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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 770 and 774

Docket No. 040810235–4235–01

RIN 0694–AC91

Clarification of Export Controls on Military Vehicles and Parts

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule clarifies the export controls on parts and components of certain military ground vehicles, adds a new class of vehicles to the Commerce Control List (CCL) and provides guidance for classifying ground vehicles that are subject to the Export Administration Regulations and distinguishing those vehicles from those that are subject to the International Traffic in Arms Regulations.

DATES: This rule is effective August 31, 2004.

FOR FURTHER INFORMATION CONTACT: Gene Christiansen, in the Office of Strategic Trade and Foreign Policy Controls, Bureau of Industry and Security, U.S. Department of Commerce at (202) 482–2984.

SUPPLEMENTARY INFORMATION: The Bureau of Industry and Security (BIS) maintains the Commerce Control List (CCL), which identifies those items subject to Department of Commerce export licensing requirements based on their characteristics. Certain entries on the CCL implement multilateral national security controls established by the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (the Wassenaar Arrangement). The Wassenaar Arrangement controls strategic items with the objective of improving regional and international security and stability.

One list maintained by the Wassenaar Arrangement is the Munitions List. The United States administers export controls on these Wassenaar Arrangement Munitions List items by making certain items subject to the export licensing jurisdiction of the Directorate of Defense Trade Controls in the Department of State, and listed on the United States Munitions List (USML), and other items subject to the export licensing jurisdiction of the Bureau of Industry and Security in the Department of Commerce, listed on the CCL.

This rule revises Export Control Classification Number (ECCN) 9A018 on the CCL of the Export Administration Regulations to make clear that this ECCN applies to parts and components as well as to vehicles. This rule updates ECCN 9A018 to include unarmed all-wheel drive vehicles capable of off-road use that have been manufactured or fitted to provide a specified level of ballistic protection. This rule also clarifies that ECCN 9A018 does not include vehicles that are on the USML.

This rule also revises Interpretation 8 in Part 770 of the Export Administration Regulations (EAR), which provides guidance relating to ECCN 9A018.b. Revised Interpretation 8 eliminates explanations of terms that are no longer used in the EAR. It employs language from the Wassenaar Arrangement Munitions List to distinguish military vehicles from civil vehicles. It also provides guidance to distinguish military vehicles subject to the export licensing jurisdiction of the Directorate of Defense Trade Controls from those subject to the export licensing jurisdiction of the Bureau of Industry and Security.

The Export Administration Act of 1979 (the Act) provides authority to administer dual-use export controls. Although the Act expired on August 20, 2001, Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp., p. 783 (2002)), as extended by the notice of August 7, 2003 (3 CFR, 2003 Comp., p. 328 (2004)), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act.

Savings Clause

Items eligible for export or reexport without a license or under a License Exception prior to publication of this rule and for which this rule imposes a license requirement or removes that License Exception eligibility may be exported or reexported without a license or under that License Exception if they are on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export, pursuant to actual orders for export or reexport by September 14, 2004, and are actually exported or reexported September 30, 2004. Any such items not meeting these conditions require a license in accordance with this rule.

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 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule involves collections of information subject to the PRA. These collections have been approved by the Office of Management and Budget (OMB) under control number 0694–0088, "Multi-Purpose Application," which carries a burden hour estimate of 58 minutes to prepare and submit. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to David Rostker, OMB Desk Officer, by e-mail at *david_rostker@omb.eop.gov* or by fax to (202)395–7285; and to the Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, P.O. Box 273, Washington, DC 20044.

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

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (Sec. 5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of

proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 5 U.S.C. 553 or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Therefore, this regulation is issued in final form. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis. Comments should be submitted to William H. Arvin, Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2705, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230.

List of Subjects in 15 CFR Parts 770 and 774

Exports, Foreign trade.

■ Accordingly, part 770 and Supplement No. 1 to part 774 of the Export Administration Regulations (15 CFR parts 730–799) are amended as follows:

PART 770—AMENDED

■ 1. The authority citation for part 770 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 6, 2004, 69 FR 48763 (August 10, 2004).

■ 2. In § 770.2 revise paragraph (h) to read as follows:

§ 770.2 Item interpretations.

* * * * *

(h) *Interpretation 8: Ground vehicles.* (1) The U.S. Department of Commerce, Bureau of Industry and Security has export licensing jurisdiction over ground transport vehicles (including trailers), parts, and components therefor specially designed or modified for non-combat military use. Vehicles in this category are primarily transport vehicles designed or modified for transporting cargo, personnel and/or equipment, or to move other vehicles and equipment over land and roads in close support of fighting vehicles and troops. The U.S. Department of Commerce, Bureau of Industry and Security also has export licensing jurisdiction over unarmed all-wheel drive vehicles capable of off-road use which have been manufactured or fitted with materials to provide ballistic protection, including protection to level III (National Institute of Justice Standard 0108.01, September 1985) or better if they do not have armor described in 22 CFR part 121, Category XIII. In this section, and in ECCN 9A018, the word "unarmed" means not having weapons installed, not having mountings for weapons installed, and not having special reinforcements for mountings for weapons.

(2) Modification of a ground vehicle for military use entails a structural, electrical or mechanical change involving one or more specially designed military components. Such components include, but are not limited to:

(i) Pneumatic tire casings of a kind designed to be bullet-proof or to run when deflated;

(ii) Tire inflation pressure control systems, operated from inside a moving vehicle;

(iii) Armored protection of vital parts, (*e.g.*, fuel tanks or vehicle cabs); and

(iv) Special reinforcements for mountings for weapons.

(3) *Scope of ECCN 9A018.b.* Ground transport vehicles (including trailers) and parts and components therefor specially designed or modified for non-combat military use are controlled by ECCN 9A018.b. Unarmed all-wheel drive vehicles capable of off-road use that are not described in paragraph (h)(4) of this section and which have been manufactured or fitted with materials to provide ballistic protection to level III (National Institute of Justice Standard 0108.01, September 1985) or better are controlled by ECCN 9A018.b. ECCN 9A018.b. does not cover civil automobiles, or trucks designed or modified for transporting money or valuables, having armored or ballistic protection, even if the automobiles or trucks incorporate items described in paragraphs (h)(2) (i), (ii), or (iii) of this section. In this section, the term "civil automobile" means a passenger car, limousine, van or sport utility vehicle designed for the transportation of passengers and marketed through civilian channels in the United States, but does not include any all-wheel drive vehicle capable of off-road use which has been manufactured or fitted with materials to provide ballistic protection at level III (National Institute of Justice Standard 0108.01, September 1985) or better, nor does it include any vehicle described in paragraph (h)(4) of this section. Ground vehicles that are not described in paragraph (h)(4) of this section and that are not covered by either ECCN 9A018.b or 9A990 are EAR99, meaning that they are subject to the EAR, but not listed in any specific ECCN.

(4) *Related control.* The Department of State, Directorate of Defense Trade Controls has export licensing jurisdiction for all military ground armed or armored vehicles and parts and components specific thereto as described in 22 CFR part 121, Category VII. The Department of State, Directorate of Defense Trade Controls also has export licensing jurisdiction for all-wheel drive vehicles capable of off-road use that have been armed or armored with articles described in 22 CFR part 121 or that have been manufactured or fitted with special reinforcements for mounting arms or other specialized military equipment described in 22 CFR part 121.

* * * * *

SUPPLEMENT NO. 1 TO PART 774—AMENDED

■ 3. The authority citation for part 774 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); 18 U.S.C. 2510 *et seq.*; 22 U.S.C. 287c, 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; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; Sec. 901–911, Pub. L. 106–387; Sec. 221, Pub. L. 107–56; 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 6, 2004, 69 FR 48763 (August 10, 2004).

■ 4. Supplement 1 to part 774, Category 9, Export Control Classification Number 9A018 is amended by revising the heading, and the *Related Controls* and *Items* paragraphs in the List of Items Controlled section to read as follows:

9A018 Equipment on the Wassenaar Arrangement Munitions List

* * * * *

List of Items Controlled

Unit: * * *

Related Controls: (a) Parachute systems designed for use in dropping military equipment, braking military aircraft, slowing spacecraft descent, or retarding weapons delivery; (b) Instrument flight trainers for combat simulation; and (c) military ground armed or armored vehicles and parts and components specific thereto described in 22 CFR part 121, Category VII; and all-wheel drive vehicles capable of off-road use that have been armed or armored with articles described in 22 CFR part 121, Category XIII (See § 770.2(h)—Interpretation 8) are all subject to the export licensing jurisdiction of the U.S. Department of State, Directorate of Defense Trade Controls.

Related Definitions * * *

Items:

a. Military trainer aircraft bearing "T" designations:

a.1. Using reciprocating engines; or

a.2. Turbo prop engines with less than 600 horse power (h.p.);

a.3. T–37 model jet trainer aircraft; and

a.4. Specially designed component parts.

b. Ground transport vehicles (including trailers) and parts and components therefor designed or modified for non-combat military use and unarmed all-wheel drive vehicles capable of off-road use which have been manufactured or fitted with materials to provide ballistic protection to level III (National Institute of Justice standard 0108.01, September 1985) or better. (See § 770.2(h)—Interpretation 8).

c. Pressure refuelers, pressure refueling equipment, and equipment specially designed to facilitate operations in confined areas; and ground equipment, n.e.s, developed specially for military aircraft and helicopters, and specially designed parts and accessories, n.e.s.;

d. Pressurized breathing equipment specially designed for use in military aircraft and helicopters;

e. Military parachutes and complete canopies, harnesses, and platforms and electronic release mechanisms therefor, except such types as are in normal sporting use;

f. Military instrument flight trainers, except for combat simulation; and components, parts, attachments and accessories specially designed for such equipment.

Dated: August 25, 2004.

Peter Lichtenbaum,

Assistant Secretary for Export Administration.

[FR Doc. 04–19872 Filed 8–30–04; 8:45 am]

BILLING CODE 3510–33–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 143

RIN 3038–AC13

Adjustment of Civil Monetary Penalties for Inflation

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission) is amending its rule which governs the maximum amount of civil monetary penalties, to adjust for inflation. This rule sets forth the maximum, inflation-adjusted dollar amount for civil monetary penalties (CMPs) assessable for violations of the Commodity Exchange Act (Act) and Commission rules and orders thereunder. The rule, as amended, implements the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996.

EFFECTIVE DATE: October 23, 2004.

FOR FURTHER INFORMATION CONTACT: Daniel A. Nathan, Chief, Office of Cooperative Enforcement, Division of Enforcement, at (202) 418–5314 or *dnathan@cftc.gov;* Terry S. Arbit, Associate General Counsel, at (202) 418–5357 or *tarbit@cftc.gov;* Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581. This document also is available at *http://www.regulations.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA), as amended by the Debt Collection Improvement Act of 1996 (DCIA),[1] requires the head of each Federal agency to adjust by regulation, at least once every four years, the maximum amount of CMPs provided by law within the jurisdiction of that agency by the cost-of-living adjustment defined in the FCPIAA, as amended.[2] Because the purposes of the inflation adjustments include maintaining the deterrent effect of CMPs and promoting compliance with the law, the Commission monitors the impact of inflation on its CMP maximums and adjusts them as needed to implement the requirements and purposes of the FCPIAA.[3]

II. Relevant Commission CMPs

The inflation adjustment requirement applies to:

[A]ny penalty, fine or other sanction that—

(A) Is for a specific monetary amount as provided by Federal law; or

(ii) Has a maximum amount provided for by Federal law; and

(B) Is assessed or enforced by an agency pursuant to Federal law; and

(C) Is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts[.]

28 U.S.C. 2661 note. The Act provides for CMPs that meet the above definition, and are therefore subject to the inflation adjustment, in three instances: Sections 6(c), 6b, and 6c of the Act.[4]

Penalties may be assessed in a Commission administrative proceeding pursuant to Section 6(c) of the Act, 7 U.S.C. 9, against "any person" found by the Commission to have:

(1) Engaged in the manipulation of the price of any commodity, in interstate commerce, or for future delivery;

(2) Willfully made a false or misleading statement or omitted a material fact in an application or report filed with the Commission; or

(3) Violated any provision of the Act or the Commission's rules, regulations or orders thereunder.

Penalties may be assessed in a Commission administrative proceeding pursuant to Section 6b of the Act, 7 U.S.C. 13a, against: (1) Any registered entity[5] that the Commission finds is not enforcing or has not enforced its rules, or (2) any registered entity, or any director, officer, agent, or employee of any registered entity, that is violating or has violated any of the provisions of the Act or the Commission's rules, regulations or orders thereunder.

Penalties may be assessed pursuant to Section 6c of the Act, 7 U.S.C. 13a–1, against "any person" found by "the proper district court of the United States" to have committed any violation of any provision of the Act or any rule, regulation or order thereunder.

III. Relevant Cost-of-Living Adjustment

The formula for determining the cost-of-living adjustment, first defined by the FCPIAA, and amended by the DCIA, consists of a four-step process.

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[1] The FCPIAA, Pub. L. 101–410 (1990), and the relevant amendments to the FCPIAA contained in the DCIA, Pub. L. 104–134 (1996), are codified at 28 U.S.C. 2461 note.

[2] The DCIA also requires that the range of minimum and maximum CMPs be adjusted, if applicable. This is not applicable to the Commission because, for the relevant CMPs within the Commission's jurisdiction, the Act provides only for maximum amounts that can be assessed for each violation of the Act or the rules and orders thereunder; the Act does not set forth any minimum penalties. Therefore, the remainder of this release will refer only to CMP maximums.

[3] Specifically, the FCPIAA states:

The purpose of [the FCPIAA] is to establish a mechanism that shall—

(1) Allow for regular adjustment for inflation of civil monetary penalties;

(2) Maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) Improve the collection by the Federal Government of civil monetary penalties.

[4] 7 U.S.C. 9, 13a and 13a–1.

[5] The Commodity Futures Modernization Act of 2000, Appendix E of the Consolidated Appropriations Act of 2000, Pub. L. 106–554, 114 Stat. 2763 (2000) (CFMA), substituted the term "registered entity" for the term "contract market" throughout the Act, including in Section 6b. The CFMA also added a definition of the term "registered entity" in section 1a(29) of the Act, 7 U.S.C. 1a(29) of the Act, 7 U.S.C. 1a(29), which includes designated contract markets, registered derivatives transaction execution facilities, and registered derivatives clearing organizations. The amended Rule 143.8 includes a technical correction substituting the term "registered entity" for the term "contract market" to conform to this change in the Act.

The first step entails determining the inflation adjustment factor. This is done by calculating the percentage increase by which the Consumer Price Index for the month of June of the calendar year preceding the adjustment exceeds the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.[6] Accordingly, the inflation adjustment factor for the present adjustment equals the Consumer Price Index for all-urban consumers published by the Department of Labor for June 2003 (*i.e.*, June of the year preceding this year), divided by that index for June 2000.[7]

Once the inflation adjustment factor is determined, it is then multiplied by the current maximum CMP set forth in Rule 143.8 to calculate the raw inflation increase.[8] This raw inflation increase is then rounded according to the guidelines set forth by the FCPIAA.[9] Finally, once the inflation increase has been rounded pursuant to the FCPIAA, it is added to the current CMP maximum to obtain the new CMP maximum penalty.[10] As a result, the maximum, inflation-adjusted CMP for each violation of the Act or Commission rules or orders thereunder assessed against any person pursuant to Sections 6(c) and 6c of the Act will be $130,000 or triple the monetary gain to such person for each violation, and $625,000 for each such violation when assessed pursuant to Section 6b of the Act.

The FCPIAA provides that "any increase under [FCPIAA] in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect."[11] Thus, the new CMP maximum may be applied only to violations of the Act that occur after the effective date of this amendment, October 23, 2004.

IV. Related Matters

A. Notice Requirement

This amendment to Rule 143.8 will implement a statutory change regarding agency procedure or practice within the meaning of 5 U.S.C. 553(b)(3)(A) and therefore does not require notice.[12] The Commission also believes that opportunity for public comment is unnecessary under 5 U.S.C. 553(b)(3)(B). This amendment does not effect any substantive change in Commission rules, nor alter any obligation that a party has under Commission rules, regulations or orders. No party must change its manner of doing business, either with the public or the Commission, to comply with the rule amendment. This change is undertaken pursuant to a statutory requirement that all agencies make such adjustments and is intended to prevent inflation from eroding the deterrent effect of CMPs.

While higher maximum CMPs may expose persons to potentially higher financial liability, in nominal terms, for violations of the Act or Commission rules or orders thereunder, the rule amendment does not require that the maximum penalty be imposed on any party, nor does it alter any substantive due process rights that a party has in an administrative proceeding or a court of law that protect against imposition of excessive penalties. Further, as previously noted, the rule amendment applies only to violations of the Act or Commission rules or orders that occur after the effective date of this amendment.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires that agencies consider the impact of their rules on small businesses. The amended rule will potentially affect those persons who are found by the Commission or the Federal courts to have violated the Act or Commission rules or orders. Some of these affected parties could be small businesses. Nevertheless, the Acting Chairman, on behalf of the Commission, certifies that this rule will not have a significant economic impact on a substantial number of small entities.

While the Commission recognizes that certain persons assessed a CMP for violating Act or Commission rules or orders may be small businesses, the rule does not mandate the imposition of the maximum CMP set forth in the rule on any party. As is currently the case, the imposition of the maximum CMP will occur only where the administrative law judge, the Commission or a Federal court finds that the gravity of the offense warrants a CMP in that amount.[13]

The rule should not increase in real terms the economic burden of the maximum CMPs set forth in the Act. Instead, the rule implements a statutory requirement that agencies adjust for inflation existing CMPs so that the real economic value of such penalties, and therefore the Congressionally-intended deterrent effect of such CMPs, is not reduced over time by inflation. Nor does the rule impose any new, affirmative duty on any party or change any

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[6] The Consumer Price Index means the Consumer Price Index for all urban consumers (CPI–U) published by the Department of Labor. Interested parties may find the relevant Consumer Price Index over the Internet. To access this information, go to the Consumer Price Index Home Page at: *http://www.bls.gov/data/*. Under the Prices and Living Conditions Section, select Most Requested Statistics for CPI–All Urban Consumers (Current Series). Then check the box for CPI for U.S. All Items, 1967=100—CUUR0000AA0, and click the Retrieve Data button.

[7] The Consumer Price Index for all-urban consumers published by the Department of Labor for June 2003 was 550.4, and for June 2000 was 516.5. Therefore, the relevant inflation adjustment factor equals 550.4 divided by 516.5 The result is a 6.56 percent increase in the CPI between June 2000 and June 2003. Accordingly, our inflation adjustment factor is 6.56 percent, or 0.0656 for computational purposes.

[8] The current CMP maximum listed in Rule 143.8, as amended in 2000, for purposes of Sections 6(c) and 6c of the Act is $120,000. The current CMP maximum for purposes of Section 6b of the Act is $575,000.

Accordingly, the calculations for the raw inflation increase are the following:

Sections 6(c) and 6c: (0.0656 × $120,000) = $7,872

Section 6b: (0.0656 × $575,000) = $37,720

[9] The FCPIAA, as amended by the DCIA, provides in relevant part that any increase "shall be rounded to the nearest—

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000."

Accordingly, the raw inflation increase for purposes of Sections 6(c) and 6c of the Act ($7,872) is rounded to $10,000, while the raw inflation increase for purposes of Section 6b ($37,720) is rounded to $50,000.

[10] For purposes of Sections 6(c) and 6c of the Act, the rounded inflation increase ($10,000) is added to the current CMP maximum ($120,000), totaling $130,000. For purposes of Section 6b of the Act, the rounded inflation increase ($50,000) is added to the current CMP maximum ($575,000), totaling $625,000.

[11] *See also Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994) (holding that there is a presumption against retroactivity in changes to damage remedies or civil penalties in the absence of clear statutory language to the contrary).

[12] U.S.C. 553(b) generally requires notice of proposed rulemaking to be published in the **Federal Register**. That provision states, however, that "[e]xcept when notice or hearing is required by statute, [notice is not required]—

(A) [for] interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable; unnecessary, or contrary to the public interest."

[13] Section 6(e) of the Act, 7 U.S.C. 9a(1), directs the Commission to "consider the appropriateness of [a] penalty to the gravity of the violation" when assessing a CMP pursuant to Section 6(c) of the Act. In addition, the Commission's penalty guidelines state that the Commission, when assessing any CMP, will consider the gravity of the offense in question. In assessing the gravity of an offense, the Community may consider such factors as whether the violations resulted in harm to the victims, whether the violations involved core provisions of the Act, and whether the violator acted intentionally or willfully, as well as other factors. *See* CFTC Policy Statement Relating to the Commission's Authority to Impose Civil Money Penalties and Futures Self-Regulatory Organizations' Authority to Impose Sanction; Penalty Guidelines, [1994–1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,265 (CFTC Nov. 1994).

existing requirements, and thus no party who is currently complying with the Act and Commission regulations will incur any expense in order to comply with the amended rule. Therefore, the Commission believes that this final rule will not have a significant economic impact on a substantial number of small entities.[14]

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3507(d), which imposes certain requirements on Federal agencies, including the Commission, connection with their conducting or sponsoring any collection of information as defined by the PRA, does not apply to this rule. The Commission believes this rule amendment does not contain information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects in 17 CFR Part 143

Civil monetary penalty, Claims.

■ In consideration of the foregoing and pursuant to authority contained in Sections 6(c), 6b and 6c of the Act, 7 U.S.C. 9, 13a, and 13a–1(d), and 28 U.S.C. 2461 note as amended by Pub. L. 104–134, the Commission hereby amends part 143 of chapter I of title 17 of the Code of Federal Regulations as follows:

PART 143—COLLECTION OF CLAIMS OWED THE UNITED STATES ARISING FROM ACTIVITIES UNDER THE COMMISSION'S JURISDICTION

■ 1. The authority of citation for part 143 reads as follows:

Authority: 7 U.S.C. 9 and 15, 9a, 12a(5), 13a, 13a–1(d) and 13(a); 31 U.S.C. 3701–3719; 28 U.S.C. 2461 note.

■ 2. Section 143.8 is amended by revising paragraph (a) to read as follows:

[14] Any agency that regulates the activities of small entities must establish a policy or program to reduce and, when appropriate, to waive civil penalties for violations of statutory or regulatory requirements by small entities. An agency is not required to reduce or waive civil penalties, however, if: (1) An entity has been the subject of multiple enforcement actions; (2) an entity's violations involve willful or criminal conduct; or (3) the violations involve serious health, safety or environmental threats. *See* Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. 104–121, § 223, 110 Stat. 862 (March. 29, 1996). The Commission takes these provisions of SBREFA into account when it considers whether to seek or impose a civil monetary penalty in a particular case involving a small entity.

§ 143.8 Inflation-adjusted civil monetary penalties.

(a) Unless otherwise amended by an act of Congress, the inflation-adjusted maximum civil monetary penalty for each violation of the Commodity Exchange Act or the rules or orders promulgated thereunder that may be assessed or enforced by the Commission under the Commodity Exchange Act pursuant to an administrative proceeding or a civil action in Federal court will be:

(1) For each violation for which a civil monetary penalty is assessed against any person (other than a registered entity) pursuant to Section 6(c) of the Commodity Exchange Act, 7 U.S.C. 9:

(i) For violations committed between November 27, 1996 and October 22, 2000, not more than the greater of $110,000 or triple the monetary gain to such person for each such violation;

(ii) For violations committed between October 23, 2000 and October 22, 2004, not more than the greater of $120,000 or triple the monetary gain to such person for each such violation; and

(iii) For violations committed on or after October 23, 2004, not more than the greater of $130,000 or triple the monetary gain to such person for each such violation;

(2) For each violation for which a civil monetary penalty is assessed against any registered entity or other person pursuant to Section 6c of the Commodity Exchange Act, 7 U.S.C. 13a–1:

(i) For violations committed between November 27, 1996 and October 22, 2000, not more than the greater of $110,000 or triple the monetary gain to such person for each such violation;

(ii) For violations committed between October 23, 2000 and October 22, 2004, not more than the greater of $120,000 or triple the monetary gain to such person for each such violation; and

(iii) For violations committed on or after October 23, 2004, not more than the greater of $130,000 or triple the monetary gain to such person for each such violation; and

(3) For each violation for which a civil monetary penalty is assessed against any registered entity or any director, officer, agent, or employee of any registered entity pursuant to Section 6b of the Commodity Exchange Act, 7 U.S.C. 13a:

(i) For violations committed between November 27, 1996 and October 22, 2000, not more than $550,000 for each such violation;

(ii) For violations committed between October 23, 2000 and October 22, 2004, not more than $575,000 for each such violation; and

(iii) For violations committed on or after October 23, 2004, not more than $625,000 for each such violation.

* * * * *

Issued in Washington, DC on August 24, 2004, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–19754 Filed 8–30–04; 8:45 am]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 143

RIN 3038–AC03

Collection of Claims Owed the United States Arising From Activities Under the Commission's Jurisdiction

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of final rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission) is amending its regulations which govern the collection of claims owed to the United States arising from activities under the Commission's jurisdiction. The amendment implements provisions of the Debt Collection Improvement Act of 1996 (DCIA) that allow Federal agencies to collect past-due debts through administrative wage garnishment. As required by the DCIA, the wage garnishment procedures the Commission is adopting are based on, and are consistent with, implementing regulations that have been issued by the Department of Treasury.

DATES: The Commission's amendment of its part 143 regulations shall be effective on August 31, 2004.

FOR FURTHER INFORMATION CONTACT: Stephen Mihans, Esq., Office of General Counsel, Commodity Futures Trading Commission, at (202) 418–5399 or *smihans@cftc.gov*. This document also is available at *http://www.regulations.gov*.

SUPPLEMENTARY INFORMATION: On December 15, 2003, the Commission published for public comment a proposed revision of part 143 of its regulations, 17 CFR part 143, which would add administrative wage garnishment to the available procedures for collecting debts owed to the United States arising from activities subject to the Commission's jurisdiction.[1] At present, the part 143 rules, which apply to debts owed by persons not employed by the Federal government, authorize

[1] *See* 68 FR 69634 (Dec. 15, 2003).

collection by (1) administrative offset against obligations owed to the debtor by the United States; (2) compromise (if the debt owed is not more than $100,000); or (3) referral to the Department of Justice for litigation.[2]

Under the Commission's proposal, Department of the Treasury regulations implementing the administrative wage garnishment provisions of the DCIA would govern wage garnishment proceedings initiated by the Commission. Those regulations, promulgated by the Treasury Department's Financial Management Service (FMS), have been codified at 31 CFR 285.11. As proposed by the Commission, when an individual owes the United States a delinquent non-tax debt arising from activities under the Commission's jurisdiction, the Commission, or another Federal agency collecting the debt on the Commission's behalf,[3] would be authorized to initiate administrative proceedings to garnish the debtor's disposable income in accordance with the requirements of 31 CFR 285.11.[4] The debtor would have an opportunity to request a hearing regarding the existence or amount of the debt or the terms of repayment. If such a hearing were requested, the Commission's Executive Director would designate a qualified and impartial employee of the Commission to act as the hearing official.[5]

In addition to adding administrative wage garnishment to the existing debt-collection measures in the part 143 rules, the Commission's proposal included several technical corrections and editorial changes of a non-substantive nature in the part 143 rules. Finally, the Commission proposed that the current part 143 rules, as revised, be grouped together in a new subpart A, while the new administrative wage garnishment rules be placed in a new subpart B.

The public comment period for the proposed revision of the Commission's part 143 rules closed on January 14, 2004. No comments were received. As a result, with the exception of certain non-substantive changes to Proposed Rule 143.10, the Commission is revising its part 143 rules as proposed.[6]

Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–611, requires that in adopting final rules, agencies consider the impact of those rules on small businesses. As noted in the preamble to the proposed rule amendments, the revisions to the part 143 rules are not subject to the provisions of the RFA because they relate solely to agency organization, procedure, and practice. Nevertheless, the Acting Chairman certifies, on behalf of the Commission, that these rules will not have a significant economic impact on a substantial number of small businesses. Although an employer of a delinquent debtor will have to certify certain information about the debtor, such as the debtor's employment status and current earnings, this information is already contained in the employer's payroll records. In addition, under 31 CFR 281.55, an employer will not be required to vary its normal payroll cycle to accommodate an administrative wage garnishment order.

B. Paperwork Reduction Act

The Commission's administrative wage garnishment rules will not require the collection of information from the general public, but only from specifically identified individuals or entities. For that reason, the rules do not impose a burden within the meaning and intent of the Paperwork Reduction Act of 1980, 5 U.S.C., *et seq.*, and do not necessitate review by the Office of Management and Budget.

C. Cost-Benefit Analysis

Section 15(a) of the Commodity Exchange Act, 7 U.S.C. 19(a), requires the Commission to consider the costs and benefits of its action before issuing a new regulation. The Commission understands that, by its terms, section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Nor does it require that each rule be analyzed in isolation when that rule is a component of a larger package of rules or rule revisions. Rather, section 15(a) simply requires the Commission to "consider the costs and benefits" of its action.

Section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern—namely, protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. As a result, the Commission can, in its discretion, give greater weight to any one of the five enumerated areas of concern and can, 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 accomplish any of the purposes, of the Commodity Exchange Act.

The administrative wage garnishment rules being adopted by the Commission are not related to the marketplace and, therefore, should not affect the protection of market participants; the efficiency, competitiveness, and financial integrity of futures markets; price discovery; or sound risk management practices. These rules do address other public interest considerations, namely, the collection of debts owed to the United States arising from activities under the Commission's jurisdiction. The costs associated with implementing administrative wage garnishment, which are mandated by the DCIA and 31 CFR 285.11, will be small. On the other hand, the benefits include providing an additional means to prevent persons who have been found liable for violating the Commodity Exchange Act or the Commission's regulations or orders from avoiding payment of monetary sanctions lawfully imposed on them.

List of Subjects in 17 CFR Part 143

Civil monetary penalty, Claims.

■ In consideration of the foregoing, the Commission amends chapter 1 of title 17

[2] The collection of debts owed to the Commission by its current employees or by the employees of other Federal agencies, and of debts owed to other Federal agencies by current Commission employees, is separately governed by part 141 of the Commission's regulations, 17 CFR part 141.

[3] On August 27, 19994, the Commission entered into a cross-servicing agreement with the FMS, which allows the FMS to undertake debt-collection activities on behalf of the Commission. The Commission's routine uses of information for purposes of the Privacy Act, 5 U.S.C. 552a, permit the disclosure of information necessary for the FMS to assist the Commission in collecting delinquent debts through administrative wage garnishment. *See* 62 FR 44442 (Aug. 21, 1997).

[4] *See* Proposed Rule 143.9, which can be found at 68 FR 69637. Under this proposed rule, the Commission's use of the other debt-collection measures set forth in part 143 would not preclude it from initiating an administrative wage garnishment proceeding against a delinquent debtor.

[5] *See* Proposed Rule 143.10, which can be found at 68 FR 69637.

[6] As adopted, Rule 143.10 clarifies that administrative wage garnishment hearings held by the Commission will be governed by 31 CFR 285.11(f). It provides, however, that in addition to the mandates of 31 CFR 285.11(f), several further requirements will apply to the Commission's wage garnishment hearings, including marking and retaining as exhibits all documents presented for consideration by the hearing official, and taking all testimony adduced at an oral hearing under oath or affirmation and on the record. These additional requirements will ensure that an adequate record is available for review in the event that an administrative wage garnishment order issued by, or on behalf of, the Commission is appealed to a Federal court with appropriate jurisdiction.

of the Code of Federal Regulations as follows:

PART 143—COLLECTION OF CLAIMS OWED THE UNITED STATES ARISING FROM ACTIVITIES UNDER THE COMMISSION'S JURISDICTION

■ 1. The authority citation for part 143 is revised to read as follows:

Authority: 7 U.S.C. 9 and 15, 9a, 12a(5), 13a, 13a–1(d), and 13(a); 31 U.S.C. 3701–3720E; 28 U.S.C. 2461 note.

■ 2. Section 143.1 is revised to read as follows:

§ 143.1 Purpose.

This part provides procedures that the Commission will use to collect debts owed the United States arising from activities under the Commission's jurisdiction. As applicable, these procedures are based upon, and conform to, the Federal Claims Collection Act, as amended, 31 U.S.C. 3701–3720E; the Federal Claims Collection Standards, 31 CFR Parts 900–905, issued by the Department of the Treasury and the Department of Justice; administrative wage garnishment regulations issued by the Department of the Treasury, 31 CFR 285.11; and other laws applicable to the collection of non-tax debts owed to the United States arising from activities under the Commission's jurisdiction. Subpart A describes procedures for collection by offset against obligations of the United States to the debtor, by compromise, and by referral to the Department of Justice for litigation. It also sets forth the Commission's policy on collecting interest on unpaid claims, the method used in calculating such interest, and the maximum inflation-adjusted civil monetary penalties that may be assessed and enforced for each violation of the Commodity Exchange Act or regulations or orders of the Commission promulgated thereunder. Subpart B describes procedures for collection by administrative garnishment of the debtor's wages.

■ 3. Sections 143.2 through 143.8 are designated as subpart A of part 143, and a new heading, "Subpart A—General Provisions," is added above § 143.2 to read as follows:

Subpart A—General Provisions

■ 4. Section 143.2 is amended by revising paragraph (c) to read as follows:

§ 143.2 Notice of claim.

* * * * *

(c) If no response or an unsatisfactory response is received by the date indicated in the notice, the Commission may take further action as appropriate under the Commodity Exchange Act or regulations thereunder, or under 31 CFR parts 900–905 or the Federal Claims Collection Act as amended, 31 U.S.C. 3701–3720E.

■ 5. Section 143.7 is amended by revising paragraph (a) to read as follows:

§ 143.7 Delegation of authority to the Executive Director.

(a) The Commission hereby delegates, until such time as the Commission orders otherwise, to the Executive Director or to any Commission employee under the Executive Director's supervision as he or she may designate, authority to take action to carry out subpart A and subpart B of this part and the requirements of 31 CFR parts 900–905 and 31 CFR 285.11.

* * * * *

■ 6. A new subpart B is added to part 143, to read as follows:

Subpart B—Administrative Wage Garnishment

§ 143.9 Administrative wage garnishment orders.

Whenever an individual owes the United States a delinquent non-tax debt arising from activities under the Commission's jurisdiction, the Commission, or another federal agency collecting the debt on behalf of the Commission, may initiate administrative proceedings to garnish the disposable income of the delinquent debtor in accordance with the requirements of, and the procedures set forth in, 31 CFR 285.11. The Commission's use of other debt-collection measures set forth in subpart A of this part does not preclude the initiation of an administrative wage garnishment proceeding against a delinquent debtor.

§ 143.10 Garnishment hearings.

Any oral or written hearing required to establish the Commission's right to collect a delinquent debt through administrative wage garnishment shall be presided over by a hearing official designated by the Executive Director, with the concurrence of the General Counsel or the General Counsel's designee. Any qualified and impartial employee of the Commission designated by the Executive Director may serve as a hearing official. Except as otherwise provided in this section, the hearing shall be conducted in accordance with the requirements of, and the procedures set forth in, 31 CFR 285.11(f). All documents presented to the hearing official for his or her consideration shall be marked as exhibits and retained in the record. All testimony given at an oral hearing, either in person or by telephone, shall be under oath or affirmation; a transcript of the hearing shall be prepared and made part of the record. When a debtor requests a hearing, the designated hearing official shall hold the hearing and issue his or her written decision within 60 days of the Commission's receipt of the request, unless otherwise approved, in writing, by the Executive Director.

Issued in Washington, DC, on August 24, 2004 by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–19755 Filed 8–30–04; 8:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD05–04–143]

RIN 1625–AA08

Special Local Regulations for Marine Events; Susquehanna River, Port Deposit, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing temporary special local regulations for "Ragin' on the River," a power boat race to be held over the waters of the Susquehanna River adjacent to Port Deposit, Maryland. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in portions of the Susquehanna River adjacent to Port Deposit, Maryland during the power boat race.

DATES: This rule is effective from 11 a.m. on September 4, 2004, to 6:30 p.m on September 5, 2004.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket CGD05–04–143 and are available for inspection or copying at Commander (oax), Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004, between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: D. M. Sens, Project Manager, Auxiliary and Recreational Boating Safety Branch, at (757) 398–6204.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. Publishing an NPRM would be impracticable. The event will take place on September 4 and 5, 2004. There is not sufficient time to allow for a notice and comment period, prior to the event. Immediate action is needed to protect the safety of life at sea from the danger posed by high-speed power boats.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date would be contrary to the public interest, since immediate action is needed to ensure the safety of the event participants, spectator craft and other vessels transiting the event area. However advance notifications will be made to affected waterway users via marine information broadcasts and area newspapers.

Background and Purpose

On September 4 and 5, 2004, the Port Deposit Chamber of Commerce will sponsor the "Ragin' on the River," on the waters of the Susquehanna River. The event will consist of approximately 60 inboard hydroplanes and runabouts racing in heats counter-clockwise around an oval racecourse. A fleet of spectator vessels is expected to gather nearby to view the competition. Due to the need for vessel control during the event, vessel traffic will be temporarily restricted to provide for the safety of participants, spectators and transiting vessels.

Discussion of Rule

The Coast Guard is establishing temporary special local regulations on specified waters of the Susquehanna River adjacent to Port Deposit, Maryland. The regulated area includes a section of the Susquehanna River approximately 1500 yards long, and bounded in width by each shoreline. The temporary special local regulations will be enforced from 11 a.m. to 6:30 p.m. on September 4 and 5, 2004, and will restrict general navigation in the regulated area during the power boat race. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area during the enforcement period.

Regulatory Evaluation

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

We expect the economic impact of this temporary rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

Although this regulation prevents traffic from transiting a portion of the Susquehanna River adjacent to Port Deposit, Maryland during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via marine information broadcasts and area newspapers so mariners can adjust their plans accordingly.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit this section of the Susquehanna River during the event.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be enforced for only a short period, from 11 a.m. to 6:30 p.m. on September 4 and 5, 2004. Although the regulated area will apply to the entire width of the river, traffic may be allowed to pass through the regulated area with the permission of the Coast Guard patrol commander. In the case where the patrol commander authorizes passage through the regulated area during the event, vessels shall proceed at the minimum speed necessary to maintain a safe course that minimizes wake near the race course. Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction, from further environmental documentation. Special local regulations issued in conjunction with a regatta or marine event permit are specifically excluded from further analysis and documentation under those sections. Under figure 2–1, paragraph (34)(h), of the Instruction, an "Environmental Analysis Check List" and a "Categorical Exclusion Determination" are not required for this rule.

List of Subjects in 33 CFR Part 100

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

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

Authority: 33 U.S.C. 1233, Department of Homeland Security Delegation No. 0170.1.

■ 2. Add a temporary section, § 100.35–T05–143 to read as follows:

§ 100.35–T05–143 Susquehanna River, Port Deposit, Maryland.

(a) *Regulated area.* The regulated area is established for the waters of the Susquehanna River, adjacent to Port Deposit, Maryland, from shoreline to shoreline, bounded on the south by a line running northeasterly from a point along the shoreline at latitude 39°35′18″ N, longitude 076°07′17″ W, to latitude 39°35′48″ N, longitude 076°06′27″ W, and bounded on the north by a line running southwesterly from a point along the shoreline at latitude 39°36′22″ N, longitude 076°07′08″ W, to latitude 39°36′00″ N, longitude 076°07′46″ W. All coordinates reference Datum NAD 1983.

(b) *Definitions:*

(1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Activities Baltimore.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Activities Baltimore with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(c) *Special local regulations:*

(1) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area shall stop the vessel immediately when directed to do so by any Official Patrol.

(3) All persons and vessels shall comply with the instructions of the Official Patrol. The operator of a vessel in the regulated area shall stop the vessel immediately when instructed to do so by the Official Patrol and then proceed as directed. When authorized to transit the regulated area, all vessels shall proceed at the minimum speed necessary to maintain a safe course that minimizes wake near the race course.

(d) *Enforcement period.* This section will be enforced from 11 a.m. to 6:30 p.m. on September 4 and 5, 2004.

Dated: August 18, 2004.

Ben R. Thomason,

Captain, U.S. Coast Guard, Acting Commander, Fifth Coast Guard District.

[FR Doc. 04–19802 Filed 8–30–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD05–04–157]

RIN 1625–AA08

Special Local Regulations for Marine Events; Patapsco River, Baltimore, MD

AGENCY: Coast Guard, DHS.

ACTION: Notice of implementation of regulation.

SUMMARY: The Coast Guard is implementing the special local regulations at 33 CFR 100.515 during the 190th Defender's Day Celebration fireworks display to be held September 11, 2004, over the waters of the Patapsco River at Baltimore, Maryland. These special local regulations are necessary to control vessel traffic due to the confined nature of the waterway and expected

vessel congestion during the fireworks display. The effect will be to restrict general navigation in the regulated area for the safety of spectators and vessels transiting the event area.

EFFECTIVE DATES: 33 CFR 100.515 is effective from 5:30 p.m. to 11 p.m. on September 11, 2004.

FOR FURTHER INFORMATION CONTACT: Ronald Houck, Marine Information Specialist, Commander, Coast Guard Activities Baltimore, 2401 Hawkins Point Road, Baltimore, MD 21226–1971, at (410) 576–2674.

SUPPLEMENTARY INFORMATION: The Society of the War of 1812, the City of Baltimore and the National Park Service will co-sponsor the 190th Defender's Day Celebration fireworks display on September 11, 2004 over the waters of the Patapsco River, Baltimore, Maryland. The fireworks display will be launched from a barge positioned within the regulated area. A fleet of spectator vessels is expected to gather nearby to view the aerial display. In order to ensure the safety of spectators and transiting vessels, 33 CFR 100.515 will be in effect for the duration of the event. Under provisions of 33 CFR 100.515, a vessel may not enter the regulated area unless it receives permission from the Coast Guard Patrol Commander. Spectator vessels may anchor outside the regulated area but may not block a navigable channel.

In addition to this notice, the maritime community will be provided extensive advance notification via the Local Notice to Mariners, marine information broadcasts, and area newspapers, so mariners can adjust their plans accordingly.

Dated: August 18, 2004.

Ben R. Thomason, III,

Captain, U.S. Coast Guard, Acting Commander, Fifth Coast Guard District.

[FR Doc. 04–19803 Filed 8–30–04; 8:45 am]

BILLING CODE 4910–15–P

POSTAL SERVICE

39 CFR Parts 221, 222, 223, 224, 225, 226, 227, 228, and 229

General Organization, Delegations of Authority, Relationships and Communication Channels

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This rule amends the Postal Service regulations on general organization, delegations of authority, and relationships and communication channels to bring these regulations into line with the Postal Service's current organizational structure. It also removes several obsolete parts from the subchapter dealing with organization and administration.

EFFECTIVE DATE: August 31, 2004.

FOR FURTHER INFORMATION CONTACT: Stanley F. Mires, (202) 268–2958.

SUPPLEMENTARY INFORMATION: Revision of parts 221 through 223 is necessary to reflect structural and other changes that have occurred in the Postal Service since the last major amendments to these parts in 1989 (54 FR 29707). In addition, successive internal restructurings of the Postal Service have made parts 224 through 229 obsolete. Rather than revise these parts, which presented an unnecessarily detailed functional description of the managerial units formerly contained in the Postal Service, the decision has been made to remove them. Exhaustive information concerning postal administrative topics is contained in the Postal Service's Administrative Support Manual (ASM). The ASM is available for inspection at the U.S. Postal Service Library, 475 L'Enfant Plaza West, S.W., Washington, DC 20260–1641. The ASM is also available for sale to the public through the Topeka Material Distribution Center, 500 SW Montana Pkwy, Topeka, KS 66624–9995, telephone 1–800–332–0317. A concise statement of the organization of the Postal Service can be found in the United States Government Manual, published by the Office of the Federal Register, National Archives and Records Administration.

This rule is a change in agency rules of organization that does not substantially affect any rights or obligations of private parties. Therefore, it is appropriate for its adoption by the Postal Service to become effective immediately.

List of Subjects in 39 CFR Parts 221, 222, 223, 224, 225, 226, 227, 228, and 229

Organization and functions (Government agencies).

■ For the reasons set forth above, the Postal Service amends 39 CFR chapter I as follows:

■ 1. Parts 221, 222, and 223 are revised to read as follows:

PART 221—GENERAL ORGANIZATION

Sec.

Authority: 39 U.S.C. 201, 202, 203, 204, 207, 401(2), 402, 403, 404, 409, 1001; Inspector General Act of 1978 (Pub. L. 95–452), 5 U.S.C. App. 3.

§ 221.1 The United States Postal Service.

The United States Postal Service was established as an independent establishment within the executive branch of the government of the United States under the Postal Reorganization Act of August 12, 1970 (Pub. L. 91–375, 84 Stat. 719).

§ 221.2 Board of Governors.

(a) Composition. The Board of Governors consists of 11 members. Nine governors are appointed by the President of the United States, by and with the advice and consent of the Senate. Not more than five governors may be adherents of the same political party. The governors are chosen to represent the public interest generally, and they may not be representatives of specific interests using the Postal Service. The governors may be removed only for cause. The postmaster general and the deputy postmaster general are also voting members of the Board of Governors.

(b) Responsibilities. The Board of Governors directs the exercise of the powers of the Postal Service, reviews the practices and policies of the Postal Service, and directs and controls its expenditures.

§ 221.3 Office of Inspector General.

(a) Establishment. The Office of Inspector General (OIG) was established as an independent law enforcement and oversight agency for the United States Postal Service under the Inspector General Act of 1978 (5 U.S.C. App. 3), as amended in 1988 (Pub. L. 100–504, 102 Stat. 2515) and 1996 (Pub. L. 104–208, 110 Stat. 3009).

(b) Responsibilities. The OIG was established to:

(1) Provide an independent and objective unit to conduct and supervise audits and investigations relating to programs and operations of the Postal Service.

(2) Provide leadership and coordination and recommend policies for activities designed to:

(i) Promote economy, efficiency, and effectiveness in the administration of postal programs and operations.

(ii) Prevent and detect fraud and abuse in postal programs and operations.

(3) Provide a means of keeping the governors and Congress fully and currently informed about:

(i) Problems and deficiencies relating to the administration of postal programs and operations.

(ii) The necessity for corrective action.
(iii) The progress of corrective action.
(4) Provide oversight of all activities of the Postal Inspection Service.
(c) Inspector General—(1) Appointment. The inspector general is appointed for a 7-year term by the nine governors.
(2) Responsibilities. The inspector general is responsible for the operations of the OIG: ensuring independent and objective audits and investigations of postal operations and programs; overseeing the Postal Inspection Service; and apprising the governors and Congress of significant observations. The inspector general has no direct responsibility for designing, installing, and/or operating postal operations or programs.
(3) Extent of powers. In addition to the authority otherwise provided by the Inspector General Act of 1978, as amended, the inspector general is authorized to:
(i) Have unrestricted access to all Postal Service operations, programs, records, and documents, whether in custody of the Postal Service or available by law, contract, or regulation.
(ii) Have direct and prompt access to the governors when necessary for any purpose pertaining to the performance of the functions and responsibilities of the OIG.
(iii) Administer oaths when necessary in performance of the functions assigned to the OIG.
(iv) Require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions of the OIG.
(v) Select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the OIG.
(vi) Obtain the temporary or intermittent services of experts or consultants in accordance with applicable laws and regulations.

§ 221.4 Corporate officers.

The Board of Governors determines the number of corporate officers and appoints the postmaster general. The governors and the postmaster general appoint the deputy postmaster general. The postmaster general appoints the remaining corporate officers. The corporate officers of the Postal Service are the following:
(a) The postmaster general and chief executive officer.
(b) The deputy postmaster general.
(c) The chief operating officer and executive vice president.
(d) The chief financial officer and executive vice president.
(e) The senior vice presidents.
(f) The general counsel and senior vice president.
(g) The vice presidents.
(h) The chief inspector.
(i) The consumer advocate and vice president.
(j) The judicial officer.
(k) Such other officers as the Board may designate from time to time.

§ 221.5 Headquarters organization.

(a) Postmaster General—(1) Appointment. The postmaster general (PMG), the chief executive officer of the Postal Service, is appointed by and can be removed by a majority of the governors in office.
(2) Responsibilities. The postmaster general is responsible for the overall operation of the Postal Service. The postmaster general determines appeals from the actions of staff and corporate officers, except in cases where he or she has delegated authority to make a decision to a subordinate; such subordinate may also determine appeals within the authority delegated.
(3) Extent of powers. The postmaster general, as directed by the Board of Governors, exercises the powers of the Postal Service to the extent that such exercise does not conflict with power reserved to the Board by law. The postmaster general is authorized to direct any officer, employee, or agent of the Postal Service to exercise such of the postmaster general's powers as the postmaster general deems appropriate.
(b) Deputy Postmaster General. The deputy postmaster general is appointed and can be removed by the postmaster general and the governors in office. The deputy postmaster general reports directly to the postmaster general.
(c) Chief Operating Officer and Executive Vice President. The chief operating officer and executive vice president is appointed by the postmaster general and directs all processing, distribution, and customer service functions.
(d) Officers in charge of Headquarters organizational units. The officers in charge of Headquarters organizational units are appointed by the postmaster general. They report directly to the postmaster general, the deputy postmaster general, an executive vice president, a senior vice president, or another officer, as the postmaster general may direct.
(e) Responsibilities. The corporate officers head the organizational units into which Headquarters and the field are divided. They are responsible for the following:
(1) Program planning, direction, and review.
(2) Establishment of policies, procedures, and standards.
(3) Operational determinations not delegated to district officials.

§ 221.6 Field organization.

(a) General. There are 8 areas, each with a vice president.
(b) Area locations.

Area name	Location
Eastern	Pittsburgh PA.
Great Lakes	Chicago IL.
New York Metro	New York NY.
Northeast	Windsor CT.
Pacific	San Francisco CA.
Southeast	Memphis TN.
Southwest	Dallas TX.
Western	Denver CO.

(c) Area functions. Functional units and reporting units are as follows:
(1) Functional units. Each area is divided into functional units responsible for finance, human resources, marketing, and operations support.
(2) Reporting units. Areas are responsible for:
(i) Customer service districts (CSDs).
(ii) Post offices (POs).
(iii) Vehicle maintenance facilities (VMFs).
(iv) Processing and distribution centers (P&DCs).
(v) Processing and distribution facilities (P&DFs).
(vi) Air mail centers (AMCs).
(vii) Air mail facilities (AMFs).
(viii) Bulk mail centers (BMCs).
(ix) Bulk mail facilities (BMFs).
(x) Remote encoding centers (RECs).
(d) Customer Service District Offices. Functional units and reporting relationships are as follows:
(1) Functional units. The 80 district offices coordinate the day-to-day management of post offices and customer service activities other than processing and distribution within a geographical area. EAS–26 and above postmasters report to their district manager. Each district office is organized into functional units responsible for post office operations, operations programs support, customer service support, finance, human resources, information technology, administrative support, and marketing.
(2) Reporting relationships. Independent delivery distribution centers and post offices level EAS–24 and below report to the functional unit responsible for post office operations.
(e) Support—(1) General. Headquarters field units and service centers provide support for area offices.
(2) Headquarters field units. As assigned, Headquarters field units are

responsible for legal services, corporate relations, human resources, facility services, finance, information technology, and supply management.

§ 221.7 Postal Service emblem.

The Postal Service emblem, which is identical with the seal, is registered as a trademark and service mark by the U.S. Patent Office. Except for the emblem on official stationery, the emblem must bear one of the following notations: "Reg. U.S. Pat. Off.", "Registered in U.S. Patent Office", or the letter R enclosed within a circle.

PART 222—DELEGATIONS OF AUTHORITY

Sec.
222.1 Authority to administer postal affairs.
222.2 Authority to administer oaths or function as notaries public.
222.3 Other delegation.

Authority: 39 U.S.C. 201, 202, 203, 204, 207, 401(2), 402, 403, 404, 409, 1001, 1011; Inspector General Act of 1978 (Pub. L. 95–452), 5 U.S.C. App. 3.

§ 222.1 Authority to administer postal affairs.

(a) The Postmaster General. The postmaster general has been authorized by the Board of Governors to exercise the powers of the Postal Service to the full extent that such exercise is lawful. The postmaster general is empowered to authorize any employee or agent of the Service to exercise any function vested in the Postal Service, in the postmaster general, or in any other Postal Service employee.

(b) Corporate officers. Corporate officers are authorized to exercise the powers and functions of the Postal Service under the Postal Reorganization Act with respect to matters within their areas of responsibility, except as limited by law or by the specific terms of their assignment.

(c) General counsel. The general counsel is authorized to settle federal tort claims under section 2672 of title 28, United States Code, up to $100,000.

§ 222.2 Authority to administer oaths or function as notaries public.

(a) Authority to approve personnel actions and administer oaths of office for employment. The postmaster general, corporate officers, and their delegatees are authorized to effect appointments, administer oaths of office for employment, and take other personnel actions.

(b) Authority to administer oaths other than for employment. The following are authorized to administer oaths concerning matters other than employment:

(1) Postal inspectors, with regard to any matter coming before them in the performance of their official duties;

(2) Any member of a board who is assigned to conduct hearings or investigations in which sworn testimony, affidavits, or depositions are required, and each officer or employee assigned to conduct such hearings or investigations;

(3) Postmasters, where required in the performance of their official duties.

(c) Authority to function as notaries public. (1) Postmasters in Alaska have the authority to administer oaths and affirmations, take acknowledgments and make and execute certificates thereof, and perform all other functions of a notary public within Alaska when a certification is necessary to meet any Act of Congress or the Legislature of Alaska. No fees may be charged for notarial services.

(2) An officer or employee who is a notary public shall not charge or receive compensation for notarial services for another officer or employee regarding Government business; nor for notarial services for any person during the hours of the notary's services to the Government, including the lunch period.

§ 222.3 Other delegation.

(a) Documentation. All delegations of authority must be officially documented.

(b) Position title. Delegations of authority must ordinarily be made by position title rather than by name of the individual involved. An officer or executive acting for a principal has the principal's full authority.

(c) Level. When authority is delegated to an officer, the officers above that officer shall have the same authority. Delegated authority does not extend to aides unless an aide is acting for the supervisor (*see* paragraph (b) of this section) or is specifically authorized by the superior to exercise such authority.

(d) Agreement with law. A delegation must agree with the law and regulations under which it is made and contain such specific limiting conditions as may be appropriate.

(e) Further delegation. Authority may be further delegated unless prohibited by law, a regulation that expressly prohibits further delegation, or terms of the delegation.

PART 223—RELATIONSHIPS AND COMMUNICATION CHANNELS

Sec.
223.1 Headquarters and areas.
223.2 Channels of communication, headquarters with area offices.

Authority: 39 U.S.C. 201, 202, 203, 204, 207, 401(2), 402, 403, 404.

§ 223.1 Headquarters and areas.

Headquarters provides policy guidance, procedures, and interpretation to area officials.

§ 223.2 Channels of communication, headquarters with area offices.

(a) General. Headquarters organizational units formulate the directives to provide guidance to area officials.

(b) Policies. Policies are issued over the signatures of the vice presidents of the functional organizations (unless the postmaster general or deputy postmaster general issues these directives personally). Whether published on paper or online, such policies must be coordinated with other appropriate organizations before issuance, and reviewed, published, and managed by Public Affairs and Communications. If within the authority of the issuer, these policies have the same effect as though sent by the postmaster general or deputy postmaster general.

(c) Procedures. Regulations, instructions, and implementation guidelines are issued over the signatures of vice presidents of functional organizations or their accountable functional unit managers and used to implement programs and business activities. Whether published on paper or online, such procedures must be coordinated with other appropriate organizations before issuance and reviewed, published, and managed by Public Affairs and Communications.

PARTS 224, 225, 226, 227, 228, AND 229—[REMOVED]

■ 2. Parts 224, 225, 226, 227, 228, and 229 are removed.

Stanley F. Mires,
Chief Counsel, Legislative.

[FR Doc. 04–19782 Filed 8–30–04; 8:45 am]
BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MD167–3112a; FRL–7804–4]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; VOC RACT for Kaydon Ring and Seal, Inc.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Maryland State Implementation Plan (SIP). The revisions pertain to a Consent Order establishing volatile organic compound (VOC) reasonably available control technology (RACT) for Kaydon Ring and Seal, Incorporated. EPA is approving these revisions in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on November 1, 2004 without further notice, unless EPA receives adverse written comment by September 30, 2004. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by MD167–3112 by one of the following methods:

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

B. E-mail: *morris.makeba@epa.gov*.

C. Mail: Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to Docket ID No. MD167–3112. EPA's policy is that all comments received will be included in the public docket without change, 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 Federal *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 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.

Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B108, Washington, DC 20460; and Maryland Department of the Environment (MDE), 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by e-mail at *quinto.rose@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On March 31, 2004, the State of Maryland submitted a formal revision to its State Implementation Plan (SIP). The SIP revision consists of a Consent Order establishing VOC RACT for Kaydon Ring and Seal, Incorporated (Kaydon) located at 1600 Wicomico Street in Baltimore, Maryland.

II. Summary of SIP Revision

Kaydon operates a piston ring manufacturing facility which includes over 300 small machining and fabricating operations, *e.g.*, cutting, grinding, milling, polishing and lapping operations. The machining and fabricating operations are distributed over 18 manufacturing cells that often require several applications of a rust preventive material and several applications of naphtha as a cleaning agent. The manufacturing processes consist of hundreds of naphtha pans located throughout the facility's product manufacturing cells. These pans are the main source of VOC emissions at the facility, causing the facility to be a VOC major source.

The facility has identified and implemented the following VOC RACT measures in order to reduce naphtha emissions from the facility:

1. Elimination of all small open top naphtha pans and reduction of the number of naphtha pans in use;

2. Development of standard operating procedures and employee training to increase the retention time of parts in the naphtha pans allowing all excess naphtha pans to drip back into the pans;

3. Development and implementation of written good operating practices for the handling, transfer, storage and recovery of naphtha;

4. Incorporation of the good operating practices into the facility's procedures manual;

5. Installation of properly sealed covers on all remaining naphtha pans and implementation of procedures to ensure that covers are closed on all naphtha pans which are not in use; and

6. Modification of its operations and relocation of the equipment in each product manufacturing cell to minimize the number of naphtha pans and the number of cleaning operations.

These actions have reduced emissions by approximately 20 tons per year or less than 100 pounds per 1000 piston rings produced. According to the Consent Order, Kaydon shall maintain compliance with the VOC RACT measures which have been implemented to date. In addition, Kaydon shall reduce the number of naphtha pans in use to not more than 185 by no later than July 1, 2003; and limit emissions of naphtha to a monthly average of not more than 90 pounds per 1000 piston rings manufactured by July 1, 2003. Compliance shall be demonstrated using actual monthly production of piston rings and a six-month average naphtha use. Kaydon shall maintain, and update as necessary, the good operating practices included in the facility's procedures manual and make available to MDE for inspection upon request. Kaydon shall also maintain records on piston rings manufactured and naphtha use, and calculations showing that the emission limit was achieved. The records should be made available for review by MDE upon request. Finally, Kaydon shall submit to MDE for approval a proposed format for piston ring production and naphtha consumption records following the execution of this Consent Order and maintain the records on site for at least five years.

III. Final Action

EPA is approving the Consent Order establishing VOC RACT for Kaydon Ring and Seal, Inc. located in Baltimore, Maryland submitted on March 31, 2004. EPA is approving this SIP submittal because MDE established and imposed requirements in accordance with the criteria set forth in SIP-approved regulations for imposing RACT. MDE has also imposed recordkeeping, monitoring, and testing requirements on this source sufficient to determine compliance with these requirements.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the "Proposed Rules" section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on November 1, 2004 without further notice unless EPA receives adverse comment by September 30, 2004. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it 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). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does 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 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability establishing source-specific requirements for one named source.

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 1, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action, pertaining to a Consent Order establishing VOC RACT for Kaydon Ring and Seal, Incorporated located in Baltimore, Maryland, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Incorporation by reference, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: August 16, 2004.

Richard J. Kampf,

Acting Regional Administrator, Region III.

■ 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 V—Maryland

■ 2. Section 52.1070 is amended by adding paragraph (c)(190) to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(c) * * *

(190) Revisions to the Maryland State Implementation Plan submitted on March 31, 2004 by the Maryland Department of the Environment:

(i) Incorporation by reference.

(A) Letter of March 31, 2004 from the Maryland Department of the Environment transmitting a Consent Order establishing VOC RACT for Kaydon Ring and Seal, Inc.

(B) Consent Order establishing VOC RACT for Kaydon Ring and Seal, Inc. with an effective date of March 5, 2004.

(ii) Additional Material.—Remainder of the State submittal pertaining to the revisions listed in paragraph (c)(190)(i) of this section.

[FR Doc. 04–19820 Filed 8–30–04; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 207–0437; FRL–7804–1]

Revisions to the California State Implementation Plan, Antelope Valley Air Quality Management District and Mojave Desert Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving a revision to the Antelope Valley Air Quality Management District (AVAQMD) and Mojave Desert Air Quality Management District (MDAQMD) portions of the California State Implementation Plan (SIP). These revisions concern federally enforceable limitations on the potential to emit from air pollution sources. We are approving local rules under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: This rule is effective on November 1, 2004, without further notice, unless EPA receives adverse comments by September 30, 2004. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this rule will not take effect.

ADDRESSES: Send comments to Gerardo Rios, Permits Office Chief (AIR–3), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, or e-mail to *R9airpermits@epa.gov*, or submit comments at *http://www.regulations.gov*.

You can inspect a copy of the submitted SIP revisions and EPA's technical support documents (TSDs) at our Region IX office during normal business hours. You may also see a copy of the submitted SIP revisions and TSDs at the following locations:

Environmental Protection Agency, Air Docket (6102), Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington DC 20460.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 1001 "I" Street, Sacramento, CA 95814.

Antelope Valley Air Quality Management District, 43301 Division Street, #206, Lancaster, CA 93535.

Mojave Desert Air Quality Management District, 14306 Park Avenue, Victorville, CA 92392.

A copy of the rule may also be available via the Internet at *http://www.arb.ca.gov/drdb/drdbltxt.htm*. Please be advised that this is not an EPA Web site and may not contain the same version of the rule that was submitted to EPA.

FOR FURTHER INFORMATION CONTACT: Manny Aquitania, Permits Office (AIR–3), U.S. Environmental Protection Agency, Region IX, (415) 947–4123, *aquitania.manny@epa.gov*.

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

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I. The State's Submittal

A. What Rules Did the State Submit?

Table 1 lists the rules addressed by this direct final action with the date that they were adopted by the local air agencies and submitted by the California Air Resources Board.

TABLE 1.—SUBMITTED RULES

Local agency	Rule #	Rule title	Adopted or amended	Submitted
AVAQMD	226	Limitations on Potential to Emit	07/21/98 Amended	02/16/99
MDAQMD	222	Limitations on Potential to Emit	07/31/95 Adopted	10/13/95

On April 23, 1999, the submittal of AVAQMD Rule 226 was found to meet the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review. On November 28, 1995, the submittal of MDAQMD Rule 222 was found to meet the completeness criteria.

B. Are There Other Versions of These Rules?

There is no previous versions of AVAQMD Rule 226 and MDAQMD Rule 222 in the SIP.

C. What Is the Purpose of the Submitted Rules?

Section 110(a) of the CAA requires states to submit regulations that control volatile organic compounds, nitrogen oxides, and other air pollutants which harm human health and the environment. These rules were developed as part of the local agency's program to regulate these pollutants.

The purposes of the submitted rules are as follows:

- To create federally enforceable limitations on the potential to emit air contaminants such that a facility would not exceed 50% of the Title V threshold for a major source.
- To create federally enforceable alternate operational limitations on the potential to emit for specific source categories, such as gasoline vapor recovery, solvent use or degreasing, and diesel engines, such that a facility would not exceed up to 90% of the Title V threshold for a major source.

These limitations on the potential to emit represent a decrease in air emissions of certain air contaminants, because the potential to emit would be in excess of the threshold for a major source if the facility did not comply with the limitations set forth in this rule. The TSDs have more information about these rules.

II. EPA's Evaluation and Action

A. How Is EPA Evaluating the Rules?

The rules describe provisions and definitions that support emission controls of volatile organic compounds, nitrogen oxides, PM–10, and other air pollutants. In combination with other requirements, this rule must be enforceable (see section 110(a) of the CAA) and must not relax existing requirements (see sections 110(l) and 193).

AVAQMD Rule 226 and MDAQMD Rule 222 are modeled on the California Model Rule developed by the California Association of Air Pollution Control Officers, CARB, and EPA. In its agreement on the Model Rule, EPA expressed certain understandings and caveats. See *Letter and Model Rule*, Lydia Wegman, Deputy Director, Office

of Air Quality Planning and Standards, U.S. EPA, to Peter D. Venturini, Chief, Stationary Source Division, CARB (January 12, 1995). Our review of these rules incorporates the understandings and caveats expressed in the letter.

EPA policy that we used to define specific enforceability requirements includes:

- *Requirements for Preparation, Adoption, and Submittal of Implementation Plans*, U.S. EPA, 40 CFR part 51.
- *Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations*, U.S. EPA (May 25, 1988). (The Bluebook)
- *Options for Limiting the Potential to Emit of a Stationary Source Under Section 112 and Title V of the Clean Air Act*, Letter from John Seitz, Office of Air Quality Planning and Standards, to EPA Air Division Directors (January 25, 1995).

B. Do the Rules Meet the Evaluation Criteria?

The rules improve the SIP by allowing a federally enforceable operational limitation on the potential to emit air pollutants, thereby decreasing air emissions to 50% or less of the threshold for a major source or decreasing air emissions to up to 90% of the threshold for a major source for specific source categories. We believe these rules are consistent with the relevant policy and guidance regarding enforceability and SIP relaxations. The TSD has more information on our evaluation.

C. EPA Recommendations To Further Improve the Rules

The TSD describes additional rule revisions that do not affect EPA's current action but are recommended for the next time the local agency modifies the rules.

D. Proposed Action and Public Comment

As authorized in section 110(k)(3) of the CAA, EPA is fully approving the submitted rules because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rules. If we receive adverse comments by September 30, 2004, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on November 1, 2004. This will incorporate these rules into the federally enforceable SIP.

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.

III. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does 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 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 1, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 23, 2004.

Laura Yoshii,

Acting Regional Administrotor, 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 F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(225)(i)(H) and (262)(i)(E)(*3*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(225) * * *

(i) * * *

(H) Mohave Desert Air Quality Management District.

(*1*) Rule 222, adopted on July 31, 1995.

* * * * *

(262) * * *

(i) * * *

(E) * * *

(*3*) Rule 226, adopted on March 17, 1998 and amended on July 21, 1998.

* * * * *

[FR Doc. 04–19817 Filed 8–30–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[WA–04–002; FRL–7807–1]

Approval and Promulgation of Implementation Plans; Washington

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this action EPA is approving numerous revisions to the State of Washington Implementation Plan. The Director of the Washington State Department of Ecology (Ecology) submitted two requests to EPA dated September 24, 2001 and February 9, 2004 to revise certain sections of the Puget Sound Clean Air Agency's (PS Clean Air) regulations. The revisions were submitted in accordance with the requirements of section 110 of the Clean Air Act (hereinafter, the Act). EPA is not approving in this rulemaking a number of submitted rule provisions which are inappropriate for EPA approval and is taking no action on a number of other provisions that are unrelated to the purposes of the State implementation plan (SIP).

EPA is also approving certain source-specific SIP revisions relating to Saint Gobain Containers and LaFarge North America.

DATES: This final rule is effective on September 30, 2004.

ADDRESSES: EPA has established a docket for this action under Docket ID No. WA–04–002. Some information is not publicly available (*i.e.*, CBI or other information whose disclosure is restricted by statute). Publicly available docket materials are available in hard copy at the EPA Region 10, Office of Air, Waste, and Toxics (AWT–107), 1200 Sixth Avenue, Seattle, Washington 98101. This Docket facility is open from 8:30–4, Monday through Friday, excluding legal holidays. The Docket telephone number is (206) 553–4273.

FOR FURTHER INFORMATION CONTACT: Roylene A. Cunningham, EPA Region 10, Office of Air, Waste and Toxics (AWT–107), 1200 Sixth Avenue, Seattle, Washington 98101, (206) 553–0513, or email address: *cunningham.roylene@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background

On Friday April 2, 2004, EPA solicited public comment on a proposal to approve for inclusion in the Washington SIP numerous revisions to the PS Clean Air regulations. EPA also proposed not to approve into the SIP a number of PS Clean Air regulations which EPA believes are inappropriate for EPA approval and to take no action on a number of other provisions that are unrelated to the purposes of the SIP. EPA also proposed to approve certain source-specific SIP revisions relating to Saint Gobain Containers and LaFarge North America. A detailed description of our action was published in the **Federal Register** on April 2, 2004. The reader is referred to the proposed rulemaking (69 FR 17368, April 2, 2004) for details.

II. Response to Comments

EPA provided a 30-day review and comment period and solicited comments on our April 2, 2004 proposal. EPA received written comments from two commenters, which raised the same two issues. The following is a summary of the issues raised by the commenters, along with EPA's response to those comments. Copies of the written comments received by EPA are in the docket.

Comment: EPA erred in three respects in denying PS Clean Air's request to remove PS Clean Air Reg. I, Section 9.11, from the SIP. First, in doing so, EPA relied on the fact that Section 9.11 is referred to by cross-reference in Regulation I, Subsection 6.03(a)(8) (adopted July 12, 2001). That version of Subsection 6.03(a)(8), however, is not currently contained in the SIP and is not the subject of this proposed rulemaking. The version of Section 6.03 that is currently contained in the SIP does not cross-reference Section 9.11 in any way. Thus, the perceived relationship between the 2001 version of Section 6.03 and the 1983 version of Section 9.11 is not relevant to this rulemaking. EPA should not base its current proposed denial of PS Clean Air's request to remove Section 9.11 from the SIP on an anticipated future action that is not the subject of this rulemaking. Only when EPA proposes to take action on a version of Section 6.03 that is related in some way to Section 9.11, will EPA's concern be relevant.

Second, even if the SIP contained the 2001 version of Section 6.03, EPA's rationale would still be insufficient. There is no legal principle requiring that all laws in any way related to a SIP to be included in the SIP itself. For example, does a SIP that requires that permit applications be sealed by a licensed professional engineer and refers to the state's engineering licensure statute have to contain that statute? *See, e.g.*, 30 TAC 116.110 (6/17/98) (approved as part of the Texas SIP 67 FR 58709 (September 18, 2002)). This rule requires certain permit applications to be submitted under the seal of a licensed professional engineer, and refers to the Texas Engineering Practice Act. As with the Texas SIP, the answer to both of these questions is no, because neither the Act nor EPA's regulations require such inclusion, and their inclusion is not otherwise necessary to implement the SIP.

Finally, there is no practical problem that would arise from Section 9.11 existing outside of the SIP. Whether or not a source has been previously cited under Section 9.11 for causing air

pollution is a mere question of fact to be determined at the time a project potentially subject to the Notice of Construction program under Section 6.03 (2001) is proposed. If the source has been cited, it cannot take advantage of the exemptions in Subsections 6.03(b) and (c) (2001) from the Notice of Construction requirement. If it has not been cited, then Subsection 6.03(a)(8) (2001) does not bar use of the exemptions. Thus, it simply makes no difference as a practical matter whether or not Section 9.11 itself is in the SIP itself or instead exists in law external to the SIP.

Response: Because Subsection 6.03(a)(8) (adopted July 12, 2001), which cross-references Section 9.11, is not currently approved as part of the SIP, EPA is granting PS Clean Air's request to remove Section 9.11 from the SIP. As discussed in the proposal, WAC 173–400–040(5), (Emissions detrimental to persons or property), is very similar to the provisions of PS Clean Air Regulation I, Section 9.11, and is currently part of the Washington SIP. Because WAC 173–400–040(5) applies statewide, removing Section 9.11 from the SIP will not decrease the stringency of the Washington SIP. See 69 FR at 17371.

Comment: PS Clean Air's Regulation I, Subsection 12.03(b) (adopted April 9, 1998) requires that a source that is required to have a continuous emission monitoring system (CEMS) must recover valid hourly monitoring data for at least 95% of the hours that the equipment (required to be monitored) is operated during each month. EPA proposed not to approve as part of the SIP Subsection 12.03(b)(1), which states that this requirement does not include:

Periods of monitoring system downtime, provided that the owner or operator demonstrates to the Control Officer that the downtime was not a result of inadequate design, operation, or maintenance, or any other reasonably preventable condition, and any necessary repairs to the monitoring system are conducted in a timely manner.

EPA erred in concluding that EPA cannot approve Subsection 12.03(b)(1) into the SIP. EPA reasoned that Subsection 12.03(b)(1) is in essence an enforcement discretion provision and does not make clear that the Control Officer's determination that compliance with the data recovery requirements should be excused is not binding on EPA or citizens. EPA's reliance on EPA's guidance document regarding State excess emission provisions [1] is not appropriate because Subsection 12.03(b)(1) is not an "enforcement discretion" provision and does not "excuse" an "excess emission." Instead, Subsection 12.03(b)(1) defines a source's substantive legal obligation to recover such data from a required CEMS—providing an affirmative defense, under specified circumstances, to the failure to recover CEMS data as otherwise required under Subsection 12.03(b). Where a source is able to make the required demonstration, the Control Officer has no discretion to consider the down time to be a violation of the data recovery requirements of Subsection 12.03(b). It is simply not a violation. Hence, the provision fits squarely within the permissible "affirmative defense" category (rather than the "enforcement discretion" category) of the guidance relied on by EPA in proposing to not approve this provision for inclusion in the SIP.

Subsection 12.03(b)(1) applies only to CEMS required by PS Clean Air regulations, orders and permits, and does not relieve anyone of the responsibility of complying with monitoring requirements under 40 CFR part 60, 61, or 63. *See* PS Clean Air, Regulation I, Section 12.01. In addition, as EPA notes, the criteria in Subsection 12.03(b)(1) for determining whether less than 95% data recovery is permissible are objective. 69 FR at 17370. CEMS, no matter how diligently maintained, sustain malfunction and calibration problems. Section 12.03 is more stringent than many analogous data recovery rules in 40 CFR parts 60 and 63. Finally, Subsection 12.03(b)(1) is more stringent than Washington's SIP-approved data recovery rule, WAC 173–400–105(h).

Response: Since publication of the proposal, PS Clean Air has submitted a letter to EPA stating that the intent of the language "demonstrates to the Control Officer" in Subsection 12.03(b)(1) was to make clear that the decision regarding whether a facility meets the requirements for the exception to monitoring is not a unilateral decision on the part of the facility. PS Clean Air further stated that it never intended that PS Clean Air's decision regarding whether a facility meets the requirements for the exception to monitoring would be conclusive or binding on EPA or on a federal court in a citizen suit enforcement action. Based on PS Clean Air's explanation regarding the intent of the "to the Control Officer" language, EPA is approving Subsection 12.03(b)(1) into the SIP with the understanding that the Control Officer's determination is not binding on EPA or citizens in an enforcement action.[2] In short, EPA is approving as part of the SIP all of Section 12.03, Continuous Emission Monitoring Systems, adopted April 9, 1998, except for Subsection 12.03(b)(2). As discussed in the proposal, EPA believes that Subsection 12.03(b)(2), if approved into the SIP, would authorize PS Clean Air to modify standards or requirements relied on to attain and maintain the NAAQS by granting an exemption or alternative to such requirements without going through a SIP revision and, as such, is not approvable. *See* 69 FR at 17370.

III. Final Action

EPA is taking final action to approve as part of the Washington SIP the following new and revised sections of the PS Clean Air regulations submitted by Ecology on September 24, 2001 and February 9, 2004:

Regulation I, Sections 1.01, Policy; 1.03, Name of Agency; 1.05, Short Title, adopted September 9, 1999; 3.04, Reasonably Available Control Technology [except (e)], adopted March 11, 1999; 3.06 Credible Evidence, adopted October 8, 1998; 5.03, Registration Required [except (a)(5)], adopted July 8, 1999; 5.05 General Reporting Requirements for Registration, adopted September 10, 1998; 7.09, General Reporting Requirements for Operating Permits, adopted September 10, 1998; 8.04, General Conditions for Outdoor Burning; 8.05, Agricultural Burning; 8.09, Description of King County No-Burn Area; 8.10, Description of Pierce County No-Burn Area; and 8.11, Description of Snohomish County No-Burn Area, adopted November 9, 2000; and 8.12, Description of Kitsap County No-Burn Area, adopted October 24, 2002; 9.03, Emission of Air Contaminant: Visual Standard [except (e)], adopted March 11, 1999; 9.04, Opacity Standards for Equipment with Continuous Opacity Monitoring Systems [except (d)(2) and (f)], adopted April 9, 1998; 9.09, Particulate Matter Emission Standards, adopted April 9,

[1] Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Monitoring, and Robert Perciasepe, Assistant Administrator for Air AND Radiation, to the Regional Administrators, entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," p. 3 (September 20, 1999).

[2] To avoid any ambiguity regarding the issue in the future, PS Clean Air has advised EPA that it will make clarifying changes to Subsection 12.03(b)(1) within the next six months to remove the language "to the Control Officer." EPA supports this clarifying change.

1998; 9.15, Fugitive Dust Control Measures, adopted March 11, 1999; 9.16, Spray-Coating Operations, adopted July 12, 2001; 12.01, Applicability and 12.03, Continuous Emission Monitoring Systems [except (b)(2)], adopted April 9, 1998; 13.01, Policy and Purpose, adopted September 9, 1999; and 13.02, Definitions, adopted October 8, 1998.

Regulation II, Sections 1.01, Purpose; 1.02, Policy; 1.03, Short Title; and 1.05, Special Definitions, adopted September 9, 1999; 2.01, Definitions, adopted July 8, 1999; 2.07, Gasoline Stations, adopted December 9, 1999; 2.08, Gasoline Transport Tanks, adopted July 8, 1999; and 3.02, Volatile Organic Compound Storage Tanks, July 8, 1999.

EPA is also approving the following new and revised PS Clean Air regulations, but is not incorporating them by reference because they relate to PS Clean Air's enforcement authority or administrative procedures:

Regulation I, Sections 3.01, Duties and Powers of the Control Officer, adopted September 9, 1999; 3.05, Investigations by the Control Officer, adopted February 10, 1994; 3.07, Compliance Tests, adopted February 9, 1995; 3.09, Violations—Notice, adopted August 8, 1991; 3.11, Civil Penalties, adopted September 26, 2002; 3.13, Criminal Penalties, adopted August 8, 1991; 3.15, Additional Enforcement, adopted August 8, 1991; 3.17; Appeal of Orders, adopted October 8, 1998; 3.19, Confidential Information, adopted August 8, 1991; and 3.21, Separability, adopted August 8, 1991. EPA is not incorporating these regulations by reference as part of the Washington SIP to avoid potential conflict with EPA's independent authorities.

EPA is not approving in this rulemaking a number of submitted rule provisions which are inappropriate for EPA approval and is taking no action on a number of other provisions that are unrelated to the purposes of the implementation plan. This includes removing such provisions from the current incorporation by reference where they have been previously incorporated:

Regulation I, Sections 3.01, Duties and Powers of the Control Officer; 3.05, Investigations by the Control Officer; 3.07, Compliance Tests; 3.09, Violations—Notice; 3.11, Civil Penalties; 3.13, Criminal Penalties; 3.15, Additional Enforcement; 3.17, Appeal of Orders; 3.19, Confidential Information; and 3.21, Separability; 3.23, Alternate Means of Compliance; 5.07, Registration Fees; 8.02, Outdoor Fires—Prohibited Types; 8.03, Outdoor Fires—Prohibited Areas; 9.03(e), Emission of Air Contaminant: Visual Standard; 9.09(c), Particulate Matter Emission Standards; 9.11, Emission of Air Contaminant: Detriment to Person or Property; 9.13, Emission of Air Contaminant: Concealment and Masking Restricted; 11.01, Ambient Air Quality Standards; 11.02, Ambient Air Monitoring; 12.02, Continuous Emission Monitoring Requirements; and 12.04, Recordkeeping and Report Requirements; *Regulation II*, Sections 2.04, Volatile Organic Compound Storage Tanks; and 3.07, Petroleum Solvent Dry Cleaning Systems; and *Regulation III*.

EPA is taking no action on Article 1, Section 1.07, Definitions, as this section has been revised since this SIP submission was submitted to EPA. PS Clean Air will be submitting the revisions to Section 1.07 to EPA in a separate action. EPA will therefore be taking action on Section 1.07 in a separate rulemaking.

Finally, EPA is approving the following Notice of Construction (NOC) Order of Approvals as source-specific SIP revisions: Holnam, Inc., Ideal Division (now known as LaFarge North America, Inc.) NOC Order of Approval No. 5183, effective date February 9, 1994; and Saint-Gobain Containers LLC, NOC Order of Approval No. 8244, effective date September 30, 2004.

IV. Geographic Scope of SIP Approval

This SIP approval does not extend to sources or activities located in Indian Country, as defined in 18 U.S.C. 1151. Consistent with previous Federal program approvals or delegations, EPA will continue to implement the Act in Indian Country in Washington because PS Clean Air did not adequately demonstrate authority over sources and activities located within the exterior boundaries of Indian reservations and other areas of Indian Country. The one exception is within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773, Congress explicitly provided State and local agencies in Washington authority over activities on non-trust lands within the 1873 Survey Area. Therefore, EPA's SIP approval applies to sources and activities on non-trust lands within the 1873 Survey Area.

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves State law as meeting Federal requirements and imposes no additional requirements beyond those imposed by State law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does 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 (64 FR 43255, August 10, 1999). This action merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the

National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 1, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: August 19, 2004.

