon and juniper (Floyd *et al.* 2000, p. 1667, 1677). *A. schmolliae* does not grow in the shrub-dominated areas of MEVE now, and we cannot predict the long- term success of the species following removal of the pinyon-juniper overstory.

Landscape modeling of the effects of projected cheatgrass increase on fire frequency in MEVE indicates the potential for frequent reburning. Projections show a fire rotation of about 45 years for MEVE. Such a frequent disturbance regime would be far outside the historical range of variability for the pinyon-juniper, and would likely impact or eliminate many native plant species (Turner *et al.,* p. 40). We have no data to indicate whether *Astragalus schmolliae* will successfully adapt to a post-fire habitat of open clearings between shrubs, and competition from cheatgrass, thistles, and native grasses versus a pinyon-juniper dominated community.

From July 29 to August 4, 2002, the Long Mesa Fire burned 1,053 ha (2,601 ac) on Chapin and Park Mesas, which included about 306 ha (756 ac) of *Astragalus schmolliae* habitat (Anderson 2004, p. 28). Between 1996 and 2008, 308 ha (762 ac) of habitat were burned by wildfires, and 6 ha (15 ac), by prescribed burns (MEVE 2010, pers. comm.). On Tribal Park habitat, several small fires appear to have burned a total of about 23 ha (57 ac) (Glenne 2010, map). Altogether these recent fires have impacted about 21 percent of the total habitat for the species.

The average density per square meter of *Astragalus schmolliae* plants on monitoring plots in MEVE decreased 39 percent from 2001 to 2003 (Anderson 2004, p. 30, 37). Density declined in both burned and unburned transect segments between 2001 and 2003. The decline in density was slightly lower in burned transect segments than in unburned, but the difference in density in 2003 between burned and unburned transect segments was not statistically significant, suggesting that burning did not significantly impact plant mortality, nor did it result in any benefit to the species. The 39 percent decline in density in MEVE was attributed to the 2002 drought and prolonged dormancy, because the plants do not send up new growth during very dry years (Anderson 2004, p. 37).

No seedlings were observed in 2001 on burned or unburned habitat, but they were observed in 2003 throughout the range of *Astragalus schmolliae* in MEVE, except at the population on northern Park Mesa that was severely burned in 1996 (Anderson 2004, p. 39). There were no clear differences in seedling success between burned and unburned areas during early summer surveys, but survivorship of seedlings through their first summer could not be determined (Anderson 2004, p. 48). Viability of seeds collected in 2003 was between 94 and 100 percent (Anderson 2004, p. 49). The patterns of seed germination are suggestive of a species that maintains a persistent seed bank (Anderson 2004, p. 47). The longevity of seeds of *A. schmolliae* is not known, but many legumes, including members of *Astragalus,* have seeds as long-lived as

97 years (Anderson 2004, p. 48). Recruitment appears to be highly episodic and is probably greatest in years that are moist in March through May (Anderson 2004, p. iv). Plants in areas burned in 2002 displayed higher reproductive effort and vigor, and produced approximately 241 times more seeds per plant than did plants in unburned areas. It is likely that this resulted in part from depletion of pollinator resources in unburned areas. Plants in areas burned in 1996 on Park Mesa had very high vigor in 2003 (possibly due to high soil nitrate levels after fire) but did not set fruit although flowers were produced and insect visitation was observed (Anderson 2004, p. iv).

Seed bank studies for other *Astragalus* species indicate that the group generally possesses hard impermeable seed coats with a strong physical germination barrier. As a result, the seeds are generally long-lived in the soil and only a small percentage of seeds germinate each year (Morris *et al.* 2002, p. 30). However, we do not know if the seed germination strategy for other *Astragalus* species is comparable to that employed by *A. schmolliae.*

The growth habit of *Astragalus schmolliae* suggests that it is tolerant of fire, with its deep taproot and shallowly buried root crown, to which the plant dies back during winter months. Plants can resprout following a low-intensity fire if the root crown is not damaged (Floyd-Hanna *et al.* 1997, 1998). Reproductive effort and fecundity were clearly higher in areas burned in 2002, and vigor also appeared to be greater. However, net reproductive success in post-fire environments has not been monitored, so it is unclear whether fire effects have a negative or beneficial initial impact on *A. schmolliae.* While fire may confer some short-term benefits to plants in burned areas (possibly at the expense of reproductive success in unburned areas if depletion of pollinator resources is responsible for poor fecundity), it may have long-term detrimental impacts (Anderson 2004, p. 64).

We conclude that the direct effects of fire on *Astragalus schmolliae* are both positive and negative. Plants burn to the ground and then resprout the following spring if the fire is not too intense, but then have competition from weeds and grasses. We do not know whether net reproduction after fire is positive. Given the high frequency and volume of fires in the area it is highly likely that new fires will burn more of the habitat for *A. schmolliae.* All of the burned and remaining unburned habitat on MEVE and the Tribal Park is at risk of burning within the foreseeable future. Although we remain concerned about the potential impacts of recurring fires, the best available information indicates that the direct effects of wildfires do not pose a threat to *A. schmolliae.* The indirect effect of facilitating invasion of the habitat by cheatgrass does pose a significant threat to the species.

Invasive Nonnative Plants

As discussed above, the main threat to the species is the indirect effect of invasion by nonnative plant species (weeds). This invasion is facilitated by the increased frequency of burns as well as the clearing of areas within occupied *Astragalus schmolliae* habitat (CNHP 2006, p. 4). In MEVE, large wildfires that occurred earlier in the twentieth century (1934, 1959, 1972) were not associated with weed invasion (Floyd *et al.* 1999, p. 148), but the pinyon-juniper forests that have burned extensively in the past two decades are being replaced by significant invasions of weedy species, especially *Bromus tectorum* (cheatgrass), *Carduus nutans* (musk thistle), and *Cirsium arvense* (Canada thistle) (Floyd *et al.* 2006, p. 1).

Since 1996, MEVE has seen more large fires and more cumulative area burned than occurred during the previous 200 years (Romme *et al.* 2006, p. 3). This recent increase in fire activity is a result of severe drought conditions preceded by wet climatic conditions and increasing fuel load due to fire suppression in the pinyon-juniper woodlands, all coinciding with the natural end of a long fire cycle (Floyd *et al.* 2006, p. 247). A recent development in the post-fire habitat response is the remarkably rapid spread of cheatgrass. This weedy winter annual germinates in the fall, grows slowly during the winter, and then grows rapidly in the early spring. By early summer it has set seed and died, creating a continuous fuel bed of quick-drying, flashy fine fuel that can readily carry fire, even without wind. Cheatgrass has been in MEVE for many years. However, it was never widespread until 2000, when unusually warm dry summers and winters, coupled with heavy fall rains, have allowed cheatgrass to rapidly expand its range, especially in places where fire or other disturbances have created bare ground (Romme *et al.* 2006, p. 3). Mature pinyon-juniper woodlands are highly vulnerable to post-fire weed invasion (Floyd *et al.* 2006, p. 254). Cheatgrass is now a dominant species in much of the area burned in MEVE (Romme *et al.* 2006, pp. 2–3) and it has inundated the burned and disturbed portions of *Astragalus schmolliae* habitat on Chapin Mesa (Hanna *et al.* 2008, p. 18). The highest infestation occurred in an area that had burned both in the 1996 and the 2002 fires on Park Mesa. This had been an old-growth pinyon-juniper woodland before the 1996 fire and was seeded with native grasses. After re-burning in 2002, this area has been inundated by cheatgrass (Hanna *et al.* 2008, p. 9). Given the seasonal overlap of *A. schmolliae* seedling growth with the peak growth of cheatgrass, it is likely that the presence of cheatgrass in populations of *A. schmolliae* compromises its viability (Anderson 2004, pp. 60–61).

In 1980, cheatgrass was found in 8 percent of survey samples in picnic grounds and 0 percent of undisturbed samples (Friedlander 1980, pp. 75–76). *Carduus nutans* was not found in either disturbed or undisturbed ground in 1980, but it was particularly invasive in burned areas of MEVE by 1999 and was aggressively invading areas occupied by *Astragalus schmolliae* (Floyd-Hanna *et al.* 1999, Romme *et al.* 2003).

We consider the invasion of nonnative weedy plants, particularly cheatgrass, to be a threat of high magnitude to *Astragalus schmolliae* because: (1) Cheatgrass has invaded all of the burned and disturbed habitat of *A. schmolliae in* MEVE, covering at least 40 percent of its entire range; (2) it competes with seedlings and resprouting adult plants for water and nutrients; (3) no landscape scale successful control methods are available; and (4) the proven ability of cheatgrass to increase fire frequency, thereby facilitating further rapid spread, threatens both burned and previously unburned occupied habitat. We conclude that cheatgrass invasion is likely to cause fire frequency to increase, with the result that only small patches of undisturbed habitat will remain for *A. schmolliae* within MEVE. The extent of cheatgrass invasion on the Tribal Park is unknown, because no surveys have been completed.

Post-Fire Mitigation

Various post-fire mitigation actions (aerial seeding of native grasses, mechanical removal, herbicides, and bio-control) have been effective in reducing the density of weeds after fire, but none of these techniques has prevented the weeds from becoming major components of the post-fire plant community. Post-fire mitigation activities were conducted in MEVE under the Burned Area Emergency Rehabilitation program in 1996 to 1997, to prevent weed invasion and severe erosion, and to encourage native plant species. Aerial seeding of native grasses

was applied intensively in the old-growth pinyon-juniper community. The density of *Carduus nutans* was significantly reduced by seeding in burned areas. There has been no evidence that the diversity of native forbs has declined by introducing native perennial grasses (Floyd *et al.* 1999, p. 155), but *Astragalus schmolliae* was not specifically monitored. Therefore, we are unsure if these efforts to prevent weed invasion negatively affect *A. schmolliae.*

Seeding of native grasses has not prevented the spread of cheatgrass into burned areas; instead, cheatgrass invasion has increased (Floyd *et al.* 2006, p. 254). If cheatgrass continues to spread into recently burned areas in MEVE, it is likely to alter the previous regime of infrequent fires occurring during extremely dry periods to a new regime of frequent fires. Because the native flora is adapted to the historical fire regime, a change of this kind could produce rapid and irreversible degradation of native vegetation in the park (Floyd *et al.* 2006, p. 257). We believe this could be the case in *Astragalus schmolliae* habitat.

Releases of two biological control weevils on *Carduus nutans* have been highly effective in reducing the density, vigor, and net fecundity of the thistle plants in *Astragalus schmolliae* habitat on MEVE. Aerial seeding with native grass species has provided effective competition for some of the weeds and improved the proportion of native to invasive plants (Nelligan 2010, p. 2).

Post-fire weed control by aerial seeding of native grasses, mechanical removal, herbicides, and bio-control has reduced competition by invasive weeds other than cheatgrass, and there is little documentation of negative effects on *Astragalus schmolliae.* We consider the impacts of these activities to be low, not rising to the level of a threat to the species.

Wildfire and Fuels Management

Wildfire management at MEVE includes the creation of fire breaks, fire lines, and staging areas, all of which remove the mature pinyon-juniper woodland habitat for *Astragalus schmolliae.* A cattle fence 4.2 km (2.6 mi) long separates the northern half of the species' habitat on MEVE from the southern half on the Tribal Park. MEVE created a fire break about 30 m (100 ft) wide along this fence by cutting all vegetation to ground level. The break covers about 14 ha (34 ac), or 0.9 percent of the species total habitat, at the center of distribution for *A. schmolliae.* On the Tribal Park side of the fence, the pinyon-juniper woodland is cut in a mosaic pattern, leaving trees and clumps of trees standing with cleared areas around them. This fire break covers about 189 ha (467 ac), or 12 percent of the species' total range. Response of *A. schmolliae* to the two different treatments has not been compared. Fire breaks also are created by prescribed burns. Mechanical removal and prescribed burning together have altered about 19 percent of the species total range, including the fenceline fire breaks described above (MEVE 2010, pers. comm.).

The ecological conditions for *Astragalus schmolliae* within the cleared areas are different from its typical pinyon-juniper woodland habitat. Cleared areas are exposed to more sun and wind that dry the soil and the *A. schmolliae* seedlings. In addition to invasion by cheatgrass, removal of woody vegetation appears to result in competitive release of native grasses. In sites where no seeding has been done, removal of woody vegetation favors *Poa fendleriana* (muttongrass), the most common grass species on Mesa Verde (Anderson 2004, p. 73). This response is seen in mechanical fuels reduction areas on Chapin Mesa, where cover of *P. fendleriana* can approach 75 percent (Anderson 2004, p. 60). Density, reproductive effort and vigor of *A. schmolliae* appears low in these areas, although there are few quantitative data with which to compare density. Plants were growing among large, crowded bunches of *P. fendleriana* and appeared small and unhealthy (Anderson 2004, p. 73). This effect is probably due to competition with *P. fendleriana* for water and nutrients. On unburned Chapin Mesa south of MEVE, density of *A. schmolliae* was second only to *P. fendleriana,* as a dominant understory plant (Colyer 2002, in Anderson 2004, p. 7). This may indicate that *A. schmolliae* can recover from the initial impact of native grass competition following removal of the overstory woodland.

Fuels management activities have had some direct and indirect impacts to *Astragalus schmolliae* plants and habitat. Fuels management activities occur in the summer and fall when impacts to mature *A. schmolliae* plants are diminished or negligible because the seeds have matured and plants are dying back for the season. Direct impacts to the plants, such as trampling during the cutting and hauling out of wood and slash and scorching during prescribed burns, are short-term because the plants will be able to resprout the following spring. Impacts to juvenile plants are not documented. Mechanical fuels reduction activities result in a low to moderate level of surface disturbance, which we believe results in little direct impact to *A. schmolliae.* However, the effects of fuels management activities tend to facilitate nonnative species invasion. In addition to cheatgrass, *Carduus nutans* appears to thrive on the disturbance created by fuels management, and to outcompete *A. schmolliae* (Floyd-Hanna *et al.* 1999). Numerous *C. nutans* plants were found in all areas visited where mechanical fuels reduction activities took place (Anderson 2004, p. 73). The canopy of *A. schmolliae* can act as a seed trap for *C. nutans,* which greatly increases the likelihood of negative impacts to *A. schmolliae* from competition (Anderson 2004, pp. 63, 70).

Clearing for fuel reduction impacts *A. schmolliae* in the following ways: (1) Above-ground stems are directly removed; (2) plants that resprout the following spring have less water available because the soil dries due to exposure to sun and wind; and (3) invasive weeds, the native grass *P. fendleriana,* and seeded native grasses provide increased competition. However, we have no data that indicates the degree to which these impacts are occurring or will occur in the future. Because clearing and prescribed burns affect 19 percent of the range of *A. schmolliae,* we believe that clearing or burning for fire management may have a detrimental effect on the species. As with wildfire, the indirect effect of facilitating invasion of the habitat by cheatgrass poses a threat to the species because it increases the likelihood of more frequent fires.

Development of Infrastructure

As of 1980, about 17.7 ha (44 ac) of *Astragalus schmolliae* habitat was graded or paved for roads within MEVE, which was 1.7 percent of the habitat known in the park at that time (Friedlander 1980, p. 78). As of 2010, about 36 ha (90 ac) or 4.5 percent of the known range of *A. schmolliae* within MEVE is classified as hardened surfaces, i.e., roads, buildings, parking lots, water tanks, trails, etc. (MEVE 2010, p. 1). A recent impact was the installation of thousands of meters of underground fiber optic cables throughout the developed areas of the park (Anderson 2004, p. 70; Nelligan 2010, p. 2). Information on the number of plants destroyed or new recruits that appeared following the installation is not available (San Miguel 2010a, pers. comm.).

It is likely that a small percentage of the *Astragalus schmolliae* population has been eliminated during the development of visitor facilities in

MEVE. Regular maintenance and construction projects at MEVE will continue to result in a small amount of plant mortality. Trampling of plants by people using trails, roads, and picnic areas in the developed portion of MEVE also eliminates a small number of plants (Nelligan 2010, p. 2). Likewise on the Tribal Park, most foot traffic is limited to routes used by escorted tour groups and, therefore, likely to have a very small impact on the species.

Trampling of plants by visitors and staff is an ongoing impact that does not rise to the level of a threat because it affects plants in a very limited portion of the species range in MEVE and in the Tribal Park. *Astragalus schmolliae* may recover from this kind of disturbance if the below-ground parts are not damaged, or if undamaged plants remain nearby to provide a seed source and the disturbance is not constantly repeated or followed up with additional disturbances. One attempt to transplant mature plants that were growing in a planned construction area was unsuccessful because the taproots were severed (Nelligan 2010, p. 2).

Construction of new roads, a visitor center, and campground are ongoing in MEVE. Most of the new construction is outside of *Astragalus schmolliae* habitat. Most of the disturbance in occupied habitat is related to a water pipeline, and because it is directionally drilled from one pad of about 4 by 24 m (14 by 80 ft) alongside the park road, the impact on the plants is negligible (San Miguel 2010b, pers. comm.).

The habitat for *Astragalus schmolliae* on tribal land is within the Tribal Park, which is managed for protection of its cultural and natural resources. It is an undeveloped area without surfaced roads or permanent facilities. We are not aware of any development activities on the Tribal Park that would impact *A. schmolliae* (Mayo 2010, pers. comm.).

Overall, the impact of existing development appears low, impacting about 2.3 percent of the species' entire range. MEVE will likely continue to locate major facilities outside of *Astragalus schmolliae* habitat, and minimize infrastructure within the habitat in the future. Most of the habitat within MEVE is protected from development, being within a National Park. Likewise, the Tribal Park is likely to remain undeveloped (Mayo 2010, pers. comm.). Therefore, development does not appear to constitute a threat to *A. schmolliae,* now nor is it likely to in the foreseeable future.

Drought and Climate Change

Drought may affect *Astragalus schmolliae.* In 2002, severe drought caused most *A. schmolliae* individuals to remain dormant (Anderson 2004, p. 4). The total annual precipitation measured at MEVE in 2002 was 28 cm (11 in.), well below the average of 44 cm (17.5 in.) for 1948 to 2003. However, there were 5 years between 1948 and 1989 in which MEVE received less than 28 cm (11 in.). Tree ring analysis indicates that droughts were as common during the Ancestral Puebloan occupation of MEVE, from approximately A.D. 600 to A.D. 1300, as they are today. It is likely that drought is common enough that *A. schmolliae* can recover from its effects (Anderson 2004, p. 35), provided that severity and duration of drought does not exceed historical levels, or that threats such as weed invasion do not increase significantly as a result. Periodic drought causes *A. schmolliae* plants and seedlings to dry out during a given year, and contributes to increased fire frequency and weed invasion. We believe that drought has a low-level direct impact on the species. It also facilitates cheatgrass invasion and increased fire frequency and therefore is a threat to the species.

Projections for changes in climate within *Astragalus schmolliae* habitat are similar to those discussed above for *Astragalus microcymbus.* Overall, future projections for the Southwestern United States include increased temperatures, more intense and longer-lasting heat waves, and an increased probability of drought, that are worsened by higher temperatures, heavier downpours, increased flooding, and increased erosion (Karl *et al.* 2009, pp. 129–134). Projections for western Colorado indicate that temperature could increase an average of 2.5 °C (4.5 °F) by 2050 (UCAR 2009, pp. 1–14).

The increasing frequency of large-scale fires is largely due to periodic drought conditions preceded by years of wet climatic conditions that allowed heavy fuel loads to accumulate (Floyd *et al.* 2006, p. 247). The specific combination of a wet season followed by drought, which is likely to be exacerbated by climate change, is unpredictable at this time. We expect that *A. schmolliae* will be affected negatively by climate change effects on precipitation, but the available information is too speculative to conclude that climate change now threatens the species.

Summary of Factor A

The highest threat to *Astragalus schmolliae* habitat is the invasion of nonnative cheatgrass following wildfires, prescribed fires, and fire break clearings. Recent wildfires have burned 21 percent of the pinyon-juniper woodland habitat for the species. Another 19 percent has been burned and/or cleared to discourage further spread of wildfires within MEVE. Dense stands of cheatgrass have invaded all of these areas, which cover 53 percent of the habitat on MEVE, 40 percent of the entire range of the species. Cheatgrass is highly flammable and greatly increases fire frequency on both burned and nearby unburned but disturbed habitat. Although mature *A. schmolliae* plants recover strongly after fire, cheatgrass competes with seedlings for water and nutrients, and we are unsure of their long-term reproductive success in open areas exposed to drying sun and wind. Frequent fires are likely to prevent recovery of the pinyon-juniper woodland. There are no landscape-scale methods known to be effective in controlling cheatgrass. Therefore, we consider the dominance of cheatgrass in occupied *A. schmolliae* habitat to be a significant threat to the long-term survival of the species. Wildfires, prescribed fires, and clearings for fire breaks are considered a moderate threat to the species because they modify the habitat and facilitate the invasion of cheatgrass.

Drought facilitates increased fire frequency and, therefore, is found to be a threat to the species. Climate change may exacerbate the threat of cheatgrass invasion and more frequent wildfires, but we cannot foresee whether its effects are likely to threaten the continued existence of *Astragalus schmolliae.*

The impact of infrastructure development and visitor use is low. About 36 ha (90 ac) of *Astragalus schmolliae* habitat on MEVE have been used for roads, buildings, parking lots, etc., which is 2.3 percent of the species' entire range. No permanent development has occurred on the Tribal Park. Existing and foreseeable future development is considered a minor impact that does not threaten the continued existence of the species.

Post-fire weed control by aerial seeding of native grasses, mechanical removal, herbicides, and bio-control has reduced competition by invasive weeds other than cheatgrass, and there is little documentation of negative effects on *Astragalus schmolliae.* We consider the impacts of these activities to be low, not rising to the level of a threat to the species.

We find that *Astragalus schmolliae* is threatened by the present or threatened destruction, modification, or curtailment of the species' habitat or range, and these threats are expected to continue or increase in the foreseeable future.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

We are not aware of any threats involving the overutilization or collection of *Astragalus schmolliae* for any commercial, recreational, scientific, or educational purposes. Therefore, we do not consider overutilization to be a threat to the species now, nor is it expected to become so in the foreseeable future.

Factor C. Disease or Predation

No diseases are known to affect *Astragalus schmolliae.* Therefore, we do not consider disease to be a threat to the species now, nor is it expected to become so in the foreseeable future.

Herbivory

Seed predation by snout beetles or weevils caused loss of seeds in about 12.5 percent of *Astragalus schmolliae* plants in plots sampled in 1980 (Friedlander 1980, p. 64). Beetle predation has not been observed again since 1980, and is not considered a threat to the species. Anderson (2001, p. 11) reported severe defoliation of *A. schmolliae* by larvae of the clouded sulfur butterfly (*Colias philodice*). Aphids also appeared to have an impact on reproductive output for this species (Anderson 2001, p. 11). These events were unusual, and insect predation is considered a low-level impact that does not rise to the level of a threat.

Herbivores such as mule deer (*Odocoileus hemionus*) and cottontail rabbits (*Sylvilagus audubonii*) browse on *Astragalus schmolliae* foliage, flowers, seed pods, and seedlings. Seedling mortality due to herbivory by rabbits or deer may be 1 to 10 percent (Anderson 2004, p. 40). Feral horses and stray cattle graze within the species' range, including the burned areas, but there is no evidence that they consume many *A. schmolliae.* Mature plants usually resprout the following spring after browsing by animals (Nelligan 2010, p. 1). Because the most abundant grass (*Poa fendleriana*) associated with *A. schmolliae* on the Tribal Park is highly palatable to cattle, grazing does not appear to be an issue in the southern portion of its range. Grazing by livestock is not permitted in MEVE. We consider herbivory an ongoing low-level impact to the species that does not rise to the level of a threat.

Summary of Factor C

No diseases are known to affect *Astragalus schmolliae.* With very little herbivory observed or documented, predation does not appear to pose a threat to *A. schmolliae.* Herbicide use occurs in a small portion of the species' habitat and is conducted so as to minimize impacts to the species. Accordingly, we find no evidence that predation or disease are a threat to *A. schmolliae* now, nor are they expected to become so in the foreseeable future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

No local, State, or Federal laws or regulations specifically protect *Astragalus schmolliae.* The National Park Service Organic Act (1916, p. 1) states that wildlife are to be conserved and left unimpaired for future generations to enjoy. The MEVE mission is to preserve and protect more than 4,000 archeological sites and also to protect wildlife, birds, and other natural resources from willful destruction, disturbance, and removal (National Park Service 2010, p. 1). The plants are protected from visitor impacts in undeveloped areas of MEVE by regulations that restrict visitor access to designated trails, roads, and campgrounds to protect cultural resources. Visitors found hiking off developed areas or designated trails when not accompanied by a uniformed National Park Service employee are subject to penalties provided for in title 36 of the Code of Federal Regulations (maximum fine of $500 and 6 months imprisonment). The MEVE does not have a management plan specific to *A. schmolliae,* nor do their draft fire management plans or draft weed management plans specifically mention management for this species (San Miguel 2010a, pers. comm.). The draft fire management plan does not have any specific mention of managing for this species because "it would be expected to respond to fuels treatments and fire much the same as most other native perennial forbs" (Nelligan 2010, p. 3). We believe that this approach is inadequate because cheatgrass invasion will lead to more frequent and recurrent fires. These draft plans include rare plant surveys and avoidance (Nelligan 2010, p. 4.), but the plans are not finalized. The MEVE gives *A. schmolliae* special consideration when planning park projects in an effort to minimize impacts to the species (Nelligan 2010, p. 3). In 2010, MEVE will begin developing a specific management/conservation plan for *A. schmolliae* (Nelligan 2010, p. 3).

The habitat for *Astragalus schmolliae* on the Tribal Park is maintained as part of a 50,586-ha (125,000-ac) undeveloped area to protect cultural and environmental resources. Visitors are allowed only on guided tours. The management goal for *A. schmolliae* occupied habitat is for no ground-disturbing activities. Grazing is allowed (Clow 2010, pers. comm.), but we do not believe it substantially impacts the species. The Ute Mountain Ute Tribe is drafting a management plan for species at risk that will include monitoring of *A. schmolliae* plants and habitat. The final draft plan may be completed in 2010 or 2011 (Clow 2010, pers. comm.). The management plan will assist us in better understanding the extent to which the Tribe plans to conserve the species and its habitat.

Despite the positive management for *Astragalus schmolliae* that occurs within MEVE and the Tribal Park, no formal plans are in place for mitigation of threats from cheatgrass and other fire effects.