Julie Hagensen,

Acting Regional Administrator, Region 10.

■ 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 WW—Washington

■ 2. Section 52.2470 is amended by adding paragraph (c)(84) to read as follows:

§ 52.2470 Identification of plan.

* * * * *

(c) * * *

(84) On September 24, 2001 and February 9, 2004, the Washington State Department of Ecology submitted amendments to Puget Sound Clean Air Agency's regulations (Regulation I, II, and III) as revisions to the Washington State implementation plan.

(i) Incorporation by reference.

(A) The following new and revised sections of Puget Sound Clean Air Agency's Regulations: *Regulation I*, Sections 1.01, Policy; 1.03, Name of Agency; and 1.05, Short Title, adopted September 9, 1999; 3.04, Reasonably Available Control Technology [except (e)], adopted March 11, 1999; 3.06 Credible Evidence, adopted October 8, 1998; 5.03, Registration Required [except (a)(5)], adopted July 8, 1999; 5.05 General Reporting Requirements for Registration, adopted September 10, 1998; 7.09, General Reporting Requirements for Operating Permits, adopted September 10, 1998; 8.04, General Conditions for Outdoor Burning; 8.05, Agricultural Burning; 8.09, Description of King County No-Burn Area; 8.10, Description of Pierce County No-Burn Area; and 8.11, Description of Snohomish County No-Burn Area, adopted November 9, 2000; and 8.12, Description of Kitsap County No-Burn Area, adopted October 24, 2002; 9.03, Emission of Air Contaminant: Visual Standard [except (e)], adopted March 11, 1999; 9.04, Opacity Standards for Equipment with Continuous Opacity Monitoring Systems [except (d)(2) and (f)], adopted April 9, 1998; 9.09, Particulate Matter Emission Standards, adopted April 9, 1998; 9.15, Fugitive Dust Control Measures, adopted March 11, 1999; 9.16, Spray-Coating Operations, adopted July 12, 2001; 12.01, Applicability and 12.03, Continuous Emission Monitoring Systems [except (b)(2)], adopted April 9, 1998; 13.01, Policy and Purpose, adopted September 9, 1999; and 13.02, Definitions, adopted October 8, 1998; *Regulation II*, Sections 1.01, Purpose; 1.02, Policy; 1.03, Short Title; and 1.05, Special Definitions, adopted September 9, 1999; 2.01, Definitions, adopted July 8, 1999; 2.07, Gasoline Stations, adopted December 9, 1999; 2.08, Gasoline Transport Tanks, adopted July 8, 1999; and 3.02, Volatile Organic Compound Storage Tanks, adopted July 8, 1999.

(B) The following Puget Sound Clean Air Agency Notice of Construction (NOC) Order of Approvals: Holnam, Inc., Ideal Division (now known as LaFarge North America, Inc.) NOC Order of Approval No. 5183, effective date February 9, 1994; and Saint-Gobain Containers LLC, NOC Order of Approval No. 8244, effective date September 30, 2004.

(C) Remove the following provisions from the current incorporation by reference: *Regulation I*, Sections 3.01, Duties and Powers of the Control Officer; 3.05, Investigations by the Control Officer; 3.07, Compliance Tests; 3.09, Violations—Notice; 3.11, Civil Penalties; 3.13, Criminal Penalties; 3.15, Additional Enforcement; 3.17, Appeal of Orders; 3.19, Confidential Information; 3.21, Separability; 3.23, Alternate Means of Compliance; 5.07, Registration Fees; 8.02, Outdoor Fires-Prohibited Types; 8.03, Outdoor Fires-Prohibited Areas; 9.03(e), Emission of Air Contaminant: Visual Standard; 9.09(c), Particulate Matter Emission Standards; 9.11, Emission of Air Contaminant: Detriment to Person or Property; 9.13, Emission of Air Contaminant: Concealment and Masking Restricted; 11.01, Ambient Air Quality Standards; 11.02, Ambient Air Monitoring; 12.02, Continuous Emission Monitoring Requirements; and 12.04, Recordkeeping and Report Requirements; *Regulation II*, Sections 2.04, Volatile Organic Compound Storage Tanks; and 3.07, Petroleum Solvent Dry Cleaning Systems; and *Regulation III*.

(ii) Additional Material.

(A) The following sections of Puget Sound Clean Air Agency *Regulation I*: Sections 3.01, Duties and Powers of the Control Officer, adopted September 9, 1999; 3.05, Investigations by the Control Officer, adopted February 10, 1994; 3.07, Compliance Tests, adopted February 9, 1995; 3.09, Violations—Notice, adopted August 8, 1991; 3.11, Civil Penalties, adopted September 26, 2002; 3.13, Criminal Penalties, adopted August 8, 1991; 3.15, Additional Enforcement, adopted August 8, 1991; 3.17, Appeal of Orders, adopted October 8, 1998; 3.19, Confidential Information, adopted August 8, 1991; and 3.21, Separability, adopted August 8, 1991.

■ 3. Section 3.PS of § 52.2479 is revised to read as follows:

§ 52.2479 Contents of the federally approved, State submitted implementation plan.

* * * * *

Washington State Implementation Plan for Air Quality; State and Local Requirements

Table of Contents

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[FR Doc. 04–19818 Filed 8–30–04; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 242

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 100

RIN 1018–AJ25

Subsistence Management Regulations for Public Lands in Alaska, Subpart D—2004–05 Subsistence Taking of Wildlife Regulations; Correction

AGENCIES: Forest Service, USDA; Fish and Wildlife Service, Interior.

ACTION: Final rule; correction.

SUMMARY: This rule corrects the Subsistence Management Regulations for Public Lands in Alaska, published in the **Federal Register** on July 1, 2004, (69 FR 40174) implementing the subsistence priority for rural residents of Alaska under Title VIII of the Alaska National Interest Lands Conservation Act of 1980. The July 1, 2004, final rule established regulations for seasons, harvest limits, methods, and means relating to the taking of wildlife for subsistence uses during the 2004–05 regulatory year. This document makes three changes to that final rule: It corrects an inadvertent error in the definition of "fur," clarifies exactly who may sell handicrafts made from the fur of bears, and corrects a Government Printing Office publication error relative to caribou seasons in Unit 10.

DATES: The amendment to section ____.25 is effective July 1, 2004. The amendment to section ____.26 is effective July 1, 2004 through June 30, 2005.

FOR FURTHER INFORMATION CONTACT: Thomas H. Boyd, Office of Subsistence Management, U.S. Fish and Wildlife Service, telephone (907) 786–3888. For questions specific to National Forest System lands, contact Steve Kessler, Regional Subsistence Program Leader, USDA—Forest Service, Alaska Region, telephone (907) 786–3592.

SUPPLEMENTARY INFORMATION:

Background

On July 1, 2004, we published in the **Federal Register** a final rule to establish regulations for seasons, harvest limits, methods, and means related to taking of wildlife for subsistence uses in Alaska during the 2004–05 regulatory year (69 FR 40174). That rulemaking was

necessary because the regulations governing the subsistence harvest of wildlife in Alaska are subject to an annual public review cycle. The July 1, 2004, rule replaced the wildlife regulations that expired on June 30, 2004. The rule also amended the regulations that establish which Alaska residents are eligible to take specific species for subsistence uses.

Since publication of the July 1, 2004, final rule, we have become aware of some needed corrections to that document. Because the final rule related to public lands managed by an agency or agencies in both the Departments of Agriculture and the Interior, identical text was incorporated into 36 CFR part 242 and 50 CFR part 100. Consequently, the corrections cited in this document will be incorporated into those same CFR sections. The corrections are as follows: (1) In the rule, we attempted to clarify the use of fur from bears in handicraft articles by inserting a definition of "fur." However, we now believe that definition to be incorrect, and this correction replaces the new definition with that in place prior to publication of the final rule. (2) This document clarifies exactly who is allowed to sell handicrafts made from the fur of bears. (3) A final correction identifies the correct seasons for caribou in Unit 10 that were scrambled during printing the original **Federal Register** publication.

The Federal Subsistence Board finds that additional public notice and comment requirements under the Administrative Procedure Act for this correcting amendment are impracticable, unnecessary, and contrary to the public interest. A lapse in regulatory control could seriously affect the continued viability of wildlife populations, adversely impact future subsistence opportunities for rural Alaskans, and would generally fail to serve the overall public interest. Therefore, the Board finds good cause pursuant to 5 U.S.C. 553(b)(3)(B) to waive the public notice and comment procedures prior to publication of this rule. The Board further finds good cause under 5 U.S.C. 553(d)(3) to make this rule effective July 1, 2004.

Drafting Information

William Knauer drafted these regulations under the guidance of Thomas H. Boyd of the Office of Subsistence Management, Alaska Regional Office, U.S. Fish and Wildlife Service, Anchorage, Alaska. Taylor Brelsford, Alaska State Office, Bureau of Land Management; Greg Bos and Carl Jack, Alaska Regional Office, U.S. Fish and Wildlife Service; Sandy Rabinowitch, Alaska Regional Office, National Park Service; Warren Eastland, Alaska Regional Office, Bureau of Indian Affairs; and Steve Kessler, Alaska Regional Office, USDA-Forest Service, provided additional guidance.

List of Subjects

36 CFR Part 242

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

50 CFR Part 100

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

■ For the reasons presented in the preamble, the Federal Subsistence Board amends Title 36, part 242, and Title 50, part 100, of the Code of Federal Regulations, by making the following correcting amendments:

PART D—SUBSISTENCE MANAGEMENT REGULATIONS FOR PUBLIC LANDS IN ALASKA [AMENDED]

■ 1. The authority citation for both 36 CFR part 242 and 50 CFR part 100 continues to read as follows:

Authority: 16 U.S.C. 3, 472, 551, 668dd, 3101–3126; 18 U.S.C. 3551–3586; 43 U.S.C. 1733.

■ 2. Section ____.25 is amended:

■ a. In paragraph (a), by removing the definition of "fur";

■ b. In paragraph (a), by removing the definition of "skin, hide, or pelt" and adding in its place a definition for "skin, hide, pelt, or fur" to read as set forth below; and

■ c. In paragraph (j), by revising paragraphs (j)(6) and (j)(7) to read as set forth below:

§ ____.25 Subsistence taking of fish, wildlife, and shellfish: general regulations.

(a) * * *

Skin, hide, pelt, or fur means any tanned or untanned external covering of an animal's body; excluding bear. The skin, hide, pelt, or fur of a bear is the entire external covering with claws attached.

* * * * *

(J) * * *

(6) If you are a federally qualified subsistence user, you may sell handicraft articles made from the fur of a black bear.

(7) If you are a federally qualified subsistence user, you may sell handicraft articles made from the fur of a brown bear taken from Units 1–5, 9(A)–(C), 9(E), 12, 17, 20, and 25.

* * * * *

■ 3. In § ____.26(n)(10), the entry for caribou in the table showing Harvest Limits and Open Season is revised to read as follows:

§ ____.26 Subsistence taking of wildlife.

* * * * *

(n) * * *

(10) * * *

Harvest limits	Open season
Hunting	
Caribou:	
Unit 10—Unimak Island only—4 caribou by Federal registration permit only	Aug. 1–Sept. 30. Nov. 15–Mar. 31.
Unit 10—remainder—No limit	July 1–June 30.

* * * * *

Dated: August 11, 2004.

Thomas H. Boyd,

Acting Chair, Federal Subsistence Board.

Dated: August 11, 2004.

Calvin H. Casipit,

Acting Regional Subsistence Program Leader, USDA-Forest Service.

[FR Doc. 04–19838 Filed 8–30–04; 8:45 am]

BILLING CODE 3410–11; 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 030221039–4247–13; I.D. 082404A]

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP)

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

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the ALWTRP's implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 2,600 square nautical miles (nm2) (8,918 km²), east of Cape Ann, MA, for 15 days. The purpose of this action is to provide protection to an aggregation of North Atlantic right whales (right whales).

DATES: Effective beginning at 0001 hours September 2, 2004, through 2400 hours September 16, 2004.

ADDRESSES: Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Diane Borggaard, NMFS/Northeast Region, 978–281–9328 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–1401.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP Web site at *http://www.nero.noaa.gov/whaletrp/.*

Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) as well as to provide conservation benefits to a fourth non-endangered species (minke) due to incidental interaction with commercial fishing activities. The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in areas north of 40° N. lat. to protect right whales. Under the DAM °program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15–day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15–day period and asking fishermen not to set any additional gear in the DAM zone during the 15–day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm² (139 km²)) such that right whale density is equal to or greater than 0.04 right whales per nm² (1.85 km²). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On August 17, 2004, NMFS received a report of two groups of right whales, totaling 15 animals, in the proximity of 42°55′ N lat. and 69°00′ W long. This position lies east of Cape Ann, MA. After conducting an investigation, the Northeast Fisheries Science Center ascertained that the report came from a qualified individual and determined that the report was reliable.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors, including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and anchored gillnet gear in this area during the 15–day restricted period unless it is modified in the manner described in this temporary rule. The DAM zone is bounded by the following coordinates:

43°20′ N, 69°24′ W (NW Corner)
43°20′ N, 68°36′ W
42°05′ N, 68°36′ W
42°05′ N, 69°24′ W

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear modification in the DAM zone, as described below, differ from other ALWTRP requirements for any overlapping areas and times, then the more restrictive requirements will apply in the DAM zone. Special note for gillnet fisherman: This DAM zone overlaps the year round Cashes Ledge Closure Area. This DAM action does not supersede Northeast multispecies closures found at 50 CFR 648.81.

Lobster Trap/Pot Gear

Fishermen utilizing lobster trap/pot gear within the portion of the Northern Nearshore Lobster Waters that overlap with the DAM zone are required to

utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per trawl; and

4. A weak link with a maximum breaking strength of 600 lb (272.4 kg) must be placed at all buoys.

Fishermen utilizing lobster trap/pot gear within the portion of the Offshore Lobster Waters Area and the Great South Channel Restricted Lobster Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per trawl; and

4. A weak link with a maximum breaking strength of 1,500 lb (680.4 kg) must be placed at all buoys.

Anchored Gillnet Gear

Fishermen utilizing anchored gillnet gear within the portion of the Other Northeast Gillnet Waters and the Great South Channel Restricted Gillnet Area that overlap with the DAM zone are required to utilize all the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per string;

4. Each net panel must have a total of five weak links with a maximum breaking strength of 1,100 lb (498.8 kg). Net panels are typically 50 fathoms (91.4 m) in length, but the weak link requirements would apply to all variations in panel size. These weak links must include three floatline weak links. The placement of the weak links on the floatline must be: one at the center of the net panel and one each as close as possible to each of the bridle ends of the net panel. The remaining two weak links must be placed in the center of each of the up and down lines at the panel ends; and

5. All anchored gillnets, regardless of the number of net panels, must be securely anchored with the holding power of at least a 22–lb (10.0–kg) Danforth-style anchor at each end of the net string.

The restrictions will be in effect beginning at 0001 hours September 2, 2004, through 2400 hours September 16, 2004, unless terminated sooner or extended by NMFS through another notification in the **Federal Register**.

The restrictions will be announced to state officials, fishermen, ALWTRT members, and other interested parties through e-mail, phone contact, NOAA website, and other appropriate media immediately upon filing with the **Federal Register**.

Classification

In accordance with section 118(f)(9) of the Marine Mammal Protection Act, the Assistant Administrator (AA) for Fisheries has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales.

Environmental Assessments for the DAM program were prepared on December 28, 2001, and August 6, 2003. This action falls within the scope of the analyses of these EAs, which are available from the agency upon request.

NMFS provided prior notice and an opportunity for public comment on the regulations establishing the criteria and procedures for implementing a DAM zone. Providing prior notice and opportunity for comment on this action, pursuant to those regulations, would be impracticable because it would prevent NMFS from executing its functions to protect and reduce serious injury and mortality of endangered right whales. The regulations establishing the DAM program are designed to enable the agency to help protect unexpected concentrations of right whales. In order to meet the goals of the DAM program, the agency needs to be able to create a DAM zone and implement restrictions on fishing gear as soon as possible once the criteria are triggered and NMFS determines that a DAM restricted zone is appropriate. If NMFS were to provide prior notice and an opportunity for public comment upon the creation of a DAM restricted zone, the aggregated right whales would be vulnerable to entanglement which could result in serious injury and mortality. Additionally, the right whales would most likely move on to another location before NMFS could implement the restrictions designed to protect them, thereby rendering the action obsolete. Therefore, pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive prior notice and an opportunity to comment on this action to implement a DAM restricted zone to reduce the risk of entanglement of endangered right whales in commercial lobster trap/pot and anchored gillnet gear as such procedures would be impracticable.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30–day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, the aggregated right whales would be vulnerable to entanglement, which could cause serious injury and mortality. Additionally, right whales would likely move to another location between the time NMFS approved the action creating the DAM restricted zone and the time it went into effect, thereby rendering the action obsolete and ineffective. Nevertheless, NMFS recognizes the need for fishermen to have time to either modify or remove (if not in compliance with the required restrictions) their gear from a DAM zone once one is approved. Thus, NMFS makes this action effective 2 days after the date of publication of this notice in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means as soon as the AA approves it, thereby providing approximately 3 additional days of notice while the Office of the **Federal Register** processes the document for publication.

NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S. Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order

13132. Accordingly, in October 2001 and March 2003, the Assistant Secretary for Intergovernmental and Legislative Affairs, DOC, provided notice of the DAM program and its amendments to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rules implementing the DAM program. A copy of the federalism Summary Impact Statement for the final rules is available upon request (**ADDRESSES**).

The rule implementing the DAM program has been determined to be not significant under Executive Order 12866.

Authority: 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3)

Dated: August 25, 2004.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 04–19865 Filed 8–30–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[I.D. 082404C]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Closure of the Spring Commercial Red Snapper Component

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

ACTION: Notice of closure.

SUMMARY: NMFS closes the commercial fishery for red snapper in the exclusive economic zone (EEZ) of the Gulf of Mexico. NMFS has determined that the spring portion of the annual commercial quota for red snapper was reached on August 10, 2004. This closure is necessary to protect the red snapper resource.

DATES: Closure is effective from noon, local time, August 10, 2004, until noon, local time, on October 1, 2004.

FOR FURTHER INFORMATION CONTACT: Phil Steele, telephone 727–570–5305, fax 727–570–5583, e-mail *Phil.Steele@noaa.gov.*

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Gulf of Mexico Fishery Management Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622. Those regulations set the commercial quota for red snapper in the Gulf of Mexico at 4.65 million lb (2.11 million kg) for the current fishing year, January 1 through December 31, 2004. The red snapper commercial fishing season is split into two time periods, the first commencing at noon on February 1 with two-thirds of the annual quota (3.10 million lb (1.41 million kg)) available, and the second commencing at noon on October 1 with the remaining one-third of the annual quota (1.55 million lb (0.70 million kg)) available. During the commercial fishing season, the red snapper fishery opens at noon on the first of each month and closes at noon on the 10th of each month, until the applicable commercial quotas are reached.

Under 50 CFR 622.43(a), NMFS is required to close the commercial fishery for a species or species group when the quota for that species or species group is reached, or is projected to be reached, by filing a notification to that effect in the **Federal Register**. Based on current statistics, NMFS has determined that the available spring commercial quota of 3.10 million lb (1.41 million kg) for red snapper was reached when the fishery closed at noon on August 10, 2004. Accordingly, the commercial fishery in the EEZ in the Gulf of Mexico for red snapper will remain closed until noon, local time, on October 1, 2004. The operator of a vessel with a valid reef fish permit having red snapper aboard must have landed and bartered, traded, or sold such red snapper prior to noon, local time, August 10, 2004.

During the closure, the bag and possession limits specified in 50 CFR 622.39(b) apply to all harvest or possession of red snapper in or from the EEZ in the Gulf of Mexico, and the sale or purchase of red snapper taken from the EEZ is prohibited. In addition, the bag and possession limits for red snapper apply on board a vessel for which a commercial permit for Gulf reef fish has been issued, without regard to where such red snapper were harvested. However, the bag and possession limits for red snapper apply only when the recreational quota for red snapper has not been reached and the bag and possession limit has not been reduced to zero. The 2004 recreational red snapper season opened on April 21, 2004 and will close on October 31, 2004. The prohibition on sale or purchase does not apply to the sale or purchase of red snapper that were harvested, landed ashore, and sold prior to noon, local time, August 10, 2004, and were held in cold storage by a dealer or processor.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, finds that the need to immediately implement this action to close the fishery constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(3)(B), as such procedures would be unnecessary and contrary to the public interest. Similarly, there is a need to implement these measures in a timely fashion to prevent an overrun of the commercial quota of Gulf red snapper, given the capacity of the fishing fleet to harvest the quota quickly. Any delay in implementing this action would be impractical and contrary to the Magnuson-Stevens Act, the FMP, and the public interest. NMFS finds for good cause that the implementation of this action cannot be delayed for 30 days. Accordingly, under 5 U.S.C. 553(d), a delay in the effective date is waived.

This action is taken under 50 CFR 622.43(a) and is exempt from review under Executive Order 12866.

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

Dated: August 24, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–19868 Filed 8–30–04; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 168
Tuesday, August 31, 2004

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. 2001–NM–243–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330, A340–200, and A340–300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This document revises an earlier proposed airworthiness directive (AD), applicable to the airplane models listed above. That proposed AD would have superseded an existing AD currently requiring repetitive inspections to detect discrepancies of the transfer tubes and the collar of the ball nut of the trimmable horizontal stabilizer actuator (THSA), and corrective action if necessary. The proposed AD would have expanded the applicability of the existing AD; and required new repetitive inspections for discrepancies of the ball screw assembly; corrective action if necessary; repetitive greasing of the THSA ball nut, and replacement of the THSA if necessary; and a modification or replacement (as applicable) of the ball nut assembly, which would end certain repetitive inspections. This new action revises the proposed AD by clarifying affected part numbers and adding a new compliance time for the inspection of the ball screw assembly which would apply under certain conditions. The actions specified by this new proposed AD are intended to prevent degraded operation of the THSA due to the entrance of water into the ball nut. Degraded operation could lead to reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by September 27, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–243–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2001–NM–243–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (e.g., reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2001–NM–243–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–243–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add an airworthiness directive (AD), applicable to certain Airbus Model A330, A340–200, and A340–300 series airplanes, was published as a notice of proposed rulemaking (NPRM) in the **Federal Register** on April 5, 2004 (69 FR 17610). That NPRM proposed to supersede AD 2001–11–09, amendment 39–12252 (66 FR 31143, June 11, 2001), which is applicable to certain Airbus Model A330 and A340 series airplanes. That proposal would have continued to require repetitive inspections to detect discrepancies of the transfer tubes and the collar of the ball nut of the trimmable horizontal stabilizer actuator (THSA); and corrective action, if necessary. That proposal would have expanded the applicability of the existing AD; and would have required new repetitive inspections for discrepancies of the ball screw

assembly; corrective action if necessary; repetitive greasing of the THSA ball nut, and replacement of the THSA if necessary; and a modification or replacement (as applicable) of the ball nut assembly. Such modification or replacement (as applicable) would have terminated certain repetitive inspections. That NPRM was prompted by reports of additional incidents in which transfer tubes disconnected from the ball nut of the THSA. In response to these incidents, Airbus enhanced existing maintenance instructions for repetitive greasing of the THSA and developed procedures for new repetitive inspections for discrepancies of the ball screw assembly. The proposed requirements were intended to prevent degraded operation of the THSA due to the entrance of water into the ball nut, which, if not corrected, could result in reduced controllability of the airplane.

Explanation of New Relevant Service Information

Airbus has issued Service Bulletin (SB) A330–27–3102, Revision 04, dated December 8, 2003. (The original NPRM refers to Airbus SB A330–27–3102, Revision 03, dated June 20, 2003, as the acceptable source of service information for accomplishing certain inspections and corrective actions.) Revision 04 of the SB clarifies procedures for inspecting the lower attachment of the trimmable horizontal stabilizer to the THSA, and revises an incorrect airplane maintenance manual (AMM) reference, but adds no new procedures. Accordingly, we have revised paragraph (e) of this supplemental NPRM to refer to Revision 04 as the acceptable source of service information for the actions required by that paragraph. We have also revised paragraph (i)(2) of this supplemental NPRM (which was included as paragraph (h)(2) of the original NPRM) to state that inspections and corrective actions accomplished previously in accordance with Airbus SB A330–27–3102, Revision 03, are acceptable for compliance with paragraph (e). The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, has approved Airbus SB A330–27–3102, Revision 04.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Request To Clarify Affected Part Numbers

Two commenters request that we revise paragraphs (d) and (e) of the original NPRM to clarify whether those paragraphs require repetitive greasing of the ball nut and repetitive inspections of the ball screw assembly of the THSA for any THSA having part number (P/N) 47172–300. The commenters note that both the referenced Airbus SBs and the parallel French airworthiness directive reference those THSAs as subject parts.

We agree that we need to clarify paragraphs (d) and (e) of this supplemental NPRM. When we prepared the original NPRM, we considered the reference to "P/N 47172" to include P/N 47172–300. We now realize that our intent was not clear. Thus we have revised paragraphs (d) and (e) of this supplemental NPRM to specifically identify P/N 47172–300 as an affected P/N.

Request To Add On-Condition Compliance Time for Inspection of THSAs

One commenter also notes that paragraph 3.2.3. of French airworthiness directives 2002–414(B) R2 and 2002–415(B) R2, both dated October 30, 2002, specifies to inspect, before the next flight, any THSA having P/N 47172–300 before the next flight if the "PRIM X PITCH FAULT" or "STAB CTL FAULT" message is displayed on the Electronic Centralized Aircraft Monitor (ECAM). (The French airworthiness directives identify Airbus Service Bulletins A330–27–3102 and A340–27–4107 as the sources of instructions for this inspection.) The commenter notes that this provision for inspecting THSAs having P/N 47172–300 before further flight was omitted from the original NPRM.

We agree that this provision was inadvertently omitted from the original NPRM. Further, we note that this inspection was omitted for not only THSAs having P/N 47172–300, but also for P/Ns 47147–XXX and 47172. Therefore, we have added a new paragraph (f) to this supplemental NPRM to specify that the inspection in paragraph (e) of this AD must be done before further flight if an applicable message is displayed on the ECAM.

Request To Correct Source for Replacement Procedures

One commenter notes that paragraphs (d) and (e)(2) of the proposed AD specify replacement of the THSA in accordance with the applicable referenced SB. The commenter points out that the referenced SB does not contain procedures for such replacement. The commenter requests that we revise the proposed AD to specify replacement of the THSA in accordance with the AMM.

We agree. Paragraph 3.B.(3) of Airbus SBs A330–27–3102, Revision 04; and A340–27–4107, Revision 04, dated June 20, 2003; specify to replace the THSA but do not specify procedures for such replacement. Consequently, we have revised paragraphs (d) and (e)(2) of this supplemental NPRM to specify that any necessary replacement of the THSA must be accomplished in accordance with a method approved by us or the DGAC (or its delegated agent). Replacement of the THSA in accordance with Chapter 27–44–51 of the Airbus A330/A340 AMM is one approved method.

Request To Correct Reference to Secondary SB

One commenter points out that references to a certain TRW SB in the "Explanation of Relevant Service Information" section and Note 4 of the original NPRM are incorrect. The references to "TRW Aeronautical Systems SB 47172–27–10" should have read "TRW Aeronautical Systems SB 47147–27–10." Airbus SBs A330–27–3093 and A340–27–4099 refer to TRW Aeronautical Systems SB 47147–27–10 as the appropriate source of service information for modifying the ball nut of the THSA.

We agree and have revised Note 4 of this supplemental NPRM accordingly. The relevant section of the preamble of the original NPRM is not restated in this supplemental NPRM, so no further change is possible in this regard.

Explanation of Additional Change Made to Supplemental NPRM

For clarification, the FAA has revised the definition of a "general visual inspection" in this action.

Conclusion

Since certain changes described previously expand the scope of the original NPRM, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

Changes to 14 CFR Part 39/Effect on the Proposed AD

On July 10, 2002, the FAA issued a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the FAA's airworthiness directives system. The regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance (AMOCs). These changes

are reflected in this supplemental NPRM.

Cost Impact

There are approximately 9 Model A330 series airplanes of U.S. registry that would be affected by this proposed AD. Currently, there are no affected Model A340–200 or –300 series airplanes on the U.S. Register. However, if an affected Model A340–200 or –300 series airplane is imported and placed on the U.S. Register in the future, the following costs would also apply to those airplanes.

The inspections (in accordance with Airbus All Operators Telex (AOT) A330–27A3088 or A340–27A4093, as applicable) that are currently required by AD 2001–11–09 take approximately 1 work hour per airplane, per inspection cycle, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be $585, or $65 per airplane, per inspection cycle.

The new inspections (in accordance with Airbus SBs A330–27–3088 or A340–27–4093, as applicable) that are proposed in this supplemental NPRM would take approximately 1 work hour per airplane, per inspection cycle, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of this proposed requirement on U.S. operators is estimated to be $585, or $65 per airplane, per inspection cycle.

The new greasing action that is proposed in this supplemental NPRM would take approximately 1 work hour per airplane, per maintenance cycle, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of this proposed requirement on U.S. operators is estimated to be $585, or $65 per airplane, per maintenance cycle.

In addition to the actions stated above, certain airplanes may be subject to additional actions. The following table contains the cost impact estimate for each airplane affected by the SBs listed below, at an average labor rate of $65 per work hour:

For airplanes listed in Airbus SB—	Estimated number of work hours	Estimated parts cost	Estimated cost per airplane
A330–27–3085 or A340–27–4089, both Revision 02	12	No charge	$780
A330–27–3093 or A340–27–4099, both Revision 01	6	No charge	390
A330–27–3052, Revision 03	6	No charge	390
A330–27–3007, Revision 01	1	No charge	65
A330–27–3015	2	No charge	130
A330–27–3047, Revision 01	2	No charge	130
A330–27–3050	2	No charge	130
A330–55–3020, Revision 01	2 (inspection only)	None	130
A340–27–4059, Revision 03	6	No charge	390
A340–27–4007	2	No charge	130
A340–27–4025	2	No charge	130
A340–27–4054, Revision 01	2	No charge	130
A340–27–4057	2	No charge	130
A340–55–4021, Revision 01	2 (inspection only)	None	130

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations proposed herein 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. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, 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. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (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. Section 39.13 is amended by removing amendment 39–12252 (66 FR 31143, June 11, 2001), and by adding a new airworthiness directive (AD), to read as follows:

Airbus: Docket 2001–NM–243–AD. Supersedes AD 2001–11–09, Amendment 39–12252.

Applicability: All Model A330, A340–200, and A340–300 series airplanes; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent degraded operation of the trimmable horizontal stabilizer actuator (THSA) due to the entrance of water into the ball nut, which could result in reduced controllability of the airplane, accomplish the following:

Requirements of AD 2001–11–09

Repetitive Inspections

(a) For Model A330, A340–200, and A340–300 series airplanes equipped with a THSA part number (P/N) 47172, and on which Airbus Modification 45299 has been performed: Within 150 flight hours from June 26, 2001 (the effective date of AD 2001–11–09, amendment 39–12252), perform a detailed inspection to detect discrepancies in the THSA (including distortion of the transfer tubes, disconnection of the tubes, and distortion of the collar of the ball nut), in accordance with Airbus All Operators Telex (AOT) A330–27A3088 (for Model A330 series airplanes) or A340–27A4093 (for Model A340 series airplanes), both dated April 5, 2001, as applicable. If any discrepancy, as defined in paragraph 4–2–2/ Rejection Criteria of the applicable AOT, is detected, prior to further flight, replace the THSA with a serviceable one, in accordance with the applicable AOT.

Note 1: For the purposes of this AD, a detailed inspection is defined as: "An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required."

(b) At intervals not to exceed 150 flight hours, repeat the inspection mandated in paragraph (a) of this AD, until paragraph (c) of this AD has been accomplished.

New Requirements of This AD

Repetitive Detailed Inspections of THSA Ball Nut and Corrective Action

(c) For airplanes equipped with a THSA having P/N 47172 or 47147–400: At the applicable compliance time specified in paragraph (c)(1), (c)(2), or (c)(3) of this AD, perform a detailed inspection of the transfer tubes and collar on the THSA ball nut to detect discrepancies, including ball migration, distortion, or evidence of disconnection of the THSA ball nut; in accordance with Airbus Service Bulletin A330–27–3088 (for Model A330 series airplanes) or A340–27–4093 (for Model A340–200 and –300 series airplanes), both Revision 04, both dated September 5, 2002; as applicable. Repeat this inspection at intervals not to exceed 150 flight hours until paragraph (g) of this AD is accomplished. If any discrepancy is found during any inspection in accordance with this paragraph, before further flight, repair the THSA, in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Direction Générale de l'Aviation Civile (DGAC) (or its delegated agent).

(1) For airplanes equipped with a THSA having P/N 47172 or 47147–400: Except as provided by paragraph (c)(3) of this AD, for airplanes inspected before the effective date of this AD in accordance with paragraph (a) of this AD, do the initial inspection within 150 flight hours since the most recent inspection in accordance with paragraph (a) or (b) of this AD. Accomplishment of this inspection terminates the repetitive inspections required by paragraph (b) of this AD.

(2) For airplanes equipped with a THSA having P/N 47172 or 47147–400: Except as provided by paragraph (c)(3) of this AD, for airplanes not inspected before the effective date of this AD in accordance with paragraph (a) of this AD, do the initial inspection within 150 flight hours after the effective date of this AD. Accomplishment of this inspection within the compliance time specified in paragraph (a) of this AD eliminates the need to accomplish the inspection in paragraph (a) of this AD and terminates the repetitive inspections required by paragraph (b) of this AD.

(3) For airplanes equipped with a THSA having P/N 47172 or 47147–400: If the "PRIM X PITCH FAULT" or "STAB CTL FAULT" message is displayed on the Electronic Centralized Aircraft Monitor (ECAM) associated with the "PITCH TRIM ACTR (1CS)" maintenance message, do the inspection in paragraph (c) of this AD before further flight after the message is displayed on the ECAM.

Repetitive Greasing Procedure

(d) For airplanes equipped with a THSA having P/N 47172, 47172–300, or 47147–XXX (where "XXX" is any dash number): Within 700 flight hours after accomplishment of the last greasing of the ball nut of the THSA, grease the ball nut of the THSA in accordance with a method approved by the Manager, International Branch, ANM–116; or the DGAC (or its delegated agent). Doing the actions in Chapter 12–22–27, page block 301, of the Airplane Maintenance Manual is one approved method. Repeat the greasing procedures at intervals not to exceed 700 flight hours. If, during any accomplishment of the greasing procedure, the new grease is expelled from the transfer tube (instead of through the drain hole): Before further flight, replace the THSA with a new or serviceable THSA in accordance with a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the DGAC (or its delegated agent). Replacement of the THSA in accordance with Chapter 27–44–51 of the Airbus A330/A340 AMM is one approved method.

Repetitive Inspections of the Ball Screw Assembly and Corrective Actions

(e) For airplanes equipped with a THSA having P/N 47172, 47172–300, or 47147–XXX (where "XXX" is any dash number): Except as provided by paragraph (f) of this AD, within 700 flight hours after the effective date of this AD, perform a detailed inspection of the ball screw assembly for discrepancies; including cracks, metallic debris, dents, corrosion, loose nuts, and damaged or missing lock washers and pins; and an inspection of the gap between the secondary nut tenons and the transfer plates using a feeler gage to ensure free movement; in accordance with Airbus Service Bulletins A330–27–3102, Revision 04, dated December 8, 2003 (for Model A330 series airplanes); or A340–27–4107, Revision 04, dated June 20, 2003 (for Model A340–200 and –300 series airplanes); as applicable.

(1) Repeat the inspection at intervals not to exceed 700 flight hours, except as provided by paragraph (f) of this AD.

(2) If any discrepancy is found that is outside the limits specified in the applicable service bulletin, before further flight, replace the THSA with a new part, in accordance with a method approved by either the Manager, International Branch, ANM–116; or the DGAC (or its delegated agent). Replacement of the THSA in accordance with Chapter 27–44–51 of the Airbus A330/A340 AMM is one approved method.

Note 2: There is no terminating action at this time for the repetitive actions required by paragraphs (d) and (e) of this AD.

(f) If the "PRIM X PITCH FAULT" or "STAB CTL FAULT" message is displayed on the ECAM associated with the "PITCH TRIM ACTR (1CS)" maintenance message, do the inspection in paragraph (e) of this AD before further flight after the message is displayed on the ECAM.

Modification

(g) Within 24 months after the effective date of this AD, modify the ball nut of each THSA by doing paragraph (g)(1) or (g)(2) of this AD, as applicable. Accomplishment of paragraph (g)(1) or (g)(2) of this AD terminates the repetitive inspections required by paragraph (c) of this AD.

(1) For THSAs having P/N 47172: Modify the ball nut of the THSA, or replace the existing THSA with a serviceable part having P/N 47172–300; in accordance with Airbus Service Bulletin A330–27–3085 (for Model A330 series airplanes) or A340–27–4089 (for Model A340–313 series airplanes), both Revision 02, both dated September 5, 2002; as applicable.

Note 3: Airbus Service Bulletins A330–27–3085 and A340–27–4089 refer to TRW Aeronautical Systems Service Bulletin 47172–27–03 as the appropriate source of service information for additional instructions for accomplishing the modification of the ball nut of the THSA.

(2) For THSAs having P/N 47147–2XX, 47147–3XX, or 47147–400 (where "XX" represents any dash number): Modify the ball nut of the THSA, or replace the existing THSA with an improved part having P/N 47147–500; as applicable; in accordance with Airbus Service Bulletin A330–27–3093 (for Model A330 series airplanes), or A340–27–4099 (for Model A340–200 and –300 series airplanes), both Revision 01, both dated September 5, 2002; as applicable.

Note 4: Airbus Service Bulletins A330–27–3093 and A340–27–4099 refer to TRW Aeronautical Systems Service Bulletin 47147–27–10 as the appropriate source of service information for additional instructions for accomplishing the modification of the ball nut of the THSA.

Previous/Concurrent Requirements

(h) Prior to or concurrently with accomplishment of the requirements of

paragraph (g)(2) of this AD, do all of the actions specified in the Accomplishment Instructions of the applicable Airbus service bulletins listed in Table 1 or 2 of this AD, as applicable, in accordance with those service bulletins.

Note 5: Airbus Service Bulletin A330–27–3093, Revision 01, dated September 5, 2002, specifies that the actions in Airbus Service Bulletin A330–27–3052 must be accomplished previously or concurrently. Airbus Service Bulletin A330–27–3052, Revision 03, dated December 5, 2001, specifies that the actions in Airbus Service Bulletins A330–27–3007, A330–27–3015, A330–27–3047, A330–27–3050, and A330–27–3020 must be accomplished previously or concurrently.

Note 6: Airbus Service Bulletin A340–27–4099, Revision 01, dated September 5, 2002, specifies that the actions in Airbus Service Bulletin A340–27–4059 must be accomplished previously or concurrently. Airbus Service Bulletin A340–27–4059, Revision 03, dated December 5, 2001, specifies that the actions in Airbus Service Bulletins A340–27–4007, A340–27–4025, A340–27–4054, A340–27–4057, and A340–55–4021, must be accomplished previously or concurrently.

TABLE 1.—PREVIOUS/CONCURRENT REQUIREMENTS FOR MODEL A330 SERIES AIRPLANES

Airbus service bulletin	Revision level	Date	Main action	Additional source of service information
A330–27–3052	03	December 5, 2001	Replace THSA with a modified THSA	Lucas Aerospace Service Bulletin 47147–27–07.
A330–27–3007	01	September 18, 1996	Replace rudder servo controls with modified parts.	Samm Avionique Service Bulletin SC5300–27–24–01.
A330–27–3015	Original	June 7, 1995	Modify the control valve detent and the jamming protection device on the THSA.	Lucas Aerospace Service Bulletin 47147–27–02.
A330–27–3047	01	November 26, 1997	Replace hydraulic motors on the THSA with new parts.	Lucas Aerospace Service Bulletin 47147–27–04.
A330–27–3050	Original	November 15, 1996	Replace mechanical input shaft for THSA with modified part.	Lucas Aerospace Service Bulletin 47147–27–05.
A330–55–3020	01	October 21, 1998	Perform a general visual inspection of the THSA screw jack fitting assembly for correct installation of a washer; and correctly install washer as applicable.	None.

TABLE 2.—PREVIOUS/CONCURRENT REQUIREMENTS FOR MODEL A340 SERIES AIRPLANES

Airbus service bulletin	Revision level	Date	Main action	Additional source of service information
A340–27–4059	03	December 5, 2001	Replace THSA with a modified THSA	Lucas Aerospace Service Bulletin 47147–27–07.
A340–27–4007	Original	April 7, 1994	Replace hydraulic motors on the THSA with new parts.	Lucas Aerospace Service Bulletin 47147–27–01.
A340–27–4025	Original	June 7, 1995	Modify the control valve detent and the jamming protection device on the THSA.	Lucas Aerospace Service Bulletin 47147–27–02.
A340–27–4054	01	November 26, 1997	Replace hydraulic motors on the THSA with new parts.	Lucas Aerospace Service Bulletin 47147–27–04.
A340–27–4057	Original	November 15, 1996	Replace mechanical input shaft for THSA with modified part.	Lucas Aerospace Service Bulletin 47147–27–05.
A340–55–4021	01	October 21, 1998	Perform a general visual inspection of the THSA screw jack fitting assembly for correct installation of a washer; and correctly install washer as applicable.	None.

Note 7: For the purposes of this AD, a general visual inspection is: "A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked."

Actions Accomplished Previously

(i) Actions accomplished before the effective date of this AD in accordance with previous revisions of the service information referenced in this AD are acceptable for corresponding actions required by this AD as specified in paragraphs (i)(1), (i)(2), (i)(3), and (i)(4) of this AD.

(1) Inspections and corrective actions accomplished in accordance with Airbus Service Bulletin A330–27–3088 (for Model A330 series airplanes) or A340–27–4093 (for Model A340–200 and –300 series airplanes), both Revision 03, both including Appendix 01, both dated October 19, 2001; as applicable; are acceptable for compliance with paragraph (c) of this AD.

(2) Inspections and corrective actions accomplished in accordance with Airbus Service Bulletin A330–27–3102, Revision 02, including Appendix 01, dated November 7, 2002, or Revision 03, including Appendix 01, dated June 20, 2003 (for Model A330 series airplanes); or A340–27–4107, Revision 03, including Appendix 01, dated December 4, 2002 (for Model A340–200 and –300 series airplanes); as applicable; are acceptable for compliance with paragraph (e) of this AD.

(3) Modifications accomplished in accordance with Airbus Service Bulletin A330–27–3085 (for Model A330 series airplanes) or A340–27–4089 (for Model A340–313 series airplanes), both Revision 01, both dated January 23, 2002; as applicable; are acceptable for compliance with paragraph (g)(1) of this AD.

(4) Modifications accomplished in accordance with Airbus Service Bulletin A330–27–3093 (for Model A330 series airplanes), or A340–27–4099 (for Model A340–200 and –300 series airplanes), both dated June 27, 2002; as applicable; are acceptable for compliance with paragraph (g)(2) of this AD.

No Reporting Required

(j) Where Airbus Service Bulletins A330–27–3088, Revision 04, dated September 5, 2002; A340–27–4093, Revision 04, dated September 5, 2002; A330–27–3102, Revision 03, dated June 20, 2003; and A340–27–4107, Revision 04, dated June 20, 2003; describe procedures for completing a reporting sheet with inspection results, this AD does not require that action.

Alternative Methods of Compliance

(k) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, is authorized to approve alternative methods of compliance for this AD.

Note 8: The subject of this AD is addressed in French airworthiness directives 2002–414(B) R2 and 2002–415(B) R2, both dated October 30, 2002.

Issued in Renton, Washington, on August 19, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–19835 Filed 8–30–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD05–04–152]

RIN 1625–AA08

Special Local Regulations for Marine Events; Western Branch, Elizabeth River, Portsmouth, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish temporary special local regulations for the "Power in the Park" hydroplane races, a marine event to be held on the waters of the Southern Branch of the Elizabeth River at Portsmouth, Virginia on September 25 and 26, 2004. This action is necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in portions of the Western Branch of the Elizabeth River during the event.

DATES: Comments and related material must reach the Coast Guard on or before September 15, 2004.

ADDRESSES: You may mail comments and related material to Commander (oax), Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004, hand-deliver them to Room 119 at the same address between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays, or fax them to (757) 398–6203. The Auxiliary and Recreational Boating Safety Branch, Fifth Coast Guard District, maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the above address between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: S.L. Phillips, Project Manager, Auxiliary and Recreational Boating Safety Branch, at (757) 398–6204.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD05–04–152), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

In order to provide notice and an opportunity to comment before issuing an effective rule for this September 25–26, 2004 event, we are providing a shorter than normal comment period. A 15-day comment period is sufficient to allow those who might be affected by this rulemaking to submit their comments because the regulations have a narrow, local application, and there will be local notifications in addition to the **Federal Register** publication such as press releases, marine information broadcasts, and the Local Notice to Mariners. If, as we anticipate, we make the temporary final rule effective less than 30 days after publication in the **Federal Register**, we will explain in that rule, as required by 5 U.S.C. (d)(3), our good cause for doing so.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to Commander (oax), Fifth Coast Guard District at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The Virginia Boat Racing Association will sponsor the "Power in the Park" hydroplane races, a marine event to be held on the waters of the Western Branch of the Elizabeth River at Portsmouth, Virginia, on September 25 and 26, 2004. The event will consist of hydroplanes racing in heats around an oval course adjacent to Portsmouth City Park. To provide for the safety of participants, spectators and support vessels, the Coast Guard proposes to temporarily restrict vessel traffic in the event area during the races.

Discussion of Proposed Rule

The Coast Guard proposes to establish temporary special local regulations on waters of the Western Branch of the Elizabeth River at Portsmouth, Virginia. The temporary regulations would be enforced from 7:30 a.m. to 6:30 p.m. on September 25 and 26, 2004. The effect would be to restrict general navigation in the regulated area during the event. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel would be allowed to enter or remain in the regulated area. The proposed regulated area is needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

Regulatory Evaluation

This proposed rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of

potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this proposed regulation would prevent traffic from transiting or anchoring in the affected section of the Western Branch of the Elizabeth River during the event, the effect of this proposed regulation would not be significant due to the limited duration that the regulated area would be in effect and the extensive advance notifications that would be made to the maritime community via the Local Notice to Mariners, marine information broadcasts, and area newspapers, so mariners can adjust their plans accordingly. Additionally, the proposed regulated area has been narrowly tailored to impose the least impact on general navigation yet provide the level of safety deemed necessary. Vessel traffic would also be allowed to transit the regulated area between heats, when the Patrol Commander determines it safe to do so.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit or anchor in the Western Branch of the Elizabeth River during the event.

This proposed rule would not have a significant economic impact on a substantial number of small entities for the following reasons. This proposed rule would be in effect for only a short period. The proposed regulated area has been narrowly tailored to impose the least impact on general navigation yet provide the level of safety deemed necessary. Vessels desiring to transit the Western Branch of the Elizabeth River during the event would be allowed to transit the regulated area between heats, when the Patrol Commander determines it safe to do so. Before the enforcement period, we would issue maritime advisories so mariners can adjust their plans accordingly.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the address listed under **ADDRESSES**. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency

provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction, from further environmental documentation. Special local regulations issued in conjunction with a regatta or marine parade permit are specifically excluded from further analysis and documentation under those sections.

Under figure 2–1, paragraph (34)(h), of the Instruction, an "Environmental Analysis Check List" and a "Categorical Exclusion Determination" are not required for this rule. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

List of Subjects in 33 CFR Part 100

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

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

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

Authority: 33 U.S.C. 1233, Department of Homeland Security Delegation No. 0170.1.

2. Add temporary § 100.35–T05–152 to read as follows:

§ 100.35–T05–152 Western Branch, Elizabeth River, Portsmouth, VA.

(a) *Regulated area.* The regulated area is established for the waters of the Western Branch of the Elizabeth River from shoreline to shoreline, bounded to the east by a line drawn along Longitude 076°21′59″ West and bounded to the west by a line drawn along Longitude 076°22′43″ West. All coordinates reference Datum NAD 1983.

(b) *Definitions.* As used in this section—

Coast Guard Patrol Commander means a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Group Hampton Roads.

Official Patrol means any vessel assigned or approved by Commander, Coast Guard Group Hampton Roads with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(c) *Special local regulations.* (1) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area shall:

(i) Stop the vessel immediately when directed to do so by any Official Patrol.

(ii) Proceed as directed by any Official Patrol.

(d) *Enforcement period.* This section will be enforced from 7:30 a.m. to 6:30 p.m. on September 25 and 26, 2004.

Dated: 18 August 2004.

Ben R. Thomason, III,

Captain, U.S. Coast Guard, Acting Commander, Fifth Coast Guard District.

[FR Doc. 04–19801 Filed 8–30–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 242

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 100

RIN 1018–AT70

Subsistence Management Regulations for Public Lands in Alaska, Subpart C and Subpart D—2005–2006 Subsistence Taking of Wildlife Regulations

AGENCIES: Forest Service, Agriculture; Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: This proposed rule would establish regulations for hunting and trapping seasons, harvest limits, methods and means related to taking of wildlife for subsistence uses during the 2005–2006 regulatory year. The rulemaking is necessary because Subpart D is subject to an annual public review cycle. When final, this rulemaking would replace the wildlife taking regulations included in the "Subsistence Management Regulations for Public Lands in Alaska, Subpart D—2004–2005 Subsistence Taking of Fish and Wildlife Regulations," which expire on June 30, 2005. This rule would also amend the Customary and Traditional Use Determinations of the Federal Subsistence Board and the General Regulations related to the taking of wildlife.

DATES: The Federal Subsistence Board must receive your written public comments and proposals to change this proposed rule no later than October 22, 2004. Federal Subsistence Regional Advisory Councils (Regional Councils) will hold public meetings to receive proposals to change this proposed rule on several dates starting from September 8, 2004–October 15, 2004. See **SUPPLEMENTARY INFORMATION** for additional information on the public meetings including dates.

ADDRESSES: You may submit proposals electronically to *Subsistence@fws.gov*. See **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing. You may also submit written comments and proposals to the Office of Subsistence Management, 3601 C Street, Suite 1030, Anchorage, Alaska 99503. The public meetings will be held at various locations in Alaska. See **SUPPLEMENTARY INFORMATION** for additional information on locations of the public meetings.

FOR FURTHER INFORMATION CONTACT: Chair, Federal Subsistence Board, c/o U.S. Fish and Wildlife Service, Attention: Thomas H. Boyd, Office of Subsistence Management; (907) 786–3888. For questions specific to National Forest System lands, contact Steve Kessler, Regional Subsistence Program Leader, USDA, Forest Service, Alaska Region, (907) 786–3592.

SUPPLEMENTARY INFORMATION:

Public Review Process—Regulation Comments, Proposals, and Public Meetings

The Federal Subsistence Board (Board), through the Regional Councils, will hold meetings on this proposed rule at the following locations and on the following dates in Alaska:

Region 1—Southeast Regional Council	Juneau	September 27, 2004.
Region 2—Southcentral Regional Council	Kenai	October 12, 2004.
Region 3—Kodiak/Aleutians Regional Council	King Cove	October 5, 2004.
Region 4—Bristol Bay Regional Council	Dillingham	September 27, 2004.
Region 5—Yukon-Kuskokwim Delta Regional Council	Bethel	October 14, 2004.
Region 6—Western Interior Regional Council	Anvik	October 10, 2004.
Region 7—Seward Peninsula Regional Council	Nome	September 22, 2004.
Region 8—Northwest Arctic Regional Council	Kotzebue	October 8, 2004.
Region 9—Eastern Interior Regional Council	Eagle	October 5, 2004.
Region 10—North Slope Regional Council	Barrow	September 8, 2004.

Specific dates, times, and meeting locations will be published in local and statewide newspapers prior to the meetings. Locations and dates may change based on weather or local circumstances. The amount of work on each Regional Council's agenda will determine the length of the Regional Council meetings. The agenda of each Regional Council meeting will include a review of wildlife issues in the Region, discussion and development of recommendations on fishery proposals for the Region, and staff briefings on matters of interest to the Council.

Electronic filing of comments (preferred method): You may submit electronic comments (proposals) and other data to *Subsistence@fws.gov*. Please submit as MS Word files, avoiding the use of any special characters and any form of encryption.

During November 2004, we will compile the written proposals to change Subpart D hunting and trapping regulations and customary and traditional use determinations in Subpart C and distribute them for additional public review. A 30-day public comment period will follow distribution of the compiled proposal packet. We will accept written public comments on distributed proposals during the public comment period, which is presently scheduled to end on January 5, 2005.

A second series of Regional Council meetings will be held in February and March 2005, to assist the Regional Councils in developing recommendations to the Board. You may also present comments on published proposals to change hunting and trapping and customary and traditional use determination regulations to the Regional Councils at those winter meetings.

The Board will discuss and evaluate proposed changes to this rule during a public meeting scheduled to be held in Anchorage in May 2005. You may provide additional oral testimony on specific proposals before the Board at that time. At that public meeting, the Board will then deliberate and take final action on proposals received that request changes to this proposed rule.

Please Note: The Board will not consider proposals for changes relating to fish or shellfish regulations at this time. The Board will be calling for proposed changes to those regulations in January 2005.

The Board's review of your comments and wildlife proposals will be facilitated by you providing the following information: (a) Your name, address, and telephone number; (b) The section and/or paragraph of the proposed rule for which you are suggesting changes; (c) A statement explaining why the change is necessary; (d) The proposed wording change; (e) Any additional information you believe will help the Board in evaluating your proposal. Proposals that fail to include the above information, or proposals that are beyond the scope of authorities in § ____.24, Subpart C and §§ ____.25 or ____.26, Subpart D, may be rejected. The Board may defer review and action on some proposals if workload exceeds work capacity of staff, Regional Councils, or Board. These deferrals will be based on recommendations of the affected Regional Council, staff members, and on the basis of least harm to the subsistence user and the resource involved. Proposals should be specific to customary and traditional use determinations or to subsistence hunting and trapping seasons, harvest limits, and/or methods and means.

Background

Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111–3126) requires that the Secretary of the Interior and the Secretary of Agriculture (Secretaries) implement a joint program to grant a preference for subsistence uses of fish and wildlife resources on public lands, unless the State of Alaska enacts and implements laws of general applicability that are consistent with ANILCA and that provide for the subsistence definition, preference, and participation specified in Sections 803, 804, and 805 of ANILCA. The State implemented a program that the Department of the Interior previously found to be consistent with ANILCA.

However, in December 1989, the Alaska Supreme Court ruled in *McDowell* v. *State of Alaska* that the rural preference in the State subsistence statute violated the Alaska Constitution. The Court's ruling in *McDowell* required the State to delete the rural preference from the subsistence statute and, therefore, negated State compliance with ANILCA. The Court stayed the effect of the decision until July 1, 1990.

As a result of the *McDowell* decision, the Department of the Interior and the Department of Agriculture (Departments) assumed, on July 1, 1990, responsibility for implementation of Title VIII of ANILCA on public lands. On June 29, 1990, the Temporary Subsistence Management Regulations for Public Lands in Alaska were published in the **Federal Register** (55 FR 27114–27170). Consistent with Subparts A, B, and C of these regulations, as revised February 18, 2003 (68 FR 7703), the Departments established a Federal Subsistence Board to administer the Federal Subsistence Management Program. The Board's composition consists of a Chair appointed by the Secretary of the Interior with concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; the Alaska Regional Director, U.S. National Park Service; the Alaska State Director, U.S. Bureau of Land Management; the Alaska Regional Director, U.S. Bureau of Indian Affairs; and the Alaska Regional Forester, USDA Forest Service. Through the Board, these agencies participate in the development of regulations for Subparts A and B and the annual Subpart C and D regulations.

All Board members have reviewed this rule and agree with its substance. Because this rule relates to public lands managed by an agency or agencies in both the Departments of Agriculture and the Interior, identical text would be incorporated into 36 CFR part 242 and 50 CFR part 100.

Applicability of Subparts A, B, and C

Subparts A, B, and C (unless otherwise amended) of the Subsistence Management Regulations for Public Lands in Alaska, 50 CFR 100.1 to 100.23 and 36 CFR 242.1 to 242.23, remain effective and apply to this rule.

Therefore, all definitions located at 50 CFR 100.4 and 36 CFR 242.4 would apply to regulations found in this subpart.

Federal Subsistence Regional Advisory Councils

Pursuant to the Record of Decision, Subsistence Management Regulations for Federal Public Lands in Alaska, April 6, 1992, and the Subsistence Management Regulations for Federal Public Lands in Alaska, 36 CFR 242.11 (2004) and 50 CFR 100.11 (2004), and for the purposes identified therein, we divide Alaska into 10 subsistence resource regions, each of which is represented by a Regional Council. The Regional Councils provide a forum for rural residents with personal knowledge of local conditions and resource requirements to have a meaningful role in the subsistence management of fish and wildlife on Alaska public lands. The Regional Council members represent varied geographical, cultural, and user diversity within each region.

The Regional Councils have a substantial role in reviewing the proposed rule and making recommendations for the final rule. Moreover, the Council Chairs, or their designated representatives, will present their Council's recommendations at the Board meeting in May 2005.

Proposed Changes from 2004–2005 Seasons and Bag Limit Regulations

Subpart D regulations are subject to an annual cycle and require development of an entire new rule each year. Customary and traditional use determinations (§____.24 of Subpart C) are also subject to an annual review process providing for modification each year. The text of the 2004–2005 Subparts C and D final rule published July 1, 2004 (69 FR 40174), with the amendment correcting the definition of fur, serves as the foundation for the 2005–2006 Subparts C and D proposed rule. The regulations contained in this proposed rule would take effect on July 1, 2005, unless elements are changed by subsequent Board action following the public review process outlined herein.

Conformance With Statutory and Regulatory Authorities

National Environmental Policy Act Compliance: A Draft Environmental Impact Statement (DEIS) that described four alternatives for developing a Federal Subsistence Management Program was distributed for public comment on October 7, 1991. That document described the major issues associated with Federal subsistence management as identified through public meetings, written comments, and staff analysis and examined the environmental consequences of the four alternatives. Proposed regulations (Subparts A, B, and C) that would implement the preferred alternative were included in the DEIS as an appendix. The DEIS and the proposed administrative regulations presented a framework for an annual regulatory cycle regarding subsistence hunting and fishing regulations (Subpart D). The Final Environmental Impact Statement (FEIS) was published on February 28, 1992.

Based on the public comment received, the analysis contained in the FEIS, and the recommendations of the Federal Subsistence Board and the Department of the Interior's Subsistence Policy Group, it was the decision of the Secretary of the Interior, with the concurrence of the Secretary of Agriculture, through the U.S. Department of Agriculture-Forest Service, to implement Alternative IV as identified in the DEIS and FEIS (Record of Decision on Subsistence Management for Federal Public Lands in Alaska (ROD), signed April 6, 1992). The DEIS and the selected alternative in the FEIS defined the administrative framework of an annual regulatory cycle for subsistence hunting and fishing regulations. The final rule for Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C (57 FR 22940; May 29, 1992) implemented the Federal Subsistence Management Program and included a framework for an annual cycle for subsistence hunting and fishing regulations.

An environmental assessment was prepared in 1997 on the expansion of Federal jurisdiction over fisheries and is available at the office listed under **FOR FURTHER INFORMATION CONTACT.** The Secretary of the Interior, with the concurrence of the Secretary of Agriculture, determined that the expansion of Federal jurisdiction does not constitute a major Federal action significantly affecting the human environment and has therefore signed a Finding of No Significant Impact.

Compliance with Section 810 of ANILCA: A Section 810 analysis was completed as part of the FEIS process on the Federal Subsistence Management Program. The intent of all Federal subsistence regulations is to accord subsistence uses of fish and wildlife on public lands a priority over the taking of fish and wildlife on such lands for other purposes, unless restriction is necessary to conserve healthy fish and wildlife populations. The final Section 810 analysis determination appeared in the April 6, 1992, ROD and concluded that the Federal Subsistence Management Program, under Alternative IV with an annual process for setting hunting and fishing regulations, may have some local impacts on subsistence uses, but will not likely restrict subsistence uses significantly.

During the environmental assessment process for extending fisheries jurisdiction, an evaluation of the effects of this rule was also conducted in accordance with Section 810. This evaluation supports the Secretaries' determination that the rule will not reach the "may significantly restrict" threshold for notice and hearings under ANILCA Section 810(a) for any subsistence resources or uses.

Paperwork Reduction Act: This proposed rule does not contain any information collections for which OMB approval is required under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Federal Agencies 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.

Economic Effects: This rule is not a significant rule subject to OMB review under Executive Order 12866. This rulemaking will impose no significant costs on small entities; this rule does not restrict any existing sport or commercial fishery on the public lands, and subsistence fisheries will continue at essentially the same levels as they presently occur. The exact number of businesses and the amount of trade that will result from this Federal land-related activity is unknown. The aggregate effect is an insignificant positive economic effect on a number of small entities, such as ammunition, snowmachine, and gasoline dealers. The number of small entities affected is unknown; however, the fact that the positive effects will be seasonal in nature and will, in most cases, merely continue preexisting uses of public lands indicates that they will not be significant.

In general, the resources to be harvested under this rule are already being harvested and consumed by the local harvester and do not result in an additional dollar benefit to the economy. However, we estimate that 2 million pounds of meat are harvested by subsistence users annually and, if given an estimated dollar value of $3.00 per pound, would equate to about $6 million in food value Statewide.

Regulatory Flexibility Act: The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires preparation

of flexibility analyses for rules that will have a significant effect on a substantial number of small entities, which include small businesses, organizations or governmental jurisdictions. The Departments certify based on the above figures that this rulemaking will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. Under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 *et seq.*), this rule is not a major rule. It does not have an effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Executive Order 12630: Title VIII of ANILCA requires the Secretaries to administer a subsistence priority on public lands. The scope of this program is limited by definition to certain public lands. Likewise, these regulations have no potential takings of private property implications as defined by Executive Order 12630.

Unfunded Mandates Reform Act: The Secretaries have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities. The implementation of this rule is by Federal agencies and there is no cost imposed on any State or local entities or tribal governments.

Executive Order 12988: The Secretaries have determined that these regulations meet the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988, regarding civil justice reform.

Executive Order 13132: In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Title VIII of ANILCA precludes the State from exercising subsistence management authority over fish and wildlife resources on Federal lands unless it meets certain requirements.

Government-to-Government Relations with Native American Tribal Governments: 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, and 512 DM 2, we have evaluated possible effects on Federally recognized Indian tribes and have determined that there are no substantial direct effects. The Bureau of Indian Affairs is a participating agency in this rulemaking.

Energy Effects: On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, or use. This Executive Order requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As this rule is not a significant regulatory action under Executive Order 13211, affecting energy supply, distribution, or use, this action is not a significant action and no Statement of Energy Effects is required.

Drafting Information: Theodore Matuskowitz drafted these regulations under the guidance of Thomas H. Boyd, of the Office of Subsistence Management, Alaska Regional Office, U.S. Fish and Wildlife Service, Anchorage, Alaska. Taylor Brelsford, Alaska State Office, Bureau of Land Management; Sandy Rabinowitch, Alaska Regional Office, National Park Service; Warren Eastland, Alaska Regional Office, Bureau of Indian Affairs; Greg Bos, Alaska Regional Office, U.S. Fish and Wildlife Service; and Steve Kessler, Alaska Regional Office, USDA-Forest Service provided additional guidance.

List of Subjects

36 CFR Part 242

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

50 CFR Part 100

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

For the reasons set out in the preamble, the Federal Subsistence Board proposes to amend 36 CFR 242 and 50 CFR 100 for the 2005–06 regulatory year. The text of the amendments would be the same as the final rule for the 2004–05 regulatory year published in the **Federal Register** of 69 FR 40174, July 1, 2004.

Dated: August 5, 2004.

Thomas H. Boyd,

Acting Chair, Federal Subsistence Board.

Dated: August 5, 2004.

Calvin H. Casipit,

Acting Subsistence Program Leader, USDA-Forest Service.

[FR Doc. 04–19839 Filed 8–30–04; 8:45 am]

BILLING CODE 3410–11–4310–55–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MD167–3112b; FRL–7804–5]

Approval and Promulgation of Air Quality Implementation Plans; Maryland, VOC RACT for Kaydon Ring and Seal, Inc.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of Maryland. The SIP revision pertains to a Consent Order establishing volatile organic compound (VOC) reasonably available control technology (RACT) for Kaydon Ring and Seal, Incorporated located in Baltimore, Maryland. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by September 30, 2004.

ADDRESSES: Submit your comments, identified by MD167–3112 by one of the following methods:

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

B. E-mail: *morris.makeba@epa.gov*.

C. Mail: Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to Docket ID No. MD167–3112. EPA's policy is that all comments received will be included in the public docket

without change, 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 Federal 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 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.

Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by e-mail at *quinto.rose@epa.gov*.

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action for the approval of a Consent Order establishing VOC RACT for Kaydon Ring and Seal, Inc., that is located in the "Rules and Regulations" section of this **Federal Register** publication.

Dated: August 16, 2004.

Richard J. Kampf,

Acting Regional Administrator, Region III.

[FR Doc. 04–19821 Filed 8–30–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 207–0437b; FRL–7803–9]

Revisions to the California State Implementation Plan, Antelope Valley Air Quality Management District and Mojave Desert Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Antelope Valley Air Quality Management District (AVAQMD) and Mojave Desert Air Quality Management District (MDAQMD) portions of the California State Implementation Plan (SIP). These revisions concern federally enforceable limitations on the potential to emit of air pollution sources. We are proposing to approve local rules under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: Any comments on this proposal must arrive by September 30, 2004.

ADDRESSES: Send comments to Gerardo Rios, Permits Office Chief (AIR–3), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, or e-mail to *R9airpermits@epa.gov*, or submit comments at *http://www.regulations.gov*.

You can inspect a copy of the submitted SIP revisions and EPA's technical support documents (TSDs) at our Region IX office during normal business hours. You may also see copies of the submitted SIP revisions and TSDs at the following locations:

Environmental Protection Agency, Air Docket (6102), Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 1001 "I" Street, Sacramento, CA 95814.

Antelope Valley Air Quality Management District, 43301 Division Street, #206, Lancaster, CA 93535.

Mohave Desert Air Quality Management District, 14306 Park Avenue, Victorville, CA 92392.

A copy of the rule may also be available via the Internet at *http://www.arb.ca.gov/drdb/drdbltxt.htm*. Please be advised that this is not an EPA website and may not contain the same version of the rule that was submitted to EPA.

FOR FURTHER INFORMATION CONTACT: Manny Aquitania, Permits Office (AIR–3), U.S. Environmental Protection Agency, Region IX, (415) 947–4123; *aquitania.manny@epa.gov*.

SUPPLEMENTARY INFORMATION: This proposal addresses the approval of local AVAQMD Rule 226 and MDAQMD 222 in the Rules and Regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe this SIP revision is not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: July 23, 2004.

Laura Yoshii,

Acting Regional Administrator, Region IX.

[FR Doc. 04–19816 Filed 8–30–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

46 CFR Parts 502, 503, 515, 520, 530, 535, 540, 550, 555, and 560

[Docket No. 04–11]

RIN 3072–AC27

Update of Existing and Addition of New Filing Fees

AGENCY: Federal Maritime Commission.

ACTION: Proposed rule.

SUMMARY: The Federal Maritime Commission ("Commission") proposes to revise its existing fees for filing petitions and complaints; various public information services, such as record searches, document copying, and admissions to practice; filing ocean transportation intermediary license applications; applications for special permission; service contracts; agreements; and passenger vessel performance and casualty certificate applications. These revised fees reflect current costs to the Commission. In addition, the Commission is adding a separate fee for the filing of terminal exempt agreements.

DATES: Comments are due by September 29, 2004.

ADDRESSES: Address comments to: Bryant L. VanBrakle, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Washington,

DC 20573–0001, E-mail: *secretary@fmc.gov*.

FOR FURTHER INFORMATION CONTACT: Thomas B. Stephens, Presidential Management Fellow, Office of the Executive Director, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573–0001, (202) 523–5800, E-mail: *executivedirector@fmc.gov*.

SUPPLEMENTARY INFORMATION: The Commission is authorized under the Independent Offices Appropriation Act ("IOAA"), 31 U.S.C. 9701 (1983), to establish fees for services and benefits that it provides to specific recipients. The IOAA provides that each service or thing of value provided by an agency to a person be self-sustaining to the extent possible, and that each charge shall be fair and based on the costs to the Government, the value of the service or thing to the recipient, the policy or interest served, and other relevant facts. 31 U.S.C. 9701.

The primary guidance for implementation of IOAA is Office of Management and Budget ("OMB") Circular A–25, as revised July 8, 1993. OMB Circular A–25 requires that a reasonable charge be made to each recipient for a measurable unit or amount of Government service from which the recipient derives a benefit, in order that the Government recover the full cost of rendering that service.

OMB Circular A–25 further provides that costs be determined or estimated from the best available records in the agency, and that cost computations cover the direct and indirect costs to the Government of carrying out the activity, including but not limited to:

(A) Direct and indirect personnel costs, including salaries and fringe benefits such as medical insurance and retirement,

(B) Physical overhead, consulting, and other indirect costs including material and supply costs, utilities, insurance, travel and rent,

(C) The management and supervisory costs, and

(D) The costs of enforcement, collection, research, establishment of standards and regulations, including any required environmental impact statements.

OMB Circular A–25, paragraphs 6.d.1.(a), (b), (c) and (d).

OMB Circular A–25 also calls for a periodic reassessment of costs, with related adjustment of fees, if necessary, and the establishment of new fees where none exist.

The Commission's current filing and service fees have been in effect since July 15, 2002, and are no longer representative of the Commission's actual costs for providing such services. Accordingly, the Commission proposes to revise its fees so as to reflect costs attendant in providing the involved services. Fee increases primarily reflect increases in salary and indirect (overhead) costs. For some services, the increase in processing or review time accounts in part for the increase in the level of proposed fees. For other services, proposed fees are lower than current fees due to overall reduced costs to provide those services.

The Commission has reviewed its current fees and developed data on the time and cost involved in providing particular services to arrive at the updated direct labor costs for those services. The direct labor costs include clerical, professional, supervisory, and executive time expended on an activity, plus a check processing cost of $0.53. The indirect costs include Government overhead costs, which are fringe benefits and other wage-related Government contributions contained in OMB Circular A–76;[1] Commission general and administrative expenses;[2] and office general and administrative overhead expenses.[3] The sum of these indirect cost components gives an indirect cost factor that is added to the direct labor costs of an activity to arrive at the fully distributed cost.

A detailed summary of the data used to arrive at the proposed fees is available from the Secretary of the Commission upon written or e-mail request.

As part of the process described above, the Commission has decided to establish a separate fee for terminal exempt agreements. Currently, the Commission maintains the same filing fee for carrier and terminal exempt agreements; however, terminal exempt agreements generally require less processing time than carrier exempt agreements. Consequently, the Commission has decided to establish a separate filing fee for terminal exempt agreements to reflect better the difference in processing times.

[1] These include leave and holidays, retirement, worker's compensation, awards, health and life insurance, and Medicare. These are expressed as a percentage of basic pay.

[2] These costs include all salaries and overhead, such as rent, utilities, supplies, and equipment, allocated to the Offices of the Commissioners, Program and Administrative Offices and General Counsel. The percentage of these costs to the total agency budget is allocated across all Commission programs.

[3] These expenses are limited to the overhead expenses allocated to those bureaus and offices involved in the fee-generating activities, and is derived from dividing allocated overhead expenses by the total funding for these fee-generated offices.

The Commission intends to update its fees biennially in keeping with OMB guidance. In updating its fees, the Commission will incorporate changes in the salaries of its employees into direct labor costs associated with its services, and recalculate its indirect costs (overhead) based on current level of costs.

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Chairman of the Federal Maritime Commission certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. While the Commission recognizes that the proposed rule may impact businesses that qualify as small entities under Small Business Administration guidelines, the Commission is required to assess recipients of specific governmental services reasonable charges to recover the costs of providing these services. The charges in the proposed rule reflect the costs of specific Commission services mandated by statute, and these services benefit the shipping industry and the foreign commerce of the United States. The Commission believes that the charges proposed in the rule will not have a harmful effect on entities within the Commission's jurisdiction, the general public, or the U.S. economy. Furthermore, the Commission's regulations provide for waiver or reduction of any charge in extraordinary situations pursuant to 46 CFR 503.41. Requests for fee waiver or reduction are to be made to the Secretary of the Commission, and should demonstrate either that the waiver or reduction is in the best interest of the public or that imposition of the fee would impose an undue hardship.

This Rule does not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1980, as amended. Therefore, OMB review is not required.

List of Subjects

46 CFR Part 502

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements.

46 CFR Part 503

Classified information, Freedom of information, Privacy, Sunshine act.

46 CFR Part 515

Exports, Freight forwarders, Non-vessel-operating common carriers, Ocean transportation intermediaries,

Licensing requirements, Financial responsibility requirements, Reporting and recordkeeping requirements.

46 CFR Part 520

Common carrier, Freight, Intermodal transportation, Maritime carriers, Reporting and recordkeeping requirements.

46 CFR Part 530

Freight, Maritime carriers, Reporting and recordkeeping requirements.

46 CFR Part 535

Administrative practice and procedure, Maritime carriers, Reporting and recordkeeping requirements.

46 CFR Part 540

Insurance, Maritime carriers, Penalties, Reporting and recordkeeping requirements, Surety bonds.

46 CFR Part 550

Administrative practice and procedure, Maritime carriers.

46 CFR Part 555

Administrative practice and procedure, Investigations, Maritime carriers.

46 CFR Part 560

Administrative practice and procedure, Maritime carriers.

For the reasons set forth above, the Federal Maritime Commission amends 46 CFR Parts 502, 503, 515, 520, 530, 535, 540, 550, 555, and 560 as follows:

PART 502—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for Part 502 continues to read as follows:

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561–569, 571–596; 5 U.S.C. 571–584; 12 U.S.C. 1141j(a); 18 U.S.C. 207; 26 U.S.C. 501(c)(3); 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. app. 817d, 817e, 1114(b), 1705, 1707–1711, 1713–1716; E.O. 11222 of May 8, 1965, 30 FR 6469, 3 CFR, 1964–1965 Comp. P. 306; 21 U.S.C. 853a; Pub. L. 105–258, 112 Stat. 1902.

Subpart D—Rulemaking

2. The fourth sentence of § 502.51(a) is revised to read as follows:

§ 502.51 Initiation of procedure to issue, amend, or repeal a rule.

(a) * * * Petitions shall be accompanied by remittance of a $241 filing fee. * * *

* * * * *

Subpart E—Proceedings; Pleadings; Motions; Replies

3. Section 502.62(g) is revised to read as follows:

§ 502.62 Complaints and fee.

* * * * *

(g) The complaint shall be accompanied by remittance of a $221 filing fee.

* * * * *

4. Section 502.68(a)(3) is revised to read as follows:

§ 502.68 Declaratory orders and fee.

(a) * * *

(3) Petitions shall be accompanied by remittance of a $241 filing fee.

* * * * *

5. Section 502.69(b) is revised to read as follows:

§ 502.69 Petitions-General and fee.

* * * * *

(b) Petitions shall be accompanied by remittance of a $241 filing fee. [Rule 69.]

Subpart K—Shortened Procedure

6. The last sentence of § 502.182 is revised to read as follows:

§ 502.182 Complaint and memorandum of facts and arguments and filing fee.

* * * The complaint shall be accompanied by remittance of a $221 filing fee. [Rule 182.]

Subpart Q—Refund or Waiver of Freight Charges

7. § 502.271(d)(5) is revised to read as follows:

§ 502.271 Special docket application for permission to refund or waive freight charges.

* * * * *

(d) * * *

(5) Applications must be accompanied by remittance of a $77 filing fee.

* * * * *

Subpart S—Informal Procedure for Adjudication of Small Claims

8. The last sentence of § 502.304(b) is revised to read as follows:

§ 502.304 Procedure and filing fee.

* * * * *

(b) * * * Such claims shall be accompanied by remittance of a $67 filing fee.

* * * * *

PART 503—PUBLIC INFORMATION

9. The authority citation for Part 503 continues to read as follows:

Authority: 5 U.S.C. 552, 552a, 552b, 553; 31 U.S.C. 9701; E.O. 12958 of April 20, 1995 (60 FR 19825), sections 5.2 (a) and (b).

10. In § 503.43, paragraphs (c)(1) (i) and (ii), the first sentence of paragraph (c)(2), paragraphs (c)(3) (ii) and (iii), paragraph (c)(4), paragraph (d) and paragraph (e) are revised to read as follows:

§ 503.43 Fees for services.

* * * * *

(c) * * *

(1) * * *

(i) Search will be performed by clerical/administrative personnel at a rate of $19 per hour and by professional/executive personnel at a rate of $48 per hour.

(ii) Minimum charge for record search is $19.

(2) Charges for review of records to determine whether they are exempt from disclosure under § 503.33 shall be assessed to recover full costs at the rate of $79 per hour. * * *

(3) * * *

(ii) By Commission personnel, at the rate of five cents per page (one side) plus $19 per hour.

(iii) Minimum charge for copying is $4.75.

* * * * *

(4) The certification and validation (with Federal Maritime Commission seal) of documents filed with or issued by the Commission will be available at $94 for each certification.

(d) To have one's name and address placed on the mailing list of a specific docket as an interested party to receive all issuances pertaining to that docket: $9 per proceeding.

(e) Applications for admission to practice before the Commission for persons not attorneys at law must be accompanied by a fee of $104 pursuant to § 502.27 of this chapter.

Subpart G—Access to Any Record of Identifiable Personal Information

11. In § 503.69, paragraph (b)(2) is revised to read as follows:

§ 503.69 Fees.

* * * * *

(b) * * *

(2) The certification and validation (with Federal Maritime Commission seal) of documents filed with or issued by the Commission will be available at $94 for each certification.

* * * * *

PART 515—LICENSING, FINANCIAL RESPONSIBILITY REQUIREMENTS, AND GENERAL DUTIES FOR OCEAN TRANSPORTATION INTERMEDIARIES

12. The authority citation for Part 515 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716, and 1718; Pub. L. 105–383, 112 Stat. 3411; 21 U.S.C. 862.

Subpart A—General

13. In Part 515 revise all references to the "Bureau of Consumer Complaints and Licensing" to read "Bureau of Certification and Licensing."

14. In § 515.5, paragraphs (a), (b)(1), (b)(2), and (b)(3) are revised to read as follows:

§ 515.5 Forms and Fees.

(a) *Forms.* License form FMC–18 Rev., and financial responsibility forms FMC–48, FMC–67, FMC–68, FMC–69 may be obtained from the Commission's Web site at *http://www.fmc.gov*, the Director, Bureau of Certification and Licensing, Federal Maritime Commission, Washington, DC 20573, or from any of the Commission's area representatives.

(b) * * *

(1) Application for license as required by § 515.12(a): $825;

(2) Application for status change or license transfer as required by §§ 515.18(a) and 515.18(b): $525; and

(3) Supplementary investigations required by § 515.25(a): $225.

Subpart D—Duties and Responsibilities of Ocean Transportation Intermediaries; Reports to Commission

15. The second sentence of § 515.34 is revised to read as follows:

§ 515.34 Regulated Persons Index.

* * * * *

The database may be purchased for $108 by contacting the Bureau of Certification and Licensing, Federal Maritime Commission, Washington, DC 20573. * * *

PART 520—CARRIER AUTOMATED TARIFFS

16. The authority citation for Part 520 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1701–1702, 1707–1709, 1712, 1716; and sec. 424 of Pub. L. 105–383, 112 Stat. 3411.

Subpart B—Filing Requirements

17. The last sentence of § 520.14(c)(1) is revised to read as follows:

§ 520.14 Special permission.

(c) * * *

(1) * * * Every such application shall be submitted to the Bureau of Trade Analysis and be accompanied by a filing fee of $195.

* * * * *

PART 530—SERVICE CONTRACTS

18. The authority citation for Part 530 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1704, 1705, 1707, 1716.

Subpart B—Service Contracts

19. Section 530.10(c), introductory text, is revised to read as follows:

§ 530.10 Amendment, correction cancellation, and electronic transmission errors.

* * * * *

(c) Corrections. Requests shall be filed, in duplicate, with the Commission's Office of the Secretary within forty-five (45) days of the contract's filing with the Commission, accompanied by remittance of a $315 service fee, and shall include:

* * * * *

PART 535—AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

20. The authority citation for Part 535 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1701–1707, 1709–1710, 1712 and 1714–1718; Pub. L. 105–383, 112 Stat. 3411.

Subpart D—Filing of Agreements

21. In § 535.401, paragraphs (f) and (g) are revised to read as follows:

§ 535.401 General requirements.

* * * * *

(f) *Fees.* The filing fee is $1,780 for new agreements requiring Commission review and action; $851 for agreement modifications requiring Commission review and action; $397 for agreements processed under delegated authority (for types of agreements that can be processed under delegated authority, see § 501.26(e) of this chapter); $138 for carrier exempt agreements; and $75 for terminal exempt agreements.

(g) The fee for the Commission's agreement database report is $6.

PART 540—PASSENGER VESSEL FINANCIAL RESPONSIBILITY

22. The authority citation for Part 540 continues to read as follows:

Authority: 5 U.S.C. 552, 553; 31 U.S.C. 9701; secs. 2 and 3, Pub. L. 89–777, 80 Stat. 1356–1358; 46 U.S.C. app. 817e, 817d; 46 U.S.C. 1716.

Subpart A—Proof of Financial Responsibility, Bonding and Certification of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation

23. The last two sentences in § 540.4(b) are revised to read as follows:

§ 540.4 Procedure for establishing financial responsibility.

* * * * *

(b) * * * An application for a Certificate (Performance), excluding an application for the addition or substitution of a vessel to the applicant's fleet, shall be accompanied by a filing fee remittance of $2,767. An application for a Certificate (Performance) for the addition or substitution of a vessel to the applicant's fleet shall be accompanied by a filing fee remittance of $1,382.

* * * * *

Subpart B—Proof of Financial Responsibility, Bonding and Certification of Financial Responsibility To Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages

24. The last two sentences in § 540.23(b) are revised to read as follows:

§ 540.23 Procedure for establishing financial responsibility.

* * * * *

(b) * * * An application for a Certificate (Casualty), excluding an application for the addition or substitution of a vessel to the applicant's fleet, shall be accompanied by a filing fee remittance of $1,206. An application for a Certificate (Casualty) for the addition or substitution of a vessel to the applicant's fleet shall be accompanied by a filing fee remittance of $605.

* * * * *

PART 550—REGULATIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE FOREIGN TRADE OF THE UNITED STATES

25. The authority citation for Part 550 continues to read as follows:

Authority: 5 U.S.C. 553; sec. 19(a)(2), (e), (f), (g), (h), (i), (j), (k) and (l) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(a)(2), (e), (f), (g), (h), (i), (j), (k) and (l), as amended by Pub. L. 105–258; Reorganization Plan No. 7 of 1961, 75 Stat 840; and sec. 10002 of the Foreign Shipping Practices Act of 1988, 46 U.S.C. app. 1710a.

Subpart D—Petitions for Section 19 Relief

26. Section 550.402 is revised to read as follows:

§ 550.402 Filing of petitions.

All requests for relief from conditions unfavorable to shipping in the foreign trade shall be by written petition. An original and fifteen copies of a petition for relief under the provisions of this part shall be filed with the Secretary, Federal Maritime Commission, Washington, DC 20573. The petition shall be accompanied by remittance of a $241 filing fee.

PART 555—ACTIONS TO ADDRESS ADVERSE CONDITIONS AFFECTING U.S.-FLAG CARRIERS THAT DO NOT EXIST FOR FOREIGN CARRIERS IN THE UNITED STATES

27. The authority citation for Part 555 continues to read as follows:

Authority: 5 U.S.C. 553; sec. 10002 of the Foreign Shipping Practices Act of 1988 (46 U.S.C. app. 1710a), as amended by Pub. L. 105–258.

28. In § 555.4, paragraph (a) is revised to read as follows:

§ 555.4 Petitions.

(a) A petition for investigation to determine the existence of adverse conditions as described in § 555.3 may be submitted by any person, including any common carrier, shipper, shippers' association, ocean freight forwarder, or marine terminal operator, or any branch, department, agency, or other component of the Government of the United States. Petitions for relief under this part shall be in writing, and filed in the form of an original and fifteen copies with the Secretary, Federal Maritime Commission, Washington, DC 20573. The petition shall be accompanied by remittance of a $241 filing fee.

* * * * *

PART 560—ACTIONS TO ADDRESS CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS

29. The authority citation for Part 560 continues to read as follows:

Authority: 5 U.S.C. 553; secs. 13(b)(6), 15 and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1712(b)(6), 1714 and 1716, as amended by Pub. L. 105–258; sec. 10002 of the Foreign Shipping Practices Act of 1988 (46 U.S.C. app. 1710a), as amended by Pub. L. 105–258.

30. Section 560.3(a)(2) is revised to read as follows:

§ 560.3 Petitions for relief.

(a) * * *

(2) An original and fifteen copies of such a petition including any supporting documents shall be filed with the Secretary, Federal Maritime Commission, Washington, DC 20573. The petition shall be accompanied by remittance of a $241 filing fee.

* * * * *

By the Commission.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–19772 Filed 8–30–04; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[I.D. 052104F]

Endangered and Threatened Species: Extension of Public Comment Period and Notice of Public Hearings on Proposed Listing Determinations for West Coast Salmonids

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

ACTION: Extension of public comment period; notice of public hearings.

SUMMARY: In June 2004, NMFS proposed to list 27 Evolutionarily Significant Units (ESUs) of salmon and O. mykiss as threatened and endangered under the ESA. As part of this proposal, NMFS announced a public comment period. In this notice, NMFS is extending the public comment period for this proposal to October 20, 2004. Additionally, NMFS is announcing that hearings will be held at eight locations in the Pacific Northwest from mid-September to mid-October to provide additional opportunities and formats to receive public input. Dates and locations of public hearings to be held in California will be announced in a subsequent **Federal Register** notice.

DATES: Written comments must be received by October 20, 2004. See **SUPPLEMENTARY INFORMATION** for the specific public meeting dates.

ADDRESSES: You may submit comments on the proposed listing determinations for 27 ESUs of West Coast Salmon and O. mykiss (69 FR 33101; June 14, 2004) by any of the following methods:

E-mail: The mailbox address for submitting e-mail comments on the proposed listing determinations for 27 West Coast ESUs of salmon and *O. mykiss* is *salmon.nwr@noaa.gov*. Please include in the subject line of the e-mail comment the document identifier "Proposed Listing Determinations."

Mail: Submit written comments and information to Chief, NMFS, Protected Resources Division, 525 NE Oregon Street, Suite 500, Portland, Oregon, 97232–2737. Please identify the comment as regarding the "Proposed Listing Determinations." You may hand-deliver written comments to our office at the street address given above, suite 210. Business hours are 8 a.m. to 5 p.m., Monday through Friday, except Federal holidays (i.e., September 6, 2004, and October 11, 2004, during the extended comment period).

Hand Delivery/Courier: NMFS, Protected Resources Division, 525 NE Oregon Street, Suite 210, Portland, Oregon, 97232–2737. Business hours are noted above.

Fax: 503–230–5435. Please identify the fax comment as regarding the "Proposed Listing Determinations."

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

See **SUPPLEMENTARY INFORMATION** for hearing locations. You may obtain information updates on the public hearings on the Internet at the following web address: *http://www.nwr.noaa.gov/AlseaResponse/meetings.html/*.

FOR FURTHER INFORMATION CONTACT: Garth Griffin, NMFS, Northwest Region, (503) 231–2005. Copies of the **Federal Register** notices cited herein and additional salmon-related materials are available on the Internet at http://www.nwr.noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

On June 14, 2004, NMFS published proposed ESA listing determinations for 27 salmon and *O. mykiss* ESUs, including 18 ESUs that occur in Oregon, Washington and Idaho (69 FR 33101). The 27 proposed listing determinations include 162 total hatchery programs as part of 4 ESUs being proposed for endangered status and 23 ESUs being proposed for threatened status. In addition, NMFS proposed amendments to the existing ESA 4(d) protective regulations for the proposed threatened ESUs.

Extension of Public Comment Period

Several requests have been received to extend the comment periods for the proposed listing determinations for 27 ESUs. The comment period for the proposed listings was to end on

September 13, 2004. NMFS is extending the comment period until October 20, 2004, to allow for adequate opportunity for public comment (see **DATES** and **ADDRESSES**).

Public Hearings

Joint Commerce-Interior ESA implementing regulations state that the Secretary shall promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed regulation to list a species or to designate critical habitat (see 50 CFR 424.16(c)(3)). In past ESA rule-making NMFS has conducted traditional public hearings, consisting of recorded oral testimony from interested individuals. This format, although providing an alternative means of public input, is time consuming for the attendees and does not provide opportunities for dialogue and information exchange. NMFS believes that the traditional public hearing format can be improved upon by also including opportunities for individuals to discuss specific elements of the proposals with agency staff in small groups. The "open-house" format of the public meetings, described below, will enhance the ability of the public to engage effectively in the rulemaking process, while respecting their valuable time and resources.

Meeting Format

NMFS believes that the proposed listing determinations and a proposed hatchery listing policy (see 69 FR 31354; June 3, 2004) are important to salmon recovery. Public engagement on these intimately related proposals will be combined into the same public meetings to make efficient use of the agency's and the public's time and resources.

Afternoon Practitioners' Sessions – Afternoon sessions (1:30 p.m. to 4:30 p.m.) will be provided for local practitioners and stakeholders involved with managing the ESA on a regular basis, including: tribal governments; forestry and agricultural interests; home builders and developers; the sport and commercial fishing community; the environmental community; the business community; utility and special districts; local government elected officials and their staff; other locally-based Federal and state agencies; and public interest groups. The structure of these afternoon meetings will be tailored to allow practitioners and NMFS staff to discuss the specific issues that are of local concern. Attendance at the afternoon sessions will be on a pre-registration basis. Information on attending the practitioners' afternoon sessions is available from NMFS upon request (see **FOR FURTHER INFORMATION CONTACT**, above) as well as on the Internet at *http://www.nwr.noaa.gov/AlseaResponse/meetings.html/*.

Evening Open House and Public Testimony – Evening "open house" sessions designed for broader public participation will be conducted on the same day as the afternoon practitioners' sessions. The "open house" format will provide the general public with an opportunity to meet with NMFS staff in small groups on specific topics in order to learn more about the proposals and their possible impacts on their communities. These evening meetings will also provide opportunities for the public to make formal recorded comments on the proposals. The preferred means of providing public comment for the official record is via written testimony prepared in advance of the meeting. In addition, blank "comment sheets" will be provided at the evening meetings for those without prepared written comments, and facilities will also be provided for recording oral testimony. The evening sessions will be open from 6:30 p.m to 9:30 p.m. Because these sessions will be designed as open houses where the public can move from "station" to "station" and discuss their particular interests with NMFS staff, members of the local community can come and go from the meeting as they please. For those who are interested, there will also be a short presentation on the proposed listing determinations and the proposed hatchery listing policy from NMFS beginning at 6:30 p.m. NMFS hopes that this format will allow busy community members to participate without necessarily attending the entire evening. Members of the public wishing to attend the evening open house meetings will receive the notification through advertising, NMFS Northwest Region's web page (http://www.nwr.noaa.gov/AlseaResponse/meetings.html/), and public notices published in their community. There is no need to register; just drop in anytime during the course of the evening event.

Meeting Dates & Locations

Public meetings, including both afternoon practitioners' (1:30 p.m. to 4:30 p.m.) and evening open house sessions (6:30 p.m. to 9:30 p.m.), will be held at eight locations in the Pacific Northwest from mid-September to mid-October. The specific dates and locations of these meetings are listed below:

(1) September 14, 2004, at the Chelan County Public Utility District (PUD) Auditorium, 327 N. Wenatchee Ave., Wenatchee, WA 98801.

(2) September 16, 2004, at the Red Lion Hotel Columbia Center, N. 1101 Columbia Center Blvd, Kennewick, WA 99336.

(3) September 22, 2004, at the Shilo Inn Hotel,536 SW Elizabeth, Newport, OR 97635.

(4) September 28, 2004, at the Stagecoach Inn, 201 Highway 93 North, Salmon, ID 83467.

(5) September 30, 2004, at the Red Lion Hotel, 621 21st St., Lewiston, ID 83501.

(6) October 5, 2004, at the Radisson Hotel (SeaTac Airport), 17001 Pacific Highway South, Seattle WA 98118.

(7) October 7, 2004, at Umpqua Community College, 1140 College Rd., Roseburg, OR 97470.

(8) October 13, 2004, at the Portland Building, 1120 SW 5th Ave, Portland, OR 97204.

Directions to the meeting locations can be obtained on the Internet at *http://www.nwr.noaa.gov/AlseaResponse/meetings.html/*. Dates and locations of public hearings to be held in California will be announced in a subsequent **Federal Register** notice.

In scheduling these public meetings, NMFS has anticipated that many affected stakeholders and members of the public may prefer to discuss the proposed listing determinations directly with staff during the public comment period. These public meetings are not the only opportunity for the public to provide input on this proposal. The public and stakeholders are encouraged to continue to comment and provide input to NMFS on the proposals (via correspondence, e-mail, and the Internet; see ADDRESSES, above) up until the scheduled close of the comment period on October 20, 2004.

References

Copies of the **Federal Register** notices and related materials cited in this document are available on the Internet at *http://nwr.noaa.gov*, or upon request (see **ADDRESSES** section above).

Authority: 16 U.S.C. 1531 *et seq.*

Dated: August 25, 2004.

Donna Wieting,

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

[FR Doc. 04–19867 Filed 8–30–04; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 69, No. 168
Tuesday, August 31, 2004

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 04–080–1]

Fiscal Year 2005 Reimbursable Overtime Rates and Veterinary Diagnostic Service User Fees

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: This notice pertains to reimbursable overtime charged for Sunday, holiday, or other overtime work performed in connection with the inspection, laboratory testing, certification, or quarantine of certain articles and to user fees for certain veterinary diagnostic services. The purpose of this notice is to remind the public of the reimbursable overtime charges and user fees for fiscal year 2005 (October 1, 2004, through September 30, 2005).

FOR FURTHER INFORMATION CONTACT: For information concerning reimbursable overtime charges related to Plant Protection and Quarantine program operations, contact Mr. Michael Caporaletti, Senior Program Analyst, Quarantine Policy Analysis and Support, PPQ, APHIS, 4700 River Road Unit 60, Riverdale, MD 20737–1231; (301) 734–5781.

For information concerning reimbursable overtime charges related to animal programs and Veterinary Services import and export program operations, contact Dr. Lee Ann Thomas, Director, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737–1231; (301) 734–3277.

For information concerning veterinary diagnostic program operations, contact Dr. Randall Levings, Director, National Veterinary Services Laboratories, 1800 Daton Road, P.O. Box 844, Ames, IA 50010; (515) 663–7357.

For information concerning user fee rate development, contact Mrs. Kris Caraher, User Fees Section Head, Financial Systems and Services Branch, APHIS, 4700 River Road Unit 54, Riverdale, MD 20737–1232; (301) 734–5901.

SUPPLEMENTARY INFORMATION:

Note: In March 2003, the agricultural import and entry inspection activities that had been performed by employees of the Animal and Plant Health Inspection Service (APHIS) were transferred to the Department of Homeland Security (DHS). The regulations cited in this notice have not yet been updated to reflect this change, so in the interests of consistency with those regulations this notice continues to refer to "APHIS employees" and services provided or work performed by APHIS employees. Readers should be aware, however, that DHS personnel are currently performing certain of the agricultural import and entry inspection activities discussed in this notice for which overtime charges or user fees are applicable.

Reimbursable Overtime Charges

The regulations in 7 CFR chapter III and 9 CFR chapter I, subchapters D and G, require inspection, laboratory testing, certification, or quarantine of certain animals, poultry, animal byproducts, germ plasm, organisms, vectors, plants, plant products, or other regulated commodities or articles intended for importation into, or exportation from, the United States. With some exceptions, when these services must be provided by an APHIS employee on a Sunday or on a holiday, or at any other time outside the APHIS employee's regular duty hours, the Government charges an hourly overtime fee for the services in accordance with 7 CFR part 354 and 9 CFR part 97.

In a final rule published in the **Federal Register** on July 25, 2002 (67 FR 48519–48525, Docket No. 00–087–2), and effective August 11, 2002, we established, for the fiscal years 2002 through 2006 and beyond, reimbursable overtime rates for Sunday, holiday, or other overtime work performed by APHIS employees for any person, firm, or corporation having ownership, custody, or control of animals, poultry, animal byproducts, germ plasm, organisms, vectors, plants, plant products, or other regulated commodities or articles subject to inspection, laboratory testing, certification, or quarantine. In this document we are providing notice to the public of the reimbursable overtime fees for fiscal year 2005 (October 1, 2004, through September 30, 2005).

Under the regulations in 7 CFR 354.1(a) and 9 CFR 97.1(a), any person, firm, or corporation having ownership, custody or control of plants, plant products, animals, animal byproducts, or other commodities or articles subject to inspection, laboratory testing, certification, or quarantine who requires the services of an APHIS employee on a Sunday or holiday, or at any other time outside the regular tour of duty of that employee, shall sufficiently in advance of the period of Sunday, holiday, or overtime service request the APHIS inspector in charge to furnish the service during the overtime or Sunday or holiday period, and shall, for fiscal year 2005, pay the Government at the rate listed in the following table:

OVERTIME FOR INSPECTION, LABORATORY TESTING, CERTIFICATION, OR QUARANTINE OF PLANTS, PLANT PRODUCTS, ANIMALS, ANIMAL PRODUCTS, OR OTHER REGULATED COMMODITIES

Outside the employee's normal tour of duty	Overtime rates (per hour) Oct. 1, 2004–Sept. 30, 2005
Monday through Saturday and holidays.	$49.00
Sundays	65.00

As specified in 7 CFR 354.1(a)(1)(iii) and 9 CFR 97.1(a)(3), the overtime rates to be charged in fiscal year 2005 to owners and operators of aircraft at airports of entry or other places of inspection as a consequence of the operation of the aircraft, for work performed outside of the regularly established hours of service will be as follows:

OVERTIME FOR COMMERCIAL AIRLINE INSPECTION SERVICES[1]

Outside the employee's normal tour of duty	Overtime rates (per hour) Oct. 1, 2004–Sept. 30, 2005
Monday through Saturday and holidays.	$40.00

OVERTIME FOR COMMERCIAL AIRLINE INSPECTION SERVICES[1]—Continued

Outside the employee's normal tour of duty	Overtime rates (per hour) Oct. 1, 2004–Sept. 30, 2005
Sundays	53.00

[1] These charges exclude administrative overhead costs.

A minimum charge of 2 hours shall be made for any Sunday or holiday or unscheduled overtime duty performed by an employee on a day when no work was scheduled for him or her, or which is performed by an employee on his or her regular workday beginning either at least 1 hour before his or her scheduled tour of duty or which is not in direct continuation of the employee's regular tour of duty. In addition, each such period of Sunday or holiday or unscheduled overtime work to which the 2-hour minimum charge provision applies may include a commuted traveltime period (*see* 7 CFR 354.1(a)(2) and 9 CFR 97.1(b)).

Veterinary Diagnostic Services User Fees

User fees to reimburse APHIS for the costs of providing veterinary diagnostic services are contained in 9 CFR part 130 (referred to below as the regulations). These user fees are authorized by section 2509(c) of the Food, Agriculture, Conservation and Trade Act of 1990, as amended (21 U.S.C. 136a), which provides that the Secretary of Agriculture may, among other things, prescribe regulations and collect fees to recover the costs of veterinary diagnostics relating to the control and eradication of communicable disease of livestock or poultry within the United States.

In a final rule published in the **Federal Register** on May 6, 2004 (68 FR 25305–25312, Docket No. 00–024–2), and effective June 7, 2004, we established, for the fiscal years 2004 through 2007 and beyond, user fees for certain veterinary diagnostic services, including certain diagnostic tests, reagents, and other veterinary diagnostic materials and services. Veterinary diagnostics is the work performed in a laboratory to determine if a disease-causing organism or chemical agent is present in body tissues or cells and, if so, to identify those organisms or agents. Services in this category include: (1) Performing identification, serology, and pathobiology tests and providing diagnostic reagents and other veterinary diagnostic materials and services at the National Veterinary Services Laboratories (NVSL) in Ames, IA; and (2) performing laboratory tests and providing diagnostic reagents and other veterinary diagnostic materials and services at the NVSL Foreign Animal Disease Diagnostic Laboratory (NVSL FADDL) in Greenport, NY.

APHIS veterinary diagnostic user fees fall into six categories:

(1) Laboratory tests, reagents, and other veterinary diagnostic services performed at NVSL FADDL;

(2) Laboratory tests performed as part of isolation and identification testing at NVSL in Ames;

(3) Laboratory tests performed as part of serology testing at NVSL in Ames;

(4) Laboratory tests performed at the pathobiology laboratory at NVSL in Ames;

(5) Diagnostic reagents produced at NVSL in Ames or other authorized sites; and

(6) Other veterinary diagnostic services or materials provided at NVSL in Ames.

As specified in § 130.14(a), the user fees for diagnostic reagents provided by NVSL FADDL for fiscal year 2005 are as follows:

Reagent	Unit	User fee
Bovine antiserum, any agent.	1 mL	$155.00
Caprine antiserum, any agent.	1 mL	189.00
Cell culture antigen/ microorganism.	1 mL	106.00
Equine antiserum, any agent.	1 mL	192.00
Fluorescent antibody conjugate.	1 mL	172.00
Guinea pig antiserum, any agent.	1 mL	189.00
Monoclonal antibody	1 mL	229.00
Ovine antiserum, any agent.	1 mL	181.00
Porcine antiserum, any agent.	1 mL	157.00
Rabbit antiserum, any agent.	1 mL	185.00

As specified in § 130.14(b), the user fees for veterinary diagnostic tests performed at NVSL FADDL for fiscal year 2005 are as follows:

Test	Unit	User fee
Agar gel immunodiffusion.	Test	$31.00
Card	Test	17.00
Complement fixation	Test	37.00
Direct immunofluorescent antibody.	Test	23.00
Enzyme linked immunosorbent assay.	Test	27.00
Fluorescent antibody neutralization (classical swine fever).	Test	201.00
Hemagglutination inhibition.	Test	59.00
Immunoperoxidase	Test	30.00
Indirect fluorescent antibody.	Test	36.00
In-vitro safety	Test	589.00
In-vivo safety	Test	5,387.00
Latex agglutination	Test	24.00
Tube agglutination	Test	28.00
Virus isolation (oesophageal/pharyngeal).	Test	186.00
Virus isolation in embryonated eggs.	Test	358.00
Virus isolation, other	Test	160.00
Virus neutralization	Test	54.00

As specified in § 130.14(c), the user fees for other veterinary diagnostic services performed at NVSL FADDL for fiscal year 2005 are as follows:

Veterinary diagnostic service	Unit	User fee
Bacterial isolation	Test	$115.00
Hourly user fee services[1]	Hour	460.00
Hourly user fee services—Quarter hour	Quarter hour	115.00
Infected cells on chamber slides or plates	Slide	50.00
Reference animal tissues for immunohistochemistry	Set	177.00
Sterilization by gamma radiation	Can	1,799.00
Training (school or technical assistance)	Per person per day	941.00
Virus titration	Test	115.00

[1] For all veterinary diagnostic services for which there is no flat rate user fee, the hourly rate user fee will be calculated for the actual time required to provide the service.

As specified in § 130.15(a), the user fees for bacteriology isolation and identification tests performed at NVSL (excluding FADDL) or other authorized sites for fiscal year 2005 are as follows:

Test	Unit	User fee
Bacterial identification, automated	Isolate	$50.00
Bacterial identification, non-automated	Isolate	84.00
Bacterial isolation	Sample	34.00
Bacterial serotyping, all other	Isolate	52.00
Bacterial serotyping, Pasteurella multocida	Isolate	17.00
Bacterial serotyping, Salmonella	Isolate	34.00
Bacterial toxin typing	Isolate	112.00
Bacteriology requiring special characterization	Test	86.00
DNA fingerprinting	Test	56.00
DNA/RNA probe	Test	79.00
Fluorescent antibody	Test	17.00
Mycobacterium identification (biochemical)	Isolate	107.00
Mycobacterium identification (gas chromatography)	Procedure	90.00
Mycobacterium isolation, animal inoculations	Submission	791.00
Mycobacterium isolation, all other	Submission	141.00
Mycobacterium paratuberculosis isolation	Submission	67.00
Phage typing, all other	Isolate	39.00
Phage typing, Salmonella enteritidis	Isolate	22.00

As specified in § 130.15(b), the user fees for virology identification tests performed at NVSL (excluding FADDL) or other authorized sites for fiscal year 2005 are as follows:

Test	Unit	User fee
Fluorescent antibody tissue section	Test	$27.00
Virus isolation	Test	45.00

As specified in § 130.16(a), the user fees for bacteriology serology tests performed at NVSL (excluding FADDL) or other authorized sites for fiscal year 2005 are as follows:

Test	Unit	User fee
Brucella ring (BRT)	Test	$34.00
Brucella ring, heat inactivated (HIRT)	Test	34.00
Brucella ring, serial (Serial BRT)	Test	51.00
Buffered acidified plate antigen presumptive	Test	7.00
Card	Test	4.00
Complement fixation	Test	15.00
Enzyme linked immunosorbent assay	Test	15.00
Indirect fluorescent antibody	Test	13.00
Microscopic agglutination—includes up to 5 serovars	Sample	22.00
Microscopic agglutination—each serovar in excess of 5 serovars	Sample	4.00
Particle concentration fluorescent immunoassay (PCFIA)	Test	34.00
Plate	Test	7.00
Rapid automated presumptive	Test	6.00
Rivanol	Test	7.00
Tube agglutination	Test	7.00

As specified in § 130.16(b), the user fees for virology serology tests performed at NVSL (excluding FADDL) or at authorized sites for fiscal year 2005 are as follows:

Test	Unit	User fee
Agar gel immunodiffusion	Test	$15.00
Complement fixation	Test	15.00
Enzyme linked immunosorbent assay	Test	15.00
Hemagglutination inhibition	Test	13.00
Indirect fluorescent antibody	Test	13.00
Latex agglutination	Test	15.00
Peroxidase linked antibody	Test	14.00

Test	Unit	User fee
Plaque reduction neutralization	Test	17.00
Rabies fluorescent antibody neutralization	Test	42.00
Virus neutralization	Test	12.00

As specified in § 130.17(a), the user fees for veterinary diagnostic tests performed at the Pathobiology Laboratory at NVSL (excluding FADDL) or at authorized sites for fiscal year 2005 are as follows:

Test	Unit	User fee
Aflatoxin quantitation	Test	$28.00
Aflatoxin screen	Test	27.00
Agar gel immunodiffusion spp. identification	Test	12.00
Antibiotic (bioautography) quantitation	Test	61.00
Antibiotic (bioautography) screen	Test	112.00
Antibiotic inhibition	Test	61.00
Arsenic	Test	16.00
Ergot alkaloid screen	Test	61.00
Ergot alkaloid confirmation	Test	80.00
Feed microscopy	Test	61.00
Fumonisin only	Test	35.00
Gossypol	Test	92.00
Mercury	Test	135.00
Metals screen	Test	41.00
Metals single element confirmation	Test	12.00
Mycotoxin: aflatoxin—liver	Test	112.00
Mycotoxin screen	Test	44.00
Nitrate/nitrite	Test	61.00
Organic compound confirmation	Test	82.00
Organic compound screen	Test	141.00
Parasitology	Test	27.00
Pesticide quantitation	Test	123.00
Pesticide screen	Test	56.00
pH	Test	25.00
Plate cylinder	Test	92.00
Selenium	Test	41.00
Silicate/carbonate disinfectant	Test	61.00
Temperature disks	Test	122.00
Toxicant quantitation, other	Test	103.00
Toxicant screen, other	Test	31.00
Vomitoxin only	Test	49.00
Water activity	Test	31.00
Zearaleone quantitation	Test	49.00
Zearaleone screen	Test	27.00

As specified in § 130.18(a), the user fees for bacteriology reagents produced by the Diagnostic Bacteriology Laboratory at NVSL (excluding FADDL) or other authorized sites for fiscal year 2005 are as follows:

Reagent	Unit	User fee
Anaplasma card test antigen	2 mL	$89.00
Anaplasma card test kit without antigen	Kit	119.00
Anaplasma CF antigen	2 mL	46.00
Anaplasma stabilate	4.5 mL	165.00
Avian origin bacterial antiserums	1 mL	44.00
Bacterial agglutinating antigens other than brucella and salmonella pullorum	5 mL	51.00
Bacterial conjugates	1 mL	90.00
Bacterial disease CF antigens, all other	1 mL	27.00
Bacterial ELISA antigens	1 mL	27.00
Bacterial or protozoal, antiserums, all other	1 mL	56.00
Bacterial reagent culture [1]	Culture	68.00
Bacterial reference culture [2]	Culture	213.00
Bacteriophage reference culture	Culture	161.00
Bovine serum factor	1 mL	17.00
Brucella abortus CF antigen	60 mL	141.00
Brucella agglutination antigens, all other	60 mL	141.00
Brucella buffered plate antigen	60 mL	161.00
Brucella canis tube antigen	25 mL	105.00
Brucella card test antigen (packaged)	Package	84.00
Brucella card test kit without antigen	Kit	109.00
Brucella cells	Gram	17.00

Reagent	Unit	User fee
Brucella cells, dried	Pellet	5.00
Brucella ring test antigen	60 mL	225.00
Brucella rivanol solution	60 mL	27.00
Dourine CF antigen	1 mL	84.00
Dourine stabilate	4.5 mL	105.00
Equine and bovine origin babesia species antiserums	1 mL	119.00
Equine negative control CF antigen	1 mL	272.00
Flazo-orange	3 mL	12.00
Glanders CF antigen	1 mL	73.00
Hemoparasitic disease CF antigens, all other	1 mL	505.00
Leptospira transport medium	10 mL	4.00
Monoclonal antibody	1 mL	90.00
Mycobacterium spp. old tuberculin	1 mL	22.00
Mycobacterium spp. PPD	1 mL	17.00
Mycoplasma hemagglutination antigens	5 mL	168.00
Negative control serums	1 mL	17.00
Rabbit origin bacterial antiserum	1 mL	48.00
Salmonella pullorum microagglutination antigen	5 mL	14.00
Stabilates, all other	4.5 mL	640.00

[1] A reagent culture is a bacterial culture that has been subcultured one or more times after being tested for purity and identity. It is intended for use as a reagent with a diagnostic test such as the leptospiral microagglutination test.

[2] A reference culture is a bacterial culture that has been thoroughly tested for purity and identity. It should be suitable as a master seed for future cultures.

As specified in § 130.18(b), the user fees for virology reagents produced by the Diagnostic Virology Laboratory at NVSL (excluding FADDL) or at authorized sites for fiscal year 2005 are as follows:

Reagent	Unit	User fee
Antigen, except avian influenza and chlamydia psittaci antigens, any	2 mL	$57.00
Avian antiserum except avian influenza antiserum, any	2 mL	45.00
Avian influenza antigen, any	2 mL	31.00
Avian influenza antiserum, any	6 mL	96.00
Bovine or ovine serum, any	2 mL	119.00
Cell culture	Flask	141.00
Chlamydia psittaci spp. of origin monoclonal antibody panel	Panel	90.00
Conjugate, any	1 mL	68.00
Diluted positive control serum, any	2 mL	23.00
Equine antiserum, any	2 mL	42.00
Monoclonal antibody	1 mL	96.00
Other spp. antiserum, any	1 mL	51.00
Porcine antiserum, any	2 mL	99.00
Porcine tissue sets	Tissue set	153.00
Positive control tissues, all	2 cm^2 section	57.00
Rabbit origin antiserum	1 mL	48.00
Reference virus, any	0.6 mL	169.00
Viruses (except reference viruses), chlamydia psittaci agent or chlamydia psittaci antigen, any.	0.6 mL	28.00

As specified in § 130.19(a), the user fees for other veterinary diagnostic services or materials available from NVSL (excluding FADDL) for fiscal year 2005 are as follows:

Service	Unit	User fee
Antimicrobial susceptibility test	Isolate	$98.00
Avian safety test	Test	3,871.00
Check tests, culture	Kit[1]	167.00
Check tests, serology, all other	Kit[1]	337.00
Fetal bovine serum safety test	Verification	1,078.00
Hourly user fee services:[2]		
Hour	Hour	84.00
Quarter hour	Quarter hour	21.00
Minimum		25.00
Manual, brucellosis culture	1 copy	107.00
Manual, tuberculosis culture (English or Spanish)	1 copy	161.00
Manual, Veterinary mycology	1 copy	161.00
Manuals or standard operating procedure (SOP), all other	1 copy	32.00
Manuals or SOP, per page	1 page	2.00

Service	Unit	User fee
Training (school or technical assistance)	Per person per day	310.00

[1] Any reagents required for the check test will be charged separately.
[2] For veterinary diagnostic services for which there is no flat rate user fee the hourly rate user fee will be calculated for the actual time required to provide the service.

Done in Washington, DC, this 25th day of August 2004.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–19809 Filed 8–30–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Pattee Canyon Weed Management Project, Lolo National Forest, Missoula County, MT

AGENCY: Forest Service, USDA.

ACTION: Notice; intent to prepare an environmental impact statement (EIS).

SUMMARY: The Missoula Ranger District of the Lolo National Forest is proposing activities to control invasive weeds on approximately 2,500 acres of land near Missoula, Montana. The purpose of the project is to enhance and maintain desirable native vegetation and to maintain big-game winter range.

Proposed actions include aerial and ground application of herbicides, controlled release of approved biological control agents, and revegetation by seeding. These activities will be conducted along with ongoing programs to prevent invasive species and to educate the public.

Preliminary issues identified include the effectiveness of the proposed treatments, potential risks to human health and safety associated with herbicides, and the potential adverse effects of herbicides on native vegetation.

DATES: Comments about this proposal should be received within 45 days of the publication of this notice.

ADDRESSES: The USDA Forest Service is the lead agency for preparing this EIS. The Forest Service will consult with the U.S. Fish and Wildlife Service when making this decision. The responsible official is Maggie Pittman, Acting District Ranger, Missoula Ranger District, Lolo National Forest, Building 24A, Fort Missoula, Missoula, MT 59804.

FOR FURTHER INFORMATION CONTACT: Andy Kulla, Resource Assistant, Missoula Ranger District, at (406) 329–3962, or e-mail *akulla@fs.fed.us*. Please direct written comments to Maggie Pittman at Missoula Ranger District, Building 24A, Fort Missoula, Missoula, MT 59804, or e-mail *mpittman@fs.fed.us*.

SUPPLEMENTARY INFORMATION: Most of the lands proposed for treatment were recently acquired by the federal government. Before the government acquired these lands, registered herbicides were periodically applied to them by air to control invasive species. These applications were partially effective, so the lands have retained a large component of native vegetation. However, within the project area are expanding populations of leafy spurge, Dalmation toadflax, spotted knapweed, sulfur cinquefoil, Canada thistle, musk thistle, cheat grass and other invasive species. Without active control measures, these invasive weed populations will expand further, replacing native vegetation and decreasing the suitability of the lands as big game winter range.

In 2001, the Lolo National Forest prepared and implemented a Big Game Winter Range and Burned Area Weed Management Project. That project authorized similar control treatments on ecologically equivalent lands across 21,750 acres. Treatments authorized by that EIS have been monitored to determine their effectiveness in controlling invasive species and their effects on other resources. This EIS will rely on the effects analyses disclosed in that EIS. This project will also rely on monitoring results to support disclosures of site-specific effects anticipated.

The Forest Service believes it is important to give reviewers notice at this early stage of several court rulings related to public participation in the environmental review process. First, reviewers of draft EIS's must structure their participation in the environmental review of the proposal so that it is meaningful and alerts the agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Secondly, environmental objections that could be raised at the draft EIS stage but are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F. 2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that people interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns about the proposed action, comments on the draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the statement. (Reviewers may wish to refer to the Council on Environmental Quality regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.)

The draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and available for public review in December 2004. At that time, the EPA will publish a Notice of Availability of the draft EIS in the **Federal Register.** The comment period on the draft EIS will be 45 days from the date of the EPA's notice of availability in the **Federal Register.**

The final EIS is scheduled to be completed by February 2005.

Dated: August 24, 2004.

Maggie Pittman,

Acting District Ranger, Missoula District, Lolo National Forest.

[FR Doc, 04–19837 Filed 8–30–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Madera County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of Resource Advisory Committee meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act of

1972 (Public Law 92–463) and under the secure Rural Schools and Community Self-Determination Act of 2000 (Public Law 106–393) the Sierra National Forest's Resource Advisory Committee for Madera County will meet on Monday, September 20, 2004. The Madera Resource Advisory Committee will meet at the Forest Service Office, North Fork, CA, 93643. The purpose of the meeting is: Review the RAC accomplishments from 2002 to 2004, close out any old business.

DATES: The Madera Resource Advisory Committee meeting will be held Monday, September 20, 2004. The meeting will be held from 7 p.m. to 9 p.m.

ADDRESSES: The Madera County RAC meeting will be held at the Forest Service Office, 57003 Road 225, North Fork, CA 93644.

FOR FURTHER INFORMATION CONTACT: Dave Martin, USDA, Sierra National Forest, Bass Lake Ranger District, 57003 Road 225, North Fork, CA, 93643 (559) 877–2218 ext. 3100; e-mail *dmartin05@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Review the RAC accomplishments from 2002 to 2004, (2) close out any old business.

Dated: August 24, 2004.

David W. Martin,

District Ranger, Bass Lake Ranger District.

[FR Doc. 04–19836 Filed 8–30–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. No. 050304B]

Endangered and Threatened Species: Extension of Public Comment Period and Notice of Public Hearings on Proposed Hatchery Listing Policy and Proposed Listing Determinations for West Coast Salmonids

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

ACTION: Extension of public comment period; notice of public hearings.

SUMMARY: In June 2004, NMFS proposed a new policy for the consideration of hatchery salmon (chum, *Oncorhynchus keta*; coho, *O. kisutch*, sockeye, *O. nerka*; chinook, O. tshawytscha) and *O. mykiss* (inclusive of anadromous steelhead and resident rainbow trout) in Endangered Species Act (ESA) listing determinations. As part of this proposal, NMFS announced a public comment period. In this notice, NMFS is extending the public comment period for this proposal to October 20, Additionally, NMFS is announcing that hearings will be held at eight locations in the Pacific Northwest from mid-September to mid-October to provide additional opportunities and formats to receive public input. Dates and locations of public hearings to be held in California will be announced in a subsequent **Federal Register** notice.

DATES: Written comments must be received by October 20, 2004. See **SUPPLEMENTARY INFORMATION** for the specific public meeting dates.

ADDRESSES:YOU MAY SUBMIT COMMENTS ON THE PROPOSED HATCHERY LISTING POLICY (69 FR 31354; JUNE 3, 2004) BY ANY OF THE FOLLOWING METHODS:

E-mail: The mailbox address for submitting e-mail comments on the hatchery listing policy is *hatch.policy@noaa.gov.* Please include in the subject line of the e-mail comment the document identifier "Hatchery Listing Policy."

Mail: Submit written comments and information to Chief, NMFS, Protected Resources Division, 525 NE Oregon Street, Suite 500, Portland, Oregon, 97232-2737. Please identify the comment as regarding the "Hatchery Listing Policy." You may hand-deliver written comments to our office at the street address given above, suite 210. Business hours are 8 a.m. to 5 p.m., Monday through Friday, except Federal holidays (i.e., September 6, 2004, and October 11, 2004, during the extended comment period).

Hand Delivery/Courier: NMFS, Protected Resources Division, 525 NE Oregon Street, Suite 210, Portland, Oregon, 97232–2737. Business hours are noted above.

Fax: 503–230–5435. Please identify the fax comment as regarding the "Hatchery Listing Policy."

See **SUPPLEMENTARY INFORMATION** for hearing locations. You may obtain information updates on the public hearings on the Internet at the following web address: *http://www.nwr.noaa.gov/AlseaResponse/meetings.html/.*

FOR FURTHER INFORMATION CONTACT: Garth Griffin, NMFS, Northwest Region, (503) 231–2005. Copies of the **Federal Register** notices cited herein and additional salmon-related materials are available on the Internet at *http://www.nwr.noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On June 3, 2004, NMFS published a proposed policy addressing the role of hatchery produced Pacific salmon and *O. mykiss* in ESA listing determinations (69 FR 31354; "proposed hatchery listing policy"). The proposed hatchery listing policy would supersede NMFS' 1993 Interim Policy on salmonid artificial (hatchery) propagation (58 FR 17573; April 5, 1993), which requires revision following the 2001 U.S. District Court ruling in *Alsea Valley Alliance* v. *Evans* (161 F. Supp. 2d 1154, D. Oreg. 2001; appeal dismissed, 358 F.3d 1181 (9th Cir. 2004); *Alsea* ruling). The *Alsea* ruling held that NMFS had made an improper distinction under the Endangered Species Act (ESA) by not listing certain artificially propagated salmon populations determined to be part of the same Evolutionarily Significant Unit (ESU) as listed natural populations. Under the proposed hatchery listing policy: hatchery fish with a level of genetic divergence relative to local natural populations that is no more than would be expected between closely related populations within the ESU would be included as part of the ESU; within-ESU hatchery fish would be considered in determining whether the ESU should be listed under the ESA; and within-ESU hatchery fish would be included in any listing of the ESU. NMFS applied this proposed policy in conducting its comprehensive review of ESA listing status for 26 previously listed ESUs, and one candidate ESU, of West Coast salmon and *O. mykiss.*

Extension of Public Comment Period

Several requests have been received to extend the comment period for the proposed hatchery listing policy. The comment period for the proposed policy was to end on September 1, 2004. NMFS is extending the comment period until October 20, 2004, to allow for adequate opportunity for public comment (see **DATES** and **ADDRESSES**).

Public Hearings

Joint Commerce-Interior ESA implementing regulations state that the Secretary shall promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed regulation to list a species or to designate critical habitat (see 50 CFR 424.16(c)(3)). In past ESA rule-making NMFS has conducted traditional public hearings, consisting of recorded oral testimony from interested individuals. This format, although providing an alternative means of public input, is time consuming for the

attendees and does not provide opportunities for dialogue and information exchange. NMFS believes that the traditional public hearing format can be improved upon by also including opportunities for individuals to discuss specific elements of the proposals with agency staff in small groups. The "open-house" format of the public meetings, described below, will enhance the ability of the public to engage effectively in the rulemaking process, while respecting their valuable time and resources.

Meeting Format

NMFS believes that the proposed hatchery listing policy and the subsequent proposed listing determinations for 27 West Coast ESUs of salmon and *O. mykiss* (see 69 FR 33101; June 14, 2004) are important to salmon recovery. Public engagement on these intimately related proposals will be combined into the same public meetings to make efficient use of the agency's and the public's time and resources.

Afternoon Practitioners' Sessions – Afternoon sessions (1:30 p.m. to 4:30 p.m.) will be provided for local practitioners and stakeholders involved with managing the ESA on a regular basis, including: tribal governments; forestry and agricultural interests; home builders and developers; the sport and commercial fishing community; the environmental community; the business community; utility and special districts; local government elected officials and their staff; other locally-based Federal and state agencies; and public interest groups. The structure of these afternoon meetings will be tailored to allow practitioners and NMFS staff to discuss the specific issues that are of local concern. Attendance at the afternoon sessions will be on a pre-registration basis. Information on attending the practitioners' afternoon sessions is available from NMFS upon request (see **FOR FURTHER INFORMATION CONTACT**, above) as well as on the Internet at *http://www.nwr.noaa.gov/AlseaResponse/meetings.html/*.

Evening Open House and Public Testimony – Evening "open house" sessions designed for broader public participation will be conducted on the same day as the afternoon practitioners' sessions. The "open house" format will provide the general public with an opportunity to meet with NMFS staff in small groups on specific topics in order to learn more about the proposals and their possible impacts on their communities. These evening meetings will also provide opportunities for the public to make formal recorded comments on the proposals. The preferred means of providing public comment for the official record is via written testimony prepared in advance of the meeting. In addition, blank "comment sheets" will be provided at the evening meetings for those without prepared written comments, and facilities will also be provided for recording oral testimony. The evening sessions will be open from 6:30 p.m to 9:30 p.m. Because these sessions will be designed as open houses where the public can move from "station" to "station" and discuss their particular interests with NMFS staff, members of the local community can come and go from the meeting as they please. For those who are interested, there will also be a short presentation on the proposed hatchery listing policy and the proposed listing determinations from NMFS beginning at 6:30 p.m. NMFS hopes that this format will allow busy community members to participate without necessarily attending the entire evening. Members of the public wishing to attend the evening open house meetings will receive the notification through advertising, NMFS Northwest Region's web page(*http://www.nwr.noaa.gov/AlseaResponse/meetings.html/*), and public notices published in their community. There is no need to register; just drop in anytime during the course of the evening event.

Meeting Dates & Locations

Public meetings, including both afternoon practitioners' (1:30 p.m. to 4:30 p.m.) and evening open house sessions (6:30 p.m. to 9:30 p.m.), will be held at eight locations in the Pacific Northwest from mid-September to mid-October. The specific dates and locations of these meetings are listed below:

(1) September 14, 2004, at the Chelan County Public Utility District (PUD) Auditorium, 327 N. Wenatchee Ave., Wenatchee, WA 98801.

(2) September 16, 2004, at the Red Lion Hotel Columbia Center, N. 1101 Columbia Center Blvd, Kennewick, WA 99336.

(3) September 22, 2004, at the Shilo Inn Hotel,536 SW Elizabeth, Newport, OR 97635.

(4) September 28, 2004, at the Stagecoach Inn, 201 Highway 93 North, Salmon, ID 83467.

(5) September 30, 2004, at the Red Lion Hotel, 621 21st St., Lewiston, ID 83501.

(6) October 5, 2004, at the Radisson Hotel (SeaTac Airport), 17001 Pacific Highway South, Seattle WA 98118.

(7) October 7, 2004, at Umpqua Community College, 1140 College Rd., Roseburg, OR 97470.

(8) October 13, 2004, at the Portland Building, 1120 SW 5th Ave, Portland, OR 97204.

Directions to the meeting locations can be obtained on the Internet at *http://www.nwr.noaa.gov/AlseaResponse/meetings.html/*. Dates and locations of public hearings to be held in California will be announced in a subsequent Federal Register notice.

In scheduling these public meetings, NMFS has anticipated that many affected stakeholders and members of the public may prefer to discuss the proposed hatchery listing policy directly with staff during the public comment period. These public meetings are not the only opportunity for the public to provide input on this proposal. The public and stakeholders are encouraged to continue to comment and provide input to NMFS on the proposals (via correspondence, e-mail, and the Internet; see **ADDRESSES**, above) up until the scheduled close of the comment period on October 20, 2004.

References

Copies of the **Federal Register** notices and related materials cited in this document are available on the Internet at *http://nwr.noaa.gov*, or upon request (see **ADDRESSES** section above).

Authority: 16 U.S.C. 1531 *et seq.*

Dated: August 25, 2004.

Donna Wieting,

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

[FR Doc. 04–19870 Filed 8–30–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 051804D]

Notice of Availability of the Draft Revised Recovery Plan for the North Atlantic Right Whale

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

ACTION: Notice of availability; request for comments.

SUMMARY: NMFS announces the availability for public review of the draft revised Recovery Plan (Plan) for the North Atlantic Right Whale (*Eubalaena glacialis*). NMFS is soliciting review and comment from the public and all

interested parties on the Plan, and will consider all substantive comments received during the review period before submitting the Plan for final approval.

DATES: Written comments on the revised Recovery Plan must be received no later than 5 p.m., eastern standard time, on November 1, 2004.

ADDRESSES: Written comments should be sent to: Chief, Marine Mammal Conservation Division, Attn: North Atlantic Right Whale Recovery Plan, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. Comments may also be sent via e-mail to the following address: *Narw.Comments@noaa.gov*. Interested persons may obtain the Plan for review from the above address; the Plan is also available on-line from the Office of Protected Resources web site at the following URL: *http://www.nmfs.noaa.gov/pr/PR3/recovery.html*

FOR FURTHER INFORMATION CONTACT: Michael Payne, Chief, Marine Mammal Conservation Division, (301) 713–2322 x101, e-mail *michael.payne@noaa.gov*; or Phil Williams, Chief, Endangered Species Division, (301) 713–1401 x145, e-mail *phil.williams@noaa.gov*.

SUPPLEMENTARY INFORMATION: Recovery Plans (1) describe actions considered necessary for the conservation and recovery of species listed under the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 *et seq.*), (2) establish criteria for the downlisting or delisting of such species, and (3) estimate the time and costs required to implement recovery actions. The ESA requires the development of Recovery Plans for listed species unless such a plan would not promote the recovery of a particular species. Section 4(f) of the ESA, as amended in 1988, requires that public notice and an opportunity for public review and comment be provided during Recovery Plan development. NMFS will consider all substantive comments and information presented during the public comment period in the course of finalizing this Recovery Plan.

Right whales were listed as endangered under the Endangered Species Conservation Act in June 1970 (35 FR 8495). Right whales in the North Pacific and North Atlantic were until recently considered a single species (*E. glacialis*), while the southern right whale (*E. australis*) was considered a separate, but closely related species. The 1991 Recovery Plan for the Northern Right Whale (*E. glacialis*) addressed right whales throughout the northern hemisphere. However, recent genetic studies provide strong evidence of separate specific status for North Atlantic and North Pacific right whales, and accordingly have suggested changing the binomial for the North Pacific population. The set of taxonomic classifications put forth were accepted by the International Whaling Commission. NMFS revised the List of Threatened and Endangered Wildlife to reflect this on April 10, 2003 (68 FR 17560). The revised classifications are as follows: the North Atlantic right whale (*E. glacialis*); the North Pacific right whale (*E. japonica*); and the Southern right whale (*E. australis*). These classifications will be used for the purposes of this Plan, and for those of a separate plan being drafted for the North Pacific right whale. Therefore, this revised Plan addresses only status, recovery actions needed, and criteria for the North Atlantic right whale.

Historically depleted by commercial whaling, the North Atlantic right whale population at present numbers approximately 300 individuals, and is impacted both directly and indirectly by human activities primarily in the form of vessel collisions and entanglement in fishing gear. These impacts have contributed to a lack of recovery for the species.

A recovery plan was completed for the Northern right whale (*Eubalaena glacialis*) in 1991, which referred to the North Atlantic right whale as a population. NMFS has revised the Plan according to: public comments received, recent information, and a recently revised plan format. In particular, NMFS further refined recovery criteria for the species and has revised the Plan accordingly. Once finalized, NMFS will use this Plan to guide research and conservation activities designed to promote the recovery of North Atlantic right whales.

The Plan includes the following prioritized objectives to recover the North Atlantic right whale: (1) Minimize sources of human-caused death, injury, and disturbance; (2) develop demographically-based recovery criteria; (3) identify, characterize, protect, and monitor important habitats; (4) monitor the status and trends of abundance and distribution of the western North Atlantic right whale population; (5) and coordinate Federal, state, international, and private efforts to implement the Recovery Plan. The ultimate goal of the Plan is to promote the recovery of the North Atlantic right whale to a level sufficient to warrant its removal from the List of Endangered and Threatened Wildlife and Plants under the Act. The intermediate goal is to reclassify the species from endangered to threatened.

Criteria for reclassification of the North Atlantic right whale are included in the Plan. In summary, the North Atlantic right whale may be reclassified from endangered to threatened when all of the following have been met: (1) the population structure of right whales (including, but not limited to, such parameters as abundance, growth rate, age structure, gender ratios) is indicative of a biologically significant increasing population; (2) the population has increased for a period of 20 years at an average rate of increase of 2 percent per year or more; (3) all five listing factors are addressed; and (4) given current and projected conditions, the population has no more than a 1 percent chance of quasi-extinction in 100 years. For the purposes of the Plan, quasi-extinction is defined by NMFS as a small, critical population threshold whose lower boundary may be unacceptable for the continued survival of a species. For instance, this could be the population size at which factors such as demographics, inbreeding depression, or behavioral constraints prohibit survival (Ginzburg *et al.*, 1982 as cited in Burgman *et al.*, 1993).

Criteria for delisting the North Atlantic right whale are not included in the Plan because the current abundance of North Atlantic right whales is an order of magnitude less than an abundance at which NMFS would consider delisting the species, and decades of population growth likely would be required before the population could attain such an abundance. In addition, conditions related to delisting are now too distant and hypothetical to realistically develop specific criteria. Such criteria will be included in a future revision of the Recovery Plan well before the population is at a level when delisting becomes a reasonable decision.

Comments and Responses

Previous public comments have been incorporated into the current updated version of the Plan. NMFS published a notice of availability of a revised draft Recovery Plan for the western North Atlantic right whale (2001 draft Plan) in the **Federal Register** on July 11, 2001 (66 FR 36260) and extended the comment period on the draft Plan on August 22, 2001 (66 FR 44115). Comments were received from 15 individuals and organizations during the comment period. Reviewers' comments and NMFS' response to the comments are discussed in this document.

The majority of comments involved updates to, or modifications of, the introductory sections of the Plan on right whale distribution, abundance, and human impact. These sections have been modified accordingly. A number of commenters commended NMFS for preparing the revised Plan and indicated that the revision was an improvement over the current (prepared in 1991) Northern Right Whale Recovery Plan.

Comment 1: Many commenters suggested NMFS include specific actions and tasks in the Plan, particularly actions to reduce right whale fishing gear entanglements and ship collisions. With regard to reducing ship strikes, these suggested actions included, among others, such things as restricting ship speed where right whales occur; limiting ship traffic where right whales occur; requiring fixed shipping routes to and from east coast ports; and complete avoidance by ships of areas used by right whales for feeding, nursing, and traveling. With regard to reducing entanglement in fishing gear, recommendations for specific actions included, among others, such things as prohibiting all fishing operations in waters where right whales occur; requiring knotless buoy weak links; prohibiting single lobster traps and requiring single buoy lines to multiple lobster traps; elimination of all vertical lines and fixed gear that pose a threat of entanglement; requiring remote and time-release lines; and requiring the removal of lobster gear in areas where whales are sighted.

Response: NMFS has considered including these specific actions in the Plan. However, many of these specific measures are being identified and implemented through other processes. For example, NMFS has developed and published in the **Federal Register** an advance notice of proposed rulemaking with proposed regulatory measures to implement a comprehensive ship strike reduction strategy which includes a number of the actions identified by commenters (69 FR 30857, 1 June 2004; public comment period extended July 9, 2004 (69 FR 41446)). In addition, NMFS identifies, assesses, develops, and implements commercial fishing operations regulations through the Atlantic Large Whale Take Reduction Plan (50 CFR 229.32). Through this process and related processes, including consultations on Federal actions under section 7 of the ESA, fishing gear advisory groups, various workshops, and other means, NMFS has implemented a number of restrictions, and is contemplating or in the process of implementing others. Therefore, NMFS believes that the wording in the Plan is sufficiently rigorous without including specific measures being identified and implemented through other processes (e.g., specific types of changes to fishing operations). The Plan requires identifying means to: reduce the effects of human activities (i.e., entanglements and ship collisions), monitor the program being used and, if not sufficiently rigorous, implement more stringent measures to reduce or eliminate threats.

Comment 2: NMFS received comments recommending the removal of specific actions. Several commenters recommended deleting the action to assess intermodal transport to explore ways to reduce ship traffic in certain areas.

Response: NMFS agrees and the Plan has been modified. This action has been deleted.

Comment 3: Several commenters pointed out an inconsistency in the 2001 draft Plan regarding the inadequacy of existing regulatory mechanisms to protect right whales (one of the factors considered in listing or delisting a species). Specifically, the draft indicated that existing regulations were adequate, but further regulation may be needed.

Response: NMFS changed the recovery criteria in the Plan to address this comment.

Comment 4: With regard to the draft recovery criteria in the 2001 draft Plan, NMFS received few comments. One commenter stated ". . . the identified approach and criteria seem reasonable."

Response. NMFS has further refined recovery criteria for the species and has revised the Plan accordingly.

Comment 5: With regard to the recovery criteria, two commenters recommended using "generation-time" rather than years.

Response: NMFS recognizes this as an approach that has been used in developing some recovery criteria, however, information on age at sexual maturity and other potential measures of generation time is imprecisely known in right whales. In addition, adopting the use of generation time as a unit of time for a temporal unit would be counter to the conclusions of the workshop convened by NMFS in February 2001 to develop reclassification criteria for endangered large whale species and much of the scientific literature on this issue. The 100–year criteria is more conservative than generation time and, therefore, ultimately more protective of the severely depleted North Atlantic right whale.

Comment 6: A number of comments concerned the designation of priorities in the implementation schedule, as well as comments aimed at clarifying the content of the table of priorities. For example, the suggestion was made to elevate the task of identifying features of right whale habitat from priority 2 to 1.

Response: These suggestions have been accepted and changes have been made accordingly, while also adhering to recovery planning guidelines which provide that priority 1 recovery actions are "Actions that must be taken to prevent extinction or to prevent the species from declining irreversibly."

Comment 7: One commenter requested that the section on "Early Warning Surveys" (surveys that are used to determine the locations of right whales and to pass the sighting information onto mariners) be revised to indicate that (a) the main purpose of the flights is to warn mariners, and (b) that information on ship strike "near misses" be collected in a standardized way.

Response: These suggested changes have been made by incorporating the recommendations into specific tasks in the Recovery Program section of the Plan on reducing ship strikes.

Comment 8: Several commenters requested a change in the Plan to indicate that right whale photo-identification data and sighting and other information apropos to Geographic Information System studies be provided to curators of such information in a timely manner.

Response: NMFS has made these changes in the Recovery Program section of the Plan.

Comment 9: Comments were received regarding statements made in the Plan about U.S. Navy operations, specifically about the need for NMFS to have a better understanding of the types of activities undertaken by the Navy in waters where right whales occur.

Response: Portions of the Plan have been modified to address the concern in this comment. For example, the threats section of the Plan on "Underwater Explosive Activities" now states "As described in Appendix A, the Navy has consulted with NMFS under section 7 of the ESA on the potential effect of some of its operations on protected species. In addition, all Navy operations that introduce loud sounds into the marine environment are subject, under the MMPA, to application for and provision of small take letters of authorization from NMFS. The Navy has made a number of significant modifications to its operations to facilitate protection of right whales in their critical habitat in the SEUS. The NMFS and Navy both

understand the need to continue to keep an open dialogue, or possible formal or informal section 7 consultations, with regard to Navy operations and to evaluate ways to mitigate possible environmental impacts of the operations throughout the eastern seaboard."

Comment 10: Several commenters indicated that voluntary measures (as identified in the 2001 draft Plan) to reduce ship strikes would not be adhered to by the shipping industry, and therefore, should not be considered.

Response: NMFS has modified the Plan by removing the task to implement voluntary ship strike reduction measures. See also response to Comment 1 regarding an advance notice of proposed rulemaking on ship strike reduction measures.

Comment 11: Several commenters indicated that the section of the Plan on compliance and enforcement of various right whale protective regulations needed to be amended and expanded.

Response: Changes have been made to the section on enforcement in the Recovery Program section of the Plan by adding a task to: "Review and assess the implementation and efficacy of the enforcement programs and take steps to improve the enforcement measures if deficiencies are identified." The level of support of this element has been increased in the implementation plan.

Comment 12: Comments from two people indicated that an assessment of the boundaries of critical habitat in the northeast U.S., as well as those in the southeast U.S., should be made.

Response: The Plan has been revised in the Recovery Program section to address the concerns raised in this comment.

Public Comments Solicited

NMFS solicits written comments on the draft Revised Recovery Plan. All substantive comments received by the data specified above will be considered prior to final approval of the Plan.

Authority

The authority for this action is section 4(f) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*)

Literature Cited

Burgman, M.A., S. Ferson, and H.R. Akcakaya. 1993. *Risk Assessment in Conservation Biology*. Chapman & Hall, University Press, Cambridge. p14.

Ginzburg, L.R., L.B. Slobodkin, K. Johnson, and A.G. Bindman. 1982. Quasiextinction probabilities as a measure of impact on population growth. *Risk Analysis*. 21: 171–81.

National Marine Fisheries Service. 1991. Recovery Plan for the Northern Right Whale (*Eubalaena glacialis*). Prepared by the Right Whale Recovery Team for the National Marine Fisheries Service, Silver Spring, Maryland. 86pp.

Dated: August 25, 2004.

Donna Wieting,

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

[FR Doc. 04–19775 Filed 8–30–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 040517149–4242–02; I.D. 050304C]

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the United States; Essential Fish Habitat; Re-opening Comment Period

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

ACTION: Notice to re-open comment period; receipt of rulemaking petition to protect deep-sea coral and sponge habitat; request for comments.

SUMMARY: The NMFS announced in the **Federal Register** on June 14, 2004, the receipt of a petition for rulemaking under the Administrative Procedure Act. Oceana, a non-governmental organization, petitioned the U.S. Department of Commerce to promulgate a rule to protect deep-sea coral and sponge habitats in the U.S. Exclusive Economic Zone (EEZ). The public comment period for that notice closed August 13, 2004. By this notice, NMFS announces the re-opening of the public comment period on the rulemaking petition to protect deep-sea coral and sponge habitat and to ensure thorough public comment.

DATES: Written comments will be accepted through October 15, 2004.

Comments that were received between August 13, 2004, and August 31, 2004 will also be deemed timely received.

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

- E-mail: *DSC-EFH@noaa.gov*. Include in the subject line of the e-mail comment the following identifier: DSC Petition.
- Mail: Rolland A. Schmitten, Director, Office of Habitat Conservation, NOAA National Marine Fisheries Service, F/HC, 1315 East-West Highway, Silver Spring, MD 20910.
- Fax: (301) 427–2572.

The complete text of Oceana's petition is available via the internet at the following web address: *http://www.nmfs.noaa.gov/habitat/habitatconservation/DSC_petition/Oceana*. In addition, copies of this petition may be obtained by contacting NMFS at the above address.

FOR FURTHER INFORMATION CONTACT: Tom Hourigan at 301–713–3459 ext. 122.

SUPPLEMENTARY INFORMATION: On June 14, 2004 (69 FR 32991), NMFS announced the receipt of a rulemaking petition to protect deep-sea coral and sponge habitat and requested comments until August 13, 2004. NMFS received a request to extend the public comment period to allow more time to review of existing science and to address the petition's requests. NMFS decided to re-open the comment period from August 31, 2004 to October 15, 2004 to allow Fishery Management Councils, Federal agencies, science organizations, and the general public more time to consider the petition's recommendations to ensure thorough public comment. Comments that were received between August 13, 2004, and August 31, 2004 will also be deemed timely received.

The petition filed by Oceana states that deep-sea coral and sponge habitat are comprised of long-lived, slow-growing organisms that are especially vulnerable to destructive fishing practices, such as the use of bottom-tending mobile fishing gear. The petition cites that without immediate protection, many of these sensitive deep-sea coral and sponge habitats will suffer irreparable harm.

The petition cites specific legal responsibilities of NMFS for essential fish habitat (EFH) and Habitat Areas of Particular Concern (HAPCs) under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the EFH guidelines at 50 CFR 600, subparts J and K, and concludes that NMFS must: identify and describe deep-sea coral and sponge habitats as EFH; designate some, if not all, of these habitat types as HAPCs; take appropriate measures to minimize to the extent practicable adverse fishing effects on this EFH; and protect such habitat from other forms of destructive activity. The petition gives a short overview of known deep-sea coral and sponge habitat in regions off the mainland United States, including areas known in the Alaska, Pacific, Northeast and Mid-Atlantic, Southeast, and Gulf of Mexico fishery management regions. The petition asserts that deep-sea coral and sponge habitats satisfy the definition of EFH in the Magnuson-

Stevens Act and concludes that such areas must be identified and described as EFH under the relevant FMPs. In addition, the petition states that deep-sea coral and sponge habitats should be identified as HAPCs because they meet the definition of HAPC and satisfy one or more of the criteria set forth in the EFH guidelines for creating HAPCs. Further, the petition argues that the Magnuson-Stevens Act requires NMFS to protect areas identified as EFH and HAPC and that such protection, as articulated in the petition, is "practicable." Finally, the petition asserts that deep-sea coral and sponge habitats must be protected for its own sake, meaning if the Secretary does not protect such habitats through existing FMPs, the Magnuson-Stevens Act requires the Secretary and the Regional Fishery Management Councils to develop FMPs specifically for the protection of deep-sea corals and sponges.

The petition specifically requests that NMFS immediately initiate rulemaking to protect deep-sea coral and sponge habitats in the U.S. EEZ by taking the following measures:

1. Identify, map, and list all known sponge areas containing high concentrations of deep-sea coral and sponge habitats;
2. Designate all known areas containing high concentrations of deep-sea coral and sponge habitat as both EFH and 'habitat areas of particular concern' (HAPC) and close these HAPC to bottom trawling;
3. Identify all areas not fished within the last three years with bottom-tending mobile fishing gear, and close these areas to bottom trawling;
4. Monitor bycatch to identify areas of deep-sea coral and sponge habitat that are currently fished, establish appropriate limits or caps on bycatch of deep-sea coral and sponge habitat, and immediately close areas to bottom trawling where these limits or caps are reached, until such time as the areas can be mapped, identified as EFH and HAPC, and permanently protected;
5. Establish a program to identify new areas containing high concentrations of deep-sea coral and sponge habitat through bycatch monitoring, surveys, and other methods, designate these newly discovered areas as EFH and HAPC, and close them to bottom trawling;
6. Enhance monitoring infrastructure, including observer coverage, vessel monitoring systems, and electronic logbooks for vessel fishing in areas where they might encounter high concentrations of deep-sea coral and sponge habitat (including encountering HAPC);
7. Increase enforcement and penalties to prevent deliberate destruction of deep-sea coral and sponge habitat and illegal fishing in already closed areas; and
8. Fund and initiate research to identify, protect, and restore damaged deep-sea coral and sponge habitat.

The exact and complete assertions of legal responsibilities under Federal law are contained in the text of Oceana's petition, which is available via the internet at the following NMFS web address: *http://www.nmfs.noaa.gov/habitat/habitatconservation/DSC_petition/Oceana*. Also, anyone may obtain a copy of this petition by contacting NMFS (see **ADDRESSES**).

The Assistant Administrator for Fisheries, NOAA has determined that the petition contains enough information to enable NMFS to consider the substance of the petition. NMFS will consider public comments received in determining whether to proceed with the development of the regulations requested by Oceana. Additionally, NMFS, by separate letter, has requested each Regional Fishery Management Council assist in evaluating this petition. Upon determining whether to initiate the requested rulemaking, the Assistant Administrator for Fisheries, NOAA, will publish in the **Federal Register** a notice of the agency's final disposition of the Oceana petition request.

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

Dated: August 24, 2004.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 04–19774 Filed 8–30–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 082404B]

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP)

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

ACTION: Notification of change of final finding of dolphin-safe tuna.

SUMMARY: This Notice announces that on August 9, 2004, the United States District Court for the Northern District of California issued an order which set aside the final finding made on December 31, 2002, by the Assistant Administrator for Fisheries, NMFS, (Assistant Administrator). Under the terms of this Order, the labeling standard for "dolphin-safe" tuna shall be governed by the provisions of the Dolphin Protection Consumer Information Act. Under that provision, tuna are deemed dolphin safe if "no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and no dolphins were killed or seriously injured during the sets in which the tuna were caught."

DATES: Effective on August 9, 2004.

FOR FURTHER INFORMATION CONTACT: Jeremy Rusin, Office of Protected Resources, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, California, 90802–4213; Phone 562–980–3248; Fax 562–980–4027.

SUPPLEMENTARY INFORMATION: The Dolphin Protection Consumer Information Act (DPCIA) (16 U.S.C. 1385), as amended by the International Dolphin Conservation Program Act, requires the Secretary of Commerce (Secretary) to make a finding based on the results of scientific research, information obtained under the International Dolphin Conservation Program, and any other relevant information, as to whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a "significant adverse impact" on any depleted dolphin stock in the eastern tropical Pacific Ocean (ETP). On December 31, 2002, the Assistant Administrator, on behalf of the Secretary of Commerce, issued a final finding under section (g)(2) of the DPCIA, and published notification in the **Federal Register** on January 15, 2003 (68 FR 2010).

In the final finding, the Assistant Administrator determined that the chase and intentional deployment on or encirclement of dolphins with purse seine nets is not having a significant adverse impact on depleted dolphin stocks in the ETP. The final finding changed the definition of "dolphin-safe" for tuna products containing tuna harvested in the ETP by purse seine vessels with carrying capacity greater than 400 short tons and sold in the United States. Based upon the final finding, the definition of dolphin-safe for such tuna is governed by the provisions of section (h)(1) of the DPCIA. Under this definition, "dolphin-safe" means that dolphins can be encircled or chased during the trip in which tuna was harvested, but that no dolphins can be killed or seriously injured in the set in which the tuna was harvested.

On December 31, 2002, Earth Island Institute, eight organizations, and one individual person (Plaintiffs), filed a complaint in the United States District Court for the Northern District of

California. This complaint challenged the Assistant Administrator's final finding and sought to enjoin any change in the dolphin-safe labeling standard for tuna harvested with purse seine nets.

On January 21, 2003, the Court, at the request of all parties, issued an order that stayed the implementation of the final finding. Under the terms of the order, the labeling standard for "dolphin-safe" tuna was governed by the provisions of (h)(2) of the DPCIA. Under that provision, tuna are deemed dolphin safe if "no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and no dolphins were killed or seriously injured during the sets in which the tuna were caught." The terms of the order further provided that this labeling standard would remain in effect for 90 days from the date of the order or until the Court issued a ruling on a motion for a preliminary injunction, whichever was earlier.

On April 10, 2003, the Court granted the Plaintiff's motion for preliminary injunction. Under the Court's order, NMFS was prohibited from taking any action under the DPCIA to allow any tuna product to be labeled as "dolphin-safe" that was harvested using purse seine nets intentionally set on dolphins in the ETP. As a result of the terms of the Court's order, the definition of dolphin-safe continued to mean that Ano tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and no dolphins were killed or seriously injured during the sets in which the tuna were caught" until further order of the Court.

On May 24, 2004, all parties simultaneously motioned the Court for summary judgment. On August 9, 2004, the Court ruled on the motions for summary judgment and found that the final finding made by the Assistant Administrator on December 31, 2002, was "arbitrary, capricious, an abuse of discretion and contrary to law pursuant to the Administrative Procedure Act, 5 U.S.C. 706(c)." Under the terms of this order, the labeling standard for "dolphin-safe" tuna shall be governed by the provisions of (h)(2) of the DPCIA. Under that provision, tuna are deemed dolphin safe if "no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and no dolphins were killed or seriously injured during the sets in which the tuna were caught."

Dated: August 25, 2004.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 04–19869 Filed 8–30–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 082304B]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) will hold a three-day Council meeting on September 14–16, 2004, to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Tuesday, September 14, 2004 beginning at 9 a.m. and on Wednesday and Thursday, September 15 and 16, beginning at 8:30 a.m.

ADDRESSES: The meeting will be held at the Holiday Inn Express, 110 Middle Street, Fairhaven, MA 02719; telephone: (508) 997–1281.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Tuesday, September 14, 2004

Following introductions, the Council will hold elections for 2004–05 officers. The Council's Habitat/Marine Protected Area Committee will present its recommendations for essential fish habitat measures to be included in Amendment 2 to the Monkfish Fishery Management Plan (FMP). The recommendations will be followed by a brief public comment period during which any member of the public may bring forward items relevant to Council business but not otherwise listed on the agenda for this meeting. The remainder of the day will be spent on sea scallop issues. During the Scallop Committee Report the Council will receive management advice from the Scallop Plan Development Team based on the most recent scallop assessment and discuss the possible initiation of a special framework adjustment to address new management issues during the 2005 fishing year. Management issues under consideration relate to overfishing, sea turtle bycatch mitigation measures, actions to cap or reduce general category scallop landings and/or improve reporting, and measures that would change the 2005 open area days-at-sea allocation as the result of management actions taken in Framework Adjustment 16/39.

Wednesday, September 15, 2004

During the Wednesday morning session the Council will receive reports from the Council Chairman and Executive Director, the NMFS Regional Administrator, Northeast Fisheries Science Center and Mid-Atlantic Fishery Management Council liaisons, NOAA General Counsel and representatives of the U.S. Coast Guard, NMFS Enforcement and the Atlantic States Marine Fisheries Commission. The Monkfish Committee will then ask for final approval of measures to be included in Amendment 2 to the Monkfish FMP. This will occur following review and discussion of Monkfish Advisory Panel and Oversight Committee recommendations and public comments submitted to the Council. This joint FMP also requires approval by the Mid-Atlantic Fishery Management Council prior to the submission of final documents.

Thursday, September 16, 2004

The Research Steering Committee will ask the Council for approval of criteria/standards for determining whether research projects have undergone a sufficient technical review before information is used for management purposes. Other recommendations to be forwarded to the Council address day-at-sea use, the disposition of catch and vessel compensation when boats are engaged in cooperative research. The Red Crab Committee will offer its recommendations for specifications for the 2005 fishing year and for Framework Adjustment 1 to the FMP, an action that could modify the annual review and specification process. The Groundfish Committee will provide an update on the development of Framework Adjustment 40B to the Northeast Multispecies FMP including a review of proposed management measures and grouping of measures into alternatives. In addition, there will be a briefing of recent reports of juvenile haddock incidental catches in the herring mid-water trawl fishery. The Council's Transboundary Management Guidance Committee will report on its recent

meeting and offer recommendations for 2005 Total Allowable Catches for yellowtail flounder, cod and haddock in the U.S./Canada area and on other related management issues. The Council meeting will adjourn following after any other outstanding business is addressed.

Although other non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subjects of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided that the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: August 26, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E4–1981 Filed 8–30–04; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Request for Public Comments on a Commercial Availability Request under the Andean Trade Promotion and Drug Eradication Act (ATPDEA)

August 26, 2004.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Request for public comments concerning a request for a determination that certain polyester monofilament yarn, for use in women's and children's apparel, cannot be supplied by the domestic industry in commercial quantities in a timely manner under the ATPDEA.

SUMMARY: On August 23, 2004, the Chairman of CITA received a petition from Textiles Erre Emme Ltda. of Bogota, Colombia, alleging that certain polyester monofilament texturized, raw, white yarn, of denier 20D/F1, classified in subheading 5402.33.30 of the Harmonized Tariff Schedule of the United States (HTSUS), for use in women's and children's apparel, cannot be supplied by the domestic industry in commercial quantities in a timely manner. It requests that such apparel made from such yarn be eligible for preferential treatment under the ATPDEA. CITA hereby solicits public comments on this request, in particular with regard to whether such yarn can be supplied by the domestic industry in commercial quantities in a timely manner. Comments must be submitted by September 15, 2004 to the Chairman, Committee for the Implementation of Textile Agreements, Room 3001, United States Department of Commerce, 14th and Constitution Avenue, N.W. Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: Shikha Bhatnagar, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3821.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 (b)(3)(B)(ii) of the ATPDEA, Presidential Proclamation 7616 of October 31, 2002, Executive Order 13277 of November 19, 2002, and the United States Trade Representative's Notice of Further Assignment of Functions of November 25, 2002.

BACKGROUND:

The ATPDEA provides for quota- and duty-free treatment for qualifying textile and apparel products. Such treatment is generally limited to products manufactured from yarns and fabrics formed in the United States or a beneficiary country. The ATPDEA also provides for quota- and duty-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more ATPDEA beneficiary countries from fabric or yarn that is not formed in the United States or a beneficiary country, if it has been determined that such fabric or yarn cannot be supplied by the domestic industry in commercial quantities in a timely manner. Pursuant to Executive Order No. 13277 (67 FR 70305) and the United States Trade Representative's Notice of Redelegation of Authority and Further Assignment of Functions (67 FR 71606), the President's authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the ATPDEA has been delegated to CITA.

On August 23, 2004, the Chairman of CITA received a petition from Textiles Erre Emme Ltda of Bogota, Colombia, alleging that certain polyester monofilament texturized, raw, white yarn, of denier 20D/F1, classified in subheading 5402.33.30 of the Harmonized Tariff Schedule of the United States (HTSUS), for use in women's and children's apparel, cannot be supplied by the domestic industry in commercial quantities in a timely manner and requesting quota- and duty-free treatment under the ATPDEA for such apparel that are woven or knit in one or more ATPDEA beneficiary countries from such yarn.

CITA is soliciting public comments regarding this request, particularly with respect to whether this yarn can be supplied by the domestic industry in commercial quantities in a timely manner. Also relevant is whether other yarns that are supplied by the domestic industry in commercial quantities in a timely manner are substitutable for these yarns for purposes of the intended use. Comments must be received no later than September 15, 2004. Interested persons are invited to submit six copies of such comments or information to the Chairman, Committee for the Implementation of Textile Agreements, room 3100, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, DC 20230.

If a comment alleges that this yarn can be supplied by the domestic industry in commercial quantities in a timely manner, CITA will closely review any supporting documentation, such as a signed statement by a manufacturer of the yarns stating that it produces the yarns that are the subject of the request, including the quantities that can be supplied and the time necessary to fill an order, as well as any relevant information regarding past production.

CITA will protect any business confidential information that is marked "business confidential" from disclosure to the full extent permitted by law. CITA will make available to the public non-confidential versions of the request and non-confidential versions of any public comments received with respect to a request in room 3100 in the Herbert Hoover Building, 14th and Constitution Avenue, N.W., Washington, DC 20230. Persons submitting comments on a request are encouraged to include a non-confidential version and a non-confidential summary.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 04–19904 Filed 8–27–04; 11:32 am]

BILLING CODE 3510–DR–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Request for Public Comments on Commercial Availability, Petition under the United States - Caribbean Basin Trade Partnership Act (CBTPA)

August 26, 2004.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Request for public comments concerning two petitions for determinations that certain woven fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA.

SUMMARY: On August 24, 2004, the Chairman of CITA received two petitions from Sharretts, Paley, Carter & Blauvelt, P.C., on behalf of Fishman & Tobin, alleging that certain woven fabrics, of the specifications detailed below, classified in the indicated subheadings of the Harmonized Tariff Schedule of the United States (HTSUS), cannot be supplied by the domestic industry in commercial quantities in a timely manner. The petitions request that apparel articles of such fabrics assembled in one or more CBTPA beneficiary countries be eligible for preferential treatment under the CBTPA. CITA hereby solicits public comments on these petitions, in particular with regard to whether these fabrics can be supplied by the domestic industry in commercial quantities in a timely manner. Comments must be submitted by September 15, 2004 to the Chairman, Committee for the Implementation of Textile Agreements, Room 3001, United States Department of Commerce, 14th and Constitution, N.W., Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: Martin J. Walsh, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-2818.

SUPPLEMENTARY INFORMATION:

Authority: Section 213(b)(2)(A)(v)(II) of the CBERA, as added by Section 211(a) of the CBTPA; Section 6 of Executive Order No. 13191 of January 17, 2001.

BACKGROUND:

The CBTPA provides for quota- and duty-free treatment for qualifying textile and apparel products. Such treatment is generally limited to products manufactured from yarns or fabrics formed in the United States. The CBTPA also provides for quota- and duty-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more CBTPA beneficiary countries from fabric or yarn that is not formed in the United States, if it has been determined that such fabric or yarn cannot be supplied by the domestic industry in commercial quantities in a timely manner. In Executive Order No. 13191, the President delegated to CITA the authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA and directed CITA to establish procedures to ensure appropriate public participation in any such determination. On March 6, 2001, CITA published procedures that it will follow in considering requests. (66 FR 13502).

On August 24, 2004, the Chairman of CITA received two petitions on behalf of Fishman & Tobin alleging that certain woven fabrics, of the specifications detailed below, classified in the indicated HTSUS subheadings, cannot be supplied by the domestic industry in commercial quantities in a timely manner and requesting quota- and duty-free treatment under the CBTPA for apparel articles that are cut and sewn in one or more CBTPA beneficiary countries from such fabrics.

Specifications:

Fabric 1	**Fancy polyester/rayon blend suiting fabric**
HTS Subheading:	5515.11.00.05
Fiber Content:	65% polyester/35% rayon
Width:	58/59 inches
Construction:	Made on the worsted wool system with two-ply combed and ring spun yarns in the warp and fill
Dyeing:	Yarns are made from dyed fibers
Fabric 2	**Fancy polyester/rayon blend suiting fabric**
HTS Subheading:	5515.11.00.05
Fiber Content:	65% polyester/35% rayon
Width:	58/59 inches
Construction:	Made on the synthetic system with two-ply carded and ring spun yarns in the warp and fill
Dyeing:	Yarns are made from dyed fibers

CITA is soliciting public comments regarding these requests, particularly with respect to whether these fabrics can be supplied by the domestic industry in commercial quantities in a timely manner. Also relevant is whether other fabrics that are supplied by the domestic industry in commercial quantities in a timely manner are substitutable for the fabric for purposes of the intended use. Comments must be received no later than September 15, 2004. Interested persons are invited to submit six copies of such comments or information to the Chairman, Committee for the Implementation of Textile Agreements, room 3100, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, DC 20230.

If a comment alleges that this fabric can be supplied by the domestic industry in commercial quantities in a timely manner, CITA will closely review any supporting documentation, such as a signed statement by a manufacturer of the fabric stating that it produces the fabric that is the subject of the request, including the quantities that can be supplied and the time necessary to fill an order, as well as any relevant information regarding past production.

CITA will protect any business confidential information that is marked "business confidential" from disclosure to the full extent permitted by law. CITA will make available to the public non-confidential versions of the request and non-confidential versions of any public comments received with respect to a request in room 3100 in the Herbert Hoover Building, 14th and Constitution Avenue, N.W., Washington, DC 20230. Persons submitting comments on a request are encouraged to include a non-confidential version and a non-confidential summary.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 04–19905 Filed 8–27–04; 11:32 am]

BILLING CODE 3510–DR–S

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden; it includes the actual data collection instruments [if any].

DATES: Comments must be submitted on or before September 30, 2004.

FOR FURTHER INFORMATION OR A COPY CONTACT: John P. Dolan at (202) 418–5220; Fax: (202) 418–5524; e-mail: *mailto:jdolan@cftc.gov*

lmauldin@cftc.gov and refer to OMB Control No. 3038–0025.

SUPPLEMENTARY INFORMATION:

Title: Practice by Former Members and Employees of the Commission (OMB Control No. 3038–0025). This is a request for extension of a currently approved information collection.