Summary of Factor D

We expect that *Astragalus schmolliae* habitat on the Tribal Park is generally protected from human disturbance by tribal regulations that do not allow public access or unauthorized activities. Human impacts in undeveloped areas of MEVE are minimized by regulations that restrict visitor access to designated trails, roads, and campgrounds to protect cultural resources. While currently needed management actions are ongoing and management plans have been drafted, no plans, policies, or regulations have been signed and implemented for the specific purpose of monitoring and protecting *A. schmolliae* from cheatgrass invasion and recurrent fires. We anticipate that MEVE and the Ute Mountain Ute Tribe will formalize their management plans within the near future.

The existing suite of local, State, and Federal laws that we evaluated do not address the primary threat to *Astragalus schmolliae* of cheatgrass invasion following fire. Additionally, the existing plans rely on the resilience of the plants and their ability to resprout after impacts, which is insufficient to provide for their recovery post-fire. Therefore, we find that the existing regulatory mechanisms for the species are inadequate and do not address the threats to the continued existence of the species.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Restricted Range

The global range of *Astragalus schmolliae* is restricted to pinyon-juniper woodlands on about 1,619 ha (4,000 ac) on 3 adjacent mesas. It does not grow in grasslands below the mesas or in adjacent shrublands at higher

elevation on the mesas, nor has it been found in pinyon-juniper woodlands on nearby mesas. Such a restricted range makes the species vulnerable to habitat modification caused by wildfire, cheatgrass invasion, increased drought, and climate change, but is not considered a threat in itself.

Herbicides

Less than 10 percent of *Astragalus schmolliae* habitat on MEVE has been sprayed with herbicide to control identified high-density stands of *Cirsium canadense.* These herbicide applications have been performed carefully to minimize overspray that might land on native species (Nelligan 2010, p. 2). We are not aware of any use of herbicides on the tribal land habitat. Because we have no information indicating that herbicide use has affected *A. schmolliae,* we do not consider herbicide use to be a threat to the species now or in the foreseeable future.

Summary of Factor E

The small range of *Astragalus schmolliae* makes it vulnerable to existing and future threats, but does not constitute a threat in itself. Herbicide is used within the habitat, but is not known to affect the species. We are not aware of any other natural or manmade factors affecting the species' continued existence that present a current or potential threat to *A. schmolliae.* Therefore, we do not consider other natural or manmade factors affecting the continued existence of the species to be a threat now or within the foreseeable future.

General Threats Summary

Table 8 below provides an overview of the threats to *Astragalus schmolliae.* Of these threats, we consider degradation of habitat by fire followed by cheatgrass invasion and subsequent increase in fire frequency to be the most significant threats (Table 8). Cheatgrass is likely to increase given its rapid spread and persistence in habitat disturbed by wildfires, fire and fuels management and development of infrastructure, and the inability of land managers to control it on a landscape scale. Threats to *A. schmolliae* and its habitat from nonnative plant invasion following wildfires and fire and fuels management currently affect about 53 percent (431 ha (1,066 ac)) of the species' range on MEVE and 26 percent (212 ha (524 ac)) on the Tribal Park for a total of 40 percent of the species entire known range (Table 8). Fires, fire break clearings, and drought are considered moderate threats to *A. schmolliae.* Inadequate regulations are a low-level threat to the species. Other impacts not considered threats include post-fire native grass seeding, thistle invasion, infrastructure development, trampling, herbivory, weed treatments, and pollinator availability.

TABLE 8—THREAT SUMMARY FOR FACTORS AFFECTING *Astragalus schmolliae*

Listing factor	Threat or impact	Scope of threat or impact	Intensity	Exposure (%)	Likelihood of exposure	Species' response	Foreseeable future	Overall threat
A	Nonnative Invasive Cheatgrass.	Moderate	High	40	High	Increased fire frequency.	Increasing with rapid increase possible.	High.
A	Wildfires	Moderate	Moderate	21	High	Strong regrowth, unknown net reproduction, Increased cheatgrass & fire frequency.	More frequent	Moderate.
A	Prescribed burns completed + proposed.	Low	Moderate	0.37 + 0.34	High	Strong regrowth, unknown net reproduction, Increased cheatgrass & fire frequency.	Continue	Moderate.
A	Fire break clearing completed + proposed.	Low	Low	18 + 0.25	High	Outcompeted by grasses, decline of growth, increased cheatgrass.	Continue	Moderate.
A	Nonnative Invasive thistles.	Low	Moderate	5	High	Competition	Decline	None.
A	Periodic Drought.	Moderate	Moderate	100	Moderate	Plants fail to sprout, or seedlings dry up. Increased cheatgrass & fire frequency.	Unpredictable but likely to increase.	Moderate.
A	Climate Change.	Moderate?	Moderate?	100	Moderate	Increased fire frequency.	Climate models predict 40-year changes.	Moderate?
A	Infrastructure Development.	Low	Low	2.3	Moderate	Loss of habitat, loss of plants.	Small increase	None.
A	Trampling	Low	Low	1	Moderate	Loss of plants	Small increase	None.

TABLE 8—THREAT SUMMARY FOR FACTORS AFFECTING ASTRAGALUS SCHMOLLIAE—Continued

Listing factor	Threat or impact	Scope of threat or impact	Intensity	Exposure (%)	Likelihood of exposure	Species' response	Foreseeable future	Overall threat
A	Native Grass Seeding Post-fire.	Moderate	Low	21	High	Competition	Continue	None.
B	None			0			Not likely to change.	None.
C	Herbivory	Low	Low	?	Low	Plants re-sprout, seedlings destroyed.	Likely to continue & fluctuate with herbivore population.	None.
C	Chemical & Mechanical Weed Treatment.	Low	Low	7	Moderate	Some mortality, strong regrowth by survivors.	Continue	None.
D	National Park Laws & Regulations.	Moderate	Low	50	Moderate	No management plan for species.	Stronger protection.	Low.
D	Tribal Laws & Regulations.	Moderate	Low	50	Moderate	No management or monitoring.	Increase management actions.	Low.
E	Limited Range	High	Low	100	High	No range expansion.	Increased effect with drought & climate change.	None.
E	Pollinator Availability.	Low	Low	22	Low	Decreased seed production.	Increase with fire.	None.

Listing factors include: (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.
? indicates significant uncertainty.

Finding

As required by the Act, we considered the five factors in assessing whether *Astragalus schmolliae* is endangered or threatened throughout all or a significant portion of its range. We carefully examined the best available scientific and commercial information regarding the past, present, and future threats faced by the species. We reviewed the petition, information available in our files, other available published and unpublished information, and we consulted with *A. schmolliae* experts and other Tribal, State, and Federal agencies.

Threats to *Astragalus schmolliae* and its habitat from nonnative cheatgrass invasion following wildfires and management of fire and fuels currently affect about 40 percent of the species entire known range. Drought is a threat that facilitates cheatgrass invasion and increased fire frequency. Frequent wildfires, and at more frequent intervals than historically, have burned the pinyon-juniper forest habitat of *A. schmolliae* in the past two decades. Burned areas and fire breaks are being invaded by weedy species, especially cheatgrass. We consider the invasion of nonnative weedy plants, particularly cheatgrass, to be a threat of high magnitude to *A. schmolliae* because: (1) Cheatgrass has invaded all of the burned and disturbed habitat of *A. schmolliae;* (2) it competes with seedlings and resprouting adult plants for water and nutrients; (3) no landscape-scale successful control methods are available; and (4) the proven ability of cheatgrass to alter fire frequency, thereby facilitating further rapid spread, threatens both burned and previously unburned occupied habitat. We conclude that cheatgrass invasion is likely to cause fire frequency to increase, with the result that only small patches of undisturbed habitat will remain for *A. schmolliae* within the foreseeable future.

Because no regulations exist that address the primary threat to the species of cheatgrass invasion following wildfires, fire and fuels and management, and drought, we find that the existing regulatory mechanisms for the species are inadequate, and represent a threat of low magnitude.

On the basis of the best scientific and commercial information available, we find that listing of the *Astragalus schmolliae* as endangered or threatened is warranted. We will make a determination on the status of the species as endangered or threatened during the proposed listing process. As explained in more detail below, an immediate proposal of a regulation implementing this action is precluded by higher priority listing actions, and progress is being made to add or remove qualified species from the Lists of Endangered and Threatened Wildlife and Plants.

We have reviewed the available information to determine if the existing and foreseeable threats render the species at risk of extinction now, such that issuing an emergency regulation temporarily listing the species, as per section 4(b)(7) of the Act, is warranted. We determined that issuing an emergency regulation temporarily listing the species is not warranted at this time, because the threats acting on the species are not immediately impacting all of the species across its range to the point where the species will be immediately lost. However, if at any time we determine that issuing an emergency regulation temporarily listing *Astragalus schmolliae* is warranted, we will initiate this action at that time.

Listing Priority Number

The Service adopted guidelines on September 21, 1983 (48 FR 43098) to establish a rational system for utilizing available resources for the highest priority species when adding species to the Lists of Endangered or Threatened Wildlife and Plants or reclassifying species listed as threatened to endangered status. These guidelines, titled "Endangered and Threatened Species Listing and Recovery Priority Guidelines" address the immediacy and

magnitude of threats, and the level of taxonomic distinctiveness by assigning priority in descending order to monotypic genera (genus with one species), full species, and subspecies (or equivalently, distinct population segments of vertebrates).

As a result of our analysis of the best available scientific and commercial information, we have assigned *Astragalus schmolliae* a Listing Priority Number (LPN) of 8, based on our finding that the species faces threats that are of moderate magnitude and are imminent. These threats include the present or threatened destruction, modification or curtailment of its habitat and the inadequacy of existing regulatory mechanisms. These threats are ongoing and, in some cases (such as nonnative species), are considered irreversible because large-scale invasions cannot be recovered to a native functioning ecosystem. Our rationale for assigning *A. schmolliae* an LPN of 8 is outlined below.

Under the Service's guidelines, the magnitude of threat is the first criterion we look at when establishing a listing priority. The guidance indicates that species with the highest magnitude of threat are those species facing the greatest threats to their continued existence. These species receive the highest listing priority. We consider the threats that *Astragalus schmolliae* faces to be moderate in magnitude because the major threats (weed invasion facilitated by fire, management of fire and fuels management, and drought, plus inadequacy of existing regulatory mechanisms), while serious and occurring rangewide, do not collectively rise to the level of high magnitude. For example, the last known populations are not about to be completely lost due to the effects of wildfires.

The magnitude of threat Factor A is considered moderate because about 40 percent of *Astragalus schmolliae* habitat has been modified by fires and fire-related activities, followed by unprecedented invasion by cheatgrass, facilitated by drought. Factor A is shown to have occurred in the past, and it is clearly a threat today and into the future. These impacts affect the competitive ability and reproductive success of *A. schmolliae* individuals, and increase the likelihood of more frequent fire intervals in the future.

The magnitude of threat Factor D is considered low. While no plans, policies, or regulations have been signed and implemented for the specific purpose of monitoring and protecting *Astragalus schmolliae* from cheatgrass invasion and recurrent fires, we anticipate that MEVE and the Ute Mountain Ute Tribe will formalize and implement their management plans within the near future.

Under our LPN guidelines, the second criterion we consider in assigning a listing priority is the immediacy of threats. This criterion is intended to ensure that the species facing actual, identifiable threats are given priority over those for which threats are only potential or that are intrinsically vulnerable but are not known to be presently facing such threats. We consider all of the threats to be imminent because we have factual information that the threats are identifiable and that the species is currently facing them in many portions of its range. These actual, identifiable threats are covered in greater detail in Factors A and D of this finding. All of the threats are ongoing and, therefore, imminent, although the likelihood varies (Table 8). In addition to their current existence, we expect these threats, except for inadequate regulations, to continue and likely intensify in the foreseeable future.

The third criterion in our Listing Priority Number guidance is intended to devote resources to those species representing highly distinctive or isolated gene pools as reflected by taxonomy. *Astragalus schmolliae* is a valid taxon at the species level and, therefore, receives a higher priority than subspecies, but a lower priority than species in a monotypic genus. Therefore, we assigned *A. schmolliae* an LPN of 8.

We will continue to monitor the threats to *Astragalus schmolliae* and the species' status on an annual basis, and should the magnitude or the imminence of the threats change, we will revisit our assessment of the LPN.

While we conclude that listing *Astragalus schmolliae* is warranted, an immediate proposal to list this species is precluded by other higher priority listings, which we address in the Preclusion and Expeditious Progress section below. Because we have assigned *A. schmolliae* an LPN of 8, work on a proposed listing determination for *A. schmolliae* is precluded by work on higher priority listing actions with absolute statutory, court-ordered, or court-approved deadlines and final listing determinations for those species that were proposed for listing with funds from fiscal year (FY) 2010. This work includes all the actions listed in the tables below under expeditious progress (see Tables 9 and 10).

Preclusion and Expeditious Progress

Preclusion is a function of the listing priority of a species in relation to the resources that are available and the cost and relative priority of competing demands for those resources. Thus, in any given fiscal year (FY), multiple factors dictate whether it will be possible to undertake work on a listing proposal regulation or whether promulgation of such a proposal is precluded by higher-priority listing actions.

The resources available for listing actions are determined through the annual Congressional appropriations process. The appropriation for the Listing Program is available to support work involving the following listing actions: Proposed and final listing rules; 90-day and 12-month findings on petitions to add species to the Lists of Endangered and Threatened Wildlife and Plants (Lists) or to change the status of a species from threatened to endangered; annual "resubmitted" petition findings on prior warranted-but-precluded petition findings as required under section 4(b)(3)(C)(i) of the Act; critical habitat petition findings; proposed and final rules designating critical habitat; and litigation-related, administrative, and program-management functions (including preparing and allocating budgets, responding to Congressional and public inquiries, and conducting public outreach regarding listing and critical habitat). The work involved in preparing various listing documents can be extensive and may include, but is not limited to: Gathering and assessing the best scientific and commercial data available and conducting analyses used as the basis for our decisions; writing and publishing documents; and obtaining, reviewing, and evaluating public comments and peer review comments on proposed rules and incorporating relevant information into final rules. The number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions; that is, more complex actions generally are more costly. The median cost for preparing and publishing a 90-day finding is $39,276; for a 12-month finding, $100,690; for a proposed rule with critical habitat, $345,000; and for a final listing rule with critical habitat, the median cost is $305,000.

We cannot spend more than is appropriated for the Listing Program without violating the Anti-Deficiency Act (*see* 31 U.S.C. 1341(a)(1)(A)). In addition, in FY 1998 and for each fiscal year since then, Congress has placed a

statutory cap on funds which may be expended for the Listing Program, equal to the amount expressly appropriated for that purpose in that fiscal year. This cap was designed to prevent funds appropriated for other functions under the Act (for example, recovery funds for removing species from the Lists), or for other Service programs, from being used for Listing Program actions (*see* House Report 105–163, 105th Congress, 1st Session, July 1, 1997).

Since FY 2002, the Service's budget has included a critical habitat subcap to ensure that some funds are available for other work in the Listing Program ("The critical habitat designation subcap will ensure that some funding is available to address other listing activities" (House Report No. 107—103, 107th Congress, 1st Session, June 19, 2001)). In FY 2002 and each year until FY 2006, the Service has had to use virtually the entire critical habitat subcap to address court-mandated designations of critical habitat, and consequently none of the critical habitat subcap funds have been available for other listing activities. In some FYs since 2006, we have been able to use some of the critical habitat subcap funds to fund proposed listing determinations for high-priority candidate species. In other FYs, while we were unable to use any of the critical habitat subcap funds to fund proposed listing determinations, we did use some of this money to fund the critical habitat portion of some proposed listing determinations so that the proposed listing determination and proposed critical habitat designation could be combined into one rule, thereby being more efficient in our work. In FY 2011 we anticipate that we will be able to use some of the critical habitat subcap funds to fund proposed listing determinations.

We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first and also because we allocate our listing budget on a nationwide basis. Through the listing cap, the critical habitat subcap, and the amount of funds needed to address court-mandated critical habitat designations, Congress and the courts have in effect determined the amount of money available for other listing activities nationwide. Therefore, the funds in the listing cap, other than those needed to address court-mandated critical habitat for already listed species, set the limits on our determinations of preclusion and expeditious progress.

Congress identified the availability of resources as the only basis for deferring the initiation of a rulemaking that is warranted. The Conference Report accompanying Public Law 97–304, which established the current statutory deadlines and the warranted-but-precluded finding, states that the amendments were "not intended to allow the Secretary to delay commencing the rulemaking process for any reason other than that the existence of pending or imminent proposals to list species subject to a greater degree of threat would make allocation of resources to such a petition [that is, for a lower-ranking species] unwise." Although that statement appeared to refer specifically to the "to the maximum extent practicable" limitation on the 90-day deadline for making a "substantial information" finding, that finding is made at the point when the Service is deciding whether or not to commence a status review that will determine the degree of threats facing the species, and therefore the analysis underlying the statement is more relevant to the use of the warranted-but-precluded finding, which is made when the Service has already determined the degree of threats facing the species and is deciding whether or not to commence a rulemaking.

In FY 2010, $10,471,000 is the amount of money that Congress appropriated for the Listing Program (that is, the portion of the Listing Program funding not related to critical habitat designations for species that are already listed). Therefore, a proposed listing is precluded if pending proposals with higher priority will require expenditure of at least $10,471,000, and expeditious progress is the amount of work that can be achieved with $10,471,000. Since court orders requiring critical habitat work will not require use of all of the funds within the critical habitat subcap, we used $1,114,417 of our critical habitat subcap funds in order to work on as many of our required petition findings and listing determinations as possible. This brings the total amount of funds we had for listing actions in FY 2010 to $11,585,417.

The $11,585,417 was used to fund work in the following categories: Compliance with court orders and court-approved settlement agreements requiring that petition findings or listing determinations be completed by a specific date; section 4 (of the Act) listing actions with absolute statutory deadlines; essential litigation-related, administrative, and listing program-management functions; and high-priority listing actions for some of our candidate species. For FY 2011, on September 29, 2010, Congress passed a continuing resolution which provides funding at the FY 2010 enacted level. Until Congress appropriates funds for FY 2011, we will fund listing work based on the FY 2010 amount. In 2009, the responsibility for listing foreign species under the Act was transferred from the Division of Scientific Authority, International Affairs Program, to the Endangered Species Program. Therefore, starting in FY 2010, we use a portion of our funding to work on the actions described above as they apply to listing actions for foreign species. This has the potential to further reduce funding available for domestic listing actions. Although there are currently no foreign species issues included in our high-priority listing actions at this time, many actions have statutory or court-approved settlement deadlines, thus increasing their priority. The budget allocations for each specific listing action are identified in the Service's FY 2011 Allocation Table (part of our administrative record).

Based on our September 21, 1983, guidance for assigning an LPN for each candidate species (48 FR 43098), we have a significant number of species with a LPN of 2. Using this guidance, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats (high or moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: Monotypic genus (a species that is the sole member of a genus); species; or part of a species (subspecies, distinct population segment, or significant portion of the range)). The lower the listing priority number, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority).

Because of the large number of high-priority species, we have further ranked the candidate species with an LPN of 2 by using the following extinction-risk type criteria: International Union for the Conservation of Nature and Natural Resources (IUCN) Red list status/rank, Heritage rank (provided by NatureServe), Heritage threat rank (provided by NatureServe), and species currently with fewer than 50 individuals, or 4 or fewer populations. Those species with the highest IUCN rank (critically endangered), the highest Heritage rank (G1), the highest Heritage threat rank (substantial, imminent threats), and currently with fewer than 50 individuals, or fewer than 4 populations, originally comprised a group of approximately 40 candidate species ("Top 40"). These 40 candidate species have had the highest priority to receive funding to work on a proposed listing determination. As we work on proposed and final listing rules for those 40 candidates, we apply the ranking

criteria to the next group of candidates with an LPN of 2 and 3 to determine the next set of highest priority candidate species. Finally, proposed rules for reclassification of threatened species to endangered are lower priority, since as listed species, they are already afforded the protection of the Act and implementing regulations. However, for efficiency reasons, we may choose to work on a proposed rule to reclassify a species to endangered if we can combine this with work that is subject to a court-determined deadline.

We assigned both *Astragalus microcymbus* and *A. schmolliae* an LPN of 8. For *A. microcymbus,* this is based on our finding that the species faces immediate and moderate magnitude threats from the present or threatened destruction, modification or curtailment of its habitat; predation; the inadequacy of existing regulatory mechanisms; and other natural or man-made factors affecting its continued existence. In the case of *A. schmolliae,* this is based on our finding that the species faces immediate and moderate magnitude threats from the present or threatened destruction, modification or curtailment of its habitat and the inadequacy of existing regulatory mechanisms. These threats are ongoing and, in some cases (*e.g.,* nonnative species), considered irreversible. Under our 1983 Guidelines, a "species" facing imminent moderate-magnitude threats is assigned an LPN of 7, 8, or 9 depending on its taxonomic status. Because both *A. microcymbus* and *A. schmolliae* are species, we assigned an LPN of 8 to each. Therefore, work on a proposed listing determination for *A. microcymbus* and *A. schmolliae* is precluded by work on higher priority candidate species (*i.e.,* species with LPN of 7); listing actions with absolute statutory, court ordered, or court-approved deadlines; and final listing determinations for those species that were proposed for listing with funds from previous FYs. This work includes all the actions listed in the tables below under expeditious progress.

With our workload so much bigger than the amount of funds we have to accomplish it, it is important that we be as efficient as possible in our listing process. Therefore, as we work on proposed rules for the highest priority species in the next several years, we are preparing multi-species proposals when appropriate, and these may include species with lower priority if they overlap geographically or have the same threats as a species with an LPN of 2. In addition, we take into consideration the availability of staff resources when we determine which high-priority species will receive funding to minimize the amount of time and resources required to complete each listing action.

As explained above, a determination that listing is warranted but precluded must also demonstrate that expeditious progress is being made to add and remove qualified species to and from the Lists of Endangered and Threatened Wildlife and Plants. As with our "precluded" finding, the evaluation of whether progress in adding qualified species to the Lists has been expeditious is a function of the resources available for listing and the competing demands for those funds. (Although we do not discuss it in detail here, we are also making expeditious progress in removing species from the list under the Recovery program in light of the resource available for delisting, which is funded by a separate line item in the budget of the Endangered Species Program. During FY 2010, we have completed two proposed delisting rules and two final delisting rules.) Given the limited resources available for listing, we find that we made expeditious progress in FY 2010 in the Listing Program and are making expeditious progress in FY 2011. This progress included preparing and publishing the following determinations:

FY 2010 AND FY 2011 COMPLETED LISTING ACTIONS

Publication date	Title	Actions	FR Pages
10/08/2009	Listing *Lepidium papilliferum* (Slickspot Peppergrass) as a Threatened Species Throughout Its Range.	Final Listing Threatened	74 FR 52013–52064
10/27/2009	90-day Finding on a Petition To List the American Dipper in the Black Hills of South Dakota as Threatened or Endangered.	Notice of 90-day Petition Finding, Not substantial.	74 FR 55177–55180
10/28/2009	Status Review of Arctic Grayling (*Thymallus arcticus*) in the Upper Missouri River System.	Notice of Intent to Conduct Status Review for Listing Decision.	74 FR 55524–55525
11/03/2009	Listing the British Columbia Distinct Population Segment of the Queen Charlotte Goshawk Under the Endangered Species Act: Proposed rule.	Proposed Listing Threatened	74 FR 56757–56770
11/03/2009	Listing the Salmon-Crested Cockatoo as Threatened Throughout Its Range with Special Rule.	Proposed Listing Threatened	74 FR 56770–56791
11/23/2009	Status Review of Gunnison sage-grouse (*Centrocercus minimus*).	Notice of Intent to Conduct Status Review for Listing Decision.	74 FR 61100–61102
12/03/2009	12-Month Finding on a Petition to List the Black-tailed Prairie Dog as Threatened or Endangered.	Notice of 12-month petition finding, Not warranted.	74 FR 63343–63366
12/03/2009	90-Day Finding on a Petition to List Sprague's Pipit as Threatened or Endangered.	Notice of 90-day Petition Finding, Substantial	74 FR 63337–63343
12/15/2009	90-Day Finding on Petitions To List Nine Species of Mussels From Texas as Threatened or Endangered With Critical Habitat.	Notice of 90-day Petition Finding, Substantial	74 FR 66260–66271
12/16/2009	Partial 90-Day Finding on a Petition to List 475 Species in the Southwestern United States as Threatened or Endangered With Critical Habitat.	Notice of 90-day Petition Finding, Not substantial and Substantial.	74 FR 66865–66905

FY 2010 AND FY 2011 COMPLETED LISTING ACTIONS—Continued

Publication date	Title	Actions	FR Pages
12/17/2009	12-month Finding on a Petition To Change the Final Listing of the Distinct Population Segment of the Canada Lynx To Include New Mexico.	Notice of 12-month petition finding, Warranted but precluded.	74 FR 66937–66950
1/05/2010	Listing Foreign Bird Species in Peru and Bolivia as Endangered Throughout Their Range.	Proposed Listing Endangered	75 FR 605–649
1/05/2010	Listing Six Foreign Birds as Endangered Throughout Their Range.	Proposed Listing Endangered	75 FR 286–310
1/05/2010	Withdrawal of Proposed Rule to List Cook's Petrel.	Proposed rule, withdrawal	75 FR 310–316
1/05/2010	Final Rule to List the Galapagos Petrel and Heinroth's Shearwater as Threatened Throughout Their Ranges.	Final Listing Threatened	75 FR 235–250
1/20/2010	Initiation of Status Review for *Agave eggersiana* and *Solanum conocarpum*.	Notice of Intent to Conduct Status Review for Listing Decision.	75 FR 3190–3191
2/09/2010	12-month Finding on a Petition to List the American Pika as Threatened or Endangered.	Notice of 12-month petition finding, Not warranted.	75 FR 6437–6471
2/25/2010	12-Month Finding on a Petition To List the Sonoran Desert Population of the Bald Eagle as a Threatened or Endangered Distinct Population Segment.	Notice of 12-month petition finding, Not warranted.	75 FR 8601–8621
2/25/2010	Withdrawal of Proposed Rule To List the Southwestern Washington/Columbia River Distinct Population Segment of Coastal Cutthroat Trout (*Oncorhynchus clarki clarki*) as Threatened.	Withdrawal of Proposed Rule to List	75 FR 8621–8644
3/18/2010	90-Day Finding on a Petition to List the Berry Cave salamander as Endangered.	Notice of 90-day Petition Finding, Substantial	75 FR 13068–13071
3/23/2010	90-Day Finding on a Petition to List the Southern Hickorynut Mussel (*Obovaria jacksoniana*) as Endangered or Threatened.	Notice of 90-day Petition Finding, Not substantial.	75 FR 13717–13720
3/23/2010	90-Day Finding on a Petition to List the Striped Newt as Threatened.	Notice of 90-day Petition Finding, Substantial	75 FR 13720–13726
3/23/2010	12-month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 13910–14014
3/31/2010	12-Month Finding on a Petition to List the Tucson Shovel-Nosed Snake (*Chionactis occipitalis klauberi*) as Threatened or Endangered with Critical Habitat.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 16050–16065
4/5/2010	90-Day Finding on a Petition To List Thorne's Hairstreak Butterfly as Threatened or Endangered.	Notice of 90-day Petition Finding, Substantial	75 FR 17062–17070
4/6/2010	12-month Finding on a Petition To List the Mountain Whitefish in the Big Lost River, Idaho, as Endangered or Threatened.	Notice of 12-month petition finding, Not warranted.	75 FR 17352–17363
4/6/2010	90-Day Finding on a Petition to List a Stonefly (*Isoperla jewetti*) and a Mayfly (*Fallceon eatoni*) as Threatened or Endangered with Critical Habitat.	Notice of 90-day Petition Finding, Not substantial.	75 FR 17363–17367
4/7/2010	12-Month Finding on a Petition to Reclassify the Delta Smelt From Threatened to Endangered Throughout Its Range.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 17667–17680
4/13/2010	Determination of Endangered Status for 48 Species on Kauai and Designation of Critical Habitat.	Final Listing Endangered	75 FR 18959–19165
4/15/2010	Initiation of Status Review of the North American Wolverine in the Contiguous United States.	Notice of Initiation of Status Review for Listing Decision.	75 FR 19591–19592
4/15/2010	12-Month Finding on a Petition to List the Wyoming Pocket Gopher as Endangered or Threatened with Critical Habitat.	Notice of 12-month petition finding, Not warranted.	75 FR 19592–19607
4/16/2010	90-Day Finding on a Petition to List a Distinct Population Segment of the Fisher in Its United States Northern Rocky Mountain Range as Endangered or Threatened with Critical Habitat.	Notice of 90-day Petition Finding, Substantial	75 FR 19925–19935
4/20/2010	Initiation of Status Review for Sacramento splittail (*Pogonichthys macrolepidotus)*.	Notice of Initiation of Status Review for Listing Decision.	75 FR 20547–20548