Abstract: Commission Rule 140.735–6 governs the practice before the Commission of former members and employees of the Commission and is intended to ensure that the Commission is aware of any existing conflict of interest. The rule generally requires former members and employees who are employed or retained to represent any person before the Commission within two years of the termination of their CFTC employment to file a brief written statement with the Commission's Office of General Counsel. The proposed rule was promulgated pursuant to the Commission's rulemaking authority contained in Section 8a(5) of the Commodity Exchange Act, 7 U.S.C. 12a(5) (1994), as amended.

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 the CFTC's regulations were published on December 30, 1981. See 46 FR 63035 (Dec. 30, 1981). The **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published on June 9, 2004 (69 FR 32325–02).

Burden Statement: The respondent burden for this collection is estimated to average .10 hours per response to file the brief written statement. This estimate 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; train personnel to be able to respond to a collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: 3.

Estimated Number of Responses: 4.5.

Estimated Total Annual Burden on Respondents: .10 hours.

Frequency of Collection: On occasion.

Send comments regarding the burden estimated or any other aspect of the information collection, including suggestions for reducing the burden, to the addresses listed below. Please refer to OMB Control No. 3038–0025 in any correspondence.

John P. Dolan, Office of General Counsel, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581 and

Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for CFTC, 725 17th Street, Washington, DC 20503.

Dated: August 25, 2004.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–19860 Filed 8–30–04: 8:45 am]

BILLING CODE 6351–01–M

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 04–C0005]

RRK Holdings, Inc., Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the Federal Register in accordance with the terms of 16 CFR 1118.20. Published below is a provisionally-accepted Settlement Agreement with RRK Holdings, Inc., containing a civil penalty of $100,000.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by September 15, 2004.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 04–C0005, Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

FOR FURTHER INFORMATION CONTACT: Michelle Faust Gillice, Trial Attorney, Office of Compliance, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–7667.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: August 25, 2004.

Todd A. Stevenson,

Secretary.

In the Matter of RRK Holdings. Inc.; Settlement Agreement and Order

1. RRK Holdings, Inc., (hereinafter "Respondent") formerly known as Roto Zip Tool Corporation (hereinafter "Roto Zip") enters into this Settlement Agreement and Order (hereinafter, "Settlement Agreement" or "Agreement") with the staff of the Consumer Product Safety Commission (the "Commission"), and agrees to the entry of the attached Order incorporated by reference herein. The Settlement Agreement resolves the Commission staff's allegations set forth below.

I. The Parties

2. The Commission is an independent federal regulatory commission responsible for the enforcement of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. 2051 *et seq.*

3. Respondent, established in September of 1977 as Roto Zip Tool Corporation, is organized and existing under the laws of the State of Wisconsin. Its principal office is located at 4524 Blue Mounds Trail, Black Earth, Wisconsin 53515. On August 1, 2003, Roto Zip sold all of its assets to the Robert Bosch Tool Corporation and subsequently ceased operations. Roto Zip was renamed RRK Holdings, Inc.

II. Staff Allegations

4. Between 1999 and October 2001, Respondent manufactured and distributed approximately 1.4 million spiral saws under the model names Revolution, Rebel and Solaris. The spiral saws are hand-held power tools with interchangeable spiral bits. The Rebel was manufactured for Respondent by two different companies, SB Power Tools and Scientific Molding Corporation, Ltd. (hereinafter "SMC"). The Revolution and Solaris were manufactured exclusively by SMC.

5. The saws were sold to and/or used by consumers for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise and are, therefore, "consumer products" as defined in section 3(a)(1) of the CPSA, 15 U.S.C. 2052(a)(1). Roto Zip was a "manufacturer" and "distributor" of the spiral saws which were "distributed into commerce" as those terms are defined in sections 3(a)(4), (5), (11) and (12) of the CPSA, 15 U.S.C. 2052(a)(4), (5), (11) and (12).

6. Certain Revolution, Rebel and Solaris spiral saws exhibited a loose fit between the handle and the tool body. The loose fit was a result of variations

in the placement of the housing receptacle on the tool body and the length of the mating stud on the handle. The spiral saws are defective because the handle, if loose, could detach from the body of the saw while the saw is in use. The falling saw could cause lacerations and other injuries to consumers.

7. In the fall of 2000, Respondent began receiving notice of saws detaching from the handles. The precise number of detaching incidents in 2000 is not available because Respondent recorded such incidents under the general term "broken handle". Between January 1, 2001 and October 23, 2001 (the date upon which Respondent submitted a full report to the Commission), Respondent had received notice of at least 235 alleged incidents of saws detaching from handles. (This number of incidents is in addition to numerous reports of the handle being too loose).

8. Between the fall of 2000 and October 23, 2001, Respondent received notice of twenty injuries alleged to be due to the saw detaching from the handle while the saw was in use. Several consumers received lacerations requiring sutures to hands and legs, and one report where a consumer allegedly received serious laceration injuries necessitating surgery.

9. In February of 2001, Respondent determined that the handles on Rebel models manufactured by SB Power Tools were too loose and required that SB Power Tools modify the product for a tighter fit. However, Respondent continued to receive complaints about the saw falling off the handles. As a result, Respondent investigated and determined that the location of the receptacle housing in the tool body and the length of the mating stud were not uniform. On March 20, 2001, Respondent made a design change to all three spiral saw models and made changes to quality control to require a visual inspection and a tolerance test of every saw. About the same time, Respondent asked SMC to modify its inventory. By the end of March 2001, Respondent had received 81 spiral saw warranty returns due to the saws detaching.

10. On September 11, 2001, the Commission conducted an establishment inspection of Respondent's headquarters in response to incident reports it had received. Following that inspection, Respondent filed a full report pursuant to section 15(b) of the CPSA on October 23, 2001.

11. By the time Respondent made design changes on March 29, 2001, it had obtained information which reasonably supported the conclusion that the Revolution, Solaris and Rebel spiral saws contained a defect which could create a substantial product hazard or created and unreasonable risk of serious injury or death, but failed to report such information in a timely manner to the Commission as required by sections 15(b)(2) and (3) of the CPSA, 15 U.S.C. 2064(b)(2), (3).

12. By failing to provide the information to the Commission in a timely manner as required by section 15(b) of the CPSA, 15 U.S.C. 2064(b), Respondent violated 19(a)(4) of the CPSA, 15 U.S.C. 2068(a)(4).

13. Respondent committed this failure to report to the Commission "knowingly" as the term "knowingly" is defined in section 20(d) of the CPSA, 15 U.S.C. 2069(d),thus, subjecting Respondent to civil penalties under section 20 of the CPSA, 15 U.S.C. 2069.

III. Response of RRK Holdings, Inc.

15. Respondent denies the staff's allegations in paragraphs 6 through 10 that the spiral saws were defective and that it violated the CPSA as set forth in paragraphs 11 through 13. In settling this matter, Respondent does not admit any fault, liability or statutory or regulatory violation.

IV. Agreement of the Parties

16. The Consumer Product Safety Commission has jurisdiction over this matter and over Respondent under the consumer Product Safety Act, 15 U.S.C. 2051 *et. seq.*

17. Respondent agrees to be bound by and comply with this Settlement Agreement and Order.

18. This Agreement is entered into for settlement purposes only and does not constitute an admission by Respondent or a determination by the Commission that Respondent knowingly violated the CPSA's reporting requirement.

19. In settlement of the staff's allegations, Respondent agrees to pay a civil penalty of one hundred thousand and 00/100 dollars ($100,000.00), in full settlement of this matter, and payable within twenty (20) calendar days of receiving service of the final Settlement Agreement and Order.

20. Upon final acceptance of this Agreement by the Commission and issuance of the Final Order, Respondent knowingly, voluntarily, and completely waives any rights it may have in this matter (1) to an administrative hearing, (2) to judicial review or other challenge or contest of the validity of the Commission's actions, (3) to a determination by the Commission as to whether Respondent failed to comply with CPSA and the underlying regulations, (4) to a statement of findings of fact and conclusions of law and (5) to any claims under the Equal Access to Justice Act.

21. Upon provisional acceptance of this Agreement by the Commission, this Agreement shall be placed on the public record and shall be published in the **Federal Register** in accordance with the procedures set forth in 16 CFR 1118.20(e). If the Commission does not receive any written objections within 15 days, the Agreement will be deemed finally accepted on the 16th day after the date it is published in the **Federal Register**.

22. The Commission may publicize the terms of the Settlement Agreement and Order.

23. The Commission's Order in this matter is issued under the provisions of the CPSA, 15 U.S.C. 2051 *et seq.* Violation of this Order may subject Respondent to appropriate legal action.

24. This Settlement Agreement may be used in interpreting the Order. Agreements, understandings, representations, or interpretations apart from those contained in this Settlement Agreement and Order may not be used to vary or contradict its terms.

25. The provisions of this Settlement Agreement and Order shall apply to Respondent and each of its successors and assigns.

Dated: March 19, 2004.

RRK Holdings, Inc.

Robert K. Kopras,
Chief Executive Officer.

James F. Stern,
Respondent's Attorney.

Dated: August 25, 2004.

The U.S. Consumer Product Safety Commission

Alan H. Schoem,
Director, Office of Compliance.

Eric L. Stone,
Director, Legal Division, Office of Compliance.

Dated: August 25, 2004.

Michelle Faust Gillice.
Trial Attorney, Legal Division, Office of Compliance.

In the Matter of RRK Holdings, Inc.; Order

Upon consideration of the Settlement Agreement between Respondent RRK Holdings, Inc. and the staff of the Consumer Product Safety Commission, and the Commission having jurisdiction over the subject matter and over RRK Holdings, Inc., and it appearing that the Settlement Agreement and Order is in the public interest, *it is Ordered* that the Settlement Agreement be, and hereby is, accepted and *it is Further Ordered* that RRK Holdings, Inc. shall pay the United

States Treasury a civil penalty in the amount of one hundred thousand and 00/100 dollars, ($100,000.00), payable within twenty (20) days of the service of the Final Order upon RRK Holdings, Inc.

Provisionally accepted and Provisional Order issued on the 25th day of August, 2004.

By Order of the Commission.

Todd A. Stevenson,
Secretary, Consumer Product Safety Commission.

[FR Doc. 04–19783 Filed 8–30–04; 8:45 am]
BILLING CODE 6355–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Extension of Currently Approved Collection; Comment Request

AGENCY: Office of the Secretary of Defense.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of Economic Adjustment announces the proposed extension of a public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by November 1, 2004.

ADDRESSES: Written comments and recommendations on the proposed information collection should be sent to the Director, Office of Economic Adjustment, 400 Army Navy Drive, Suite 200, Arlington, VA 22202–4704.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal, please write to the above address or call the Director, Office of Economic Adjustment (OEA) at (703) 604–6020.

Title and OMB Number: Base Realignment and Closure (BRAC) Military Base Reuse Status; OMB Number 0790–0003.

Needs and Uses: The information collection requirement is necessary to evaluate and measure program performance through civilian job creation and type of redevelopment at former military installations. The respondents to the annual survey (formerly semi-annual) are the single points of contact at the local level responsible for overseeing redevelopment efforts. This data is collected to provide OEA accurate information regarding civilian reuse of former military bases, and thus information on the results of its grant-making. The collected information is incorporated into an Annual Report to Congress.

Affected Public: Business or Other For-Profit; Federal Government; State, Local, or Tribal Government.

Annual Burden Hours: 75.

Number of Respondents: 75.

Responses Per Respondent: 1.

Average Burden Per Response: 1 hour.

Frequency: Annually.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The information collection is used for the Annual Report to Congress as authorized by the Defense Economic Adjustment, Diversification, Conversion, and Stabilization Act of 1990, Public Law 101–510, 10 USC 2391(c), and Executive Order 12788. The data form asks respondents to provide information for 8 data fields per parcel describing reuse of the base, including new tenants, zoning, leasing, square feet, and number of new jobs.

Dated: August 25, 2004.

L.M. Bynum,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–19811 Filed 8–30–04; 8:45 am]
BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by September 30, 2004.

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 223, Environment, Conservation and Occupational Safety, and related clauses at DFARS Part 252; OMB Number 0704–0272.

Type of Request: Extension.

Number of Respondents: 1,518.

Responses Per Respondent: 8.89.

Annual Responses: 13,507.

Average Burden Per Response: 0.70 hours.

Annual Burden Hours: 9,448.

Needs and Uses: This information collection requires that an offeror or contractor submit information to DoD in response to DFARS solicitation provisions and contract clauses relating to occupational safety. DoD contracting officers use this information to: (1) Verify compliance with requirements for labeling of hazardous materials; (2) ensure contractor compliance and monitor subcontractor compliance with DoD 4145.26–M, DoD Contractors' Safety Manual for Ammunition and Explosives, and minimize risk of mishaps; (3) identify the place of performance of all ammunition and explosives work; and (4) ensure contractor compliance and monitor subcontractor compliance with DoD 5100.76–M, Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives.

Affected Public: Business or Other for-Profit; Not-for-Profit Institutions.

Frequency: On Occasion.

Respondent's Obligation: Required To Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jacqueline Zeiher.

Written comments and recommendations on the proposed information collection should be sent to Ms. Zeiher at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/ESCD/Information Management Division, 1225 South Clark Street, Suite 504, Arlington, VA 22202–4326.

Dated: August 25, 2004.

L.M. Bynum,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–19812 Filed 8–30–04; 8:45 am]
BILLING CODE 5001–03–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by September 30, 2004.

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 244, Subcontracting Policies and Procedures; OMB Number 0704–0253.

Type of Request: Extension.

Number of Respondents: 90.

Responses Per Respondent: 1.

Annual Responses: 90.

Average Burden Per Response: 16 hours.

Annual Burden Hours: 1,440.

Need and Uses: Administrative contracting officers use this information in making decisions to grant, withhold, or withdraw purchasing system approval at the conclusion of a contractor purchasing system review. Withdrawal of purchasing system approval would necessitate Government consent to individual subcontracts.

Affected Public: Business or Other For-Profit; Not-For-Profit Institutions.

Frequency: On Occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jacqueline Zeiher.

Written comments and recommendations on the proposed information collection should be sent to Ms. Zeiher at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/ESCD/ Information Management Division, 1225 South Clark Street, Suite 504, Arlington, VA 22202–4326.

Dated: August 25, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–19813 Filed 8–30–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice. The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 25.

DATES: Consideration will be given to all comments received by September 30, 2004.

Title, Form, and OMB Number: Application for Discharge of Member or Survivor of Member of Group Certified to Have Performed Active Duty with the Armed Forces of the United States; DD Form 2168; OMB Number 0704–0100.

Type of Request: Extension.

Number of Respondents: 3,000.

Responses Per Respondent: 1.

Annual Responses: 3,000.

Average Burden Per Response: 30 minutes.

Annual Burden Hours: 1,500.

Needs and Uses: This information collection requirement is necessary to implement Public Law 95–202, section 401, which directs the Secretary of Defense to determine if civilian employment or contractual service rendered by groups to the Armed Forces of the United States shall be considered active duty. This information is collected on DD Form 2168, "Application for Discharge of Member or Survivor of Member of Group Certified to Have Performed Active Duty with the Armed Force of the United States," which provides the necessary information to assist each of the Military Departments in determining if an applicant was a member of a group which has performed active military service. Those individuals who have been recognized as a member of an approved group are eligible for benefits provided for by laws administered by the Veteran's Administration.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jacqueline Zeiher.

Written comments and recommendations on the proposed information collection should be sent to Ms. Zeiher at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DoD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/ESCD/ Information Management Division, 1225 South Clark Street, Suite 504, Arlington, VA 22202–4326.

Dated: August 25, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–19814 Filed 8–30–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Renewal of the Joint Advisory Committee on Nuclear Weapons Surety

ACTION: Notice.

SUMMARY: The Joint Advisory Committee on Nuclear Weapons Surety (JACNWS) has been renewed in consonance with the public interest, and in accordance with the provisions of Public Law 92–463, the "Federal Advisory Committee Act."

The JACNWS provides advice and recommendations to the Secretary of Defense and the Department of Energy on nuclear weapons systems surety matters. The committee undertakes studies and prepares reports on national policies and procedures to ensure the safe handling, stockpiling, maintenance, disposition and risk reduction of nuclear weapons.

The Committee will continue to be composed of four to seven members, both government and non-government individuals, who are acclaimed experts in nuclear weapons surety measures. Efforts will be made to ensure that here is a fairly balanced membership in terms of the functions to be performed and the interest groups represented.

FOR FURTHER INFORMATION CONTACT: Mr. John Fedrigo, Defense Threat Reduction Agency, telephone: 703–325–2073.

Dated: August 25, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–19810 Filed 8–30–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Army

Armed Forces Epidemiological Board: Meeting

AGENCY: Department of the Army; DoD.

ACTION: Notice of partially-closed meeting.

SUMMARY: In accordance with section 10(a)(2) of Public Law 92–463, The Federal Advisory Committee Act, announcement is made of the following meeting:

Name of Committee: Armed Forces Epidemiological Board (AFEB).

Dates: September 21, 2004 (partially-closed meeting); September 22, 2004 (open meeting).

Times: 7:30 a.m.–5:10 p.m. (September 21, 2004); 7:30 a.m.–4:30 p.m. (September 22, 2004).

Location: St. Anthony Hotel, September 21 from 7:30 a.m.–12:15 p.m. and Brooks Air Force Base, 2602 West Gate Road, San Antonio, TX 78235–5252 from 12:45–5:30 p.m., St. Anthony Hotel, 300 East Travis Street, San Antonio, TX 78205 from 7 a.m.–4:30 p.m.

Agenda: The purpose of the meeting is to address pending and new Board issues, provide briefings for Board members on topics related to ongoing and new Board issues, conduct subcommittee meetings, and conduct an executive working session.

FOR FURTHER INFORMATION CONTACT: Colonel Roger Gibson, Executive Secretary, Armed Forces Epidemiological Board, Skyline Six, 5109 Leesburg Pike, Room 682, Falls Church, VA 22041–3258, (703) 681–8012/3.

SUPPLEMENTARY INFORMATION: In the interest of national security, and in accordance with 5, U.S.C. 552b(c)(1), the afternoon session on September 21, 2004 may be closed to the public. In addition, any classified portions of the meeting minutes may be withheld from public disclosure in accordance with 5 U.S.C. 552b(f)(2). The morning session on September 21, 2004 and the entire session on September 22, 2004 will be open to the public. Open sessions of the meeting will be limited by space accommodations. Any interested person may attend, appear before or file statements with the committee at the time and in the manner permitted by the committee.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 04–19824 Filed 8–30–04; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Prepare a Draft Supplemental Environmental Impact Statement for Mississippi River and Tributaries, Len Small Levee Project, Alexander County, IL

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The Draft Supplemental Environmental Impact Statement (DSEIS) will supplement the Final Environmental Impact Statement (FEIS) "Mississippi River and Tributaries, Mississippi River Levees and Channel Improvement," prepared by the U.S. Army Corps of Engineers (USACE), Vicksburg District, dated February 1976. The DSEIS is being prepared in conjunction with a feasibility study, a joint effort between the St. Louis and Memphis districts, to determine the need for federal flood damage reduction and navigation improvements along the Mississippi River between approximate River Miles (RM) 21 and 34 upstream of the Ohio River in Alexander County, IL. The study will also address National Ecosystem Restoration (NER) features.

FOR FURTHER INFORMATION CONTACT: Ms. Tamara Atchley, telephone (314) 331–8044, CEMVS–PM–N, 1222 Spruce Street, St. Louis, MO 63103. Questions regarding the DSEIS may be directed to Ms. Leighann Gipson, telephone (901) 544–4015, CEMVM–PM–E, 167 North Main Street, Room B–202, Memphis, TN 38103.

SUPPLEMENTARY INFORMATION:

1. Proposed Action

The project study consists of determining the need for flood damage reduction and maintaining navigation on the Mississippi River, Alexander County, IL. The area of focus is the Mississippi River from RM 21 to RM 34. The project is authorized under a resolution of the U.S. House of Representatives, Committee on Transportation and Infrastructure adopted March 7, 1996, as well as Section 517 of the Water Resources Development Act (WRDA) of 1996 and the 1928 Flood Control Act (H.R. 8497). Studies involve reevaluation of the project design flood flowline, evaluating alternatives that will not affect navigation, and developing ecosystem restoration features. The Flood Control Act of 1928 and WRDA 1986 authorized the project originally. A final EIS, entitled *Mississippi Rivers and Tributaries, Mississippi River Levees (MRL) and Channel Improvement*, was prepared by the U.S. Army Corps of Engineers (USACE), Vicksburg District, in February 1976. This document was filed with the Council of Environmental Quality in April 1976. Based on additional environmental laws and regulations enacted after 1976, information from other federal agencies, and litigation by private environmental groups, the decision was made to supplement the 1976 FEIS to cover construction of all remaining Mississippi River mainline levees and seepage control with a supplemental FEIS, *Mississippi River Mainline Levees Enlargement and Seepage Control*, prepared by USACE, Vicksburg, Memphis, and New Orleans districts, dated July 1998. It covered a total of 225 potential work items along the mainstem of the Mississippi River, which included construction of borrow areas for fill material, levee enlargements, and installation of additional seepage control measures. The resolution by Congress in 1996, the Flood Control Act of 1928, as amended, and WRDA 1996 authorized the present study and reevaluation of the MRL system. The Len Small Levee Project was not included in the 1998 supplemental EIS. It was decided that a separate feasibility study should be conducted because of its complexity. Len Small Levee is a privately owned levee that is being studied because of its effect on the Commerce to Birds Point section of the federal MRL system. Extensive hydraulics and other engineering and environmental analyses are being conducted to evaluate project alternatives.

2. Reasonable Alternatives

Project alternatives are being formulated and analyzed in order to develop an optimal plan. Alternatives to be considered include possible modifications to the MRL system, routing floodwaters across Dogtooth Bend Peninsula, and no federal action. An ecosystem restoration plan is also being developed.

3. The Scoping Process

A public involvement program has been initiated and will be maintained throughout the study. The broad goal is to identify significant issues through an exchange of information on project-related topics. Input will be sought from the public including local residents, agencies, and individuals from the private sector. Federally recognized American Indian tribes and the Illinois State Historic Preservation Officer will be consulted regarding cultural

resources in the study area. Status reports will be made to interested parties throughout the study. A public scoping meeting was held on March 18, 2003, in Tamms, IL. Comments and concerns raised at this meeting will be addressed in the study to the extent justified. It is anticipated that a draft SEIS will be available for public review during 2004. It is likely that a workshop will be held prior to release of the draft EIS to gain additional input from interested parties. A public hearing will be held during the draft EIS review period to receive comments and questions concerning the draft report.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 04–19825 Filed 8–30–04; 8:45 am]

BILLING CODE 3710–KS–M

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement/ Environmental Impact Report for a Permit Application for a Proposed Marine Terminal Expansion at Piers D, E and F in the Middle Harbor District of the Port of Long Beach, Los Angeles County, CA

AGENCY: Army Corps of Engineers, Los Angeles District, DoD.

ACTION: Notice of Intent (NOI).

SUMMARY: The U.S. Army Corps of Engineers (Corps) is considering an application for Section 404 and Section 10 permits to conduct dredge and fill activities to redevelop and consolidate two existing container terminals for the construction of a 342-acre marine terminal including redevelopment of 272 acres of existing land and the placement of dredged material in open water to create 70 acres of new land.

The primary Federal concern is the dredging and discharging of materials within waters of the Unites States and potential significant impacts to the human environment. Therefore, in accordance with the National Environmental Policy Act (NEPA), the Corps is requiring the preparation of an Environmental Impact Statement (EIS) prior to consideration of any permit action. The Corps may ultimately make a determination to permit or deny the above project, or permit or deny modified versions of the above project.

Pursuant to the California Environmental Quality Act (CEQA), the Port of Long Beach will serve as Lead Agency for the preparation of an Environmental Impact Report (EIR) for its consideration of development approvals within its jurisdiction. The Corps and the Port of Long Beach have agreed to jointly prepare a Draft EIS/EIR in order to optimize efficiency and avoid duplication. The Draft EIS/EIR is intended to be sufficient in scope to address both the Federal and the state and local requirements and environmental issues concerning the proposed activities and permit approvals.

FOR FURTHER INFORMATION CONTACT: Comments and questions regarding scoping of the Draft EIS/EIR may be addressed to: U.S. Army Corps of Engineers, Los Angeles District, Regulatory Branch, ATTN: File Number 2004–01053–AOA, P.O. Box 532711, Los Angeles, California 90053–2325. Comments or questions can also be sent to Stacey Crouch, Port of Long Beach, P.O. Box 570, Long Beach, CA 90801–0570. Phone messages or questions should be directed to Dr. Aaron O. Allen at 805–585–2148.

SUPPLEMENTARY INFORMATION:

1. Project Site

The proposed project is located in the southern portion of the Port of Long Beach, California. The proposed dredge and fill activities would take place at Piers D, E and F and would involve redeveloping portions of Pier D and reconfiguring existing wharves and berths at Piers E and F to create a single 342-acre marine terminal to accommodate increasing cargo volumes being produced by the new generation of larger container vessels.

2. Proposed Action

The project applicant, the Port of Long Beach, proposes to permanently impact approximately 70 acres of open-water habitat for dredge and fill activities and to rehabilitate 272 acres of existing terminal area at Piers D, E and F for the construction of a new 342-acre container terminal in the Port of Long Beach. The proposed project would reconfigure existing wharves and berths at Piers D, E and F into one 4,250-foot-long wharf with four deep-water berths, a container terminal yard that includes 70 acres of new land and 272 acres of rehabilitated land and an intermodal rail yard. The specific components of the proposed project would include: widening Slip Number Three to 480 feet and deepening it to −55 to −60 feet Mean Lower Low Water (MLLW); excavating one million cubic yards of material from Berths D28–D31; filling Slip One with 2.7 million cubic yards of structurally suitable dredge and excavated material; placement of an additional 770,000 cubic yards in waters of the United States for the construction of a rock dike to the contain the proposed fill at Slip One; filling the East Basin between Piers E and F with 4.06 million cubic yards of dredged material, including the construction of a rock dike to contain the fill area; and construction of 2,260 linear feet of pile supported concrete wharves. The proposed construction and rehabilitation activities would be completed over a 12-year period. All of the above construction activities would include the demolition of existing terminal facilities as well as existing buildings and infrastructure in both open water and upland areas.

3. Issues

There are several potential environmental issues that will be addressed in the Draft EIS/EIR. Additional issues may be identified during the scoping process. Issues initially identified as potentially significant include:

1. Geological issues including dredging and stabilization of fill areas.
2. Potential impacts to marine biological resources.
3. Impacts to air quality.
4. Traffic, including navigation issues and transportation related impacts.
5. Potential noise impacts.
6. Impacts to public utilities and services.
7. Impact to aesthetic resources.
8. Potential impacts on public health and safety.
9. Cumulative impacts.

4. Alternatives

Several alternatives are being considered for the proposed marine terminal. These alternatives will be further formulated and developed during the scoping process and an appropriate range of alternatives, including the no federal action alternative, will be considered in the Draft EIS/EIR.

5. Scoping Process

A public meeting will be held to receive public comment and assess public concerns regarding the appropriate scope and preparation of the Draft EIS/EIR. Participation in the public meeting by Federal, state, and local agencies and other interested organizations and persons is encouraged.

The Corps of Engineers will also be consulting with the U.S. Fish and Wildlife Service under the Endangered Species Act and Fish and Wildlife Coordination Act, and with the National

Marine Fisheries Service under the Magnuson-Stevens Act. Additionally, the EIS/EIR will assess the consistency of the proposed Action with the Coastal Zone Management Act and potential water quality impacts pursuant to Section 401 of the Clean Water Act. The public scoping meeting for the Draft EIS/EIR will be held at the Port of Long Beach on September 27, 2004 and will start at 6:30 PM. Written comments will be received until October 4, 2004.

6. Availability of the Draft EIS

The Draft EIS/EIR is expected to be published and circulated in April of 2005, and a Public Hearing will be held after its publication.

David H. Turk,

Colonel, Corps of Engineers, Acting District Engineer.

[FR Doc. 04–19874 Filed 8–30–04; 8:45 am]

BILLING CODE 3710–92–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the Board of Visitors of Marine Corps University

AGENCY: Department of the Navy, DOD.

ACTION: Notice of open meeting.

SUMMARY: The Board of Visitors of the Marine Corps University (BOV MCU) will meet to review, develop and provide recommendations on all aspects of the academic and administrative policies of the University; examine all aspects of professional military education operations; and provide such oversight and advice as is necessary to facilitate high educational standards and cost effective operations. The Board will be focusing primarily on the University's progress in meeting the 2005 Southern Association of Colleges and Schools accreditation requirements and the quality enhancement plan. The Board will be apprised of recent developments at Marine Corps University, including developments in the presidency of the institution. All sessions of the meeting will be open to the public.

DATES: The meeting will be held on Thursday, September 30, 2004, from 9 a.m. to 5 p.m. and on Friday, October 1, 2004, from 8 a.m. to 11:30 a.m.

ADDRESSES: The meeting will be held at the Alfred M. Gray Marine Corps Research Center, 2040 Broadway Street, Rooms 164 and 165, Quantico, VA 22134.

FOR FURTHER INFORMATION CONTACT: Mary Lanzillotta, Executive Secretary, Marine Corps University Board of Visitors, 2076 South Street, Quantico, VA 22134, telephone number (703) 784–4037.

Dated: August 20, 2004.

J.H. Wagshul,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 04–19842 Filed 8–30–04; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant Exclusive Patent License; SWORD Diagnostics

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant to SWORD Diagnostics, a revocable, nonassignable, exclusive license, to practice in the fields of rapid detection of pathogens for food safety; drinking water and process water; and human and veterinary diagnostic markets in the United States and certain foreign countries, the Government-owned inventions described in U.S. Patent No. 6,038,344 entitled "Intelligent Hypersensor Processing System (IHPS)", Navy Case No. 77,409; U.S. Patent No. 6,167,156 entitled "Compression of Hyperdata with ORASIS Multisegment Pattern Sets (CHOMPS)", Navy Case No. 78,739; and U.S. Provisional Patent Application Serial No. 60/535,179 entitled "Scanned Wavelength Spectroscopic Detector (SWSD) for Identifying Biological Cells and Organisms", Navy Case No. 84,871.

DATES: Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than September 15, 2004.

ADDRESSES: Written objections are to be filed with the Naval Research Laboratory, Code 1004, 4555 Overlook Avenue, SW., Washington, DC 20375–5320.

FOR FURTHER INFORMATION CONTACT: Ms. Jane Kuhl, Head, Technology Transfer Office, NRL Code 1004, 4555 Overlook Avenue, SW., Washington, DC 20375–5320, telephone (202) 767–3083. Due to U.S. Postal delays, please fax (202) 404–7920, E-Mail: *kuhl@utopia.nrl.navy.mil* or use courier delivery to expedite response.

(Authority: 35 U.S.C. 207, 37 CFR part 404.)

Dated: August 24, 2004.

J.H. Wagshul,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 04–19843 Filed 8–30–04; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before September 30, 2004.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Carolyn Lovett, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: August 25, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Office of Special Education and Rehabilitative Services

Type of Review: New.

Title: Written Application for the Independent Living Services for Older Individuals Who are Blind Formula Grant.

Frequency: Every three years.

Affected Public: State, local, or tribal gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 56.

Burden Hours: 9.

Abstract: This document is used by States to request funds to administer the Independent Living Services for Older Individuals Who are Blind (IL–OIB) program. The IL–OIB is provided for under Title VII, Chapter 2 of the Rehabilitation Act of 1973, as amended (Act) to assist individuals who are age 55 or older whose significant visual impairment makes competitive employment extremely difficult to attain but for whom independent living goals are feasible.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2560. 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., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Sheila Carey at her e-mail address *Sheila.Carey@ed.gov*. 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. 04–19833 Filed 8–30–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before September 30, 2004.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Carolyn Lovett, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.*, new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: August 26, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Office of Elementary and Secondary Education

Type of Review: New.

Title: Improving Literacy Through School Libraries Program Final Grant Report.

Frequency: Annually.

Affected Public: State, local, or tribal gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 100.

Burden Hours: 500.

Abstract: The Improving Literacy Through School Libraries Program Final Grant Report will be used by grantees at the end of the project period to show necessary data on the accomplishment of approved activities. The report will identify, by occupation and contributed time, key personnel. It will confirm the schools and the number of students served. It will show changes in school library access hours. School districts will show the differences between the number of library resources and computers before and during the year of the award. The beneficiaries of professional development activities, if applicable, are also requested. The breakdown of grant expenditures per activity is also described. Important data on student reading achievement by school is also requested.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2564. 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., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address *Kathy.Axt@ed.gov*. 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. 04–19834 Filed 8–30–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC04–147–000, et al.]

NCP of Virginia, LLC, et al.; Electric Rate and Corporate Filings

August 23, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. NCP of Virginia, LLC, TM Delmarva Power L.L.C.

[Docket No.: EC04–147–000]

Take notice that on August 18, 2004, NCP of Virginia, LLC (NCP) and TM Delmarva Power L.L.C. (TMD) submitted an application pursuant to section 203 of the Federal Power Act for authorization of a disposition of jurisdictional facilities whereby TMD will purchase NCP's interest in Commonwealth Chesapeake Company, L.L.C. in exchange for a combination of cash and TECO Energy, Inc. common stock.

Comment Date: 5 p.m. eastern standard time on September 8, 2004.

2. ANP Bellingham Energy Company, LLC, ANP Blackstone Energy Company, LLC, ANP Funding I, L.L.C., ANP Marketing Company, Hartwell Energy Limited Partnership, Milford Power Limited Partnership

[Docket No.: EC04–148–000]

Take notice that on August 18, 2004, ANP Bellingham Energy Company, LLC (ANP Bellingham), ANP Blackstone Energy Company, LLC (ANP Blackstone), ANP Funding I, L.L.C. (ANP Funding), ANP Marketing Company (ANP Marketing), Hartwell Energy Limited Partnership (Hartwell), and Milford Power Limited Partnership (Milford) (jointly, Applicants) filed an application pursuant to section 203 of the Federal Power Act requesting authorization for an internal reorganization. Applicants requested expedited consideration of the application.

Comment Date: 5 p.m. eastern standard time on September 8, 2004.

3. Vermont Electric Cooperative, Inc.

[Docket No.: EC04–149–000]

Take notice that on August 19, 2004, Vermont Electric Cooperative, Inc. (VEC) filed with the Commission an application pursuant to section 203 of the Federal Power Act for authorization to purchase certain shares of voting Class B Common Stock issued by the Vermont Electric Power Company, Inc. VEC states that approval of the stock issuance by the Vermont Public Service Board is pending. VEC requests that the Commission issue an order granting approval no later than September 17, 2004.

VEC states that the Vermont Public Service Board, the Vermont Department of Public Service, and VELCO were mailed copies of the filing.

Comment Date: 5 p.m. eastern standard time on September 9, 2004.

4. PSEG Power In-City I, LLC Complainant, v. Consolidated Edison Co. of New York, Inc. Respondent.

[Docket No.: EL04–126–000]

Take notice that on August 23, 2004, PSEG Power In-City I, LLC (In-City) filed a complaint under section 206 of the Federal Power Act, 16 U.S.C. 824e (1994), and section 206 of the Commission's Rules of Practice and Procedure, 18 CFR 206 (2003), against Consolidated Edison Co. of New York, Inc. (ConEd) requesting that the Commission extend by 18 months the Interconnection Date of In-City's Interconnection Agreement with ConEd.

Comment Date: 5 p.m. eastern standard time on September 13, 2004.

5. Duke Power, a Division of Duke Energy Corporation

[Docket No.: ER96–110–011]

Take notice that, on August 17, 2004, Duke Power, a division of Duke Energy Corporation, submitted an errata to its August 11, 2004 compliance filing in Docket No. ER96–110–010.

Duke Power states that copies of the filing were served on parties on the official service list in the above-captioned proceeding, the North Carolina Utilities Commission and the South Carolina Public Service Commission.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

6. Constellation Power Source, Inc.

[Docket No.: ER97–2261–017]

Take notice that on August 16, 2004, Constellation Power Source, Inc. (CPS), submitted a notice of change in status under CPS' market-based rate authority, pursuant to Section 205 of the Federal Power Act and the Federal Energy Regulatory Commission's order in *Constellation Power Source, Inc.*, 79 FERC ¶ 61,167 (1997).

CPS states that copies of the filing were served upon parties on the official service list in the above-captioned proceeding.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

7. Consolidated Edison Energy, Inc.

[Docket No.: ER00–865–002]

Take notice that on August 18, 2004, Consolidated Edison Energy, Inc., (CEE) submitted an amendment to its Tariff for the Wholesale Sale of Electricity at Market-Based Rates to include the Market Behavior Rules promulgated by the Commission, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), and to correct the inadvertent omission from the tariff of CEE's authority to make sales of ancillary services at market-based rates to the ISO New England, PJM Interconnection ISO, and New York ISO.

CEE states that it is serving this filing on all parties to the subject docket and on the New York Public Service Commission.

Comment Date: 5 p.m. eastern standard time on September 8, 2004.

8. ISO New England Inc .

[Docket No.: ER02–2153–008]

Take notice that on August 16, 2004, ISO New England Inc. (ISO) submitted a report in compliance with the Commission's order issued July 31, 2004 in Docket No. ER02–2153–000.

ISO states that copies of the filing have been served upon all parties to this proceeding and the New England utility regulatory agencies, and electronically upon the New England Power Pool participants.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

9. ONEOK Energy Marketing and Trading Company, L.P.

[Docket No.: ER03–10–002]

Take notice that on August 17, 2004, ONEOK Energy Marketing and Trading Company, L.P. (OEMT), formerly known as ONEOK Power Marketing Company, submitted a report regarding its triennial updated market analysis.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

10. Southern California Edison Company

[Docket No.: ER04–757–001]

Take notice that on August 18, 2004, Southern California Edison Company (SCE) submitted a revised Amended and Restated Edison-AEPCO Firm Transmission Service Agreement and a revised Amended and Restated Edison-AEPCO Load Control Agreement between SCE and the Arizona Electric Power Cooperative, Inc. (AEPCO), and the Southwest Transmission Cooperative, Inc. (SWTC). SEC requests an effective date of June 1, 2004.

SCE states that copies of the filing were served upon those persons whose names appear on the official service list compiled by the Commission for this proceeding, the Public Utilities Commission of the State of California, AEPCO and SWTC.

Comment Date: 5 p.m. eastern standard time on September 8, 2004.

11. ISO New England Inc.

[Docket No.: ER04–798–002]

Take notice that on August 16, 2004, ISO New England Inc. (ISO) submitted

Substitute Sheet No. 51–A to New England Power Pool's FERC Electric Rate Schedule No. 7 in compliance with the Commission's order issued July 15, 2004 in Docket No. ER04–798–000. 108 FERC ¶ 61,069.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

12. Union Electric Company

[Docket No.: ER04–931–001]

Take notice that on August 16, 2004, Union Electric Company, d/b/a AmerenUE, (Union) submitted for filing a corrected version of their June 15, 2004 filing of an unexecuted Contract between United States of America, represented by the Secretary of Energy, acting by and through the Administrator, Southwestern Power Administration and Union Electric Company, d/b/a AmerenUE (the parties). Union states that the purpose of this filing is to correct typographical errors in the June 15, 2004 document.

Union states that copies of the Application have been served on the Missouri Public Service Commission and the Southwestern Power Administration.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

13. The Detroit Edison Company, DTE East China, LLC, DTE River Rouge No. 1, LLC

[Docket No.: ER04–948–001]

Take notice that on August 16, 2004, DTE East China, LLC and DTE River Rouge No. 1, LLC (Applicants) submitted a compliance filing pursuant to a Commission's order issued July 16, 2004 in Docket No. ER04–948–000, 108 FERC ¶ 61,070.

Applicants state that copies of the filing were served on parties on the official service list in the above-captioned proceeding.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

14. The Dayton Power and Light Company

[Docket No.: ER04–1079–001]

Take notice that on August 19, 2004, The Dayton Power and Light Company (Dayton) filed a supplement to its Notice of Cancellation of its Open Access Transmission Tariff (OATT) filing made on July 30, 2004.

Dayton states that copies of the filing were served on Dayton's OATT customers, the Ohio state commission, and those on the service list in the above-captioned docket.

Comment Date: 5 p.m. eastern standard time on September 9, 2004.

15. PPL University Park, LLC

[Docket No.: ER04–1111–001]

Take notice that on August 13, 2004 University Park, LLC (PPL University Park) amended its filing submitted on August 11, 2004 in Docket No. ER04–1111–000.

PPL University Park states that copies of the filing were served upon PJM Interconnection, L.L.C., New York Independent System Operator, Inc. and ISO New England, Inc.

Comment Date: 5 p.m. eastern standard time on September 3, 2004.

16. Starlight Energy, L.P.

[Docket No.: ER04–1131–000]

Take notice that on August 16, 2004, Starlight Energy, L.P., (Starlight) petitioned the Commission for acceptance of Starlight's Rate Schedule FERC No. 1; the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain Commission regulations. Starlight states that it intends to engage in wholesale electric power and energy purchases and sales as a marketer.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

17. PJM Transmission Owners Agreement Administrative Committee

[Docket No.: ER04–1132–000]

Take notice that on August 16, 2004 the PJM Transmission Owners Agreement Administrative Committee (TOA–AC) tendered for filing Second Revised Sheet No. 14 to PJM Interconnection, L.L.C.'s First Revised Rate Schedule FERC No. 29, an amendment to the PJM Transmission Owners Agreement. TOA–AC states that the amendment requires that the senior representative to the TOA–AC for each transmission owner be an officer of the transmission owner. TOA–AC requests an effective date of August 17, 2004.

TOA–AC states that copies of the filing were served upon PJM Interconnection, L.L.C., the representatives of the TOA–AC, and the relevant State Commissions.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

18. Southern California Edison Company

[Docket No.: ER04–1133–000]

Take notice that on August 16, 2004 Southern California Edison Company (SCE) submitted for filing a Notice of Cancellation of Service Agreement Nos. 79 and 82 under SCE's FERC Electric Tariff, First Revised Volume No. 5, to be effective December 5, 2003 and May 18, 2004, respectively.

SCE states that a copy of the filing has been served upon the Public Utilities Commission of the State of California, and Whitewater Hill Wind Partners, LLC.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

19. Consolidated Edison Solutions, Inc.

[Docket No.: ER04–1134–000]

Take notice that on August 17, 2004, Consolidated Edison Solutions, Inc. (ConEdison Solutions) filed a Notice of Cancellation of Inventory Management and Distribution Company, Inc.'s (IMD), FERC Rate Schedule No. 1, to terminate IMD's market-based rate authority effective February 27, 2001.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

20. Wisconsin Power and Light Company

[Docket No.: ER04–1135–000]

Take notice that on August 17, 2004, Wisconsin Power and Light Company (WPL) tendered for filing proposed changes in its FERC Electric Service Tariff—W–2A, W–3A, W–4A, and PR–1 (Volume Nos. 1 and 2). WPL states that the proposed changes would increase revenues from jurisdictional sales and service by $12.2 million based on the 12-month period ending December 31, 2005. In addition, WPL proposes to extend the applicability of its fuel adjustment clause to its FERC Electric Service Tariff—W–2A. WPL requests that proposed rates in this proceeding go into effect under bond on January 1, 2005.

WPL states that copies of the filing were served upon WPL's jurisdictional customers, their representatives and the Public Service Commission of Wisconsin.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

21. Huntington Beach Development, LLC

[Docket No.: ER04–1136–000]

Take notice that, on August 17, 2004, Huntington Beach Development, LLC (HBD) filed a Notice of Cancellation of its FERC Electric Rate Schedule No. 1. HBD requests an effective date of July 18, 2004.

Comment Date: 5 p.m. eastern standard time on September 7, 2004.

22. MeadWestvaco Energy Services, LLC

[Docket No.: ER04–1137–000]

Take notice that on August 18, 2004, MeadWestvaco Energy Services, LLC, (MWES) filed a petition for acceptance of MWES's Rate Schedule FERC No. 1;

the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain Commission regulations. MWES states that it intends to engage in wholesale electric power and energy purchases and sales as a marketer.

Comment Date: 5 p.m. eastern standard time on September 8, 2004.

23. New York Independent System Operator, Inc.

[Docket No.: ER04–1138–000]

Take notice that on August 18, 2004, the New York Independent System Operator, Inc. (NYISO) filed proposed revisions to its Market Administration and Control Area Services Tariff (Services Tariff) and Open Access Transmission Tariff to revise the exception from special balancing rules for certain generators. In addition, NYISO proposed to revise its Services Tariff to eliminate penalty exemptions for certain generators and to revise an accepted but not yet effective provision to extend bid-cost protections for certain generators.

NYISO states that it has electronically served a copy of this filing on the official representative of each of its customers, on each participant in its stakeholder committees, and on the New York Public Service Commission. In addition, the NYISO has served a copy of this filing on the electric utility regulatory agencies of New Jersey and Pennsylvania.

Comment Date: 5 p.m. eastern standard time on September 8, 2004.

24. Pacific Gas and Electric Company

[Docket No.: ER04–1139–000]

Take notice that on August 19, 2004, Pacific Gas and Electric Company (PG&E) tendered for filing an amendment to the Interconnection Agreement (IA) between PG&E and the Port of Oakland (Port) to include the Davis Substation at Transmission Voltage as a Point of Interconnection. PG&E states that the IA is submitted pursuant to the PG&E Wholesale Distribution Tariff (WDT). PG&E requests an effective date of January 5, 2005.

PG&E states that copies of this filing have been served upon Port, the California Independent System Operator Corporation, Western Area Power Administration and the California Public Utilities Commission.

Comment Date: 5 p.m. eastern standard time on September 9, 2004.

25. New England Power Pool

[Docket No.: ER04–1140–000]

Take notice that on August 20, 2004, New England Power Pool, (NEPOOL) Participants Committee filed changes to NEPOOL's Market Rule 1 and its Appendices. NEPOOL Participants Committee requests an effective date of November 1, 2004.

NEPOOL Participants Committee states that copies of these materials were sent to the New England state governors and regulatory commissions and the Participants in NEPOOL.

Comment Date: 5 p.m. eastern standard time on September 10, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1980 Filed 8–30–04; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0159; FRL–7674–8]

Metam-Sodium; Availability of Revised Risk Assessments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of documents that were developed as part of EPA's process for making pesticide reregistration eligibility decisions consistent with the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA). These documents are the revised human health and environmental fate and effects risk assessments and related documents for metam-sodium. These documents have been revised based on consideration of public comments and other input on the preliminary risk assessments that were released to the public on June 2, 2004. This notice also starts another 60–day public comment period for the risk assessments. Comments are to be limited to issues directly associated with metam-sodium and raised by the risk assessments or other documents placed in the docket. By allowing access and opportunity for comment on the risk assessments, EPA is seeking to strengthen stakeholder involvement and help ensure that our decisions under FQPA are transparent and based on the best available information. The Agency cautions that these revised risk assessments for metam-sodium are still considered to be preliminary and that further refinements may be appropriate. Risk assessments reflect only the work and analysis conducted as of the time they were produced and it is appropriate that, as new information becomes available and/or additional analyses are performed, the conclusions they contain may change.

DATES: Comments, identified by the docket identification (ID) number OPP–2004–0159, must be received on or before October 31, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Mark Seaton, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–

0001; telephone number: (703) 306–0469; e-mail address: *seaton.mark@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, nevertheless, a wide range of stakeholders will be interested in obtaining the risk assessments for metam-sodium, including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the use of pesticides on food. Since other entities 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 person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2004–0159. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell Street, Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0159. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID number OPP–2004–0159. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically

captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID number OPP–2004–0159.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell Street, Arlington, VA 22202, Attention: Docket ID number OPP–2004–0159. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, 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 CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any 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 and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the notice.

7. Make sure to submit your comments by the deadline in this document.

8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Background

What Action is the Agency Taking?

EPA is making available risk assessments that have been developed as part of the Agency's public participation process for making reregistration eligibility decisions for the organophosphates and other pesticides consistent with FFDCA, as amended by FQPA. Metam-sodium does not have tolerances under FFDCA and thus is not subject to tolerance reassessment. The Agency's human health and environmental fate and effects risk assessments and other related documents for metam-sodium, and public comments received in response to the preliminary risk assessments are available in the individual pesticide docket. As additional comments, reviews, and risk assessment modifications become available, these will also be docketed for metam-sodium.

The Agency cautions that the metam-sodium revised risk assessments are still considered to be preliminary and that further refinements may be appropriate. These documents reflect only the work and analysis conducted as of the time they were produced and it is appropriate that, as new information becomes available and/or additional analyses are performed, the conclusions they contain may change.

EPA is providing an opportunity, through this notice, for interested parties to provide additional written comments and input to the Agency on the risk assessments for the pesticide specified in this notice. Such comments and input could address, for example, the availability of additional data to further refine the risk assessments, such as acres treated per day or typical application rates, or could address the Agency's risk assessment methodologies and assumptions as applied to this specific chemical. Comments should be limited to issues raised within the risk assessments and associated documents. All comments should be submitted by October 31, 2004, using the methods in Unit I. of the **SUPPLEMENTARY INFORMATION.** Comments will become part of the Agency record for metam-sodium.

List of Subjects

Environmental protection, Chemicals, Pesticides and pests.

Dated: August 18, 2004.

Debra Edwards,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 04–19712 Filed 8–30–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0225; FRL–7369–7]

Bacillus Thuringiensis Cry34Ab1 and Cry35Ab1 Proteins and the Genetic Material Necessary for Their Production in Corn; Notice of Filing a Pesticide Petition to Establish a Tolerance for Certain Pesticide Chemicals in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket identification (ID) number OPP–2004–0225, must be received on or before September 30, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Mike Mendelsohn, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington,

DC 20460–0001; telephone number: (703) 308–8715; e-mail address: *mendelsohn.mikem@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are a agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 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 under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2004–0225. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in EPA's Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

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ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0225. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in theofficial public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2004–0225.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. Attention: Docket ID Number OPP–2004–0225. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

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E. What Should I Consider as I Prepare My Comments for EPA?

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1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this pesticide petition contains data or information regarding the elements set forth 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 petition. Additional data may be needed before EPA rules on the pesticide petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 23, 2004.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

Summary of Petition

The petitioner's summary of the pesticide petition (PP) is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by the petitioner and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Mycogen Seeds c/o Dow AgroSciences LLC

PP 3F6785

EPA has received a pesticide petition (3F6785) from Mycogen Seeds c/o Dow AgroSciences LLC, 9330 Zionsville Road, Indianapolis, IN 46268, proposing pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 174 to establish an exemption from the requirement of a tolerance for the plant-incorporated protectant *Bacillus thuringiensis* Cry34Ab1 and Cry35Ab1 proteins and the genetic material necessary for their production in corn. Pursuant to section 408(d)(2)(A)(i) of the FFDCA, as amended, Mycogen Seeds c/o Dow AgroSciences LLC has submitted the following summary of information, data, and arguments in support of their pesticide petition. This summary was prepared by Mycogen Seeds c/o Dow AgroSciences LLC and EPA has not fully evaluated the merits of the pesticide petition. The summary may have been edited by EPA if the terminology used was unclear, the summary contained extraneous material, or the summary unintentionally made the reader conclude that the findings reflected EPA's position and not the position of the petitioner.

A. Product Name and Proposed Use Practices

B.t. Cry34/35Ab1 inductively coupled plasma (ICP) is expressed in corn plants to provide protection from key coleopteran insect pests such as the western corn rootworm. B.t. Cry34/35Ab1 transgenic plants are derived from transformation events that contain the insecticidal genes via a plasmid insert. The B.t. Cry34/35Ab1 ICP poses no foreseeable risks to non-target organisms including mammals, birds,

fish, beneficial insects, and earthworms. B.t. Cry34/35Ab1-protected field corn provides growers with a highly efficacious tool for controlling important insect pests in corn in a manner that is fully compatible with integrated pest management practices.

B. Product Identity/Chemistry

Identity of the pesticide and corresponding residues. The Cry34Ab1 and Cry35Ab1 genes were isolated from *Bacillus thuringiensis* strain PS149B1 and modified before insertion into corn plants. The Cry34/35Ab1 ICP has been adequately characterized. Several safety studies were conducted using microbially produced test substances that contained 54% of the Cry34Ab1 (14 kDa) protein and 37% of the Cry35Ab1 (44 kDa) protein. Studies conducted to establish the equivalence of the Cry34/35Ab1 ICP obtained from corn or from a microbial source demonstrate that the materials are similar with respect to molecular weight, immunoreactivity, lack of post-translational modification (glycosylation) *N*-terminal amino acid sequence, and spectrum of bioactivity.

A qualitative analytical method (lateral flow immunoassay) for the detection of the Cry34Ab1 (14 kDa) protein has been submitted; master record identification number ((MRID) #45383401). Quantitative analytical methods enzyme linked immunosorbent assay (ELISA) for the detection of Cry34Ab1 and detection of Cry35Ab1 have been submitted (MRID #45833201).

C. Mammalian Toxicological Profile

Cry proteins have been deployed as safe and effective pest control agents in microbial *Bacillus thuringiensis* formulations for almost 40 years. There are currently 180 registered microbial *Bacillus thuringiensis* products in the United States for use in agriculture, forestry, and vector control. The numerous toxicology studies conducted with these microbial products show no significant adverse effects, and demonstrate that the products are practically non-toxic to mammals. An exemption from the requirement of a tolerance has been in place for these products since at least 1971 (40 CFR 180.1011).

Toxicology studies conducted to determine the toxicity of Cry34/35Ab1 ICP demonstrated that the proteins have very low toxicity. The acute oral lethal dose $(LD)_{50}$ of Cry34Ab1 (14 kDa) is greater than 5,000 milligrams/kilogram (mg/kg), and at 54% purity, the acute LD_{50} for pure protein is greater than 2,700 mg/kg. The acute oral LD_{50} of Cry35Ab1 (44 kDa) is greater than 5,000 mg/kg, and at 37% purity, the acute LD_{50} for pure protein is greater than 1,850 mg/kg in male mice when the proteins were tested individually. When tested as a mixture (1:3 molar ratio of Cry34Ab1:Cry35Ab1 proteins), the acute oral LD_{50} of Cry34/35Ab1 proteins in male and female mice is greater than 5,000 mg/kg, and greater than 2,000 mg/kg of an equimolar (1:3) mixture of pure proteins.

In *in vitro* studies, Cry34/35Ab1 ICP exhibited a high rate of digestibility under simulated gastric conditions (referred to as SGF) in the presence of pepsin. The Cry34Ab1(14 kDa protein) was greater than 90% digested in SGF 6.2 minutes. The Cry35Ab1 (44 kDa protein) was greater than 97% digested in less than 5 minutes. Also, thermolability testing results showed that the ICP was deactivated following exposure to 60 °C, 75 C°, and 90 °C for 30 minutes. A search of relevant data bases indicated that the amino acid sequences of the Cry34/35Ab1 ICP exhibit no significant homology to the sequences of known protein allergens. Thus, Cry34/35Ab1 ICP is highly unlikely to exhibit an allergic response.

The genetic material necessary for the production of the Cry34/35Ab1 ICP is nucleic acid deoxyribonucleic acid (DNA) which is common to all forms of plant and animal life. There are no known instances where nucleic acids have caused toxic effects as a result of dietary exposure.

Collectively, the available data on Cry34/35Ab1 ICP along with the safe use history of microbial *Bacillus thuringiensis* products establishes the safety of the plant-incorporated protectant B.t. Cry34/35Ab1 ICP and the genetic material necessary for its production in all raw agricultural commodities.

D. Aggregate Exposure

Dietary exposure. Because B.t. Cry34/35Ab1 ICP is expressed in minute quantities and is retained within the plant, there is virtually no potential for dermal or inhalation exposure to the protein. Significant dietary exposure to Cry34/35Ab1 ICP is unlikely to occur. Dietary exposures at very low levels, via ingestion of processed commodities, although, they may occur, are unlikely to be problematic because of the low toxicity and the high degree of digestibility of the protein. In addition, the protein is not likely to be present in drinking water because the protein is deployed in minute quantities within the plant, and studies demonstrate that Cry34/35Ab1 ICP is rapidly degraded in soil. In summary, the potential for significant aggregate exposure to Cry34/35Ab1 is highly unlikely.

E. Cumulative Exposure

Common modes of toxicity are not relevant to consideration of the cumulative exposure to B.t. Cry34/35Ab1 ICP. The product has demonstrated low toxicity, and these effects do not appear to be cumulative with any other known compounds.

F. Safety Determination

1. *U.S. population.* The deployment of the product in minute quantities within the plant, the very low toxicity of the product, the lack of allergenic potential, and the high degree of digestibility of the proteins, are all factors in support of Mycogen/Dow AgroSciences' assertion that no significant risk is posed by exposure of the U.S. population to B.t. Cry34/35Ab1 ICP.

2. *Infants and children.* Non-dietary exposure to infants and children are not anticipated, due to the proposed use pattern of the product. Due to the very low toxicity of the product, the lack of allergenic potential, and the high degree of digestibility of the proteins, dietary exposure is anticipated to be at very low levels and is not anticipated to pose any harm to infants and children.

G. Effects on the Immune and Endocrine Systems

Given the high degree of digestibility of the Cry34/35Ab1 ICP, no chronic effects are expected. Cry34/35Ab1 ICP, or metabolites of the ICP are not known to, or are expected to have any effect on the immune or endocrine systems. Proteins in general are not carcinogenic, therefore, no carcinogenic risk is associated with the Cry34/35Ab1 ICP.

H. Existing Tolerances

A temporary exemption from the requirement of a tolerance is in effect through April 30, 2006.

I. International Tolerances

No Codex maximum residue levels exists for the plant-incorporated protectant modified Cry3A *Bacillus thuringiensis* protein and the genetic material necessary for its production in corn.

[FR Doc. 04–19720 Filed 8–30–04; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0226; FRL–7369–8]

Modified Cry3A Protein (mCry3A) and the Genetic Material Necessary for its Production in Corn; Notice of Filing a Pesticide Petition to Establish a Temporary Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket identification (ID) number OPP–2004–0226, must be received on or before September 30, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Mike Mendelsohn, Biopesticies and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8715; e-mail address: *mendelsohn.mike@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are a agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 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 under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2004–0226. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

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C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your

comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0226. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0226. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in theofficial public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2004–0226.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number OPP–2004–0226. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, 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 CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any 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 and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this pesticide petition contains data or information regarding the elements set forth 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 petition. Additional data may be needed before EPA rules on the pesticide petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 23, 2004.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

Summary of Petition

The petitioner's summary of the pesticide petition (PP) is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by the petitioner and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Syngenta Seeds, Inc.

PP 4G6808

EPA has received a pesticide petition (4G6808) from Syngenta Seeds, Inc., P.O. Box 12257, 3054 Cornwallis Road, Research Triangle Park, NC 27709–2257, proposing pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346(d), to amend 40 CFR part 174 to establish an exemption from the requirement of a tolerance for the plant-pesticide modified Cry3A protein (mCry3A) and the genetic material necessary for its production in or on all corn.

Pursuant to section 408(d)(2)(A)(i) of the FFDCA, as amended, Syngenta Seeds, Inc., has submitted the following summary of information, data, and arguments in support of their pesticide petition. This summary was prepared by Syngenta Seeds, Inc., and EPA has not fully evaluated the merits of the pesticide petition. The summary may have been edited by EPA if the terminology used was unclear, the summary contained extraneous material, or the summary untentionally made the reader conclude that the findings reflected EPA's position and not the position of the petitioner.

A. Product Name and Proposed Use Practices

A modified Cry3A *Bacillus thuringiensis* insect control protein and the genetic material necessary for its production in Event MIR604-derived corn is proposed for use as a plant-incorporated protectant active ingredient. Production of the mCry3A protein within corn plants confers resistance to damage caused by the western corn rootworm and northern corn rootworm, which are major corn pests in the United States. A temporary exemption from tolerances is being requested in conjunction with a proposed Experimental Use Permit to allow large-scale field testing of field corn plants derived from Syngenta Seeds' transformation event MIR604.

B. Product Identity/Chemistry

1. *Identity of the pesticide and corresponding residues.* A modified Cry3A (mCry3A) *Bacillus thuringiensis* insect control protein is produced in transgenic corn plants derived from transformation Event MIR604. A *cry3A* gene from *Bacillus thuringiensis* subspecies (subsp.) *tenebrionis* was recreated synthetically to optimize for expression in corn. Additional changes in this corn-optimized gene were made, such that the encoded mCry3A protein has enhanced activity against larvae of the western corn rootworm (*diabrotica virgifera virgifera*) and northern corn rootworm (*diabrotica longicornis barberi*). Event MIR604-derived corn plants express the synthetic modified *cry3A* gene, introduced *via* transformation vector pZM26, and display resistance to these pests. The native Cry3A protein of *Bacillus thuringiensis* subsp. *tenebrionis* is a carbon absorber (ca) 73 kDa polypeptide of 644 amino acids. By comparison, the mCry3A protein expressed in Event MIR604 corn is a ca 67 kDa polypeptide of 598 amino acids. Its amino acid sequence corresponds to that of the native Cry3A protein, except that (1) its *N*-terminus corresponds to methionine-48 of the native protein and (2) a cathepsin *G* protease recognition site has been introduced into the protein, conferring enhanced activity toward western and northern corn rootworms. Residues of the mCry3A protein, and/or breakdown products thereof, are present in corn grain and other tissues of Event MIR604-derived plants.

2. *Magnitude of residue at the time of harvest and method used to determine the residue.* A determination of the magnitude of residue at harvest is not required for residues exempt from tolerances. However, the petitioner has provided data on the quantity of mCry3A protein measured in various plant parts. Average mCry3A levels in grain from Event MIR604-derived hybrid field corn plants were less than 1 part per million (ppm) on a dry-weight or fresh-weight basis, as measured by enzyme linked immunosorbent assay (ELISA). Average mCry3A levels measured in chopped whole Event MIR604-derived hybrid corn plants were less than or equal to ca. 20 ppm on a dry-weight basis and less than or equal to ca. 8 ppm on a fresh-weight basis.

3. *A statement of why an analytical method for detecting and measuring the levels of the pesticide residue are not needed.* An analytical method is not required because this petition requests an exemption from tolerances. However, the petitioner has submitted an analytical method for detection of the mCry3A protein by ELISA.

C. Mammalian Toxicological Profile

Syngenta Seeds is providing the results of a mammalian toxicology study, *in vitro* digestibility study, heat stability study and bioinformatics evaluations conducted on the mCry3A protein. These studies, summarized herein, demonstrate the lack of toxicity of the mCry3A protein following acute oral high-dose exposure to mice, rapid degradation of mCry3A upon exposure to simulated mammalian gastric fluid, instability of the mCry3A protein upon heating, and the lack of significant amino acid sequence homology of the mCry3A protein to proteins known to be mammalian toxins or human allergens.

When proteins are toxic, they are known to act *via* acute mechanisms and at very low doses, Sjoblad, R.D., J.T. McClintock and R. Engler (1992) Toxicological Considerations for Protein Components of Biological Pesticide Products. *Regulatory Toxicolology and Pharmacology.* 15: 3–9. Therefore, when a protein demonstrates no acute oral toxicity in high-dose testing using a standard laboratory mammalian test species, this supports the determination that the protein will be non-toxic to humans and other mammals, and will not present a hazard under any realistic exposure scenario, including long-term exposures.

Because it is not feasible to extract sufficient mCry3A protein from transformed plants for toxicology studies, mCry3A protein was produced in recombinant *E. coli* by over-expressing the same modified *cry3A* gene that was introduced into Event MIR604 corn plants. Following purification from *E. coli*, dialysis and lyophilization, the resulting sample, designated test substance MCRY3A–0102, was estimated by ELISA to contain ca. 90.3% mCry3A protein by weight. Side-by-side comparisons of mCry3A in test substance MCRY3A–0102 with mCry3A extracted from Event MIR604-derived corn plants indicated that mCry3A from both sources is biologically active against the same target pest species, has the same apparent molecular weight by SDS-PAGE, immunoreacts with the same anti-Cry3A antibody, and is not apparently post-translation. Additionally, peptide mapping of 40% of the mCry3A polypeptide by mass-spectral analysis confirmed the identity and intended amino sequence of mCry3A in test substance MCRY3A–0102. Nucleotide sequencing of the entire DNA insert in Event MIR604-derived plants also confirmed that the mCry3A protein produced in the plants has the intended amino acid sequence. These data justify the use of test substance MCRY3A–0102 in safety studies as a surrogate for mCry3A as produced in Event MIR604-derived plants.

An acute toxicity study was conducted in mice according to EPA's Test Harmonized Guideline OPPTS 870.1100. Test substance MCRY3A–0102 was administered orally by gavage to five male and five female mice at a dose of 2,632 milligrams/kilogram (mg/kg) body weight, representing ca. 2,377 mg of pure mCry3A protein/kg body weight. A negative control group (five males and five females) concurrently received the dosing vehicle alone, an aqueous suspension of 1% methylcellulose, at the same dosing volume used for the test substance mixture. No test substance-related mortalities or clinical signs of toxicity occurred during the 14–day study. One female mouse in the test group was euthanized the day following dosing due to adverse clinical signs resulting from a dosing injury (confirmed by post-mortem examination). At study termination, macroscopic and

microscopic examination of all major organs of the surviving mice revealed no treatment-related abnormalities. Body weight, body weight gain and organ weights (brain, liver, kidneys, and spleen) were comparable in the control and test groups. There was no evidence of toxicity. Accordingly, the LD_{50} value for MCRY3A–0102 in male and female mice is greater than 2,632 mg/kg body weight, and the LD_{50} value for pure mCry3A protein is greater than 2,377 mg/kg body weight, the single dose tested.

Extensive bioinformatics searches of public protein data bases revealed that the mCry3A protein shows no significant amino acid homology to proteins known to be mammalian toxins or known or suspected to be human allergens. Additional information and testing indicate that the mCry3A protein does not have properties that would suggest it has the potential to become a food allergen. The source of native Cry3A protein (*Bacillus thuringiensis*) is not known to produce food allergens. Unlike allergenic proteins, which typically are present at 1–80% of the total protein in an offending food, the average mCry3A concentration measured in raw grain derived from Event MIR604 corn represents less than 0.0001% of the total protein. This calculation is based on corn grain containing 10% total protein by weight, and assumes less than 1 ppm mCry3A in the grain. Additionally, due to degradation *via* food processing methods, mCry3A will not likely be present in processed food products, or will be present in only trace quantities. The mCry3A protein produced in transformed corn plants is not targeted to a cellular pathway for glycosylation, and shows no evidence of post-translational glycosylation. Bioactivity of mCry3A is lost upon heating at 95 °C for 30 minutes. Upon exposure to simulated mammalian gastric fluid containing pepsin, mCry3A rapidly degrades.

The native Cry3A protein has had a history of safe use as a component of spore preparations of the microbial insecticide *Bacillus thuringiensis* subsp. *tenebrionis*, as an encapsulated component of a microbial insecticide derived from *Bacillus thuringiensis* subsp. *san diego*, and as a plant-incorporated protectant in *Bacillus thuringiensis* potato.

The genetic material occurring in the subject plant-incorporated protectant active ingredient has been adequately characterized. This genetic material (*i.e.*, the nucleic acids DNA and RNA), including regulatory regions, necessary for the production of mCry3A in all corn will not present a dietary safety concern. "Regulatory regions" are the DNA sequences such as promoters, terminators, and enhancers that control the expression of the genetic material encoding the protein. Based on the ubiquitous occurrence and established safety of nucleic acids in the food supply, a tolerance exemption under the FFDCA regulations has been established for residues of nucleic acids that are part of plant-incorporated protectants in 40 CFR 174.475 (66 FR 37817 July 19, 2001) (FRL–6057–5). Therefore, no mammalian toxicity is anticipated from dietary exposure to the genetic material necessary for the production of mCry3A protein in all corn.

D. Aggregate Exposure

1. *Dietary exposure*—i. *Food.* Average mCry3A levels measured in grain from Event MIR604-derived hybrid field corn plants were less than 1 ppm on a dry-weight or fresh-weight basis. Processed corn products or by-products used in food are unlikely to have measurable mCry3A protein, or will have only trace amounts. Oral exposure is not expected to result in adverse health effects, because of a demonstrated lack of toxicity to mammals and the rapid digestibility of the mCry3A protein. It is expected that any mCry3A protein consumed will be digested as conventional dietary protein.

ii. *Drinking water.* Little to no exposure *via* drinking water is anticipated. Due to the demonstrated mammalian safety profile of mCry3A, such exposure would not present a risk.

2. *Non-dietary exposure.* Non-dietary exposure is not anticipated, due to the proposed use pattern of the product. Exposure *via* dermal or inhalation routes is unlikely because the active ingredient is contained within plant cells. However, if exposure were to occur by non-dietary routes, no risk would be expected because the mCry3A protein is not toxic to mammals.

E. Cumulative Exposure

Because there is no indication of mammalian toxicity of the mCry3A protein or the genetic material necessary for its production, it is reasonable to conclude that there will be no cumulative effects for this active ingredient.

F. Safety Determination

1. *U.S. population.* The lack of mammalian toxicity at high levels of exposure to the mCry3A protein demonstrates the safety of the product at levels well above possible maximum exposure levels anticipated *via* consumption of all food commodities produced from corn plants that produce mCry3A. Moreover, little to no human dietary exposure to mCry3A protein is expected to occur via transformed corn. Due to the digestibility and lack of toxicity of the mCry3A protein, and its very low potential to become an allergen in food, dietary exposure is not anticipated to pose any harm for the U.S. population. No special safety provisions are applicable for consumption patterns or for any population sub-groups.

2. *Infants and children.* Based on the mammalian safety profile of the active ingredient and the proposed use pattern, there is ample evidence to conclude with a reasonable certainty that no harm will result to infants and children.

G. Effects on the Immune and Endocrine Systems

The active ingredient is derived from sources that are not known to exert an influence on the endocrine or immune systems.

H. Existing Tolerances

The registrant is not aware of any existing tolerances or tolerance exemptions for mCry3A protein and the genetic material necessary for its production as an active ingredient.

However, exemptions from tolerances exist for use of the native form of Cry3A protein as a plant-incorporated protectant in Bt potato (40 CFR 180.1147) and as a component of an encapsulated *Bacillus thuringiensis* microbial insecticide (40 CFR 180.1108).

I. International Tolerances

No Codex maximum residue levels exists for the plant-incorporated protectant modified Cry3A *Bacillus thuringiensis* protein and the genetic material necessary for its production in corn.

[FR Doc. 04–19719 Filed 8–30–04; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7807–9]

Receipt of an Application From the State of Ohio to Declare Its Waters of Lake Erie a No Discharge Zone for Vessel Sewage

AGENCY: Environmental Protection Agency (EPA).

ACTION: Receipt of a petition from the State of Ohio for determination as to the adequacy of facilities on Lake Erie for the disposal of vessel sewage.

SUMMARY: Notice is hereby given that a petition has been received from the State of Ohio for a determination by the Administrator of Region 5 that there is a reasonable availability of adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels on its waters of Lake Erie.

SUPPLEMENTARY INFORMATION: On June 23, 2004, the State of Ohio, Department of Natural Resources, submitted a petition requesting the EPA to declare the Ohio waters of Lake Erie a No Discharge Zone under section 312(f)(3) of the Clean Water Act (33 U.S.C. 1322(f)(3) and 40 CFR 140.4(a). Section 312(f)(3) states that "After the effective date of the initial standards and regulations promulgated under this section, if any State determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such waters to which the prohibition would apply."

The petition states that there are 81,371 licensed watercraft in the counties bordering Lake Erie with 22% of the motorized boat users having either a portable or permanent toilet on board and that approximately 353 marinas are located with access to the lake. Of these, 121 marinas have pumpout and/or dump stations for vessel sewage. A listing of these facilities and their location has been submitted with the petition. In addition, there are over 700 shoreline public restrooms available at public boat launches, docks and parks. Also, there are nine ports with 35 commercial docking facilities with no pumpout stations. However, the petition states that these ports are serviced by private septage tanker trucks. Once the Regional Administrator determines that adequate facilities are available, the State of Ohio has the authority pursuant to section 312(f)(3) of the Clean Water Act and 40 CFR 140.4(a) to completely prohibit the discharge of sewage, whether treated or not, from all vessels into the waters of Lake Erie under its jurisdiction.

Comments and views regarding this petition, pending a determination by the Regional Administrator, may be filed within 30 days of publication of this notice. These should be addressed to Irvin J. Dzikowski P.E. at U.S. Environmental Protection Agency, Region 5 WN–16J, 77 West Jackson Blvd, Chicago, Illinois 60604.

Dated: August 23, 2004.

Bharat Mathur,

Acting Regional Administrator, Region 5.

[FR Doc. 04–19819 Filed 8–30–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

[Docket No. 04 –10]

Agreement No. 201158; Docking and Lease Agreement by and Between City of Portland, Maine and Scotia Prince Cruises Limited; Order of Investigation and Hearing

Agreement No. 201158 is a "docking and lease agreement" between the city of Portland, Maine ("Portland"), a municipal corporation organized under the laws of Maine, and Scotia Prince Cruises Limited ("Scotia Prince"), a Bermuda corporation. Under the Agreement, effective this date, Scotia Prince leases certain docking and terminal facilities from Portland for purposes of operating a daily passenger and passenger vehicle service between Portland and Yarmouth, Nova Scotia.

Ordinarily, a docking and lease agreement would be classified as a "marine terminal facilities agreement" exempt by regulation from the filing and waiting period requirements of section 5 of the Shipping Act of 1984, as amended ("Shipping Act"), 46 U.S.C. app. § 1704. *See* 46 CFR § 535.311. Agreement No. 201158, however, contains exclusive use and non-compete provisions which cause it to be classified as a cooperative working agreement under section 4(b)(2) of the Act, 46 U.S. app. 1705(b)(2). Specifically, in sections 15 and 16 of the Agreement, Portland has agreed not to grant to any other operator permission to use its terminal premises for passenger or passenger vehicle service to or from Portland during Scotia Prince's scheduled season.[1] In return, Scotia Prince has agreed not to operate or participate in the operation of any competitive passenger or passenger vehicle service operating between any New England port and any port in Nova Scotia.

The effect of sections 15 and 16 of the agreement is to grant Scotia Prince a monopoly on passenger and passenger vehicle service between Portland, Maine and all ports in Nova Scotia, including Yarmouth. At the same time, Portland is protected from possible competition from Scotia Prince at nearby Portsmouth, NH, Bar Harbor, ME or any other New England port. Inclusion of these restrictive provisions in an otherwise routine agreement raises serious concerns under section 10(d) of the Shipping Act, 46 U.S.C. app. 1709(d). Section 10(d)provides, as pertinent:

(1) No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

(2) No marine terminal operator may agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, any common carrier or ocean tramp.

(3) The prohibitions in subsections (b)(10) and (13)of this section apply to marine terminal operators.

(4) No marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.

The restrictions on competitive service at Portland may also contravene section 10(b)(10), made applicable to marine terminal operators by section 10(d)(3), which makes it unlawful to "unreasonably refuse to deal or negotiate."

Background

Scotia Prince's service to Portland is provided by the M/V Scotia Prince, a 485 foot cruise vessel which accommodates approximately 1200 passengers and 200 vehicles. The Scotia Prince, which was extensively renovated in 2003, offers passengers restaurant dining, a casino, a café and bars, live entertainment, duty free shopping, a skydeck, and a massage and beauty spa, among other amenities. Overnight berths for 1,054 are provided in 174 cabins and staterooms.

The Scotia Prince operates on a daily basis carrying passengers and passenger vehicles between Portland and Yarmouth in southern Nova Scotia. The vessel departs Portland each evening, sails overnight and arrives at Yarmouth the next morning, eleven hours later. After an hour in port to disembark and embark passengers and vehicles, the Scotia Prince sails for Portland, arriving in the early evening. Approximately 153,000 passengers were boarded in 2003.[2]

[1] Approximately May 1–October 31.

[2] Scotia Prince Cruises is separately regulated by the Commission as a passenger vessel operator under 46 CFR part 540.

Portland is a municipal corporation which operates the Port of Portland under the authority and control of the Portland City Council. Portland has recently undertaken to construct a new "International Passenger and Ferry Terminal" and has committed $17 million dollars of public money to do so. It is the intention of the parties to relocate Scotia Prince's operation to the new terminal and to continue to apply the exclusive use provisions in sections 15 and 16, applicable to all terminal facilities in Portland, after the relocation.[3]

In response to the **Federal Register** publication of Agreement No. 201158, Bay Ferries Limited ("Bay Ferries") submitted comments objecting to certain provisions of the agreement, specifically sections 15 and 16. Bay Ferries is a Canadian corporation, headquartered in Charlottetown, Prince Edward Island, which provides transportation of passengers and passenger vehicles between Bar Harbor, Maine, and Yarmouth, Nova Scotia. Bay Ferries' service is provided by "The Cat," a 300 foot, high speed catamaran which accommodates 875 passengers and 250 vehicles, including busses and oversized vehicles. The Cat has no berths or cabins and offers relatively modest amenities. It makes the crossing from Bar Harbor to Yarmouth in about three hours, including port time.

Bay Ferries has expressed its desire to provide passenger and passenger vehicle service between Portland and Yarmouth, has met with Portland officials, and has indicated it is prepared to introduce service utilizing its existing catamaran with an intermediary call at Bar Harbor. Bay Ferries anticipates providing service between Portland and Yarmouth, with an intermediary call at Bar Harbor, in 4.5 hours.

Discussion

Exclusive arrangements which foreclose competition, such as those created by sections 15 and 16 of Agreement No. 201158, have been considered in a number of Commission decisions and are generally viewed as contrary to this nation's pro-competitive policies. In *Petchem, Inc.* v. *Canaveral Port Authority*, 23 S.R.R. 974, 988 (1986), we stated:

> The exclusive arrangement between the Port Authority and Hvide is *prima facie* unreasonable because it is contrary to the general policies of the United States favoring competition, which fact obligates Respondents to justify the arrangement.

[3] Docking and Lease Extension #2 between Portland and Scotia Prince Cruises Limited, p. 2, January 3, 2004.

As we have recognized, however, the Shipping Act of 1984, like the Shipping Act, 1916, does "not forbid all preferential or prejudicial treatment; only that which is undue or unreasonable." *Id.*, quoting *A.P. St. Philip* v. *Atlantic Land & Improvement Co. et al*, 13 F.M.C. 167, 174 (1969). After discussing the decision in *Agreement No. T–2598*, 17 F.M.C. 286 (1974), where the parties successfully justified an exclusive terminal and stevedoring arrangement, we held in *Petchem, supra:*

> In sum, the appropriate standard for judging exclusive terminal arrangements under the Shipping Acts is a synthesis of the *St. Philip* and *Agreement T–2598* decisions. Such arrangements are generally undesirable and, in the absence of justification by their proponents, may be unlawful under the Shipping Acts. However, in certain circumstances, such arrangements may be necessary to provide adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services and generally to advance the port's economic well-being. *Id.*, at 990.

While an exclusive arrangement may be justified under appropriate circumstances, we noted with approval the ALJ's affirmation that "the greater the degree of preference or monopoly, the greater the evidentiary burden of justification." *All Marine Moorings* v. *ITO Corp. of Baltimore*, 27 S.R.R. 539, 545 (1996).

A refusal "to deal or negotiate" is, in and of itself, not a violation of the Shipping Act. We must determine whether the refusal was unreasonable or whether it may have been justified by particular circumstances in effect. In *Petchem, Inc.* v. *Federal Maritime Commission*, 853 F.2d 558, 563 (D.C. Cir. 1988), the Court of Appeals recognized that "[t]he Shipping Act contemplates the existence of permissible preferences or prejudices." The Commission's analysis in *Seacon Terminals, Inc.* v. *Port of Seattle*, 26 S.R.R 886 (1993), indicates that whether a marine terminal operator gave good faith consideration to an entity's proposal or efforts at negotiation is central to determining whether a refusal to deal or negotiate was reasonable.

In view of the above, an evidentiary investigation is necessary to determine whether the City of Portland and/or Scotia Prince Cruises is in violation of sections 10(b)(10) and 10(d)(1)–(4) of the Shipping Act by entering into and operating under a restrictive working arrangement which negatively impacts competition for passenger and passenger vessel service in the trade between Portland and Nova Scotia.

Now Therefore, It Is Ordered that, pursuant to sections 10(b)(10),10(d)(1)–(4), 11, and 13 of the Shipping Act, 46 U.S.C. app. 1709(b)(10), 1709(d)(1)–(4), 1710, and 1712, an investigation is hereby instituted to determine:

(1) Whether the Port of Portland and/or Scotia Prince Cruises, alone or in conjunction with one another, have violated sections 10(b)(10) and 10(d)(3) of the Shipping Act by entering into an agreement whereby the Port of Portland unreasonably refuses to deal or negotiate with other providers of passenger and passenger vehicle transportation;

(2) Whether the Port of Portland and/or Scotia Prince Cruises, alone or in conjunction with one another, have violated sections 10(b)(10) and 10(d)(3) of the Shipping Act by entering into an agreement whereby Scotia Prince Cruises unreasonably refuses to deal or negotiate with ports in New England other than Portland;

(3) Whether the Port of Portland has violated section 10 (d)(1) of the Shipping Act by failing to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property;

(4) Whether the Port of Portland and Scotia Prince Cruises have violated section 10(d)(2) of the Shipping Act by agreeing to boycott or unreasonably discriminate in the provision of terminal services to a common carrier;

(5) Whether the Port of Portland has violated section 10(d)(4) of the Shipping Act by providing Scotia Prince Cruises with an undue and unreasonable preference or advantage;

(6) Whether, in the event violations of sections 10(b) and 10(d) of the Shipping Act are found, civil penalties should be assessed against the Port of Portland and Scotia Prince Cruises and, if so, in what amount; and

(7) Whether, in the event such violations are found, the Port of Portland and Scotia Prince Cruises should be ordered to cease and desist from practices and agreements which are in violation of sections 10(b)(10) and 10(d)(1)–(4) of the Shipping Act.

It Is Further Ordered, that the Port of Portland and Scotia Prince Cruises Limited are designated as respondents in this proceeding;

It Is Further Ordered, that a public hearing be held in this proceeding and that these matters be assigned for hearing before an Administrative Law Judge ("ALJ") of the Commission's Office of Administrative Law Judges at a date and place to be hereafter determined by the ALJ in compliance with Rule 61 of the Commission's Rules

of Practice and Procedure, 46 CFR 502.61. The hearing shall include oral testimony and cross-examination in the discretion of the presiding ALJ only after consideration has been given by the parties and the presiding ALJ to the use of alternative forms of dispute resolution, including but not limited to mediation pursuant to 46 CFR 502.91, and upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record.

It Is Further Ordered, that the Commission's Bureau of Enforcement is designated a party to this proceeding.

It Is Further Ordered, that notice of this Order be published in the **Federal Register**, and a copy be served on each party of record.

It Is Further Ordered, that other persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 CFR 502.72.

It Is Further Ordered, that all further notices, orders, and/or decisions issued by or on behalf of the Commission in this proceeding, including notice of the time and place of hearing or prehearing conference, shall be served on each party of record;

It Is Further Ordered, that all documents submitted by any party of record in this proceeding shall be directed to the Secretary, Federal Maritime Commission, Washington, DC 20573–0001, in accordance with Rule 118 of the Commission's Rules of Practice and Procedure, 46 CFR 502.118, and shall be served on each party of record.

Finally, It Is Ordered, that in accordance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 CFR 502.61, the initial decision of the presiding ALJ shall be issued by August 23, 2005, and the final decision of the Commission shall be issued by December 21, 2005.

By the Commission.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–19773 Filed 8–30–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:30 a.m., Tuesday, September 7, 2004.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

FOR FURTHER INFORMATION CONTACT: Michelle A. Smith, Director, Office of Board Members; 202–452–2955.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Board of Governors of the Federal Reserve System, August 27, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–19986 Filed 8–27–04; 3:53 pm]

BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

OMB Control No. 3090–0043

Information Collection; Appraisal of Fair Annual Parking Rate per Space for Standard Level User Charge; GSA Form 3357

AGENCY: Public Buildings Service, GSA.

ACTION: Notice of request for comments regarding a renewal to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to review and approve a renewal of a currently approved information collection requirement regarding appraisal of fair annual parking rate per space for standard level user charge.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: November 1, 2004.

FOR FURTHER INFORMATION CONTACT: Robert A. Yevoli, Policy and Analysis Division at telephone (202) 219–1403 or via email to robert.yevoli@gsa.gov.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Regulatory Secretariat (V), General Services Administration, Room 4035, 1800 F Street, NW., Washington, DC 20405. Please cite OMB Control No. 3090–0043, Appraisal of Fair Annual Parking Rate per Space for Standard Level User Charge; GSA Form 3357, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

GSA Form 3357 is needed by GSA contract and staff appraisers who use the form for estimating parking rates assessed on Federal agencies occupying space in GSA owned or controlled buildings.

B. Annual Reporting Burden

Respondents: 260

Responses Per Respondent: 5

Total Responses: 1300

Hours Per Response: 1.6

Total Burden Hours: 2,080

OBTAINING COPIES OF PROPOSALS: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (V), 1800 F Street, NW., Room 4035, Washington, DC 20405, telephone (202) 208–7312. Please cite OMB Control No. 3090–0043, Appraisal of Fair Annual Parking Rate Per Space for Standard Level User Charge; GSA Form 3357, in all correspondence.

Dated: August 25, 2004

Michael W. Carleton,

Chief Information Officer.

[FR Doc. 04–19827 Filed 8–30–04; 8:45 am]

BILLING CODE 6820–23–S

GENERAL SERVICES ADMINISTRATION

Maximum Per Diem Rates for the Continental United States (CONUS)

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Notice of Per Diem Bulletin 05–1, Fiscal Year (FY) 2005 continental United States (CONUS) per diem rates.

SUMMARY: An analysis of lodging data reveals that the FY 2005 maximum per diem rates for locations within the continental United States (CONUS) should be updated to provide for the reimbursement of Federal employees' expenses covered by per diem. Per Diem Bulletin 05–1 increases/decreases the maximum lodging amounts in existing per diem localities, increases the standard CONUS lodging amount from $55 to $60 (which results in the deletion of several existing per diem localities), and adds new per diem localities due to requests by Federal agencies. The per diems prescribed in Bulletin 05–1 may be found at http://www.gsa.gov/perdiem. In an effort to improve the ability of the per diem rates to meet the lodging demands of Federal travelers, the General Services Administration (GSA) has integrated average daily rate cost data obtained from lodging industry sources into the per diem rate-setting process. The use of such data in the per diem rate setting process enhances the Government's ability to obtain policy compliant lodging where it is needed. Bulletin 05–1 also contains a listing of pertinent information that must be submitted through an agency for GSA to restudy a location if a CONUS per diem rate is insufficient to meet necessary expenses.

DATES: This notice is effective October 1, 2004, and applies for travel performed on or after October 1, 2004.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Adlore Chaudier, Office of Governmentwide Policy, Travel Management Policy, at (202) 501–3859. Please cite Notice of Per Diem Bulletin 05–1.

SUPPLEMENTARY INFORMATION:

A. Background

After an analysis of additional data, GSA has determined that current lodging rates for certain localities do not adequately reflect the lodging economics in those areas.

B.Change in standard procedure

GSA issues/publishes the CONUS per diem rates, formerly published in Appendix A to 41 CFR chapter 301, solely on the internet at http://www.gsa.gov/perdiem. This process, implemented in 2003, ensures more timely increases or decreases in per diem rates established by GSA for Federal employees on official travel within CONUS. Notices published periodically in the **Federal Register**, such as this one, now constitute the only notification of revisions in CONUS per diem rates to agencies.

Dated: August 25, 2004

John G. Sindelar,

Deputy Associate Administrator.

[FR Doc. 04–19826 Filed 8–30–04; 8:45 am]

BILLING CODE 6820–14–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Notice of Meeting: Secretary's Advisory Committee on Genetics, Health, and Society

Pursuant to Public Law 92–463, notice is hereby given of the fifth meeting of the Secretary's Advisory Committee on Genetics, Health, and Society (SACGHS), U.S. Public Health Service. The meeting will be held from 8:30 a.m. to 5 p.m. on October 18, 2004 and 8:30 a.m. to 3 p.m. October 19, 2004 at the Marriott Hotel Bethesda at 5151 Pooks Hill Road, Bethesda, Maryland. The meeting will be open to the public with attendance limited to space available. The meeting will be webcast.

The first half of the first day will be devoted to a session to receive testimony from individuals who have been affected by genetic discrimination in health insurance and employment. The second half of the first day will include presentations related to and discussion of a revised draft report on coverage and reimbursement for genetic technologies and services and the development of recommendations on the issues identified in the report. Discussion of the draft coverage and reimbursement report will continue throughout the first half of the second day. The second day will end with a status report on the National Academy of Sciences' study of genomics and patents and discussions of future plans for Committee action on the issues of pharmacogenomics and large population studies. Time will be provided each day for public comments.

Under authority of 42 U.S.C. 217a, Section 222 of the Public Health Service Act, as amended, the Department of Health and Human Services established SACGHS to serve as a public forum for deliberations on the broad range of human health and societal issues raised by the development and use of genetic technologies and, as warranted, to provide advice on these issues. The draft meeting agenda and other information about SACGHS, including information about access to the webcast, will be available at the following Web site: *http://www4.od.nih.gov/oba/sacghs.htm.*

The Committee would welcome hearing from anyone wishing to provide public comment on any issue related to genetics, health and society. In addition, the Committee is specifically seeking written public comment from individuals who have experienced genetic discrimination in health insurance or in employment, who fear genetic discrimination, or who have paid out of pocket for services to keep genetic information out of medical records. Individuals who would like to provide public comment or who plan to attend the meeting and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the SACGHS Executive Secretary, Ms. Sarah Carr, by telephone at 301–496–9838 or E-mail at *sc112c@nih.gov*. The SACGHS office is located at 6705 Rockledge Drive, Suite 750, Bethesda, MD 20892.

Dated: August 19, 2004.

LaVerne Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–19850 Filed 8–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Population-Based Birth Defects Surveillance Programs and the Utilization of Surveillance Data by Public Health Programs

Announcement Type: New.

Funding Opportunity Number: RFA 05009.

Catalog of Federal Domestic Assistance Number: 93.283.

Key Dates:

Letter of Intent Deadline: September 27, 2004.

Application Deadline: October 20, 2004.

I. Funding Opportunity Description

Authority: This program is authorized under sections 311, 317(k)(2), and 317(C) of the Public Health Service Act [42 U.S.C. 243, 247(k)(2), and 247b-4], as amended.

Purpose: The purpose of this program is to support: (1) The development, implementation, expansion, and evaluation of state's population-based birth defects surveillance systems; (2) the development and implementation of population-based programs to prevent birth defects; (3) the development and implementation or expansion of activities to improve the access of children with birth defects to health services and early intervention programs; and (4) the evaluation of the effectiveness of the referral activities and the impact on the affected children and families. This program addresses the "Healthy People 2010" focus area of Maternal, Infant, and Child Health.

Measurable outcomes of the program will be in alignment with the following performance goal for the National Center on Birth Defects and Developmental Disabilities (NCBDDD):

• Increase the number of United States births covered by birth defects monitoring programs which use these data to plan services for children and evaluate prevention strategies.

Applicants may apply under one of two categories: Category 1—States/territories/tribes with nonexistent or less than three year old birth defects surveillance systems; or Category 2—States/territories/tribes with ongoing surveillance systems.

This announcement is only for non-research activities supported by CDC/ATSDR. If research is proposed, the application will not be reviewed. For the definition of research, please see the CDC Web site at the following Internet address: *http://www.cdc.gov/od/ads/opspolll.htm.*

Activities: Awardee activities for this program are as follows: In conducting activities to achieve the purpose of this program, the recipient will be responsible for the activities under (1) recipient activities for States with nonexistent or less than three year old birth defects surveillance systems; or (2) Recipient activities for States with ongoing surveillance systems. CDC will be responsible for the activities under (3) CDC activities.

(1) Recipient Activities for States with nonexistent or less than three year old birth defects surveillance systems:

a. Develop and begin implementation of a population-based surveillance system to ascertain cases and generate timely population-based data of major birth defects occurring in the State.

b. Analyze and disseminate the surveillance data generated by the system in a timely fashion including rates and trends of major birth defects.

c. Develop and implement a plan to evaluate the surveillance methodology used.

d. Involve the appropriate partners within the State, including the State's organization receiving Title V federal funds, to develop a plan and begin implementation of a birth defects prevention program (*i.e.*, Neural Tube Defects (NTD) occurrence and recurrence prevention). Share results with appropriate organizations within the State and with other States.

e. Develop a plan to evaluate your prevention activities.

f. Involve the appropriate partners within the State to develop a plan and begin implementation of activities to improve the access of children with birth defects to comprehensive, community-based, family-centered care (*e.g.*, establish linkages with other programs like Children with Special Health Care Needs).

g. Develop a plan to evaluate the identification of and/or timeliness of referral to services among eligible children or families.

(2) Recipient Activities for States with ongoing surveillance systems:

a. Broaden methodologies and approaches which will improve and expand the capacity of the existing population-based surveillance system to ascertain cases and generate timely population-based data of major birth defects occurring in the State.

b. Analyze and disseminate the surveillance data generated by the system in a timely fashion including rates and trends of major birth defects (*e.g.*, publish a report on the surveillance data).

c. Evaluate the surveillance methodology used.

d. Involve the appropriate additional partners within the State, including the State's organization receiving Title V federal funds, to expand birth defects prevention programs (*i.e.*, Neural Tube Defects (NTD) occurrence and recurrence prevention). Share results with appropriate organizations within the State and with other States.

e. Evaluate the prevention progress.

f. Involve the appropriate partners within the State to expand activities to improve the access of children with birth defects to comprehensive, community-based, family-centered care (*e.g.*, establish linkages with other programs like Children with Special Health Care Needs).

g. Evaluate the progress on improving access to services (*e.g.*, identification of children and families eligible for services; evaluate the timeliness of referral to services).

h. Evaluate the effectiveness of the referral activities and the benefit/impact on the affected children and families.

(3) In a cooperative agreement, CDC staff is substantially involved in the program activities, above and beyond routine grant monitoring. CDC Activities for this program are as follows:

a. Provide technical assistance such as presenting the need, benefits, and description of a birth defects surveillance, prevention, and intervention program, reviewing draft legislation, etc. to state agencies and interested parties.

b. Assist in designing, developing, and evaluating methodologies and approaches used for population-based birth defects surveillance. Discuss the advantages and disadvantages of different case ascertainment methods.

c. Assist in analyzing surveillance data related to birth defects.

d. Assist in designing, developing, and evaluating plans for prevention programs.

e. Assist in designing, developing, and evaluating plans to improve the access of children with birth defects to health services and intervention programs.

f. Provide a reference point for sharing regional and national data and information pertinent to the surveillance and prevention of birth defects.

II. Award Information

Type of Award: Cooperative Agreement. CDC involvement in this program is listed in the Activities Section above.

Fiscal Year Funds: 2005.

Approximate Total Funding: $2,500,000 (This amount is an estimate, and subject to the availability of funds.)

Approximate Number of Awards: Fifteen; Two—Eight Category 1 awards and Six—Fourteen Category 2 awards.

Approximate Average Award: $120,000 for Category 1 awards and $190,000 for Category 2 awards (This amount is for the first 12-month budget period, and includes both direct and indirect costs.)

Floor of Award Range: $100,000 for Category 1 awards and $150,000 for Category 2 awards.

Ceiling of Award Range: $140,000 for Category 1 awards and $220,000 for Category 2 awards (This ceiling is for the first 12 month budget period.)

Anticipated Award Date: March 1, 2005.

Budget Period Length: Twelve months.

Project Period Length: Five years; 3/1/05–2/28/10. Throughout the project

period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the Federal Government.

III. Eligibility Information

III.1. Eligible Applicants

Applications may be submitted by governments and their agencies, such as:

- Federally recognized Indian tribal governments
- Indian tribes
- Indian tribal organizations
- State governments or their Bona Fide Agents (this includes the District of Columbia, the Virgin Islands, the Commonwealth of the Northern Marianna Islands, American Samoa, Guam, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau)

A Bona Fide Agent is an agency/organization identified by the state as eligible to submit an application under the state eligibility in lieu of a state application. If you are applying as a bona fide agent of a state government, you must provide a letter from the state as documentation of your status. Place this documentation behind the first page of your application form. Applications that fail to submit the evidence requested above will be considered non-responsive and returned without review.

III.2. Cost Sharing or Matching

Matching funds are not required for this program. Applicants are encouraged to list other sources of funding such as state funds, in-kind funds, partner funds, etc. that will be used to support this program announcement's activities.

III.3. Other

Special Requirements: If your application is incomplete or non-responsive to the special requirements listed in this section, it will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

- If you request a funding amount greater than the ceiling of the award range, your application will be considered non-responsive.
- Late applications will be considered non-responsive. See section "IV.3. Submission Dates and Times" for more information on deadlines.
- If you are applying as a bona fide agent of a state government, you must provide a letter from the state as documentation of your status. Place this documentation behind the first page of your application form. Applications that fail to submit the evidence requested above will be considered non-responsive.
- Recipients funded under CDC Program Announcement 03019 (Population-Based Birth Defect Surveillance Programs and the Utilization of Surveillance Data by Public Health Programs) and Program Announcement 02081 (Centers for Birth Defects Research and Prevention) are not eligible. See Attachment I, as posted on the CDC Web site, for a list of the States currently funded under these program announcements. The eligible States are: Alabama, Alaska, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Note: Title 2 of the United States Code section 1611 states that an organization described in section 501(c)(4) of the Internal Revenue Code that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

IV. Application and Submission Information

IV.1. Address To Request Application Package

To apply for this funding opportunity use application form PHS 5161. Application forms and instructions are available on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm.* If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO–TIM) staff at: 770–488–2700. Application forms can be mailed to you.

IV.2. Content and Form of Submission

Letter of Intent (LOI): Your LOI must be written in the following format:

- Maximum number of pages: two
- Font size: 12-point unreduced
- Single spaced
- Paper size: 8.5 by 11 inches
- Page margin size: One inch
- Printed only on one side of page
- Written in English, avoid jargon

Your LOI must contain the following information:

1. This program announcement number..
2. Applicant's legal name and address.
3. Principal Investigator's name, address, telephone number, and e-mail address.
4. Identification of which category applicant is submitting.
5. A brief description of the number of state-wide births and current birth defects surveillance system.
6. A brief description of the planned statement of work.

Application: This program announcement is the definitive guide on application format, content, and deadlines. It supersedes information provided in the application instructions. If there are discrepancies between the application form instructions and the program announcement, adhere to the guidance in the program announcement.

You must include a project narrative with your application forms. Your narrative must be submitted in the following format:

- Maximum number of pages: 30. If your narrative exceeds the page limit, only the first pages which are within the page limit will be reviewed.
- Font size: 12 point unreduced
- Paper size: 8.5 by 11 inches
- Page margin size: One inch
- Printed only on one side of page
- Held together only by rubber bands or metal clips; not bound in any other way.

The applicant should provide a detailed description of first-year activities and briefly describe future-year objectives and activities. Your narrative should address activities to be conducted over the entire project period. Your application must include the following items in the order listed:

1. Cover Letter: A one page cover letter should indicate whether the applicant is applying for Category 1 or Category 2. Additionally, if the applicant is not the State health agency, the applicant must provide a letter from the appropriate State health agency designating the applicant as a bona fide agent. This information should be placed directly behind the cover letter of the application.

2. A one-page, single-spaced, typed abstract in 12-point font must be submitted with the application. The heading should include the title of the grant program, project title, organization, name and address, project director and telephone number. The abstract should clearly state which option the applicant is applying for: Category 1 or Category 2. The abstract should briefly summarize the program for which funds are requested, the

activities to be undertaken, and the applicant's organization structure. The abstract should precede the program narrative. A table of contents that provides page numbers for each of the following sections should be included. All pages must be numbered.

3. Narrative: The narrative should be no more than 30 double-spaced pages, printed on one side, with one-inch margins, and unreduced font (12-point). The required detailed budget, detailed budget justification, and appendices are not considered to be part of the program narrative. The narrative should specifically address item 1. or 2. in the "Program Requirements" and should contain the following sections:

a. Use of Surveillance Data for Improving Access to Health Services and Early Intervention Programs.

b. Use of Surveillance Data for Prevention Activities.

c. Impact on Population-Based Birth Defects Surveillance.

d. Organizational and Program Personnel Capability.

e. Understanding of the Public Health Impact of Birth Defects.

f. Human Subjects Review.

4. Budget and Budget Justification—Provide a detailed budget which indicates the anticipated costs for personnel, fringe benefits, travel, supplies, contractual, consultants, equipment, indirect, and other items. Please provide detailed budget and budget justifications for each subcontractor/subawardee.

Additional information may be included in the application appendices. The appendices will not be counted toward the narrative 30-page limit. This additional information can include:

- Birth surveillance legislation
- Most current calendar year birth surveillance data
- International Classification of Diseases codes
- Percent coverage of births
- Memorandums with neighboring states
- Folic acid educational materials
- Curriculum Vitaes/Resumes
- Organizational Charts
- Letters of Support
- Subcontractor/Subawardee budget justification
- Scientific articles and publications

You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711.

For more information, see the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcommt.htm.* If your application form does not have a DUNS number field, please write your DUNS number at the top of the first page of your application, and/or include your DUNS number in your application cover letter.

Additional requirements that may require you to submit additional documentation with your application are listed in section "VI.2. Administrative and National Policy Requirements."

IV.3. Submission Dates and Times

LOI Deadline Date: September 27, 2004.

CDC requests that you send a LOI if you intend to apply for this program. Although the LOI is not required, not binding, and does not enter into the review of your subsequent application, the LOI will be used to gauge the level of interest in this program, and to allow CDC to plan the application review.

Application Deadline Date: October 20, 2004.

Explanation of Deadlines: Applications must be received in the CDC Procurement and Grants Office by 4:00 p.m. Eastern Time on the deadline date. If you send your application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If CDC receives your application after closing due to: (1) Carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carriers guarantee. If the documentation verifies a carrier problem, CDC will consider the application as having been received by the deadline.

This program announcement is the definitive guide on application format, content, and deadlines. It supersedes information provided in the application instructions. If your application does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that your application did not meet the submission requirements.

CDC will not notify you upon receipt of your application. If you have a question about the receipt of your LOI or application, first contact your courier. If you still have a question, contact the PGO-TIM staff at: 770–488–2700. Before calling, please wait two to three days after the application deadline. This will allow time for applications to be processed and logged.

IV.4. Intergovernmental Review of Applications

Your application is subject to Intergovernmental Review of Federal Programs, as governed by Executive Order (EO) 12372. This order sets up a system for state and local governmental review of proposed federal assistance applications. You should contact your state single point of contact (SPOC) as early as possible to alert the SPOC to prospective applications, and to receive instructions on your state's process. Click on the following link to get the current SPOC list: *http://www.whitehouse.gov/omb/grants/spoc.html.*

IV.5. Funding Restrictions

Restrictions, which must be taken into account while writing your budget are as follows:

- Funds may not be used for research.
- Reimbursement of preaward costs is not allowed.
- These awards may be used for personnel services, equipment, travel, and other costs related to project activities. Project funds may not be used to supplant State funds available for birth defects surveillance or prevention, health care services, patient care, nor construction.
- Award recipients agree to use cooperative agreement funds for travel by project staff selected by CDC to participate in CDC-sponsored workshops, or other called meetings such as regional or annual meetings.

If you are requesting indirect costs in your budget, you must include a copy of your indirect cost rate agreement. If your indirect cost rate is a provisional rate, the agreement should be less than 12 months of age.

Guidance for completing your budget can be found on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

IV.6. Other Submission Requirements

LOI Submission Address: Submit your LOI by mail, express delivery service, fax, or E-mail to: (Regular Mail) Bill Paradies, CDC, NCBDDD, 1600 Clifton Road, M/S E–86, Atlanta, GA 30333, Telephone: 404.498.3919, Fax: 404.498.3040 or 3550. (Direct/Overnight) Bill Paradies, CDC, NCBDDD, 12 Executive Park Drive, Atlanta, GA 30329. E-mail: *wep2@cdc.gov.*

Application Submission Address: Submit the original and two hard copies of your application by mail or express delivery service to: Technical Information Management–RFA# 05009, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

Applications may not be submitted electronically at this time.

V. Application Review Information

V.1. Criteria

Applicants are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the performance goals stated in the "Purpose" section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation.

Your application will be evaluated against the following criteria:

1. Use of surveillance data for improving access to health services and early intervention programs (30 points): The feasibility of the applicant's plans to develop and implement or expand existing activities to improve the access of children with birth defects to health services and early interventions. The current and proposed activities evaluated in this element are specific for Category 1 and Category 2.

a. Evaluation criteria for Category 1 (States with nonexistent or less than 3 year old birth defects surveillance systems):

(1) Identification of appropriate programs within the State for referral to health services (*e.g.*, provide letters of support, Memorandums of Agreement/ Understanding).

(2) Plan for linking programs or developing other approaches to increase identification of children or families eligible for health services.

(3) Plan to evaluate the implementation process.

b. Evaluation criteria for Category 2 (States with ongoing birth defects surveillance systems):

(1) Ability to integrate programs within the State (*e.g.*, provide letters of support, Memorandums of Agreement/ Understanding, documentation of numbers of eligible children or families referred for and percent receiving services).

(2) Improve and expand approaches to increase identification of children or families eligible for health services.

(3) Evaluate the effectiveness of the referral services and the outcomes of children and families who receive services.

2. Use of the surveillance data for prevention activities (25 points): The applicant's feasibility and completeness of the plans for using surveillance data to develop and implement or expand existing programs to prevent birth defects. The current and proposed activities evaluated in this element are specific for Category 1 and Category 2.

a. Evaluation criteria for Category 1 (States with nonexistent or less than 3 year old birth defects surveillance systems):

(1) Ability to work with appropriate partners in the State (*e.g.*, provide letters of support, Memorandums of Agreement/Understanding).

(2) Plan for using the surveillance data to develop prevention programs.

(3) Plan for sharing surveillance data (*e.g.*, personal identifiers and contact information) with programs or agencies so that children or families can be enrolled in prevention programs.

(4) Letter from the State's organization receiving Title V federal funds that describe the data linkages and other collaborative activities with the applicant.

b. Evaluation criteria for Category 2 (States with ongoing birth defects surveillance systems):

(1) Ability to work with appropriate partners in the State (*e.g.*, provide letters of support, Memorandums of Agreement/Understanding).

(2) Use of surveillance data to expand prevention programs.

(3) Sharing the surveillance data (*e.g.*, personal identifiers and contact information) with programs or agencies so that children or families are enrolled in prevention programs.

(4) Evaluation of progress made in the prevention of birth defects.

(5) Letter from the State's organization receiving Title V federal funds that describe the data linkages and other collaborative activities with the applicant.

3. Impact on population-based birth defects surveillance (25 points): The accuracy and completeness of the applicant's description of the anticipated level of impact this cooperative agreement will have on birth defects surveillance activities in the State. The current and proposed activities evaluated in this element are specific for Category 1 and Category 2.

a. Evaluation criteria for Category 1 (States with nonexistent or less than 3 year old birth defects surveillance systems):

(1) Plans for developing population-based birth defects surveillance.

(2) Methods of case ascertainment.

(3) Timeliness of case ascertainment.

(4) Level of coverage of the population.

(5) Specific birth defects ascertained.

(6) Plans for analyzing and reporting surveillance data to appropriate State, local, and federal health officials.

(7) Plans for evaluating the surveillance methodology and the quality of the surveillance data.

(8) The degree to which the applicant has met the CDC Policy requirements regarding the inclusion of women, ethnic, and racial groups in the proposed research. This includes:

(a) The proposed plan for the inclusion of both sexes and racial and ethnic minority populations for appropriate representation.

(b) The proposed justification when representation is limited or absent.

(c) A statement as to whether the design of the study is adequate to measure differences when warranted.

(d) A statement as to whether the plans for recruitment and outreach for study participants include the process of establishing partnerships with community(ies) and recognition of mutual benefits.

b. Evaluation criteria for Category 2 (States with ongoing birth defects surveillance systems):

(1) Ability to improve/expand population-based birth defects surveillance.

(2) Methods of case ascertainment.

(3) Timeliness of case ascertainment.

(4) Level of coverage of the population.

(5) Specific birth defects ascertained.

(6) Analyzing and reporting surveillance data to appropriate State, local, and federal health officials.

(7) Evaluating the surveillance methodology and quality of the surveillance data.

(8) The degree to which the applicant has met the CDC Policy requirements regarding the inclusion of women, ethnic, and racial groups in the proposed research. This includes:

(a) The proposed plan for the inclusion of both sexes and racial and ethnic minority populations for appropriate representation.

(b) The proposed justification when representation is limited or absent.

(c) A statement as to whether the design of the study is adequate to measure differences when warranted.

(d) A statement as to whether the plans for recruitment and outreach for study participants include the process of establishing partnerships with community(ies) and recognition of mutual benefits.

4. Organizational and program personnel capability (15 points):

a. Whether the applicant has the appropriate experience, skills, and ability to develop and improve birth defects surveillance and use surveillance data to develop prevention programs and improve access to health services or early intervention programs.

b. The adequacy of the present staff and/or the capability to assemble competent staff to either implement or improve upon a birth defects surveillance system and develop programs for prevention or improving access to health services and early intervention programs. If it is necessary to hire staff to conduct program activities, provide plans for identifying and hiring qualified applicants on a timely basis. Also, provide plans for how work on program activities will be conducted prior to hiring necessary staff.

c. The applicant shall identify all current and potential personnel who will work on this cooperative agreement including qualifications and specific experience as it relates to the requirements set forth in this announcement.

5. Applicant's understanding of the public health impact of birth defects (5 points): The adequacy of the applicant's description of a clear, concise understanding of the requirements, objectives, and purpose of the cooperative agreement. This application shall reflect the applicant's understanding of the public health impact of birth defects in their State and the purpose and complexities of birth defects surveillance as it relates to their State.

6. Human Subjects Review (not scored): Does the application adequately address the requirements of Title 45 CFR Part 46 for the protection of human subjects? (Not scored; however, an application can be disapproved if the research risks are sufficiently serious and protection against risks are so inadequate as to make the entire application unacceptable.)

7. Budget justification and adequacy of facilities (not scored): The budget will be evaluated for the extent to which it is reasonable, clearly justified, and consistent with the intended use of the cooperative agreement funds. The applicant shall describe and indicate the availability of facilities and equipment necessary to carry out this project.

V.2. Review and Selection Process

Applications will be reviewed for completeness by the Procurement and Grants Office staff and for responsiveness by the National Center on Birth Defects and Developmental Disabilities. Incomplete applications and applications that are non-responsive to the eligibility criteria will not advance through the review process. Applicants will be notified that their application did not meet submission requirements. An objective review panel will evaluate complete and responsive applications according to the criteria listed in the "V.1. Criteria" section above. The objective review panel will consist of CDC employees who will be randomly assigned applications to review and score. Category 1 and Category 2 applications will be funded respectively in order by score and rank as determined by the review panel. CDC will provide justification for any decision to fund out of rank order.

V.3. Anticipated Award Date

February 2005 for a March 1, 2005 project start date.

VI. Award Administration Information

VI.1. Award Notices

Successful applicants will receive a Notice of Grant Award (NGA) from the CDC Procurement and Grants Office. The NGA shall be the only binding, authorizing document between the recipient and CDC. The NGA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review by mail.

VI.2. Administrative and National Policy Requirements

45 CFR Parts 74 and 92

For more information on the Code of Federal Regulations, see the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

The following additional requirements apply to this project:

- AR–7 Executive Order 12372
- AR–9 Paperwork Reduction Act Requirements
- AR–10 Smoke-Free Workplace Requirements
- AR–11 Healthy People 2010
- AR–12 Lobbying Restrictions
- AR–24 Health Insurance Portability and Accountability Act Requirements

Additional information on these requirements can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm.*

VI.3. Reporting Requirements

You must provide CDC with an original, plus two copies of the following reports:

1. Interim progress report, no less than 90 days before the end of the budget period. The progress report will serve as your non-competing continuation application, and must contain the following elements:

a. Current Budget Period Activities Objectives.

b. Current Budget Period Financial Progress.

c. New Budget Period Program Proposed Activity Objectives.

d. Detailed Line-Item Budget and Justification.

e. Measures of Effectiveness.

f. Additional Requested Information.

2. Financial status report and annual progress report, no more than 90 days after the end of the budget period.

3. Final financial and performance reports, no more than 90 days after the end of the project period.

These reports must be mailed to the Grants Management or Contract Specialist listed in the "Agency Contacts" section of this announcement.

VII. Agency Contacts

We encourage inquiries concerning this announcement. For general questions about this announcement, contact: Technical Information Management Section, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, Telephone: 770–488–2700.

For program technical assistance, contact: Cara Mai/Bill Paradies, Project Officers, 1600 Clifton Road, Mailstop E–86, Atlanta, GA 30333, Telephone: 404–498–3918/3919, Fax: 404–498–3040 or 3550, E-mail: *cmai@cdc.gov* and *wep2@cdc.gov.*

For financial, grants management, or budget assistance, contact: Susan B. Kiddoo, Grants Management Officer, CDC Procurement and Grants Office, 2920 Brandywine Road, Room 3000, Atlanta, GA 30341, Telephone: 770–488–2605, Fax: 770–488–2777, E-mail: *scb7@cdc.gov.*

VIII. Other Information

This and other CDC funding opportunity announcements can be found on the CDC Web site, Internet address *http://www.cdc.gov.* Click on "Funding" then "Grants and Cooperative Agreements."

Dated: August 25, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–19799 Filed 8–30–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Animal Models and Correlates of Protection for Plague Vaccines; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration (FDA) is announcing the following public workshop: "Animal Models and Correlates of Protection for Plague Vaccines." The purpose of this workshop is to provide a public forum to discuss the animal models that may be most appropriate for evaluating new plague vaccines; the critical immune responses that may correlate with protection against plague; and the kinds of experimental and clinical assays that will need to be developed to measure these critical immune responses both in animals and in humans. The workshop will develop information that may be critical to the design of the pivotal studies required to assess plague vaccine efficacy.

Date and Time: This 1 1/2-day public workshop will be held on October 13, 2004, from 8:30 a.m. to 5 p.m., and October 14, 2004, from 8:30 a.m. to 12 noon.

Location: The workshop will be held at the Marriott Gaithersburg Washingtonian Center, 9751 Washingtonian Blvd., Gaithersburg, MD. The Marriott Gaithersburg Washingtonian Center is located approximately 30 minutes from Ronald Reagan Washington National and Washington Dulles International airports. Directions to the hotel can be found at *http://marriott.com/property/propertyPage/WASWG.*

Contact Person: *Regarding the public workshop*: Robert J. Watson, Science Applications International Corp., 5340 Spectrum Dr., suite N, Frederick, MD 21703, 301–228–3148, FAX: 301–698–5991, e-mail: *robert.j.watson@saic.com.* *Regarding this document*: Nathaniel L. Geary, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

Registration: Registration is required; however, there is no registration fee for this public workshop. The deadline for registration is Wednesday, October 6, 2004. There will be no onsite registration. Information about the workshop and online registration can be found at *https://www.seeuthere.com/event/m2c640–122589588204.*

If you need special accommodations due to a disability, please contact Robert Watson (see *Contact Person*) at least 7 days in advance of the workshop.

SUPPLEMENTARY INFORMATION: FDA's Center for Biologics Evaluation and Research; the National Institutes of Health, National Institute of Allergy and Infectious Diseases; and the Department of Health and Human Services, Office of Research Development and Coordination are sponsoring a public workshop. The workshop will be divided into interactive sessions in which leaders in the plague research field will present topics of particular relevance to plague vaccines. The sessions will include the following topics: (1) Introduction to the "Animal Rule," (2) pathogenesis of plague, (3) plague vaccines and assessment of immune responses, (4) human disease and relevant animal models, and (5) implementation of the "Animal Rule" for plague vaccines. In addition, an expert panel will discuss the issues that will be critical for the development and eventual licensure of plague vaccines. The workshop's goal is to expedite the development and licensure of new plague vaccines by providing information critical to the development of the following: (1) Appropriate animal models, (2) immuno-assays, and (3) testing plans for vaccine evaluation.

Transcripts: Transcripts of the workshop may be requested in writing from the Freedom of Information Office (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm. 12A–16, Rockville, MD 20857, approximately 15 working days after the workshop at a cost of 10 cents per page. Additionally, the transcript will be placed on the FDA Internet at *http://www.fda.gov/cber/minutes/workshop-min.htm.*

Dated: August 24, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–19776 Filed 8–30–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Food Advisory Committee; Tentative Schedule of Meetings for 2004; Amendment of Notice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an amendment to the tentative schedule of meetings for 2004. This document was announced in the **Federal Register** of December 31, 2003 (68 FR 75574 through 75577). The amendment is being made to reflect the following change: The Center for Food Safety and Applied Nutrition is canceling the tentatively scheduled meeting for the Dietary Supplements Subcommittee of the Food Advisory Committee on September 14 and 15, 2004.

FOR FURTHER INFORMATION CONTACT: Carolyn E. Jeletic, Center for Food Safety and Applied Nutrition (HFS–006), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2397.

SUPPLEMENTARY INFORMATION: You may also obtain up-to-date meeting information by calling the Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area).

Dated: August 24, 2004.

Lester M. Crawford,

Acting Commissioner of Food and Drugs.

[FR Doc. 04–19777 Filed 8–30–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0366]

From Concept to Consumer: Center for Biologics Evaluation and Research Working With Stakeholders on Scientific Opportunities for Facilitating Development of Vaccines, Blood and Blood Products, and Cellular, Tissue, and Gene Therapies; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop; request for comments.

The Food and Drug Administration (FDA), is announcing a public workshop entitled "From Concept to Consumer: Center for Biologics Evaluation and

Research Working With Stakeholders on Scientific Opportunities for Facilitating Development of Vaccines, Blood and Blood Products, and Cellular, Tissue, and Gene Therapies." The goal of the public workshop is to provide a forum for stakeholders to discuss opportunities for and potential approaches to the development of innovative scientific knowledge and tools to facilitate the development and availability of new biological products including vaccines, blood and blood products, and cellular, tissue, and gene therapies.

Date and Time: The public workshop will be held on October 7, 2004, from 8:30 a.m. to 5 p.m.

Location: The public workshop will be held at The Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Blvd., Gaithersburg, MD.

Contact Person: Melanie Whelan, Center for Biologics Evaluation and Research (HFM–43), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–3841, FAX: 301–827–3079, e-mail: *Whelan@cber.fda.gov*.

Registration: Mail, fax, or e-mail the registration information (including name, title, affiliation, address, and telephone and fax numbers) to Melanie Whelan (see *Contact Person*) by September 30, 2004. Because seating is limited, we recommend early registration. There is no registration fee for the workshop. If you need special accommodations due to a disability, please contact Melanie Whelan (see *Contact Person*) at least 7 days in advance.

Comments: Regardless of attendance at the public workshop, interested persons may submit to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852 written or electronic comments by September 23, 2004. Submit electronic comments to *http://www/fda.gov/dockets/ecomments*. Submit a single copy of electronic comments or two copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified 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.

SUPPLEMENTARY INFORMATION: The goal of this workshop is to provide a public forum for input and discussion concerning opportunities for the enhancement of scientific knowledge and tools for safety, efficacy, and product quality that can be used to more effectively and efficiently develop and evaluate new biological products in the areas described.

On March 16, 2004, FDA released a report addressing the recent slowdown in innovative medical therapies submitted to FDA for approval entitled "Innovation/Stagnation: Challenge and Opportunity on the Critical Path to New Medical Products" at *http://www.fda.gov/oc/initiatives/criticalpath/*. That report describes the urgent need to create the scientific and technological "tools" to modernize the medical product development process—the Critical Path—to make medical product development more predictable and less costly.

The Center for Biologics Evaluation and Research (CBER) is seeking input from government and nongovernment research organizations, medical professional organizations, health care practitioners, patients, disease interest groups, pharmaceutical and biological product manufacturers and their industry organizations, and others with interests in facilitating development of the biological products that CBER regulates. The workshop will cover delineation of opportunities in key technologies and medical science knowledge needed to contribute to science based evaluation of the safety and efficacy of those biological products, and innovative development processes to manufacture them. FDA will discuss and welcomes input concerning all applicable areas of science including, but not limited to, bench laboratory investigations, clinical research and clinical trial design and execution, facility and manufacturing process research, statistical and epidemiological research, and computer science and computer modeling research. The workshop will not cover discussions of biological product discovery and invention or regulatory policies. The workshop will include presentations by FDA speakers and breakout sessions with panels composed of both FDA staff and non-FDA stakeholders, with an opportunity for public questions and comments.

FDA will post the agenda for this public workshop, when finalized on CBER's Web sites at *http://www.fda.gov/cber/scireg.htm* and *http://www.fda.gov/cber/minutes/workshop-min.htm*.

Transcripts: Please note that transcripts of the workshop will not be prepared.

Dated: August 24, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–19778 Filed 8–30–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Veterinary Medicine Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Veterinary Medicine Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on October 13, 2004, from 8:30 a.m. to 5 p.m.

Location: DoubleTree Hotel, Plaza III, 1750 Rockville Pike, Rockville, MD.

Contact Person: Aleta Sindelar, Center for Veterinary Medicine (HFV–3), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 301–827–4515, e-mail: *asindela@cvm.fda.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512548, for up-to-date information on this meeting.

Agenda: The committee will discuss and make recommendations on the microbial food safety of an antimicrobial drug application currently under review for use in food-producing animals in accordance with the Center for Veterinary Medicine's guidance for industry #152.

The background material for this meeting will be posted on the Internet no later than 1 business day before the meeting at*http://www.fda.gov/cvm/default.html*. A limited number of paper copies of the background information will be available at the registration table.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by October 1, 2004. Oral presentations from the public will be scheduled between approximately 10:45 a.m. and 11:45 a.m. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person by October 1, 2004, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of

proposed participants, and an indication of the approximate time requested to make their presentation.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Aleta Sindelar at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: August 24, 2004.

Lester M. Crawford,

Acting Commissioner for Food and Drugs.

[FR Doc. 04–19779 Filed 8–30–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Requested; Outcome Evaluation of the Small Grants Program for Behavioral Research in Cancer Control

Summary: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Cancer Institute (NCI), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection:

Title: Outcome Evaluation of the Small Grants Program for Behavioral Research in Cancer Control.

Type of Information Collection Request: New.

Need and Use of Information Collection: The Small Grants Program support projects that can be completed in a short period of time, such as pilot projects, development and testing of new methodologies, secondary data analyses, or innovative studies that provide a basis for more extended research. This evaluation is being conducted to identify progress of this program in establishing a cohort of scientists with a high level of research expertise in behavioral research cancer control. A primary objective of this study is to determine if the program's small grants R03 funding mechanism is effective in attracting investigators to the field of behavioral research and if so, what impact does the program have on the career of successful applicants. The findings will provide valuable information regarding (1) effectiveness of the program in attracting investigators to the field; (2) the impact of the program on investigators' careers; and (3) the overall benefit provided by the program through the R03 funding mechanism and assist the agency in determining whether changes to the program are necessary in future.

Frequency of Response: On occasion.

Affected Public: Individuals; teaching institutions or other non-profit.

Type of Respondents: Grantees funded under PAR 99–006 (n=80).

Type of Respondents: Principal Investigator awarded grants funded by PAR 00–006 (Dec. 1999–Nov. 2001).

Estimated Number of Respondents: 80.

Estimated Number of Responses per Respondent: 1.

Average Burden Hours per Response: .75.

Estimated Total Annual Burden Hours Requested: 60.

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Principal Investigators awarded grants funded by PAR 99–006 (Dec. 1999–Nov. 2001)	80	1	0.75	60.0
Total				60.0

There is no cost to respondents. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are able to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Veroncia Chollette, RN, MS program Director, Applied Cancer Screening Research Branch, Behavioral Research Program Division of Cancer Control and Population Sciences, National Cancer Institute, 6130 Executive Blvd., Room 4100, Rockville, MD 20852 or call non-toll free number (301) 435–2837 or e-mail your request to: *vc24a@nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: August 20, 2004.

Rachelle Ragland-Greene,

NCI Project Clearance Liaison, National Institutes of Health.

[FR Doc. 04–19853 Filed 8–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the meeting of the President's Cancer Panel.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B), Title 5 U.S.C., as amended, because the premature disclosure of information and the discussions would likely to significantly frustrate implementation of recommendations.

Name of Committee: President's Cancer Panel.

Date: September 27–28, 2004.

Open: September 27, 2004, 8 a.m. to 4 p.m.

Agenda: Translating Research to Reduce Burden of Cancer.

Place: The Fawcett Center, The Ohio State University, 2400 Olentangy River Road, Columbus, OH 43210.

Closed: September 28, 2004, 8 a.m. to 12 p.m.

Agenda: To review and evaluate prepublication manuscripts on Translating Research into Clinical Practice.

Place: The Fawcett Center, The Ohio State University, 2400 Olentangy River Road, Columbus, OH 43210.

Contact Person: Maureen O. Wilson, PhD, Executive Secretary, National Cancer Institute, National Institutes of Health, 31 Center Drive, Building 31, Room 3A, 18, Bethesda, MD 20892, 301/496–1148.

Any interested person may file written comments with the committee by forwarding the comments to the Contact Person listed on this notice. The comments should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *deainfo.nci.nih.gov/advisory/pcp/pcp.htm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: August 24, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–19847 Filed 8–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, Special Emphasis Panel for Two Types of R25 Grant Applications and an R13.

Date: October 5–6, 2004.

Time: 7 p.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: Henley Park Hotel, 926 Massachusetts Avenue, Washington, DC 20001.

Contact Person: Raymond A. Petryshyn, PhD, Scientific Review Administrator, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 6116 Executive Blvd., 8th Fl., Room 8109, Bethesda, MD 20892, 301/594–1216. *petryshr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: August 23, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–19851 Filed 8–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group Subcommittee H—Clinical Groups.

Date: October 3–5, 2004.

Time: 6:30 p.m. to 11 p.m.

Agenda: To review and evaluate grant applications.

Place: Millennium Hotel, 2800 Campus Walk Avenue, Durham, NC 27705.

Contact Person: Deborah R. Jaffe, PhD, Scientific Review Administrator, Resources and Training Review Branch, National Cancer Institute, Division of Extramural Activities, 6116 Executive Blvd., Rm 8135, Bethesda, MD 20892, (301) 496–7721, *jaffed@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: August 23, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–19852 Filed 8–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center on Minority Health and Health Disparities; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Council on Minority Health and Health Disparities.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Minority Health and Health Disparities.

Date: September 14, 2004.

Open: 8:30 a.m. to 4:30 p.m.

Agenda: The Agenda will include opening remarks, administrative matters, director's report, NCMHD, Advisory Council Subcommittee Reports, HHS Health Disparities Update, NIH IC and NCMHD grantees health disparities reports, and other business of the Council.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Closed: 4:30 p.m. to adjournment.

Agenda: To review and evaluate and grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Lisa Evans, JD, Senior Advisor for Policy, National Center on Minority Health, and Health Disparities, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, 301–402–1366, *evansl@ncmhd.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Dated: August 20, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–19849 Filed 8–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel, August 24, 2004, 8:30 a.m. to August 24, 2004, 5 p.m., Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD, 20814 which was published in the **Federal Register** on August 20, 2004, FR 69:51689.

This Telephone Conference Meeting will be held on September 8, 2004 at 11 a.m. at 6701 Democracy Boulevard, Suite 800, Bethesda, MD. The meeting is closed to the public.

Dated: August 24, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–19845 Filed 8–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The portions of the meeting devoted to the review and evaluation of journals for potential indexing by the National Library of Medicine will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B), Title 5 U.S.C., as amended. Premature disclosure of the titles of the journals as potential titles to be indexed by the National Library of Medicine, the discussions, and the presence of individuals associated with these publications could significantly frustrate the review and evaluation of individual journals.

Name of Committee: Literature Selection Technical Review Committee.

Date: October 28–29, 2004.

Open: October 28, 2004, 9 a.m. to 11 a.m.

Agenda: Administrative reports and program discussions.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20894.

Closed: October 28, 2004, 11 a.m. to 5 p.m.

Agenda: To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20894.

Closed: October 29, 2004, 8:30 a.m. to 2 p.m.

Agenda: To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20894.

Contact Person: Sheldon Kotzin, MLS, Chief, Bibliographic Services Division, Division of Library Operations, National Library of Medicine, 8600 Rockville Pike, Bldg. 38A/Room 4N419, Bethesda, MD 20894.

Any interested person may file written comments with the Committee by forwarding the statement to the Contact Person listed on this Notice. The statement should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance into the building by non-government employees. Persons without a government I.D. will need to show a photo I.D. and sign in at the security desk upon entering the building.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: August 24, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy, NIH.

[FR Doc. 04–19846 Filed 8–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Library of Medicine Special Emphasis Panel Publications.

Date: September 27, 2004.

Time: 8 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Double Tree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Hua-Chuan Sim, MD, Health Science Administrator, National Library of Medicine, Extramural Programs, Bethesda, MD 20892.

(Catalogue of Federal Domestic Assistance Program No. 93.897, Medical Library Assistance, National Institutes of Health, HHS)

Dated: August 25, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–19848 Filed 8–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Native American Research Centers for Health.

Date: September 13–14, 2004.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, Qne Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Mushtaq A. Khan, PhD, DVM, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2176, MSC 7818, Bethesda, MD 20892, (301) 435–1778, *khanm@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1 SBIB G (03) Member Conflict Bioengineering and Surgical Sciences.

Date: September 30, 2004.

Time: 11 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call).

Contact Person: Paul F. Parakkal, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5122, MSC 7854, Bethesda, MD 20892, (301) 435–1176, *parakkap@csr.nih.gov.*

Name of Committee: Digestive Sciences Integrated Review Group Gastrointestinal Cell and Molecular Biology Study Section.

Date: October 4, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center,, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Najma Begum, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2175, MSC 7818, Bethesda, MD 20892, (301) 435–1243, *begumn@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Gastrointestinal Mucosal Pathobiology: Quorum.

Date: October 4, 2004.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Peter J. Perrin, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2183, MSC 7818, Bethesda, MD 20892, (301) 435–0682, *perrinp@csr.nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group Biomedical Imaging Technology Study Section.

Date: October 5–6, 2004.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.

Contact Person: Lee Rosen, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5116, MSC 7854, Bethesda, MD 20892, (301) 435–1171, *rosenl@csr.nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group Bioengineering, Technology and Surgical Sciences Study Section.

Date: October 5–6, 2004.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.

Contact Person: Dharam S. Dhindsa, DVM, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5110, MSC 7854, Bethesda, MD 20892, (301) 435–1174, *dhindsad@csr.nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group Medical Imaging Study Section.

Date: October 5–6, 2004.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave., Bethesda, MD 20814.

Contact Person: Eileen W. Bradley, DSC, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5120, MSC 7854, Bethesda, MD 20892, (301) 435–1179, *bradleye@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group Somatosensory and Chemosensory Systems Study Section.

Date: October 5–6, 2004.

Time: 8 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington Embassy Row, 2015 Massachusetts Ave., NW., Washington, DC 20036.

Contact Person: Daniel R. Kenshalo, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5176, MSC 7844, Bethesda, MD 20892, 301–435–1255, *kenshalod@csr.nih.gov.*

Name of Committee: Oncological Sciences Integrated Review Group Tumor Progression and Metastasis Study Section.

Date: October 6–7, 2004.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.

Contact Person: Martin L. Padarathsingh, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6212, MSC 7804, Bethesda, MD 20892, 301–435–1717, *padaratm@crs.nih.gov.*

Name of Committee: Biophysical and Chemical Sciences Integrated Review Group, Metallobiochemistry Study Section.

Date: October 7–8, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: Janet Nelson, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4168, MSC 7806, Bethesda, MD 20892, 301–435–1723, *nelsonja@crs.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Bacterial Pathogenesis.

Date: October 7–8, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Watergate, 2650 Virginia Avenue, NW., Washington, DC 20037.

Contact Person: Rolf Menzel, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3196, MSC 7808, Bethesda, MD 20892, 301–435–0952, *menzelro@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group, Integrative and Clinical Endocrinology and Reproduction Study Section.

Date: October 7–8, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.

Contact Person: Abubakar A. Shaikh, DVM, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6168, MSC 7892, Bethesda, MD 20892, 301–435–1042, *shaikha@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group Cognitive Neuroscience Study Section.

Date: October 7–8, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Michael A. Steinmetz, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5172, MSC 7844, Bethesda, MD 20892. 301–435–1247, *steinmem@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group, Biobehavioral Regulation, Learning and Ethology Study Section.

Date: October 7–8, 2004.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Wyndham Washington, DC, 1400 M Street, NW., Washington, DC 20005.

Contact Person: Luci Roberts, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3188, MSC 7848, Bethesda, MD 20892, 301–435–0692, *roberlu@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: August 24, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–19844 Filed 8–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Agency Information Collection Activities: Articles Assembled Abroad With Textile Components Cut To Shape in the U.S.

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted 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: Articles Assembled Abroad with Textile Components Cut to Shape in the U.S. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (69 FR 25135) on May 5, 2004, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before September 30, 2004.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Homeland Security Desk Officer, Washington, DC 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395–6974.

SUPPLEMENTARY INFORMATION: The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). Your comments should address one 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/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components 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 collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Title: Articles Assembled Abroad with Textile Components Cut to Shape in the U.S.

OMB Number: 1651–0070.

Form Number: N/A.

Abstract: This collection of information enables CBP to ascertain whether the conditions and requirements relating to 9802.00.80, Harmonized Tariff Schedule (HTSUS), have been met.

Current Actions: This submission is being submitted to extend the expiration date with no change to the burden hours.

Type of Review: Extension (without change).

Affected Public: Businesses, individuals, institutions.

Estimated Number of Respondents: 500.

Estimated Time Per Respondent: 80 minutes.

Estimated Total Annual Burden Hours: 667.

Estimated Total Annualized Cost on the Public: $13,340.

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: August 25, 2004.

Tracey Denning,

Agency Clearance Officer, Information Services Branch.

[FR Doc. 04–19871 Filed 8–30–04; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Secret Service

Appointment of Performance Review Board (PRB) Members

This notice announces the appointment of members of the Senior Executive Service Performance Review Boards in accordance with 5 U.S.C. 4314(c)(4) for the rating period beginning October 1, 2003, and ending September 30, 2004. Each PRB will be composed of at least three of the Senior Executive Service members listed below.

Name and Title

Carlton D. Spriggs—Deputy Director, U.S. Secret Service

Barbara S. Riggs—Chief of Staff (USSS)

Brian K. Nagel—Assistant Director, Investigation (USSS)

Mark J. Sullivan—Assistant Director Protective Operations (USSS)

Michael C. Stenger—Assistant Director, Protective Research (USSS)

Keith W. Young—Assistant Director, Administration (USSS)

Donald A. Flynn—Assistant Director, Inspection (USSS)

Keith L. Prewitt—Assistant Director, Human Resources and Training (USSS)

George D. Rogers—Assistant Director, Government and Public Affairs (USSS)

Paul D. Irving—Assistant Director, Homeland Security (USSS)

John J. Kelleher—Chief Counsel (USSS)

FOR FURTHER INFORMATION CONTACT: Charles R. Tozier, Acting Chief, Personnel Division, 950 H St., NW., Suite 7400, Washington, DC 20223, Telephone No. (202) 406–5309.

W. Ralph Basham,

Director.

[FR Doc. 04–19784 Filed 8–30–04; 8:45 am]

BILLING CODE 4810–42–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of the Final Comprehensive Conservation Plan and Environmental Impact Statement for Nisqually National Wildlife Refuge

AGENCY: Fish and Wildlife Service, Department of the Interior.

ACTION: Notice of Availability of the Final Comprehensive Conservation Plan and Environmental Impact Statement for Nisqually National Wildlife Refuge.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces that a Final Comprehensive Conservation Plan and Environmental Impact Statement (Final CCP/EIS) for Nisqually National Wildlife Refuge (Refuge) is available for review and comment. This Final CCP/EIS, prepared pursuant to the National Wildlife Refuge System Administration Act of 1966, as amended and the National Environmental Policy Act of 1969, describes the Service's proposal for management of the Refuge for the next 15 years. Proposed changes to the Refuge being considered include the restoration of historic estuarine habitat and dike removal; a proposed expansion of the approved Refuge boundary; changes to the trail system; opening the Refuge to waterfowl hunting; and establishing a speed limit of five miles per hour in Refuge waters for all water craft.

DATES: A Record of Decision may be signed no sooner than 30 days after publication of this notice (40 CFR 1506.10(b)(2)).

FOR FURTHER INFORMATION CONTACT: For further information or to request a copy of the Summary of Changes and Appendix M (Comments and Responses) document, contact Jean Takekawa, Refuge Manager, via telephone at (360) 753–9467, fax at (360) 534–9302, or in writing at Nisqually National Wildlife Refuge Complex, 100 Brown Farm Road, Olympia, Washington 98516. Copies of the Final CCP/EIS may be viewed at Nisqually National Wildlife Refuge and at the following libraries in Washington State: Timberland Community Library in Olympia, Tacoma Public Library; University of Washington's Suzallo Library in Seattle; William J. Reed Library in Shelton; and the Evergreen State College Library in Olympia. The Final CCP/EIS will be available for viewing and downloading online at *http://pacific.fws.gov/planning.*

SUPPLEMENTARY INFORMATION: Nisqually National Wildlife Refuge is located in western Washington at the southern end of Puget Sound in Thurston and Pierce counties. The Refuge protects one of the few relatively undeveloped large estuaries remaining in Puget Sound. It provides crucial habitat for migratory birds of the Pacific Flyway, including many waterfowl, shorebirds, waterbirds, and seabirds. The Refuge also contains regionally important migration and rearing habitat for salmon, particularly the federally threatened fall chinook salmon. Each year, more than 100,000 visitors come to view wildlife and enjoy and learn about Refuge habitats and the wildlife they support.

The Proposed Action is to adopt and implement a Comprehensive Conservation Plan (CCP) that best achieves the purposes for which the Refuge was established; furthers its vision and goals; contributes to the mission of the National Wildlife Refuge System; addresses significant issues and applicable mandates; and is consistent with principles of sound fish and wildlife management. Implementing the CCP will enable the Refuge to fulfill its critical role in the conservation and management of fish and wildlife resources of the Nisqually River delta and lower watershed, and to provide high quality environmental education and wildlife-dependent recreation opportunities for Refuge visitors. The Service analyzed four alternatives for future management of the Refuge; of these, Alternative D has been identified as the preferred alternative.

Alternative D, modified from the Draft CCP/EIS, would provide a Refuge boundary expansion of 3,479 acres. Restoration of 699 acres of estuarine habitat would be accomplished through removal of a large portion of the exterior Brown Farm Dike. The remaining 263-acre area within a newly constructed dike system would be managed to provide greatly improved freshwater wetland and riparian habitats. Thirty-eight acres of valuable forested surge plain habitat would be restored along the Nisqually River. The environmental education program would be improved and expanded to serve 15,000 students per year. Due to dike removal, the existing 5.5-mile wildlife observation loop trail would be reduced to a 3.5-mile round trip trail, and bank fishing on McAllister Creek would no longer be

offered. A new 2.5-mile trail would be developed on Tribal and Refuge properties east of the Nisqually River and a primitive 0.5-mile trail would be provided in surge plain habitat. New fishing opportunities could be provided in the future if appropriate lands were acquired. A seasonal waterfowl hunting program open seven days per week, would be provided on 191 acres of Refuge lands. A speed limit of five miles per hour would be established for all water craft in Refuge waters.

Public comments were requested, considered, and incorporated throughout the planning process in numerous ways. Public outreach has included open houses, public meetings, technical workgroups, planning update mailings, and **Federal Register** notices. Three previous notices were published in the **Federal Register** concerning this CCP/EIS (62 FR 52764, October 9, 1997; 65 FR 6390, February 9, 2000; and 67 FR 78009, December 20, 2002). During the Draft CCP/EIS comment period that occurred from December 20, 2002 to February 21, 2003, the Service received a total of 1,717 comments (e-mails, letters, faxes, postcards, comment sheets, visits, or telephone calls). All substantive issues raised in the comments have been addressed through revisions incorporated in the Final CCP/EIS text or in responses contained in Appendix M of the Final CCP/EIS.

Dated: August 24, 2004.

Chris McKay,

Acting Regional Director, Region 1, Portland, Oregon.

[FR Doc. 04–19828 Filed 8–30–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Notice of Service Area Designation

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice announces the service area designation for the Samish Indian Tribe which is recognized as eligible to receive services from the United States Federal Government Bureau of Indian Affairs (BIA). This notice is published in the exercise of the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs.

DATES: This service area designation becomes effective on September 30, 2004.

FOR FURTHER INFORMATION CONTACT: Larry Blair, Tribal Services, Bureau of Indian Affairs, Department of the Interior, 1951 Constitution Avenue, NW., MS–320–SIB, Washington, DC 20240–0001. Telephone: (202) 513–7640.

SUPPLEMENTARY INFORMATION: In accordance with 25 CFR part 20, Financial Assistance and Social Services programs, the Assistant Secretary—Indian Affairs designates the following locale as a service area appropriate for the extension of BIA financial assistance and/or social services. The Financial Assistance and Social Services programs regulations at 25 CFR part 20 have full force and effect when extending BIA financial assistance and/or social services into the service area location. The Samish Indian Tribe is authorized to extend financial assistance and social services to eligible tribal members and other eligible Indians who reside within the areas designated below.

Tribe: The Samish Indian Tribe.

Service Area Locations: The counties of Whatcom, Skagit, Snohomish, Island, and San Juan in the State of Washington.

Dated: August 17, 2004.

David W. Anderson,

Assistant Secretary—Indian Affairs.

[FR Doc. 04–19800 Filed 8–30–04; 8:45 am]

BILLING CODE 4310–4M–P

DEPARTMENT OF THE INTERIOR

National Park Service

Final Environmental Impact Statement/ Fire Management Plan, Point Reyes National Seashore, Marin County, CA; Notice of Availability

Summary: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (Pub. L. 91–190, as amended), and the Council on Environmental Quality Regulations (40 CFR part 1500–1508), the National Park Service (NPS), Department of the Interior, has prepared a Final Environmental Impact Statement identifying and evaluating three alternatives for a Fire Management Plan for Point Reyes National Seashore administered lands. Potential impacts, and appropriate mitigations, are assessed for each alternative. When approved, the plan will guide all future fire management actions on lands administered by Point Reyes National Seashore. The Fire Management Plan and Final Environmental Impact Statement (FMP/FEIS) documents the analyses of two action alternatives, and a "no action" alternative.

Revisions to the 1993 Fire Management Plan are needed to meet public and firefighter safety, natural and cultural resource management, and wildland urban interface objectives for the Point Reyes National Seashore and the north district of Golden Gate National Recreation Area. The action alternatives vary in the emphasis they place on fire management goals developed by the park. The current program has been effective in fire suppression and conducting limited fuel reduction in strategic areas, but has not been able to fully accomplish resource management, fuel reduction, and prescribed fire goals.

The planning area for the Fire Management Plan (FMP) includes NPS lands located approximately 40 miles northwest of San Francisco in Marin County, California. These lands include the 70,046-acre Point Reyes National Seashore, comprised primarily of beaches, coastal headlands, extensive freshwater and estuarine wetlands, marine terraces, and forests; as well as 18,000 acres of the Northern District of Golden Gate National Recreation Area (GGNRA), primarily supporting annual grasslands, coastal scrub, and Douglas-fir and coast redwood forests.

Proposed Fire Management Plan. Alternative C is the preferred alternative in the final FMP/FEIS and remains unchanged from the draft EIS. Under Alternative C "Increased Natural Resource Enhancement and Expanded Hazardous Fuel Reduction", fire management actions will be used to markedly increase efforts to enhance natural resources and reduce hazardous fuels. This alternative includes objectives for increasing the abundance and distribution of federally listed species, reducing infestations of invasive, non-native plants and increasing native plant cover. Prescribed burning and mechanical treatments will be used to protect or enhance cultural resources, such as reducing vegetation in areas identified as important historic viewsheds. Alternative C permits the highest number of acres treated annually for hazardous fuels reduction concentrating on high priority areas (*e.g.*, along road corridors, around structures, and in strategic areas to create fuel breaks). Up to 3,500 acres could be treated per year using prescribed fire and mechanical treatments. Under this alternative, research efforts will be expanded to determine the effects of fire on natural resources of concern (*e.g.*, rare and non-native species) and to determine the effectiveness of various treatments for fuel reduction. Research results will be used adaptively to guide the fire

management program in maximizing benefits to natural resources, while protecting lives and property. This alternative will reduce the threat of a catastrophic wildland fire to a more stable fire condition at Year 13 of implementation rather than Year 23 as in Alternative B or indefinite extension of the program under Alternative A, the No Action Alternative. Ten of eleven Fire Management Units (FMUs) will be treated under Alternative C; the eleventh FMU—the Minimum Management FMU—is primarily leased for agriculture and is subject to defensible space and roadside clearing under all three alternatives. As documented in the final EIS, Alternative C was also deemed to be the "Environmentally Preferred" Alternative.

Alternatives: The final FMP/FEIS analyzes two other alternatives. Alternative A, Continued Fuel Reduction for Public Safety and Limited Resource Enhancement, is the No Action Alternative representing the current fire management program. The current program uses a limited range of fire management strategies—including prescribed fire, mechanical treatment, and suppression of all wildland fires, including natural ignitions. Alternative A would continue the existing program described in the 1993 Fire Management Plan including mechanical treatments of hazardous fuels of up to 500 acres per year, primarily mowing in grasslands. Up to 500 acres per year would be treated by prescribed burning, primarily for fuel reduction in grasslands and for Scotch and French broom control. Total treatments per year will not exceed 1,000 acres. Research projects already in progress on reducing Scotch broom and velvet grass through prescribed burning would continue under this alternative. In continuing current practices, treatments would occur in four of eleven FMUs sited along the primary roadways. This program does not place emphasis on wildland/urban interface communities.

Alternative B—Expanded Hazardous Fuel Reduction and Additional Natural Resource Enhancement. Alternative B calls for a substantial increase over present levels in the reduction of hazardous fuels through prescribed burning and mechanical treatments (up to a combined total of 2,000 acres treated per year). Efforts would be concentrated where unplanned ignitions will be most likely to occur (*e.g.*, road corridors), and where defensible space could most effectively contain unplanned ignitions and protect lives and property (*e.g.*, around structures and strategically along the park interface zone). Natural resource enhancement would occur as a secondary benefit only. For example, prescribed burning to reduce fuels may have the secondary resource benefit of controlling a flammable, invasive non-native plant. Fire management actions would occur in nine of eleven FMUs with no projects occurring at the low grasslands within the Headlands FMU or in the Minimum Management FMU. Assuming full annual implementation, a stable fire condition with a lowered potential for a catastrophic fire such as the 1995 Vision Fire, could be achieved by Year 23 of plan implementation.

Planning Background: On January 27, 2000, a "Notice of Scoping" for Fire Management Plan at Point Reyes National Seashore was published in the **Federal Register**. The beginning of public scoping was announced on January 29, 2000, at a public meeting of the Point Reyes National Seashore Citizens Advisory Commission with a presentation on the FMP planning process. In a series of internal and public scoping meetings input on fire management issues of concern and range of alternatives was solicited from the public, federal, state and local agencies, and NPS resource specialists. Briefing continued for local fire management and protection agencies during the FMP preparation. Scoping comments were solicited from January 27 through March 28, 2000. The major issues raised during the public review period are summarized in Chapter 1, Purpose of and Need for the Action. Approximately 50 people were involved in public scoping activities.

A "Notice of Availability" of the Draft FMP EIS was published in the **Federal Register** on February 20, 2004, noted in San Francisco Bay area newspapers and mailed to the Point Reyes National Seashore mailing list (210 individuals and organizations). Fifteen copies of the Draft FMP EIS were sent to the California Clearinghouse for distribution. Copies of the document were also sent to interested parties, public libraries and state and federal agencies and the full document was posted on the park internet site. Approximately 15 other copies were distributed to the public when requested. A public workshop was held at the Point Reyes National Seashore Red Barn meeting room on the evening of March 18, 2004. The workshop was advertised by a mass mailing (210 individuals and organizations) and a notice was placed in the local newspapers. Approximately 15 people came to the public workshop on the Draft FMP EIS.

Comments on the draft were accepted until April 20, 2004. The NPS received seven written responses, including two letters comprising the informal consultation process as required for Endangered Species Act conformance. All comments were duly considered in preparing the FMP FEIS. All comments are reprinted in the FMP FEIS and are part of the administrative record for the FMP. The main issues and concerns expressed by the respondents included: clarification of conformance with air district regulations and prescribed burning procedures, smoke effects on public health, visual impacts of prescribed burns, effects on vegetation clearing on wildlife and privacy, and opportunity for continued communication between wildlife resources agency and the park.

As part of this planning process, consultation for NEPA Section 7 was held with the U.S. Fish and Wildlife Service (USFWS). NOAA Fisheries Service. For NHPA, 106 Compliance, the State of California Preservation Offices (SHPO), and the Advisory Council for Historic Preservation were also contacted. Only the Washington State Historic Preservation Office responded with formal written comments. Neither the SHPOs nor the Advisory Council raised any concerns regarding the implementation of the Selected Plan. The USWFS provided comments that are incorporated in the Final FMP FEIS and NOAA concurred with the parks finding of not likely to adversely affect listed species.

Addresses:

Printed or CD copies of the FMP FEIS may be obtained from the Superintendent, Point Reyes National Seashore, Point Reyes, CA 94956, Attn: Fire Management Plan, or by e-mail request to: *Ann_Nelson@nps.gov* (in the subject line, type: Fire Management Plan)—it will be sent directly to those who have requested it. The FEIS FMP can be obtained on the park's Web page (*http://www.nps.gov/pore/pphtml/documents.html*), and the printed document and digital version on compact disk will also be available at the park headquarters and local libraries. Please note that names and addresses of people who comment become part of the public record. If individuals commenting request that their name or/and address be withheld from public disclosure, it will be honored to the extent allowable by law. Such requests must be stated prominently in the beginning of the comments. There also may be circumstances wherein the NPS will withhold from the record a respondent's identity, as allowable by law. As always:

the NPS will make available to public inspection all submissions from organizations or businesses and from persons identifying themselves as representatives or officials of organizations and businesses; and, anonymous comments may not be considered.

Decision:

As a delegated EIS, the official responsible for the final decision is the Regional Director, Pacific West Region; a Record of Decision may be approved not sooner than 30 days after EPA's publication of the notice of filing of the FMP FEIS in the **Federal Register**. Notice of the final decision will be similarly posted in the **Federal Register** and announced in local and regional newspapers. Following approval of the Fire Management Plan, the official responsible for implementation will be the Superintendent, Point Reyes National Seashore.

Dated: June 25, 2004.

Jonathan B. Jarvis,

Regional Director, Pacific West Region.

[FR Doc. 04–19787 Filed 8–30–04; 8:45 am]

BILLING CODE 4312–FW–P

DEPARTMENT OF THE INTERIOR

National Park Service

Final Notice of Intent 6/22/04

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of intent to prepare an environmental impact statement for an Elk Management Plan, Theodore Roosevelt National Park, North Dakota.

SUMMARY: Under the provisions of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the National Park Service (NPS) is preparing an environmental impact statement for an elk management plan for Theodore Roosevelt National Park (THRO), North Dakota. An elk management plan is needed to manage the elk population within established acceptable levels, to test for chronic wasting disease (CWD) and to identify a range of elk management strategies that are compatible with long-term protection of other park resources and natural ecosystems and processes. A number of factors contribute to the need for this plan. The elk population within the park has increased rapidly since elk were reintroduced in 1985. Due to the lack of predators, less suitable habitat outside the park and the limited movement of elk, the elk population will likely continue to grow unchecked. Excessive browsing caused by high densities of elk may adversely affect rangeland and cultural resources in the park. Furthermore, this plan is needed because the 2003 agreement related to the reintroduction of elk among the NPS, the U.S. Forest Service (USFS) and the North Dakota Game and Fish Department indicates that the NPS has the responsibility to manage the elk population within the park at an acceptable level.

DATES: To be most helpful to the scoping process, comments should be received within 60 days of the publication of this notice in the **Federal Register**. See details for sending comments in **SUPPLEMENTARY INFORMATION** below. The NPS intends to conduct public scoping at locations throughout North Dakota, including Bismarck, Medora, Dickinson, Fargo, and Minot. Please check local newspapers, the THRO website at *http://www.nps.gov/thro* or contact the name listed below to find out when and where these open houses will be held and to view draft documents and other current information regarding elk management and the EIS.

ADDRESSES: Information will be available for public review and comment at the Theodore Roosevelt National Park headquarters located at 315 2nd Ave., Medora, ND 58645.

FOR FURTHER INFORMATION CONTACT: Bruce Kaye, Public Information Officer, or Valerie Naylor, Superintendent, at (701) 623–4466.

SUPPLEMENTARY INFORMATION: The NPS seeks to complete an environmental impact statement (EIS) to address elk management at THRO. Section 4.4.2 of the NPS Management Policies (2001) provides for the active management of native animals when management of a population is necessary because it occurs in unnaturally high or low numbers because of human influence. An elk management strategy is needed at THRO because past and current actions within and beyond the park have created conditions that allow the THRO elk population to increase with little or no control. These conditions include the absence of elk predators, the ineffectiveness of public hunting outside of the park as a population control method for elk that range primarily within the park, lack of significant winter kill and other environmentally-caused elk mortalities, high reproductive and survival rates, and the discontinuation of translocating elk from the park.

Elk were reintroduced to the South Unit (SU) of THRO in 1985 to restore an extirpated native species. The SU is surrounded by a 7 foot high woven-wire fence, which has specially designed crossings to allow for movement of most wildlife, yet confines bison and feral horses in the park. Large predators have been extirpated since the late 1800s, and effective natural predation on ungulates is limited to that which occurs on young by coyotes and bobcats. Since elk reintroduction in 1985, the population has doubled approximately every 3 years. Research was initiated in 1985 to provide insight into the forage requirements of elk and other grazers in the SU. The resulting model, which considered the forage needs of all ungulates in the park, suggested the park could maintain up to 360 elk. Since 1993, the population has exceeded 360 several times, causing subsequent removals through translocation to tribes and other agencies. A third removal was scheduled for January 2003 but canceled due to concerns about chronic wasting disease (CWD). Although CWD has not been found in North Dakota, the NPS policy dictates that translocation of elk may only occur if the animals are free of disease. Currently, the elk herd numbers about 550, exceeding the maximum number of animals the model suggested can be sustained long-term without negatively affecting other park resources.

A determination of the effects of the elk management plan will be conducted in accordance with NEPA (42 U.S.C. 4372 *et seq.*), NEPA regulations (40 CFR 1500–1508), other appropriate Federal regulations, and the NPS procedures and policies for compliance with those regulations.

The North Dakota Game and Fish Department and the USFS will serve as Cooperating Agencies in the preparation of the EIS, per NEPA guidelines.

If you wish to comment on the scoping brochure or any other issues associated with the plan, you may submit your comments by any one of several methods. Written comments may be mailed or hand-delivered to the Superintendent at the address above. You may e-mail comments to *thro_forum@nps.gov*. Please submit internet comments as a text file avoiding the use of special characters and any form of encryption. Please put in the subject line "Elk Management Plan," and include your name and return address in your message. If you do not receive a confirmation from the system that we have received your message, contact Bruce Kaye, Public Information Officer, at the number listed above.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours.

Individual respondents may request we withhold their home addresses from the record, which we will honor to the extent allowable by law. There, also, may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Dated: July 15, 2004.

Ernest Quintana,

Regional Director.

[FR Doc. 04–19789 Filed 8–30–04; 8:45 am]

BILLING CODE 4312–AH–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Realty Action: Proposed Exchange of Federally-Owned Lands for Privately-Owned Lands Located in Chelan County, WA

The Federally-owned land described below, which was acquired by the National Park Service, has been determined to be suitable for disposal by exchange. The authority for this exchange is the Act of July 15, 1968 (16 U.S.C. 460*l*–22(b)) and the Act of October 2, 1968 (16 U.S.C. 90), as amended.

The selected Federal land is within the boundary of Lake Chelan National Recreation Area (NRA). This land was identified as suitable for disposal by exchange in the Lake Chelan NRA General Management Plan, accompanying Environmental Impact Statement, and Land Protection Plan. Furthermore, an Environmental Assessment was prepared to evaluate potential consequences specifically associated with this proposed exchange, including surveys for cultural resources and threatened/endangered species, resulting in a Finding of No Significant Impact. These reports are available upon request.

Fee ownership of the Federally-owned property to be exchanged: LACH Tract No. 05–131 is a 7.15+/− acre parcel of land acquired by the United States of America by deeds recorded in Deed Book 700 on Pages 724–725 and Book 701 on Pages 1720–1721 at the Chelan County Auditor's Office.

Conveyance of the land by the United States of America will be by Quitclaim Deed and include certain land use restrictions to prohibit inappropriate use and development.

In exchange for the lands identified in Paragraph I, the United States of America will acquire a 5+/− acre parcel of land, currently owned by Mr. and Mrs. Cragg Courtney, lying within the boundary of Lake Chelan NRA (LACH Tract No. 04–103). The private lands are being acquired in fee simple with no reservations, subject only to rights of way and easements of record. Acquisition of these private lands will eliminate the risk of inappropriate development along a sensitive riparian area of the Stehekin River upon completion of the exchange. The exchange will allow future private development in a more suitable location with minimal impacts to visitor services, natural resources, and scenic values in the national recreation area.

The value of the proposed properties to be exchanged has been determined by current fair market value appraisals to be equal in value. Both properties are unimproved. There is no anticipated increase in maintenance or operational costs as a result of the exchange.

Detailed information concerning this exchange including precise legal descriptions, Land Protection Plan, Environmental Assessment, and Finding of No Significant Impact are available from: Superintendent, North Cascades National Park Service Complex, 810 State Route 20, Sedro Woolley, Washington 98284; telephone (360) 856–5700.

For a period of 45 calendar days from the date of this notice, interested parties may submit written comments to the above address. Adverse comments will be evaluated and this action may be modified or vacated accordingly. In the absence of any action to modify or vacate, this realty action will become the final determination of the Department of Interior.

Dated: June 2, 2004.

Jonathan B. Jarvis,

Regional Director, Pacific West Region.

[FR Doc. 04–19790 Filed 8–30–04; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Availability of the Draft United States World Heritage Periodic Report for Public Review

AGENCY: National Park Service, Department of the Interior.

SUMMARY: The National Park Service (NPS) announces the availability of the draft United States World Heritage Periodic Report for public review. The draft Periodic Report was prepared in compliance with US commitments under the World Heritage Convention, an international conservation treaty. The Periodic Report consists of the following three components: Section I, a national overview report on US implementation of the World Heritage Convention in the context of overall cultural and natural resource protection and management in the nation; Section II, individual site reports on the current status of each US World Heritage Site with particular reference to the condition of the outstanding universal value for which the site was inscribed on the World Heritage List; and, a joint US-Canada North American Regional Report outlining the key strengths and issues facing World Heritage in the region.

Periodic reporting provides an opportunity for the United States and Canada to raise international awareness of their World Heritage Sites and to provide for the continued protection of these sites and their outstanding universal value.

DATES: There will be a 60-day public review period for these documents. Comments must be received on or before November 1, 2004.

ADDRESSES: The US World Heritage Periodic Report will be available to the public on the NPS Office of International Affairs Web site at *http://www.nps.gov/oia/topics/periodic.htm.*

FOR FURTHER INFORMATION CONTACT: Stephen Morris, National Park Service, Office of International Affairs, 1849 C Street, NW., (org. code 0050), Washington, DC 20240; or by calling (202) 354–1800.

SUPPLEMENTARY INFORMATION: Under the World Heritage Convention, both the United States and Canada are required to submit a country-specific periodic report and a joint regional periodic report for North America, by the end of 2004. Periodic reporting provides the World Heritage Committee with an overview of each participating nation's implementation of the World Heritage Convention and a "snapshot" of current conditions at World Heritage Sites.

In 1998, the World Heritage Committee approved a periodic reporting format and process to provide up-to-date information about the application of the World Heritage Convention and the state of conservation of World Heritage Sites around the world. The Periodic Report for North America (followed by the Periodic Report for Europe) once accepted by the World Heritage

Committee, represent the conclusion of the first cycle of periodic reporting by the various regions of the world as defined by the World Heritage Committee.

Each periodic report is comprised of three sections:

In *Section I*, each country reports on the application of the World Heritage Convention. This includes: Identifying properties of cultural or natural value on their territory; legal measures and efforts to protect, conserve and present cultural and natural heritage; international cooperation and fund-raising; and education, information and awareness-building activities.

Section II describes the state of conservation of specific World Heritage Sites located in each country and updates the information that was provided to the World Heritage Committee at the time of inscription. The main objective is to assess whether the World Heritage values, for which the property was inscribed on the World Heritage List, are being maintained over time.

The National Park Service is responsible for developing the United States' country-specific periodic report and Parks Canada is responsible for developing Canada's country-specific periodic report. The United States and Canada worked together to develop the third component, a joint regional report outlining the major strengths and issues facing World Heritage in the region as a whole. Both countries have coordinated consultations with World Heritage Site managers and information sharing with key stakeholders.

The ultimate objective is to produce concise, accurate periodic reports for both the United States and Canada, and a joint regional periodic report for North America that fully address the requirements of the World Heritage convention and focus on the criteria established by the World Heritage Committee.

Public Comment Solicitation: Persons wishing to comment on these documents may do so by mailing written comments to Stephen Morris, National Park Service, Office of International Affairs, 1849 C Street, NW., (org. code 0050), Washington, DC 20240. They also may submit written comment via e-mail to *WASO_Office_of_International_Affairs@nps.gov* (include name and return address in the e-mail message).

The NPS practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request we withhold their home address from the record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Dated: August 5, 2004.

Paul Hoffman,

Deputy Assistant Secretary, Fish and Wildlife and Parks.

[FR Doc. 04–19788 Filed 8–30–04; 8:45 am]

BILLING CODE 4312–52–M

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–523]

In the Matter of Certain Optical Disk Controller Chips and Chipsets and Products Containing the Same, Including DVD Players and PC Optical Storage Devices II; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on July 23, 2004, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of MediaTek Corporation of Hsin-Chu City, Taiwan. A letter supplementing the complaint was filed on August 16, 2004. The complaint, as supplemented, alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain optical disk controller chips and chipsets by reason of infringement of claims 1, 3–6, and 8–10 of U.S. Patent No. 5,970,031 and claims 1–4 of U.S. Patent No. 6,229,773. The complaint, as supplemented, further alleges that a domestic industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a permanent exclusion order and a permanent cease and desist order.

ADDRESSES: The complaint, as supplemented, except for any confidential information contained therein, is 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., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: Dayid O. Lloyd, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2576.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2003).