FY 2010 AND FY 2011 COMPLETED LISTING ACTIONS—Continued

Publication date	Title	Actions	FR Pages
4/26/2010	90-Day Finding on a Petition to List the Harlequin Butterfly as Endangered.	Notice of 90-day Petition Finding, Substantial	75 FR 21568–21571
4/27/2010	12-Month Finding on a Petition to List Susan's Purse-making Caddisfly (*Ochrotrichia susanae*) as Threatened or Endangered.	Notice of 12-month petition finding, Not warranted.	75 FR 22012–22025
4/27/2010	90-day Finding on a Petition to List the Mohave Ground Squirrel as Endangered with Critical Habitat.	Notice of 90-day Petition Finding, Substantial	75 FR 22063–22070
5/4/2010	90-Day Finding on a Petition to List Hermes Copper Butterfly as Threatened or Endangered.	Notice of 90-day Petition Finding, Substantial	75 FR 23654–23663
6/1/2010	90-Day Finding on a Petition To List *Castanea pumila* var. *ozarkensis*.	Notice of 90-day Petition Finding, Substantial	75 FR 30313–30318
6/1/2010	12-month Finding on a Petition to List the White-tailed Prairie Dog as Endangered or Threatened.	Notice of 12-month petition finding, Not warranted.	75 FR 30338–30363
6/9/2010	90-Day Finding on a Petition To List van Rossem's Gull-billed Tern as Endangered or Threatened.	Notice of 90-day Petition Finding, Substantial	75 FR 32728–32734
6/16/2010	90-Day Finding on Five Petitions to List Seven Species of Hawaiian Yellow-faced Bees as Endangered.	Notice of 90-day Petition Finding, Substantial	75 FR 34077–34088
6/22/2010	12-Month Finding on a Petition to List the Least Chub as Threatened or Endangered.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 35398–35424
6/23/2010	90-Day Finding on a Petition to List the Honduran Emerald Hummingbird as Endangered.	Notice of 90-day Petition Finding, Substantial	75 FR 35746–35751
6/23/2010	Listing *Ipomopsis polyantha* (Pagosa Skyrocket) as Endangered Throughout Its Range, and Listing *Penstemon debilis* (Parachute Beardtongue) and *Phacelia submutica* (DeBeque Phacelia) as Threatened Throughout Their Range.	Proposed Listing Endangered Proposed Listing Threatened.	75 FR 35721–35746
6/24/2010	Listing the Flying Earwig Hawaiian Damselfly and Pacific Hawaiian Damselfly As Endangered Throughout Their Ranges.	Final Listing Endangered	75 FR 35990–36012
6/24/2010	Listing the Cumberland Darter, Rush Darter, Yellowcheek Darter, Chucky Madtom, and Laurel Dace as Endangered Throughout Their Ranges.	Proposed Listing Endangered	75 FR 36035–36057
6/29/2010	Listing the Mountain Plover as Threatened	Reinstatement of Proposed Listing Threatened.	75 FR 37353–37358
7/20/2010	90-Day Finding on a Petition to List *Pinus albicaulis* (Whitebark Pine) as Endangered or Threatened with Critical Habitat.	Notice of 90-day Petition Finding, Substantial	75 FR 42033–42040
7/20/2010	12-Month Finding on a Petition to List the Amargosa Toad as Threatened or Endangered.	Notice of 12-month petition finding, Not warranted.	75 FR 42040–42054
7/20/2010	90-Day Finding on a Petition to List the Giant Palouse Earthworm (*Driloleirus americanus*) as Threatened or Endangered.	Notice of 90-day Petition Finding, Substantial	75 FR 42059–42066
7/27/2010	Determination on Listing the Black-Breasted Puffleg as Endangered Throughout its Range; Final Rule.	Final Listing Endangered	75 FR 43844–43853
7/27/2010	Final Rule to List the Medium Tree-Finch (*Camarhynchus pauper*) as Endangered Throughout Its Range.	Final Listing Endangered	75 FR 43853–43864
8/3/2010	Determination of Threatened Status for Five Penguin Species.	Final Listing Threatened	75 FR 45497–45527
8/4/2010	90-Day Finding on a Petition To List the Mexican Gray Wolf as an Endangered Subspecies With Critical Habitat.	Notice of 90-day Petition Finding, Substantial	75 FR 46894–46898
8/10/2010	90-Day Finding on a Petition to List *Arctostaphylos franciscana* as Endangered with Critical Habitat.	Notice of 90-day Petition Finding, Substantial	75 FR 48294–48298
8/17/2010	Listing Three Foreign Bird Species from Latin America and the Caribbean as Endangered Throughout Their Range.	Final Listing Endangered	75 FR 50813–50842
8/17/2010	90-Day Finding on a Petition to List Brian Head Mountainsnail as Endangered or Threatened with Critical Habitat.	Notice of 90-day Petition Finding, Not substantial.	75 FR 50739–50742

FY 2010 AND FY 2011 COMPLETED LISTING ACTIONS—Continued

Publication date	Title	Actions	FR Pages
8/24/2010	90-Day Finding on a Petition to List the Oklahoma Grass Pink Orchid as Endangered or Threatened.	Notice of 90-day Petition Finding, Substantial	75 FR 51969–51974
9/1/2010	12-Month Finding on a Petition to List the White-Sided Jackrabbit as Threatened or Endangered.	Notice of 12-month petition finding, Not warranted.	75 FR 53615–53629
9/8/2010	Proposed Rule To List the Ozark Hellbender Salamander as Endangered.	Proposed Listing Endangered	75 FR 54561–54579
9/8/2010	Revised 12-Month Finding to List the Upper Missouri River Distinct Population Segment of Arctic Grayling as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 54707–54753
9/9/2010	12-Month Finding on a Petition to List the Jemez Mountains Salamander (*Plethodon neomexicanus*) as Endangered or Threatened with Critical Habitat.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 54822–54845
9/15/2010	12-Month Finding on a Petition to List Sprague's Pipit as Endangered or Threatened Throughout Its Range.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 56028–56050
9/22/2010	12-Month Finding on a Petition to List *Agave eggersiana* (no common name) as Endangered.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 57720–57734
9/28/2010	Determination of Endangered Status for the African Penguin.	Final Listing Endangered	75 FR 59645–59656
9/28/2010	Determination for the Gunnison Sage-grouse as a Threatened or Endangered Species.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 59803–59863
9/30/2010	12-Month Finding on a Petition to List the Pygmy Rabbit as Endangered or Threatened.	Notice of 12-month petition finding, Not warranted.	75 FR 60515–60561
10/6/2010	Endangered Status for the Altamaha Spinymussel and Designation of Critical Habitat.	Proposed Listing Endangered	75 FR 61664–61690
10/7/2010	12-month Finding on a Petition to list the Sacramento Splittail as Endangered or Threatened.	Notice of 12-month petition finding, Not warranted.	75 FR 62070–62095
10/28/2010	Endangered Status and Designation of Critical Habitat for Spikedace and Loach Minnow.	Proposed Listing Endangered (uplisting)	75 FR 66481–66552
11/2/2010	90-Day Finding on a Petition to List the Bay Springs Salamander as Endangered.	Notice of 90-day Petition Finding, Not substantial.	75 FR 67341–67343
11/2/2010	Determination of Endangered Status for the Georgia Pigtoe Mussel, Interrupted Rocksnail, and Rough Hornsnail and Designation of Critical Habitat.	Final Listing Endangered	75 FR 67511–67550
11/2/2010	Listing the Rayed Bean and Snuffbox as Endangered.	Proposed Listing Endangered	75 FR 67551–67583
11/4/2010	12-Month Finding on a Petition to List Cirsium wrightii (Wright's Marsh Thistle) as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 67925–67944

Our expeditious progress also includes work on listing actions that we funded in FY 2010 and FY 2011 but have not yet been completed to date. These actions are listed below. Actions in the top section of the table are being conducted under a deadline set by a court. Actions in the middle section of the table are being conducted to meet statutory timelines, that is, timelines required under the Act. Actions in the bottom section of the table are high-priority listing actions. These actions include work primarily on species with an LPN of 2, and, as discussed above, selection of these species is partially based on available staff resources, and when appropriate, include species with a lower priority if they overlap geographically or have the same threats as the species with the high priority. Including these species together in the same proposed rule results in considerable savings in time and funding, as compared to preparing separate proposed rules for each of them in the future.

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED

Species	Action
Actions Subject to Court Order/Settlement Agreement	
6 Birds from Eurasia	Final listing determination.
Flat-tailed horned lizard	Final listing determination.
Mountain plover[4]	Final listing determination.

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED—Continued

Species	Action
6 Birds from Peru	Proposed listing determination.
Pacific walrus	12-month petition finding.
Wolverine	12-month petition finding.
Solanum conocarpum	12-month petition finding.
Desert tortoise—Sonoran population	12-month petition finding.
Thorne's Hairstreak butterfly [3]	12-month petition finding.
Hermes copper butterfly [3]	12-month petition finding.
Utah prairie dog (uplisting)	90-day petition finding.
Actions with Statutory Deadlines	
Casey's june beetle	Final listing determination.
7 Bird species from Brazil	Final listing determination.
Southern rockhopper penguin—Campbell Plateau population	Final listing determination.
5 Bird species from Colombia and Ecuador	Final listing determination.
Queen Charlotte goshawk	Final listing determination.
5 species southeast fish (Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace) [4].	Final listing determination.
Ozark hellbender [4]	Final listing determination.
Altamaha spinymussel [3]	Final listing determination.
3 Colorado plants (*Ipomopsis polyantha* (Pagosa Skyrocket), *Penstemon debilis* (Parachute Beardtongue), and *Phacelia submutica* (DeBeque Phacelia)) [4].	Final listing determination.
Salmon crested cockatoo	Final listing determination.
Loggerhead sea turtle (assist National Marine Fisheries Service) [5]	Final listing determination.
2 mussels (rayed bean (LPN = 2), snuffbox No LPN) [5]	Final listing determination.
Mt Charleston blue [5]	Proposed listing determination.
CA golden trout [4]	12-month petition finding.
Black-footed albatross	12-month petition finding.
Mount Charleston blue butterfly	12-month petition finding.
Mojave fringe-toed lizard [1]	12-month petition finding.
Kokanee—Lake Sammamish population [1]	12-month petition finding.
Cactus ferruginous pygmy-owl [1]	12-month petition finding.
Northern leopard frog	12-month petition finding.
Tehachapi slender salamander	12-month petition finding.
Coqui Llanero	12-month petition finding/Proposed listing.
Dusky tree vole	12-month petition finding.
3 MT invertebrates (mist forestfly (*Lednia tumana*), *Oreohelix* sp.3, *Oreohelix* sp. 31) from 206 species petition.	12-month petition finding.
5 UT plants (*Astragalus hamiltonii, Eriogonum soredium, Lepidium ostleri, Penstemon flowersii, Trifolium friscanum*) from 206 species petition.	12-month petition finding.
2 CO plants (*Astragalus microcymbus, Astragalus schmolliae*) from 206 species petition.	12-month petition finding.
5 WY plants (*Abronia ammophila, Agrostis rossiae, Astragalus proimanthus, Boechere* (*Arabis*) *pusilla, Penstemon gibbensii*) from 206 species petition.	12-month petition finding.
Leatherside chub (from 206 species petition)	12-month petition finding.
Frigid ambersnail (from 206 species petition) [3]	12-month petition finding.
Platte River caddisfly (from 206 species petition) [5]	12-month petition finding.
Gopher tortoise—eastern population	12-month petition finding.
Grand Canyon scorpion (from 475 species petition)	12-month petition finding.
Anacroneuria wipukupa (a stonefly from 475 species petition) [4]	12-month petition finding.
Rattlesnake-master borer moth (from 475 species petition) [3]	12-month petition finding.
3 Texas moths (*Ursia furtiva, Sphingicampa blanchardi, Agapema galbina*) (from 475 species petition).	12-month petition finding.
2 Texas shiners (*Cyprinella* sp., *Cyprinella lepida*) (from 475 species petition).	12-month petition finding.
3 South Arizona plants (*Erigeron piscaticus, Astragalus hypoxylus, Amoreuxia gonzalezii*) (from 475 species petition).	12-month petition finding.
5 Central Texas mussel species (3 from 475 species petition)	12-month petition finding.
14 parrots (foreign species)	12-month petition finding.
Berry Cave salamander [1]	12-month petition finding.
Striped Newt [1]	12-month petition finding.
Fisher—Northern Rocky Mountain Range [1]	12-month petition finding.
Mohave Ground Squirrel [1]	12-month petition finding.
Puerto Rico Harlequin Butterfly [3]	12-month petition finding.
Western gull-billed tern	12-month petition finding.
Ozark chinquapin (*Castanea pumila* var. *ozarkensis*) [4]	12-month petition finding.
HI yellow-faced bees	12-month petition finding.
Giant Palouse earthworm	12-month petition finding.
Whitebark pine	12-month petition finding.

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED—Continued

Species	Action
OK grass pink (*Calopogon oklahomensis*) [1]	12-month petition finding.
Ashy storm-petrel [5]	12-month petition finding.
Southeastern pop snowy plover & wintering pop. of piping plover [1]	90-day petition finding.
Eagle Lake trout [1]	90-day petition finding.
Smooth-billed ani [1]	90-day petition finding.
32 Pacific Northwest mollusks species (snails and slugs) [1]	90-day petition finding.
42 snail species (Nevada & Utah)	90-day petition finding.
Red knot *roselaari* subspecies	90-day petition finding.
Peary caribou	90-day petition finding.
Plains bison	90-day petition finding.
Spring Mountains checkerspot butterfly	90-day petition finding.
Spring pygmy sunfish	90-day petition finding.
Bay skipper	90-day petition finding.
Unsilvered fritillary	90-day petition finding.
Texas kangaroo rat	90-day petition finding.
Spot-tailed earless lizard	90-day petition finding.
Eastern small-footed bat	90-day petition finding.
Northern long-eared bat	90-day petition finding.
Prairie chub	90-day petition finding.
10 species of Great Basin butterfly	90-day petition finding.
6 sand dune (scarab) beetles	90-day petition finding.
Golden-winged warbler [4]	90-day petition finding.
Sand-verbena moth	90-day petition finding.
404 Southeast species	90-day petition finding.
Franklin's bumble bee [4]	90-day petition finding.
2 Idaho snowflies (straight snowfly & Idaho snowfly) [4]	90-day petition finding.
American eel [4]	90-day petition finding.
Gila monster (Utah population) [4]	90-day petition finding.
Arapahoe snowfly [4]	90-day petition finding.
Leona's little blue [4]	90-day petition finding.
Aztec gilia [5]	90-day petition finding.
White-tailed ptarmigan [5]	90-day petition finding.
San Bernardino flying squirrel [5]	90-day petition finding.
Bicknell's thrush [5]	90-day petition finding.
Sonoran talussnail [5]	90-day petition finding.
2 AZ Sky Island plants (*Graptopetalum bartrami* & *Pectis imberbis*) [5]	90-day petition finding.
I'iwi [5]	90-day petition finding.
High-Priority Listing Actions	
19 Oahu candidate species [2] (16 plants, 3 damselflies) (15 with LPN = 2, 3 with LPN = 3, 1 with LPN =9).	Proposed listing.
19 Maui-Nui candidate species [2] (16 plants, 3 tree snails) (14 with LPN = 2, 2 with LPN = 3, 3 with LPN = 8).	Proposed listing.
Dune sagebrush lizard (formerly Sand dune lizard) [4] (LPN = 2)	Proposed listing.
2 Arizona springsnails [2] (*Pyrgulopsis bernadina* (LPN = 2), *Pyrgulopsis trivialis* (LPN = 2)).	Proposed listing.
New Mexico springsnail [2] (*Pyrgulopsis chupaderae* (LPN = 2)	Proposed listing.
2 mussels [2] (sheepnose (LPN = 2), spectaclecase (LPN = 4))	Proposed listing.
8 Gulf Coast mussels (southern kidneyshell (LPN = 2), round ebonyshell (LPN = 2), Alabama pearlshell (LPN = 2), southern sandshell (LPN = 5), fuzzy pigtoe (LPN = 5), Choctaw bean (LPN = 5), narrow pigtoe (LPN = 5), and tapered pigtoe (LPN = 11)) [4].	Proposed listing.
Umtanum buckwheat (LPN = 2) [4]	Proposed listing.
Grotto sculpin (LPN = 2) [4]	Proposed listing.
2 Arkansas mussels (Neosho mucket (LPN = 2) & Rabbitsfoot (LPN = 9)) [4].	Proposed listing.
Diamond darter (LPN = 2) [4]	Proposed listing.
Gunnison sage-grouse (LPN = 2) [4]	Proposed listing.
Miami blue (LPN = 3) [3]	Proposed listing.
4 Texas salamanders (Austin blind salamander (LPN = 2), Salado salamander (LPN = 2), Georgetown salamander (LPN = 8), Jollyville Plateau (LPN = 8)) [3].	Proposed listing.
5 SW aquatics (Gonzales Spring Snail (LPN = 2), Diamond Y springsnail (LPN = 2), Phantom springsnail (LPN = 2), Phantom Cave snail (LPN = 2), Diminutive amphipod (LPN = 2)) [3].	Proposed listing.
2 Texas plants (Texas golden gladecress (*Leavenworthia texana*) (LPN = 2), Neches River rose-mallow (*Hibiscus dasycalyx*) (LPN = 2)) [3].	Proposed listing.
FL bonneted bat (LPN = 2) [3]	Proposed listing.
Kittlitz's murrelet (LPN = 2) [5]	Proposed listing.
Umtanum buckwheat (LPN = 2) [3]	Proposed listing.

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED—Continued

Species	Action
21 Big Island (HI) species[5] (includes 8 candidate species—5 plants & 3 animals; 4 with LPN = 2, 1 with LPN = 3, 1 with LPN = 4, 2 with LPN = 8).	Proposed listing.
Oregon spotted frog (LPN = 2)[5]	Proposed listing.
2 TN River mussels (fluted kidneyshell (LPN = 2), slabside pearlymussel (LPN = 2)[5].	Proposed listing.
Jemez Mountain salamander (LPN = 2)[5]	Proposed listing.

[1] Funds for listing actions for these species were provided in previous FYs.
[2] Although funds for these high-priority listing actions were provided in FY 2008 or 2009, due to the complexity of these actions and competing priorities, these actions are still being developed.
[3] Partially funded with FY 2010 funds and FY 2011 funds.
[4] Funded with FY 2010 funds.
[5] Funded with FY 2011 funds.

We have endeavored to make our listing actions as efficient and timely as possible, given the requirements of the relevant law and regulations, and constraints relating to workload and personnel. We are continually considering ways to streamline processes or achieve economies of scale, such as by batching related actions together. Given our limited budget for implementing section 4 of the Act, these actions described above collectively constitute expeditious progress.

Astragalus microcymbus and *Astragalus schmolliae* will be added to the list of candidate species upon publication of this 12-month finding. We will continue to monitor the status of these species as new information becomes available. This review will determine if a change in status is warranted, including the need to make prompt use of emergency listing procedures.

We intend that any proposed listing action for *Astragalus microcymbus* and *Astragalus schmolliae* will be as accurate as possible. Therefore, we will continue to accept additional information and comments from all concerned governmental agencies, the scientific community, industry, or any other interested party concerning this finding.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Western Colorado Ecological Services Office (see **ADDRESSES** section).

Author(s)

The primary authors of this notice are the staff members of the Western Colorado Ecological Services Office.

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: December 6, 2010.

Paul R. Schmidt,

Acting Director, Fish and Wildlife Service.

[FR Doc. 2010–31225 Filed 12–14–10; 8:45 am]

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Federal Register

Wednesday,
December 15, 2010

Part VI

Environmental Protection Agency

40 CFR Part 82

Protection of Stratospheric Ozone: Amendments to the Section 608 Leak Repair Requirements; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[EPA–HQ–OAR–2003–0167; FRL–9238–4]

RIN 2060–AM09

Protection of Stratospheric Ozone: Amendments to the Section 608 Leak Repair Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Environmental Protection Agency (EPA) is proposing changes to the leak repair regulations promulgated under Section 608 of the Clean Air Act Amendments of 1990 (CAA or Act). EPA is proposing to lower the leak repair trigger rates for comfort cooling, commercial refrigeration, and industrial process refrigeration and air-conditioning equipment (*i.e.,* appliances) with ozone-depleting refrigerant charges greater than 50 pounds. This action proposes to streamline existing required practices and associated reporting and recordkeeping requirements by establishing similar leak repair requirements for owners or operators of comfort cooling, commercial refrigeration, and industrial process refrigeration appliances. This action also proposes to reduce the use and emissions of class I and class II controlled substances (such as but not limited, to CFC–11, CFC–12, HCFC–123, HCFC–22) by requiring the following: Verification and documentation of all repairs, retrofit or retirement of appliances that cannot be sufficiently repaired, mandatory replacement of appliance components that have a history of failures, and mandatory recordkeeping of the determination of the full charge and the fate of recovered refrigerant.

DATES: Written comments on this proposed rule must be received by the EPA Docket on or before February 14, 2011, unless a public hearing is requested. Any party requesting a public hearing must notify the contact listed below under **FOR FURTHER INFORMATION CONTACT** by 5 p.m. Eastern Standard Time on December 29, 2010. If a public hearing is requested, commenters will have until February 28, 2011 to submit comments before the close of the comment period. If a hearing is held, it will take place at EPA headquarters in Washington, DC. EPA will post a notice on our Web site, *http://www.epa.gov/ozone/strathome.html,* announcing further information should a hearing take place.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2003–0167, 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.*
- *Fax:* 202–343–2338, Attn: Julius Banks.
- *Mail:* Air Docket, Environmental Protection Agency, Mail Code 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- *Hand Delivery or Courier:* Deliver your comments to EPA Air Docket, EPA West, 1301 Constitution Avenue, NW., Room B108, Mail Code 6102T, 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–2003–0167. 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 that has disclosure restrictions by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. 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 that 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.html.*

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 that has disclosure restrictions 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 Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. A fee may be charged for the copying of documents at the Air Docket facility.

FOR FURTHER INFORMATION CONTACT: Julius Banks; U.S. Environmental Protection Agency; Stratospheric Program Division; Office of Atmospheric Programs; Office of Air and Radiation; Mail Code 6205–J; 1200 Pennsylvania Avenue, NW.; Washington, DC 20460; (202) 343–9870.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. General Information

A. Does this action apply to me?

Categories and entities potentially regulated by this action include those who own, operate, maintain, service, or repair comfort cooling, commercial refrigeration, and industrial process refrigeration appliances. Such entities include, but are not limited to, owners or operators of comfort cooling chillers; refrigerated warehouses; retail food stores, including supermarkets, grocery stores, wholesale markets, supercenters, and convenience stores; beverage and food manufacturers, distributors, and packagers; ice rinks; and other industrial process refrigeration applications. Regulated entities include, but are not limited to, the following:

Category	North American Industry Classification (NAIC) Code	Examples of regulated entities
Industrial Process Refrigeration (IPR).	311, 325, 3118, 3254, 31212, 324110, 312111, 312112, 312113, 713940.	Owners or operators of refrigeration equipment used in the manufacture of pharmaceuticals, frozen food, dairy products, baked goods, food and beverages, petrochemicals, chemicals, ice rinks, ice manufacturing.
Commercial Refrigeration	45291, 49312, 49313, 445110, 445120, 447110.	Owners or operators of refrigerated warehousing and storage facilities, supermarket, grocery, warehouse clubs, supercenters, convenience stores, refrigerated warehousing and storage.
Comfort Cooling	72, 622, 6111, 6112, 6113, 531312.	Owners or operators of air-conditioning equipment used in the following: hospitals, office buildings, colleges and universities, metropolitan transit authorities, real estate rental & leased properties, lodging & food services, property management, schools, public administration or other public institutions.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated and potentially affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your company is regulated by this action, you should carefully examine the applicability criteria contained in section 608 of the CAA Amendments of 1990. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What should I consider as I prepare my comments for EPA?

1. Confidential Business Information (CBI)

Do not submit confidential business information (CBI) to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR 2.2.

2. Tips for Preparing Your Comments

When submitting comments, remember to do the following:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions. The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree with the proposal; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used in preparing your comments.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Section 608 of the Clean Air Act

Section 608 of the Clean Air Act as amended (CAA, the Act), the *National Recycling and Emissions Reduction Program,* requires EPA to establish regulations governing the use of ozone-depleting substances (ODS) used as refrigerants,[1] such as chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs), during the maintenance, service, or disposal of appliances including air-conditioning and refrigeration equipment. Section 608 also prohibits any person from knowingly venting, or from otherwise knowingly releasing or disposing of ODS used as refrigerants during the maintenance, service, repair, or disposal of air-conditioning and refrigeration equipment.