Scope of Investigation: Having considered the complaint, as supplemented, the U.S. International Trade Commission, on August 24, 2004, *Ordered That*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of optical disk controller chips or chipsets or products containing same, including DVD players and PC optical storage devices, by reason of infringement of one or more of claims 1, 3–6, and 8–10 of U.S. Patent No. 5,970,031 and claims 1–4 of U.S. Patent No. 6,229,773, and whether an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—

MediaTek, Inc., 5F, No. 1–2, Innovation Road 1, Science Based Industrial Park, Hsin-Chu City, Taiwan.

(b) The respondents are the following companies alleged to be in violation of section 337, and are parties upon which the complaint is to be served:

Zoran Corporation, 1390 Kifer Road, Sunnyvale, CA 94806–5305.

Oak Technology, Inc., 1390 Kifer Road, Sunnyvale, CA 94806–5305.

(c) David O. Lloyd, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436, who shall be the Commission investigative attorney, party to this investigation; and

(3) For the investigation so instituted, the Honorable Delbert R. Terrill, Jr., is designated as the presiding administrative law judge.

A response to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter a final determination containing such findings, and may result in the issuance of a limited exclusion order or cease and desist order or both directed against such respondent.

By order of the Commission.

Issued: August 26, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–19854 Filed 8–30–04; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

Notice of Reinstatement, Pacific Coast Feather Company

AGENCY: Office of Federal Contract Compliance Programs, U.S. Department of Labor.

ACTION: Notice of reinstatement, Pacific Coast Feather Company.

SUMMARY: This notice advises that, pursuant to 41 CFR 60–1.31, Pacific Coast Feather Company has been reinstated as an eligible bidder on Federal contracts and subcontracts. For further information, contact Charles E. James, Sr., Deputy Assistant Secretary for Federal Contract Compliance, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–3325, Washington, DC 20210 (202) 693–0101.

SUPPLEMENTARY INFORMATION: Pacific Coast Feather Company, is as of this date, reinstated as an eligible bidder on Federal and federally assisted contracts and subcontracts.

Dated: August 20, 2004, Washington, DC.

Charles E. James, Sr.,

Deputy Assistant Secretary, For Federal Contract Compliance.

[FR Doc. 04–19808 Filed 8–30–04; 8:45 am]

BILLING CODE 4510–CM–M

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 04–09]

Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in FY 2005

AGENCY: Millennium Challenge Corporation.

SUMMARY: The Millennium Challenge Act of 2003, 22 U.S.C.A. 7701, 7707(b) (the "Act") authorizes the provision of assistance to countries that enter into compacts with the United States to support policies and programs that advance the prospects of such countries achieving lasting economic growth and poverty reduction. The Act requires the Millennium Challenge Corporation to take a number of steps in determining the countries that, based on their demonstrated commitment to just and democratic governance, economic freedom and investing in their people, will be eligible countries for Millennium Challenge Account ("MCA") assistance during Fiscal Year 2005. These steps include the publication of Notices in the **Federal Register** that identify:

1. The "candidate countries" for MCA assistance (section 608(a) of the Act);

2. The eligibility criteria and methodology that will be used to choose "eligible countries" from among the "candidate countries" (section 608(b) of the Act); and

3. The countries determined by the Board of Directors of the Millennium Challenge Corporation to be "eligible countries" for Fiscal Year 2005 and identify the countries on the list of eligible countries with which the Board will seek to enter into compacts (section 608 (d) of the Act).

This Notice is the second of the three required Notices listed above.

Public Comment: For a thirty-day period beginning on the date of publication of this notice in the **Federal Register**, the Millennium Challenge Corporation will accept public comment on the eligibility criteria and methodology contained in the report and will consider such comment for purposes of determining eligible countries.

FOR FURTHER INFORMATION CONTACT: Public comments should be submitted through the MCC Web site at *http://www.mcc.gov* or in writing addressed to: Public Comment, Millennium Challenge Corporation, 1000 Wilson Boulevard, Suite 1411, Arlington, VA 22209.

Report: Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in FY 2005.

SUMMARY: This report to Congress is provided in accordance with section 608(b) of the Millennium Challenge Act of 2003, 22 U.S.C.A. 7701, 7707(b) (the "Act").

The Act authorizes the provision of Millennium Challenge Account ("MCA") assistance to countries that enter into compacts with the United States to support policies and programs that advance the prospects of such countries achieving lasting economic growth and poverty reduction. The Act requires the Millennium Challenge Corporation to take a number of steps in determining the countries that, based on their demonstrated commitment to just and democratic governance, economic freedom and investing in their people, will be eligible for MCA assistance during Fiscal Year 2005. These steps include the submission of reports to the congressional committees specified in the Act and the publication of Notices in the **Federal Register** that identify:

1. The countries that are "candidate countries" for MCA assistance during

Fiscal Year 2005 based on their per-capita income levels and their eligibility to receive assistance under U.S. law and countries that would be candidate countries but for legal prohibitions on assistance (section 608(a) of the Act);

2. The criteria and methodology that the Board of Directors of the Millennium Challenge Corporation (the "Board") will use to measure and evaluate the relative policy performance of the candidate countries consistent with the requirements of section 607 of the Act in order to select "eligible countries" from among the "candidate countries" (section 608(b) of the Act); and

3. The list of countries determined by the Board to be "eligible countries" for Fiscal Year 2005, including which of the eligible countries the Board will seek to enter into MCA compacts (section 608(d) of the Act).

This report sets out the criteria and methodology to be applied in determining eligibility for FY 2005 MCA assistance.

Changes to the Criteria and Methodology for FY 2005

MCC has received constructive input on the indicators since the announcement of FY 2004's selection criteria and methodology. That input has been taken into account in creating the criteria and methodology for the selection of eligible countries for FY05. Since the selection process for FY05 falls soon after the FY04 selection process, MCC will not make far-reaching changes this year, as continuity is a vital concept to the selection methodology. In addition, more time is necessary to fully evaluate some potential changes, including the use of additional or different policy indicators. This section describes two changes in the policy indicators for the FY05 selection process. This section also outlines some potential changes to the indicators that will be explored for the FY06 process, in order to solicit comments from the public and to provide countries an opportunity to evaluate their performance in these areas prior to the possible implementation of more substantial changes.

We hope that by highlighting our intention to look for better and more comprehensive indicators we will stimulate interest in improving the available data. In assessing new indicators, we will favor those that: (1) Are developed by an independent third party, (2) utilize objective and high-quality data, (3) are analytically rigorous and publicly available, (4) have broad country-coverage and are comparable across countries, (5) have a clear theoretical or empirical link to economic growth and poverty reduction, (6) are policy-linked, *i.e.*, measure factors that governments can influence within a two to three year horizon, and (7) have broad consistency in results from year to year.

A summary of the changes (and potential future changes) to the selection criteria and methodology follows:

Economic Freedom

Inflation: A new inflation rate of 15 percent will be used in FY05 (down from the 20 percent rate used in FY04), making it slightly more difficult to pass and a more meaningful test of a country's economic policies. MCC intends to consider a further reduction to 10 percent for FY06.

Management of Natural Resources: As indicated in the FY04 report to Congress, MCC has been working with experts both inside and outside of government to explore possible better measures in this area. MCC has not yet identified a source of reliable, consistent data for assessing the quality of a country's policies regarding the management of natural resources. In order to identify an existing natural resources management indicator or to stimulate development of a new indicator, MCC intends to establish a working group, chaired by MCC Board Member Christine Todd Whitman, to work with outside groups and experts to establish criteria, and invite proposals, for such an indicator. Pending the results of this work, the Board will rely on the assessments described in the "Criteria and Methodology" section below for the FY05 selection process.

Trade Policy: The Trade Policy indicator is viewed by MCC as valuable and no changes will be made for the FY05 selection process. MCC intends, however, to conduct a thorough review over the next year to explore whether a measure of trade barriers more closely linked to growth is available.

Entrepreneurial Environment: The Days to Start a Business indicator is viewed by MCC as a valuable indicator of barriers to entrepreneurship. In the future, MCC would like to move towards a more comprehensive measure of a country's policies with respect to encouraging entrepreneurship and private-sector ownership. As such, in addition to continuing to use the Days to Start a Business indicator, in the coming year MCC will be investigating the use of related indicators, such as costs of starting businesses, time and costs of enforcing contracts, time and costs of land registration, protection of property rights, and the private sector's share of the economy.

Investing in People: MCC has evaluated the indicators in the Investing in People category and will substitute one indicator for FY05.

Girls' Primary Completion Rates: In FY05, we have substituted Girl's Primary Completion Rates for Primary Completion Rates. We believe that using completion rate data disaggregated by gender both continues MCC's focus on the importance of countries investing in the education of their people while better highlighting the importance of the well-being of women and girls as contributors to a country's economic growth and poverty reduction.

MCC will continue to explore additional ways to measure investments in people, particularly with respect to women and children, and anticipates additional changes in FY06. MCC has, in conjunction with outside experts, researched possible indicators measuring investments in women's health, children's heath, girls' education, and public health. We have identified several possible indicators, including Skilled Attendants at Birth (a proxy for maternal mortality which measures births attended by medically-trained midwifes, nurses or doctors), which will be considered more closely for potential use in FY06.

Criteria and Methodology

The Board will select eligible countries based on their overall performance in relation to their peers in three broad policy categories: Ruling Justly, Encouraging Economic Freedom, and Investing in People. Section 607 of the Act requires that the Board's determination of eligibility be based "to the maximum extent possible, upon objective and quantifiable indicators of a country's demonstrated commitment" to the criteria set out in the Act. For FY 2005, candidate countries are those countries that have a per capita income equal to or less than $1465, and are not ineligible to receive United States economic assistance.

The Board will make use of sixteen indicators to assess policy performance of individual countries (specific definitions of the indicators and their sources are set out in Annex A). These indicators are grouped for purposes of the assessment methodology under the three policy categories as follows:

Ruling Justly

1. Civil Liberties
2. Political Rights
3. Voice and Accountability
4. Government Effectiveness
5. Rule of Law

6. Control of Corruption

Encouraging Economic Freedom

1. Country Credit Rating
2. 1-year Consumer Price Inflation
3. Fiscal Policy
4. Trade Policy
5. Regulatory Quality
6. Days to Start a Business

Investing in People

1. Public Expenditures on Health as Percent of GDP
2. Immunization Rates: DPT3 and Measles
3. Public Primary Education Spending as Percent of GDP
4. Girls Primary Education Completion Rate

In making its determination of eligibility with respect to a particular candidate country, the Board will consider whether such country performs above the median in relation to its peers on at least half of the indicators in each of the three policy categories and above the median on the corruption indicator. One exception to this methodology is that the median is not used for the inflation indicator. Instead, to pass the indicator, a country's inflation rate needs to be under a fixed ceiling of 15%. The indicators methodology will be the predominant basis for determining which countries will be eligible for MCA assistance. In addition, the Board may exercise discretion in evaluating and translating the indicators into a final list of eligible countries. In this respect, the Board may also consider whether any adjustments should be made for data gaps, lags, trends, or other weaknesses in particular indicators. Likewise, the Board may deem a country ineligible if it performs substantially below average on any indicator and has not taken appropriate measures to address this shortcoming.

Where necessary, the Board may also take into account other data and quantitative information as well as qualitative information to determine whether a country performed satisfactorily in relation to its peers in a given category. As provided in the Act, the CEO's report to Congress setting out the list of eligible countries and which of those countries the MCC will seek to enter into Compact negotiations will include a justification for such eligibility determinations and selections for Compact negotiation.

There are elements of the criteria set out in the Act for which there is either limited quantitative information (*e.g.*, rights of people with disabilities) or no well-developed performance indicator (*e.g.*, sustainable management of natural resources). Until such data and/or indicators are developed, in assessing performance in these areas the Board may rely on supplemental data and qualitative information. For example, the State Department Human Rights report contains qualitative information to make an assessment on a variety of criteria outlined by Congress, such as the rights of people with disabilities, the treatment of women and children, worker rights, and human rights. Similarly, as additional information in the area of corruption, the Board may also consider how the country scores on Transparency International's Corruption Perceptions Index.

The Board's assessment of a country's commitment to economic policies that promote the sustainable management of natural resources may make use of quantitative and qualitative information such as access to sanitation, deforestation, conservation of land and marine resources, land tenure institutions, and protection of threatened and endangered species. The MCC will continue to consult with experts and work to refine this approach over time, including by creating a working group that will establish and make public criteria for the indicator and continue to explore existing data with the objective of finding a suitable indicator.

Relationship to Legislative Criteria

Within each policy category, the Act sets out a number of specific selection criteria. As indicated above, a set of objective and quantifiable policy indicators is being used to establish eligibility for MCA assistance and measure the relative performance by candidate countries against these criteria. The Board's approach to determining eligibility ensures that performance against each of these criteria is assessed by at least one of the sixteen objective indicators. Most are addressed by multiple indicators. The specific indicators used to measure each of the criteria set out in the Act are as follows:

Section 607(b)(1): Just and democratic governance, including a demonstrated commitment to—

(A) promote political pluralism, equality, and the rule of law: Indicators—Political Rights, Civil Liberties, Voice and Accountability and Rule of Law.

(B) respect human and civil rights, including the rights of people with disabilities; Indicators—Political Rights and Civil Liberties.

(C) protect private property rights; Indicators—Civil Liberties, Regulatory Quality and Rule of Law.

(D) encourage transparency and accountability of government; and Indicators—Political Rights, Civil Liberties, Voice and Accountability, and Government Effectiveness.

(E) combat corruption; Indicators—Civil Liberties and Control of Corruption.

Where necessary the Board will also draw on supplemental data and qualitative information, including: the State Department's Human Rights Report and Transparency International Corruption Perception's Index.

Section 607(b)(2): Economic freedom, including a demonstrated commitment to economic policies that—

(A) encourage citizens and firms to participate in global trade and international capital markets; Indicators—Country Credit Rating, Fiscal Policy, Inflation, Trade Policy, and Regulatory Quality.

(B) promote private sector growth and the sustainable management of natural resources; Indicators—Inflation, Days to Start a Business, Fiscal Policy, and Regulatory Quality.

(C) strengthen market forces in the economy; and Indicators—Fiscal Policy, Inflation, and Regulatory Quality.

(D) respect worker rights, including the right to form labor unions; and Indicators—Civil Liberties.

Where necessary the Board will also draw on supplemental data and qualitative information including: the State Department's Human Rights Report, access to sanitation, deforestation, conservation of land and marine resources, land tenure institutions, and protection of threatened and endangered species.

Section 607(b)(3): Investments in the people of such country, particularly women and children, including programs that—

(A) promote broad-based primary education; and Indicators—Girls' Primary Education Completion Rate and Public Spending on Primary Education.

(B) strengthen and build capacity to provide quality public health and reduce child mortality. Indicators—Immunization and Public Spending on Health.

Annex A: Indicator Definitions

The following 16 indicators will be used to measure candidate countries' adherence to the criteria found in Section 607(b) of the Act. The indicators are intended to assess the degree to which the political and economic conditions in a country serve to promote broad-based sustainable economic growth and thus provide a sound environment for the use of MCA funds. The indicators are not goals in

themselves; rather, they measure policies that are necessary conditions for a country to achieve broad-based sustainable economic growth. The indicators were selected based on their relationship to growth and poverty reduction, the number of countries they cover, their transparency and availability, and their relative soundness and objectivity. Where possible, the indicators rely on indices of performance developed by independent sources.

Ruling Justly:

(1) *Civil Liberties:* A panel of independent experts rates countries on: freedom of expression, association and organizational rights, rule of law and human rights, and personal autonomy and economic rights. Source: Freedom House.

(2) *Political Rights:* A panel of independent experts rates countries on: the prevalence of free and fair elections of officials with real power; the ability of citizens to form political parties that may compete fairly in elections; freedom from domination by the military, foreign powers, totalitarian parties, religious hierarchies and economic oligarchies; and the political rights of minority groups. Source: Freedom House.

(3) *Voice and Accountability:* An index of surveys that rates countries on: ability of institutions to protect civil liberties, the extent to which citizens of a country, are able to participate in the selection of governments, and the independence of the media. Source: World Bank Institute.

(4) *Government Effectiveness:* An index of surveys that rates countries on: the quality of public service provision, civil services' competency and independence from political pressures, and the government's ability to plan and implement sound policies. Source: World Bank Institute.

(5) *Rule of Law:* An index of surveys that rates countries on: the extent to which the public has confidence in and abides by rules of society; incidence of violent and non-violent crime; effectiveness and predictability of the judiciary; and the enforceability of contracts. Source: World Bank Institute.

(6) *Control of Corruption:* An index of surveys that rates countries on: The frequency of "additional payments to get things done," the effects of corruption on the business environment, "grand corruption" in the political arena and the tendency of elites to engage in "state capture." Source: World Bank Institute.

Encouraging Economic Freedom

(1) *Country Credit Rating:* A semi-annual survey of bankers' and fund managers' perceptions of a country's risk of default. Source: Institutional Investor Magazine.

(2) *Inflation:* The most recent 12 month change in consumer prices as reported in the IMF's International Financial Statistics or in another public forum by the relevant national monetary authorities. Source: Multiple.

(3) *Fiscal Policy:* The overall budget deficit divided by GDP, averaged over a three-year period. The data for this measure is being provided directly by the recipient government and will be cross checked with other sources and made publicly available to try to ensure consistency across countries. Source: National Governments and IMF WEO.

(4) *Days to Start a Business:* The Private Sector Advisory Service of the World Bank Group works with local lawyers and other professionals to examine specific regulations that impact business investment. One of their studies measures how many days it takes to open a new business. Source: World Bank.

(5) *Trade Policy:* A measure of a country's openness to international trade based on average tariff rates and non-tariff barriers to trade. Source: The Heritage Foundation's Index of Economic Freedom.

(6) *Regulatory Quality Rating:* An index of surveys that rates countries on: the burden of regulations on business, price controls, the government's role in the economy, foreign investment regulation and many other areas. Source: World Bank Institute.

Investing in People

(1) *Public Expenditure on Health:* Total expenditures by government at all levels on health divided by GDP. Source: National Governments.

(2) *Immunization:* The average of DPT3 and measles immunization rates for the most recent year available. Source: The World Health Organization WHO.

(3) *Total Public Expenditure on Primary Education:* Total expenditures by government at all levels on primary education divided by GDP. Source: National Governments.

(4) *Girls' Primary Completion Rate:* The number of female students completing primary education divided by the population in the relevant age cohort. Source: World Bank and UNESCO.

Dated: August 26, 2004.

Paul V. Applegarth,

Chief Executive Officer, Millennium Challenge Corporation.

[FR Doc. 04–19859 Filed 8–30–04; 8:45 am]

BILLING CODE 9210–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–3392]

In the Matter of Honeywell International, Inc., Metropolis Works Facility; Order Modifying License (Effective Immediately)

AGENCY: Nuclear Regulatory Commission.

ACTION: Issuance of Order for Implementation of Additional Security Measures Associated with Access Authorization.

FOR FURTHER INFORMATION CONTACT: Michael Raddatz, Senior Project Manager, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Rockville, MD 20852. Telephone: (301) 415–6334; fax number: (301) 415–5955; e-mail: *MGR@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

Pursuant to 10 CFR 2.106, the Nuclear Regulatory Commission (NRC) is providing notice in the Matter of Honeywell International, Inc., Metropolis Works Facility of the issuance of an order modifying License (SUB–526) (ML042240002) (Effective Immediately).

II. Further Information

Honeywell International, Inc. ("Honeywell" or the "licensee") holds Materials License No. SUB–526, issued by the U. S. Nuclear Regulatory Commission (NRC or Commission) authorizing the licensee to receive, acquire, possess and transfer byproduct and source material in accordance with the Atomic Energy Act of 1954 and 10 CFR parts 30 and 40. Commission regulations at 10 CFR § 20.1801, require the licensee to secure licensed material from unauthorized removal or access from controlled or unrestricted areas. Further, License Condition 10 of Materials License No. SUB–526, as amended, requires the licensee to implement and maintain specific measures to control public and private access to the facility as described in the

October 1, 1998, enclosure to its application dated September 23, 1998.

II

On September 11, 2001, terrorists simultaneously attacked targets in New York, NY and Washington, DC, utilizing large commercial aircraft as weapons. In response to the attacks and intelligence information subsequently obtained, the Commission issued a number of Safeguards and Threat Advisories to its licensees in order to strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility. The Commission has also communicated with other Federal, State, and Local government agencies and industry representatives to discuss and evaluate the current threat environment in order to assess the adequacy of security measures at licensed facilities. In addition, the Commission has been conducting a comprehensive review of its safeguards and security programs and requirements.

As a result of its initial consideration of the current safeguards and security requirements, as well as a review of information provided by the intelligence community, the Commission issued a Confirmatory Action Letter, No. RIII–01–005, dated December 21, 2001 to Honeywell, confirming the Licensee's agreement to immediately implement enhanced security measures and review longer term security enhancements to the site. On March 29, 2002 the Commission issued an Order to Honeywell to put the actions taken in response to the advisories in the established regulatory framework and implement additional enhancements which emerged from the NRC's ongoing comprehensive review. The Commission has now determined that certain additional security measures are required to address the current threat. Therefore, the Commission is imposing requirements, set forth in Attachment 1[1] of this Order, which supplement existing regulatory requirements and any previously issued Order, to provide the Commission with reasonable assurance that the public health and safety and the common defense and security continue to be adequately protected in the current threat environment. These requirements will remain in effect until the Commission determines otherwise.

The Commission recognizes that some of the requirements set forth in Attachment 1 to this Order may already have been initiated by Honeywell in response to previously issued advisories, Confirmatory Action Letter No. RIII–01–005, the March 29, 2002 Order or on its own. It also recognizes that some measures may need to be tailored to accommodate the specific circumstances or characteristics existing at the licensee's facility, to achieve the intended objectives and avoid any unforeseen effect on safe operation. Although the licensee's response to the Safeguards Threat Advisories and the March 29, 2002 Order has been adequate to provide reasonable assurance of adequate protection of the public health and safety, the Commission believes that the response must be supplemented because the current threat environment continues to persist. Therefore, it is appropriate to require certain additional security measures.

In order to provide assurance that the licensee is implementing prudent measures to achieve an appropriate level of protection to meet the current threat environment, Materials License No. SUB–526 is modified to include the requirements identified in Attachment 1 to this Order. In addition, pursuant to 10 CFR § 2.202, I find that, in the circumstances described above, the public health, safety and interest require that this Order be immediately effective.

III

Accordingly, pursuant to Sections 63, 81, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, the Commission's regulations in 10 CFR § 2.202 and 10 CFR Parts 30 and 40, *It Is Hereby Ordered, Effective Immediately, That Materials License No. SUB–526 Is Modified as Follows:*

A. The licensee shall, notwithstanding the provisions of any Commission regulation or license to the contrary, comply with the requirements described in Attachment 1 to this Order. The Licensee shall immediately start implementation of the requirements in Attachment 1 to the Order and shall complete implementation **no later than 180 days from the date of this Order**, with the exception of the additional security measure B.4., which shall be implemented **no later than 365 days from the date of this Order**.

B. 1. The Licensee shall, within **twenty (20) days** of the date of this order, notify the Commission, (1) If it is unable to comply with any of the requirements described in Attachment 1; (2) if compliance with any of the requirements is unnecessary in its specific circumstances; or (3) if implementation of any of the requirements would cause the Licensee to be in violation of the provisions of any Commission regulation or the facility license. The notification shall provide the Licensee's justification for seeking relief from or variation of any specific requirement.

2. If the Licensee considers that implementation of any of the requirements described in Attachment 1 to this Order would adversely impact safe operation of the facility, the Licensee must notify the Commission, within **twenty (20) days** of this Order, of the adverse safety impact, the basis for its determination and that the requirement has an adverse safety impact, and either a proposal for achieving the same objectives specified in the Attachment 1 requirement in question, or a schedule for modifying the facility procedures and practices to address the adverse safety condition. If neither approach is appropriate, the Licensee must supplement its response to Condition B.1 of this Order to identify the condition as a requirement with which it cannot comply, with attendant justifications as required in Condition B.1.

C. 1. The Licensee shall, within **twenty (20) days** of the date of this Order, submit to the Commission, a schedule for achieving compliance with each requirement described in Attachment 1.

2. The Licensee shall report to the Commission, when it has achieved full compliance with the requirements described in Attachment 1.

D. Notwithstanding any provision of the Commission's regulations to the contrary, all measures implemented or actions taken in response to this Order shall be maintained pending until the Commission determines otherwise.

Licensee responses to Conditions B.1, B.2, C.1 and C.2 above, shall be submitted in accordance with 10 CFR 30.6 and 40.5. In addition, Licensee submittals that contain Safeguards Information shall be properly marked and handled in accordance with 10 CFR 73.21.

The Director, Office of Nuclear Material Safety and Safeguards, may, in writing, modify, relax or rescind any of the above conditions upon demonstration by the Licensee of good cause.

IV

In accordance with 10 CFR 2.202, the Licensee must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within 20 days of the date of the Order. Where good cause is shown, consideration will be given to the time to request a hearing. A request for

[1] Attachment 1 contains *Safeguards Information* and will not be released to the public.

extension of time in which to submit an answer or request a hearing must be made in writing to the Director, Office of Nuclear Material Safety and Safeguards, Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. The answer may consent to this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically set forth the matters of fact and law on which the Licensee or other person adversely affected relies and the reasons as to why the Order should not have been issued. Any answer or request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies also shall be sent to the Director, Office of Nuclear Material Safety and Safeguards and the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington DC, 20555, to the Assistant General Counsel for Materials Litigation and Enforcement, at the same address, to the Regional Administrator, NRC Region II, 801 Warrenville Road, Lisle, Illinois 60532, and to the Licensee if the answer or hearing request is by a person other than the Licensee. Because of possible disruptions in delivery of mail to United States Government offices, it is requested that decontrolled answers, (no Safeguards Information) and requests for a hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to (301) 415–1101 or by e-mail to *hearingdocket@nrc.gov* and also to the Office of General Counsel either by means of facsimile transmission to (301) 415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. If a person other than the Licensee requests a hearing, that person shall set forth with particularity the manner in which his/her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR § 2.714(d). If a person other than the Licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is requested by the Licensee or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(I), the Licensee, may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section III above shall be final 20 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section III shall be final when the extension expires if a hearing request has not been received. *An Answer or a Request for Hearing Shall Not Stay the Immediate Effectiveness of This Order.*

For The Nuclear Regulatory Commission

Dated this 18th day of August 2004.

Margaret V. Federline,

Deputy Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 04–19805 Filed 8–30–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–348 and 50–364]

Southern Nuclear Operating Company, Inc.; Alabama Power Company; Joseph M. Farley Nuclear Plant, Units 1 and 2; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License Nos. NPF–2 and NPF–8, issued to Southern Nuclear Operating Company, Inc. (the licensee) for operation of the Joseph M. Farley Nuclear Plant (FNP), Units 1 and 2, located in Houston County, Alabama.

The proposed amendment would revise FNP, Units 1 and 2 Technical Specifications (TSs) to address control room boundary unfiltered inleakage by revising Limiting Condition for Operation (LCO) 3.7.10, "Control Room Emergency Filtration/Pressurization System (CREFS)" and TS 5.5.11, "Ventilation Filter Testing Program (VFTP)." It would also add a new section, TS 5.5.18, "Control Room Integrity Program (CRIP)."

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in Title 10 of the *Code of Federal Regulations* (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes do not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility. The proposed changes do not alter or prevent the ability of structures, systems, and components (SSCs) from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. This is a revision to the TS for the control room ventilation system which is a mitigation system designed to minimize inleakage and to filter the control room atmosphere to protect the operator following accidents previously analyzed. An important part of the system is the control room envelope (CRE). The CRE integrity is not an initiator or precursor to any accident previously evaluated.

Editorial changes and implementation of the guidance in Regulatory Guide 1.52, Revision 3 for testing cannot be initiators of any accident. Therefore, the probability of any accident previously evaluated is not increased. Performing tests and implementing programs that verify the integrity of the CRE and control room habitability ensure mitigation features are capable of performing the assumed function. Therefore, the consequences of any accident previously evaluated are not increased.

Therefore, it is concluded that this change does not significantly increase

the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The changes will not alter the requirements of the control room ventilation system or its function during accident conditions. No new or different accidents result from performing the new or revised actions and surveillances or programs required. The changes do not involve a physical alteration of the plant (*i.e.*, no new or different type of equipment will be installed) or a significant change in the methods governing normal plant operation. The proposed changes are consistent with the safety analysis assumptions and current plant operating practice.

Therefore, the possibility of a new or different kind of accident from any accident previously evaluated is not created.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed changes do not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by these changes. The proposed changes will not result in plant operation in a configuration outside the design basis for an unacceptable period of time without mitigating actions. The proposed changes do not affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition.

Therefore, it is concluded that this change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. federal workdays. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i)–(viii).

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff; (3) e-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV*; or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to (301) 415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. A copy of the request for hearing and petition for leave to intervene should also be sent to M. Stanford Blanton, Esq., Balch and Bingham, Post Office Box 306, 1710 Sixth Avenue North, Birmingham, Alabama 35201, attorney for the licensee.

For further details with respect to this action, see the application for amendment dated August 25, 2004, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 26th day of August 2004.

Christopher Gratton,

Acting Chief, Section 1, Project Directorate II, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–19804 Filed 8–30–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of August 30, September 6, 13, 20, 27, October 4, 2004.

PLACE: Commissioner's Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTER TO BE CONSIDERED:

Week of August 30, 2004

Friday, September 3, 2004

10 a.m. Affirmation Session (Public Meeting) (Tentative).

a: Public Citizen's Request for Hearing on the Commission's July 2, 2004, Spent Fuel Security Order (Tentative).

Week of September 6, 2004—Tentative

Wednesday, September 8, 2004

9:30 a.m. Discussion of Office of Investigation (OI) Programs and Investigations (Closed—Ex. 7).

Week of September 13, 2004—Tentative

Tuesday, September 14, 2004

9:30 a.m. Discussion of Security Issues (Closed—Ex. 1).

Week of September 20, 2004—Tentative

There are no meetings scheduled for the Week of September 20, 2004.

Week of September 27, 2004—Tentative

There are no meetings scheduled for the Week of September 27, 2004.

Week of October 4, 2004.—Tentative

Thursday, October 7, 2004

10:30 a.m. Discussion of Security Issues (Closed—Ex. 1).

1 p.m. Discussion of Security Issues (Closed—Ex. 1).

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Dave Gamberoni, (301) 415–1651.

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The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/what-we-do/polic-making/schedule.html*

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, August Spector, at 301–415–7080, TDD: 301–415–2100, or by e-mail at *aks@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov*.

Dated: August 26, 2004.

Dave Gamberoni,

Office of the Secretary.

[FR Doc. 04–19901 Filed 8–27–04; 9:39 am]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from, August 6 through August 19, 2004. The last biweekly notice was published on August 19, 2004 (69 FR 51487).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, And Opportunity For a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel. will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or

fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff; (3) E-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV*; or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to 301–415–3725 or by email to *OGCMailCenter@nrc.gov*. A copy of the request for hearing and petition for leave to intervene should also be sent to the attorney for the licensee.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(I)–(viii).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr@nrc.gov*.

AmerGen Energy Company, LLC, Docket No. 50–461, Clinton Power Station, Unit 1, DeWitt County, Illinois

Date of amendment request: June 22, 2004.

Description of amendment request: The proposed amendment would revise Technical Specification 3.1.8, "Scram Discharge Volume (SDV) Vent and Drain Valves," to allow a vent or drain line with one inoperable valve to be isolated instead of requiring the valve to be restored to Operable status within 7 days.

The U.S. Nuclear Regulatory Commission (NRC) staff issued a notice of opportunity for comment in the **Federal Register** on February 24, 2003 (68 FR 8637), on possible amendments to revise the action for one or more SDV vent or drain lines with an inoperable valve, including a model safety evaluation and model no significant hazards consideration (NSHC) determination, using the consolidated line-item improvement process. The NRC staff subsequently issued a notice of availability of the models for referencing in license amendment applications in the **Federal Register** on April 15, 2003 (68 FR 18294). The licensee affirmed the applicability of the model NSHC determination in its application dated June 22, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

A change is proposed to allow the affected SDV vent and drain line to be isolated when there are one or more SDV vent or drain lines with one valve inoperable instead of requiring the valve to be restored to operable status within 7 days. With one SDV vent or drain valve inoperable in one or more lines, the isolation function would be maintained since the redundant valve in the affected line would perform its safety function of isolating the SDV. Following the completion of the required action, the isolation function is fulfilled since the associated line is isolated. The ability to vent and drain the SDV is maintained and controlled through administrative controls. This requirement assures the reactor protection system is not adversely affected by the inoperable valves. With the safety functions of the valves being maintained, the probability or consequences of an accident previously evaluated are not significantly increased.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Accident Previously Evaluated

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. Thus, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The proposed change ensures that the safety functions of the SDV vent and drain valves are fulfilled. The isolation function is maintained by redundant valves and by the required action to isolate the affected line. The ability to vent and drain the SDV is maintained through administrative controls. In addition, the reactor protection system will prevent filling of the SDV to the point that it has insufficient volume to accept a full scram. Maintaining the safety functions related to isolation of the SDV and insertion of control rods ensures that the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Thomas S. O'Neill, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60666.

NRC Section Chief: Anthony J. Mendiola.

AmerGen Energy Company, LLC, Docket No. 50–289, Three Mile Island Nuclear Station, Unit 1 (TMI–1), Dauphin County, Pennsylvania

Date of amendment request: April 23, 2004.

Description of amendment request: The proposed amendment would delete Technical Specification (TS) Section 6.16, "Post-Accident Sampling Programs NUREG 0737 (II.B.3, II–F.1.2)," and the related requirements to maintain a Post-Accident Sampling System (PASS). Licensees were generally required to implement PASS upgrades as described in NUREG–0737, "Clarification of TMI [Three Mile Island] Action Plan Requirements," and Regulatory Guide 1.97, Revision 3, "Instrumentation for Light-Water-Cooled Nuclear Power Plants to Access Plant and Environs Conditions During and Following an Accident." Implementation of these upgrades was an outcome of the NRC's lessons learned from the accident that occurred at TMI Unit 2. Requirements related to PASS were imposed by Order for many facilities and were added to or included in the TSs for nuclear power reactors currently licensed to operate. Lessons learned and improvements implemented over the last 20 years have shown that the information obtained from PASS can be readily obtained through other means or is of little use in the assessment and mitigation of accident conditions.

The NRC staff issued a notice of opportunity for comment in the **Federal Register** on March 3, 2003 (68 FR 10052) on possible amendments to eliminate PASS, including a model safety evaluation and model no significant hazards consideration (NSHC) determination, using the consolidated line item improvement process. The NRC staff subsequently issued a notice of availability of the models for referencing in a license amendment application in the **Federal Register** on May 13, 2003 (68 FR 25664). The licensee affirmed the applicability of the following NSHC determination in its application dated April 23, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The PASS was originally designed to perform many sampling and analysis functions. These functions were designed and intended to be used in post accident situations and were put into place as a result of the TMI–2 accident. The specific intent of the PASS was to provide a system that has the capability to obtain and analyze samples of plant fluids containing potentially high levels of radioactivity, without exceeding plant personnel radiation exposure limits. Analytical results of these samples would be used largely for verification purposes in aiding the plant staff in assessing the extent of core damage and subsequent offsite radiological dose projections. The system was not intended to and does not serve a function for preventing accidents and its elimination would not affect the probability of accidents previously evaluated.

In the 20 years since the TMI–2 accident and the consequential promulgation of post accident sampling requirements, operating experience has demonstrated that a PASS provides little actual benefit to post accident mitigation. Past experience has indicated that there exists in-plant instrumentation and methodologies available in lieu of a PASS for collecting and assimilating information needed to assess core damage following an accident. Furthermore, the implementation of Severe Accident Management Guidance (SAMG) emphasizes accident management strategies based on in-plant instruments. These strategies provide guidance to the plant staff for mitigation and recovery from a severe accident. Based on current severe accident management strategies and guidelines, it is determined that the PASS provides little benefit to the plant staff in coping with an accident.

The regulatory requirements for the PASS can be eliminated without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. The elimination of the PASS will not prevent an accident management strategy that meets the initial intent of the post-TMI–2 accident guidance through the use of the SAMGs, the emergency plan (EP), the emergency operating procedures (EOP), and site survey monitoring that support modification of emergency plan protective action recommendations (PARs).

Therefore, the elimination of PASS requirements from Technical Specifications (TS) (and other elements of the licensing bases) does not involve a significant increase in the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The elimination of PASS related requirements will not result in any failure mode not previously analyzed. The PASS was intended to allow for verification of the extent of reactor core damage and also to provide an input to offsite dose projection calculations. The PASS is not considered an accident precursor, nor does its existence or elimination have any adverse impact on the pre-accident state of the reactor core or post accident confinement of radioisotopes within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The elimination of the PASS, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety. Methodologies that are not reliant on PASS are designed to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The use of a PASS is redundant and does not provide quick recognition of core events or rapid response to events in progress. The intent of the requirements established as a result of the TMI–2 accident can be adequately met without reliance on a PASS.

Therefore, this change does not involve a significant reduction in the margin of safety.

Based upon the reasoning presented above and the previous discussion of the amendment request, the requested change does not involve a significant hazards consideration.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Thomas S. O'Neill, Associate General Counsel, AmerGen Energy Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Section Chief: Richard J. Laufer.

Carolina Power & Light Company, Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of amendments request: July 26, 2004.

Description of amendments request: The proposed amendments would delete requirements from the Technical Specifications (TS) to maintain hydrogen recombiners and hydrogen and oxygen monitors. Licensees were generally required to implement upgrades as described in NUREG–0737, "Clarification of TMI [Three Mile Island] Action Plan Requirements," and Regulatory Guide (RG) 1.97, "Instrumentation for Light-Water-Cooled Nuclear Power Plants to Assess Plant and Environs Conditions During and Following an Accident." Implementation of these upgrades was an outcome of the lessons learned from the accident that occurred at TMI, Unit 2. Requirements related to combustible gas control were imposed by Order for

many facilities and were added to or included in the TS for nuclear power reactors currently licensed to operate. The revised 10 CFR 50.44, "Combustible gas control for nuclear power reactors," eliminated the requirements for hydrogen recombiners and relaxed safety classifications and licensee commitments to certain design and qualification criteria for hydrogen and oxygen monitors.

The NRC staff issued a notice of availability of a model no significant hazards consideration determination for referencing in license amendment applications in the **Federal Register** on September 25, 2003 (68 FR 55416). The licensee affirmed the applicability of the model no significant hazards consideration determination in its application dated July 26, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The revised 10 CFR 50.44 no longer defines a design-basis loss-of-coolant accident (LOCA) hydrogen release, and eliminates requirements for hydrogen control systems to mitigate such a release. The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage. In addition, these systems were ineffective at mitigating hydrogen releases from risk-significant accident sequences that could threaten containment integrity.

With the elimination of the design-basis LOCA hydrogen release, hydrogen and oxygen monitors are no longer required to mitigate design-basis accidents and, therefore, the hydrogen monitors do not meet the definition of a safety-related component as defined in 10 CFR 50.2. RG 1.97, Category 1, is intended for key variables that most directly indicate the accomplishment of a safety function for design-basis accident events. The hydrogen and oxygen monitors no longer meet the definition of Category 1 in RG 1.97. As part of the rulemaking to revise 10 CFR 50.44, the Commission found that Category 3, as defined in RG 1.97, is an appropriate categorization for the hydrogen monitors because the monitors are required to diagnose the course of beyond design-basis accidents. Also, as part of the rulemaking to revise 10 CFR 50.44, the Commission found that Category 2, as defined in RG 1.97, is an appropriate categorization for the oxygen monitors, because the monitors are required to verify the status of the inert containment.

The regulatory requirements for the hydrogen and oxygen monitors can be relaxed without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. Classification of the hydrogen monitors as Category 3, classification of the oxygen monitors as Category 2 and removal of the hydrogen and oxygen monitors from TS will not prevent an accident management strategy through the use of the SAMGs [severe accident management guidelines], the emergency plan (EP), the emergency operating procedures (EOPs), and site survey monitoring that support modification of emergency plan protective action recommendations (PARs).

Therefore, the elimination of the hydrogen recombiner requirements and relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, does not involve a significant increase in the probability or the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, will not result in any failure mode not previously analyzed. The hydrogen recombiner and hydrogen and oxygen monitor equipment was intended to mitigate a design-basis hydrogen release. The hydrogen recombiner and hydrogen and oxygen monitor equipment are not considered accident precursors, nor does their existence or elimination have any adverse impact on the pre-accident state of the reactor core or post accident confinement of radionuclides within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety.

The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage.

Category 3 hydrogen monitors are adequate to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The intent of the requirements established as a result of the TMI, Unit 2, accident can be adequately met without reliance on safety-related hydrogen monitors. Category 2 oxygen monitors are adequate to verify the status of an inerted containment.

Therefore, this change does not involve a significant reduction in the margin of safety. The intent of the requirements established as a result of the TMI. Unit 2, accident can be adequately met without reliance on safety-related oxygen monitors. Removal of hydrogen and oxygen monitoring from TS will not result in a significant reduction in their functionality, reliability, and availability.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Steven R. Carr, Associate General Counsel—Legal Department, Progress Energy Service Company, LLC, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Section Chief (Acting): Michael L. Marshall.

Carolina Power & Light Company, Docket No. 50–261, H. B. Robinson Steam Electric Plant, Unit No. 2, Darlington County, South Carolina

Date of amendment request: June 21, 2004.

Description of amendment request: The proposed amendment would revise Technical Specification Section 5.5.14, "Technical Specifications (TS) Bases Control Program," to replace the previous 10 CFR 50.59 term "unreviewed safety question" with current terminology. The proposed amendment would also revise TS Section 5.7.1, "High Radiation Area," to add wording that was inadvertently deleted with the issuance of the Improved Standard Technical Specifications in Amendment No. 176.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes do not modify the facility or the procedures for operation of the facility. One change updates the terminology used in 10 CFR 50.59 evaluations. The change does not alter the requirement of the TS Bases Control Program. The requirement for NRC review and approval of a TS Bases change is still determined through the use of the 10 CFR 50.59 review process. The second change corrects a typographical error that occurred under Amendment No. 176. The wording as proposed in this correction restores the requirement to the phraseology approved in Amendment No. 152 and is consistent with existing plant procedures.

Since there are no changes to the facility or facility procedures, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

The proposed changes do not modify the facility or the procedures for operation of the facility. One change updates the terminology used in 10 CFR 50.59 evaluations. The change does not alter the requirement of the TS Bases Control Program. The requirement for NRC review and approval of a TS Bases change is still determined through the use of the 10 CFR 50.59 review process. The second change corrects a typographical error that occurred under Amendment No. 176. The wording as proposed in this correction restores the requirement to the phraseology approved in Amendment No. 152 and is consistent with existing plant procedures.

Since there are no changes to the facility or facility procedures, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed change does not involve a significant reduction in the margin of safety.

The proposed changes continue to provide the controls necessary to ensure changes to the TS Bases are made in conformance with 10 CFR 50.59. The proposed changes continue to provide the controls necessary to ensure adequate control of High Radiation Areas. The proposed changes will not result in any changes to the facility or facility operating procedures. Therefore, the changes do not result in a significant reduction in the margin of safety.

Based on the above discussion, Carolina Power & Light has determined that the requested change does not involve a significant hazards consideration.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Steven R. Carr, Associate General Counsel—Legal Department, Progress Energy Service Company, LLC, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Section Chief: Michael L. Marshall, Acting.

Energy Northwest, Docket No. 50–397, Columbia Generating Station, Benton County, Washington

Date of amendment request: June 9, 2004.

Description of amendment request: The proposed change revises Technical Specifications (TS) Limiting Condition for Operation (LCO) 3.4.11, "RCS Pressure and Temperature (P/T) Limits," to replace the P/T curves for inservice leak and hydrostatic testing, non-nuclear heating and cooldown, and nuclear heating and cooldown currently illustrated in TS Figures 3.4.11–1, 3.4.11–2, and 3.4.11–3, respectively.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes deal exclusively with the Reactor Coolant System (RCS) Pressure and Temperature (P/T) curves, which define the limitations for operation and testing. Because of the design conservatisms used to calculate the RCS P/T limits, reactor vessel failure has a low probability of occurrence and is not considered as a design basis accident in the safety analyses of the plant. The proposed changes adjust the reference temperature for the limiting material to account for irradiation effects and provide a comparable level of protection as previously evaluated and approved. The adjusted reference temperature calculations were performed in accordance with the requirements of 10 CFR [Part] 50 Appendix G using the guidance contained in RG [Regulatory Guide] 1.99, Revision 2, "Radiation Embrittlement of Reactor Vessel Materials," to provide operating limits for up to 33.1 EFPY [effective full power years]. The proposed license amendment does not involve a change to operation of equipment required to mitigate any accident analyzed in Columbia's UFSAR [Updated Final Safety Analysis Report]. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The revised P/T curves are based on a later edition and addenda of the ASME Code that incorporates current industry standards for the curves. The revised curves are also based on an RPV [reactor pressure vessel] fluence that has been recalculated in accordance with the methodology of RG 1.190. The proposed changes do not involve a modification to plant equipment. There is no effect on the function of any plant system, and no new system interactions are introduced by this change. No new failure modes are introduced. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed curves conform to the guidance contained in RG 1.190, "Calculational and Dosimetry Methods for Determining Pressure Vessel Neutron Fluence," and RG 1.99, Revision 2, "Radiation Embrittlement of Reactor Vessel Materials," and maintain the safety margins specified in 10 CFR [Part] 50 Appendix G. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Thomas C. Poindexter, Esq., Winston & Strawn, 1400 L Street, NW., Washington, DC 20005–3502.

NRC Section Chief: Stephen Dembek.

Energy Northwest, Docket No. 50–397, Columbia Generating Station, Benton County, Washington

Date of amendment request: August 5, 2004.

Description of amendment request: The proposed change will revise Technical Specification (TS) 5.5.12, "Primary Containment Leakage Rate Testing Program," to allow a one-time deferral of the Type A containment integrated leak rate test (ILRT). The current 10-year interval between Type A tests would be extended to 15 years from the previous time a Type A test was performed. The last Type A test was performed on July 20, 1994.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed one-time extension to the Type A testing interval from once-per-10 years to once-per-15 years will not increase the probability of an accident previously evaluated. The performance of Type A tests is not an accident initiator. The primary containment Type A testing interval extension does not involve a plant

modification and will not cause equipment failure or accident initiation.

The proposed extension to the Type A testing interval does not involve a significant increase in the consequences of an accident. The NUREG 1493 generic study of the effects of extending containment leakage testing concluded that Type B and C testing can identify the vast majority (greater than 95 percent) of potential leakage paths and that reducing the Type A test interval to once-per-20 years leads to an "imperceptible increase in risk." Other testing and inspection programs, in addition to the Type A test, provide a high degree of assurance that the primary containment integrity will be maintained. Inspections required by the Maintenance Rule and ASME Code [are] periodically performed in order to identify indications of containment degradation that could affect containment leak tightness.

Experience at Columbia demonstrates that excessive containment leakage paths are detectable by Type B and C local leak rate tests. Type B and C testing will identify containment openings, such as a valve, that would otherwise be detected by the Type A test. These factors show that a one-time Type A test interval extension from once-per-10 years to once-per-15 years will not involve a significant increase in the consequences of an accident.

Previous Type A test results at Columbia show leakage has not exceeded acceptance criteria in the past, indicating a leak-tight containment and demonstrating the structural capability of the primary containment. The testing results have established that Columbia has had acceptable containment leakage rates with considerable margin.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The Columbia primary containment is designed to contain energy and fission products during and after a design basis accident. The proposed extension of the Type A testing interval will not create the possibility of a new or different type of accident from any previously evaluated. There are no changes being made to the physical plant or in operation of the plant that could introduce a new failure mode with the potential to create an accident or affect mitigation of an accident.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed extension of the Type A testing interval will not significantly reduce the margin of safety. The NUREG 1493 generic study of the effects of extending containment leakage testing found that a 20-year interval in Type A leakage testing leads to an "imperceptible increase in risk." NUREG 1493 found that generically, the design containment leakage rate contributes less than 0.1 percent to the overall accident risk and that the increase in the Type A testing interval would have a minimal effect on risk because the vast majority (greater than 95 percent) of all potential leakage paths are detected by Type B and C leakage testing.

A Columbia plant specific probabilistic risk assessment on the change in the Type A test interval from once-per-10 years to once-per-15 years determined:

- The risk impact due to a change in Large Early Release Frequency (LERF) is an increase of 2E–8/year that is characterized by Regulatory Guide 1.174 ["An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis"] as "very small."
- The total integrated plant risk increase measured by person-rem/year is negligible.
- The change in conditional containment failure probability is an increase of 0.1 percent, which is considered to represent a very small impact on risk.

Deferral of Type A testing for Columbia does not increase the level of risk to the public due to loss of capability to detect and measure containment leakage or loss of containment structural integrity. Other containment testing methods and inspections will assure all limiting conditions for operation will continue to be met. The margin of safety inherent in existing accident analyses will be maintained.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Thomas C. Poindexter, Esq., Winston & Strawn, 1400 L Street, NW., Washington, DC 20005–3502.

NRC Section Chief: Stephen Dembek.

Entergy Nuclear Operations, Inc., Docket No. 50–333, James A. FitzPatrick Nuclear Power Plant, Oswego County, New York

Date of amendment request: June 22, 2004.

Description of amendment request: The proposed amendment would delete requirements from the Technical Specifications (TSs) to maintain hydrogen and oxygen monitors. A notice of availability for this technical specification improvement using the consolidated line item improvement process (CLIIP) was published in the **Federal Register** (FR) on September 25, 2003 (68 FR 55416). Licensees were generally required to implement upgrades as described in NUREG–0737, "Clarification of TMI [Three Mile Island] Action Plan Requirements," and Regulatory Guide 1.97, "Instrumentation for Light-Water-Cooled Nuclear Power Plants to Assess Plant and Environs Conditions During and Following an Accident." Implementation of these upgrades was an outcome of the lessons learned from the accident that occurred at TMI, Unit 2. Requirements related to combustible gas control were imposed by Order for many facilities and were added to or included in the TSs for nuclear power reactors currently licensed to operate. The revised 10 CFR 50.44, "Standards for combustible gas control system in light-water-cooled power reactors," eliminated the requirements for hydrogen recombiners (not installed at FitzPatrick and therefore not addressed by this proposed amendment) and relaxed safety classifications and licensee commitments to certain design and qualification criteria for hydrogen and oxygen monitors.

The NRC staff issued a notice of availability of a model no significant hazards consideration (NSHC) determination for referencing in license amendment applications in the FR on September 25, 2003 (68 FR 55416). The licensee affirmed the applicability of the model NSHC determination in its application dated June 22, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The revised 10 CFR 50.44 no longer defines a design-basis loss-of-coolant accident (LOCA) hydrogen release, and eliminates requirements for hydrogen control systems to mitigate such a release. The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage. In addition, these systems were ineffective at mitigating hydrogen releases from risk-significant accident sequences that could threaten containment integrity.

With the elimination of the design-basis LOCA hydrogen release, hydrogen and oxygen monitors are no longer required to mitigate design-basis accidents and, therefore, the hydrogen monitors do not meet the definition of a safety-related component as defined in 10 CFR 50.2. RG [Regulatory Guide] 1.97 Category 1, is intended for key

variables that most directly indicate the accomplishment of a safety function for design-basis accident events. The hydrogen and oxygen monitors no longer meet the definition of Category 1 in RG 1.97. As part of the rulemaking to revise 10 CFR 50.44 the Commission found that Category 3, as defined in RG 1.97, is an appropriate categorization for the hydrogen monitors because the monitors are required to diagnose the course of beyond design-basis accidents. Also, as part of the rulemaking to revise 10 CFR 50.44, the Commission found that Category 2, as defined in RG 1.97, is an appropriate categorization for the oxygen monitors, because the monitors are required to verify the status of the inert containment.

The regulatory requirements for the hydrogen and oxygen monitors can be relaxed without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. Classification of the hydrogen monitors as Category 3, [classification of the oxygen monitors as Category 2,] and removal of the hydrogen and oxygen monitors from TS will not prevent an accident management strategy through the use of the severe accident management guidelines (SAMGs), the emergency plan (EP), the emergency operating procedures (EOPs), and site survey monitoring that support modification of emergency plan protective action recommendations (PARs).

Therefore, the relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, does not involve a significant increase in the probability or the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, will not result in any failure mode not previously analyzed. The hydrogen and oxygen monitor equipment was intended to mitigate a design-basis hydrogen release. The hydrogen and oxygen monitor equipment are not considered accident precursors, nor does their existence or elimination have any adverse impact on the pre-accident state of the reactor core or post accident confinement of radionuclides within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety.

The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage.

Category 3 hydrogen monitors are adequate to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The intent of the requirements established as a result of the TMI, Unit 2 accident can be adequately met without reliance on safety-related hydrogen monitors.

Category 2 oxygen monitors are adequate to verify the status of an inerted containment.

Therefore, this change does not involve a significant reduction in the margin of safety. The intent of the requirements established as a result of the TMI, Unit 2 accident can be adequately met without reliance on safety-related oxygen monitors. Removal of hydrogen and oxygen monitoring from TS will not result in a significant reduction in their functionality, reliability, and availability.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. John Fulton, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Section Chief: Richard J. Laufer.

Entergy Nuclear Operations, Inc., Docket No. 50–286, Indian Point Nuclear Generating Unit No. 3, Westchester County, New York

Date of amendment request: June 2, 2004.

Description of amendment request: The proposed amendment would revise the Technical Specifications (TSs) to fully adopt the alternate source term (AST) methodology for design-basis accident dose consequence evaluations in accordance with 10 CFR 50.67. Specifically, the amendment would revise the TS Definition regarding dose equivalent iodine and TS Section 5.5.10, "Ventilation Filter Testing Program (VFTP)." The AST methodology for the fuel-handling accident was previously approved in Amendment No. 215, dated March 17, 2003.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change involves the reanalysis of design basis radiological accidents in Containment and the Fuel Storage Building. The new analyses, based on the Alternate Source Term (AST), in accordance with 10 CFR 50.67, will replace the existing analyses that are based on the methodologies of [Atomic Energy Commission Report, "Calculation of Distance Factors for Power and Test Reactor Sites," 1962] TID–14844. As a result of the new analyses, changes to the Technical Specifications are proposed which take credit for the new analysis results.

The proposed changes to the Technical Specifications modify requirements regarding filter testing for a variety of systems (*i.e.*, Containment Purge, Fuel Storage Building Emergency Ventilation). The analyses do not credit charcoal or HEPA [high-efficiency particulate air] filtration for dose mitigation. The proposed changes reflect the plant configuration that will support implementation of the AST analyses.

The AST analysis follows the guidance of the NRC Regulatory Guide 1.183 and uses the acceptance criteria of the NRC Standard Review Plan (NUREG–0800) for offsite doses and General Design Criteria for Control Room personnel. The accident analyses conservatively assume that the Containment Building and the Fuel Storage Building, including ventilation filtration systems for those buildings, do not diminish or delay the assumed fission product release.

The proposed changes also revise the definition of Dose Equivalent Iodine (DEI) to be consistent with the assumptions of the analyses. The limits for DEI do not change as a result of the implementation of the AST analyses.

The change from the original source term to the new proposed AST is a change in analysis method and assumptions and has no effect on accident initiators or causal factors that contribute to the probability of occurrence of previously analyzed accidents. Use of AST to analyze the dose effect of design basis accidents shows that regulatory acceptance criteria for the new methodology continue to be met. Changing the analysis methodology does not change the sequence or progression of the accident scenario.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The changes proposed in this license amendment request involve the use of a new analysis methodology and related regulatory acceptance criteria. In addition, certain changes to plant ventilation systems can be made based on the analysis results, using the new methodology. Use of a new analysis

method does not impact the design or operation of plant systems or components and new accident scenarios would therefore not be created. The proposed changes to air ventilation and filtration systems do not adversely affect plant equipment used to protect plant safety limits or the way in which that plant equipment is operated or maintained. As a result, no new failure modes are being introduced that could lead to different accidents.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The existing dose analysis methodology and assumptions demonstrate that the dose consequences for all design basis accidents are within regulatory limits for whole body and thyroid doses as established in 10 CFR 100 (except for the Fuel Handling Analysis, which is already based on the AST methodology). The alternate dose analysis methodology and assumptions also demonstrate that the dose consequences of these accidents are within the regulatory requirements established for the new methodology.

The limits applicable to the alternate analysis are established in 10 CFR 50.67 in conjunction with the Total Effective Dose Equivalent (TEDE) acceptance directed in Regulatory Guide 1.183. The acceptance criteria for both dose analysis methods have been developed for the purpose of evaluating design basis accidents to demonstrate adequate protection of public health and safety. An acceptable margin of safety is inherent in both types of acceptance criteria.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. John Fulton, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Section Chief: Richard J. Laufer.

Entergy Nuclear Operations, Inc., Docket No. 50–286, Indian Point Nuclear Generating Unit No. 3, Westchester County, New York

Date of amendment request: June 3, 2004.

Description of amendment request: The proposed amendment would increase the maximum authorized reactor core power level from 3067.4 megawatt thermal (MWt) to 3216 MWt. This represents a nominal increase of 4.85% rated thermal power. The amendment would also revise the Technical Specifications (TSs) to relocate certain cycle-specific parameters to the Core Operating Limits Report (COLR) by adopting TS Task Force Traveler TSTF–339, "Relocate Technical Specification Parameters to the COLR." In addition, the amendment would revise several allowable values in TS Table 3.3.1–1, "Reactor Protection System (RPS) Instrumentation," and Table 3.3.2–1, "Engineered Safety Feature Actuation System (ESFAS) Instrumentation."

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The evaluations and analyses associated with this proposed change to core power level have demonstrated that all applicable acceptance criteria for plant systems, components, and analyses (including the Final Safety Analysis Report Chapter 14 safety analyses) will continue to be met for the proposed increase in licensed core thermal power for Indian Point 3 (IP3). The subject increase in core thermal power will not result in conditions that could adversely affect the integrity (material, design, and construction standards) or the operational performance of any potentially affected system, component or analysis. Therefore, the probability of an accident previously evaluated is not affected by this change. The subject increase in core thermal power will not adversely affect the ability of any safety-related system to meet its intended safety function. Further, the radiological dose evaluations in support of this power uprate effort show all acceptance criteria are met.

The relocation of cycle-specific core operating limits from the Technical Specifications to the Core Operating Limits Report (COLR), in accordance with TSTF–339, has no influence or impact on the probability or consequences of a Design Basis Accident. Adherence to the COLR and accepted methodologies for establishing COLR parameters continues to be controlled by the plant Technical Specifications. Relocation of cycle-specific values to the COLR while maintaining the limiting requirements in the Technical Specifications reduces administrative burden associated with processing license amendments for routine core reload designs.

RPS and ESF [engineered safety feature] allowable values established in plant technical specifications represent acceptance criteria used by plant personnel in assessing the operability of instrumentation channels.

Allowable values are not accident initiators and have no role in the probability of occurrence of an accident. Safety analyses for design basis accidents use certain assumptions (Safety Analysis Limits) regarding the actuation of RPS and ESF protective functions. The proposed allowable values are developed using a methodology that assures the accident analysis assumptions are valid and the consequences of previously analyzed accidents continue to meet established limits.

Therefore, the proposed changes described in this license amendment request do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The analyses and evaluations performed for the proposed increase in power show that all applicable acceptance criteria for plant systems, components, and analyses (including FSAR [Final Safety Analysis Report] Chapter 14 safety analyses) will continue to be met for the proposed power increase in IP3 licensed core thermal power. The subject increase in core thermal power will not result in conditions that could adversely affect the integrity (material, design, and construction standards) or operational performance of any potentially affected system, component, or analyses. The subject increase in core thermal power will not adversely affect the ability of any safety-related system to meet its safety function. Furthermore, the conditions and changes associated with the subject increase in core thermal power will neither cause initiation of any accident, nor create any new credible limiting single failure. The power uprate does not result in changing the status of events previously deemed to be non-credible being made credible. Additionally, no new operating modes are proposed for the plant as a result of this requested change.

The relocation of cycle-specific core operating limits from the Technical Specifications to the Core Operating Limits Report (COLR), in accordance with TSTF–339, does not involve any changes to plant equipment or the way is which the plant is operated. There are no new accident initiators or causal mechanisms being introduced by this proposed change. Relocation of cycle-specific values to the COLR while maintaining the limiting requirements in the Technical Specifications reduces administrative burden associated with processing license amendments for routine core reload designs.

RPS and ESF allowable values established in plant technical specifications represent acceptance criteria used by plant personnel in assessing the operability of instrumentation channels. Revising allowable values does not involve installation of new equipment, modification to existing equipment, or a change in plant operation that could create a new or different accident scenario.

Therefore, the proposed changes described in this license amendment request will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The analyses and evaluations associated with the proposed increase in power show that all applicable acceptance criteria for plant systems, components, and analyses (including FSAR Chapter 14 safety analyses) will continue to be met for this proposed increase in IP3 licensed core thermal power. The subject increase in core thermal power will not result in conditions that could adversely affect the integrity (material, design, and construction standards) or operational performance of any potentially affected system, component, or analysis. The subject power uprate will not adversely affect the ability of any safety-related system to meet its intended safety function.

Adoption of TSTF–339 allows relocation of cycle-specific parameters to the COLR, while maintaining limiting requirements in the Technical Specifications. Approved methodologies for calculating cycle-specific parameters are maintained in the Technical Specifications, and changes to the COLR are subject to the requirements and controls of 10 CFR 50.59. This assures that required margins to safety limits are maintained.

The proposed new allowable values are developed using established methodologies and incorporate additional conservatism that assures the validity of analysis limits assumed in the evaluation of hypothetical accidents.

Therefore, the proposed changes described in this license amendment request will not involve a significant reduction in [a] margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. John Fulton, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Section Chief: Richard J. Laufer.

Entergy Operations, Inc., Docket No. 50–368, Arkansas Nuclear One, Unit No. 2, Pope County, Arkansas

Date of amendment request: July 8, 2004.

Description of amendment request: Delete Technical Specification Surveillance Requirement 4.5.2.d.1, Emergency Core Cooling System Subsystems $-T_{ave} \geq 300$ °F, associated with the requirement to maintain an operable Automatic Closure Interlock (ACI) for the Shutdown Cooling (SDC) suction isolation valves.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The removal of the ACI function is consistent with the guidelines previously endorsed by the NRC in Generic Letter 88–17. Removal of this function results in a calculated decrease in intersystem Loss of Coolant Accident (ISLOCA) frequency. Additionally, the removal of the ACI function will result in a decrease in SDC system unavailability and a corresponding decrease in risk associated with loss of SDC events. As a result, the proposed change will result in a net decrease in risk and a net improvement in plant safety.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The presence or omission of an ACI function is not considered an accident initiator nor is this function credited in any safety analyses for the prevention or mitigation of any accident. Alarms, design features, and strict administrative/procedural controls support correct and timely operator action to ensure the SDC system will not be exposed to high Reactor Coolant System (RCS) pressure.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The ACI function is not credited in a margin of safety analysis for any accident previously evaluated. Removal of the ACI function will result in an overall net increase in nuclear safety. Appropriate alarm, design features, and administrative controls will continue to ensure proper isolation and isolation maintenance of the SDC system during plant operations with elevated RCS pressures.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Nicholas S. Reynolds, Esquire, Winston and Strawn, 1400 L Street, NW., Washington, DC 20005–3502.

NRC Section Chief: Robert A. Gramm.

Entergy Operations, Inc., Docket No. 50–368, Arkansas Nuclear One, Unit No. 2, Pope County, Arkansas

Date of amendment request: July 8, 2004. This supersedes the May 12, 2004, application in its entirety (69 FR 34699).

Description of amendment request: The proposed amendment would change the reactor core analytical methods used to determine the core operating limits, reflect the changes allowed by Technical Specification (TS) Task Force (TSTF) Traveler No. 363, "Revised Topical Report References in ITS [Improved Standard Technical Specifications] 5.6.5, COLR [Core Operating Limits Report]," and delete the Index from the TSs. This request completely supersedes the previous request of May 12, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

TS 6.9.5.1, Core Operating Limits Report (COLR)

The proposed amendment, in part, identifies a change in the nuclear physics codes used to confirm the values of selected cycle-specific reactor physics parameter limits and includes minor editorial changes which do not alter the intent of stated requirements. The proposed change also allows the use of methods required for the implementation of ZIRLO clad fuel rods. Inasmuch as the proposed change includes codes that have been previously approved by the NRC for CE [Combustion Engineering] cores, the amendment is administrative in nature and has no impact on any plant configuration or system performance relied upon to mitigate the consequences of an accident. Parameter limits specified in the COLR for this amendment are not changed from the values presently required by TSs. Future changes to the calculated values of such limits may only be made using NRC approved methodologies, must be consistent with all applicable safety analysis limits, and are controlled by the 10 CFR 50.59 process. Assumptions used for accident initiators and/or safety analysis acceptance criteria are not altered by this change.

The proposed change will add an NRC approved topical report, WCAP–16072–P–A, to the list of referenced topical reports. The topical report has been previously approved by the NRC for use in Combustion Engineering core designs and as such, the proposed change is administrative in nature and has no impact on any plant configurations or on system performance that is relied upon to mitigate the consequences of an accident. In addition, prior to the use

of the ZrB_2 burnable absorber coating, fuel design will be analyzed with applicable NRC staff approved codes and methods.

The proposed change also implements NRC approved TSTF Traveler No. 363. This is an administrative change that will allow specific details, such as the revision number, revision date, and supplement number of topical reports that are referenced in the TSs, to be deleted and relocated in the cycle specific COLR. This proposed change does not result in any changes to the assumptions used to evaluated [evaluate] accident initiators and/or safety analysis acceptance criteria.

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The proposed deletion of the Index is purely administrative and does not impact the accident analysis.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

TS 6.9.5.1, Core Operating Limits Report (COLR)

The proposed change, in part, identifies a change in the nuclear physics codes used to confirm the values of selected cycle-specific reactor physics parameter limits. The proposed change also allows the use of methods required for the implementation of ZIRLO clad fuel rods. Neither of these changes results in a change to the physical plant or to the modes of operation defined in the facility license.

The proposed change adds a reference to the topical report that allows the use of ZrB_2 as a burnable absorber coating on the fuel pellet. The topical report has been previously approved by the NRC for use in Combustion Engineering core designs and as such, the proposed change is administrative in nature and has no impact on any plant configurations or on system performance that is relied upon to mitigate the consequences of an accident. In addition, prior to the use of the ZrB_2 burnable absorber coating, fuel design will be analyzed with applicable NRC staff approved codes and methods. This change is administrative in nature and does not create a new or different type of accident than previously evaluated because the design requirements for the facility remain the same.

The proposed change also implements TSTF Traveler No. 363. The proposed change does not result in changes to the physical plant or to the modes of operation defined in the facility license nor does it involve the addition of new equipment or the modification of existing equipment.

Index

The proposed deletion of the Index is purely administrative has no affect on existing equipment.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

TS 6.9.5.1, Core Operating Limits Report (COLR)

The proposed changes to change the nuclear physics code package and to add a topical report to support the use of ZIRLO do not amend the cycle specific parameter limits located in the COLR from the values presently required by the TS. The individual specifications continue to require operation of the plant within the bounds of the limits specified in COLR. Benchmarking has shown that uncertainties for the Westinghouse Physics code system yields are essentially the same or less than those obtained for the current ROCS and DIT [computer code] methodology. Future changes to the values of these limits by the licensee may only be developed using NRC approved methodologies, must remain consistent with all applicable plant safety analysis limits addressed in the Safety Analysis Report, and are further controlled by the 10 CFR 50.59 process. The relocation of the supplement numbers, revision numbers, and approval dates of the analytical methods listed in the COLR does not affect the margin of safety. The analysis will continue to be performed using NRC approved methodology. Safety analysis acceptance criteria are not being altered by this amendment.

The proposed change will add WCAP–16072–P–A to the list of referenced topical reports. The topical report has been previously approved by the NRC for use in Combustion Engineering core designs and as such, the proposed change is administrative in nature and has no impact on any plant configurations or on system performance that is relied upon to mitigate the consequences of an accident. In addition, prior to the use of the ZrB_2 burnable absorber coating, fuel design will be analyzed with applicable NRC staff approved codes and methods.

Index

The proposed deletion of the Index, which is an administrative document, does not impact any TS values or safety limits.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Nicholas S. Reynolds, Esquire, Winston and Strawn, 1400 L Street, NW., Washington, DC 20005–3502.

NRC Section Chief: Robert A. Gramm.

Exelon Generation Company, LLC, Docket Nos. 50–254 and 50–265, Quad Cities Nuclear Power Station, Units 1 and 2, Rock Island County, Illinois

Date of amendment request: June 10, 2004, as supplemented by letter dated July 21, 2004.

Description of amendment request: The proposed amendments would revise the Quad Cities Nuclear Power Station (QCNPS) technical specifications (TS) to change the allowable value (AV) and add surveillance requirements (SRs) for the main steam line (MSL) flow-high initiation of Group 1 primary containment isolation and control room emergency ventilation system isolation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability of occurrence or consequences of an accident previously evaluated?

For QCNPS, Units 1 and 2, the proposed amendment will implement a design change that upgrades the existing MSL Flow-High instrumentation from pressure switches to analog trip unit devices. Analog trip units (ATUs) have proven to be a more reliable technology than the currently installed equipment. Analog trip units are used in various applications at QCNPS, including the Reactor Protection System (RPS) low water level trip function. Because the trip units are more reliable, the likelihood of spurious isolations is reduced. Further, ATUs experience less instrument drift during the operating cycle. The proposed change adds a 92-day trip unit calibration requirement for the MSL-High isolation function. The NRC has previously found that a 92-day calibration is appropriate for individual ATUs.

Procedure revisions required by this modification are limited to those associated with the calibration, maintenance, and operation of the replacement transmitter and trip unit analog loops. All required design functions of the MSL high flow loop are maintained. No system, structure, or component will be used in a manner that is not already bounded by the reference design, or is inconsistent with analyses or descriptions in the QCNPS Updated Final Safety Analysis Report (UFSAR). There is no adverse effect on the performance or control of any design function described in the UFSAR.

TS requirements that govern operability or routine testing of plant instruments are not assumed to be initiators of any analyzed event because these instruments are intended to prevent, detect, or mitigate accidents. Therefore, these changes will not involve an increase in the probability of occurrence of an accident previously evaluated. In addition, these changes will not increase the

consequences of an accident previously evaluated because the proposed change does not adversely impact structures, systems, or components. The planned instrument upgrade is a more reliable design than existing equipment. The proposed changes establish requirements that ensure components are operable when necessary for the prevention or mitigation of accidents or transients. Furthermore, there will be no change in the types or significant increase in the amounts of any effluents released offsite. For these reasons, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed changes support a planned instrumentation upgrade by incorporating SRs required to ensure operability. The change does not adversely impact the manner in which the instrument will operate under normal and abnormal operating conditions. Therefore, these changes provide an equivalent level of safety and will not create the possibility of a new or different kind of accident from any accident previously evaluated. The changes in methods governing normal plant operation are consistent with the current safety analysis assumptions.

All required design functions are maintained, and the new setpoint is analyzed in accordance [with] an NRC-approved methodology for determination of setpoints and TS AVs in accordance with the QCNPS UFSAR, Section 7.3.2.4, "Design Evaluation." Therefore, replacing the existing MSL high flow DPISs with analog trip instrumentation does not alter any UFSAR described evaluation methodologies, or introduce any new methodologies. These changes will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the change involve a significant reduction in a margin of safety?

The proposed changes support a planned instrumentation upgrade from differential pressure switches to ATUs. The proposed changes do not adversely affect the probability of failure or availability of the affected instrumentation. The addition of a 92-day trip unit calibration for MSL Flow-High is a conservative change that aligns the SRs for a planned instrumentation upgrade with that of similar instrumentation. The NRC has previously found that a 92-day calibration is appropriate for individual ATUs. The setpoint was determined using an NRC-approved methodology. The proposed changes do not affect the analytical limit assumed in the safety analyses for the actuation of the instrumentation. Therefore, it is concluded that the proposed changes will not result in a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Attorney for licensee: Mr. Thomas S. O'Neill, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Section Chief: Anthony J. Mendiola.

FirstEnergy Nuclear Operating Company, et al., Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit Nos. 1 and 2 (BVPS–1 and 2), Beaver County, Pennsylvania

Date of amendment request: March 22, 2004 as supplemented July 23, 2004.

Description of amendment request: The proposed change allows entry into a mode or other specified condition in the applicability of a technical specification (TS), while in a condition statement and the associated required actions of the TS, provided the licensee performs a risk assessment and manages risk consistent with the program in place for complying with the requirements of Title 10 of the Code of Federal Regulations (10 CFR), part 50, Section 50.65(a)(4). Limiting Condition for Operation (LCO) 3.0.4 exceptions in individual TSs would be eliminated, several notes or specific exceptions are revised to reflect the related changes to LCO 3.0.4, and Surveillance Requirement (SR) 4.0.4 is revised to reflect the LCO 3.0.4 allowance.

This change was proposed by the industry's Technical Specification Task Force (TSTF) and is designated TSTF–359. The NRC staff issued a notice of opportunity for comment in the **Federal Register** on August 2, 2002 (67 FR 50475), on possible amendments concerning TSTF–359, including a model safety evaluation and model no significant hazards consideration (NSHC) determination, using the consolidated line item improvement process. The NRC staff subsequently issued a notice of availability of the models for referencing in license amendment applications in the **Federal Register** on April 4, 2003 (68 FR 16579). The licensee affirmed the applicability of the following NSHC determination in its application dated March 22, 2004 and July 23, 2004, supplement.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change allows entry into a mode or other specified condition in the applicability of a TS, while in a TS condition statement and the associated required actions of the TS. Being in a TS condition and the associated required actions is not an initiator of any accident previously evaluated. Therefore, the probability of an accident previously evaluated is not significantly increased. The consequences of an accident while relying on required actions as allowed by proposed LCO 3.0.4, are no different than the consequences of an accident while entering and relying on the required actions while starting in a condition of applicability of the TS. Therefore, the consequences of an accident previously evaluated are not significantly affected by this change. The addition of a requirement to assess and manage the risk introduced by this change will further minimize possible concerns. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed). Entering into a mode or other specified condition in the applicability of a TS, while in a TS condition statement and the associated required actions of the TS, will not introduce new failure modes or effects and will not, in the absence of other unrelated failures, lead to an accident whose consequences exceed the consequences of accidents previously evaluated. The addition of a requirement to assess and manage the risk introduced by this change will further minimize possible concerns. Thus, this change does not create the possibility of a new or different kind of accident from an accident previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in a Margin of Safety

The proposed change allows entry into a mode or other specified condition in the applicability of a TS, while in a TS condition statement and the associated required actions of the TS. The TS allow operation of the plant without the full complement of equipment through the conditions for not meeting the TS LCO. The risk associated with this allowance is managed by the imposition of required actions that must be performed within the prescribed completion times. The net effect of being in a TS condition on the margin of safety is not considered significant. The proposed change does not alter the required actions or completion times of the TS. The proposed change allows TS conditions to be entered. and the associated required actions and completion times to be used in new circumstances. This use is predicated upon the licensee's performance of a risk assessment and the management of plant risk. The change also eliminates current allowances for utilizing required actions and completion times in similar circumstances, without assessing and managing risk. The net change to the margin of safety is insignificant. Therefore, this change does not involve a significant reduction in a margin of safety.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mary O'Reilly, FirstEnergy Nuclear Operating Company, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.

NRC Section Chief: Richard J. Laufer.

FirstEnergy Nuclear Operating Company, et al., Docket No. 50–412, Beaver Valley Power Station, Unit No. 2 (BVPS–2), Beaver County, Pennsylvania

Date of amendment request: July 23, 2004.

Description of amendment request: The proposed amendment would revise the BVPS–2 Technical Specifications to eliminate periodic response time testing requirements on selected sensors and selected protection channel components and permit the option of measuring or verifying the response times by means other than testing.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

This change to the Technical Specifications does not result in a condition where the design, material, and construction standards that were applicable prior to the change are altered. The same RTS [reactor trip system] and ESFAS [engineered safety features actuation system] instrumentation is being used; the time response allocations/modeling assumptions in the Updated Final Safety Analysis Report (UFSAR) Chapter 15 analyses are still the same; only the method of verifying [the] time response is changed. The proposed change will not modify any system interface and could not increase the likelihood of an accident since these events are independent of this change. The proposed activity will not change, degrade or prevent actions or alter any assumptions previously made in evaluating the radiological consequences of an accident described in the UFSAR.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

This change does not alter the performance of the pressure and differential pressure transmitters, process protection racks, Nuclear Instrumentation, and logic systems used in the Reactor Trip and Engineered Safety Features Actuation Systems. All sensors, process protection racks, Nuclear Instrumentation, and logic systems will still have response time verified by [a] test before placing the equipment into operational service and after any maintenance that could affect the response time. Changing the method of periodically verifying instrument response times for certain equipment (assuring equipment operability) from time response testing to calibration and channel checks will not create any new accident initiators or scenarios. Periodic surveillance of these instruments will detect significant degradation in the equipment response time characteristics.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

This change does not affect the total system response time assumed in the safety analysis. The periodic system response time verification method for selected sensors and differential pressure sensors and for process protection racks, Nuclear Instrumentation, and logic systems is modified to allow use of actual test data or engineering data. The method of verification still provides assurance that the total system response time is within that assumed in the safety analysis.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mary O'Reilly, FirstEnergy Nuclear Operating Company, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.

NRC Section Chief: Richard J. Laufer.

FirstEnergy Nuclear Operating Company, Docket No. 50–440, Perry Nuclear Power Plant, Unit 1, Lake County, Ohio

Date of amendment request: April 26, 2004.

Description of amendment request: This proposed license amendment would revise the frequency of the Mode 5 Intermediate Range Monitoring (IRM) Instrumentation CHANNEL FUNCTIONAL TEST contained in Technical Specification (TS) 3.3.1.1 from 7 days to 31 days. The methodology used to analyze the change in testing frequency is based upon guidance contained in Generic Letter 91–04, "Changes in Technical Specification Surveillance Intervals to Accommodate a 24-month Fuel Cycle," and Electric Power Institute (EPRI) Report TI–103335, "Guidance for Instrumentation Calibration Extension/Reduction Programs."

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed Technical Specification (TS) change involves an increase in the Mode 5 CHANNEL FUNCTIONAL TEST interval for Reactor Protection System (RPS) Intermediate Range Monitor (IRM) from 7 days to 31 days. The proposed TS change does not alter the design or functional requirements of the RPS or IRM systems. Evaluation of the proposed testing interval change demonstrated that the availability of the IRMs to prevent or mitigate the consequences of a control rod withdrawal event at low power levels are not significantly affected because of other, more frequent testing that is performed, the availability of redundant systems and equipment, and the high reliability of the IRM equipment.

Furthermore, using the guidance of GL 91–04, a historical review of surveillance test results and associated maintenance records did not indicate evidence of any failure that would invalidate the above conclusions.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change would not create the possibility of a new or different kind of accident from any previously evaluated.

The proposed TS change involves an increase in the Mode 5 IRM CHANNEL FUNCTIONAL TEST interval from 7 days to 31 days. Existing TS testing requirements ensure the operability of the IRMs. The proposed TS change does not introduce any failure mechanisms of a different type than those previously evaluated, since no physical changes to the plant are being made. No new or different equipment is being installed, and no installed equipment is being operated in a different manner. As a result, no new failure modes are introduced. In addition, the manner in which surveillance tests are performed remain unchanged.

Furthermore, using the guidance in GL 91–04, a historical review of surveillance test results and associated maintenance records did not indicate evidence of any failure that would invalidate the above conclusions.

Therefore, the proposed TS change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed change will not involve a single reduction in the margin of safety.

The proposed Technical Specifications (TS) change involves an increase in the Mode 5 CHANNEL FUNCTIONAL TEST interval for Reactor Protection System (RPS) Intermediate Range Monitor (IRM) from 7 days to 31 days. The impact on system operability is minimal, based upon performance of the more frequent Channel

Checks, continuous Control Room monitoring when the IRMs are in use, and the overall IRM reliability. Evaluations show there is no evidence of time-dependent failures that would impact the availability of the IRMs.

Furthermore, using the guidance in GL 91–04, a historical review of surveillance test results and associated maintenance records did not indicate evidence of any failure that would invalidate the above conclusions.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mary E. O'Reilly, Attorney, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.

NRC Section Chief: Anthony J. Mendiola.

FPL Energy Seabrook, LLC, Docket No. 50–443, Seabrook Station, Unit No. 1, Rockingham County, New Hampshire

Date of amendment request: June 28, 2004.

Description of amendment request: The proposed amendment would revise Technical Specification 3/4.9.4, "Containment Building Penetrations," to align the language of the Surveillance Requirement with the Applicability Statement contained in the Limiting Condition for Operation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change aligns the language of the Surveillance Requirement for Containment Building Penetrations with the language of the Applicability Statement of Technical Specification 3.9.4.

The proposed amendment will not change the design function, or method of performing or controlling design functions, of structures, systems and components, nor will there be an effect on FPL Energy Seabrook programs. As a result, the proposed amendment will not change assumptions, or change, degrade or prevent actions described or assumed in accidents evaluated and described in the Seabrook Station UFSAR [updated final safety analysis report]. The proposed change to the Surveillance Requirement wording does not adversely affect performance of the Surveillance Requirement that verifies the status of Containment Building Penetrations. Since the status of the Containment Penetrations is not adversely affected by the proposed change, the radiological consequences of an event are unchanged. Therefore, the proposed amendment does not result in an increase in the radiological consequences of any accident described in the Seabrook Station UFSAR.

Therefore, it is concluded that these proposed changes do not involve a significant increase in the probability or consequence of an accident previously evaluated.

2. The proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

The proposed change aligns the language of the Surveillance Requirements for Containment Building Penetrations with the language in the Applicability Statement of the Technical Specification.

The proposed amendment will not change the design function, or method of performing or controlling design functions, of structures, systems and components, nor will there be an effect on FPL Energy Seabrook programs. As a result, there are no changes associated with the proposed amendment that could potentially introduce new failure modes or accident scenarios.

Therefore, it is concluded that these proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed changes do not involve a significant reduction in the margin of safety.

The proposed change aligns the language of the Surveillance Requirement for Containment Building Penetrations with the language of the Applicability Statement of Technical Specification 3.9.4. The proposed amendment does not change the design function, or method of performing or controlling design functions, of structures, systems and components, nor will there be an effect on FPL Energy Seabrook programs. The status of containment penetrations will continue to be verified. The proposed change does not involve any changes to a margin of safety.

Therefore, it is concluded that these proposed changes do not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis, and based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M. S. Ross, Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420.

NRC Section Chief: James W. Clifford.

Nine Mile Point Nuclear Station, LLC, Docket No. 50–220, Nine Mile Point Nuclear Station Unit No. 1, Oswego County, New York

Date of amendment request: August 17, 2004.

Description of amendment request: The licensee proposed to revise Section 3.3.1, "Oxygen Concentration [of the primary containment]," of the Technical Specifications (TSs) to (1) add a new action allowing 24 hours to restore the oxygen concentration to within the limit of <4% by volume if the limit is exceeded when the reactor is in the power operating condition, and (2) incorporate the associated conforming changes of editorial nature. The proposed 24-hour completion time for restoring oxygen concentration is consistent with Improved Standard Technical Specifications for Boiling Water Reactors (NUREG–1433, Revision 3).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The NRC staff's analysis is presented below:

The first standard requires that operation of the unit in accordance with the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated. The effect of the proposed amendment is to provide the same 24-hour completion time to restore oxygen concentration to under the 4% limit should the oxygen concentration rise due to other than a reactor shutdown-startup evolution. The proposed amendment does not lead to, nor is it the result of, a plant design change. These TS changes will not lead to alteration of the physical design or operational procedures associated with the containment system, or any other plant structure, system, or component (SSC). All requirements needed to assure operability of the containment system will remain unchanged. Containment atmospheric oxygen concentration was not assumed to be a precursor of accidents, nor was it assumed to be a component in previously evaluated accident scenarios. Accordingly, the revised specifications will lead to no increase in the consequences of an accident previously evaluated, and no increase of the probability of an accident previously evaluated.

The second standard requires that operation of the unit in accordance with the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated. As stated above, the proposed amendment involves only the time allowed to restore containment atmospheric oxygen concentration to under 4 percent by volume, and associated editorial changes. These

changes do not alter the physical design, safety limits, or method of operation associated with the operation of the plant. Accordingly, the changes do not introduce any new or different kind of accident from those previously evaluated.

The third standard requires that operation of the unit in accordance with the proposed amendment will not involve a significant reduction in a margin of safety. Since the licensee did not propose to exceed or alter a design basis or safety limit, did not propose to operate any component in a less conservative manner, and did not propose to use a less conservative analysis methodology, the proposed amendment will not affect in any way the performance characteristics and intended functions of any SSC. Therefore, the proposed amendment does not involve a significant reduction in a margin of safety.

Based on the NRC staff's analysis, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the proposed amendment involves no significant hazards consideration.

Attorney for licensee: Mark J. Wetterhahn, Esquire, Winston & Strawn, 1400 L Street, NW., Washington, DC 20005–3502.

NRC Section Chief: Richard J. Laufer.

Nuclear Management Company, LLC, Docket No. 50–305, Kewaunee Nuclear Power Plant, Kewaunee County, Wisconsin

Date of amendment request: July 6, 2004.

Description of amendment request: The proposed change involves the extension from 1 hour to 24 hours for the completion time (CT) of Technical Specification (TS) 3.3.a.2.B, which defines requirements for accumulators. Accumulators are part of the emergency core cooling system and consist of tanks partially filled with borated water and pressurized with nitrogen gas. The contents of the tank are discharged to the reactor coolant system (RCS) if, as during a loss-of-coolant accident, the coolant pressure decreases to below the accumulator pressure. TS 3.3.a.2.B specifies a CT to restore an accumulator to operable status when it has been declared inoperable for a reason other than the boron concentration of the water in the accumulator not being within the required range. This change was proposed by the Westinghouse Owners Group participants in the TS Task Force (TSTF) and is designated TSTF–370, "Increase Accumulator Completion Time from 1 Hour to 24 Hours." TSTF–370 is supported by NRC-approved Topical Report WCAP–15049–A, "Risk-Informed Evaluation of an Extension to Accumulator Completion Times," submitted on May 18, 1999. The NRC staff issued a notice of opportunity for comment in the **Federal Register** on July 15, 2002 (67 FR 46542), on possible amendments concerning TSTF–370, including a model safety evaluation and model no significant hazards consideration (NSHC) determination, using the consolidated line-item improvement process. The NRC staff subsequently issued a notice of availability of the models for referencing in license amendment applications in the **Federal Register** on March 12, 2003 (68 FR 11880). The licensee affirmed the applicability of the following NSHC determination in its application dated July 6, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The basis for the accumulator limiting condition for operation (LCO), as discussed in [Standard Technical Specifications] Bases Section 3.5.1, is to ensure that a sufficient volume of borated water will be immediately forced into the core through each of the cold legs in the event the RCS pressure falls below the pressure of the accumulators, thereby providing the initial cooling mechanism during large RCS pipe ruptures. As described in Section 9.2 of the WCAP–15049, "Risk-Informed Evaluation of an Extension to Accumulator Completion Times," evaluation, the proposed change will allow plant operation in a configuration outside the design basis for up to 24 hours, instead of 1 hour, before being required to begin shutdown. The impact of the increase in the accumulator CT on core damage frequency for all the cases evaluated in WCAP–15049 is within the acceptance limit of 1.0E–06/yr for a total plant core damage frequency (CDF) less than 1.0E–03/yr. The incremental conditional core damage probabilities calculated in WCAP–15049 for the accumulator CT increase meet the criterion of 5E–07 in Regulatory Guides (RG) 1.174 and 1.177 for all cases except those that are based on design basis success criteria. As indicated in WCAP–15049, design basis accumulator success criteria are not considered necessary to mitigate large break loss-of-coolant accident (LOCA) events, and were only included in the WCAP–15049 evaluation as a worst case data point. In addition, WCAP–15049 states that the NRC has indicated that an incremental conditional core damage frequency (ICCDP) greater than 5E–07 does not necessarily mean the change is unacceptable. The proposed technical specification change does not involve any hardware changes nor does it affect the probability of any event initiators. There will be no change to normal plant operating parameters, engineered safety feature (ESF) actuation setpoints, accident mitigation capabilities, accident analysis assumptions or inputs. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

No new accident scenarios, transient precursors, failure mechanisms, or limiting single failures are introduced as a result of the proposed change. As described in Section 9.1 of the WCAP–15049 evaluation, the plant design will not be changed with this proposed technical specification CT increase. All safety systems still function in the same manner and there is no additional reliance on additional systems or procedures. The proposed accumulator CT increase has a very small impact on core damage frequency. The WCAP–15049 evaluation demonstrates that the small increase in risk due to increasing the accumulator allowed outage time (AOT) is within the acceptance criteria provided in RGs 1.174 and 1.177. No new accidents or transients can be introduced with the requested change and the likelihood of an accident or transient is not impacted. The malfunction of safety related equipment, assumed to be operable in the accident analyses, would not be caused as a result of the proposed technical specification change. No new failure mode has been created and no new equipment performance burdens are imposed. Therefore, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The proposed change does not involve a significant reduction in a margin of safety. There will be no change to the departure from nucleate boiling ratio (DNBR) correlation limit, the design DNBR limits, or the safety analysis DNBR limits. The basis for the accumulator LCO, as discussed in Bases Section 3.5.1, is to ensure that a sufficient volume of borated water will be immediately forced into the core through each of the cold legs in the event the RCS pressure falls below the pressure of the accumulators, thereby providing the initial cooling mechanism during large RCS pipe ruptures. As described in Section 9.2 of the WCAP–15049 evaluation, the proposed change will allow plant operation in a configuration outside the design basis for up to 24 hours, instead of 1 hour, before being required to begin shutdown. The impact of this on plant risk was evaluated and found to be very small. That is, increasing the time the accumulators will be unavailable to respond to a large LOCA event, assuming accumulators are needed to mitigate the design basis event, has a very small impact on plant risk. Since the frequency of a design basis large LOCA (a

large LOCA with loss of offsite power) would be significantly lower than the large LOCA frequency of the WCAP–15049 evaluation, the impact of increasing the accumulator CT from 1 hour to 24 hours on plant risk due to a design basis large LOCA would be significantly less than the plant risk increase presented in the WCAP–15049 evaluation. Therefore, this change does not involve a significant reduction in a margin of safety.

Based upon the reasoning presented above and the previous discussion of the amendment request, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Bradley D. Jackson, Esq., Foley and Lardner, P.O. Box 1497, Madison, WI 53701–1497.

NRC Section Chief: L. Raghavan.

Nuclear Management Company, LLC, Docket No. 50–305, Kewaunee Nuclear Power Plant, Kewaunee County, Wisconsin

Date of amendment request: July 6, 2004.

Description of amendment request: The proposed amendment relocates the surveillance requirements for Item 22, "Accumulator Level and Pressure," and Item 25, "Portable Radiation Survey Instruments," from Table TS 4.1–1 of the Technical Specifications to licensee-controlled documents.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

NMC [Nuclear Management Company] Response for Proposed Change to Table TS 4.1–1, Item 22

No. This TS change removes the accumulator water level and pressure channel surveillance from the TS and places them into licensee controlled documents. This change is consistent with industry and NRC [Nuclear Regulatory Commission] recognition that the accumulator instrumentation operability is not directly related to the capability of the accumulators to perform their safety function.

Relocating the instrumentation surveillance requirements is an administrative change that will not affect equipment testing, availability, or operation. Therefore, the change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

NMC Response for Proposed Change to Table TS 4.1–1, Item 25

No. Removing the surveillance requirements for portable radiation survey instruments from the TS is administrative and has no impact on plant equipment, accident initiators, or the safety analysis. Additionally, eliminating the monthly check and modifying the line item description does not impact plant equipment or operation. Therefore, the change does not involve an increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

NMC Response for Proposed Change to Table TS 4.1–1, Item 22

No. Relocating the accumulator water level and pressure instrument surveillance requirements to licensee controlled documents is an administrative change that will not change any equipment, require new equipment to be installed, or change the way current equipment operates in the plant.

Therefore, the change will not create the possibility of a new or different kind of accident from any accident previously evaluated.

NMC Response for Proposed Change to Table TS 4.1–1, Item 25

No. Removing the surveillance requirements for portable radiation survey instruments from the TS and relocating the requirements to licensee controlled documents is administrative and has no impact on plant equipment or the way the plant equipment operates. Additionally, eliminating the monthly check and modifying the line item description does not impact plant equipment or operation. Portable radiation survey instruments are not accident initiators. Therefore, the change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

NMC Response for Proposed Change to Table TS 4.1–1, Item 22

No. Relocating the accumulator water level and pressure instrument surveillance requirements to licensee controlled documents is an administrative change that will not change the safety analyses performed for the plant nor reduce the ability of the accumulators to perform their safety related function. There is no change in the operation of the accumulators or related equipment and systems. Therefore, the change does not involve a reduction in the margin of safety.

NMC Response for Proposed Change to Table TS 4.1–1, Item 25

No. Portable radiation survey instruments are not inputs to the safety analysis or to automatic plant actions. The change is administrative since it moves the requirements out of TS and into licensee controlled documents through use of the 10 CFR 50.36 selection criteria for TS. Additionally, eliminating the monthly check and modifying the line item description does not impact plant equipment or operation. Therefore, the change does not reduce the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Bradley D. Jackson, Esq., Foley and Lardner, P.O. Box 1497, Madison, WI 53701–1497.

NRC Section Chief: L. Raghavan.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: August 2, 2004.

Description of amendment request: The proposed amendment would implement a risk-informed process for determining allowed outage times for South Texas Project (STP), Units 1 and 2, Technical Specifications (TS). The risk-informed process involves the application of the STP, Units 1 and 2, Configuration Risk Management Program (CRMP). The STP CRMP is a procedurally controlled program utilized for the implementation of 50.65(a)(4) of Title 10 of the Code of Federal Regulations (10 CFR).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change to the Technical Specifications involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed changes to the Technical Specifications to add a new TS 3.13.1 and to change specific TS to apply the new TS 3.13.1 do not involve a significant increase in the probability of an accident previously evaluated because the changes involve no change to the plant or its modes of operation. In addition, the risk-informed configuration management program will be applied to effectively manage the availability of required systems, structures, and components to assure there is no significant increase in the probability of an accident. These proposed changes do not increase the consequences of an accident because the design-basis mitigation function of the affected systems is not changed and the risk-informed configuration management program will be applied to effectively manage the availability of systems, structures and components required to mitigate the consequences of an accident. The application of the risk-informed configuration management program is considered a substantial technological improvement over current methods.

Therefore, none of the proposed changes involve a significant increase in the

probability or consequences of an accident previously evaluated.

2. Does the proposed change to the Technical Specifications create the possibility of a new or different kind of accident from any accident previously evaluated?

None of the proposed changes involve a new mode of operation or design configuration. There are no new or different systems, structures, or components proposed by these changes. Therefore, there is no possibility of a new or different kind of accident.

3. Does the proposed change to the Technical Specifications involve a significant reduction to a margin of safety?

Proposed new TS 3.13.1 and the associated changes to the specifications that apply the new TS 3.13.1 implement a risk-informed configuration management program to assure that adequate margins of safety are maintained. Application of these new specifications and the configuration management program considers cumulative effects of multiple systems or components being out of service and does so more effectively than the current Technical Specifications. Therefore, application of these new specifications will not involve a significant reduction in a margin of safety.

Based on the evaluation above, none of the proposed changes involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Attorney for licensee: A.H. Gutterman, Esq., Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW., Washington, DC 20004.

NRC Section Chief: Robert A. Gramm.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: August 12, 2004.

Description of amendment request: The proposed changes to the South Texas Project (STP), Units 1 and 2, Technical Specifications (TS) for steam generators (SGs) are based on draft TS Task Force (TSTF) Improved Standard TS Change Traveler TSTF–449, Rev. 2, and the Joseph M. Farley Nuclear Plant, Units 1 and 2, submittal dated June 28, 2004, as supplemented by letter dated August 5, 2004. The changes would implement guidance for the industry initiative on Nuclear Energy Institute (NEI) 97–06, "Steam Generator Program Guidelines."

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change requires a Steam Generator Program that includes performance criteria that will provide reasonable assurance that the SG tubing will retain integrity over the full range of operating conditions (including startup, operation in the power range, hot standby, cooldown, and all anticipated transients included in the design specification). The SG performance criteria are based on tube structural integrity, accident induced leakage, and operational leakage.

The structural integrity performance criterion is:

All inservice SG tubes shall retain structural integrity over the full range of normal operating conditions (including startup, operation in the power range, hot standby, and cooldown, and all anticipated transients included in the design specification) and design basis accidents. This includes retaining a safety factor of 3.0 (3 [delta] P) against burst under normal steady state full power operation primary-to-secondary pressure differential and a safety factor of 1.4 against burst applied to the design basis accident primary-to-secondary pressure differentials. Apart from the above requirements, additional loading conditions associated with the design basis accidents, or combination of accidents in accordance with the design and licensing basis, shall also be evaluated to determine if the associated loads contribute significantly to burst or collapse. In the assessment of tube integrity, those loads that do significantly affect burst or collapse shall be determined and assessed in combination with the loads due to pressure with a safety factor of 1.2 on the combined primary loads and 1.0 on axial secondary loads.

The accident induced leakage performance criterion is:

The primary-to-secondary accident induced leakage rate for any design basis accidents, other than a SG tube rupture, shall not exceed the leakage rate assumed in the accident analysis in terms of total leakage rate for all SGs and leakage rate for an individual SG. Accident induced leakage is not to exceed 1 gpm [gallons per minute] total for all four SGs in a unit.

The operational leakage performance criterion is:

"The RCS operational primary-to-secondary leakage through any one SG shall be limited to 150 gallons per day."

An SGTR [steam generator tube rupture] event is one of the design basis accidents analyzed as part of the plant licensing basis. In the analysis of an SGTR event, a bounding primary-to-secondary leakage rate equal to the operational leakage rate limits in the licensing basis plus the leakage rate associated with a double-ended rupture of a single tube is assumed.

For other design basis accidents such as MSLB [main steamline break], rod ejection, and reactor coolant pump locked rotor, the tubes are assumed to retain their structural integrity (*i.e.*, they are assumed not to rupture). At STP these analyses assume that the total primary-to-secondary leakage is 1 gpm. The accident induced leakage criterion introduced by the proposed changes accounts for tubes that may leak during design basis accidents. The accident induced leakage criterion limits this leakage to no more than the value assumed in the accident analysis.

The SG performance criteria proposed in this change to the TS identify the standards against which tube integrity is to be measured. Meeting the performance criteria provides reasonable assurance that the SG tubing will remain capable of fulfilling its specific safety function of maintaining RCPB [reactor coolant pressure boundary] integrity throughout each operating cycle and in the unlikely event of a design basis accident. The performance criteria are only a part of the Steam Generator Program required by the proposed change to the TS. The program, defined by NEI 97–06, includes a framework that incorporates a balance of prevention, inspection, evaluation, repair, and leakage monitoring.

The consequences of design basis accidents are, in part, functions of the dose equivalent I–131 in the primary coolant and the primary-to-secondary leakage rates resulting from an accident. Therefore, limits are included in the TS for operational leakage and for dose equivalent I–131 in primary coolant to ensure the plant is operated within its analyzed condition. The analysis of the limiting design basis accident assumes that primary-to-secondary leak rate after the accident is 1 gpm with no more than 500 gpd [gallons per day] in any one SG, and that the reactor coolant activity levels of dose equivalent I–131 are at the TS values before the accident.

The proposed change does not affect the design of the SGs, their method of operation, or primary coolant chemistry controls. The proposed approach updates the current TS and enhances the requirements for SG inspections. The proposed change does not adversely impact any other previously evaluated design basis accident and is an improvement over the current TS.

Therefore, the proposed change does not affect the consequences of an SGTR accident and the probability of such an accident is reduced. In addition, the proposed changes do not affect the consequences of an MSLB, rod ejection, or a reactor coolant pump locked rotor event.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed performance-based requirements are an improvement over the requirements imposed by the current TS.

Implementation of the proposed Steam Generator Program will not introduce any adverse changes to the plant design basis or postulated accidents resulting from potential tube degradation. The result of the implementation of the Steam Generator Program will be an enhancement of SG tube performance. Primary-to-secondary leakage

that may be experienced during all plant conditions will be monitored to ensure it remains within current accident analysis assumptions.

The proposed change does not affect the design of the SGs, their method of operation, or primary or secondary coolant chemistry controls. In addition, the proposed change does not impact any other plant system or component. The change enhances SG inspection requirements.

Therefore, the proposed change does not create the possibility of a new or different type of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The SG tubes are an integral part of the RCPB and, as such, are relied upon to maintain the primary system pressure and inventory. As part of the RCPB, the SG tubes are unique in that they are also relied upon as a heat transfer surface between the primary and secondary systems such that residual heat can be removed from the primary system. In addition, the SG tubes also isolate the radioactive fission products in the primary coolant from the secondary system. In summary, the safety function of a SG is maintained by ensuring the integrity of its tubes.

Steam generator tube integrity is a function of the design, environment, and the physical condition of the tube. The proposed change does not affect tube design or operating environment. The proposed change is expected to result in an improvement in tube integrity by implementing the Steam Generator Program to manage SG tube inspection, assessment, repair, and plugging. The requirements established by the Steam Generator Program are consistent with those in the applicable design codes and standards and are an improvement over the requirements in the current TS.

For the above reasons, the margin of safety is not changed and overall plant safety will be enhanced by the proposed change to the TS.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Attorney for licensee: A.H. Gutterman, Esq., Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW., Washington, DC 20004.

NRC Section Chief: Robert A. Gramm.

TXU Generation Company LP, Docket Nos. 50–445 and 50–446, Comanche Peak Steam Electric Station, Units 1 and 2, Somervell County, Texas

Date of amendment request: August 5, 2004.

Brief description of amendments: The proposed change revises Technical Specification 3.7.10 entitled, "Control Room Emergency Filtration/ Pressurization System (CREFS)," to add a new condition for an inoperable Control Room boundary.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

This is a revision to the Technical Specifications for the Control Room Emergency/Filtration System which is a mitigation system designed to minimize in leakage and to filter the control room atmosphere to protect the operator following accidents previously analyzed. An important part of the system is the Control Room boundary. The Control Room boundary integrity is not an initiator or precursor to any accident previously evaluated. Therefore, the probability of any accident previously evaluated is not increased. The analysis of the consequences of analyzed accident scenarios under the control room breach conditions along with the compensatory actions for restoration of control room integrity demonstrate that the consequences of any accident previously evaluated are not increased. Therefore, it is concluded that this change does not significantly increase the probability [or consequences] of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change will not impact the accident analysis. The change will not alter the requirements of the Control Room Emergency/Filtration System or its function during accident conditions. The administrative controls and compensatory actions will ensure the control room emergency/filtration system will perform its safety function. No new or different accidents result from performing the new actions and surveillance required. The change does not involve a physical alteration of the plant (*i.e.*, no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The change does not alter assumptions made in the safety analysis. The proposed change is consistent with the safety analysis assumptions and current plant operating practice. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No.

The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by these changes. The proposed change will not result in plant operation in a configuration outside the design basis for an unacceptable period of time without compensatory actions and administrative controls. The proposed change does not affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition. Therefore the proposed change does not involve a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied.

Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: George L. Edgar, Esq., Morgan, Lewis and Bockius, 1800 M Street, NW., Washington, DC 20036.

NRC Section Chief: Robert A. Gramm.

Virginia Electric and Power Company, Docket Nos. 50–338 and 50–339, North Anna Power Station, Units No. 1 and No. 2, Louisa County, Virginia

Date of amendment request: July 1, 2004.

Description of amendment request: The proposed license amendments would modify the Reactor Coolant System (RCS) pressure/temperature (P/T) limit curves, the Low-Temperature Overpressure Protection System (LTOPS) setpoint allowable values, and the LTOPS Tenable values. In addition, the cumulative core burnup applicability limits for the LTOPS would be extended.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed changes modify the North Anna Units 1 and 2 RCS P/T limit curves, LTOPS setpoint allowable values, LTOPS Tenable and extend the cumulative core burnup applicability limits for the LTOPS. The allowable operating pressures and temperatures under the proposed RCS P/T limit curves are not significantly different from those allowed under the existing Technical Specification P/T limits. The revisions in the values for the LTOPS setpoint allowable values and LTOPS Tenable values do not significantly change the plant operating space. No changes to plant systems, structures or components are proposed, and no new operating modes are established. The P/T limits, LTOPS setpoint allowable values, and Tenable values do not contribute to the probability of occurrence or consequences of accidents previously analyzed. The revised licensing basis

analyses utilize acceptable analytical methods, and continue to demonstrate that established accident analysis acceptance criteria are met. Therefore, there is no increase in the probability or consequences of any accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed changes modify the North Anna Units 1 and 2 RCS P/T limit curves, LTOPS setpoint allowable values, LTOPS Tenable values and extend the cumulative core burnup applicability limits for the LTOPS. The allowable operating pressures and temperatures under the proposed RCS P/T limit curves are not significantly different from those allowed under the existing Technical Specification P/T limits. No changes to plant systems, structures or components are proposed, and no new operating modes are established. Therefore, the proposed changes do not create the possibility of any accident or malfunction of a different type previously evaluated.

3. Does the change involve a significant reduction in the margin of safety?

The proposed revised RCS P/T limit curves, LTOPS setpoint allowable values, and LTOPS Tenable analysis bases do not involve a significant reduction in the margin of safety for these parameters. The effects of RCS pressure and temperature measurement uncertainty continue to be considered in the supporting analyses. The proposed revised RCS P/T limit curves are valid to cumulative core burnups of 50.3 EFPY [effective full-power year] and 52.3 EFPY for North Anna Units 1 and 2 respectively. The proposed revised LTOPS setpoint allowable values and Tenable analyses support these same cumulative core burnup limits. The analyses demonstrate that established analysis acceptance criteria continue to be met. Specifically, the proposed P/T limit curves, LTOPS setpoint allowable values and LTOPS Tenable values provide acceptable margin to vessel fracture under both normal operation and LTOPS design basis (mass addition and heat addition) accident conditions. Therefore, the proposed changes do not result in a significant reduction in margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ms. Lillian M. Cuoco, Esq., Senior Counsel, Dominion Resources Services, Inc., Millstone Power Station, Building 475, 5th Floor, Rope Ferry Road, Rt. 156, Waterford, Connecticut 06385.

NRC Section Chief: Mary Jane Ross-Lee (Acting).

Wolf Creek Nuclear Operating Corporation, Docket No. 50–482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: July 22, 2004.

Description of amendment request: The proposed change would revise Technical Specification (TS) Figure 3.5.5–1, "Seal Injection Flow Limits," to reflect flow limits that allow a higher seal injection flow for a given differential pressure between the charging discharge header and the reactor coolant system pressure. Specifically, the licensee requests approval of the proposed amendment to allow for repositioning the seal injection throttle valves during the upcoming refueling outage.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The restriction on reactor coolant pump (RCP) seal injection flow limits the amount of Emergency Core Cooling System (ECCS) flow that would be diverted from the injection path following an accident. This limit is based on safety analysis assumptions that are required because RCP seal injection flow is not isolated during safety injection. The intent of the Limiting Condition for Operation (LCO) limit on seal injection flow is to make sure that flow through the RCP seal water injection line is low enough to ensure sufficient centrifugal charging pump injection flow is directed to the Reactor Coolant System (RCS) via the injection points.

There are no hardware changes nor are there any changes in the method by which any safety related plant system performs its safety function. The proposed change does not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility or the manner in which [the] plant is operated and maintained. The proposed change does not alter or prevent the ability of structures, systems, and components from performing their intended safety function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed change does not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of an accident previously evaluated. Further, the proposed change does not increase the types or amounts of radioactive effluent that may be released offsite, nor significantly increase individual or cumulative occupational/public radiation exposures. The proposed change is consistent with the safety analysis assumptions and resultant consequences.

Since the change continues to ensure 100 percent of the assumed charging flow is available, the proposed change does not involve a significant increase in the probability or consequences of an accident previously analyzed.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

There are no hardware changes nor are there any changes in the method by which any safety related plant system performs its safety function. This amendment will not affect the normal method of plant operation. The proposed change does not introduce any new equipment into the plant or alter the manner in which existing equipment will be operated. No performance requirements or response time limits will be affected. The change is consistent with assumptions made in the safety analysis and licensing basis regarding limits on RCP seal injection flow.

No new accident scenarios, transient precursors, failure mechanisms, or limiting single failures are introduced as a result of this amendment. The[re] will be no adverse effect or challenges imposed on any safety related system as a result of this amendment.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed change does not affect the acceptance criteria for any analyzed event. There will be no effect on the manner in which safety limits or limiting safety system settings are determined nor will there be any effect on those plant systems necessary to assure the accomplishment of protection function. Increasing the total seal injection flow limit to 90 gpm does not significantly impact the assumed ECCS flow that would be available for injection into the RCS following an accident.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jay Silberg, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Section Chief: Stephen Dembek.

Wolf Creek Nuclear Operating Corporation, Docket No. 50–482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: July 23, 2004.

Description of amendment request: The proposed amendment will delete the requirements from the technical

specifications (TS) to maintain hydrogen recombiners and hydrogen monitors. Licensees were generally required to implement upgrades as described in NUREG–0737, "Clarification of TMI [Three Mile Island] Action Plan Requirements," and Regulatory Guide (RG) 1.97, "Instrumentation for Light-Water-Cooled Nuclear Power Plants to Assess Plant and Environs Conditions During and Following an Accident." Implementation of these upgrades was an outcome of the lessons learned from the accident that occurred at TMI Unit 2. Requirements related to combustible gas control were imposed by Order for many facilities and were added to or included in the TS for nuclear power reactors currently licensed to operate. The revised 10 CFR 50.44, "Standards for Combustible Gas Control System in Light-Water-Cooled Power Reactors," eliminated the requirements for hydrogen recombiners and relaxed safety classifications and licensee commitments to certain design and qualification criteria for hydrogen and oxygen monitors.

The proposed license amendment will revise TS 3.3.3, "Post Accident Monitoring (PAM) Instrumentation," to delete the Note in Condition C. Also in TS 3.3.3, Condition D will be deleted. In TS Table 3.3.3–1, Function 10, "Containment Hydrogen Concentration Level," is deleted and replaced with "Not Used." TS 3.6.8, "Hydrogen Recombiners," will be deleted and the Table of Contents will be revised to reflect that deletion. TS 5.6.8, "PAM Report," will be revised to reflect changing Condition G to Condition F in TS 3.3.3.

The NRC staff issued a notice of availability of a model no significant hazards consideration determination for referencing in license amendment applications in the **Federal Register** on September 25, 2003 (68 FR 55416). The licensee affirmed the applicability of the model NSHC determination in its application dated July 23, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The revised 10 CFR 50.44 no longer defines a design-basis loss-of-coolant accident (LOCA) hydrogen release, and eliminates requirements for hydrogen control systems to mitigate such a release. The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage. In addition, these systems were ineffective at mitigating hydrogen releases from risk-significant accident sequences that could threaten containment integrity.

With the elimination of the design-basis LOCA hydrogen release, hydrogen monitors are no longer required to mitigate design-basis accidents and, therefore, the hydrogen monitors do not meet the definition of a safety-related component as defined in 10 CFR 50.2. RG 1.97 Category 1, is intended for key variables that most directly indicate the accomplishment of a safety function for design-basis accident events. The hydrogen monitors no longer meet the definition of Category 1 in RG 1.97. As part of the rulemaking to revise 10 CFR 50.44 the Commission found that Category 3, as defined in RG 1.97, is an appropriate categorization for the hydrogen monitors because the monitors are required to diagnose the course of beyond design-basis accidents.

The regulatory requirements for the hydrogen monitors can be relaxed without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. Classification of the hydrogen monitors as Category 3, and removal of the hydrogen monitors from TS will not prevent an accident management strategy through the use of the SAMGs [severe accident management guidelines], the emergency plan (EP), the emergency operating procedures (EOP), and site survey monitoring that support modification of emergency plan protective action recommendations (PARs).

Therefore, the elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, does not involve a significant increase in the probability or the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, will not result in any failure mode not previously analyzed. The hydrogen recombiner and hydrogen monitor equipment was intended to mitigate a design-basis hydrogen release. The hydrogen recombiner and hydrogen monitor equipment are not considered accident precursors, nor does their existence or elimination have any adverse impact on the pre-accident state of the reactor core or post accident confinement of radionuclides within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety.

The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage.

Category 3 hydrogen monitors are adequate to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The intent of the requirements established as a result of the TMI, Unit 2 accident can be adequately met without reliance on safety-related hydrogen monitors.

Therefore, this change does not involve a significant reduction in the margin of safety. Removal of hydrogen monitoring from TS will not result in a significant reduction in their functionality, reliability, and availability.

Based upon the reasoning presented above and the previous discussion of the amendment request, the requested change does not involve a significant hazards consideration.

Attorney for licensee: Jay Silberg, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Section Chief: Stephen Dembek.

Wolf Creek Nuclear Operating Corporation, Docket No. 50–482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: July 23, 2004.

Description of amendment request: The requested change will delete Technical Specification (TS) 5.6.1, "Occupational Radiation Exposure Report," and TS 5.6.4, "Monthly Operating Reports." The Table of

Contents will also be revised to reflect the deletions.

The NRC staff issued a notice of availability of a model no significant hazards consideration (NSHC) determination for referencing in license amendment applications in the **Federal Register** on June 23, 2004 (69 FR 35067). The licensee affirmed the applicability of the model NSHC determination in its application dated July 23, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change eliminates the Technical Specifications (TSs) reporting requirements to provide a monthly operating letter report of shutdown experience and operating statistics if the equivalent data is submitted using an industry electronic database. It also eliminates the TS reporting requirement for an annual occupational radiation exposure report, which provides information beyond that specified in NRC regulations. The proposed change involves no changes to plant systems or accident analyses. As such, the change is administrative in nature and does not affect initiators of analyzed events or assumed mitigation of accidents or transients. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve a physical alteration of the plant, add any new equipment, or require any existing equipment to be operated in a manner different from the present design. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

This is an administrative change to reporting requirements of plant operating information and occupational radiation exposure data, and has no effect on plant equipment, operating practices or safety analyses assumptions. For these reasons, the proposed change does not involve a significant reduction in the margin of safety.

Based upon the reasoning presented above, the requested change does not involve significant hazards consideration.

Attorney for licensee: Jay Silberg, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Section Chief: Stephen Dembek.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr@nrc.gov*.

AmerGen Energy Company, LLC, et al., Docket No. 50–219, Oyster Creek Nuclear Generating Station, Ocean County, New Jersey

Date of application for amendment: March 23, 2004.

Brief description of amendment: The amendment eliminates the Technical Specification requirements related to hydrogen monitors.

Date of Issuance: August 9, 2004.

Effective date: August 9, 2004 and shall be implemented within 60 days of issuance.

Amendment No.: 246.

Facility Operating License No. DPR–16: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** April 27, 2004 (69 FR 22879).

The Commission's related evaluation of this amendment is contained in a Safety Evaluation dated August 9, 2004.

No significant hazards consideration comments received: No.

Duke Energy Corporation, et al., Docket Nos. 50–413 and 50–414, Catawba Nuclear Station, Units 1 and 2, York County, South Carolina

DukeEnergy Corporation, Docket Nos.50–369 and 50–370, McGuire Nuclear Station, Units 1 and 2, Mecklenburg County, North Carolina

Date of application for amendments: March 23, 2004.

Brief description of amendments: The amendments revise the reactor coolant pump flywheel inspection interval from 10 years to 20 years.

Date of issuance: August 5, 2004.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: 216 and 210, 223 and 205.

Renewed facility operating license Nos. NPF–35, NPF–52, NPF–9, And NPF–17: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** May 25, 2004.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 5, 2004.

No significant hazards consideration comments received: No.

Duke Energy Corporation, Docket Nos. 50–269, 50–270, and 50–287, Oconee Nuclear Station, Units 1, 2, and 3, Oconee County, South Carolina

Date of application of amendments: August 22, 2002, as supplemented by letters dated September 12, 2003, and February 4, February 16, March 23, April 28, June 17, July 6, July 12, July 19, and July 29, 2004.

Brief description of amendments: The amendments revised Technical Specification 3.8.1, "AC Sources—Operating," to temporarily extend the Completion Times (CTs) for the Keowee hydro units (KHUs) to allow additional time for maintenance and upgrades. The amendments extend by 17 days (from 45 days to 62 days) the CT when one KHU is not operable and extend by 120 hours (from 60 hours to 180 hours) the CT when both KHUs are not operable.

Date of Issuance: August 5, 2004.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: 339, 341, and 340.

Renewed Facility Operating License Nos. DPR–38, DPR–47, and DPR–55: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 17, 2002 (67 FR 58641).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 5, 2004.

No significant hazards consideration comments received: No.

Entergy Gulf States, Inc., and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana

Date of amendment request: October 21, 2003.

Brief description of amendment: The change removes MODE restrictions that prevent performance of Surveillance Requirements (SRs) 3.8.4.7 and 3.8.4.8 for the Division III direct current electrical power subsystem while in MODES 1, 2, or 3. These surveillances verify that the battery capacity is adequate to perform its required functions. The changes allow the performance of SR 3.8.4.7 and SR 3.8.4.8 during normal plant operations rather than only during refueling outages.

Date of issuance: August 12, 2004.

Effective date: As of the date of issuance and shall be implemented 60 days from the date of issuance.

Amendment No.: 141.

Facility Operating License No. NPF–47: The amendment revised the Technical Specfications.

Date of initial notice in ***Federal Register:*** December 9, 2003 (68 FR 68662).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 12, 2004.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–286, Indian Point Nuclear Generating Unit No. 3, Westchester County, New York

Date of application for amendment: March 9, 2004.

Brief description of amendment: The amendment extends the completion time (CT) from 1 hour to 24 hours for Condition B of Technical Specification (TS) 3.5.1, which defines requirements for the emergency core cooling system accumulators. Condition B of TS 3.5.1 specifies a CT to restore an accumulator to operable status when it has been declared inoperable for a reason other than the boron concentration of the water in the accumulator not being within the required range.

Date of issuance: August 18, 2004.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment No.: 222.

Facility Operating License No. DPR–64: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** April 13, 2004 (69 FR 19567).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 18, 2004.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–293, Pilgrim Nuclear Power Station, Plymouth County, Massachusetts

Date of application for amendment: August 16, 2002, as supplemented March 25, 2003, April 6, and July 22, 2004.

Brief description of amendment: This amendment deleted the existing requirements in Technical Specification (TS) 3.10.D.1.d from TS 3/4.10.D, "Multiple Control Rod Removal," and the associated Surveillance Requirement 4.10.D.1.d. This amendment added a new requirement to TS 3.10.D.1.d. Additionally, this amendment made an editorial change to correct a reference to TS 3.3.B.3 instead of TS 3.3.B.4 in TS 3/4.10.D.1.

Date of issuance: August 17, 2004.

Effective date: As of the date of issuance, and shall be implemented within 60 days.

Amendment No.: 207.

Facility Operating License No. DPR–35: Amendment revised the TSs.

Date of initial notice in ***Federal Register:*** December 10, 2002 (67 FR 75873).

The supplements dated March 25, 2003, April 6, and July 22, 2004, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 17, 2004.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., Docket No. 50–313, Arkansas Nuclear One, Unit No. 1, Pope County, Arkansas

Date of amendment request: February 9, 2004.

Brief description of amendment: The amendment eliminates the requirements in the Technical Specifications associated with hydrogen recombiners and hydrogen monitors.

Date of issuance: August 12, 2004.

Effective date: As of the date of issuance and shall be implemented within 120 days from the date of issuance.

Amendment No.: 222.

Renewed Facility Operating License No. DPR–51: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** March 30, 2004 (69 FR 16617).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 12, 2004.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., Docket No. 50–368, Arkansas Nuclear One, Unit No. 2, Pope County, Arkansas

Date of application for amendment: February 9, 2004.

Brief description of amendment: The amendment eliminates the requirements in the Technical Specifications associated with hydrogen recombiners and hydrogen monitors.

Date of issuance: August 5, 2004.

Effective date: As of the date of issuance to be implemented within 120 days from the date of issuance.

Amendment No.: 254.

Facility Operating License No. NPF–6: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** March 30, 2004 (69 FR 16618).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 5, 2004.

No significant hazards consideration comments received: No.

Indiana Michigan Power Company, Docket Nos. 50–315 and 50–316, Donald C. Cook Nuclear Plant, Units 1 and 2, Berrien County, Michigan

Date of application for amendments: August 27, 2003.

Brief description of amendments: The amendments change Technical Specification 4.0.3, "Missed Surveillance Time Allowance." TS 4.0.3 describes the relationship between meeting the surveillance requirement and operability. The amendments modify TS 4.0.3 to allow a missed surveillance to be completed within 24 hours or up to the limit of the specified interval, whichever is greater. Additionally, the amendments add a statement that a risk evaluation shall be performed for any surveillance delayed greater than 24 hours and that the risk impact shall be managed. The amendments also change the Bases to further clarify the provisions of the TS. In addition, the proposed amendments make format changes to improve appearance. The changes to the TS and its Bases are consistent with industry/Technical Specification Task Force TSTF–358, Revision 6, which was approved by the Nuclear Regulatory Commission (NRC) on October 3, 2001, and incorporated the NRC's comments on TSTF–358, Revision 5. TSTF–358, Revision 5, was approved with comment by the NRC as a part of the Consolidated Line Item Improvement Process in a **Federal Register** Notice dated September 28, 2001.

Date of issuance: August 9, 2004.

Effective date: As of the date of issuance and shall be implemented within 45 days.

Amendment Nos.: 282, 266.

Facility Operating License Nos. DPR–58 and DPR–74: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** May 11, 2004 (69 FR 26190).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 9, 2004.

No significant hazards consideration comments received: No.

Nuclear Management Company, LLC, Docket Nos. 50–266 and 50–301, Point Beach Nuclear Plant, Units 1 and 2, Town of Two Creeks, Manitowoc County, Wisconsin

Date of application for amendments: January 30, 2004.

Brief description of amendments: The amendments relocate the requirements for hydrogen monitors to the Technical Requirements Manual.

Date of issuance: August 13, 2004.

Effective date: As of the date of issuance and shall be implemented within 120 days.

Amendment Nos.: 214 and 219.

Facility Operating License Nos. DPR–24 and DPR–27: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** March 2, 2004 (69 FR 9862).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 13, 2004.

No significant hazards consideration comments received: No.

Nuclear Management Company, LLC, Docket Nos. 50–282 and 50–306, Prairie Island Nuclear Generating Plant, Units 1 and 2, Goodhue County, Minnesota

Date of application for amendments: March 25, 2004, as supplemented June 2, 2004.

Brief description of amendments: The amendments approve a change to the licensing basis to allow the use of the methods described in Framatome–ANP Topical Report BAW–10169–A, "RSG Plant Safety Analysis—B&W Safety Analysis Methodology for Recirculating Steam Generator Plants," dated October 1989, for calculating the mass and energy release rates resulting from a postulated main steamline break accident for input to containment analyses. These methods utilize the RELAP5/MOD2–B&W code approved by the Nuclear Regulatory Commission staff in a safety evaluation report dated March 14, 1995.

Date of issuance: August 19, 2004.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment Nos.: 164 and 155.

Facility Operating License Nos. DPR–42 and DPR–60: Amendments authorized revision to the Updated Final Safety Analysis Report.

Date of initial notice in ***Federal Register:*** April 27, 2004 (69 FR 22881).

The June 2, 2004, supplemental letter contained clarifying information and did not change the initial proposed no significant hazards consideration determination and was within the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendments is contained in a safety evaluation dated August 19, 2004.

No significant hazards consideration comments received: No.

South Carolina Electric & Gas Company, South Carolina Public Service Authority, Docket No. 50–395, Virgil C. Summer Nuclear Station, Unit No. 1, Fairfield County, South Carolina

Date of application for amendment: July 23, 2003.

Brief description of amendment: Revised the near end-of-life Moderator Temperature Coefficient (MTC) Surveillance Requirement 4.1.1.3.b by placing a set of conditions on core operation, which if met, would allow exemption from the required MTC measurement. The conditional exemption is determined on a cycle-specific basis by considering the margin predicted to the surveillance requirement MTC limit and the performance of other core parameters, such as beginning of life MTC measurements and the critical boron concentration as a function of cycle life.

Date of issuance: July 21, 2004.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment No.: 169.

Renewed Facility Operating License No. NPF–12: Amendment revises the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 30, 2003 (68 FR 56346).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 21, 2004.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50–321 and 50–366, Edwin I. Hatch Nuclear Plant, Units 1 and 2, Appling County, Georgia

Date of application for amendments: December 30, 2003.

Brief description of amendments: The amendments revised the staff position titles in Section 5.0 "Administrative Controls" of the Technical Specifications.

Date of issuance: June 3, 2004.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: 242 and 185.

Renewed Facility Operating License Nos. DPR–57 and NPF–5: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** March 2, 2004 (69 FR 9865).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 3, 2004.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 23rd day of August 2004.

For the Nuclear Regulatory Commission.
Ledyard B. Marsh,
Division of Licensing Project Management, Office of Nuclear Reactor Regulation.
Director,
[FR Doc. 04–19586 Filed 8–30–04; 8:45 am]
BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50241; File No. SR–Amex–2004–57]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change by the American Stock Exchange LLC Relating to the Listing and Trading of Notes Linked to the Performance of the Standard & Poor's 500 Stock Index

August 24, 2004.

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 July 27, 2004, the American Stock Exchange LLC ("Amex" or "Exchange") 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 the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposed to list and trade notes, the performance of which is linked to the Standard & Poor's 500 Index ("S&P 500" or "Index").

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 Amex included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Amex 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

Under Section 107A of the Amex Company Guide ("Company Guide"), the Exchange may approve for listing and trading securities which cannot be readily categorized under the listing criteria for common and preferred stocks, bonds, debentures, or warrants.[3] The Amex proposes to list for trading under Section 107A of the Company Guide notes linked to the performance of the S&P 500 (the "S&P Notes" or "Notes").[4] Wachovia will issue the Notes under the name "**LUNARS**," "Leveraged Upside Indexed Accelerated Return Securities." Each Note will be offered at an original public offering price of $1,000. The S&P 500 is determined, calculated and maintained solely by S&P.[5] At maturity the Notes will provide for a multiplier of any positive performance of the S&P 500 during such term subject to a maximum payment amount or ceiling to be determined at the time of issuance (the "Capped Amount"). The Capped Amount is expected to be $1,125.[6]

The S&P 500 Notes will conform to the initial listing guidelines under Section 107A[7] and continued listing guidelines under Sections 1001–1003[8] of the Company Guide. The Notes are senior non-convertible debt securities of Wachovia. The Notes will have a term of not less than one or more than ten years. Wachovia will issue the Notes in denominations of whole units (a "Unit") with each Unit representing a single Note. The original public offering price will be $1,000 per Unit. The Notes will entitle the owner at maturity to receive

[3] *See* Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8626 (March 8, 1990) (order approving File No. SR–Amex–89–29).

[4] Wachovia Corporation ("Wachovia") and Standard & Poor's Corporation, a division of the McGraw-Hill Companies, Inc. ("S&P") have entered into a non-exclusive license agreement providing for the use of the S&P 500 by Wachovia and certain affiliates and subsidiaries in connection with certain securities including these Notes. S&P is not responsible and will not participate in the issuance and creation of the Notes.

[5] The S&P 500 Index is a broad-based stock index, which provides an indication of the performance of the U.S. equity market. The Index is a capitalization-weighted index reflecting the total market value of 500 widely held component stocks relative to a particular base period. The Index is computed by dividing the total market value of the 500 stocks by an Index divisor. The Index Divisor keeps the Index comparable over time to its base period of 1941–1943 and is the reference point for all maintenance adjustments. The securities included in the Index are listed on the Amex, New York Stock Exchange, Inc. ("NYSE") or traded through NASDAQ. The Index reflects the price of the common stocks of 500 companies without taking into account the value of the dividend paid on such stocks. The Index Value is disseminated once every fifteen seconds through numerous data providers. Telephone conference between Laura Clare, Assistant General Counsel, Amex, and Florence Harmon, Senior Special Counsel, Division of Market Regulation ("Division"), Commission, on August 20, 2004 (pertaining to dissemination of Index Value).

In connection with the S&P 500, the Exchange notes that S&P has announced a change to its methodology so that weightings are based on the "public float" of a component stock and not those shares of stock that are not publicly traded. The S&P 500 is currently a market capitalization weighted index that is expected to be changed to a "float-adjusted" market capitalization index by September 2005. In a "traditional" market capitalization index, the value of the index is calculated by multiplying the total number of shares outstanding of each component by the price per share of the component. The result is then divided by the divisor. On March 1, 2004, S&P announced that it intends to shift its major indexes, such as the S&P 500 to a "float-adjusted" market capitalization index. In a "float-adjusted" market capitalization index, the value of the index will be calculated by multiplying the public float of each component by the price per share of the component. The result is then divided by the divisor. Accordingly, a "float-adjusted" market capitalization index will exclude those blocks of stocks that do not publicly trade from determining the weight for a stock in the index. The transition from a market capitalization weighted index to a "float-adjusted" capitalization weighted index will be implemented over an 18-month period.

[6] *See* prospectus supplement dated August 3, 2004.

[7] The initial listing standards for the Notes require: (1) A minimum public distribution of one million units; (2) a minimum of 400 shareholders; (3) a market value of at least $4 million; and (4) a term of at least one year. In addition, the listing guidelines provide that the issuer has assets in excess of $100 million, stockholder's equity of at least $10 million, and pre-tax income of at least $750,000 in the last fiscal year or in two of the three prior fiscal years. In the case of an issuer that is unable to satisfy the earning criteria stated in Section 101 of the Company Guide, the Exchange will require the issuer to have the following: (1) Assets in excess of $200 million and stockholders' equity of at least $10 million; or (2) assets in excess of $100 million and stockholders' equity of at least $20 million. The Exchange concluded, pursuant to its evaluation of the nature and complexity of the product pursuant to Section 107A, not to issue a circular regarding member firm compliance responsibilities because the notes are issued in $1,000 denominations and are categorized as debt. Telephone conference between Jeffrey Burns, Associate General Counsel, Amex, and Florence Harmon, Senior Special Counsel, Division, Commission, on August 24, 2004 (pertaining to issuance of a circular to members).

[8] The Exchange's continued listing guidelines are set forth in Sections 1001 through 1003 of Part 10 to the Exchange's Company Guide. Section 1002(b) of the Company Guide states that the Exchange will consider removing from listing any security where, in the opinion of the Exchange, it appears that the extent of public distribution or aggregate market value has become so reduced to make further dealings on the Exchange inadvisable. With respect to continued listing guidelines for distribution of the Notes, the Exchange will rely, in part, on the guidelines for bonds in Section 1003(b)(iv) because the Notes are issued in $1,000 denominations. Section 1003(b)(iv)(A) provides that the Exchange will normally consider suspending dealings in, or removing from the list, a security if the aggregate market value or the principal amount of bonds publicly held is less than $400,000.

an amount based upon the percentage change of the S&P 500. At maturity, if the value of the S&P 500 has increased over the term of the Notes, a beneficial owner will be entitled to receive a payment on the Notes equal to two (2) times the amount of that percentage increase, not to exceed the Capped Amount of $1,125. The Notes will not have a minimum principal amount that will be repaid, and accordingly, payment on the Notes prior to or at maturity may be less than the original issue price of the Notes because the final payment per Note will be exposed to the full decrease of the Index. Thus, if the Index ending level is lower than the Index starting Level, the investor will lose some or all of his principal.[9] The Notes are also not callable by the Issuer, Wachovia, or redeemable by the holder.

The cash payment that a holder or investor of a Note will be entitled to receive (the "Redemption Amount") depends entirely on the value of the S&P 500 at the close of the market on the valuation date, which will be four (4) business days prior to the maturity date[10] of the Notes (the "Final Level"), and the closing value of the S&P 500 on the date the Notes are priced for initial sale to the public (the "Initial Level").

If the Final Level is greater than the Initial Level, the Redemption Amount per Unit will equal:

$$\$1000 \times \left[1 + \left(2 \times \left(\frac{\text{Initial Level} - \text{Final Level}}{\text{Initial Level}}\right)\right)\right], \text{ subject to Capped Amount.}$$

If the Final Level is less than or equal to the Initial Level, the Redemption Amount per Unit will equal:

$$\$1000 \times \left[1 + \left(\frac{\text{Initial Level} - \text{Final Level}}{\text{Initial Level}}\right)\right]$$

The Notes are cash-settled in U.S. dollars and do not give the holder any right to receive a portfolio security, dividend payments or any other ownership right or interest in the portfolio or index of securities comprising the S&P 500. The Notes are designed for investors who want to participate or gain exposure to the S&P 500, subject to a cap, and who are willing to forego market interest payments on the Notes during such term. The Commission has previously approved the listing of options on, and securities, the performance of which have been linked to or based on, the S&P 500 Index.[11]

As of July 15, 2004, the market capitalization of the securities included in the S&P 500 ranged from a high of $352.199 billion to a low of $0.738 billion. The average daily trading volume for these same securities for the last six (6) months ranged from a high of 9.507 million shares to a low of .943 million shares.

Because the Notes are issued in $1000 denominations, the Amex's existing debt floor trading rules will apply to the trading of the Notes. Pursuant to Amex Rule 411, the Exchange will impose a duty of due diligence on its members and member firms to learn the essential facts relating to every customer prior to trading the Notes.[12] With respect to suitability recommendations and risks, the Exchange will require members, member organizations and employees thereof recommending a transaction in the Notes: (1) To determine that such transaction is suitable for the customer, and (2) to have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of such transaction. In addition, Wachovia will deliver a prospectus in connection with the initial sales of the Notes.

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Notes. Specifically, the Amex will rely on its existing surveillance procedures governing equities, which have been deemed adequate under the Act. In addition, the Exchange also has a general policy that prohibits the distribution of material, non-public information by its employees.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act[13] in general and furthers the objectives of Section 6(b)(5)[14] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, 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.

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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange did not receive any written comments on the proposed rule change.

[9] A negative return of the S&P 500 will reduce the redemption amount at maturity with the potential that the holder of the Note could lose his entire investment. Accordingly, the Notes are not "principle protected," and are fully exposed to any decline in the level of the S&P 500.

[10] If the maturity date is not a trading day or if a market disruption event occurs on such day, the valuation date will be the next following trading day on which no market disruption event has occurred. A "market disruption event" is defined as: (i) The occurrence of a suspension, absence or material limitation of trading of 20% or more of the component stocks of the Index on the primary market for more than two hours of trading or during the one-half hour period preceding the close of the principal trading session on such primary market; (ii) a breakdown or failure in the price and trade reporting systems of any primary market as a result of which the reported trading prices for 20% or more of the component stocks of the Index during the last one-half hour preceding the close of the principal trading session on such primary market are materially inaccurate; (iii) the suspension, material limitation or absence of trading on any major securities market for trading in futures or options contracts or exchange traded funds related to the Index for more than two hours of trading or during the one-half hour period preceding the close of the principal trading session on such market; and (iv) a determination by Wachovia Securities that any event described in clauses (i)–(iii) above materially interfered with the ability of Wachovia or any of its affiliates to unwind or adjust all or a material portion of the hedge position with respect to the Notes.

[11] *See* Securities Exchange Act Release Nos. 50019 (July 14, 2004), 69 FR 43635 (July 21, 2004) (approving the listing and trading of notes (Morgan Stanley PLUS) linked to the S&P 500); 48486 (September 11, 2003), 68 FR 54758 (September 18, 2003) (approving the listing and trading of CSFB Contingent Principal Protection Notes on the S&P 500); 48152 (July 10, 2003), 68 FR 42435 (July 17, 2003) (approving the listing and trading of a UBS Partial Protection Note linked to the S&P 500); 47983 (June 4, 2003), 68 FR 35032 (June 11, 2003) (approving the listing and trading of a CSFB Accelerated Return Notes linked to S&P 500); and 47911 (May 22, 2003), 68 FR 32558 (May 30, 2003) (approving the listing and trading of notes (Wachovia TEFS) linked to the S&P 500).

[12] Amex Rule 411 requires that every member, member firm or member corporation use due diligence to learn the essential facts, relative to every customer and to every order or account accepted.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

III. 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 SR–Amex–2004–57 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. All submissions should refer to SR–Amex–2004–57. 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 Commissions 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 inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. 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 SR–Amex–2004–57 and should be submitted on or before September 21, 2004.

IV. Commission's Findings and Order Granting Approval of Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b)(5) of the Act.[15] The Commission has approved the listing of securities with a structure similar to that of the Notes.[16] Accordingly, the Commission finds that the listing and trading of the Notes based on the Index is consistent with the Act and will promote just and equitable principles of trade, foster cooperation and coordination with person engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions securities, and, in general, protect investors and the public interest consistent with Section 6(b)(5) of the Act.[17]

The Notes will provide investors who are willing to forego market interest payments during the term of the Notes with means to participate or gain exposure to the Index, subject to the Capped Value. The Notes are non-convertible debt securities whose prices will be derived and based upon the Initial Level. The Commission notes that the Notes will not have a minimum principal investment amount that will be repaid, and payment on the Notes prior to or at maturity may be less than the original issue price of the Notes. At maturity, if the Final Value of the S&P 500 is greater than the Initial Value, the performance of the Note is leveraged on the "upside." In other words, the investor will receive, for each Note a payment equal to the $1,000 principal amount plus double the percent increase in the value of the S&P 500, subject to the Capped Value of $1,125 or 12.5% of the issue price. However, if the S&P 500 declines from the Initial Value, then the investors will receive proportionately less than the original issue price of the Notes. The return on the notes, however, is not leveraged on the downside.

Thus, the Notes are non-principal protected instruments, but are not leveraged on the downside. The level of risk involved in the purchase or sale of the Notes is similar to the risk involved in the purchase or sale of traditional common stock. Because the final level of return of the Notes is derivatively priced and based upon the performance of an index of securities; because the Notes are debt instruments that do not guarantee a return of principal; and because investors' potential return is limited by the Capped Value, if the value of the Index has increased over the term of such Note, there are several issues regarding the trading of this type of product. However, for the reasons discussed below, the Commission believes the Exchange's proposal adequately addresses the concerns raised by this type of product.

The Commission notes that the protections of Section 107A of the Company Guide were designed to address the concerns attendant on the trading of hybrid securities like the Notes. In particular, by imposing the hybrid listing standards, suitability, disclosure and compliance requirements noted above, the Commission believes the Amex has addressed adequately the potential problems that could arise from the hybrid nature of the Notes. The Commission notes that Wachovia will deliver a prospectus in connection with the initial sales of the Notes. In addition, the Commission notes that Amex will incorporate and rely upon its existing surveillance procedures governing equities, which have been deemed adequate under the Act.

In approving the product, the Commission recognizes that the Index is a capitalization-weighted index[18] of 500 companies listed on Nasdaq, the NYSE, and the Amex. The Exchange represents that the Index will be determined, calculated, and maintained by S&P. As of July 15, 2004, the market capitalization of the securities included in the S&P 500 ranged from a high of $352.199 billion to a low of $0.738 million. The average daily trading volume for these same securities for the last six (6) months ranged from a high of 9.507 million shares to a low of .943 shares.

Given the large trading volume and capitalization of the compositions of the stocks underlying the Index, the Commission believes that the listing and trading of the Notes that are linked to the Index should not unduly impact the market for the underlying securities compromising the Index or raise

[15] *Id.*

[16] *See* Securities Exchange Act Release Nos. 48152 (July 10, 2003), 68 FR 42435 (July 17, 2003) (approving the listing and trading of the UBS Partial Protection Note linked to the Index); 47983 (June 4, 2003), 68 FR 35032 (June 11, 2003) (approving the listing and trading of a CSFB Accelerated Return Notes linked to Index); 47911 (May 22, 2003), 68 FR 32558 (May 30, 2003) (approving the listing and trading of notes (Wachovia TEES) linked to the Index); 31591 (December 18, 1992), 57 FR 60253 (December 18, 1992) (approving the listing and trading of Portfolio Depositary Receipts based on the Index); 30394 (February 21, 1992), 57 FR 7409 (March 2, 1992) (approving the listing and trading of a unit investment trust linked to the Index) (SPDR); 27382 (October 26, 1989), 54 FR 45834 (October 31, 1989) (approving the listing and trading of Exchange Stock Portfolios based on the value of the Index); and 19907 (June 24, 1983), 48 FR 30814 (July 5, 1983) (approving the listing and trading of options on the Index).

[17] 15 U.S.C. 78f(b)(5). In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[18] *See supra* note 5.

manipulative concerns.[19] As discussed more fully above, the underlying stocks comprising the Index are well-capitalized, highly liquid stocks. Moreover, the issuers of the underlying securities comprising the Index are subject to reporting requirements under the Act, and all of the component stocks are either listed or traded on, or traded through the facilities of, U.S. securities markets. Additionally, the Amex's surveillance procedures will serve to deter as well as detect any potential manipulation.

Furthermore, the Commission notes that the Notes are depending upon the individual credit of the issuer, Wachovia. To some extent this credit risk is minimized by the Exchange's listing standards in Section 107A of the Company Guide which provide the only issuers satisfying substantial asset and equity requirements may issue securities such as the Notes. In addition, the Exchange's "Other Securities" listing standards further require that the Notes have a market value of at least $4 million.[20] In any event, financial information regarding Wachovia in addition to the information on the 500 common stocks comprising the Index will be publicly available.[21]

The Commission also has a systemic concern, however, that a broker-dealer such as Wachovia, or a subsidiary providing a hedge for the issuer will incur position exposure. However, as the Commission has concluded in previous orders for other hybrid instruments issued by broker-dealers,[22] the Commission believes that this concern is minimal given the size of the Notes issuance in relation to the net worth of Wachovia.

Finally, the Commission notes that the value of the Index will be disseminated at least once every fifteen seconds throughout the trading day. The Commission believes that providing access to the value of the Index at least once every fifteen seconds throughout the trading day is extremely important and will provide benefits to investors in the product.

The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of the notice of filing thereof in the **Federal Register**. The Exchange has requested accelerated approval because this product is similar to several other instruments currently listed and traded on the Amex.[23] The Commission believes that the Notes will provide investors with an additional investment choice and that accelerated approval of the proposal will allow investors to begin trading the Notes promptly. Additionally, the Notes will be listed pursuant to Amex's existing hybrid security listing standards as described above. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[24] to approve the proposal on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[25] that the proposed rule change (SR–Amex–2004–57) is hereby approved on an accelerated basis.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[26]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E4–1982 Filed 8–30–04; 8:45 am]

BILLING CODE 8010–01–P

[19] The issuer Wachovia disclosed in the prospectus that the original issue price of the Notes includes commissions (and the secondary market prices are likely to exclude commissions) and Wachovia's costs of hedging its obligations under the Notes. These costs could increase the initial value of the Notes, thus affecting the payment investors receive at maturity. The Commission expects such hedging activity to be conducted in accordance with applicable regulatory requirements.

[20] *See* Company Guide Section 107A.

[21] The Commission notes that the 500 component stocks that comprise the Index are reporting companies under the Act, and the Notes will be registered under Section 12 of the Act.

[22] *See* Securities Exchange Act Release Nos. 44913 (October 9, 2001), 66 FR 52469 (October 15, 2001) (order approving the listing and trading of notes whose return is based on the performance of the Nasdaq-100 Index) (File No. SR–NASD–2001–73); 44483 (June 27, 2001), 66 FR 35677 (July 6, 2001) (order approving the listing and trading of notes whose return is based on a portfolio of 20 securities selected from the Amex Institutional Index) (File No. SR–Amex–2001–40); and 37744 (September 27, 1996), 61 FR 52480 (October 7, 1996) (order approving the listing and trading of notes whose return is based on a weighted portfolio of healthcare/biotechnology industry securities) (File No. SR–Amex–96–27).

[23] *See supra* note 11.

[24] 15 U.S.C. 78f(b)(5) and 78s(b)(2).

[25] 15 U.S.C. 78*o*–3(b)(6) and 78s(b)(2).

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50237; File No. SR–NYSE–2004–37]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Procedures for Gapping the Quote

August 24, 2004.

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 July 2, 2004, the New York Stock Exchange ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The proposed rule change has been filed by the NYSE as a "non-controversial" rule change pursuant to Rule 19b–4(f)(6) under the Act.[3] 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 NYSE proposes to describe its new procedures for gapping the quote. The proposed rule text consists of NYSE Information Memo 04–27 (June 9, 2004), which the Exchange previously sent out to its members and member organizations. The text of the proposed rule change is available for viewing on the Commission's Web site, *http://www.sec.gov/rules/sro.shtml*, and at the Exchange and 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 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 NYSE believes that its auction market provides valuable opportunities to price transactions fairly to all investors in a way that truly reflects supply and demand. According to the Exchange, at the moment of that pricing, transparency of any imbalance is critical to attract participation to offset the imbalance and facilitate price discovery. In that regard, the NYSE is updating its policies with respect to situations

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

involving gapping the quote to achieve greater transparency in light of faster market conditions and technology. The Exchange believes that the procedures that are being updated will provide improved opportunities for all market participants to access the NYSE market and serve customers, improving transparency in situations where gapped quotations are used.

Background

The purpose of the proposed rule change is to discuss the procedures for gapping the quote, as currently described in Information Memo 94–32 (August 9, 1994)[4] and the 2003 Floor Official Manual.[5] The modification involves a new procedure for specifying the size in gapped quoting situations, making the size of the gapped quote 100 shares × size or size × 100 shares, instead of 100 shares × 100 shares. In addition, the new procedure shortens the reasonable period of time for the gapped quotation to remain in place in light of faster market conditions and technology.[6]

According to the Exchange, the purpose of the gapped quote procedures is to provide public dissemination of an order imbalance and to minimize short-term price dislocation associated with such imbalance by allowing appropriate time for the entry of offsetting orders or the cancellation of orders on the side of the imbalance. An imbalance may occur when the specialist receives a sudden influx of orders on the same side of the market at the same time or when there are one or more large-size orders and there is no offsetting interest. An imbalance may also occur when a member proposes to effect a one-sided block transaction at a significant premium or discount from the prevailing market.

When an imbalance exists, the gapped quote procedures provide that the specialist widen the spread between the bid and offer, a process known as "gapping." In such cases, the quote on the side of the imbalance must match ("touch") the prior sale price. Once a quotation has been gapped, it should remain in place for a reasonable time to allow interested parties to respond to the order imbalance. A Floor Governor, Executive Floor Official, or Senior Floor Official oversees and provides input into the gapped quote process.

Prior Practice

Formerly, the gapped quote procedures provided that the specialist show the size associated with the gapped quotation as 100 × 100 and a senior-level Floor Official determined a reasonable period of time for the gapped quotation to be maintained (generally, not to exceed 5 minutes), to allow for adequate public disclosure and sufficient time to attract contra-side interest.

New Procedures To Accelerate Price Discovery

In order to provide more useful information and accelerate price discovery, the Exchange is updating the gapped quotation procedures to require that the specialist disseminate a quote size of 100 shares on only one side of the market. Size consistent with the order imbalance is to be shown on the other side, *i.e.*, 100 × size or size × 100. The 100-share side represents the specialist's determination of the price at which the stock would trade if no contra-side interest develops or no cancellations occur as a result of the gapped quotation. This determination takes into account executable orders on the book at better prices than the price of the 100-share bid or offer. The size side represents the extent of the order imbalance, which can represent orders of members in the crowd as well as SuperDot® ("DOT") orders.

Under the new procedures, when a gapped quotation situation arises, the specialist must:

- Complete all related Display Book reports of transactions that have been consummated to honor the existing firm quotation, and check the status of the order imbalance (to see whether it has increased or decreased);
- Gap the quotation:
  - —On the side of the imbalance, make the bid or offer price, as appropriate, touch the last sale; and
  - —Show the size of the imbalance in that bid or offer size;
  - —On the side opposite the imbalance, show the possible extent of price impact in the bid or offer price, as appropriate; and
  - —Make the size on that side of the market one round lot;
- Consult with a Floor Governor, Executive Floor Official, or Senior Floor Official as to how to proceed;
- Promptly contact known contra-side parties; and
- Continue to permit the entry and cancellation of orders in the Display Book.

The procedures provide that a gapped quotation should remain in place for a reasonable time to allow for interested parties to respond to the order imbalance. What constitutes a reasonable time is determined by the unique circumstances of each gapped quotation situation. However, the gapped quotation generally should last at least 30 seconds unless offsetting interest is received earlier, and generally should not exceed two minutes,[7] unless circumstances require otherwise.

The Floor Governor, Executive Floor Official, or Senior Floor Official shall determine whether to:

- Execute the orders immediately;
- Direct the specialist to maintain the gapped quotation beyond 30 seconds, but no more than two minutes, unless circumstances require otherwise, in order to allow time for contra-side interest to develop or cancellations to occur; or
- Halt trading in the stock.

Under Exchange Rule 60(e), as described in Information Memo 03–21 (May 15, 2003), in a situation involving the use of the new gapped quote procedures, specialists will not be required to modify the 100-share side of the quotation to post better priced buy or sell limit orders or add to size during the reasonable gapped quote period.

Example

At 2:10 P.M., the market in XYZ is $76.45 bid for 2,000 shares, 5,000 shares offered at $76.50 with the last sale at $76.47. The specialist receives a sudden influx of orders through the system and from floor brokers to buy 370,000 shares at the market. The specialist executes a portion of the buy order imbalance against the 5,000 shares offered to honor the firm quote. 5,000 shares at $76.50 are reported to the consolidated tape

[4] The Exchange filed Information Memo 94–32 in File No. SR–NYSE–93–48. *See* Securities Exchange Act Release No. 34303 (July 1, 1994), 59 FR 35157 (July 8, 1994).

[5] *See* NYSE Floor Official Manual at page 38.

[6] All other procedures and requirements set forth in NYSE Information Memo 94–32 and File No. SR–NYSE–93–48 remain unchanged and in effect. *See* Securities Exchange Act Release No. 34303 (July 1, 1994), 59 FR 35157 (July 8, 1994). Telephone conversation between Jeffery Rosenstrock, Senior Special Counsel, Market Surveillance-Rule Development, and Kelly Riley, Assistant Director, Division of Market Regulation, Commission, on August 12, 2004.

[7] NYSE Rule 123D provides that with respect to a trading halt, a minimum of five minutes must elapse between the publication of the initial indication and the stock's reopening. In the event that more than one indication was published, the stock may re-open three minutes after the last indication was published, provided that at least five minutes had elapsed from the publication of the initial indication. *See* NYSE Information Memo 03–5 (February 27, 2003) and Securities Exchange Act Release No. 47104 (December 30, 2002), 68 FR 597 (January 6, 2003) (File No. SR–NYSE–2002–39) (decreasing the minimum number of minutes that must elapse from 10 minutes to 5 minutes for the first indication, and from 5 minutes to 3 minutes for subsequent indications, provided that the minimum 5 minutes has elapsed since the first price indication). The Exchange represents that these time limits guide Floor Officials as to what may be an appropriate duration of a gapped quote.

and the related floor reports are issued. The specialist then gaps the quote, making the market $76.50 bid for 365,000 shares, 100 shares offered at $78.00. Note that this gapped quotation meets all of the requirements discussed above. The bid price touches the last sale. The size of the imbalance, which was reduced when the specialist took the offer, is published as the bid size. The offer price indicates the possible extent of the impact of the buy imbalance on the price of the stock. Lastly, the offer size is shown as 100 shares to indicate that there is insufficient interest on the sell side of the market.

Autoquote Feature

When the specialist disseminates a 100-share quote on one side of the market (100 × size or size × 100) where the 100-share side represents the specialist's bid or offer, the autoquote feature is temporarily not available on that side of the market for the limited period of the gapped quote. However, the side of the market displaying size will continue to be subject to autoquoting.

NYSE Direct+ ("Direct+")

Auto ex orders will continue to trade with and will reduce the size of the side of the market where the imbalance is being shown. Auto ex executions will not take place on the side of the market showing 100 shares.[8]

Inappropriate Use of Manual 100-Share Market

The Exchange believes that it would not be appropriate for a specialist to repeat or continue to disseminate the manual 100-share by 100-share market as that could have the effect of not displaying or quoting a limit order (unless executed or cancelled) until after 30 seconds.

Changes to the Exchange's Direct+ facility and market structure may affect the procedures described herein. However, until rule changes are submitted to the Commission for comment and review, and approval and implementation, the procedures described above will remain in place.[9]

The new procedures on gapping the quote are described in Information Memo 04–27, which has been sent to all members and member organizations.[10]

2. Statutory Basis

The Exchange believes that the proposed rule change 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 and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, according to the Exchange, is not designed to permit unfair discrimination between customers, brokers, or dealers, or to regulate by virtue of any authority matters not related to the administration of the Exchange.

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 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 (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms, does not become operative until 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, and the Exchange provided the Commission with 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, it has become effective pursuant to section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14]

The NYSE has requested that the Commission waive the 30-day operative delay. The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow the Exchange to transition to the new gapped quoting procedures, which provide more information regarding imbalances, without delay. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.[15] At any time within 60 days of the filing of this proposed rule change, the Commission may summarily abrogate 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*.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NYSE–2004–37. 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

[8] Under Exchange Rule 1000(iv), an auto ex order shall receive an immediate, automatic execution against orders reflected in the Exchange's published quotation and shall be immediately reported as NYSE transactions, unless, with respect to a single-sided auto ex order, the NYSE's published bid or offer is 100 shares.

[9] The Commission notes that the NYSE filed a proposal to change its Direct+ facility and market structure, which was published for comment in the **Federal Register** on August 16, 2004. *See* Securities Exchange Act Release No. 50173 (August 10, 2004), 69 FR 50407 (August 16, 2004) (File No. SR–NYSE–2004–05).

[10] The Commission notes that the proposed rule change was not effective until filed with the Commission on July 2, 2004.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6).

[15] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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 inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. 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–2004–37 and should be submitted on or before September 21, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E4–1979 Filed 8–30–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50231; File No. SR–PCX–2004–70]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. Relating to the PCX Equities, Inc.'s Ability To Waive an Examination Requirement for an ETP Applicant

August 23, 2004.

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 August 4, 2004, the Pacific Exchange, Inc. ("PCX" or "Exchange"), through its wholly-owned subsidiary PCX Equities, Inc. ("PCXE"), filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I and II below, which Items have been prepared by the PCX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PCX is proposing to adopt a rule permitting the Exchange to waive the examination requirement for an Equity Trading Permit ("ETP") applicant if the applicant can show that an appropriate basis exists for waiving this requirement. The text of the proposed rule change is as follows:

New text is *italicized*; deleted text is in [brackets].

Rules of PCX Equities, Inc.

Rule 2

Equity Trading Permits

Denial of or Conditions to ETPs

Rule 2.4(b) (1–9)—No change.

(10) does not successfully complete [such written proficiency] examinations as required by the Corporation to [enable it to examine and] verify the applicant's qualifications to function in [one or more of the] capacities *covered by the application* [applied for];

Series 7 Requirement

(A) Traders of ETP Holders for which the Corporation is the Designated Examining Authority ("DEA") must successfully complete the *Series 7 Examination.* [General Securities Registered Representative Examination (Test Series 7), if the primary business of the ETP Holder involves the trading of securities that is unrelated to the performance of the functions of a registered Market Maker. Unless required to complete the Series 7 under Rule 7.21(b)(2), the following are exempt from the requirement to successfully complete the Series 7 Examination:] ETP Holders [who are] performing the function of a registered Market Maker [(]pursuant to Rule *7.21(b)(2)[)] are exempt from this requirement.*

For purposes of this Rule:

(i) The term "trader" means a person (a) Who is directly or indirectly compensated by an ETP Holder, or who is any other associated person of an ETP Holder and (b) who trades, makes trading decisions with respect to, or otherwise engages in the proprietary or agency trading of securities. [; and

(ii) The term "primary business" means greater than 50% of the ETP Holder's business.

(B) Each ETP Holder for which the Corporation is the DEA must complete, on an annual basis, and on a form prescribed by the Corporation, a written attestation as to whether the ETP Holder's primary business is conducted in the performance of the function of a registered Market Maker (pursuant to Rule 7).]

[(C)] *(B)* The requirement to complete the Series 7 Examination will apply to current traders of ETP Holders that meet the criteria of subsection (A), above, as well as to future traders of ETP Holders that meet the criteria of subsection (A), above, at a later date. Traders of ETP Holders that meet the criteria of subsection (A), above, at the time of SEC approval of this Rule, must successfully complete the Series 7 Examination within six months of notification by the Corporation.

Rule 2.4(b) (11–13)—No change.

(c) The Corporation may waive or modify a required examination *for any Trader who has been a member of a self regulatory organization within six months of applying for trading privileges under an ETP if appropriate basis for an exemption from a required examination exists based on the following standards of evidence regarding an applicant's qualifications:* [for any applicant if, within two years of the date of such applicant applied to the Corporation for an ETP, such applicant has successfully completed a comparable examination administered by a self-regulatory organization or the Securities and Exchange Commission.]

(1) length and quality of securities industry experience or professional experience in investment related fields;

(2) specific registration requested by the applicant and type of business to be conducted in relation to the applicant's experience;

(3) previous registration history with the Corporation and nature of any pre-existing regulatory matters; and

(4) other examinations (e.g. Series 1 Examination) taken by the applicant that may be acceptable substitutes in conjunction with securities industry experience.

Within fifteen calendar days after the Corporation reviews a request for a waiver of the examination requirement, the Corporation shall provide the applicant with a written determination of whether the waiver was granted or denied. If the Corporation denies the request for a waiver, the notice shall include a statement with the reasons for the denial. An applicant whose request for a waiver is denied may appeal the decision of the Corporation in accordance with the terms and conditions of Rule 10.13.

Rule 2.4(d–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 PCX 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 PCX 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 Purpose

The Exchange is proposing to amend PCXE Rule 2.4(b)–(c) to allow the Exchange to waive the examination requirement for an ETP applicant if the Exchange believes the applicant is qualified based upon the applicant's industry experience, the type of registration requested, the previous history of the applicant with the PCX and any other examinations the applicant has successfully completed that may be considered acceptable substitutes. The Exchange is also proposing to make certain technical changes to PCXE Rule 2.4(b)(10) so that the Rule for ETP applicants is similar to the existing rule for individuals who apply for an Options Trading Permit ("OTP"). The Exchange believes that the proposed changes will bring the PCX examination requirements up to date and make the PCX's requirements similar to those at other SROs.[3] The Exchange notes that the proposed waiver is similar to one recently approved by the Commission for individuals who apply for an OTP at the PCX.[4]

Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(5),[6] in particular, because it is designed 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 and perfect the mechanisms of a free and open market and 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

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act,[7] and subparagraph (f)(6) of Rule 19b–4,[8] thereunder because it 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. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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.

The PCX has requested that the Commission waive the 30-day operative delay so that the proposed rule change will become immediately effective upon filing. The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission believes that accelerating the operative date will permit the Exchange to implement the changes to its examination requirements without undue delay. The Commission notes that it previously approved a similar proposed rule change for options trading on PCX and therefore the instant proposed rule change should not raise any new regulatory issues.[9] Accordingly, the Commission designates the proposal to be effective and operative upon filing with the Commission.[10]

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–PCX–2004–70 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File No. SR–PCX–2004–70. 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 inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the PCX. 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–PCX–2004–70 and should be submitted on or before September 21, 2004.

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[3] *See* Philadelphia Stock Exchange Rule 620(a) and (b), the American Stock Exchange Rule 353, and the Boston Stock Exchange Rule Chapter 15, Section (1)(b)(3).

[4] *See* Securities Exchange Act Release No. 49922 (June 28, 2004), 69 FR 40701 (July 6, 2004).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] *See* Securities Exchange Act Release No. 49922 (June 28, 2004), 69 FR 40701 (July 6, 2004) (SR–PCX–2003–51).

[10] For the purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E4–1978 Filed 8–30–04; 8:45 am]

BILLING CODE 8010–01–P

SOCIAL SECURITY ADMINISTRATION

Privacy Act of 1974, as Amended; Computer Matching Program (SSA/Centers for Medicare and Medicaid Services (CMS) Match Number 1094)

AGENCY: Social Security Administration (SSA).

ACTION: Notice of renewal of an existing computer matching program which expired on September 21, 2003. The next match is scheduled to take place in November 2004.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces the renewal of an existing computer matching program that SSA is currently conducting with CMS.

DATES: SSA will file a report of the subject matching program with the Committee on Governmental Affairs of the Senate, the Committee on Government Reform of the House of Representatives and Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). The renewal of the matching program will be effective as indicated below.

ADDRESSES: Interested parties may comment on this notice by either telefax to (410) 965–8582 or writing to the Associate Commissioner for Income Security Programs, 245 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401. All comments received will be available for public inspection at this address.

FOR FURTHER INFORMATION CONTACT: The Associate Commissioner for Income Security Programs as shown above.

SUPPLEMENTARY INFORMATION:

A. *General:*

The Computer Matching and Privacy Protection Act of 1988 (Public Law (Pub. L.) 100–503) amended the Privacy Act (5 U.S.C. 552a) by establishing the conditions under which computer matching involving the Federal government could be performed and adding certain protections for individuals applying for and receiving Federal benefits. Section 7201 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508) further amended the Privacy Act regarding protections for such individuals.

The Privacy Act, as amended, regulates the use of computer matching by Federal agencies when records in a system of records are matched with other Federal, State, or local government records. It requires Federal agencies involved in computer matching programs to:

(1) Negotiate written agreements with the other agency or agencies participating in the matching programs;

(2) Obtain the Data Integrity Boards'' approval of the match agreements;

(3) Publish notice of the computer matching program in the **Federal Register**;

(4) Furnish detailed reports about matching programs to Congress and OMB;

(5) Notify applicants and beneficiaries that their records are subject to matching; and

(6) Verify match findings before reducing, suspending, terminating, or denying an individual's benefits or payments.

B. *SSA Computer Matches Subject to the Privacy Act:* We have taken action to ensure that all of SSA's computer matching programs comply with the requirements of the Privacy Act, as amended.

Dated: August 19, 2004.

Martin H. Gerry,

Deputy Commissioner for Disability and Income Security Programs.

Notice of Computer Matching Program, Social Security Administration (SSA) with the Centers for Medicare and Medicaid Services (CMS)

A. *Participating Agencies:* SSA and CMS.

B. *Purpose of the Matching Program:* The purpose of this matching program is to establish the conditions, safeguards and procedures under which CMS agrees to disclose Medicare non-utilization data to SSA. In some instances, if an individual has not used Medicare benefits for an extended period of time, this may indicate that the individual is deceased. SSA will use the selected data as an indicator of cases that should be reviewed to determine continued eligibility to SSA-administered programs.