Section 608 is divided into three subsections. Section 608(a) requires EPA to promulgate regulations to reduce

[1] Refrigerant means, for purposes of 40 CFR part 82, Subpart F, any substance consisting in part or whole of a class I or class II ozone-depleting substance that is used for heat transfer purposes and provides a cooling effect.

the use and emissions of class I substances (*i.e.,* CFCs, halons, carbon tetrachloride, and methyl chloroform) and class II substances (*i.e.,* HCFCs) to the lowest achievable level, and to maximize the recycling of such substances. Section 608(b) requires that the regulations promulgated pursuant to subsection (a) contain requirements for the safe disposal of class I and class II substances. Finally, section 608(c) is a self-effectuating provision that prohibits any person from knowingly venting, releasing or disposing into the environment of any class I or class II substances, and eventually their substitutes, during servicing and disposal of air-conditioning or refrigeration appliances.

EPA's authority to propose the requirements in this Notice of Proposed Rulemaking (NPRM) is based on Section 608(a), which requires EPA to promulgate regulations regarding use and disposal of class I and II substances to "reduce the use and emission of such substances to the lowest achievable level" and "maximize the recapture and recycling of such substances." Section 608(a) further provides that "such regulations may include requirements to use alternative substances (including substances which are not class I or class II substances) . . . or to promote the use of safe alternatives pursuant to section [612] or any combination of the foregoing."

Section 608(c)(1) provides that, effective July 1, 1992, it is "unlawful for any person, in the course of maintaining, servicing, repairing, or disposing of an appliance or industrial process refrigeration, to knowingly vent or otherwise knowingly release or dispose of any class I or class II substance used as a refrigerant in such appliance (or industrial process refrigeration) in a manner which permits such substance to enter the environment." The statute exempts from this prohibition "[d]e minimis releases associated with good faith attempts to recapture and recycle or safely dispose" of a substance. To implement and enforce the venting prohibitions of this section, EPA, through its regulations, interprets releases to meet the criteria for exempted "de minimis" releases when they occur while the recycling and recovery requirements of sections 608 and 609 regulations are followed. Effective November 15, 1995, section 608(c)(2) of the Act prohibits the knowingly venting or otherwise knowingly release or disposal of any substitute for class I and class II substances by any person maintaining, servicing, repairing, or disposing of air-conditioning and refrigeration equipment. This prohibition applies unless EPA determines that such venting, releasing, or disposing does not pose a threat to the environment.

III. Leak Repair Regulations

Final regulations promulgated under section 608 of the Act, published on May 14, 1993 (58 FR 28660), established a recycling program for ozone-depleting refrigerants recovered during the servicing and maintenance of air-conditioning and refrigeration appliances. Together with the prohibition on venting during the maintenance, service, repair and disposal of class I and class II ODS (January 22, 1991; 56 FR 2420), these regulations were intended to substantially reduce the use and emissions of ozone-depleting refrigerants.

The May 14, 1993 regulations established leak repair requirements to further minimize emissions of class I and class II substances. The rule states that appliances that hold a refrigerant charge greater than 50 pounds are subject to the leak repair requirements. An annual leak rate of 35 percent was established for industrial process refrigeration and commercial refrigeration appliances, while an annual leak rate of 15 percent was established for comfort cooling appliances. Where the leak rate is exceeded, the appliance must be repaired within 30 days. These regulations were amended August 8, 1995, to provide greater flexibility to owners or operators of industrial process refrigeration appliances (60 FR 40419). Thus an alternative was provided that allows owners or operators to develop a retrofit or replacement plan within 30 days that outlines actions to retrofit or replace the leaking appliance within one year. The leak repair components of the regulations (*i.e.,* definitions, required practices, and associated reporting and recordkeeping requirements) were subsequently revised again in final regulations published on January 11, 2005 (70 FR 1972).

On August 8, 1995, EPA promulgated a final rule (60 FR 40420) in response to a settlement agreement reached by EPA and the Chemical Manufacturers Association (CMA). In that settlement, EPA permitted owners or operators of appliances with refrigerant charges greater than 50 pounds to take additional time, beyond 30 days, to complete repairs and more than one year to retrofit appliances where certain conditions applied (*e.g.,* equipment located in areas subject to radiological contamination, unavailability of necessary parts, adherence to local or State laws that may hinder immediate repairs). EPA also agreed to clarify that purged emissions that have been captured and destroyed can be excluded from the leak rate calculations.

On January 11, 2005, EPA issued a final rule (70 FR 1972) clarifying that the leak repair requirements apply to any refrigerant substitute that consists of a class I or class II ODS, and amended and added definitions for "full charge" and "leak rate." The final rule amended the required practices and associated reporting/recordkeeping requirements. It also provided clarification to current leak repair requirements. These regulations are applicable to all owners or operators of comfort cooling, commercial refrigeration, and industrial process refrigeration (as defined at § 82.152) with a refrigerant full charge greater than 50 pounds. Refrigerant is defined at § 82.152 as any substance consisting in part or whole of a class I or class II ODS that is used for heat transfer and provides a cooling effect. Such refrigerants include, but are not limited to, R–11, R–12, R–123, R–22, R–401A, R–402B, R–414B, R–500, and R–502.

While the leak repair regulations are limited to appliances containing more than 50 pounds of refrigerant that leak above the leak repair trigger rate percentage, the leak repair requirements do not grant an exemption to the remainder of the refrigerant regulations at 40 CFR part 82, subpart F. In particular, the leak repair required practices of § 82.156 do not grant an exemption to the statutory venting prohibition for refrigerants or their non-ODS substitutes.

EPA stated in *Section F.—Required Practices* of the original refrigerant recycling final rule (May 14, 1993; 58 FR 28660) that "knowingly venting is any release that permits a class I or class II substance to enter the environment and that takes place during the maintenance, service, repair, or disposal of air-conditioning or refrigeration equipment." In other words, the leak repair requirements do not allow owners or operators to ignore leaks from appliances just because the leak repair trigger rate has not been breached. The aim of the leak repair requirements is to reduce emissions of refrigerants from appliances by mandating repairs that adequately address the leaks within the appliance as a whole, within a set period of time (*i.e.,* 30 days). The leak repair requirements are geared to persuade owners or operators to retrofit or replace appliances that either have a history of leaking or cannot be sufficiently repaired over a period of

time; however, this regulatory framework does not establish an exemption to the venting prohibition of the Act.

EPA is proposing changes to the existing leak repair required practices, in part, to provide a streamlined set of requirements for all owners or operators of comfort cooling, commercial, and IPR appliances with refrigerant (*i.e.,* ODS) charges greater than 50 pounds. EPA believes that the current regulatory structure could be simplified by clarifying existing regulatory definitions, required practices, and recordkeeping and reporting requirements.

In addition to the Agency's proposal to provide clarity to existing regulations, EPA is meeting the CAA Section 608(a) requirement for EPA to promulgate regulations to reduce the use and emissions of class I substances (*i.e.,* CFCs, halons, carbon tetrachloride, and methyl chloroform) and class II substances (*i.e.,* HCFCs) to the lowest achievable level, and to maximize the recycling of such substances by proposing to lower leak repair trigger rates and require appliance owners or operators to maintain service records that will document the ultimate fate of refrigerant that is recovered from appliances during their service and maintenance.

IV. Proposed Revisions to the Leak Repair Regulations

This NPRM proposes changes to the leak repair regulations promulgated at 40 CFR part 82, subpart F. This NPRM proposes changes to the Subpart's purpose and scope, definitions, required practices, and reporting and recordkeeping sections, in order to create a streamlined set of leak repair requirements that are applicable to all types of appliances with large ozone-depleting refrigerant charges (*i.e.,* greater than 50 pounds).

Many of the provisions of this NPRM are meant to clarify existing requirements found at 40 CFR 82.156 and do not impose new requirements. For example, EPA is clarifying the following:

- The purpose and scope of the existing 40 CFR part 82, subpart F regulations apply to owners or operators of air conditioning and refrigeration equipment;
- Editing existing definitions to provide clarity and provide consistency with industry nomenclature;
- That leak repair trigger rates are not an exemption to the statutory refrigerant venting prohibition;
- That leak repair calculations are required upon addition of refrigerant;
- Verification of leak repair efforts is a service record, and should be maintained in compliance with existing recordkeeping and reporting requirements; and
- Defining terms that are referenced but are not defined in the current regulatory text.

In addition to the clarifying aspects of today's NPRM, EPA is proposing to amend the existing required practices and recordkeeping requirements (at § 82.156 and § 82.166, respectively) by proposing the following:

- Lower applicable leak rates for currently regulated appliances;
- Require written verification of all repair attempts for comfort cooling and commercial appliances, and not just industrial process refrigeration equipment (as currently required);
- Exempt addition of refrigerant due to "seasonal variances" from the existing leak repair requirements;
- Allow all appliance owners/operators additional time to complete repairs due to unavailability of components, and not just industrial process refrigeration equipment (as currently required);
- Require service technicians to maintain records on the fate of refrigerant that is recovered from but not returned to appliances during service;
- Decrease the amount of time allowed for the completion of currently required retrofit/retirement plans.

EPA believes that the proposed changes will meet the Clean Air Act requirement, at CAA 608(a)(3), for the Agency to promulgate regulations that reduce use and emissions of ozone-depleting to the lowest achievable level, and maximize the recapture and recycling of such substances. EPA estimates that the proposed amendments to the current regulatory scheme will result in total expected environmental benefits, in terms of avoided ODS refrigerant emissions, is approximately 316 ozone-depleting potential (ODP) weighted tons (approximately 2.8 million metric tons of carbon equivalent (MMTCE).

EPA has estimated that the projected emissions of the most popular ozone-depleting refrigerant impacted by this NPRM, HCFC–22 (or R–22), between January 1, 2010 and December 31, 2019 is approximately 35,000 ODP [2] weighted tons. This estimate is based in part on refrigeration and air conditioning equipment charge sizes and leak rates. EPA estimates that this proposal will account for an annual emissions avoidance of approximately 316 ODP weighted tons or roughly 9% of the estimated emissions of HCFC–22 between January 1, 2010 and December 31, 2019. Additionally, the estimated avoided emissions over a 10-year period of 3,160 ODP weighted tons [3] is approximately 7 percent of the estimated 44,000 ODP weighted tons of all allocated HCFC emissions projected for the United States for this same time period. For purposes of a relative comparison, an estimated 316 ODP tons per year of avoided ODS emissions is approximately 11.5 percent of the 2,750 ODP tons that the U.S. has allocated for consumption of all HCFCs for 2010, and approximately 21 percent of the HCFCs allocated for 2015.[4]

EPA believes that the avoided emissions attributed to this NPRM will result in additional health benefits. The links between stratospheric ozone depletion and skin cancer are well established. Other public health concerns include cataracts and immune suppression. Since the appearance of an ozone hole over the Antarctic in the 1980s, Americans have become aware of the health threats posed by ozone depletion, which decreases the atmosphere's ability to protect the earth's surface from the sun's UV rays. The 2006 documents *Scientific Assessment of Ozone Depletion,* prepared by the Scientific Assessment Panel to the Montreal Protocol, and *Environmental Effects of Ozone Depletion and its Interactions with Climate Change,* prepared by the Environmental Effects Assessment Panel (*see http://ozone.unep.org/Assessment_Panels/*), provide comprehensive information regarding the links between emissions of ODS, ozone layer depletion, UV radiation, and human health effects.

Skin cancer is the most common form of cancer in the U.S., with more than 1,000,000 new cases diagnosed annually (National Cancer Institute, "Common Cancer Types," at *http://www.cancer.gov.cancertopics/commoncancers*). Melanoma, the most serious form of skin cancer, is also one of the fastest growing types of cancer in the U.S.; melanoma cases in this country have more than doubled in the past two decades, and the rise is expected to continue (Ries, L., Eisner, M.P., Kosary, C.L., *et al.,* eds. *SEER Cancer Statistics Review, 1973–1999.*

[2] The ODP is the ration of the impact on the stratospheric ozone layer of a chemical compared to the impact of a similar mass of CFC–11. Thus, the ODP of CFC–11 is defined to be 1.0.

[3] This is an undiscounted avoided emission.

[4] In accordance with the Montreal Protocol adjustments from 2007, the 2010 consumption cap for the total basket of HCFCs in the United States is 3,810 ODP tons annually for the years 2010–2014 and 1,524 ODP tons for the years 2015–2020.

Vol 2003. Bethesda (MD): National Cancer Institute; 2002). In 2007, invasive melanoma was expected to strike more than 59,000 Americans and kill more than 8,000 (National Cancer Institute, "Melanomas," at *http://www.cancer.gov.cancertopics/types/melanoma*).

Nonmelanoma skin cancers are less deadly than melanomas. Nevertheless, left untreated, they can spread, causing disfigurement and more serious health problems. There are two primary types of nonmelanoma skin cancers. Basal cell carcinomas are the most common type of skin cancer tumors. They usually appear as small, fleshy bumps or nodules on the head and neck, but can occur on other skin areas. Basal cell carcinoma grows slowly, and rarely spreads to other parts of the body. It can, however, penetrate to the bone and cause considerable damage. Squamous cell carcinomas are tumors that may appear as nodules or as red, scaly patches. This cancer can develop into large masses, and unlike basal cell carcinoma, it can spread to other parts of the body. Other UV-related skin disorders include actinic keratoses and premature aging of the skin. Actinic keratoses are skin growths that occur on body areas exposed to the sun. The face, hands, forearms, and the "V" of the neck are especially susceptible to this type of lesion. Although premalignant, actinic keratoses are a risk factor for squamous cell carcinoma. Chronic exposure to the sun also causes premature aging, which over time can make the skin become thick, wrinkled, and leathery.

Cataracts are a form of eye damage in which a loss of transparency in the lens of the eye clouds vision. If left untreated, cataracts can lead to blindness. Research has shown that UV radiation increases the likelihood of certain cataracts. Although curable with modern eye surgery, cataracts diminish the eyesight of millions of Americans. Other kinds of eye damage include pterygium (*i.e.,* tissue growth that can block vision), skin cancer around the eyes, and degeneration of the macula (*i.e.,* the part of the retina where visual perception is most acute).

A. Purpose and Scope

Currently, EPA describes the purpose of Subpart F as an effort to reduce emissions of class I and class II refrigerants and their substitutes to the lowest achievable level by maximizing the recapture and recycling of such refrigerants during the service, maintenance, repair, and disposal of appliances and restricting the sale of refrigerants consisting in whole or in part of a class I or class II ODS in accordance with Title VI of the Clean Air Act. The regulations are applicable to any person servicing, maintaining, or repairing appliances. This subpart also applies to persons disposing of appliances, including small appliances and motor vehicle air conditioners. In addition, this subpart applies to refrigerant reclaimers, technician certifying programs, appliance owners or operators, manufacturers of appliances, manufacturers of recycling and recovery equipment, approved recycling and recovery equipment testing organizations, persons selling class I or class II refrigerants or offering class I or class II refrigerants for sale, and persons purchasing class I or class II refrigerants (69 FR 11978; March 12, 2004).

EPA wishes to clarify that the regulations also apply persons using refrigerants who are owners or operators of appliances with large refrigerant charges. It is not the intent of the Subpart F regulations to exclude such persons; therefore, the Agency proposes to add "use" to paragraph (a) of the Purpose and Scope section to read as follows:

> The purpose and scope of this subpart is to reduce the use and emissions of ozone-depleting refrigerants to the lowest achievable level and encourage the use of substitutes, by maximizing the recapture and recycling of such ozone-depleting substances during the use, service, maintenance, repair, and disposal of appliances and by restricting the sale of refrigerants in accordance with Title VI of the Clean Air Act.

EPA requests comment on the inclusion of users to the purpose and scope of Subpart F, specifically as it applies to the leak repair provisions for appliances with ozone-depleting refrigerant charges greater than 50 pounds.

B. Definitions

1. Comfort Cooling Appliance

The leak repair requirements have placed refrigeration and air-conditioning equipment (*i.e.,* appliances) into three categories: comfort cooling (air-conditioning), commercial refrigeration, and industrial process refrigeration appliances. However, EPA has not included a definition of comfort cooling appliance in Subpart F at § 82.152. EPA has relied on equipment that the Agency believes is commonly recognized as "chillers" and light commercial heating, ventilation, and air-conditioning systems that provide cooling and/or humidity control. They may be used for the comfort of occupants or for climate control to protect equipment within a facility, such as in computer rooms.

For purposes of the leak repair requirements, comfort cooling appliances include air-conditioning systems that use refrigerant (with charge sizes greater than 50 pounds) to transfer heat in order to control heat and/or humidity in a facility, such as a commercial office building. EPA considers the sum of all of the cooling system's components as an appliance, meaning that the major components that make up the refrigerant circuit such as the compressor, heat exchangers (condenser and evaporator), and expansion valves are all part of the comfort cooling appliance. Comfort cooling appliances are also comprised of other components such as receivers, filter driers, pumps, manifolds, oil separators, and associated piping.

In order to provide greater clarity to the existing leak repair provisions, EPA proposes to add a definition for *comfort cooling appliance* at § 82.152 that reads as follows: "*Comfort cooling appliance* means any air-conditioning appliance used to provide cooling in order to control heat and/or humidity in facilities, such as office buildings and computer rooms. Comfort cooling appliances include building chillers, as well as roof-top self-contained units typically used to cool small to medium-size office and light commercial buildings. Chillers that would be subject to the leak repair requirements include, but are not limited to, those using R–12, R–11, and R–123. Self-contained units that provide comfort cooling that would be captured by the proposed definition of comfort cooling appliance include, but are not limited to, those using R–22." EPA seeks comment on the applicability of the proposed definition of *comfort cooling appliance* to air-conditioning equipment that is typically used to provide cooling/humidity controlled environments.

2. Commercial Refrigeration Appliance

For the purposes of the leak repair requirements, EPA currently defines commercial refrigeration appliance as:

> The refrigeration appliances used in the retail food and cold storage warehouse sectors. Retail includes the refrigeration equipment found in supermarkets, convenience stores, restaurants and other food service establishments. Cold storage includes the equipment used to store meat, produce, dairy products, and other perishable goods. All of the equipment contains large refrigerant charges, typically over 75 pounds.

EPA's definition of commercial refrigeration appliance is not limited to the supermarket and grocery store refrigeration systems used to store perishable food items. The definition

also includes appliances using ozone-depleting refrigerants that are used to store or warehouse perishable goods or any other product requiring temperature controlled storage. Such appliances may be found in industrial settings where a manufactured product requires cold storage, but the appliance itself would not be considered as an industrial process refrigeration appliance.

EPA proposes to amend the definition of commercial refrigeration to remove any ambiguity concerning the types of appliances that are subject to the leak repair regulations. The last sentence of the current definition at § 82.152 states, that all of the equipment contains large refrigerant charges, typically over 75 pounds. While accurate, this sentence has caused some confusion as to whether or not the leak repair requirements are applicable to appliances with a full charge of more than 50 pounds as stated in the leak repair required practices or 75 pounds as referenced in the definition of commercial refrigeration appliance. EPA proposes to remove the 75 pound reference from the last sentence of the definition. The Agency feels that it is not required since the threshold for the leak repair requirements is a refrigerant charge greater than 50 pounds. EPA seeks comment on whether the proposed amendment to the definition provides greater clarity to the definition of *commercial refrigeration appliance* and reduces uncertainty regarding the applicability of the leak repair provisions.

Over the past several years, EPA has received questions from the grocery and supermarket sector concerning what constitutes a commercial refrigeration appliance. EPA reminds readers that commercial refrigeration appliances typically found in grocery stores and supermarkets are not limited to what is typically referred to as "a rack" or "compressor rack," but include the "rack system." This means that all of the major refrigeration components making up the refrigerant circuit that are typically found in supermarket refrigeration equipment, including the condenser, compressor rack, receiver, evaporator, filter driers, and liquid and suction manifolds comprise the commercial refrigeration appliance. The commercial refrigeration appliance also includes the display cases, walk-in coolers and freezers, field and rack piping, valves, and regulators. EPA will clarify later in this action when retrofits or retirements of commercial refrigeration appliances are required in the commercial refrigeration sector.

EPA's proposed definition of *commercial refrigeration appliance* means any refrigeration appliance used to store perishable goods in retail food, cold storage warehousing, or any other sector requiring cold storage. Retail food includes the refrigeration equipment found in supermarkets, grocery and convenience stores, restaurants, and other food service establishments. Cold storage includes the refrigeration equipment used to house perishable goods or any manufactured product requiring refrigerated storage. EPA requests comment on the definition of commercial refrigeration appliance. Specifically, EPA seeks comments on the inclusion of the compressor rack system in the Agency's current interpretation of what comprises a commercial refrigeration appliance.

3. Critical (Appliance) Component

EPA currently defines *critical component* as a component without which industrial process refrigeration equipment will not function, will be unsafe in its intended environment, and/or will be subject to failures that would cause the industrial process served by the refrigeration appliance to be unsafe. EPA is considering changing the definition to delete the term "critical" and simply define "component." EPA is also proposing to delete the safety aspect from the definition, because the Agency believes that while safety is vital, it should not be used as a means of distinguishing what meets the proposed revised definition of "component." EPA considers components as the major parts of the appliance that typically make up the refrigerant circuit such as the compressor, heat exchangers (condenser and evaporator), and valves (*e.g.,* heat recovery, expansion, charging). Other components may include receivers, manifolds, filter driers, and refrigerant piping. EPA believes that the meaning of the definition can be presented without necessarily classifying the component as critical.

The current definition of *critical component* has implications for the leak repair requirements, because owners or operators of industrial process refrigeration appliances may be granted additional time to make repairs, if they can show that repairs cannot be completed within specified timelines due to the amount of time needed to deliver components or their subassemblies. Later in this action, EPA proposes changes to the leak repair requirements that will allow changes to the individual refrigeration appliance components in lieu of retirement of an entire appliance. In addition, EPA is seeking a consistent set of regulations for all types of appliances. The unavailability of components is not a situation that is unique to owners or operators of industrial process refrigeration appliances. EPA believes that owners or operators of comfort cooling and commercial refrigeration appliances should be granted the same flexibility as owners of industrial process refrigeration appliances when requesting additional time to make repairs due to the unavailability of components. Having similar requirements for all affected appliances also provides for a more consistent set of regulations that should reduce the level of complexity inherent in the current leak repair regulations.

Therefore, EPA is proposing to change the definition so that it is not limited to industrial process refrigeration appliances, but also includes comfort cooling and commercial refrigeration appliances. EPA proposes to replace the current definition of "critical component" with "component," which will mean an essential appliance component, without which the appliance will not function (*e.g.,* compressor, condenser, evaporator). EPA seeks comment on the proposed change to the definition of critical component.

4. Initial and Follow-Up Verification Tests

Current leak repair requirements at § 82.156 mandate the validation of repairs by both an initial verification and a follow-up verification. The purpose of the initial verification test is to make certain that appliance owners or operators instruct service contractors and technicians to verify repairs as soon as possible, after conclusion of repairs. EPA currently defines the term at § 82.152 to read in part: "those leak tests that are conducted as soon as practicable after the repair is completed. An initial verification test, with regard to the leak repairs that require the evacuation of the appliance or portion of the appliance, means a test conducted prior to the replacement of the full refrigerant charge and before the appliance or portion of the appliance has reached operation at normal operating characteristics and conditions of temperature and pressure. An initial verification test with regard to repairs conducted without the evacuation of the refrigerant charge means a test conducted as soon as practicable after the conclusion of the repair work."

The purpose of the follow-up verification is to make certain that service personnel return to check the efficacy of repair efforts after the appliance is operating under normal operational characteristics and

conditions. Follow-up verification tests involve the additional verification of repairs by checking the repairs within 30 days of the appliance's returning to normal operating characteristics and conditions. EPA currently defines the term at § 82.152 to read in part: "those tests that involve checking the repairs within 30 days of the appliance's returning to normal operating characteristics and conditions. Follow-up verification tests for appliances from which the refrigerant charge has been evacuated means a test conducted after the appliance or portion of the appliance has resumed operation at normal operating characteristics and conditions of temperature and pressure, except in cases where sound professional judgment dictates that these tests will be more meaningful if performed prior to the return to normal operating characteristics and conditions. A follow-up verification test with respect to repairs conducted without evacuation of the refrigerant charge means an additional verification test conducted after the initial verification test and usually within 30 days of normal operating conditions. Where an appliance is not evacuated, it is only necessary to conclude any required changes in pressure, temperature or other conditions to return the appliance to normal operating characteristics and conditions."

EPA believes that it is common practice for technicians and contractors to perform verification immediately upon completion of repairs; however, it has been reported to EPA that many owners or operators have follow-up verifications performed immediately upon completion of the initial verification. The intent of the follow-up verification is for appliance owners or operators to conduct verification of repairs after the appliance has operated under normal conditions over an extended period of time (but no longer than 30 days), in order to ensure that the repairs hold under normal operating conditions.

EPA is proposing to amend the definition of *follow-up verification* to reduce the likelihood of repeat repair attempts and subsequent releases of refrigerant by making the tests applicable to comfort cooling and commercial refrigeration appliances as well as industrial process refrigeration appliances. EPA proposes to require owners or operators of commercial, comfort cooling, and industrial process refrigeration appliances with refrigerant charges greater than 50 pounds to perform follow-up verifications after the repaired appliance has operated under normal conditions for an extended period of time. EPA proposes that once the appliance returns to normal operating characteristics and conditions, that follow-up verification tests occur no sooner than one full day (*i.e.,* 24 hours) after the repairs to the leaking appliance have been completed, but within 30 days of the appliance repair. EPA is proposing a definition that reads:

Follow-up verification test means a test that validates the effectiveness of repairs within 30 days of the appliance's return to normal operating characteristics and conditions but no sooner than 24 hours after completion of repairs. Follow-up verification tests include, but are not limited to, the use of soap bubbles, electronic or ultrasonic leak detectors, pressure or vacuum tests, fluorescent dye and black light, infrared or near infrared tests, and handheld gas detection devices.

While EPA is not specifying one specific test to satisfy the definition of follow-up verification, the Agency is including in the proposed definition several means of conducting verification tests. These methods are not meant to be all-inclusive, but are intended to provide examples of known methodologies of performing leak repair verification tests.

EPA provides additional discussion of both initial and follow-up verification tests and the proposal to extend the requirement to perform such tests to comfort cooling and commercial refrigeration appliances in Section C.4 of today's proposed rule. EPA requests comment on the proposed amendment to the definition of follow-up verification. In particular, the Agency is asking for public comment on the selection of 24 hours as an appropriate amount of time, at a minimum, that must transpire before owners or operators have follow-up verification tests performed on appliances that are subject to the leak repair requirements.

5. Full Charge and Seasonal Variance

Compliance with the leak repair requirements requires calculating both the full charge of the appliance and the leak rate. By definition of leak rate (at § 82.152), appliance owners or operators cannot make a determination of the leak rate without knowledge of the appliance's full charge. EPA has provided flexibility in the determination of full charge by allowing appliance owners or operators to select from an array of options in determining the full charge. EPA has never mandated one particular method, and in fact relies on the appliance owner or operator's determination of the appliance's full charge.

EPA currently defines *full charge* at § 82.152 as: "the amount of refrigerant required for normal operating characteristics and conditions of the appliance as determined by using one or a combination of the following four methods: (1) Use the equipment manufacturer's determination of the correct full charge for the equipment; (2) Determine the full charge by making appropriate calculations based on component sizes, density of refrigerant, volume of piping, and other relevant considerations; (3) Use actual measurements of the amount of refrigerant added or evacuated from the appliance; and/or (4) Use an established range based on the best available data regarding the normal operating characteristics and conditions for the appliance, where the midpoint of the range will serve as the full charge, and where records are maintained in accordance with § 82.166(q)."

EPA believes that the four methods allow owners or operators to either rely on manufacturer's data, actual refrigerant weights, or their own engineering and operating experience with their appliances in order to determine the full charge. EPA understands that in some instances manufacturer's data might not be available. The Agency also understands that some appliances, such as commercial refrigeration and industrial process refrigeration appliances, are unique in nature and erected in the field, and that attempts to shutdown operations in order to recover and weigh the refrigerant charge may not always be practical for these appliances.

EPA believes that an option allowing a combination of methodologies is not in line with one of the goals of this NPRM to create a streamlined set of regulatory requirements. Therefore, EPA seeks comment on the proposal to remove the option of allowing a combination of the methods, while continuing to allow owners or operators to use any one method of their choosing in determining the full charge.

EPA believes that records documenting the determination of the full charge should be maintained. This is especially true in instances where the owner or operator is relying on calculations or engineering estimates to determine the full charge. The leak repair requirements currently have such a requirement, but only for those owners or operators choosing to determine the full charge by using an established range in their estimate. Therefore, EPA is proposing a change in the definition of full charge that requires the maintenance of a written record documenting the determination of the

full charge, regardless of the means used to make such a determination. EPA does not believe that this proposed change will result in additional burden since owners or operators must determine the full charge of the appliance in order to comply with the existing leak repair required practices, at § 82.156. By definition (of leak rate at § 82.152) owners or operators would need to make a determination of the equipment's full charge in order to determine steps required to comply with existing regulations. EPA requests comment on its assertion that the proposed definition of leak rate will not pose additional burden, since owners or operators would need to make a determination of the equipment's full charge in order to determine steps required to comply with existing regulations. Further discussion on the recordkeeping requirement for determination of the full charge is provided in Section D.4.

Owners or operators of commercial and industrial process refrigeration appliances have expressed concerns that the full charge may not be accurately determined due to seasonal variances that may alter the amount of refrigerant in an appliance. Ambient conditions and other factors may affect the amount of refrigerant in certain appliance components, but such variances do not mean that the full charge cannot be determined. EPA believes that owners or operators can estimate the effect that seasonal variances have on appliance components by making calculations based on component sizes, density of refrigerant, volume of piping, and other relevant considerations. While seasonal variances in ambient temperature and pressure have the effect of forcing refrigerant to different appliance components (for example, from an appliance's receiver to the condenser), the Agency does not support the notion that seasonal variances cause the refrigerant to be emitted to the atmosphere.

EPA believes that regulatory flexibility should be considered as a regulatory option by allowing owners or operators to take seasonal variances into account in determining the full charge, EPA is proposing to amend the second option by including seasonal variances as well as other relevant considerations. EPA is also proposing to add a definition for seasonal variance, at § 82.152, that reads*:* The need to add refrigerant to an appliance due to a change in ambient conditions caused by a change in season, followed by the subsequent removal of refrigerant in the corresponding change in season, where both the addition and removal of refrigerant occurs within one consecutive 12-month period.

The proposed definition of "full charge" means the amount of refrigerant required for normal operating characteristics and conditions of the appliance, as determined by using one of the following four methods: (1) Use the equipment manufacturer's determination of the full charge; (2) Use appropriate calculations based on component sizes, density of refrigerant, volume of piping, seasonal variances, and other relevant considerations; (3) Use actual measurements of the amount of refrigerant added or evacuated from the appliance; or (4) Use an established range based on the best available data regarding the normal operating characteristics and conditions for the appliance, where the midpoint of the range will serve as the full charge. EPA intends for owners or operators of affected appliances to commit to one methodology in determining the full charge for the life of the appliance. EPA seeks comment on whether the proposed changes have any impact or burden on an owner or operator's ability to determine the full charge.

6. Industrial Process Refrigeration

Industrial process refrigeration appliances include a vast array of refrigeration equipment used in manufacturing or production processes. Such appliances may be used to generate electricity, process or create food and beverages, manufacture pharmaceuticals or chemicals, or in any other process that is essential to the manufacture of an end product. EPA differentiates industrial process refrigeration from comfort cooling or commercial refrigeration appliances in that the end product cannot be completely manufactured in the absence of such refrigeration appliances. Currently, the definition of industrial process refrigeration reads:

> Industrial process refrigeration means, for the purposes of § 82.156(i), complex customized appliances used in the chemical, pharmaceutical, petrochemical and manufacturing industries. These appliances are directly linked to the industrial process. This sector also includes industrial ice machines, appliances used directly in the generation of electricity, and ice rinks. Where one appliance is used for both industrial process refrigeration and other applications, it will be considered industrial process refrigeration equipment if 50 percent or more of its operating capacity is used for industrial process refrigeration.

EPA is proposing to clarify that the definition of industrial process refrigeration includes the industrial process refrigeration appliances found in an array of manufacturing industries. In addition, EPA does not see a need to cross-reference the required practices in the definition and is also proposing to remove the cross-reference to § 82.156(i). The proposed definition of "industrial process refrigeration appliance" means refrigeration equipment, that may be complex or customized, that is used in a manufacturing process. Industrial process refrigeration appliances include refrigeration equipment that is directly linked to a manufacturing process, including but not limited to appliances used in the chemical; pharmaceutical; petrochemical; food or beverage manufacturing, packaging or processing; power generation; and industrial ice manufacturing industries. Where one appliance is used for both industrial process refrigeration and another type of refrigeration or air-conditioning application, the appliance will be considered an industrial process refrigeration appliance if 50 percent or more of its operating capacity is used for industrial process refrigeration. EPA views these amendments as clarifications and not as substantive changes from the current definition. However, EPA seeks public comment on the proposed clarifications.

EPA is proposing a parallel change to the definition of industrial *process shutdown* by removing the reference to § 82.156(i). As noted above, EPA does not see the need to cross-reference required practices in the definition. Further discussion of the deletion of the definition of *industrial process* shutdown is provided in section C.5, "Extension to repair and retrofit and retirement timelines," of today's NPRM.

7. Leak Rate

EPA published a final rule on leak repair (January 11, 2005; 70 FR 1975) that discussed in detail the advantages and disadvantages of using the EPA annualized method or rolling average method as described in the definition of "leak rate" at § 82.152. EPA believes that there are advantages and disadvantages to each approach. The annualizing method may capture some leaks more quickly than the rolling average, and in some instances may cause a delay in repairs by owners or operators whose appliances leak slowly but show no signs of leakage until a relatively large percentage of the refrigerant charge has been lost. Whereas, the rolling average method may capture sudden leaks more quickly than the annualizing method and may permit owners or operators to delay repair of certain types of leaks longer than the annualizing method. The current definition of "leak repair"

contains two methods. Method 1—The Annualizing Method is summarized as follows:

$$\text{Leak rate (\% per year)} = \frac{\text{pounds of refrigerant added}}{\text{pounds of refrigerant in full charge}} \times \frac{365 \text{ days}}{\text{shorter of \# days since refrigerant last added or 365 days}} \times 100\%$$

This method does not allow for the time period over which leaks are evaluated to extend beyond 365 days, because it annualizes by multiplying the percentage of refrigerant lost by the shorter of the number of days since refrigerant was last added to the appliance or 365 days. Method 2—The Rolling Average Method is summarized as follows:

$$\text{Leak rate (\% per year)} = \frac{\text{pounds of refrigerant added over past 365 days (or since leaks were last repaired, if that period is less than one year)}}{\text{pounds of refrigerant in full charge}} \times 100\%$$

Similarly, this method does not allow for the time period over which leaks are evaluated to extend beyond 365 days, because it aggregates the amount of refrigerant added to the appliance over the past 365 days or since the last time that repairs were made if that period is less than one year.

In an effort to provide greater clarity to the leak repair requirements, EPA is proposing to change the definition of leak rate by removing the annualizing method (*i.e.,* Method 1). EPA understands that many appliance owners or operators have chosen to use the Annualizing Method; however, EPA believes that the Rolling Average Method is more in line with what most in the regulated community would consider as a true rolling average. It takes a true snapshot of the amount of refrigerant that is added to an appliance over a consecutive 12-month period by simply looking at the ratio of the amount of refrigerant added over the last consecutive 12-month period and the full charge. EPA requests comment on the exclusive use of the rolling average method in defining the term "leak rate."

EPA has considered an option to maintain the current definition of leak rate, but believes that the current leak repair requirements raise the question of when a leak event ceases. In other words, when does the leak repair clock start over? While the definition of leak rate is limited to a consecutive 12-month period, there is no linkage to an event that would show due diligence in making repairs or verification that the repairs did indeed hold, thus providing a rationale for closing the leak event. EPA believes that such rationale is found in the verification of repairs. The leak repair clock for a leak event should be stopped after successful initial verification and follow-up verification and documentation of repairs for all leaks. EPA is proposing to amend the leak rate definition such that it is dependent upon the successful completion of a follow-up verification test. EPA is also proposing to delete "measured" from the definition of leak rate. This change is warranted because the rate is based upon a calculation that in itself is not a physical measurement but a calculation. The proposed definition of leak rate reads:

> The rate at which an appliance is losing refrigerant, calculated at the time of refrigerant addition. The leak rate is expressed in terms of the percentage of the appliance's full charge that has been lost since the last successful repair over a consecutive 12-month period, and is calculated by:
>
> (i) Step 1. Taking the number of pounds of refrigerant added to the appliance since the last successful follow-up verification or the number of pounds of refrigerant added during the previous 365-day period (if the last successful follow-up verification occurred more than one year ago); (ii) Step 2. Divide the result of Step 1. by the number of pounds of refrigerant the appliance contains at full charge; (iii) Step 3. Multiply the result of Step 2. by 100 to obtain a percentage. This method is summarized in the following formula:

$$\text{Leak rate (\% per year)} = \frac{\text{pounds of refrigerant added since last successful follow-up verification (or during the past 365 days if that period is greater than one year)}}{\text{pounds of refrigerant in full charge}} \times 100\%$$

EPA seeks comment on the proposed changes to the definition of leak rate. In particular, EPA requests comment on the clarity provided by linking leak rate to the requirement to perform and successfully pass an initial and follow-up verification test.

8. Normal Operating Characteristics or Conditions

The current definition of *Normal operating characteristics or conditions,* found at § 82.152, means for the purposes of § 82.156(i), temperatures, pressures, fluid flows, speeds and other characteristics that would normally be expected for a given process load and ambient condition during operation. Normal operating characteristics and conditions are marked by the absence of atypical conditions affecting the operation of the refrigeration appliance.

As a part of today's NPRM, EPA is suggesting several edits to the leak repair required practices at § 82.156(i). EPA does not see a need to cross-reference the required practices, so the Agency is proposing to remove the reference to § 82.156(i). Therefore the reference to § 82.156(i) would also need to change. EPA is also proposing to add a reference to the appliance's "full charge" in defining *normal operating characteristics or conditions.* EPA believes that the appliance's full charge is a state of its normal characteristics and should be reflected as such in the definition. EPA's proposed definition of Normal operating characteristics and conditions means the appliance operating temperatures, pressures, fluid flows, speeds and other characteristics, including full charge of the appliance, that would be expected for a given process load and ambient condition during operation. Normal operating characteristics and conditions are marked by the absence of atypical conditions affecting the operation of the refrigeration appliance. EPA views these amendments as minor edits that provide consistency with similar proposed edits and is not considering or proposing other changes to the definition. EPA seeks comment on the effectiveness of the proposed changes to delete the reference to § 82.156(i) and include a reference to the appliance's full charge.

9. Retrofit, Repair, and Retire

Many appliance owners or operators have incorrectly equated the two terms retrofit and repair. EPA does not view a retrofit or the need to retrofit as a repair. EPA considers a repair as an action that addresses the leaking appliance or more specifically the affected component(s) of the leaking appliance. Repairs may include replacement of components or component subassemblies, whereas a retrofit involves the conversion of an appliance so that it is compatible for use with a substitute with a lower ODP. Retrofits often require changes to the appliance (for example, change in lubricants, filter driers, gaskets, o-rings, and in some cases, changes in components) in order to acquire system compatibility.

EPA considers substitutes as those alternatives for ODS refrigerants that have been found acceptable for use in a specified refrigeration or air-conditioning end-use, in accordance with Section 612 of the Clean Air (*i.e.,* the EPA Significant New Alternatives Policy (SNAP) program codified at 40 CFR part 82, subpart G). The current definition of substitute at § 82.152 means any chemical or product, whether existing or new, that is used by any person as an EPA approved replacement for a class I or II ozone-depleting substance in a given refrigeration or air-conditioning end-use. Whereas, a refrigerant, as defined at § 82.152, "means any substance consisting in part or whole of a class I or class II ozone-depleting substance that is used for heat transfer purposes and provides a cooling effect." Therefore, for purposes of the Section 608 refrigerant regulations (including the leak repair requirements), EPA considers any substance used to provide a cooling effect that consists of an ODS as a *refrigerant.* Therefore, a class II substance used as substitute for a class I that has been found acceptable under SNAP for any specific refrigeration or air-conditioning end-use may also be considered a refrigerant (*e.g.,* the use of R–22 as a SNAP-acceptable substitute for R–502 in retail food refrigeration or commercial refrigeration). Similarly, refrigerants could include SNAP-acceptable substitutes if such substitutes were/are a blend in which at least one of its components is an ODS (*e.g.,* the use of R–401A as a SNAP-acceptable substitute for R–12 in retail food refrigeration or commercial refrigeration).

Current leak repair requirements limit retrofits to conversion of IPR appliances so that they are compatible for use with refrigerants with a lower or equivalent ODP or substitutes with an equivalent or lower ODP (§ 82.156(i)(7)). As the U.S. completes the phaseout of class II ODS, such as HCFC–22,[5] EPA believes that it is not reasonable to allow an appliance retrofit to a substitute with an equivalent ODP. EPA also believes that a retrofit must include a change in refrigerant.

The concern with the current definition is that by allowing a retrofit to a refrigerant with an equivalent ODP, the Agency could unintentionally permit the continued use of the same refrigerant that leaked from the appliance. EPA does not feel that such action is a retrofit. Nor does EPA believe that such action meets the intent of the regulations to reduce the use and emissions of ODS by having such systems retrofitted (*i.e.,* converted) to a non-ODS; therefore, the Agency feels that clarification is warranted.

EPA is also concerned that the leak repair requirements could be misinterpreted as requiring the retrofit of appliances without addressing leaks. In order to address these concerns and provide regulatory clarity, EPA is proposing a definition for "retrofit" that means the repair and conversion of an appliance from a refrigerant to a substitute with a lower ozone-depleting potential. Retrofit includes the conversion of the appliance to achieve system compatibility with the new substitute and may include, but is not limited to, changes in lubricants, gaskets, filters, driers, valves, o-rings or appliance components. EPA believes that it is unlikely that a SNAP-acceptable alternative for a specific refrigeration or air-conditioning end-use would have an equivalent ODP to the refrigerant being replaced.[6] EPA seeks comment on the proposed definition of retrofit as it relates to the conversion of leaking appliances, and the likelihood that a SNAP-acceptable alternative for a specific stationary refrigeration or air-conditioning end-use would have an equivalent ODP to the (ODS) refrigerant being replaced.

EPA has not finalized a definition of retire, retirement, or retired even though these terms are referenced throughout the leak repair regulations. EPA considers retirement of appliances to mean the disassembly and retirement of the entire appliance including its major components, such that the appliance as a whole cannot be used by any person in the future. Retirement means that any remaining refrigerant would be recovered from the appliance and properly stored for reuse by the same owner, unless that recovered refrigerant is reclaimed or destroyed. Recovery efforts would be followed by the

[5] As of January 1, 2010, EPA has banned the production and importation of HCFC–142b and HCFC–22, except for use in equipment manufactured before 1/1/2010 (so no production or importing for NEW equipment that uses these refrigerants). As of January 21, 2003, no person may import class II ODS (such as HCFC–22) in excess of their EPA granted consumption allowance (40 CFR 82.15(b)).

[6] The intended effect of the SNAP program is to expedite movement away from ozone depleting substances while avoiding a shift into high-risk substitutes posing other environmental problems. EPA considers energy savings, flammability, and toxicity, in addition to ozone depletion potential, in its SNAP review.

dismantling and proper disposal of the compliance components. Hence, retirement does not mean that the appliance is undergoing "system mothballing," as defined at § 82.152,[7] until it is ready to be used once again. Retirement should also not be confused with a repair. Repair may include the removal of a faulty component, but such removal does not mean that the appliance as a whole has been retired.

In order to make this distinction between a repair, system mothballing, and retirement, EPA is proposing to define "retire" as the permanent removal from service of the entire appliance rendering it unfit for use by the current or any future owner or operator. EPA requests comment on the proposed definition of retire, and the distinction that it provides with respect to the term repair.

C. Required Practices

Final regulations promulgated by EPA under section 608 of the Act (58 FR 28660; May 14, 1993), established leak repair requirements at § 82.156 to further minimize emissions of class I and class II ODS used as refrigerants. The rule states that appliances that normally hold a refrigerant charge greater than 50 pounds are subject to the leak repair requirements. An annual leak rate of 35 percent of the full charge was established for industrial process refrigeration and commercial refrigeration appliances, while an annual leak rate of 15 percent was established for comfort cooling appliances.

1. Repair of Leaks and Leak Repair Trigger Rates

The goal of the required practices, found at § 82.156, is to reduce refrigerant emissions by encouraging owners or operators of industrial process refrigeration, comfort cooling, and commercial refrigeration appliances to successfully repair appliances or retrofit (*i.e.,* convert), retire, or replace leaking refrigeration and air-conditioning equipment (*i.e.,* appliances) that cannot be successfully repaired or maintained. One of the goals of the leak repair regulations is to address the repair and maintenance of appliances with large refrigerant charges, particularly as they age. Via regulation, EPA has intended to reduce the use and emissions of ozone-depleting refrigerants by requiring owners or operators of appliances to effectively address leaks in their appliances, and to replace, retrofit, or retire appliances that cannot be effectively repaired, hence breaking cycles of repeat repair attempts followed by refrigerant recharges. EPA has occasionally found that owners or operators of appliances make repair attempts followed by refrigerant recharge multiple times, sometimes over the span of just a few months. Such repetitive actions unnecessarily increase emissions of refrigerant to the atmosphere. These actions are amplified when taking into account the large charge size of some appliances.

EPA's aim is to reduce emissions by breaking the cycle of repair and recharge of appliances. Often owners or operators state that they always make repairs, and in some refrigeration end-uses, repairs must be made in order to remain in business. EPA does not dispute this point, but repeated repair attempts, without verifying repairs, followed by additional refrigerant recharges have adverse effects on the environment. In many instances, repeated repair attempts result in hundreds of pounds of refrigerant released into the atmosphere by one appliance. The aim of the leak repair regulations is to reduce emissions of refrigerants to the lowest achievable level by addressing leaks, specifically components with common failures. Repeat component failures may be an indication of a greater maintenance issue or the end of the equipment's useful lifetime.

The required practices at § 82.156 currently require owners or operators of industrial process refrigeration (§ 82.156(i)(2)), comfort cooling (§ 82.156(i)(5)), and commercial refrigeration appliances (§ 82.156(i)(1)) with refrigerant charges of more than 50 pounds to repair leaks within 30 days, unless owners or operators decide to immediately retrofit or retire the appliance. Retrofit or retirement plans must be completed within 30 days of discovering the leak and must be fully implemented within one-year of the plan's date. For those appliances not undergoing retrofit or retirement, the repairs must bring the leak rate to below the applicable leak rate of 35 or 15 percent.

This requirement has allowed scenarios where owners or operators could decide to not repair all known leaks within an appliance, as long as repair efforts brought the leak rate of the appliance to beneath the associated leak rate. The problem with such a scenario is that owners or operators may assume that they have complied with the leak repair requirements, but may find themselves out of compliance if another leak resulting in a calculated leak rate greater than the applicable trigger rate occurs shortly after the initial repair effort was completed. Absent repair verification, the owner or operator may not know that the appliance's leak rate was brought beneath the applicable leak repair trigger rate until the next addition of refrigerant.

EPA is proposing changes that will reduce the opportunity for selective repair of appliances. Leaving some appliance leaks unattended does not reduce emissions of refrigerants to the lowest achievable level. Since selective repairs can result in excessive refrigerant emissions to the atmosphere, with associated human health and environment impacts, and have the potential to hinder compliance with the leak repair requirements, EPA is proposing that owners or operators of comfort cooling, industrial process refrigeration, or commercial refrigeration appliances with a full charge greater than 50 pounds of refrigerant repair all leaks within the appliance within 30 days, if the leak rate exceeds the applicable leak repair trigger rate.

This proposal, if promulgated, means that appliance owners or operators cannot be selective about repairs made to appliances that leak in excess of the leak repair trigger rate, since the leaks would have to be repaired within 30 days of the date that the appliance's leak rate exceeds the leak repair trigger rate. EPA believes that this proposal will remove ambiguity concerning compliance with the leak repair requirements by requiring the repair of all leaks once the leak repair trigger rate has been breached; thereby removing any question as to whether a repair attempt was sufficient. EPA understands that some level of refrigerant leakage from appliance valves, seals, gaskets, and other fittings occurs. By requiring owners or operators to repair "all" leaks once the leak repair trigger rate has been breached, it is not EPA's intent to require that owners or operators address leaks from such fittings. However, EPA strongly encourages appliance owners or operators to address leaks from fittings as an additional means of reducing emissions, especially if addressing such leaks will reduce the leak rate of the appliance. EPA requests comment on the proposed requirement to repair all leaks within 30 days of discovery when the appliance leaks above the respective leak repair trigger rate.

The current and proposed requirement to repair leaks references

[7] *System mothballing* means the intentional shutting down of a refrigeration appliance undertaken for an extended period of time by the owners or operators of that facility, where the refrigerant has been evacuated from the appliance or the affected isolated section of the appliance, at least to atmospheric pressure.

leak rate. Leak rate, as currently defined at § 82.152, allows two methods for calculating the leak rate that projects the percentage of leakage over a consecutive 12-month period. Current required practices do not mandate the calculation of the leak rate each time that refrigerant is added to the appliance. Such action is implied since owners or operators may not be able to determine compliance without calculating the leak rate each time refrigerant is added to the appliance. For example, if a commercial refrigeration appliance owner adds refrigerant to the appliance but does not calculate the leak rate, the owner would have no means of determining if the appliance's leak rate was kept beneath 35 percent. Hence, the owner would not know if further action was warranted. In order to reinforce the required practices, EPA is proposing language that would require the calculation of the leak rate (as defined at § 82.152) upon each addition of refrigerant to the appliance, unless the addition is made in order to recharge refrigerant immediately following a retrofit or the addition is made to counter a seasonal variance (where records documenting the seasonal variance are maintained as proposed at § 82.166). EPA views these proposed requirements as reinforcements of a requirement by reference that will aid in the interpretation of the leak repair regulations. EPA seeks comment on the proposed changes to the required practices at § 82.156.

a. Applicable Leak Rate for Commercial, Comfort Cooling, and Industrial Process Refrigeration Appliances

The intent of proposing lower leak repair trigger rates is to reduce use and emissions of ozone-depleting refrigerants from appliances with large refrigerant charges, particularly as they age. EPA believes that this is best accomplished by tightening existing regulations and requiring repair of appliances, possible retrofit or conversion of ODS appliances, and possible appliance replacement of components when they cannot be satisfactorily maintained or repaired within the specified timelines.

Many owners or operators of appliances (particularly commercial refrigeration and industrial process refrigeration appliance owners or operators) have stated that they always repair leaks, and must do so in order for their businesses to remain viable. Comments provided in response to the June 11, 1998 NPRM (63 FR 32044), by The National Grocers Association (NGA) echo this point. The NGA commented in response to the 1998 proposed rule that, "* * * Eliminating leaks is a primary concern in designing new refrigeration equipment. Systems are being made tighter and new equipment may also reduce the refrigerant charge. For obvious reasons, the older the refrigeration system is, the higher the leak rate." Such statements are reinforced by EPA evaluation of leak reports submitted to the Agency from owners or operators of industrial process refrigeration, commercial supermarket chains, and chillers of various sizes and refrigerant types. Review of this data shows that many leaks from comfort cooling, commercial refrigeration, and industrial process refrigeration appliances with more than 50 pounds of refrigerant are caused by catastrophic events, and often times repairs can and do occur within 30 days. EPA agrees that many businesses are dependent upon repair of appliances and that it may not be in the best financial interests of many appliance owners or operators to allow their appliances to continue to leak. Hence, the Agency views the leak repair trigger rates and the leak repair requirements as a reinforcement of current repair practices, while further reducing the use and emissions of ozone-depleting refrigerants.

As a means of reducing emissions of ozone-depleting substances to the lowest achievable level, EPA is proposing to tighten the 15 and 35 percent leak repair trigger rates for comfort cooling, commercial refrigeration, and IPR appliances. EPA has considered multiple leak repair trigger rates of: (1) 5% for comfort cooling and 10% for commercial refrigeration and IPR appliances; (2) 5% for comfort cooling and 20% for commercial refrigeration and IPR appliances; (3) 5% for comfort cooling and 30% for commercial refrigeration and IPR appliances; (4) 10% for comfort cooling and 10% for commercial refrigeration and IPR appliances; (5) 10% for comfort cooling and 20% for commercial refrigeration and IPR appliances; and (6) 10% for comfort cooling and 30% for commercial refrigeration and IPR appliances. Within each option, EPA has considered whether additional emissions reduction is gained by requiring: (1) the replacement of leaking appliance components after the failure of repair verification; or by (2) maintaining the existing regulatory flexibility allowing owners/operators to make unlimited attempts at repair (followed by subsequent refrigerant recharges) without a mandate to actually replace a leaking component.

Under the first scenario, leaking components that fail verification tests must be replaced within 30 days. Under the second scenario, the owners or operators must still make repairs to leaking appliances, but owners or operators have the discretion to determine whether or not repairs will include the replacement of leaking components. Under both scenarios, repairs must be completed within 30 days of leak detection, and verifications (immediate and follow-up within 30 days) must be conducted. A summary of the scenarios with estimated costs and benefits is summarized as follows:

COSTS AND BENEFITS OF REGULATORY OPTIONS

Option	Costs (million dollars)	Benefits (ODP-weighted tonnes)	Monetized Benefits at 3% discount rate (million dollars)
Scenario 1:			
1 (5% and 10%)	$135.6	493	$2.5
2 (5% and 20%)	111.0	394	2.0
3 (5% and 30%)	92.2	273	1.4
4 (10% and 10%)	129.9	483	2.5
5 (10% and 20%)	105.3	384	2.0
6 (10% and 30%)	86.5	263	1.3
Scenario 2:			
1 (5% and 10%)	53.2	423	2.2
2 (5% and 20%)	40.9	326	1.7
3 (5% and 30%)	31.1	208	1.1
4 (10% and 10%)	50.5	413	2.1

COSTS AND BENEFITS OF REGULATORY OPTIONS—Continued

Option	Costs (million dollars)	Benefits (ODP-weighted tonnes)	Monetized Benefits at 3% discount rate (million dollars)
5 (10% and 20%)	38.2	316	1.6
6 (10% and 30%)	28.5	198	1.0

Based in part on EPA analysis (*see* accompanying *Screening Analysis to Examine the Economic Impact of Proposed Revisions to the Refrigerant Recycling and Emissions Rule,* EPA Docket ID No. EPA–HQ–OAR–2003–0167), the Agency has decided to propose a reduction of the leak repair trigger rate for comfort cooling appliances from 15 to 10 percent and for commercial refrigeration appliance and industrial process refrigeration appliances from 35 to 20 percent. EPA believes that this combination of leak repair trigger rates provides for continued flexibility in allowing appliance owners or operators to decide upon the necessary action needed to repair leaking appliances, and also provides for additional environmental benefit in terms of avoided refrigerant emissions. EPA estimates that the total expected annual incremental cost of the proposed options across all affected sectors is between $86.5 million and $135.6 million for the six options under the first scenario (requiring component replacement), and between $28.5 million and $53.2 million for the six options under the second scenario. EPA also estimates that a reduction of the leak repair trigger rate for comfort cooling appliances from 15 to 10 percent and for commercial refrigeration appliance and industrial process refrigeration appliances from 35 to 20 percent will result in the lowest costs at $38.2 million, with the largest environmental benefit 316 ODP weighted tons, when compared to the other five options that were considered. EPA requests comment on the estimated costs associated with this NPRM.

The proposed 10 and 20 percent leak rates are not viewed by EPA as the optimal leak rate that can be achieved by appliances at the point of original installation or as the appliance ages. Nor does the Agency view the leak repair trigger rates as an exemption to the CAA statutory venting prohibition. The leak rates are a trigger point that requires that the appliance be repaired, retired, or retrofitted by a set date (*e.g.,* 30 days from addition of refrigerant). It is not necessarily a violation for an appliance owner or operator to discover a leak greater than the leak repair trigger rate; however, it would be a violation of the proposed required practices at § 82.156 to allow that appliance to continue to leak above the trigger rate without making and verifying the efficacy of repairs in a timely manner. EPA would expect that appliances would undergo more repairs as they age. It is also expected that the overwhelming majority of appliances that are at least 10 years of age would contain ozone-depleting refrigerants. The result is that it is reasonable to expect that the majority of older ODS appliances will leak with more frequency in the near future, thus increasing the likelihood that incidences of repair attempts and refrigerant recharges would increase over time for these aging appliances.

Therein lies the benefit of the leak repair regulations. A prohibition against venting in itself may not stop the cycle of unsuccessful repair attempts followed by refrigerant recharge, and a breach of the leak repair trigger rates does not automatically mean a violation of the leak repair required practices. A breach of the leak repair trigger rates sets a chain of events that will address the appliance as a whole by requiring a timely repair, verification, and possible retirement of the entire appliance if it shows a history of leak events.

Again, EPA is not making claims as to the optimal leak rate for different types of appliances, but on the ability of appliance owners or operators to address those leaks within 30 days of when the proposed leak repair rates are triggered. However, EPA notes that it has made efforts to set leak repair trigger rates that are based on historical service records of actual refrigeration and air-conditioning equipment, leak tightness claims of equipment manufacturers, as well as testimonies from equipment owners or operators and the groups that represent them. EPA has reviewed a number of data sources in proposing to lower the leak repair trigger rates. EPA has reviewed leak data submitted to California's South Coast Air Quality Management District (SCAQMD). SCAQMD is responsible for controlling emissions primarily from stationary sources of air pollution. California South Coast Air Quality Management is an air pollution control agency that services the areas of Orange County and the urban portions of Los Angeles, Riverside, and San Bernardino counties. The agency reaches about 16 million people on a 10,743 square mile radius, which is half of the population of the state of California.

Similar to the EPA's requirements under Section 608 of the Act, SCAQMD has issued Rule 1415 aimed at reducing emissions of ozone-depleting refrigerants from stationary refrigeration and air-conditioning systems. The rule requires any person within SCAQMD's jurisdiction, who owns or operates a refrigeration system, to minimize refrigerant leakage. A refrigeration system is defined for the purposes of the rule, "as any non-vehicular equipment used for cooling or freezing, which holds more than 50 pounds of any combination of class I and/or class II refrigerant, including, but not limited to, refrigerators, freezers, or air-conditioning equipment or systems." Under Rule 1415, SCAQMD collects the following information every two years from owners or operators of stationary refrigeration systems holding more than 50 pounds of an ozone depleting refrigerant (*http://www.aqmd.gov/prdas/forms/1415form2.doc*): Number of refrigeration systems in operation; type of refrigerant in each refrigeration system; amount of refrigerant in each refrigeration system; date of the last annual audit or maintenance performed for each refrigeration system; and the amount of additional refrigerant charged every year. For the purposes of the rule, additional refrigerant charge is defined as the quantity of refrigerant (in pounds) charged to a refrigeration system in order to bring the system to a full-capacity charge and replace refrigerant that has leaked.

EPA has reviewed data for over 4,750 pieces of equipment from SCAQMD covering the time-period 2004 through 2005. The data includes refrigeration and air-conditioning systems that meet EPA's existing and proposed definitions of industrial process refrigeration appliances (*e.g.,* food processing industry, pharmaceutical manufacturing), comfort cooling refrigeration appliances (*e.g.* office buildings, schools and universities, hospitals), and commercial refrigeration appliances (*e.g.,* refrigerated warehouses, supermarkets, retail box

stores). The appliances that were evaluated all had ODS refrigerant charges greater than 50 pounds. EPA's review shows that a tightening of the leak rate for commercial refrigeration appliances to 20 percent results in 8 percent of the 1,722 systems examined facing mandatory repair within 30 days. Similarly, EPA evaluated data from 2,700 comfort cooling appliances and 350 industrial process refrigeration appliances. The Agency's review shows that lowering the leak rate to 20 percent for industrial process refrigeration will result in slightly less than 5 percent of systems facing mandatory repair within 30 days, and lowering the leak rate to 10 percent for comfort cooling applications will result in slightly less than 1 percent of systems facing mandatory repair within 30 days. The data collected includes businesses of all sizes that meet the reporting criteria.

The SCAQMD leak repair data for commercial refrigeration systems is consistent with EPA's independent analysis on the commercial refrigeration sector. EPA's *Draft Analysis of U.S. Commercial Supermarket Refrigeration Systems* (2005) presents descriptions and a wide range of data collected on five types of supermarket refrigeration systems: Direct expansion (DX), secondary loops, distributed, low-charge multiplex, and advanced self-contained systems. The analysis summarized information on commercial refrigeration appliances gathered from published literature, proceedings from technical conferences, technical trade journals and magazines, and interviews with industry experts. EPA estimates that there are more than 34,000 supermarkets in the United States, each operating 3–4 commercial refrigeration appliances with combined charge sizes of several thousand pounds. EPA also estimates that DX systems using HCFC–22 refrigerant dominant the commercial refrigeration sector with an estimated 60 to 80 percent of new market sales in the United States. EPA notes that leak rates can vary widely; the reduction in leakage from DX systems can be explained by a number of steps taken by equipment manufacturers and users to minimize leakage, including: Designing the system for tightness, practicing maintenance procedures for early detection and leakage repairs; training personnel. EPA estimates that annual leak rates for DX systems range from 3 percent to 35 percent for in-use equipment, with the higher annual leak rates (25%) being more characteristic of older appliances and the lower ones (15%) being more characteristic of newer appliances.

EPA has also considered comments on leak rates that were submitted in response to a NPRM issued on June 11, 1998 (63 FR 32044). In that NPRM, EPA proposed to lower the leak repair trigger rates and also extend the leak repair required practices and associated recordkeeping and reporting to substitute refrigerants. FMI noted in their August 31, 1998 response to the NPRM that * * * the targeted leak rates of 15 percent and 10 percent for equipment built before and after 1992, was unattainable * * *. We believe that rates of 25 percent for equipment manufactured before 1992 and 20 percent for equipment manufactured after 1992 are more realistic. Similar comments were stated by major supermarket chains noting that * * *. Leak rates of 25% would be more practical and allow more effective refrigerant management.

EPA believes that the equipment designs for which leak data has been reported should not differ according to the business size of the reporting entity. For example, both a small independent grocery store and a major supermarket chain might report on leak history of a typical DX refrigeration system. However, EPA would not expect the operating characteristics of the DX system to differ based on the size of the reporting entity. The charge sizes may differ, but the Agency would expect that the general mechanics of the systems would not vary greatly as a function of the size of the owner or operator. EPA expects similar results for owners or operators of appliances in other refrigeration and air-conditioning end-use sectors (*i.e.,* comfort cooling, commercial refrigeration, and industrial process refrigeration). The Agency seeks comment on this expectation and also requests substantiating leak data from owners or operators of comfort cooling, commercial refrigeration, and industrial process refrigeration appliances.

Again, it is not EPA's intention to estimate the lowest achievable leak rate for existing equipment. However, review of actual leak data does reinforce the notion that repair of leaks beneath 20 and 10 percent within 30 days is achievable, and would reduce emissions of ODS. EPA seeks comments on the ability or lack thereof of owners or operators of commercial refrigeration and comfort cooling and industrial process refrigeration appliances to repair leaks within 30 days when their appliances leak above the proposed leak repair trigger rates of 20 percent for industrial process refrigeration and commercial refrigeration appliances and 10 percent for comfort cooling refrigeration appliances.

2. Addition of Refrigerant Due to Seasonal Variances

The proposed leak repair required practices require that the owner or operator determine the full charge of the appliance in order to determine the leak rate of the leaking appliance. In today's NPRM, EPA has proposed to amend the definition of "full charge" to mean:

the amount of refrigerant required for normal operating characteristics and conditions of the appliance as determined by using one of the following four methods: (1) Use the equipment manufacturer's determination of the full charge; (2) Use of calculations based on component sizes, density of refrigerant, volume of piping, seasonal variances, and other relevant considerations; (3) Use actual measurements of the amount of refrigerant evacuated from the appliance; or (4) Use an established range based on the best available data regarding the normal operating characteristics and conditions for the appliance, where the midpoint of the range will serve as the full charge.

EPA is also proposing changes to the required practices in order to acknowledge the rare occasion or need to add refrigerant to an appliance due to a change in seasons. In parts of the country that experience large temperature swings during the year, refrigerant in appliances can migrate from one component to another (*i.e.,* from the condenser to the receiver). This migration results in a need to add refrigerant to an appliance (or "flood the condenser") in the season of lower ambient (*i.e.,* fall or winter). Refrigerant receivers must be properly sized in order to hold the appliances' full charge (*i.e.,* the normal operating refrigerant charge plus the additional charge needed to flood the condenser) during periods with lower ambient conditions. However, EPA understands that owners or operators of appliances without properly sized receivers that need to add refrigerant to the appliance in the fall or winter would also have to remove refrigerant the next spring in order to prevent high head pressures at design ambient conditions. This technique, often referred to as a winter-summer charge procedure or a seasonal adjustment, may occur without the presence of a leak. EPA would not expect seasonal adjustments to be an issue for appliances with properly designed system receivers, because the owner or operator would not need to add refrigerant to account for wintertime operation.

In a properly charged, non-leaking system, EPA would expect that

additions of refrigerant during months with lower ambient conditions (*i.e.,* fall or winter) would necessitate an equivalent amount of refrigerant removal in the higher ambient months (*i.e.,* spring or summer). EPA believes that appliances with properly sized receivers provide the flexibility needed to account for seasonal variances, and the Agency does not expect multiple additions of refrigerant in order to account for seasonal variance; however, EPA seeks comment on its consideration of seasonal variance and the likelihood of multiple refrigerant additions to account for seasonal variance in any one calendar year.

EPA is not opposed to the concept of exempting addition of refrigerant due to a seasonal variance from the requirement to calculate the leak rate upon addition of refrigerant. As previously discussed, EPA has proposed to define *seasonal variance* in such a way as to negate the addition and subsequent removal of refrigerant due to change in seasons, by making the definition contingent upon the future removal of refrigerant in the next season after the addition of refrigerant. However, any exemption to the required practice to calculate the leak rate due to seasonal variance should be accounted for in a service record. Therefore, in order to receive an exemption to the requirement to calculate the leak rate upon a seasonal variance addition of refrigerant, EPA is proposing that both the addition and subsequent removal of refrigerant due to seasonal variances are accounted for and documented as a condition for receiving an exemption. In order to implement this exemption, EPA is proposing language at § 82.156 requiring owners or operators to determine the leak rate upon each addition of refrigerant, except in cases where the addition of refrigerant is due to a seasonal variance. The proposed exemption is contingent upon the owner or operator's maintenance of records documenting the amount of refrigerant added to the appliance in one season and the amount of refrigerant removed from the appliance in the subsequent season. Both the addition and removal must take place within a consecutive 12-month period. Such additions and removal of refrigerant would be documented as proposed at § 82.166(r). EPA seeks comment on the need and effectiveness of a limited exemption [to the requirement to calculate the leak rate upon addition of refrigerant] for seasonal variance in cases where the appliance owner or operator has documented the date, type and amount of refrigerant added and removed from the appliance to account for the seasonal variance. EPA also seeks comment on the need to document the capacity of the receiver, as well as a requirement making the exemption contingent upon an equivalent amount of refrigerant being removed and added over a consecutive 12-month period.

3. Verification of Repairs

The current leak repair verification requirements only apply to owners or operators of industrial process refrigeration and federally-owned commercial and comfort cooling appliances whose owners are granted additional time to make repairs. EPA has found the lack of a verification requirement to be problematic for owners or operators of comfort cooling and commercial refrigeration appliances. The lack of a verification requirement may leave owners or operators of comfort cooling and commercial refrigeration appliances with an uncertainty as to whether their repair efforts have brought them into compliance with the leak repair requirements. The current leak repair regulations require repair of the comfort cooling or commercial refrigeration appliance within 30 days, without any requirement to verify repairs. A lack of verification allows a scenario by which insufficient or incomplete repairs might be attempted which will lead to future leaks. Continued leaks, especially when they are at the same location or component in the appliance, could be interpreted as an insufficient repair, which did not bring the leak rate of the entire appliance beneath the leak repair trigger rate.

EPA sees no reason why verification should not be mandated for all types of appliances with refrigerant charges greater than 50 pounds (*i.e.,* comfort cooling and commercial refrigeration appliance in addition to industrial process refrigeration appliances). The environmental benefit of verifying repairs applies to comfort cooling and commercial refrigeration appliances as well as industrial process refrigeration appliances; therefore, EPA is proposing a requirement that owners or operators of all types of appliances that are subject to the leak repair requirements perform both an initial and follow-up verification of repairs.

EPA is also concerned with the amount of time taken between the initial and follow-up verification tests. The Agency understands that most technicians pressure check appliances immediately following repairs. The Agency considers such pressure checks as satisfying the initial verification requirements, currently required for industrial process refrigeration appliances. EPA's concern is that follow-up verifications do not appear to be a part of normal operating procedures for most service calls. Follow-up verifications require a technician to perform a second test after the appliance has operated under normal operating conditions for an extended period of time. EPA believes that such follow-up verification is an indicator of the success of repairs and must be required of all appliances that have leaked refrigerant above the leak repair trigger rate. Such a requirement to perform follow-up verifications is in place for owners or operators of industrial process refrigeration. However, the current leak repair required practices do not set a minimum amount of time that must pass between such verifications.

EPA has found that in some instances follow-up verifications are performed immediately after repairs and the initial verification. In many cases verifications have been performed without documentation to support the verification efforts. The Agency is proposing a requirement that all owners or operators of commercial, industrial process refrigeration, and comfort cooling appliances with refrigerant charges greater than 50 pounds that leak above the annual leak repair trigger rate repair all leaks within 30 days of discovery (as made evident by the need to add refrigerant that is not the result of a seasonal variance) and perform both initial and follow-up verification, where the follow-up verification occurs no sooner than 24 hours after repairs have been made. EPA requests comment on the clarification that follow-up verification testing take place at least 24 hours after repairs have been made and the appliance has operated under typical conditions. EPA also requests comment on the additional burden or costs that stakeholders may incur as a result of the proposed requirement that follow-up verification take place at least 24 hours after repairs have been made.

4. Requirement to Develop and Complete Retrofit/Retirement Plans

EPA currently requires owners or operators of industrial process refrigeration appliances that have failed an initial or follow-up verification test to develop a dated and written retrofit/retirement plan within 30 days of the failed verification and implement the plan within one year. Owners or operators of comfort cooling and commercial refrigeration appliances are currently not required to perform verification tests and, in lieu of making repairs within 30 days, are given the option to draft and implement retrofit/

retirement plans within 30 days of discovering a leak greater than the applicable trigger rate.

EPA has heard concerns of appliance owners or operators that a requirement to retrofit or retire an entire appliance because it has failed a verification test may not always be practical. Some owners or operators would prefer to have the ability to replace a faulty component before they are required to retrofit or retire an entire appliance. The Agency does not wish to place an undue burden of large scale conversions and retirements upon owners or operators when repair via complete replacement of the leaking appliance component might satisfactorily repair the appliance.

In order to provide a greater level of flexibility, EPA has considered several options that would trigger the requirement to retrofit or retire a leaking appliance. The first proposed option would require owners or operators of comfort cooling, commercial refrigeration, and industrial process refrigeration appliances to replace a leaking component in its entirety upon failure of an initial or follow-up verification test. Such a proposal would be a departure from the current requirement for owners or operators of industrial process refrigeration appliances to retire or retrofit the appliance upon such a failure. Under this scenario EPA could require replacement of the leaking component and all of its subassemblies within 30 days of the failed verification. EPA believes that such a requirement would reduce emissions by addressing the source of the failure and removing the potential for cyclic repair attempts followed by subsequent refrigerant recharge. The Agency seeks comment on the effectiveness and feasibility of requiring owners or operators of comfort cooling, commercial refrigeration, and industrial process refrigeration appliances to replace leaking components in their entirety upon failure of an initial or follow-up verification. EPA is interested in comments concerning its belief that refrigerant emissions might be reduced by requiring component replacement, in lieu of repeat repair attempts and subsequent refrigerant recharges.

EPA is considering a second option that would allow owners or operators to decide on a case-by-case basis if a component or its subassembly requires replacement in order to completely repair the appliance. EPA recognizes that this option would allow a greater level of flexibility to owners or operators of impacted appliances; however, the Agency is concerned that such flexibility could allow increased refrigerant emissions by allowing appliance owners or operators to make multiple repair attempts to an appliance or a specific appliance component in lieu of taking action to completely repair the appliance via a component replacement.[8] A benefit of this proposal is that it eliminates the chance of mandatory component replacement in cases where it might not be warranted. The owner or operator would have the flexibility of determining if wholesale component replacement would be the best means of addressing a leaking appliance. EPA is selecting this option as its lead proposal to amend the required practice, by removing the requirement to retrofit or retire an industrial process refrigeration appliance upon failure of an initial or follow-up verification test. EPA is also proposing to extend this requirement to owners or operators of commercial refrigeration and comfort cooling appliances with refrigerant full charges greater than 50 pounds. EPA believes that this proposal will reduce refrigerant emissions while establishing a consistent set of regulatory required practices. The Agency seeks comment on the effectiveness and feasibility of adhering to the proposed changes to the required practices.

EPA also proposes to shorten the one-year timeframe that is currently granted to owners or operators to complete appliance retrofit/retirement plans. The Agency does not wish to allow refrigerant emissions from faulty equipment by allowing an extensive amount of time to pass before appliance owners or operators complete required retrofit/retirement plans. EPA proposes a six-month timeframe to complete retrofit/retirement plans for appliances that have encountered three failed verification tests (either initial or follow-up) within a consecutive six-month period. EPA provides further discussion of this proposed requirement in the "Worst Leaker" section of this preamble.

EPA has often been asked what should be included in a retrofit/retirement plan. The Agency has not previously mandated a specified listing of items to be included in retrofit/retirement plans due to the complex nature of many appliances. The Agency felt that one listing of items may not fit all types of appliances considering the wide array of configurations and refrigerant choices that may be encountered by appliance owners or operators. However, EPA finds merit in providing a minimum set of requirements that are likely to be encountered by any type of appliance that is undergoing a conversion from a refrigerant to a substitute with a lower ODP.

EPA is proposing, at § 82.166(n), that appliance owners or operators who are subject to the requirement to develop a retrofit or retirement plan include a minimum set of requirements into such plans. These requirements are universal in that all owners or operators of appliances undergoing a conversion from a refrigerant to a substitute with a lower ODP should consider such steps. EPA proposes to require that retrofit/retirement plans provide the following information for each appliance for which a retrofit/retirement plan is required to be developed:

- Identification and location of the appliance;
- Type and full charge of the refrigerant used by the leaking appliance;
- Type and full charge of the substitute to which the appliance will be converted, if retrofitted;
- Itemized procedure for the appliance conversion to a substitute with a lower ODP, including changes required for compatibility with the new substitute (for example, procedure for flushing old refrigerant and lubricant; and changes in lubricants, filters, gaskets, o-rings, or valves);
- Plan for the disposition of recovered refrigerant;
- Plan for the disposition of the appliance, if retired; and a
- Six-month schedule for completion of the appliance retrofit or retirement.

EPA does not intend for this list to be all inclusive. However, EPA believes that, at a minimum, such requirements should be considered by any owner or operator that is retrofitting or retiring a leaking appliance. EPA seeks public comment on these minimum requirements. Specifically, the Agency requests comment on whether there are other minimal factors that should be considered when developing a retrofit/retirement plan.

EPA has heard concerns from appliance owners or operators that the Agency is forcing the retrofit of HCFC appliances to substitutes without addressing leaks. EPA promotes a systematic approach to addressing repairs, retrofits, or retirements of appliances. The first step in any retrofit plan should be to identify and repair all leaks. Retrofitting appliances without first repairing the appliance is not consistent with the intent of the leak repair regulations to promote actions that will reduce use and emissions of

[8] EPA provides anecdotes about multiple repairs in Docket ID No. EPA–HQ–OAR–2003–0167.

ODS and promote the use of substitutes when feasible. EPA-accepted substitutes (under SNAP) for commercial refrigeration, comfort cooling, and industrial process refrigeration appliances are available, as are industry retrofit procedures. Many chemical and equipment manufacturers provide conversion or retrofit guidelines that specify that repair of the appliance must be done prior to initiating retrofit procedures. EPA believes that repair of appliances prior to retrofit is a standard industry practice and does not need to be specifically called for in the proposed definition of retrofit. However, EPA seeks comment on the effectiveness of industry retrofit guidelines in promoting the repair of appliances prior to making an attempt to retrofit appliances.

EPA wishes to clarify that the retrofit (*i.e.,* the conversion) of an appliance to use a substitute with a lower ODP is only required for appliances using refrigerants (*i.e.,* substances that consist in part or whole of an ODS). However, the installation of new appliances using non-ODS substitutes does not provide an exemption to the refrigerant venting prohibitions of Section 608 of the Clean Air Act or § 82.154. It remains a violation of Section 608(c)(2) of the Act as well as the regulatory prohibition at § 82.154(a)(1) to knowingly release substitutes (such as R–134a, R–410A, R–404A, *etc.*) during the maintenance, service, repair, and disposal of appliances; therefore, efforts to isolate leaking components or use recovery/recycling equipment in order to recover such substitutes are still required, even though the leak repair regulations do not currently apply to appliances using non-ODS substitutes.

EPA also wishes to clarify that the current requirement to retrofit to a refrigerant or a substitute with a lower or equivalent ODP does not mean that the same refrigerant can be returned to the leaking appliance. Such actions do not satisfy the regulatory intent or the proposed definition of "retrofit." The requirement to retrofit to a refrigerant or substitute with a lower or equivalent ODP than the previous refrigerant means the owner or operator is switching refrigerants. So while the Agency allows flexibility in refrigerant and substitute choices, the intent is not to allow the continued use of the leaking refrigerant in the retrofit/retirement plan.

In order to provide consistency with the proposed definition of "retrofit," EPA proposes to change the required practice to make it clear that a retrofit must include a change (*i.e.,* a conversion) from a refrigerant to a substitute with a lower ODP. As an example, this proposed change would mean that an appliance using a CFC or HCFC refrigerant such as R–12 (with an ODP of 1.0) or R–22 (with an ODP of 0.055), could be retrofitted to use a SNAP-acceptable HFC substitute such as R–134a or R–410A (both non-ODS substitutes). EPA believes that this proposed change will remove any ambiguity as to what the Agency considers a retrofit in regards to refrigerant and substitute choices.

5. Extension To Repair and Retrofit/Retirement Timelines

The current leak repair required practices allow extensions to the repair or retrofit/retirement deadlines for industrial process refrigeration and federally-owned appliances under certain conditions. Extensions are granted to owners or operators of industrial process refrigeration appliances if the necessary parts are unavailable or if requirements of other applicable Federal, State, or local regulations make a repair within 30 (or 120 days when an industrial process shutdown is required) [9] impossible (§ 82.156(i)(2)(i)). This exemption also applies to owners or operators of federally-owned comfort cooling and commercial appliances. There is no similar exemption granted to owners or operators of comfort cooling and commercial refrigeration appliances with refrigerant charges greater than 50 pounds.

Currently, there are three separate regulatory paths that may result in extensions to the 30 day requirement (or 120 days if an industrial process shutdown is required) to repair leaks or the one-year requirement to complete implementation of retrofit/retirement plans for industrial process refrigeration and federally-owned comfort cooling and commercial refrigeration appliances. Under the first path, an extension of one additional year may be granted if the quoted delivery time for any critical component needed to complete retrofit is greater than 30 weeks (§ 82.156(i)(7)(ii)(C)). Under the second path, an extension is granted (to the extent reasonably necessary) for retrofit delays occasioned by the requirements of other applicable Federal, State, or local laws or regulations, or due to the unavailability of a suitable replacement refrigerant with a lower ozone depletion potential (§ 82.156(i)(7)(i)). The final regulatory path allows an additional extension to the one-year retrofit completion deadline if additional time in excess of the one-year under the first path is required. This third extension, which in essence is a two-year extension, is contingent upon EPA notification prior to the end of the ninth month of the first additional one-year extension (§ 82.156(i)(7)(iii)).

These exemptions do not currently apply to owners or operators of comfort cooling and commercial refrigeration appliances. However, in accordance with § 82.156(i)(1)(i), owners or operators of federally-owned commercial refrigerant appliances may receive extensions to the 30 or 120-day timeframe to complete repairs if they document repair efforts, and notify EPA of their inability to comply within 30 days of discovering the leaks (as evidenced by the need to add refrigerant). Owners or operators of federally-owned commercial refrigerant appliances may also receive extensions, if the commercial refrigeration appliance is located in an area subject to radiological contamination, or where the shutting down of the appliance will directly lead to radiological contamination. Once extensions are granted to owners or operators of federally-owned commercial refrigerant appliances, their appliances are treated as if they were industrial process refrigeration appliances, meaning that all of the applicable industrial process refrigeration leak repair requirements and reporting/recordkeeping requirements would apply (§ 82.156(i)(3)).

EPA believes that the regulatory extension process should be amended due to its complexity. In addition, EPA believes that the opportunity to obtain extensions that is available to owners or operators of industrial process refrigeration and federally-owned commercial refrigeration appliances should be made available to owners or operators of all appliance categories. Therefore, the Agency proposes to allow extensions to the requirement to repair leaks within 30 days, if the leak rate of the appliance is above 20 percent for industrial process refrigeration and commercial refrigeration appliances and 10 percent for comfort cooling appliances, regardless if they are federally-owned. EPA also proposes to grant similar exemptions to all appliance owners or operators who cannot complete required retrofit/retirement plans in the proposed six-month timeframe, provided that they fulfill the recordkeeping requirements discussed below.

[9] *Industrial process shutdown* means, for the purposes of § 82.156(i), that an industrial process or facility temporarily ceases to operate or manufacture whatever is being produced at that facility.

The extensions would be applicable to all appliances and not limited to industrial process refrigeration or federally owned commercial refrigeration appliances, if any one of the following conditions applies: (i) The appliance is located in an area subject to radiological contamination or where the shutting down of the appliance will directly lead to radiological contamination, and where such records are maintained in accordance with § 82.166(o); (ii) The necessary parts for an appliance component are unavailable and the owner or operator maintains a written statement from the appliance or component manufacturer or distributor stating the unavailability of parts, and where such records are maintained in accordance with § 82.166(o); or (iii) Other applicable Federal, State, or local regulations make a repair within 30 days impossible, and where such records are maintained in accordance with § 82.166(o).

EPA is limiting extensions based on the current extensions for leak repair, at § 82.156, with modification. The Agency is not proposing additional reasons, such as budgetary cycles or planned maintenance schedules, as a justification for delaying repairs. For instances when the extension is due to the need to shutdown the area subject to radiological contamination or adhere to any Federal, State, or local regulations that would make repair, retrofit, or retirement within the specified timelines for repair or retrofit/retirement (*i.e.,* 30 days or 6 months, respectively) infeasible, EPA would automatically grant an extension of 30 days beyond the date that the appliance subject to radiological contamination is brought back online or the date that of adherence to any Federal, State, or local regulations. Such extensions, as proposed at § 82.156(i)(4)(iii), would be contingent upon written and retained documents noting the reason for the extension, in accordance with proposed § 82.166(o).

When the extension is required due to the unavailability of parts within 12 weeks of the 6 month period to complete retrofit plans, EPA proposes to limit the extension to an additional 12 weeks beyond the date that the necessary parts or components are delivered. EPA believes that this amount of time is equitable in that owners or operators who were able to obtain parts must complete retrofits in a total of 6 months; so, for those owners or operators who could obtain the necessary parts within 12 weeks would still have a total of 6 months to complete retrofits once the parts or components became available. The amount of time allowed for the extensions would automatically be granted and would not be contingent upon a written request or an EPA written authorization. Such extensions would be contingent upon written and retained documents noting the reason for the extension, as proposed at § 82.166(o). EPA requests comment on the proposed changes to the required practices.

EPA also proposes to remove the 120-day exemption when owners or operators of industrial process refrigeration appliances undergo an industrial process shutdown. EPA believes that, under the proposed approach, the120 day delay is no longer justified. All impacted appliance owners or operators have the option of system mothballing their appliances, which temporarily suspends all leak repair related timeframes. The Agency sees no reason why owners or operators of industrial process refrigeration appliances should be singled out for an additional exemption that is not also provided in other refrigeration and air-conditioning sectors. Therefore, EPA proposes to remove the definition of *industrial process shutdown* and all references to the definitions in the required practices of § 82.156. EPA requests comment on the regulatory simplicity gained by such an approach and the need for such exemptions when all appliance owners or operators have the option of mothballing their appliances.

6. Worst Leaker Provision

Appliance owners or operators have the flexibility to decide what actions to take in order to complete repairs. Such actions may or may not include the complete replacement of a leaking component or one or more of its subassemblies. As previously discussed, EPA is concerned that the leak repair required practices could allow a leaking appliance to undergo multiple repair attempts, in some instances to the same component, without the owner or operator's decision to replace the leaking component. Each repair attempt would likely be followed by a release of refrigerant due to the component failure and a subsequent recharge of the refrigerant. EPA wants to ensure that appliance owners or operators who have multiple leak events in a short period of time take action to replace the component in its entirety, or repair and retrofit the appliance, instead of continuing the pattern of leak repair followed by refrigerant recharge. EPA does not view such cyclical efforts of repair attempts followed by recharge in a relatively short amount of time as an effective means of reducing emissions of ODS. EPA believes it is necessary to address these situations specifically. Therefore, EPA is proposing two options as possible changes to the required practices at § 82.156(m).

The first proposed option would require the retrofit to a refrigerant or substitute with a lower ODP or retirement of the entire appliance if it experiences three component replacements during a consecutive six-month period, that occur as a result of a failed initial or follow-up verification. This proposal would be linked to the aforementioned option of requiring a complete component change within 30 days of a failed initial or follow-up verification tests.

The second proposed option would require the retrofit to a refrigerant or substitute with a lower ODP, or retirement of the entire appliance, if it fails three initial or follow-up verifications during a consecutive six-month period. The second option is linked to the previously discussed proposal allowing owners or operators to decide on a case-by-case basis if a component or its subassembly requires replacement in order to completely repair the appliance. EPA prefers this second option, and believes that this second option provides the greatest level of flexibility to appliance owner or operator, while addressing the unwanted environmental consequences of cyclic repair attempts that may not adequately address the underlying cause of the appliance leak/s. This option allows the owner or operator to determine the best cause of action to address the leaking appliance, while reducing the likelihood of entering into a cycle of inept repair attempts. EPA requests comments on the proposed options, and the potential that each has to reduce refrigerant emissions.

A likely scenario that would trigger the second proposed option would be a comfort cooling appliance with an R–22 charge of 800 lbs that encounters three separate repair incidents during a consecutive 6-month period, where all of the following apply:

- Each of the three repair incidents during the consecutive 6-month period is undertaken to repair leak(s) identified as a result of an addition of refrigerant where the calculated leak rate of the appliance (as proposed at § 82.152) is greater than 10 percent each time, and a record documenting the amount of refrigerant added is maintained in accordance with § 82.166(k), as proposed.
- The owner or operator repaired all leaks within 30 days of the calculated leak rate that showed a rate greater than

10 percent, as required by proposed § 82.156(i).

• Immediately after each repair attempt, an initial verification test was performed and documented in accordance with the proposed § 82.156(i) and § 82.166(k), respectively.

• Within 30 days, but no sooner than 24 hours, after each repair a follow-up verification was performed and documented in accordance with the proposed § 82.156(i) and § 82.166(k).

In this scenario, any combination of three failed initial or follow-up verifications during a consecutive six-month period, regardless if the appliance leaked at the identical component, would trigger the requirement to develop and implement the six-month retrofit or retirement plan. The owner or operator must make plans to either retire or retrofit the appliance, in accordance with the proposed § 82.156(m). The owner or operator would be required to maintain a written and dated retrofit/retirement plan that provides a six-month schedule to complete retrofit or retirement of the leaking appliance, in accordance with § 82.166(n). Retirement would mean the permanent decommissioning of the leaking appliance such that it is deemed unfit for use by the current or any future owner or operator, as defined at § 82.152. The retrofit, as defined at § 82.152, would include a conversion of the appliance to use a substitute with a lower ODP. This scenario assumes that there is no delay in receipt of parts or components, and that none of the other extensions to repair timelines, as stated in proposed § 82.156(i)(4), are applicable. EPA requests comment on the potential for this proposal to reduce emissions by addressing the source of the leak(s) after multiple repair attempts have failed.

D. Reporting and Recordkeeping Requirements

1. Service Records

EPA is proposing several changes to the current reporting and recordkeeping requirements associated with the maintenance, service, and repair of comfort cooling, commercial refrigeration, and industrial process refrigeration appliances with refrigerant charge sizes greater than 50 pounds. Currently, EPA requires that persons servicing appliances (*e.g.,* technicians or service contractors) provide their customer with an invoice or other written documentation that states the amount of refrigerant added to the appliance. EPA believes that this limited amount of information is insufficient and may not provide essential information needed by the appliance owner or operator to make decisions on the fate of the repaired appliance.

In order to make certain that appliance owners or operators are provided with sufficient information with which to make decisions on the fate of their appliances, EPA is proposing that all persons servicing appliances with charge sizes greater than 50 pounds provide the owner or operator of such appliances with an invoice or other documentation, that indicates the date and type of service, the physical location of all leaks that were repaired, the amount and type of refrigerant recovered from the appliance, the type and results of initial and follow-up verification tests, as well as the quantity and type of refrigerant added to the appliance. EPA is proposing identical recordkeeping requirements for appliance owners or operators who use in-house service personnel. EPA is also proposing that appliance owners or operators maintain all calculations, measurements, and assumptions used to determine the leak rate of the appliance upon each addition of refrigerant.

As with all other records associated with the leak repair requirement, owners or operators would be required to maintain these service records on-site, at the location of the affected appliance, for a minimum of three years. The submission of such records to EPA would not be required, but they must be made immediately available upon request. EPA believes that this enhanced recordkeeping requirement is consistent with records that are likely provided by service personnel. EPA requests comment on the effectiveness of this proposal in establishing a consistent regulatory structure that will provide appliance owners or operators with sufficient information to make decisions on the fate of their appliance. EPA also seeks comment on whether this proposal provides sufficient information for appliance owners or operators to maintain compliance with the leak repair requirements, by maintaining a record of the calculated leak rate upon each addition of refrigerant.

EPA is also clarifying the recordkeeping retention requirement of § 82.166(m), that currently states that all records required to be maintained pursuant to this section must be kept for a minimum of three years unless otherwise indicated. Entities that dispose of appliances must keep these records on-site. EPA believes that all records required under Subpart F (not just disposal records) should be maintained on-site, and that records on leak repair should be maintained on-site at the physical location of the appliance, and is concerned that the current provision may be misinterpreted as being applicable solely to disposal records. Therefore, the Agency is proposing a requirement that all service records pertinent to the leak repair required practices at § 82.156 be maintained on-site, at the physical location, of the appliance undergoing service for a minimum of three years. EPA believes that such records are being kept at the physical locations of the appliances, but seeks comment on this issue.

2. Records Documenting the Fate of Recovered Refrigerant

EPA requires refrigerant recovery during service, maintenance, and repair of appliances; however, EPA is concerned about the ultimate fate of refrigerant that may be recovered during service, retrofit, or retirement. EPA has established regulatory prohibitions (at § 82.154) that do not allow the sale or distribution of used refrigerant to a new owner, until that used refrigerant has first been reclaimed by an EPA-certified reclaimer. This prohibition does not affect owners or operators of appliances who wish to recover and store used refrigerant for their own future use. In fact, EPA has granted flexibility by allowing used refrigerant to be reused by the owner in appliances owned by the same parent company without having it reclaimed [10] (68 FR 43793; July 24, 2003).

EPA is concerned that refrigerant recovered during service, retrofit, or retirement may not be properly reclaimed or destroyed. Based on data provided by EPA-certified refrigerant reclaimers, the amount of refrigerant returned for reclamation is lower than anticipated. This is certainly the case for popular refrigerants that have not yet been fully phased out of production and consumption (for example, R–22). EPA believes that a linkage should be established between the amounts of refrigerant recovered from appliances and the ultimate fate of those refrigerants. Such a linkage will provide reinforcement to the statutory and regulatory refrigerant venting prohibition, by creating a paper trail for refrigerant that is recovered but is not being stored for reuse by the appliance owner or operator. Therefore, EPA is proposing new recordkeeping

[10] EPA does not restrict the sale and distribution of used refrigerant when that refrigerant is being transferred between or among a parent company and one or more of its subsidiaries, or between or among subsidiaries having the same parent company (40 CFR 82.154(g)(4)).

requirements for owners or operators of appliances, the service contractors that they hire or employ, as well as the third parties involved in the distribution of recovered refrigerant. EPA is proposing an addition to the recordkeeping and reporting requirements at 82.166(u), requiring any person who sends used refrigerant off-site to a new owner to maintain records of the types and amounts of used refrigerant sent off-site for any reason (such as storage, recycling, reclamation, destruction, *etc.*). The records must include the name and address of the facility accepting used refrigerant, the type and amount of refrigerant transferred, and the date that the refrigerant was transferred. This proposed recordkeeping requirement is not limited to owners or operators of appliances, but any person involved in the transfer of used refrigerant to a new owner, such as service contractors and technicians, when such transfer occurs prior to the used refrigerant being reclaimed by an EPA-certified refrigerant reclaimer. EPA believes that improved tracking of the fate of used refrigerant, in tandem with a proposed requirement to document the amount and type of refrigerant recovered from appliances, will lead to decreases in the amount of refrigerant vented into the atmosphere by increasing awareness and accountability of the fate of used refrigerant. EPA also believes that such accountability will lead to increases in the amount of refrigerant that is properly reclaimed by EPA-certified refrigerant reclaimers.

This proposal would not ban the transfer of used refrigerant to a party independent of the appliance owner or operator and the refrigerant reclaimer. Many refrigerant supply facilities will collect used refrigerant from their customers, with the intent of forwarding the used refrigerant to reclaimers once they have accumulated sufficient quantity to make the transfer economically feasible. EPA does not wish to disrupt this practice, since it has environmental benefits, particularly in remote areas of the country where refrigerant wholesalers and reclaimers may not be readily available. Such transfer is allowed, as long as the transfer is not for purposes of use as a refrigerant prior to the reclamation process. EPA requests comment on the impact of tracking used refrigerant by appliance owners or operators, service contractors, and other entities involved in recycling and reclamation of used refrigerants. EPA also seeks comment on the impact of increased tracking of used refrigerant and the potential impact that such recordkeeping may have on the quantities of used refrigerant reclaimed in the U.S.

3. Extensions To Repair and Retrofit/Retirement Timelines

Section C.5. of this proposed rule discusses the existing and proposed changes to the extensions to the 30-day timeframe to complete repairs and the proposed six-month timeframe to complete retrofit/retirement plans. EPA has proposed several changes to the requirements to develop and implement a retrofit/retirement plan. EPA wishes to retain the opportunity for owners or operators to request extensions to the retrofit/retirement timelines, but wishes to make the extensions contingent upon the maintenance of records to justify the extensions.

In support of the existing and proposed required practices, EPA is proposing to add recordkeeping requirements that should be required to obtain such extensions. EPA is proposing that owners or operators who are granted additional time, beyond 30 days, to make repairs or more than 6 months to implement retrofit/retirement plans maintain the following records justifying the need for additional time, as applicable:

(1) A written statement describing the radiological conditions that prevent immediate repair of the appliance;

(2) A written statement from the appliance or component manufacturer or distributor estimating a date of delivery for parts required to complete repairs of the appliance;

(3) A written statement describing the applicable Federal, State, or local regulations that prevent the immediate repair of the appliance.

4. Documenting the Determination of the Appliance Full Charge

EPA has granted appliance owners or operators a great deal of flexibility in determining the full charge of their appliances. EPA has proposed to allow owners or operators to determine the full charge of an appliance by using one of the following four methods: (1) Use the equipment manufacturer's determination of the correct full charge for the equipment; (2) Determine the full charge by making appropriate calculations based on component sizes, density of refrigerant, volume of piping, and other relevant considerations; (3) Use actual measurements of the amount of refrigerant added or evacuated from the appliance; and/or (4) Use an established range based on the best available data regarding the normal operating characteristics and conditions for the appliance, where the midpoint of the range will serve as the full charge, and where records are maintained in accordance with § 82.166(q).

EPA has granted this level of flexibility due to the difficulties in determining the full charge for unique appliances with large charge sizes. In many applications, nameplate data is not available, and recovery and weighing the full charge may not be practical. While EPA provides flexibility in determining the full charge, the current leak repair regulations only require documentation of the assumptions used to determine the full charge, if the owner or operator uses option 4.

EPA proposes that the owner or operator maintain records documenting the full charge determination, regardless of the means used to calculate or determine the full charge. This proposal would result in a recordkeeping requirement for determination of the full charge. In order to comply with the required practices as currently written, owners or operators would be required to determine the appliance full charge in order to calculate the leak rate (as defined at § 82.152) upon addition of refrigerant. So in order to make such calculations, the owner or operator must make efforts to document their assumptions, but may not necessarily maintain those documents for an extended period of time. EPA believes that compliance will be eased by requiring the maintenance of such full charge determinations.

Therefore, EPA is proposing to amend the recordkeeping requirement at § 82.166(q) so that owners or operators must maintain documents showing all data, including calculations and assumptions, used to determine the full charge. EPA is not proposing that these records be reported to the Agency, but is proposing that such records be maintained on-site, at the physical location of the appliance. EPA seeks comment on the effectiveness of such a recordkeeping requirement, and the ability of affected appliance owners or operators to maintain records to support their determination of the appliance full charge.

5. Documenting Seasonal Variances

As previously discussed, EPA is proposing an exemption to the requirement to calculate the leak rate upon each addition of refrigerant, if the addition is due to seasonal variance, as proposed for definition at § 82.152. While EPA is proposing to allow this exemption, the Agency believes that it should be contingent upon the documentation of the amount and type of refrigerant added during the periods

of low ambient conditions, as well as documentation of the removal of refrigerant from the appliance during the warmer months.

In order to achieve this exemption, EPA proposes a recordkeeping requirement at § 82.166(r) documenting the seasonal variance. EPA will only exempt appliance owners or operators from the proposed requirement to calculate the leak rate upon each addition of refrigerant when that addition occurs due to a seasonal variance, if the owner or operator maintains records stating the amount and type of refrigerant and the date that the refrigerant was added to the appliance. Owners or operators must also maintain a record of the amount and type of refrigerant removed from the appliance to counter the seasonal adjustment. Such records would be required to be maintained, but would not be submitted to EPA. As previously proposed the definition of "seasonal variance" would limit the time period covering seasonal variance to one consecutive 12-month period. EPA seeks comment on the proposed recordkeeping requirement, and its linkage to the exemption to calculate the leak rate upon each addition of refrigerant.

6. Destruction of Purged Refrigerant

Purge devices are used on low-pressure chillers (*e.g.,* R–11, R–113, R–123) to collect accumulated non-condensable gases from the appliance. When leaks occur in such systems they act as a vacuum bringing air into the system. The purge devices release the air to the atmosphere, but also release a small quantity of refrigerant during the purge events. EPA has allowed exemptions to the leak repair requirements in instances where appliance owners or operators can show that purged refrigerants are captured and subsequently destroyed.

The current leak repair reporting and recordkeeping requirements, at § 82.166(p)(1), provide details used to obtain an exemption; owners or operators who wish to exclude purged refrigerants that are recovered and destroyed from annual leak rate calculations must maintain records on-site to support and document the amount of refrigerant sent for destruction. Records are based on a monitoring strategy that provides reliable data to demonstrate that the recovered purged refrigerant has been destroyed to at least 98 percent destruction efficiency. In accordance with § 82.166(p)(2), owners or operators who wish to exclude purged refrigerants that are destroyed from annual leak rate calculations must maintain the following information after the first time the exclusion is utilized: The identification of the facility and a contact person, including the address and telephone number; a general description of the appliance, focusing on aspects of the appliance relevant to the purging of refrigerant and subsequent destruction; a description of the methods used to determine the quantity of refrigerant sent for destruction and type of records that are being kept by the owners or operators where the appliance is located; the frequency of monitoring and data-recording; and a description of the control device and its destruction efficiency. The information must also be included in any applicable reporting requirements that are required for compliance with the leak repair and retrofit requirements for industrial process refrigeration appliances, as currently set forth in paragraphs § 82.166(n) and (o).

During the period 1998–2006, EPA has not received a report from an industrial process refrigeration appliance owner or operator justifying the exemption of purged and destroyed refrigerant from the calculation of the leak rate. The Agency believes that the lack of use of this provision is due to the likely higher costs of recovering and destroying refrigerant when compared to recycling and reuse or reclamation, as well as improved chiller technology that greatly reduces refrigerant releases during purge events. EPA believes that current chiller technologies using vapor recovery systems for older CFC and newer HCFC chillers allow refrigerant from purge events to be captured and returned to the appliance. In addition, EPA has recognized new chiller technology that is marketed as having the ability to monitor purge events in order to minimize or nearly eliminate the amount of refrigerant released into the atmosphere during a purge event. Due to the advent of such technology and the lack of use of the exemption provision, EPA proposes to remove the recordkeeping and reporting requirements related to documenting purged and destroyed refrigerant. The Agency requests comment on the need for such an exemption, and the likelihood that a chiller owner or operator would recover purged refrigerant for purposes of storage, reclamation, or destruction.

7. Applicability to Residential and Light Commercial Appliances

The leak repair regulations are limited to appliances containing more than 50 pounds of refrigerant that leak above the leak repair trigger rate percentage. However, the leak repair required practices do not grant an exemption to the statutory refrigerant venting prohibition (CAA Section 608(c)(1)) for appliances containing less than 50 pounds of refrigerant. For example, residential split systems providing comfort cooling to residential homes typically have refrigerant charges less than 10 pounds. While the leak repair requirements do not apply to owners or operators of such appliances, persons servicing, maintaining, or repairing them are not allowed to intentionally release refrigerant into the atmosphere (§ 82.154(a)(1) and (2)).

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." This proposed rulemaking may raise novel policy issues that are unique to the refrigeration and air-conditioning service sectors. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

EPA has prepared an analysis of the potential costs and benefits associated with this action. This analysis is entitled *Screening Analysis to Examine the Economic Impact of Proposed Revisions to the Section 608 Leak Repair Regulations.* A copy of the analysis is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2003–0167).

EPA evaluated the impact of today's NPRM on owners or operators of air-conditioning and refrigeration appliances with ozone-depleting refrigerant charge sizes greater than 50 pounds, including the following sectors: Educational facilities, hospitals, ice rinks, supermarkets and grocery stores, convenience stores, warehouse and club supercenters, refrigerated warehouse and storage (including farm) facilities, office buildings, lodging, bakeries, breweries; and food, ice, soft drink, chemical, pharmaceutical, and petrochemical manufacturing facilities. The economic analysis was based on a "model entity" approach for size categories based on the number of employees within each affected sector. This model entity analysis was used to estimate the impact on the economy as a whole (*i.e.,* aggregate cost of the

proposed rule) and on small businesses individually [*i.e.,* for a Regulatory Flexibility Act (RFA) analysis]. Each model entity reflects information about the typical number of facilities in a given sector and size category and the number of pieces of equipment in each equipment category that are likely to be owned and/or operated by each facility. The characteristics and costs of model pieces of equipment were then used to establish costs of compliance for model facilities, and the costs associated with model facilities were used to establish costs for the model entities.

As a means of reducing emissions of ozone-depleting substances to the lowest achievable level, EPA has considered multiple leak repair trigger rates and estimated their potential impact on the regulated community. For purposes of today's NPRM, EPA has considered the following scenarios: (1) 5% for comfort cooling and 10% for commercial refrigeration and IPR appliances; (2) 5% for comfort cooling and 20% for commercial refrigeration and IPR appliances; (3) 5% for comfort cooling and 30% for commercial refrigeration and IPR appliances; (4) 10% for comfort cooling and 10% for commercial refrigeration and IPR appliances; (5) 10% for comfort cooling and 20% for commercial refrigeration and IPR appliances; and (6) 10% for comfort cooling and 30% for commercial refrigeration and IPR appliances. Within each option, EPA has considered whether additional emissions reduction is gained by requiring: (1) The replacement of leaking appliance components after the failure of repair verification; or by (2) maintaining the existing regulatory flexibility allowing owners/operators to make unlimited attempts at repair (followed by subsequent refrigerant recharges) without a mandate to actually replace a leaking component. EPA has also considered the potential emissions avoided and estimated impact on the regulated community, and summarizes those findings as follows: A summary of the scenarios with estimated costs and benefits is summarized as follows:

COSTS AND BENEFITS OF REGULATORY OPTIONS

Option	Costs (million dollars)	Benefits (ODP-weighted tonnes)	Monetized benefits at 3% discount rate (million dollars)
Scenario 1:			
1 (5% and 10%)	$135.6	493	$2.5
2 (5% and 20%)	111.0	394	2.0
3 (5% and 30%)	92.2	273	1.4
4 (10% and 10%)	129.9	483	2.5
5 (10% and 20%)	105.3	384	2.0
6 (10% and 30%)	86.5	263	1.3
Scenario 2:			
1 (5% and 10%)	53.2	423	2.2
2 (5% and 20%)	40.9	326	1.7
3 (5% and 30%)	31.1	208	1.1
4 (10% and 10%)	50.5	413	2.1
5 (10% and 20%)	38.2	316	1.6
6 (10% and 30%)	28.5	198	1.0

Under the first scenario, leaking components that fail verification tests must be replaced within 30 days. Under the second scenario, the owners or operators must still make repairs to leaking appliances, but owners or operators have the discretion to determine whether or not repairs will include the replacement of leaking components. Under both scenarios, repairs must be completed within 30 days of leak detection, and verifications (immediate and follow-up within 30 days) must be conducted. Based in part on EPA analysis (*see* accompanying Screening Analysis to Examine the Economic Impact of Proposed Revisions to the Refrigerant Recycling and Emissions Rule, EPA Docket ID No. EPA–HQ–OAR–2003–0167), the Agency has decided to propose a reduction of the leak repair trigger rate for comfort cooling appliances from 15 to 10 percent and for commercial refrigeration appliance and industrial process refrigeration appliances from 35 to 20 percent. EPA believes that this combination of leak repair trigger rates provides for continued flexibility in allowing appliance owners or operators to decide upon the necessary action needed to repair leaking appliances, and also provides for additional environmental benefit in terms of avoided refrigerant emissions. EPA estimates that the total expected annual incremental cost of the proposed options across all affected sectors is between $86.5 million and $135.6 million for the six options under the first scenario (requiring component replacement), and between $28.5 million and $53.2 million for the six options under the second scenario. EPA also estimates that a reduction of the leak repair trigger rate for comfort cooling appliances from 15 to 10 percent and for commercial refrigeration appliance and industrial process refrigeration appliances from 35 to 20 percent will result in the lowest costs at $38.2 million, with the largest environmental benefit 316 ODP weighted tons, when compared to the other five options that were considered.

It was assumed that owners or operators would make repairs only as mandated by regulation. In all likelihood there would be a number of cases in which normal maintenance would involve making the repairs to ensure that the system in question was operating smoothly and performing its function regardless of proposed changes to the rule. Based on the analysis, the total expected incremental cost of the rule across all sectors is $38.2 million. The small business analysis used a statistical technique known as Monte Carlo analysis to estimate the number of entities in a sector size category that are expected to experience costs exceeding one percent (and three percent) of the average annual value of shipments. This analysis did not account for actions mandated by current regulations. EPA has requested comment on the estimated costs attributable to today's NPRM.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have

been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 1626.10.

Today's action proposes to strengthen existing reporting and recordkeeping requirements at 40 CFR part 82, subpart F by providing information describing the service that has been performed on refrigeration and air conditioning equipment (*i.e.,* appliances) with refrigerant charge sizes greater than 50 pounds. Owners or operators of refrigeration and air-conditioning equipment (*i.e.,* appliances) as well as personnel servicing such appliances are currently required to maintain service records, and today's proposal would require additional specificity concerning the types and results of repairs performed on such appliances. EPA believes that amending the required service records will provide consistency to the existing regulations by placing similar requirements on owners or operators of commercial refrigeration, comfort cooling, and IPR appliances. EPA also believes that amending the currently required reporting and recordkeeping requirements will meet the CAA Section 608(a) requirement for EPA to promulgate regulations regarding use and disposal of class I and II substances to "reduce the use and emission of such substances to the lowest achievable level" and "maximize the recapture and recycling of such substances."

OMB has previously approved the information collection requirements contained in the existing regulations at Subpart F under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0256. EPA has estimated that the proposed amendments to the existing reporting and recordkeepking requirements will result in an estimated average annual burden of 6,182 hours at an annual cost of $148,365. This represents an estimated burden of 5,825 hours at a cost of $139,803, that will affect up to 133,777 owners or operators of refrigeration and air-conditioning appliances with an ODS refrigerant charge greater than 50 pounds. EPA also estimates that technicians servicing the affected appliances will incur an estimated annual burden of 357 hours at a cost of $8,562.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this rule, which includes this ICR, under Docket ID No. EPA–HQ–OAR–2003–0167. Submit any comments related to the ICR to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after December 15, 2010, a comment to OMB is best assured of having its full effect if OMB receives it by January 14, 2011. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this proposal on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this proposed rule are owners or operators of comfort cooling, commercial refrigeration, or industrial process refrigeration equipment (*i.e.,* appliances) with ozone-depleting refrigerant charges greater than 50 pounds. We have estimated that a total of 353 small businesses will experience compliance costs greater than or equal to one percent of their average value of shipments. This represents 0.34 percent of the 104,068 total potentially affected small businesses examined across all sectors. At the one percent level, the most heavily impacted sector, the ice rink sector, is predicted to have 36 impacted entities (out of 443 small businesses in the sector, or 8.1 percent of the sector). The sector with the most impacted small entities, bakeries, is predicted to have 114 affected small businesses (of the 9,598 potentially impacted small businesses in the sector, or 1.2 percent of the sector). There are 74 small businesses with anticipated compliance costs greater than or equal to three percent of their average value of shipments, mainly in the bakery and ice rink sectors. In the bakery sector (using industrial process refrigeration appliances) 24 companies are expected to have impacts between 3 and 4 percent, while 6 are expected to have impacts between 4 and 9.5 percent. In the ice rink sector (using industrial process refrigeration appliances) 25 companies are expected to experience impacts between 3 and 4 percent, 4 companies will likely experience impacts between 4 and 10 percent and there is a small chance that 1 of those 4 companies may experience impacts between 10 and 26 percent.

Although this proposed rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. The Agency has reduced the regulatory impact on small businesses by proposing to reduce the recordkeeping and reporting burden placed upon owners or operators of regulated appliances. The Agency is relying more on the maintenance of typical recordkeeping that would be expected to be collected as a part of normal business operations, such as service invoices stating the service performed and the amount of refrigerant added to the leaking appliance. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or

the private sector. The provisions in this proposed rule fulfill the obligations of the United States under the international treaty, *The Montreal Protocol on Substances that Deplete the Ozone Layer,* as well as those requirements set forth by Congress in the Clean Air Act. Viewed as a whole, all of these proposed amendments do not create a Federal mandate resulting in costs of $100 million or more in any one year for State, local and tribal governments, in the aggregate, or for the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA. This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's proposal is expected to primarily affect owners or operators of comfort cooling, commercial refrigeration, and industrial process refrigeration equipment that hold large ozone-depleting refrigerant charges (*i.e.,* full charges greater than 50 pounds). While such State-owned equipment falls under the regulations of this proposal, this proposal will not impose substantial direct effects on the States or on the relationship between the national government and the States. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This NPRM affects owners or operators of comfort cooling, commercial refrigeration, and industrial process refrigeration equipment that hold large ozone-depleting refrigerant charges (*i.e.,* full charges greater than 50 pounds). While today's NPRM may impact such equipment that is owned or operated by Tribal Governments it will not significantly or uniquely affect the communities of Indian tribal governments nor does it impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this action. EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Applicability of Executive Order 13045: Protection of Children From Environmental Health & Safety Risks

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action's health and risk assessments are contained in the following discussion.

Stratospheric ozone protects the biosphere from potentially damaging doses of ultraviolet (UV) radiation. Depletion of stratospheric ozone, caused by the release of man-made ODS could lead to significant increases in UV radiation reaching the Earth's surface, which could in turn lead to adverse human and animal health effects, as well as ecosystem impacts. This rule will reduce emissions of ODS by amending the leak repair requirements and associated recordkeeping and reporting requirements for owners or operators of appliances using ozone-depleting refrigerants. Reductions in ODS emissions will protect human health and the environment from increased amounts of UV radiation and increased incidence of skin cancer, but will not have a disproportionate effect on children.

EPA notes that for the whole life exposure assumption, the risks of ozone depletion are borne primarily by the present population of adults who will experience these health effects as they age. Depletion of stratospheric ozone results in greater transmission of the sun's ultraviolet (UV) radiation to the Earth's surface. The following studies describe the effects on children of excessive exposure to UV radiation: (1) Westerdahl J, Olsson H, Ingvar C. "At what age do sunburn episodes play a crucial role for the development of malignant melanoma," Eur J Cancer 1994: 30A: 1647–54; (2) Elwood JM, Japson J. "Melanoma and sun exposure: an overview of published studies," Int J Cancer 1997; 73:198–203; (3) Armstrong BK, "Melanoma: childhood or lifelong sun exposure," In: Grobb JJ, Stern RS, Mackie RM, Weinstock WA, eds. "Epidemiology, causes and prevention of skin diseases," 1st ed. London, England: Blackwell Science, 1997: 63–6; (4) Whieman D, Green A. "Melanoma and Sunburn," Cancer Causes Control, 1994: 5:564–72; (5) Heenan, PJ. "Does intermittent sun exposure cause basal cell carcinoma? A case control study in Western Australia," Int J Cancer 1995; 60: 489–94; (6) Gallagher RP Hill GB, Bajdik CD, *et al.* "Sunlight exposure, pigmentary factors, and risk of nonmelanocytic skin cancer I, Basal cell carcinoma." Arch Dermatol 1995; 131: 157–63; (7) Armstrong, DK. "How sun exposure causes skin cancer: an epidemiological perspective," Prevention of Skin Cancer. 2004. 89–116.

This NPRM proposes changes to the existing regulatory regime for repair of leaking refrigeration and air-conditioning appliances with ODS refrigerant charges greater than 50 pounds. These changes are not expected to increase the impacts on children's health from stratospheric ozone depletion. The public is invited to submit comments or identify peer-reviewed studies and data that assess effects of early life exposure to UV radiation as a result of the release of ODS refrigerants used in refrigeration and air-conditioning equipment addressed in this NPRM.

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

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This NPRM addresses leak rates of air-conditioning and refrigeration equipment (*i.e.,* appliances) with ozone-depleting refrigerant charges greater than 50 pounds, and proposes to amend the recordkeeping and reporting requirements associated with the refrigerant leak repair required practices. We have concluded that this

rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

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

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. Today's NPRM addresses repair and maintenance of refrigeration and air-conditioning equipment (*i.e.,* appliances) by requiring repair and associated recordkeeping of such appliances that leak ozone-depleting refrigerants. An overall reduction in the emission rates of such appliances will provide protection to all populations and will not have a disproportionately high adverse human health or environmental impact on minority or low-income populations.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Chlorofluorocarbons, Exports, Hydrochlorofluorocarbons, Imports, Reporting and recordkeeping requirements.

Dated: December 7, 2010.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 82, of the Code of Federal Regulations is proposed to be amended as follows:

PART 82—[AMENDED]

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

2. Section 82.150 is amended by revising paragraph (a) to read as follows:

§ 82.150 Purpose and scope.

(a) The purpose and scope of this subpart is to reduce the use and emissions of ozone-depleting refrigerants to the lowest achievable level and encourage the use of substitutes, by maximizing the recapture and recycling of such ozone-depleting substances during the use, service, maintenance, repair, and disposal of appliances and by restricting the sale of refrigerants in accordance with Title VI of the Clean Air Act.

* * * * *

3. Section 82.152 is amended as follows:

a. By adding definitions for "Comfort cooling appliance," "Commercial refrigeration appliance," "Component," "Industrial process refrigeration appliance," "Retrofit," Retire," and "Seasonal variance,"

b. By revising the definitions for "Follow-up verification test," "Full charge," "Initial verification test," "Leak rate," and "Normal operating characteristics,"

c. By removing the definitions for "Commercial refrigeration," "Critical component," "Custom-built," "Industrial process refrigeration," and "Industrial process shutdown."

§ 82.152 Definitions.

* * * * *

Comfort cooling appliance means any air-conditioning appliance used to provide cooling in order to control heat and/or humidity in facilities such as office buildings and computer rooms.

Commercial refrigeration appliance means any refrigeration appliance used to store perishable goods in retail food, cold storage warehousing, or any other sector requiring cold storage. Retail food includes the refrigeration equipment found in supermarkets, grocery and convenience stores, restaurants, and other food service establishments. Cold storage includes the refrigeration equipment used to house perishable goods or any manufactured product requiring refrigerated storage.

Component means an appliance component, such as, but not limited to, compressors, condensers, evaporators, receivers and all of its connections and subassemblies without which the appliance will not properly function and/or will be subject to failures.

* * * * *

Follow-up verification test means a test that validates the effectiveness of repairs within 30 days of the appliance's return to normal operating characteristics and conditions but no sooner than 24 hours after completion of repairs. Follow-up verification tests include, but are not limited to, the use of soap bubbles, electronic or ultrasonic leak detectors, pressure or vacuum tests, fluorescent dye and black light, infrared or near infrared tests, and handheld gas detection devices.

Full charge means the amount of refrigerant required for normal operating characteristics and conditions of the appliance, as determined by using one of the following four methods:

(1) Use the equipment manufacturer's determination of the full charge;

(2) Use calculations based on component sizes, density of refrigerant, volume of piping, seasonal variances, and other relevant considerations;

(3) Use actual measurements of the amount of refrigerant evacuated from the appliance; or

(4) Use an established range based on the best available data regarding the normal operating characteristics and conditions for the appliance, where the midpoint of the range will serve as the full charge.

* * * * *

Industrial process refrigeration appliance means refrigeration equipment, that may be complex or customized, that is used in a manufacturing process. Industrial process refrigeration appliances include equipment that is directly linked to a manufacturing process, including, but not limited to, appliances used in the chemical; pharmaceutical; petrochemical; food or beverage manufacturing, packaging or processing; power generation; and industrial ice

manufacturing industries. Where one appliance is used for both industrial process refrigeration and another type of refrigeration or air-conditioning application, the appliance will be considered an industrial process refrigeration appliance if 50 percent or more of its operating capacity is used for industrial process refrigeration.

Initial verification test means a leak test that is conducted as soon as practicable after the repair is completed. An initial verification test, with regard to the leak repairs that require the evacuation of the appliance or portion of the appliance, means a test conducted prior to the replacement of the full refrigerant charge and before the appliance or portion of the appliance has reached operation at normal operating characteristics and conditions of temperature and pressure. An initial verification test with regard to repairs conducted without the evacuation of the refrigerant charge means a test conducted as soon as practicable after the conclusion of the repair work.

Leak rate means the rate at which an appliance is losing refrigerant, calculated at the time of refrigerant addition. The leak rate is expressed in terms of the percentage of the appliance's full charge that has been lost since the last successful repair over a consecutive 12-month period, and is calculated by:

(1) Step 1. Take the number of pounds of refrigerant added to the appliance since the last successful follow-up verification or the number of pounds of refrigerant added during the previous 365-day period (if the last successful follow-up verification occurred more than one year ago);

(2) Step 2. Divide the result of Step 1. by the number of pounds of refrigerant the appliance contains at full charge;

(3) Step 3. Multiply the result of Step 2. by 100 to obtain a percentage. This method is summarized in the following formula:

$$\text{Leak rate (\% per year)} = \frac{\text{pounds of refrigerant added since last successful follow-up verification (or during the past 365 days if that period is greater than one year)}}{\text{pounds of refrigerant in full charge}} \times 100\%$$

* * * * *

Normal operating characteristics and conditions mean the appliance operating temperatures, pressures, fluid flows, speeds and other characteristics, including full charge of the appliance, that would be expected for a given process load and ambient condition during operation. Normal operating characteristics and conditions are marked by the absence of atypical conditions affecting the operation of the refrigeration appliance.

* * * * *

Retire means the permanent removal from service of the entire appliance, rendering it unfit for use by the current or any future owner or operator.

Retrofit means the conversion of an appliance from a refrigerant to a substitute with a lower ozone-depleting potential. Retrofit includes a complete conversion of the appliance to achieve systems compatibility with the substitute and may include, but is not limited to, changes in lubricants, gaskets, filters, driers, valves, o-rings or appliance components.

Seasonal variance means the need to add refrigerant to an appliance due to a change in ambient conditions caused by a change in season, followed by the subsequent removal of refrigerant in the corresponding change in season, where both the addition and removal of refrigerant occurs within one consecutive 12-month period.

* * * * *

4. Section 82.156 is amended as follows:

a. By revising paragraph (i),

b. By adding paragraph (j),

c. By adding and reserving paragraph (k),

d. By adding paragraphs (l) amd (m).

§ 82.156 Required practices.

* * * * *

(i) Owners or operators of comfort cooling appliances with a full charge greater than 50 pounds of refrigerant must have all leaks within the appliance repaired within 30 days, if the leak rate exceeds 10 percent. The leak rate must be calculated immediately upon each addition of refrigerant to the appliance, unless the addition is required to recharge the appliance immediately after repair or retrofit or the addition is due to a seasonal variance where records justifying the addition due to a seasonal variance are maintained in accordance with § 82.166(r). The determination of the leak rate must be maintained in accordance with § 82.166(k).

(1) Owners or operators shall conduct an initial verification test immediately upon completion of repairs. Methods and results of all initial verification tests must be maintained in accordance with § 82.166(k).

(2) Owners or operators shall conduct a follow-up verification test within 30 days of completing but no sooner than 24 hours after repair and recharge of the appliance. The follow-up verification test shall be conducted at normal operating characteristics and conditions. Methods and results of all follow-up verification tests must be maintained in accordance with § 82.166(k).

(3) If the initial or follow-up verification test indicates that the repairs have not been successful, meaning that leaks are still occurring within the appliance component(s) requiring repair, the owner or operator must make an additional repair attempt, within 30 days of the failed verification and must conduct an additional initial and a follow-up verification test, as set forth in paragraphs (i)(1) and (2) of this section.

(4) Owners or operators of commercial refrigeration appliances must retire or retrofit the appliance to use a refrigerant or substitute with a lower ozone depleting potential (ODP), in accordance with paragraph (l) of this section, if the appliance has experienced three failed verification tests within a consecutive six-month period.

(5) Owners or operators of comfort cooling appliances may have more than 30 days to repair the appliance if one or more of the following conditions apply:

(i) The appliance is located in an area subject to radiological contamination or where the shutting down of the appliance will directly lead to radiological contamination, and where such records are maintained in accordance with § 82.166(o).

(ii) The necessary parts for an appliance component(s) are unavailable, and the owner or operator maintains a written statement from the appliance or component manufacturer or distributor stating the unavailability of parts, and where such records are maintained in accordance with § 82.166(o).

(iii) Other applicable Federal, State, or local regulations make a repair within 30 days impossible, and where such records are maintained in accordance with § 82.166(o).

(iv) Owners or operators are allowed an additional 30 days beyond the date that radiological contamination can be minimized; by which repairs can comply with applicable Federal, State, or local regulations that originally hindered repairs; or the delivery of parts to conduct and complete repairs to the affected appliance.

(j) Owners or operators of commercial refrigeration or industrial process refrigeration appliances with a full charge greater than 50 pounds of refrigerant must have all leaks within the appliance repaired within 30 days, if the leak rate exceeds 20 percent of the full charge. The leak rate must be calculated immediately upon each addition of refrigerant to the appliance, unless the addition is required to recharge the appliance immediately after repair or retrofit, or the addition is due to a seasonal variance where records justifying the addition due to the seasonal variance are maintained in accordance with § 82.166(r). The determination of the leak rate must be maintained in accordance with § 82.166(k).

(1) Owners or operators shall conduct an initial verification test immediately upon completion of repairs. Methods and results of all initial verification tests must be maintained in accordance with § 82.166(k).

(2) Owners or operators shall conduct a follow-up verification test within 30 days of completing, but no sooner than 24 hours after repair and recharge of the appliance. The follow-up verification test shall be conducted at normal operating characteristics and conditions. Methods and results of all follow-up verification tests must be maintained in accordance with § 82.166(k).

(3) If the initial or follow-up verification test indicates that the repairs have not been successful, meaning that leaks are still occurring within the appliance component(s) requiring repair, the owner or operator must make an additional repair attempt, within 30 days of the failed verification and must conduct an additional initial and a follow-up verification test, as set forth in paragraphs (j)(1) and (2) of this section.

(4) Owners or operators of commercial refrigeration or industrial process refrigeration appliances must retire or retrofit the appliance to use a refrigerant or substitute with a lower ozone depleting potential (ODP), in accordance with paragraph (l) of this section, if the appliance has experienced three failed verification tests within a consecutive six-month period.

(5) Owners or operators of commercial refrigeration or industrial process refrigeration appliances may have more than 30 days to repair the appliance or replace the leaking component(s) if one or more of the following conditions apply:

(i) The appliance is located in an area subject to radiological contamination or where the shutting down of the appliance will directly lead to radiological contamination, and where such records are maintained in accordance with § 82.166(o).

(ii) The necessary parts for a component are unavailable and the owner or operator maintains a written statement from the appliance or component manufacturer or distributor stating the unavailability of parts, and where such records are maintained in accordance with § 82.166(o).

(iii) Other applicable Federal, State, or local regulations make a repair within 30 days impossible, and where such records are maintained in accordance with § 82.166(o).

(iv) Owners or operators are allowed an additional 30 days beyond the date that radiological contamination can be minimized; by which repairs can comply with applicable Federal, State, or local regulations that originally hindered repairs; or the delivery of parts to conduct and complete repairs to the affected appliance.

(k) [Reserved]

(l) Owners or operators are not required to repair the appliance within 30 days as specified in paragraphs (i) and (j) of this section, if within 30 days of the date that the appliance exceeded the applicable leak rate, they develop a written and dated retrofit or retirement plan.

(1) The written and dated retrofit or retirement plan must include a six-month schedule to either permanently retire the entire appliance from operation or retrofit the appliance for use with a substitute with a lower ozone-depleting potential. The retrofit or retirement plan must be maintained on-site at the physical location of the affected appliance, in accordance with § 82.166(n).

(2) Retrofit or retirement of the appliance must be completed within six months of the date of the retrofit or retirement plan.

(3) Owners or operators may have more than 6 months to complete the retrofit of the appliance, if the supplier of the appliance or one or more of its components has quoted a delivery time of more than 12 weeks from the date of the retrofit plan. In such instances, the owner or operator will have an additional 12 weeks after the date of delivery of the component(s) in order to completely implement the retrofit of the appliance. A written statement from the supplier must be maintained in accordance with § 82.166(p).

(m) The amount of time for owners or operators to complete and verify repairs, prepare and implement written retrofit or retirement plans, under paragraphs (i) and (j) of this section, is temporarily suspended during the time that an appliance is undergoing system mothballing, as defined in § 82.152. The time for owners or operators to complete repairs, replace components, or fully implement written retrofit or retirement plans will resume on the day the appliance is brought back on-line, indicating that the appliance is no longer undergoing system mothballing.

* * * * *

5. Section 82.166 is amended as follows:

a. By revising paragraphs (j) through (q),

b. By adding paragraphs (r) through (v).

§ 82.166 Reporting and recordkeeping requirements.

* * * * *

(j) Persons servicing appliances with a full charge greater than 50 pounds of refrigerant must provide the owner or operator of such appliances with an invoice or other documentation which includes: the quantity and type of refrigerant added to the appliance; the identity and location of the appliance; the date and type of service performed; the physical location of any leaks; the amount and type of refrigerant recovered from the appliance; and the date, method, and results of initial verification and follow-up verification tests.

(k) Owners or operators of appliances with a full charge greater than 50 pounds of refrigerant must keep records documenting the quantity and type of refrigerant added to the appliance; the full charge of the appliance; the calculated leak rate of the appliance; the identity and location of the appliance; the date and type of service performed; the physical location of any leaks; the amount and type of refrigerant recovered from the appliance; and the date, method, and results of initial verification and follow-up verification tests.

(l) Owners or operators of appliances with a full charge greater than 50 pounds of refrigerant must keep records

of the type and quantity of refrigerant purchased.

(m) Owners or operators of appliances with a full charge greater than 50 pounds of refrigerant must keep records of the types and amounts of refrigerant recovered from their appliances that are transferred to a different owner. The records must include the name and address of the facility accepting used refrigerant, and the date that the refrigerant was transferred.

(n) Owners or operators of appliances must maintain a dated retrofit or retirement plan that establishes a six-month schedule to retrofit or retire the leaking appliance, where required in § 82.156(l)(1). The dated plan must be maintained at the site of the leaking appliance, and at a minimum must include: identification and location of the appliance; type and full charge of the refrigerant used by the leaking appliance; location of all leaks and efforts taken to address leaks prior to retrofit or retirement; type and full charge of the substitute to which the appliance will be converted, if retrofitted; itemized procedure for retrofit including, but not limited to, the procedure for flushing old refrigerant and lubricant, changes in lubricants, filters, gaskets, o-rings, or valves; the plan for the disposition of recovered refrigerant; the plan for the disposition of the appliance, if retired; and a six-month schedule for the complete retrofit or retirement of the appliance.

(o) Owners or operators of appliances who are unable to complete repairs in 30 days due to radiological conditions, unavailability of components, or government regulations must maintain dated records justifying the need for additional time, by maintaining the following records, as applicable:

(1) A written statement describing the radiological conditions that prevent immediate repair of the appliance;

(2) A written statement from the appliance or component manufacturer or distributor estimating a date of delivery for parts required to complete repairs of the appliance;

(3) A written statement describing the applicable Federal, State, or local regulations that prevent the immediate repair of the appliance.

(p) Owners or operators of appliances who are unable to complete retrofit plans within 6 months, due to the unavailability of one or more of the appliance's components that has a quoted delivery time of more than 12 weeks, as specified in § 82.156(l)(3), must maintain a written statement from the appliance or component manufacturer or distributor estimating a date of delivery for parts required to complete the retrofit plan. Owners or operators must also maintain records documenting the actual date of delivery of the appliance component.

(q) Owners or operators of appliances with refrigerant charges greater than 50 pounds must maintain documents showing all appliance or appliance component data, measurements, calculations and assumptions used to determine the full charge, as defined at § 82.152.

(r) Owners or operators of appliances with refrigerant charges greater than 50 pounds who seek an exemption from the requirement to calculate the leak rate upon each addition of refrigerant, as specified in § 82.152, due to a seasonal variance must maintain records stating the amount and type of refrigerant and the date that the refrigerant was added to the appliance. Owners or operators must also maintain a record of the amount and type of refrigerant and the date that refrigerant was removed from the appliance to counter the seasonal adjustment.

(s) Technicians certified under § 82.161 must keep a copy of their certificate on-site, at their place of business.

(t) Technicians servicing, repairing, or maintaining appliances containing more than 50 pounds of refrigerant must maintain records recording the amount and type of refrigerant recovered, but not returned to the appliance.

(u) Any person, including, but not limited to, service contractors or technicians and refrigerant wholesalers or brokers, who distributes or sells, or offers to distribute or sell, used refrigerant, that has not yet been reclaimed, to a new owner must maintain records documenting the type and quantity of used refrigerant distributed or sold, the date of such distribution or sale, and the name and address of the entity taking possession of the used refrigerant.

(v) All records required under this section must be kept on-site for a minimum of three years, unless otherwise stated.

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