C. *Authority for Conducting the Matching Program:* Sections 202 (42 U.S.C. 402) and 205(c) (42 U.S.C. 405(c)) of the Social Security Act.

D. *Categories of Records and Individuals Covered by the Matching Program:* SSA will periodically furnish CMS with an electronic finder file containing Title II Claim Account Number (CAN) and Title II Beneficiary Identification Code (BIC) of beneficiaries from SSA's file of Master Beneficiary Records (SSA/OEEAS 60–0090) who receive Medicare.

SSA will request CMS to match the finder file against their National Claims History (09–70–0005) and the Enrollment Database (09–70–0502) and release an electronic file to SSA containing certain identifying information on enrollees who have not used Medicare for a specified period of a least 12 consecutive months.

E. *Inclusive Dates of the Matching Program:* The matching program shall become effective no sooner than 40 days after notice for the program is sent to Congress and OMB, or 30 days after publication of this notice in the **Federal Register**, whichever date is later. The matching program will continue for 18 months from the effective date and may be extended for an additional 12 months thereafter, if certain conditions are met.

[FR Doc. 04–19815 Filed 8–30–04; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 4783]

Advisory Committee on Private International Law Request for Public Comments on a Draft UN Convention on Electronic Commerce

Summary: Comment is sought on a draft UNCITRAL convention (multilateral treaty) on use of electronic messaging in the formation of contracts and related matters. Completion of the convention is possible by the Fall of 2005; it is then optional for member States to accept and implement the convention. Advisory Committee meetings will be held as indicated below; additional meetings will be scheduled after the next UNCITRAL Working Group meeting in mid-October to review changes to the draft text. Persons not able to attend are welcome to provide comments at any time as indicated below.

Request for Comments: The Office of Legal Advisor of the Department of State requests comments on the current and future drafts of a convention under consideration by the United Nations Commission on International Trade Law (UNCITRAL), through its Working Group IV on electronic commerce, designed to promote basic enabling laws on enforceability of electronic messaging related to contractual matters. The draft may encompass default rules on dispatch and receipt, error correction in automated transactions, location for purposes of applying the convention and for determining applicable law, and other matters affecting international electronic transactions within its scope.

Documentation: The current draft, Working Group IV's recent document WP.110, can be obtained on UNCITRAL's Web site at *http://www.uncitral.org (http://*

[11] 17 CFR 200.30–3(a)(12).

www.uncitral.org/English/workinggroups/wgIVec/index.htm). Commentators may wish to review additional documents therein listed, including reports of prior Working Group meetings, Secretariat analyses, and other matters.

Project Timing: The UNCITRAL Working Group, composed of member and observer States and participants from other governmental and non-governmental organizations, will review the current draft text in mid-October at United Nations offices in Vienna, Austria, and a revised draft is expected to be available for comment by mid-November. The revised text will be reviewed by the Working Group at its next meeting in April 2005 in New York. If sufficient progress has been made and if support from enough countries is evidenced, the text could be finalized at UNCITRAL's annual Plenary session in July 2005. If that is not feasible, a text could be completed at the next succeeding annual plenary session in mid-2006. Once completed and if endorsed by the UN General Assembly, consideration would be given in the United States whether and on what terms to join the new treaty, or implement it in another manner, and whether to promote its adoption by other States.

Overview: As now drafted, the convention is intended to expand a common base-line between participating States of general principles applying to electronic transactional communications. These principles are largely drawn from relevant parts of the 1996 UNCITRAL Model law on Electronic Commerce, as well as similar provisions in uniform state laws and federal law adopted in the United States, including the 1999 Uniform Electronic Transactions Act (UETA), and the Electronic Signatures in Global and National Commerce Act ("E-Sign"), enacted by Congress in 2000. In addition to commercial transactions within its scope that cross State boundaries, the proposed convention would also apply to transactions governed by certain listed UN commercial law conventions and to such other treaties and international agreements as may be agreed upon by participating States. As an overlay to existing laws, the convention would be designed to promote harmonized rules and fill gaps between the laws that may otherwise apply, thus promoting efficiency and certainty in cross-border transactions. Particular notice should be given to certain provisions of the draft convention: Article 2 on general exclusions from the convention; Article 3 on party autonomy, which permits parties to vary or modify the convention's terms as to their transactions; Article 8, which provides that parties cannot be obligated by this treaty to use e-messages; and Article 18, which allows each country to exclude such further matters as it deems appropriate. Finally, as the present draft indicates, it is expected that a number of optional provisions (called declarations) will permit States to further modify certain provisions from time to time. That flexibility, as well as the optional exclusions in article 18, would allow adjustment of the rules to specific classes of transactional activity, as usages change and the needs of electronic commerce grow over time.

Commentators should take into account the provisions of current laws in the United States noted above, as well as other state and federal law. Attention should also be given to existing legal treatment in other countries and in regional bodies such as the European Union, as well as relevant treaties and international agreements.

Public Comment: Comments can be sent to the Office of the Assistant Legal Adviser for Private International Law of the Department of State in any form addressed to Harold S. Burman (L/PIL) 2430 E Street, NW., Suite 355 South Building,Washington, DC 20037–2800, or by fax to (202) 776–8482, or by e-mail to *halburman@aol.com.*

Meeting(s): Persons wishing to attend one or more public meetings or to receive direct notice of further convention drafts and other information may do so by contacting Cherise Reid at *ReidCD@state.gov* or by fax at (202) 776–8482 with their names, contact numbers, including e-mail addresses, and affiliations, if any. Meetings are expected to be scheduled in the week of September 13 in the Washington, DC metropolitan area in conjunction with a forum on CEFACT, a body of the UN's Economic Commission for Europe, and additional meetings are expected to be scheduled after release of the next revised draft convention in November 2004.

Dated: August 24, 2004.

Harold S. Burman,

Advisory Committee Executive Director, Department of State.

[FR Doc. 04–19864 Filed 8–30–04; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of denials.

SUMMARY: The FMCSA announces its denial of 51 applications from individuals who requested an exemption from the Federal vision standard applicable to interstate truck drivers and the reasons for the denials. The FMCSA has statutory authority to exempt individuals from the vision standard if the exemptions granted will not compromise safety. The agency has concluded that granting these exemptions does not provide a level of safety that will equal or exceed the level of safety maintained without the exemptions for these commercial motor vehicle drivers.

FOR FURTHER INFORMATION CONTACT: Ms. Teresa Doggett, Office of Bus and Truck Standards and Operations, (MC–PSD), (202) 366–4001, Department of Transportation, FMCSA, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.s.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31315 and 31136(e), FMCSA may grant an exemption from the Federal vision standard for a renewable two year period if it finds such an exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such an exemption (49 CFR 381.305(a)).

Accordingly, FMCSA evaluated 51 individual exemption requests on their merits and made a determination that these applicants do not satisfy the criteria established to demonstrate that granting an exemption is likely to achieve an equal or greater level of safety than exists without the exemption. Each applicant has, prior to this notice, received a letter of final disposition on his/her individual exemption request. Those decision letters fully outlined the basis for the denial and constitute final agency action. The list published today summarizes the agency's recent denials as required under 49 U.S.C. 31315(b)(4) by periodically publishing names and reason for denials.

The following 28 applicants lacked sufficient recent driving experience over three years:

Behrer, Ed
Boven, Scott H.
Bradford, Johnny W.
Briones, Joe C.
Cupples, Geoffrey
Dean, Joseph A.
Decker, Karl
Fix, James E.
Fogle, Stephen B.
Grey, Walter M.
Gysberg, Rocky D.
Holt, Jeffrey L.
Lovejoy, Michael J.
McDade, Matthew
Mena, Jaime E.
Miller, Odis G.
Perkins, Kenneth D.
Peters, Karl
Remsburg, III, Albert L.
Roy, Paul R.
Schmitt, James L.
Siano, Jr., Peter
Slinde, Jay A.
Smith, Wayne M.
Stanley, John W.
Thompson, Jr., Ned
Wheeler, Greg
Williams, Dennis J.

Three applicants, Mr. Cory W. C. Thaine, Mr. Edward Tripp, Jr., and Mr. Danny R. Wood, do not have experience operating a commercial motor vehicle (CMV) and therefore presented no evidence from which FMCSA can conclude that granting the exemption is likely to achieve a level of safety equal to that existing without the exemption.

The following five applicants do not have three years of experience driving a CMV on public highways with the vision deficiency:

Fultz, Ronald K.
Hilliker, Jason D.
Jackman, Steven R.
Watkins, Sr., William A.
Worley, Billy

Three applicants, Mr. George H. Blakey, Mr. Curtis A. Boyster, and Mr. Terry J. Edwards, do not have three years of recent experience driving a CMV with the vision deficiency.

Two applicants, Mr. Thomas G. Carpenter and Mr. Donald L. Scoville, meet the vision requirements of 49 CFR 391.41(b)(10) and do not need a vision exemption.

One applicant, Mr. Bruce A. Homan, was charged with a moving violation in conjunction with a CMV crash, which is a disqualifying offense.

The following four applicants had their commercial driver's license suspended during the three year period, in relation to a moving violation. Applicants do not qualify for an exemption with a suspension during the three year review period.

Barnett, Jamenson L.
Bone, Stephen M.
Ross, James C.
Wise, Gregory

The following three applicants, Mr. William J. Cunningham, Mr. Robert A. Miller, and Mr. Lasaro R. Salgado, contributed to a crash while operating a CMV, which is a disqualifying offense.

One applicant, Mr. Ruben Duron, did not hold a license that allowed operation of vehicles over 10,000 pounds for all or part of the three year period.

One applicant, Mr. Gilbert L. Martinez, does not meet the vision standard in the better eye.

Issued on: August 16, 2004.

Rose A. McMurray,

Associate Administrator for Policy and Program Development.

[FR Doc. 04–19807 Filed 8–30–04; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2004–18923; Notice 1]

CCI Manufacturing IL Corporation, Receipt of Petition for Decision of Inconsequential Noncompliance

CCI Manufacturing IL Corporation (CCI) has determined that certain brake fluid containers manufactured by its supplier, Gold Eagle, do not comply with S5.2.2.2(d) of 49 CFR 571.116, Federal Motor Vehicle Safety Standard (FMVSS) No. 116, "Motor vehicle brake fluids." CCI has filed an appropriate report pursuant to 49 CFR Part 573, "Defect and Noncompliance Reports."

Pursuant to 49 U.S.C. 30118(d) and 30120(h), CCI has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of CCI's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition. Affected are a total of approximately 21,204 units of brake fluid containers manufactured in March 2004. S5.2.2.2 of FMVSS No. 116 requires that:

> Each packager of brake fluid shall furnish the information specified in [paragraph d] of this S5.2.2.2 by clearly marking it on each brake fluid container or on a label (labels) permanently affixed to the container * * *. After being subjected to the operations and conditions specified in S6.14, the information required by this section shall be legible * * *.

The information specified in paragraph d of S5.2.2.2 is "[a] serial number identifying the package lot and date of packaging." With regard to the noncompliant brake fluid containers, the lot and date codes required by S5.2.2.2(d) are not legible after the containers are subjected to the test conditions of S6.14.

CCI believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. CCI states:

> NHTSA has identified only one purpose for [the lot and date code] marking: namely, "to facilitate determination of the extent of defective brake fluid should such be discovered." * * * While it is clearly in the manufacturer's interest to be able to limit the "extent of defective brake fluid should such be discovered," by reference to lot/date code markings, there is no serious risk to motor vehicle safety if that information is lost. Instead, in the event of a defect or noncompliance determination affecting certain batches of brake fluid, the brake fluid manufacturer would be compelled to recall a larger population of brake fluid containers than it otherwise would need to do, because it could not rely on the presence of a legible lot/date code marking to limit the population of the recall.

CCI explains that it sold the affected brake fluid only to Mercedes-Benz, who then distributed it to its dealerships and authorized repair facilities. CCI states:

> First, Mercedes-Benz purchases and distributes the brake fluid to its dealerships and authorized repair facilities in bulk quantities, and those products are used quickly. Even in the unlikely event that a dealership or repair facility could not read the lot/date code on a particular container of brake fluid, that entity would likely have other containers from the same lot/date code on its premises, and could ascertain the lot/date code for the fouled container from its companion products. Second, CCI believes that all of the noncompliant containers in Mercedes-Benz's inventory may already have been used.
>
> CCI does not believe Mercedes-Benz offers the brake fluid for retail sale to customers, however it cannot be certain.

CCI states that the brake fluid containers comply with all other requirements of FMVSS No. 116 and the brake fluid itself complies with the substantive performance requirements of FMVSS No. 116. CCI indicates that it has corrected the problem.

Interested persons are invited to submit written data, views, and arguments on the petition described above. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods. Mail: Docket Management Facility, U.S.

Department of Transportation, Nassif Building, Room PL–401, 400 Seventh Street, SW., Washington, DC, 20590–0001. Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC. It is requested, but not required, that two copies of the comments be provided. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays. Comments may be submitted electronically by logging onto the Docket Management System Web site at *http://dms.dot.gov*. Click on "Help" to obtain instructions for filing the document electronically. Comments may be faxed to 1–202–493–2251, or may be submitted to the Federal eRulemaking Portal: go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the Federal Register pursuant to the authority indicated below.

Comment closing date: September 30, 2004.

Authority (49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8)

Issued on: August 25, 2004.

Kenneth N. Weinstein,

Associate Administrator for Enforcement.

[FR Doc. 04–19806 Filed 8–30–04; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

Proposed Information Collection; Comment Request

AGENCY: Alcohol and Tobacco Tax and Trade Bureau (TTB), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau, as part of their continuing effort to reduce paperwork and respondent burden, invite the public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Currently, we are seeking comments on TTB Form 5110.34, titled "Notice of Change in Status of Plant."

DATES: We must receive your written comments on or before November 1, 2004.

ADDRESSES: You may send comments to Sandra Turner, Alcohol and Tobacco Tax and Trade Bureau, at any of these addresses:

- P.O. Box 14412, Washington, DC 20044–4412;
- 202–927–8525 (facsimile); or
- *formcomments@ttb.gov* (e-mail).

Please reference the information collection's title, form or recordkeeping requirement number, and OMB number (if any) in your comment. If you submit your comment via facsimile, send no more than five 8.5 x 11 inch pages in order to ensure electronic access to our equipment.

FOR FURTHER INFORMATION CONTACT: To obtain additional information, copies of the information collection and its instructions, or copies of any comments received, contact Sandra Turner, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or telephone 202–927–8210.

SUPPLEMENTARY INFORMATION:

Title: Notice of Change in Status of Plant.

OMB Number: 1513–0044.

TTB Form Number: 5110.34.

Abstract: TTB F 5110.34 is necessary to show the use of distilled spirits plant premises for other activities or by alternating proprietors. It describes the proprietor's use of plant premises and other information to show that the change in plant status is in conformity with laws and regulations.

Current Actions: There are no changes to this information collection, and it is being submitted for extension purposes only.

Type of Review: Extension.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 100.

Estimated Total Annual Burden Hours: 1,000.

Request for Comments

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of this information collection. All comments are part of the public record and subject to disclosure. Please do not include any confidential or inappropriate material in your comments.

We invite comments on: (a) Whether this information collection is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the information collection's burden; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the information collection's burden on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

Dated: August 19, 2004.

William H. Foster,

Chief, Regulations and Procedures Division.

[FR Doc. 04–19831 Filed 8–30–04; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

Proposed Information Collection; Comment Request

AGENCY: Alcohol and Tobacco Tax and Trade Bureau (TTB), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau, as part of their continuing effort to reduce paperwork and respondent burden, invite the public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Currently, we are seeking comments on TTB Form 5110.50, titled "Tax Deferral Bond—Distilled Spirits (Puerto Rico)."

DATES: We must receive your written comments on or before November 1, 2004.

ADDRESSES: You may send comments to Sandra Turner, Alcohol and Tobacco Tax and Trade Bureau, at any of these addresses:

- P.O. Box 14412, Washington, DC 20044–4412;
- 202–927–8525 (facsimile); or
- *formcomments@ttb.gov* (e-mail).

Please reference the information collection's title, form or recordkeeping requirement number, and OMB number (if any) in your comment. If you submit your comment via facsimile, send no more than five 8.5 x 11 inch pages in order to ensure electronic access to our equipment.

FOR FURTHER INFORMATION CONTACT: To obtain additional information, copies of the information collection and its instructions, or copies of any comments received, contact Sandra Turner,

Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or telephone 202–927–8210.

SUPPLEMENTARY INFORMATION:

Title: Tax Deferral Bond—Distilled Spirits (Puerto Rico).

OMB Number: 1513–0050.

TTB Form Number: 5110.50.

Abstract: A manufacturer who ships distilled spirits from Puerto Rico to the U.S. may either choose to pay the tax prior to shipment or file a bond and defer payment of taxes. TTB F 5110.50 is the bond form which a manufacturer in Puerto Rico must file if such manufacturer elects to defer the taxes for payment on a semi-monthly tax return system. The form may be destroyed 5 years after discontinuance of business or after all outstanding liabilities have been satisfied, or after elimination of the requirement for the bond.

Current Actions: There are no changes to this information collection, and it is being submitted for extension purposes only.

Type of Review: Extension.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 10.

Estimated Total Annual Burden Hours: 10.

Request for Comments

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of this information collection. All comments are part of the public record and subject to disclosure. Please not do include any confidential or inappropriate material in your comments.

We invite comments on: (a) Whether this information collection is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the information collection's burden; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the information collection's burden on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

Dated: August 19, 2004.

William H. Foster,

Chief, Regulations and Procedures Division.

[FR Doc. 04–19832 Filed 8–30–04; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–04: H–4113 and 06923]

Roebling Financial Corp., Inc., Roebling, NJ; Approval of Conversion Application

Notice is hereby given that on August 13, 2004, the Assistant Managing Director, Examinations and Supervision—Operations, Office of Thrift Supervision (OTS), acting pursuant to delegated authority, approved the application of Roebling Financial Corp., MHC, and Roebling Bank, Roebling, New Jersey, to convert to the stock form of organization. Copies of the application are available for inspection by appointment (phone number: 202–906–5922 or e-mail: *Public.Info@OTS.Treas.gov*) at the Public Reading Room, OTS, 1700 G Street, NW., Washington, DC 20552, and the Northeast Regional Office, Harborside Financial Center Plaza Five, Suite 1600, Jersey City, New Jersey 07311.

By the Office of Thrift Supervision.

Dated: August 26, 2004.

Nadine Y. Washington,

Corporate Secretary.

[FR Doc. 04–19873 Filed 8–30–04; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF VETERANS AFFAIRS

Office of Research and Development; Government Owned Invention Available for Licensing

AGENCY: Office of Research and Development.

ACTION: Notice of Government owned invention available for licensing.

SUMMARY: The invention listed below is owned by the U.S. Government as represented by the Department of Veterans Affairs, and is available for licensing in accordance with 35 U.S.C. 207 and 37 CFR part 404 and/or CRADA Collaboration under 15 U.S.C. 3710a to achieve expeditious commercialization of results of federally funded research and development. Foreign patents are filed on selected inventions to extend market coverage for U.S. companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Technical and licensing information on the invention may be obtained by writing to: Dr. Mindy Aisen, Acting Director, Technology Transfer Program, Office of Research and Development (12TT), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; fax: 202–254–0473; e-mail at *mindy.aisen@hq.med.va.gov*. Any request for information should include the Number and Title for the relevant invention as indicated below. Issued patents may be obtained from the Commissioner of Patents, U.S. Patent and Trademark Office, Washington, DC 20231.

SUPPLEMENTARY INFORMATION: The invention available for licensing is:

Provisional Patent Application No. 60/547,052 "Methods for Diagnosing and Treating Bladder Cancer."

Dated: August 23, 2004.

Anthony J. Principi,

Secretary, Department of Veterans Affairs.

[FR Doc. 04–19780 Filed 8–30–04; 8:45 am]

BILLING CODE 8320–01–P

Corrections

Federal Register
Vol. 69, No. 168
Tuesday, August 31, 2004

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50187; File No. SR–Amex–2004–58]

Self–Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC To Reduce ETF Transaction Fees for Specialist and Registered Traders and the Cap on ETF Transaction Charge for Specialists

August 12, 2004.

Correction

In notice document 04–18907 beginning on page 51339 in the issue of Wednesday, August 18, 2004, make the following correction:

On page 51340, in the third column, in the fourth full paragraph, in the last line, the date "September 7, 2004" should read "September 8, 2004".

[FR Doc. C4–18907 Filed 8–30–04; 8:45 am]
BILLING CODE 1505–01–D

Federal Register

Tuesday,
August 31, 2004

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Five Endangered Mussels in the Tennessee and Cumberland River Basins; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AI76

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Five Endangered Mussels in the Tennessee and Cumberland River Basins

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate 13 river and stream segments (units) in the Tennessee and/or Cumberland River Basins, encompassing a total of approximately 885 river kilometers (rkm) (550 river miles (rmi)) of river and stream channels, as critical habitat for five endangered mussels [Cumberland elktoe (*Alasmidonta atropurpurea*), oyster mussel (*Epioblasma capsaeformis*), Cumberlandian combshell (*Epioblasma brevidens*), purple bean (*Villosa perpurpurea*), and rough rabbitsfoot (*Quadrula cylindrica strigillata*)] under the Endangered Species Act of 1973, as amended (Act). We solicited data and comments from the public on all aspects of this designation, including data on economic and other impacts of the designation. This publication also provides notice of the availability of the final economic analysis for this designation.

DATES: This rule is effective September 30, 2004.

ADDRESSES: Comments and materials received, as well as supporting documentation used in preparation of this final rule, are available for public inspection, by appointment, during normal business hours at the Tennessee Field Office, U.S. Fish and Wildlife Service, 446 Neal Street, Cookeville, TN 38501.

You may obtain copies of the final rule or the economic analysis from the field office address above, by calling (931) 528–6481, or from our Web site at *http://cookeville.fws.gov*.

If you would like copies of the regulations on listed wildlife or have questions about prohibitions and permits, please contact the appropriate State Ecological Services Field Office: Tennessee Field Office (see **ADDRESSES** section above); Alabama Field Office, U.S. Fish and Wildlife Service, P.O. Box 1190, Daphne, AL 36526 (telephone (251) 441–5181); Kentucky Field Office, USFWS, 3761 Georgetown Road, Frankfort, KY 40601 ((502) 695–0468); Mississippi Field Office, USFWS, 6578 Dogwood View Parkway, Ste. A, Jackson, MS 39213 ((601) 965–4900); Southwestern Virginia Field Office, USFWS, 330 Cummings Street, Abingdon, VA 24210 ((276) 623–1233).

FOR FURTHER INFORMATION CONTACT: Timothy Merritt, Tennessee Field Office (telephone (931) 528–6481, facsimile (931) 528–7075).

SUPPLEMENTARY INFORMATION:

Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 446, or 36 percent, of the 1,252 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,252 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, and the section 10 incidental take permit process. The Service believes it is these measures that may make the difference between extinction and survival for many species.

We note, however, that a recent 9th Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United State Fish and Wildlife Service,* has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. We are currently reviewing the decision to determine what effect it may have on the outcome of consultations pursuant to Section 7 of the Act.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public

comment, and in some cases the cost of compliance with the National Environmental Policy Act. None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

Background

This final rule addresses five mussels in the family Unionidae that are historically native to portions of the "Cumberlandian" Region of the Tennessee and Cumberland River Basins, including the Cumberland elktoe (*Alasmidonta atropurpurea*), oyster mussel (*Epioblasma capsaeformis*), Cumberlandian combshell (*Epioblasma brevidens*), purple bean (*Villosa perpurpurea*), and rough rabbitsfoot (*Quadrula cylindrica strigillata*). It is our intent, in this final rule, to discuss information obtained since the proposed critical habitat designation. Please refer to our proposed critical habitat rule (68 FR 33234, June 3, 2003) for a more detailed discussion of the species' general life history and our current understanding of their historical and current range and distribution.

We present information below on taxonomy, life history, and distribution specific to these 5 Cumberlandian mussels. The following section incorporates information received during the public comment period, thereby updating and/or revising this section from the information presented in the proposed rule. Additional information can be found in the listing determination (62 FR 1647) and the final recovery plan for these five mussels (Service 2004).

Taxonomy, Life History, and Distribution

Cumberland Elktoe (Alasmidonta atropurpurea (Rafinesque 1831))

Gravid Cumberland elktoe females (females with larvae) have been observed between October and May, but fish infected with glochidia of the Cumberland elktoe have not been encountered until March (Gordon and Layzer 1993). While glochidial infestation from this species has been recorded on five native fish species, glochidia successfully transformed or developed only on the northern hogsucker (*Hypentelium nigricans*) under laboratory conditions (Gordon and Layzer 1993). This species appears to prefer habitats in medium-sized streams to large rivers that contain sand and mud substrata interspersed with cobbles and large boulders (Call and Parmalee 1981; Parmalee and Bogan 1998).

The Cumberland elktoe is endemic to the upper Cumberland River System in southeast Kentucky and north-central Tennessee. It appears to have historically occurred only in the main stem of the Cumberland River and primarily its southern tributaries upstream from the hypothesized original location of Cumberland Falls near Burnside, Pulaski County, Kentucky (Cicerello and Laudermilk 2001). This species has apparently been extirpated from the main stem of the Cumberland River as well as Laurel River and its tributary, Lynn Camp Creek (Service 2004). Based on recent records, the Cumberland elktoe continues to persist in 12 Cumberland River tributaries: Laurel Fork, Claiborne County, Tennessee, and Whitley County, Kentucky; Marsh Creek, McCreary County, Kentucky; Sinking Creek, Laurel County, Kentucky; Big South Fork, Scott County, Tennessee, and McCreary County, Kentucky; Rock Creek, McCreary County, Kentucky; North Fork White Oak Creek, Morgan and Fentress Counties, Tennessee; Clear Fork, Fentress, Morgan, and Scott Counties, Tennessee; North Prong Clear Fork and Crooked Creek, Fentress County, Tennessee; White Oak Creek, Scott County, Tennessee; Bone Camp Creek, Morgan County, Tennessee; and New River, Scott County, Tennessee (Call and Parmalee 1981; Bakaletz 1991; Gordon 1991; Cicerello 1996; Parmalee and Bogan 1998; Cicerello and Laudermilk 2001; R.R. Cicerello, Kentucky State Nature Preserves Commission (KSNPC), personal communication (pers. comm.) 2002, 2003; Service 2004; Ahlstedt *et al.* 2003).

Oyster Mussel (Epioblasma capsaeformis (Lea 1834))

Ortmann (1924) was the first to note color differences in female oyster mussel mantle pads (shell lining). The mantle color appears to be bluish or greenish white in the Clinch River, grayish to blackish in the Duck River, and mottled brown in the Big South Fork population (Ortmann 1924; Service 2004; J.W. Jones, Virginia Polytechnic Institute and State University (Virginia Tech), pers. comm. 2003). In addition, the Duck River form achieves nearly twice the size of specimens from other populations. Two small projections (microattractants) at the junction of the mantle pads serve to attract host fish. Subtle differences in the morphology of these projections or structures also exist in these two populations and coupled with additional data, suggest that they are distinct species (J.W. Jones, pers. comm. 2002).

Spawning probably occurs in the oyster mussel in late spring or early summer (Gordon and Layzer 1989; J.W. Jones, pers. comm. 2003). Glochidia of the oyster mussel have been identified on seven native host fish species, including the wounded darter (*Etheostoma vulneratum*), redline darter (*E. rufilineatum*), bluebreast darter (*E. camurum*), dusky darter (*Percina sciera*), banded sculpin (*Cottus carolinae*), black sculpin (*C. baileyi*), and mottled sculpin (*C. bairdi*) (Yeager and Saylor 1995; J.W. Jones and R.J. Neves, U.S. Geological Survey (USGS), unpublished (unpub.) data 1998). Oyster mussels typically occur in sand and gravel substrate in streams ranging from medium-sized creeks to large rivers (Gordon 1991; Parmalee and Bogan 1998). They prefer shallow riffles and shoals and have been found associated with water willow (*Justicia americana*) beds (Ortmann 1924; Gordon 1991; Parmalee and Bogan 1998).

The oyster mussel was one of the most widely distributed Cumberlandian mussel species, with historical records existing from six States (Alabama, Georgia, Kentucky, North Carolina, Tennessee, and Virginia). It has been eliminated from the entire Cumberland River System and the Tennessee River main stem and a large number of its tributaries (Fraley and Ahlstedt 2001; S.A. Ahlstedt, USGS, pers. comm. 2002, 2003; Service 2004; Ahlstedt 1991a; J.W. Jones, pers. comm. 2003). This mussel is now extant only in a handful of stream and river reaches in two States, including the Duck River, Maury and Marshall counties, Tennessee; Clinch River, Hancock County, Tennessee, and Scott County, Virginia; and Nolichucky River, Hamblen and Cocke counties, Tennessee (Wolcott and Neves 1990; Ahlstedt 1991b; Bakaletz 1991; Gordon 1991; Ahlstedt and Tuberville 1997; S.A. Ahlstedt, pers. comm. 2003; Service 2004; J.W. Jones, pers. comm. 2003).

Cumberlandian Combshell (Epioblasma brevidens (Lea 1831))

Spawning in Cumberlandian combshell most likely occurs in late summer and fall, while the actual release of glochidia takes place during the remainder of the year.

Spawning in Cumberlandian combshell most likely occurs in late summer and fall, while the actual release of glochidia takes place during the remainder of the year (J.W. Jones, pers. comm. 2003; J. Layzer, Tennessee Technological University, pers. comm.

2003). Glochidia of the Cumberlandian combshell have been identified on several native host fish species, including the wounded darter, redline darter, bluebreast darter, snubnose darter (*Etheostoma simoterum*), greenside darter (*E. blennioides*), logperch (*Percina caprodes*), banded sculpin, black sculpin, and mottled sculpin (Yeager and Saylor 1995; J.W. Jones and R.J. Neves, unpub. data 1998). This species is typically associated with riffle and shoal areas in medium to large-sized rivers (Gordon 1991; Parmalee and Bogan 1998). It is found in substrate ranging from coarse sand to cobble (Gordon 1991).

This species, like the oyster mussel, was once widely distributed, historically occurring in five States (Alabama, Kentucky, Mississippi, Tennessee, and Virginia). It has likewise apparently been eliminated from the main stems of the Tennessee and Cumberland rivers and several of their tributaries (Service 2004). It is now restricted to five stream reaches. The Cumberlandian combshell persists in Bear Creek, Colbert County, Alabama, and Tishomingo County, Mississippi; Powell River, Claiborne and Hancock Counties, Tennessee, and Lee County, Virginia; Clinch River, Hancock County, Tennessee, and Scott and Russell Counties, Virginia; Big South Fork, Scott County, Tennessee, and McCreary County, Kentucky; and Buck Creek, Pulaski County, Kentucky (Isom and Yokely 1968; Schuster *et al.* 1989; Ahlstedt 1991b; Bakaletz 1991; Gordon 1991; Ahlstedt and Tuberville 1997; Hagman 2000; S.A. Ahlstedt, pers. comm. 2002; R.M. Jones, Mississippi Museum of Natural Science, pers. comm. 2002; R.R. Cicerello, pers. comm. 2003; McGregor and Garner 2004).

Purple Bean (Villosa perpurpurea (Lea 1861))

Gravid female purple beans have been observed in January and February (Ahlstedt 1991b; R.S. Butler, Service, pers. comm. 2003). Glochidia of the purple bean have been identified on the fantail darter (*Etheostoma flabellare*), greenside darter, banded sculpin, black sculpin, and mottled sculpin (Watson and Neves 1996; J. W. Jones, pers. comm. 2003). This species inhabits small creeks to medium-sized rivers and can be found in a variety of substrates (Gordon 1991; Parmalee and Bogan 1998).

The purple bean is endemic to the upper Tennessee River drainage in Tennessee and Virginia. Its historical range included Powell River, Lee County, Virginia; Clinch River System, Claiborne, Grainger, and Hancock Counties, Tennessee, and Russell, Scott, Tazewell, and Wise counties, Virginia; Emory River System Morgan and Cumberland Counties, Tennessee; and Holston River System, Hawkins and Sullivan Counties, Tennessee, and Scott and Washington Counties, Virginia. It has apparently been extirpated from Powell River, Emory River, Daddys Creek (Emory River System), North Fork Beech Creek (Holston River System), and North Fork Holston River (Service 2004). The purple bean persists in portions of the Clinch River main stem, Hancock County, Tennessee, and Scott, Russell, and Tazewell Counties, Virginia; Copper Creek (a Clinch River tributary), Scott County, Virginia; Indian Creek (a Clinch River tributary), Tazewell County, Virginia; Obed River (an Emory River tributary), Morgan and Cumberland Counties, Tennessee; and Beech Creek (a Holston River tributary), Hawkins County, Tennessee (Ahlstedt 1991b; Gordon 1991; Winston and Neves 1997; Watson and Neves 1996; Ahlstedt and Tuberville 1997; S.A. Ahlstedt, pers. comm. 2000, 2002, 2003; Fraley and Ahlstedt 2001).

Rough Rabbitsfoot (Quadrula cylindrica strigillata (Wright 1898))

Spawning for the rough rabbitsfoot apparently occurs from May through June (Yeager and Neves 1986). Glochidia of rough rabbitsfoot have been identified on the whitetail shiner (*Cyprinella galactura*), spotfin shiner (*Cyprinella spiloptera*), and bigeye chub (*Hybopsis amblops*) (Yeager and Neves 1986). This species prefers clean sand and gravel substrate in streams ranging from medium-sized creeks to medium-sized rivers (Parmalee and Bogan 1998).

Like the purple bean, the rough rabbitsfoot is endemic to the upper Tennessee River System. The rough rabbitsfoot historically occupied Powell River, Hancock and Claiborne Counties, Tennessee, and Lee County, Virginia; Clinch River System, Hancock and Claiborne Counties, Tennessee, and Russell, Scott, and Tazewell Counties, Virginia; and Holston River System, Hawkins and Sullivan Counties, Tennessee, and Scott and Washington Counties, Virginia. It is apparently extirpated from the entire Holston River System (Service 2004). It currently persists in portions of Powell River, Claiborne and Hancock Counties, Tennessee and Lee County, Virginia; Clinch River, Hancock County, Tennessee and Scott, Russell, and Tazewell Counties, Virginia; and in Indian Creek, Tazewell County, Virginia (Ahlstedt 1981; Gordon 1991; Ahlstedt and Tuberville 1997; Winston and Neves 1997; Watson and Neves 1996; S.A. Ahlstedt, pers. comm. 2000, 2002, 2003; Fraley and Ahlstedt 2001).

The summary of these five mussels presented above represents our current understanding of their historical and current range and distribution. Research is ongoing regarding further taxonomic division of some species. For example, varying mantle coloration, microattractant configuration, size differential, and spawning cycles may indicate that the oyster mussel is actually a species complex (more than one species represented). Researchers from Virginia Tech are in the process of formally describing the Duck River variety (J.W. Jones, unpub. data), and most malacologists (biologists specializing in the life history and ecology of mollusks) believe that the Big South Fork variety is actually a sister species of the federally listed endangered tan riffleshell (*Epioblasma florentina walkeri*), a closely related species (historical records do exist, however, for true oyster mussels in the Big South Fork (see Unit 9 description) (S.A. Ahlstedt, pers. comm. 2002, 2003; J.W. Jones, pers. comm. 2003). Research focusing on the Big South Fork *Epioblasma* should be completed and published later this year (J.W. Jones, pers. comm. 2003). Therefore for this final rule, we recognize the extant *Epioblasma* in the Big South Fork River main stem as a sister species of the tan riffleshell. We also believe for this final rule that the Duck River oyster mussel population is true *E. capsaeformis*. For the remainder of the species, the distributions presented above are based upon shell morphology as described and currently recognized in the best available information. Therefore, we will consider these species' current ranges as outlined above, until presented with new information.

Summary of Decline and Threats to Surviving Populations

Please refer to our proposed rule (68 FR 33234, June 3, 2003) and the recovery plan (Service 2004) for a summary of the decline of and threats to all five mussel species.

Previous Federal Actions

On October 12, 2000, the Southern Appalachian Biodiversity Project filed a lawsuit in U.S. District Court for the Eastern District of Tennessee against the Service, the Director of the Service, and the Secretary of the Department of the Interior, challenging our not-prudent critical habitat determination for the 5 Cumberlandian Region mussel species. On November 8, 2001, the District Court issued an order directing us to re-evaluate our prudency determination for

these five mussels and submit new proposed prudency determinations for the Cumberland elktoe to the **Federal Register** no later than May 19, 2003, and for the remaining four mussels to the **Federal Register** no later than June 16, 2003. We were also directed to submit by those same dates new proposed critical habitat designations, if prudent. Additionally, for the mussels in which critical habitat was found to be prudent, we were directed to finalize our designation not less than 12 months following the prudency determination. On January 8, 2004, the District Court extended our deadline to submit the final rule to the Office of the Federal Register to not later than August 19, 2004.

Other Federal actions for these species prior to June 3, 2003, are outlined in our proposed rule to designate critical habitat for these 5 mussel species (68 FR 33234). Publication of the proposed rule opened a 60-day comment period, which closed on September 2, 2003. The comment period was reopened October 6, 2003, through December 5, 2003, in order to receive comments on a draft economic analysis, a technical correction and possible modification of Unit 8 Rock Creek, and to accommodate a public hearing which was held on October 29, 2003, in Tazewell County, Virginia (68 FR 57643).

Summary of Comments and Recommendations

During the open comment periods for the proposed rule (68 FR 33234), public hearing, and draft economic analysis (68 FR 57643), and the October 2003 reopening (68 FR 57643), we requested all interested parties to submit comments or information concerning the proposed designation of critical habitat for the 5 mussels. We contacted all appropriate Federal, State, and local agencies, county governments, elected officials, scientific organizations, and other interested parties and invited them to comment. We also sent notifications to the following newspapers: TimesDaily, Florence, Alabama; The Tennessean, Nashville, Tennessee; The Knoxville News-Sentinel, Knoxville, Tennessee; The Kingsport Times-News, Kingsport, Tennessee; The Columbia Daily Herald, Columbia, Tennessee; and The Commonwealth Journal, Somerset, Kentucky.

We received a total of 27 comments at the public hearing and during the two comment periods. A transcript of the hearing is available for inspection (see **ADDRESSES** section). Nine comments supported the proposed designation. Of these, two also supported an expansion of critical habitat, ten comments expressed opposition, and four either provided additional information, were noncommittal, or expressed both opposition to and support of certain aspects of the proposed designation. Four of the responses were from the peer reviewers. Comments were received from five private organizations, four Federal agencies, three State governmental agencies, one business, three local governments, and four individuals. Several of the respondents commented on more than one occasion (*e.g.*, at the public hearing and during the first comment period).

We directly notified and requested comments from all affected States. The State comments can be found in the Comment Section under numbers 1, 2, and 3 for Kentucky State Nature Preserves Commission (KNPC), 13 and 34 for the Virginia Department of Transportation (VDOT), and 14 and 35 for the Tennessee Department of Environment and Conservation (TDEC). TDEC and KNPC both submitted comments in support of the designation. KNPC also supported an expansion of designated areas. The States of Virginia, Alabama, and Mississippi expressed no position.

Peer Review

In accordance with our peer review policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we requested the expert opinions of four independent specialists who are recognized authorities on freshwater mussels and the Tennessee and Cumberland River Basins regarding pertinent scientific or commercial data and assumptions relating to the supporting biological and ecological information in the proposed designation. The purpose of such review is to ensure that the designation is based on scientifically sound data, assumptions, and analyses, including input of appropriate experts and specialists. All four experts submitted written responses that the proposal included a thorough and accurate review of the available scientific and commercial data on these mussels and their habitats. The peer reviewers neither endorsed nor opposed the proposed designation, but provided technical corrections and additional information for consideration. Comments from peer reviewers are included in the summary below and have been incorporated into this final rule.

We reviewed all comments received for substantive issues and any new information regarding the mussels and critical habitat, and the draft economic analysis. Written comments and oral statements presented at the public hearing and received during the comment periods are addressed in the following summary. For readers' convenience, we have assigned comments to major issue categories and we have combined similar comments into single comments and responses.

Peer Review Comments

(1) *Comment:* The current distribution of the Cumberland elktoe in Rock Creek extends upstream from Dolen Branch. It is described inaccurately in the text, but it is depicted accurately on the Unit 8 map.

Response: After our proposed rule was published, we were informed by the U.S. Forest Service (USFS) that we did not include a reach of Rock Creek upstream of Dolen Branch that contains a 1998 record of a live Cumberland elktoe. This specimen was collected approximately 5 rkm (3 rmi) upstream of Dolen Branch, southwest of Bell Farm. In an October 6, 2003, **Federal Register** notice (68 FR 57643), we announced that we were considering a 6.4 rkm (4.0 rmi) upstream extension to Unit 8. We visited the proposed extension and found that it contains one or more of the primary constituent elements and is of similar quality habitat and character as the remainder of the Unit. We are, therefore, including the upstream extension in our final designation (see Map Unit 8).

(2) *Comment:* The Sinking Creek (Unit 11) Cumberland elktoe population is described as "strong," but it should be considered "uncommon."

Response: We concur and have modified the text accordingly (see "Critical Habitat Unit Description" section).

(3) *Comment:* Critical habitat must include the upstream watershed to conserve aquatic organisms.

Response: Critical habitat designations have relevance to section 7 consultations, which apply solely to Federal actions, including those funded or authorized by Federal agencies. When evaluating the effects of any Federal action subject to a section 7 consultation, activities upstream or along the margin of a designated area must be considered for adverse impacts to critical habitat. Therefore, specific designation of areas above or adjacent to stream channel critical habitats is unnecessary. Identification of the stream channel as critical habitat will provide notice to Federal agencies to review activities conducted within the drainage on their potential effects to the channel, and will alert third parties of the

importance of the area to the survival of the species.

(4) *Comment:* The identified spawning period for the oyster mussel and Cumberlandian combshell is really the glochidial release period.

Response: We have made the appropriate change to the "Taxonomy, Life History, and Distribution" section.

(5) *Comment:* The Duck River population of the oyster mussel will be described as a new species within the next year or so.

Response: We concur that there are differences between the oyster mussel in the Duck River and in other extant populations of the oyster mussel in the Tennessee River System. However, for the purpose of this rule, we continue to consider the oyster mussel in the Duck River as true *E. capsaeformis* (see Taxonomy, Life History, and Distribution section).

(6) *Comment:* The taxonomic status of tan riffleshell (*Epioblasma florentina walkeri*) in the Big South Fork National River and Recreation Area (BSFNRRA) is unambiguous; therefore, this population is not the oyster mussel (*Epioblasma capsaeformis*).

Response: We concur and have made the appropriate changes to the text (see "Taxonomy, Life History, and Distribution" and "Critical Habitat Unit Descriptions" sections).

(7) *Comment:* The mantle pad color of the tan riffleshell (*Epioblasma florentina walkeri*) in the Big South Fork is mottled-brown, not white.

Response: We have modified the text accordingly (see "Taxonomy, Life History, and Distribution" section).

(8) *Comment:* The oyster mussel is likely extirpated from the Clinch River in Russell and Tazewell counties, Virginia, and perhaps from the entire Powell River in Virginia and Tennessee.

Response: We believe that the oyster mussel is likely extirpated from the Powell River, since no live individuals or shells have been found there in the last 14 years. The last time it was found in the Powell River was in Tazewell County, Virginia, in 1990. However, mussels are cryptic species living embedded in the bottom of rivers, and rare species, the oyster mussel in particular, may be difficult to find. The oyster mussel may be found again in this stretch of the Powell in the near future. It has been found recently in Scott County, Virginia, in the Clinch River. We have revised the appropriate sections in the rule to reflect this information.

(9) *Comment:* Black sculpin (*Cottus baileyi*) and banded sculpin (*Cottus carolinae*) also serve as host fish for purple bean.

Response: We concur and have modified the rule accordingly (see "Taxonomy, Life History, and Distribution" section).

Public Comments

Issue A: Comments on Adequacy and Extent of Critical Habitat

(10) *Comment:* It is premature to consider the lower Holston River, lower French Broad River, and Tennessee River below Wilson Dam as potential components of critical habitat for any of these species.

Response: We have determined that these areas are essential to the conservation of the oyster mussel and Cumberlandian combshell. These areas are some of the only river sections remaining that contain the primary constituent elements that are needed for reintroducing these species into their historical habitat. The Tennessee River below Wilson Dam is an established nonessential experimental population (NEP) for 16 mussel species, which includes the oyster mussel and Cumberlandian combshell. Under section 10(j) of the Act, we cannot designate critical habitat for nonessential experimental populations. We are also actively considering the lower French Broad, lower Holston, and Rockcastle Rivers for designation as NEPs to create additional viable populations necessary to conserve and recover the species. Therefore, with this rule, we are not designating the free-flowing reach of the French Broad River below Douglas Dam to its confluence with the Holston River, the free-flowing reach of the Holston River below Cherokee Dam to its confluence with the French Broad River, and the free-flowing reach of the Rockcastle River from the backwaters of Cumberland Lake upstream to Kentucky Route 1956 bridge as critical habitat due to their current or potential status as NEPs. Based on our evaluation under section 4(b)(2) of the Act, we have excluded these potential NEP areas from consideration as critical habitat. See "Exclusions Under Section 4(b)(2)."

(11) *Comment:* It is unclear why suitable river areas (*e.g.*, Knox County sections of the French Broad for the oyster mussel) should be excluded from critical habitat consideration because of "potential status as nonessential experimental population area."

Response: Section 10(j)(2) of the Act provides for the designation of specific reintroduced populations of listed species as "experimental populations." It also states that critical habitat shall not be designated under the Act for any experimental population determined to be not essential to the continued existence of a species. We are actively working with partners and pursuing an NEP designation in the lower French Broad and lower Holston Rivers in Tennessee as well as the Rockcastle River in Kentucky. We believe that the benefits of excluding the remaining river reaches from the designation, from a conservation standpoint, outweigh the benefits of their inclusion (See the Benefits of Inclusion and Benefits of Exclusion Sections in the Proposed Rule, 68 FR 33234). Experimental populations provide us with a flexible, proactive means to meet recovery criteria while not alienating stakeholders, such as municipalities and landowners, whose cooperation is essential for eventual success of the reintroduced population.

(12) *Comment:* Consider using NEPs of nonendangered species and, on occasion, endangered species in the tailwaters of the lower French Broad River, lower Holston River, and Tennessee River downstream of Wilson Dam to determine the realistic limits of their potential use as habitat.

Response: NEPs, as specified in section 10(j) of the Act, are only used for federally listed species. A NEP already exists in the Tennessee River downstream of Wilson Dam for 16 federally listed mussels and under section 10(j) of the Act, we can not designate critical habitat for nonessential experimental populations. The lower French Broad and lower Holston Rivers are presently being considered for designation as NEPs. We have concluded that these three areas, in addition to the Rockcastle River, are essential to the conservation of the oyster mussel and Cumberlandian combshell and are important to our recovery strategy. These areas are some of the only river sections remaining that contain the primary constituent elements that are needed for reintroducing these species into their historical habitat. Based on our evaluation under section 4(b)(2) of the Act, we have excluded these potential NEP areas from consideration as critical habitat.

(13) *Comment:* The Service should exclude any roadway and bridge projects in the Powell and Clinch River systems from the section 7 consultations that might result from the critical habitat designation because of the precautions implemented by the VDOT during design, construction, and maintenance activities to minimize projects' effects on the mussel species.

Response: Only projects that have a Federal nexus (*i.e.*, Federal funding, Federal permit required, etc.) will

trigger section 7 of the Act. Federal agencies consult on actions that may affect listed species of its designated critical habitat. One of the benefits of critical habitat designation is to inform Federal agencies and other third parties of the importance of habitats to the conservation of species, and thus allow for the early consideration of alternatives to actions that might destroy or adversely affect critical habitat. We acknowledge the precautions taken by the VDOT to protect these species and encourage early planning and coordination that can help by resulting in projects that may be determined "not likely to adversely affect" under section 7 and thus avoid a formal consultation. However, we cannot exempt an entity entirely from provisions of section 7 of the Act if there is a Federal nexus. These areas are being retained in the final critical habitat designation because the Powell and Clinch Rivers represent some of the best remaining habitat for four of the five mussels in question. Both streams contain one or more primary constituent elements along with populations of the mussels and are essential to their conservation.

(14) *Comment:* The TDEC and others commented that the Service should exclude the Old Columbia Dam and its impoundment from the final designation because it does not contain the primary constituent elements or mussels in question.

Response: The Old Columbia Dam in Unit 1, at approximately 4.3 meters (14.0 feet) in height, impounds an area from rkm 211 (rmi 131) to rkm 220 (rmi 136.4). Our regulations allow us to designate inclusive areas where the species is not present if they are adjacent to areas occupied by the species and essential to their management and protection (50 CFR 424.12(d)). The dam is inundated during extreme high water conditions and has flow-through during lower water conditions which allows for at least downstream movement of host fishes and possibly attached glochidia. This short reach does contain one or more of the primary constituent elements and is important in maintaining downstream water quality and quantity. It also serves as a downstream corridor between the areas below and above the dam where the oyster mussel is known to survive. Including this reach in the designation will not preclude its continued use for water supply, and the dam itself, which was constructed in 1925, is not included in the critical habitat designation (see "Critical Habitat Unit Descriptions" section discussion of existing features).

(15) *Comment:* The areas designated as critical habitat should be larger to include historical habitat.

Response: Each of the 13 critical habitat units contains one or more of the primary constituent elements and is currently occupied by one or more of the five listed mussels. Because portions of the historical range of each of the five mussels are shared with two or more of the other mussel species, there is considerable overlap between species' current and historical distribution within the 13 habitat units (*e.g.*, the critical habitat for the oyster mussel includes the Powell River, even though this mussel has not been found in the Powell River in 14 years). We believe that we have an adequate mix of occupied and unoccupied habitat (historical) in our final critical habitat designation to establish additional viable populations necessary to conserve the species. Including a mix of occupied and unoccupied habitat offers opportunities to increase each species' current range and number of extant populations into units currently occupied by other listed species included in this designation. We are either designating critical habitat or actively pursuing NEPs for all the remaining habitat that could support these five mussel species.

(16) *Comment:* The designation of critical habitat for the Cumberland elktoe mussel in upper Crooked Creek and upper North Prong of Clear Fork will preclude future construction of a water supply reservoir potentially located in these headwaters and should be moved downstream to accommodate this need.

Response: The Cumberland elktoe presently occurs in both Crooked Creek and the North Prong of Clear Fork. Section 7 of the Act already applies to Federal agencies and their actions as a result of the presence of this federally listed mussel. The habitat designated in Crooked Creek and North Prong Clear Fork contains one or more of the primary constituent elements and has been found to be essential to the conservation of this mussel. After reviewing the best available information, including all public comments, new information, and the economic analysis, we are designating critical habitat for the Cumberland elktoe in these two streams. We refer the reader to the "Methods and Analysis Used to Identify Critical Habitat for Five Mussel Species" section in which we explain our rationale for designating critical habitat.

(17) *Comment:* Can the area designated as critical habitat be expanded in the future to include other streams located in Tazewell County, Virginia, and wouldn't any potential expansion of the areas likewise negatively impact the county?

Response: Under the Act, we can, from time to time as appropriate, revise critical habitat based on the best available information. Such a revision would require us to complete the same rulemaking procedures that occurred with this rule. These procedures include publishing a proposed designation, requesting public comment on a proposed rule, peer-reviewing the proposed rule, conducting public hearings if requested, and publishing a final rule. We are required under the Act when designating or revising critical habitat to evaluate economic or any other relevant impacts associated with specifying an area as critical habitat. Therefore, we would also conduct a new economic analysis as part of this process.

Issue B: Procedural and Legal Comments

(18) *Comment:* Several commenters stated that the critical habitat designation will place undue bureaucratic requirements on small businesses.

Response: Small businesses will only be involved in a section 7 requirement if a project or activity that they are working on is federally funded or permitted or otherwise involves a Federal nexus. The designation of critical habitat for these five mussels will not have a significant economic impact on a substantial number of small entities. Impacts to small businesses are included in the small business analysis in Appendix C of the economic analysis. We refer the reader to the sections below entitled "Regulatory Flexibility Act" (5 U.S.C. 601 *et seq.*) and "Small Business Regulatory Enforcement Fairness Act" (5 U.S.C. 802(2)) for more details.

(19) *Comment:* Comments were received regarding the accuracy of the Service's disclaimer and the belief that the text in the sections "Designation of Critical Habitat Provides Little Additional Protection to Species," "Role of Critical Habitat in Actual Practice of Administering and Implementing the Act," and "Procedural and Resource Difficulties in Designating Critical Habitat" of the proposed rule is factually inaccurate on three specific topics: (1) That critical habitat provides little additional protection to species, (2) that there are insufficient budgetary resources and time to designate critical habitat for listed species, and (3) that the statement "these measures * * * may make the difference between

extinction and survival for many species'' applies a standard of survival that is different from the standard of conservation that is mandated by the Act.

Response: As discussed in the sections ''Designation of Critical Habitat Provides Little Additional Protection to Species,'' ''Role of Critical Habitat in Actual Practice of Administering and Implementing the Act,'' and ''Procedural and Resource Difficulties in Designating Critical Habitat'' and other sections of this and other critical habitat designations, we believe that, in most cases, conservation mechanisms provided through section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, the section 10 incidental take permit process, and cooperative programs with private and public landholders and tribal nations provide greater incentives and conservation benefits than does the designation of critical habitat.

(20) *Comment:* Existing public facilities serving essential needs of the community would be considered to be in noncompliance by the Service when the critical habitat designation is made official.

Response: The areas designated as critical habitat do not include existing features such as water intakes and outfalls, low-level dams, bridge footings, piers and abutments, boat ramps, and exposed pipelines. Federal actions limited to these existing features would not trigger consultation pursuant to section 7 of the Act, unless they adversely modify or destroy critical habitat.

(21) *Comment:* The Columbia Power and Water Systems (CPWS) requested that they be allowed to provide input into the regulatory flexibility analysis on behalf of the local small entities that would be affected by the proposed designation.

Response: No regulatory flexibility analysis is required if the head of the Federal agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. We have certified that this rule will not have a significant effect on a substantial number of small entities. We refer the reader to the ''Regulatory Flexibility Act'' section of this rule in which we explain why we came to that conclusion.

(22) *Comment:* CPWS requested that we revisit our initial certification that a regulatory flexibility analysis is not required.

Response: We have revisited that decision and, relying upon data in the final economic analysis, we have again certified that the designation of critical habitat for these five mussel species will not have a significant economic impact on a substantial number of small entities and that a regulatory flexibility analysis is not required (see ''Regulatory Flexibility Analysis'' section).

(23) *Comment:* CPWS is concerned about the possibility of ''taking'' (as defined under the Act) implications of this proposed designation.

Response: As defined under section 3(18) of the Act: the term ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. Section 9 of the Act applies to the species itself and not to the critical habitat. Since federally listed species already exist in this reach of the Duck River, section 9 of the Act already applies and will not change as a result of the designation of critical habitat. For the same reasons, section 7 already applies to any Federal activity. The designation of critical habitat will not affect the operation of existing structures such as the Old Columbia Dam, as they are presently being operated. Any additions, modifications, new structures, etc., would be subject to section 7.

(24) *Comment:* The critical habitat designation for the entire Duck River reach could prevent development of several of the Tennessee Valley Authority (TVA) water supply alternatives.

Response: These alternatives were already subject to section 7 of the Act due to the fact that federally listed species occur in the Duck River. The inclusion of a reach of the Duck River as critical habitat will not affect this requirement for Federal agencies. They will still have to comply with section 7, but their consultation with the Service now must include a determination on whether the proposed action may affect critical habitat as well as the species.

(25) *Comment:* Areas proposed as critical habitat in the Daniel Boone National Forest (DBNF) should be excluded from the designation because they currently are, and will continue to be, managed to protect endangered mussels.

Response: The DBNF final forest management plan was completed in April 2004 after our proposed critical habitat rule for the five mussel species was published. We reviewed this plan prior to completing our final critical habitat rule to determine if it provided sufficient conservation benefits specific to the mussel species and if there were assurances that the conservation management strategies would be implemented and effective. We found that though the plan was generic in nature and does provide indirect benefits to overall aquatic systems, it did not specifically address the mussel species. For example, a riparian corridor prescription area was established that includes the watercourse and, for varying widths, its associated uplands; standards were developed for the prescription area to lessen the impacts of various activities on water quality and the physical characteristics of the corridor. However, these standards were not specifically developed for the mussel species, and do not address all the threats to mussels in that area.

Furthermore, the plan does not commit the DBNF to any specific project or local action, thus there are no assurances that any conservation management strategies will be implemented for the area, nor these mussel species. In Chapter 1 of the plan, the DBNF states that ''As a framework for decision-making, this Plan does not commit the Forest Service to any specific project or local action. Rather, it describes general management direction; estimates production levels, and assesses the availability and suitability of lands for resource management practices.'' Since the plan does not specifically address mussels and does not provide for measures to reduce threats to mussels, we have not excluded this area from the designation.

(26) *Comment:* Several commenters suggested that critical habitat could impact private property.

Response: The consultation history for these species does not include any consultations for private activities on private lands and few such consultations are anticipated for the future. No Federal nexus exists for activities on private lands that do not require a Federal permit or involve the use of Federal funds. Streambeds of non-navigable waters and most navigable waters are owned by the riparian landowner, which can include private lands. Though streambeds designated can include private lands, without a Federal nexus, these streambeds will not be affected by the designation. Waters of navigable streams are considered public waters by the States of Mississippi, Alabama, Tennessee, Kentucky, and Virginia. The designation includes streams and river channels within the ordinary high water line. No private upland areas were proposed. In addition, development activities with the greatest potential to affect the mussels and habitat revolve around the increased construction of pipelines, water supply and wastewater infrastructure, and roads and bridges

within the proposed critical habitat. These activities involved Federal entities or have a Federal nexus, and thus do not impact entirely private activity. Increased costs of these activities due to the presence of species and habitat is captured through the anticipated consultations and project modifications as quantified within the economic analysis.

(27) *Comment:* The City of Columbia, Tennessee, commented that the designation of critical habitat for the mussels may engender additional State water quality requirements under the Clean Water Act (CWA) involving total maximum daily load (TMDL) approvals and antidegradation language.

Response: As discussed in Section 4.3.3 of the economic analysis, the designation of critical habitat can result in greater State protection to a stream segment. Critical habitat is one of many considerations used by TDEC when determining whether a water body is a high quality water (Tier II or Tier III, also known as Outstanding National Resource Waters) and thus to determine the level of water quality protection, including the application of TMDLs and antidegradation language. However, there are stream sections in Tennessee that contain critical habitat, but are listed on the State's 303(d) list of impaired streams. Therefore, the designation of critical habitat does not automatically mean that the water body is classified as high quality water. The designation of critical habitat will not affect the State water quality requirements on existing discharges. It could result in greater State protections for new discharges or modifications to existing discharges. However, since this section of the Duck River already contains federally listed species, we believe that the addition of critical habitat will not significantly increase the State's water quality requirements.

(28) *Comment:* Will the area designated as critical habitat be required to comply with or be subject to more stringent conditions or regulations, either now or in the future, and will this stop or delay economic development along the Clinch River or within the identified drainage area?

Response: The designation of critical habitat on private land will have no impact on private landowner activities that do not involve federally funded or authorized activities. Section 7 of the Act already applies to projects that are federally funded or authorized due to the existing presence of federally listed species in the stream. Thus, the designation of critical habitat will not increase the section 7 consultation burden to either the Federal agency or the permit applicant.

(29) *Comment:* Tazewell County, Virginia, currently has no zoning. What will be the method of enforcement for the critical habitat?

Response: The burden to comply with the section 7 of the Act falls only on Federal agencies and projects that they fund or authorize. Likewise, the burden to enforce the Act is a Federal responsibility that has been given to the Service. The county is not responsible for enforcement of the Act regardless of the zoning laws.

Issue C: Comments on Individual Units

(30) *Comment:* For the proposed critical habitat in Unit 1 Duck River, Table 4 does not indicate that any of the 74 rkm (46 rmi) is bordered by State or Federal land.

Response: We acknowledge this discrepancy and have modified the text accordingly (see "Land Ownership" section and Table 4).

(31) *Comment:* There does not appear to be adequate justification for the designation of critical habitat for the oyster mussel and the Cumberlandian combshell in the Duck River Unit. The Service states in the rule that from a resource perspective, critical habitat designation is ineffective.

Response: We noted in our prudency determination that, according to the standards placed upon us by the courts, a designation for these five mussels is warranted (see "Prudency Determination" in the proposed rule). The Duck River contains a highly diverse mussel fauna that is one of the best remaining in the Cumberlandian Region, perhaps in the country. It contains one or more of the primary constituent elements and is currently occupied by the oyster mussel and historically contained the Cumberlandian combshell. It is essential to the conservation of both taxa. We acknowledge that critical habitat, from a resource perspective, is often ineffective (see "Designation of Critical Habitat Provides Little Additional Protection to Species" section).

(32) *Comment:* The Cumberlandian combshell does not currently occur in the Duck River; therefore, critical habitat for this species should not be designated there.

Response: The Cumberlandian combshell historically occurred in the Duck River. Water quality and habitat conditions in the Duck River have improved since the TVA instituted minimum flows for Normandy Dam. The section of the Duck River designated as critical habitat now contains higher levels of dissolved oxygen and continuous flow and therefore possesses one or more of the primary constituent elements for the Cumberlandian combshell. This reach, although currently devoid of the Cumberlandian combshell, is essential to its conservation. The Duck River is also occupied by the oyster mussel.

(33) *Comment:* Critical habitat is not needed because this measure will not add to the overall or site-specific protection already afforded to the three federally listed mussels (Cumberland elktoe, Cumberlandian combshell, and oyster mussel) that occur in Units 8, 10, 11, and 12.

Response: The Act has given us the requirement to designate critical habitat once we found that the designation of critical habitat for these five mussels was prudent (68 FR 33234) in accordance with standards established by the courts. Once a prudency determination was made, we set about determining what the primary constituent elements were and deciding what areas were essential to the conservation of these species. Units 8, 10, 11, and 12 all contain one or more of the primary constituent elements and we have determined that all these units are essential to the conservation of these three mussels. Therefore, critical habitat is warranted for all four of these units.

(34) *Comment:* VDOT commented that 425 projects in the Powell River System and 275 projects in the Clinch River System may be impacted by the designation of critical habitat for the mussels. The commenter also noted that existing critical habitat for the spotfin chub (*Erimonax monacha*), yellowfin madtom (*Noturus flavipinnis*), and slender chub (*Erimystax cahni*) overlap with the proposed designation for the mussels by 36 percent and none of the past consultations for roadway projects found that the proposed action would adversely modify habitat.

Response: The final economic analysis addresses the estimated total costs of section 7 projects, which include the VDOT projects that might be affected by the designation of critical habitat in the Clinch and Powell River systems. Most of the cost of the designation (77 percent) is comprised of the administrative costs. The analysis found that existing State and Federal regulations provide sufficient protection of these waterways, and as a result section 7 project modifications are unlikely for most activities. The commenter points out that there is existing critical habitat and that there have been no past consultations for roadway projects that have resulted in an adverse modification of critical habitat. This fact points to the excellent

working relationship between our two agencies and the mutual desire to insure that areas that are essential to the conservation of a federally listed species are adequately protected.

(35) *Comment:* Multiple commenters provided information on the status of the Yanahli Wildlife Management Area (YWMA) in Unit 1 Duck River. In 2001, TVA transferred the area from rmi 137 to rmi 166 to the Tennessee Wildlife Resource Agency (TWRA).

Response: We acknowledge this new information regarding YWMA and have incorporated that information into the final rule and Appendix B of the economic analysis. TWRA is managing YWMA for wildlife, recreation, and natural and cultural preservation. The deed transfer from TVA to TWRA requires no land be sold or used for residential development. In addition, no industrial use will be allowed on the land. In total, 2,752 ha (6,800 ac) are protected through development and use restrictions, 809 ha (2,000 ac) are protected as State Natural Areas, and 1,538 ha (3,800 ac) that includes Fountain Creek are protected for water supply. This will aid in the protection of the designated critical habitat on the Duck River.

A management plan for this site is still in development. We anticipate that this plan will be generic in nature to protect overall water quality, and will not specifically address the mussel species. Thus, we have not excluded this area from the designation.

Issue D: Comments on Science

(36) *Comment:* The introduction of cultured mussels and host fish will provide much greater hope for the preservation of these species than a critical habitat designation.

Response: We believe the reintroduction of captively propagated mussels and host fish is an essential part of the conservation strategy for these mussels. In the 13 critical habitat units and the potential NEP areas in lower French Broad, lower Holston, and Rockcastle River areas that contain one or more of the primary constituent elements essential for the conservation of these mussels, we have identified areas that are suitable for reintroductions for the conservation of all of these mussels.

(37) *Comment:* The designation of critical habitat will not stop the decline of these species, which is due to of the introduction of exotic clams and other species.

Response: Our recovery biologists are tasked with identifying threats to federally listed species and using the Service's resources to reduce or eliminate those threats in our effort to recover the species. We are aware that exotic species may pose threats to the native mussel fauna and that critical habitat may not address that threat. We are working closely with our State partners to address these threats.

Issue E: Comments on Economic Impacts and Economic Analysis

(38) *Comment:* Tazewell County, Virginia, provided a list of 55 businesses that may potentially be affected by critical habitat designation for the mussels and inquired as to whether any of these businesses had been contacted in the process of conducting the economic analysis.

Response: The Tazewell County Administrator was contacted February 27, 2003, and interviewed regarding potential impacts of critical habitat on the county, as were representatives of each of the 20 other counties in which critical habitat is being designated. In addition, all relevant State and Federal regulatory agencies were contacted regarding potential impacts to projects they authorize or fund. It is not feasible to contact every small business which might be affected, nor is there any requirement to do so.

(39) *Comment:* The draft economic analysis should assess potential economic benefits of the critical habitat designation.

Response: The published economic and conservation biology literature indicates that welfare benefits can result from the conservation of endangered and threatened species. A regional economy can benefit from the preservation of healthy populations of endangered and threatened species and the habitat on which they depend. In the final economic analysis of critical habitat designation for the mussels, additional discussion has been provided concerning the potential economic benefits associated with measures implemented for the protection of water and habitat quality that may occur and be attributable to the effects of future section 7 consultations. It is not feasible, however, due to the scarcity of available studies and information relating to the size and value of potential beneficial changes that are likely to occur as a result of the listing of the species or the designation of their critical habitat, to fully describe and accurately quantify all the benefits of potential future section 7 consultation in the context of the economic analysis. Although there are existing studies valuing ecosystem services related to the mussels, such as water filtration, they have limited applicability for valuing the benefits of the critical habitat designation.

The economic analysis does not conclude that the mussels or their critical habitat have no economic value; rather, it simply states that the value cannot be quantified at this time. Further, while the economic analysis concludes that many of the benefits of critical habitat designation are difficult to estimate, it does not necessarily lead to the conclusion that the benefits are exceeded by the costs. We also note that we did not exclude any area due to economic reasons.

(40) *Comment:* If the stream reach below the Old Columbia Dam is designated critical habitat, it is believed that gravel removal will not be permitted. Failure to remove the gravel buildup will cause long-term economic loss to the CPWS and impair our rights under the Federal Energy Regulatory Commission (FERC) license.

Response: The Old Columbia Dam is a FERC licensed hydropower facility with a generating capacity of 300 kilowatts. The dam is not currently in production for two reasons, (1) a flood in March of 2002 damaged the system and repairs have yet to be made, and (2) a gravel bar has formed at the tailwater area of the dam, causing a 1.2 m (4.0-foot) elevation of the water level against the downstream side of the turbine, resulting in a loss of power production. The second issue could impact the mussels, as the oyster mussel currently occupies the gravel bar. A formal consultation with the U.S. Army Corps of Engineers (Corps) and the CPWS would result if the CPWS were to apply for a 404 permit to remove the gravel bar. A potential project modification for this permit is mussel relocation of half a mile of habitat. It is also possible that the permit may not be issued. The total project modification cost, if the permit was issued and mussels were relocated, could be $75,500 per relocation effort. The present value of the opportunity cost of lost power production if the permit was not issued and power generation did not commence would be $452,000 over the next 40 years. Therefore, the costs associated with the Old Columbia Dam hydropower project could be $75,500 (if the permit was issued and mussels were relocated as a result of a formal consultation) to $452,000 (opportunity cost of hydropower generation). However, it has not been determined whether the CPWS will pursue this project based on the costs required to rebuild the equipment damaged in the 2002 flood.

(41) *Comment:* The draft economic analysis completely omits any discussion of water-supply reservoirs and any analysis of potential indirect economic impacts of this designation

resulting from the denial of municipal water supply impoundments by regulatory authorities.

Response: A discussion of water-supply reservoirs is addressed in the final economic analysis. Any possible denial of municipal water supply impoundments by regulatory authorities is based on many different issues (*e.g.*, water quality, federally listed species, loss of free-flowing streams, etc.). In each critical habitat unit that we designated, there are existing federally listed species. As a result, section 7 of the Act already applies to any project that has a Federal nexus (*e.g.*, federally funded or authorized) in these units.

The potential indirect economic impacts cannot be quantified since proposals do not presently exist for a municipal water supply impoundment in any of the designated critical habitat units. Additionally, there is no way to quantify any potential permit denials from regulatory authorities based on the single criteria of critical habitat. We have stated in the final economic analysis that the section 7 consultations would be greater due to the critical habitat designation. These costs are clearly spelled out in section 4 of the economic analysis and were considered in the final critical habitat designation.

(42) *Comment:* The economic analysis should go beyond direct and indirect costs of the consultation process and address the wide-ranging potential impacts on equestrian visitation to the Big South Fork National River and Recreation Area (BSFNRRA.)

Response: River crossings in mussel habitat may be altered but will not be precluded in the BSFNRRA. The economic analysis does not anticipate a measurable reduction in equestrian visitation to the Big South Fork due to alteration of certain river crossings in mussel habitat. Therefore, the economic analysis does not quantify potential impacts on equestrian visitation. We do not believe that there will be any wide-ranging impacts on equestrian visitation to the BSFNRRA due to the critical habitat designation. The critical habitat unit already contains existing federally listed species, so section 7 already applied to equestrian projects such as river crossings and has not resulted in the termination of any river crossings to date.

(43) *Comment:* The draft economic analysis anticipated that a river crossing project within the BSFNRRA may lead to such project modifications as temporary mussel relocation in order to minimize disturbance to the mussels, or termination of the project altogether. The potential termination of the crossing project is inconsistent with the National Park Service's (NPS) January 2003 Supplemental Draft General Management Plan Environmental Impact Statement Big South Fork National River and Recreation Area.

Response: The Draft General Management Plan states that the Station Camp Ford is a designated river crossing for horses and that the riverbed at this location is habitat for endangered mussels. The draft plan states that an "interim method for addressing this issue, *i.e.*, a flagged trail and educational signs, continues to provide for visitor use across, or through, the river" and that additional studies are planned. The preferred alternative is to continue the interim trail crossing method and continue to investigate the most appropriate long-term crossing method. The NPS is still exploring a range of alternatives for this crossing, including "(1) construction of horse bridges over the river, (2) hardening of crossings in the river, (3) relocation of the horse crossings to a less sensitive location, (4) removal of horse crossings from the river, and (5) relocation of mussels to a more suitable location." Therefore, the economic analysis and the General Management Plan do consider a consistent set of possible planning outcomes.

(44) *Comment:* Areas with strong economies, such as the lower French Broad River below Douglas Dam and the Holston River below Cherokee Dam in Grainger, Jefferson, and Knox Counties, were excluded from the proposed critical habitat designation while economically depressed areas (*e.g.*, Clinch River, Tazewell County) were included. The proposal appears to give preferential treatment to these economically strong areas.

Response: The reasons for excluding three river reaches from the proposed, and this final, critical habitat designation had nothing to do with the economics of the areas. We excluded the French Broad River below Douglas Dam and Holston River below Cherokee Dam in Tennessee, and a 24-km (15-mi) stretch of the Rockcastle River in Kentucky, because of our intent to establish NEPs for these areas. While it is true that the economic impact of including these areas would be high (estimated costs top $4.5 million), they were not excluded on economic grounds, but because of their potential status as NEPs for the oyster mussel and Cumberlandian combshell under section 10(j)(2) of the Act. The historical populations of these two species have been extirpated from (and are not able to naturally recolonize) the referenced segments of the Rockcastle, French Broad, and Holston Rivers. The reason we included the Clinch River was because it contained one or more of the primary constituent elements and was found to be essential to the conservation of, and occupied by, four of the five mussel species. The Clinch River is one of the last strongholds for Cumberlandian Region mussels.

(45) *Comment:* A regional economic analysis is not appropriate in the economic analysis for this rule.

Response: The economic analysis conducted with this rule assesses economic impacts incurred by the Service, action agencies, and third parties conducting affected activities in, and adjacent to, the critical habitat designation for the 5 mussels. A regional economic analysis was not performed for this rule.

(46) *Comment:* The Birmingham, Alabama, Field Office of the Office of Surface Mining commented that no impacts to coal mining in Alabama and Mississippi are anticipated due to the designation of critical habitat for the mussels.

Response: This comment confirms the findings discussed in section 4.2.6 of the economic analysis with which we concur.

(47) *Comment:* There are 28 active mines within Tazewell County, Virginia, affecting 588 ha (1,454 ac) in the Clinch River System. How will critical habitat designation impact these operations?

Response: The critical habitat does not include existing features of the human-built environment. These existing mine sites would not be subject to the reinitiation of section 7 consultation as long as the companies met all their existing permit conditions. States are allowed to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations on non-Federal lands, contingent upon the State regulation being as effective and no less stringent than the Federal regulation of the Office of Surface Mining with the Department of the Interior. We do not anticipate any adverse effect on these existing operations. We believe that these 28 active mines are included in the Viriginia's Division of Mined Land Reclamation estimate of 300 permits associated with Unit 5 (Clinch River) and are expected to require technical assistance efforts with the Service during their review process.

(48) *Comment:* The impact analysis (economic) did not include the current gas well operations in the Clinch River drainage, and the impact on these types of operations should be considered.

Response: In Virginia, oil and gas drilling permits are issued by the

Division of Gas and Oil. Because Virginia has regulatory authority, there is no nexus to require section 7 consultation unless a project involves constructing or modifying a FERC-licensed interstate gas line. While FERC maintains a short-term "On the Horizon" listing of major pipeline projects, the agency is unable to estimate the number or location of projects which may require consultation with the Service in the critical habitat units over the next 10 years. If a consultation were required, the project modifications likely to be recommended include minimizing stream crossings, spanning lines along existing bridges to avoid instream work, and constructing catchment basins around wells.

(49) *Comment:* Comments were also received stating that critical habitat for the mussels may impact Tazewell County, Virginia. Tazewell County commented that the designation of critical habitat will be "devastating to Tazewell County's economic growth and development." Comments were also submitted stating that the designation of critical habitat will not have a negative impact on the economy of Tazewell County.

Response: With the exception of cases in which critical habitat designation excludes a portion of available land from development, and where substitutes are limited, designation is unlikely to substantially affect the course of regional economic development. In cases where an industry requires the direct use of the natural resources of mussel-habitat (*e.g.*, large volume of water for cooling or discharge), the presence of the mussels or critical habitat may impact a decision to locate in that area. Environmental regulations such as critical habitat designation likely constitute some fraction of the many factors involved in the decision to locate a facility. However, in the absence of information on the type of economic activity being considered, it is not feasible to determine what level of economic impact the designation may create on the activity. Therefore, the economic analysis recognizes, but does not quantify, potential impacts to the future growth and development.

Critical Habitat

Critical habitat is defined in section 3 of the Act as: (i) The specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. "Conservation" means the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat.

To be included in a critical habitat designation, the habitat must first be "essential to the conservation of the species." Critical habitat designations identify, to the extent known and using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Occupied habitat may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2).)

Our regulations state that "The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species" (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographic area currently occupied by the species.

Our Policy on Information Standards Under the Endangered Species Act, published on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that decisions made by the Service represent the best scientific and commercial data available. It requires Service biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

Critical habitat designations do not signal that habitat outside the designation is unimportant to these five mussels. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 take prohibitions, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods and Criteria Used To Identify Critical Habitat for the Five Mussel Species

As required by section 4(b)(2) of the Act and its implementing regulations (50 CFR 424.12), we used the best scientific and commercial information available to determine critical habitat areas that contain the physical and biological features that are essential for the conservation of these five mussels. We reviewed the available information pertaining to the historical and current distributions, life histories, host fishes, habitats of, and threats to these species. The information used in the preparation of this designation includes: our own site-specific species and habitat information; unpublished survey reports, notes, and communications with other qualified biologists or experts; statewide Geographic Information System (GIS) species occurrence coverages provided by the KSNPC, TDEC, and TVA; peer-reviewed scientific publications; the final listing rule for the five mussels; and our recovery plan for these mussels (Service 2004). We considered all collection records within the last 15 years from streams currently and historically known to be occupied by one or more of the species (see "Taxonomy, Life History, and Distribution" section).

As discussed in part under the "Summary of Decline" section of the proposed rule (68 FR 33237) and the recovery plan (Service 2004), the five mussels are highly restricted in

distribution, generally occur in small populations, exhibit limited recruitment, and show little evidence of recovering from historical habitat loss without significant human intervention. In fact, the recovery plan states that recovery for the five mussels is not likely in the near future because of the extent of their decline, the relative isolation of remaining populations, and varied threats to their continued existence (Service 2004). Therefore, the recovery plan emphasizes protection of surviving populations of these five mussels and their stream and river habitats, enhancement and restoration of habitats, and population management, including augmentation and reintroduction of the mussels.

Primary Constituent Elements

In accordance with sections 3(5)(A)(I) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, we are required to base critical habitat determinations on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species and that may require special management considerations or protection. These include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distribution of a species.

As detailed in the Background section in the proposed critical habitat rule (refer to 68 FR 33234, June 3, 2003) and in this final rule, these five mussels, in general, live embedded in the bottom sand, gravel, and/or cobble substrates of rivers and streams. They also have a unique life cycle that involves a parasitic stage on host fish. Juvenile mussels require stable substrates with low to moderate amounts of sediment and low amounts of filamentous algae, and correct flow and water quality to continue to develop. The presence of suitable host fish is considered an essential element in these mussels' life cycles. In addition, because of their life cycle, small population sizes, and limited habitat availability, they are highly susceptible to competitive or predaceous nonnative species.

Unfortunately, knowledge of the essential features required for the survival of any particular freshwater mussel species consists primarily of basic concepts with few specifics (Jenkinson and Todd 1997). Among the difficulties in defining habitat parameters for mussels are that specific physical and chemical conditions (*e.g.*, water chemistry, flow, etc.) within stream channel habitats may vary widely according to season, precipitation, and human activities within the watershed. In addition, conditions between different streams, even those occupied by the same species, may vary greatly due to geology, geography, and/or human population density and land use. Based on the best available information at this time, the primary constituent elements of critical habitat for all five species discussed herein consist of:

1. Permanent, flowing stream reaches with a flow regime (*i.e*, the magnitude, frequency, duration, and seasonality of discharge over time) necessary for normal behavior, growth, and survival of all life stages of the five mussels and their host fish;

2. Geomorphically stable stream and river channels and banks (structurally stable stream cross section);

3. Stable substrates, consisting of mud, sand, gravel, and/or cobble/boulder, with low amounts of fine sediments or attached filamentous algae;

4. Water quality (including temperature, turbidity, oxygen content, and other characteristics) necessary for the normal behavior, growth, and survival of all life stages of the five mussels and their host fish; and

5. Fish hosts with adequate living, foraging, and spawning areas for them.

All areas designated as critical habitat for the five mussels are within the species' historic ranges and contain one or more of the physical or biological features (primary constituent elements) identified as essential for the conservation of these species. We believe these physical and biological features are essential to the conservation of the species and provide space for individual and population growth and for normal behavior [Constituent elements 1, 2, 3, and 5]; food, water, air, light, minerals, or other nutritional or physiological requirements [Constituent elements 1, 3, and 4]; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring [Constituent elements 3 and 5]; and habitats that are protected from disturbance [Constituent element 1, 2, and 3].

In identifying primary constituent elements, we have taken into account the dynamic nature of riverine systems. We recognize that riparian areas and floodplains are integral parts of the stream ecosystem because they are important in maintaining channel geomorphology, providing nutrient input, and buffering from sediments and pollution. Further, side channel and backwater habitats may be important in the life cycle of fish that serve as hosts for mussel larvae.

Analysis Used To Delineate Critical Habitat

We considered several factors in the selection of specific areas for critical habitat for these five mussels. We assessed the recovery strategy outlined in the recovery plan for these species, which emphasizes: (1) Protection and stabilization of surviving populations; (2) protection and management of their habitat; (3) augmentation of existing small populations; (4) reestablishment/reintroduction of new populations within their historical ranges; and (5) research on species biology and ecology. Small, isolated populations are subject to the loss of unique genetic material (genetic drift) (Soulé 1980; Lacy *et al.* 1995) and the gradual loss of reproductive success or fecundity due to limited genetic diversity (Foose *et al.* 1995). They are likewise more vulnerable to extirpation from random catastrophic events and to changes in human activities and land-use practices (Soulé 1980; Lacy *et al.* 1995). The ultimate goal of the recovery plan is to restore enough viable (self-sufficient) populations of these five mussels such that each species no longer needs protection under the Act (Service 2004).

In the recovery plan, we selected the number of distinct viable stream populations required for delisting of each of the five mussels on the basis primarily of the historical distribution of each species (Table 1). For example, the rough rabbitsfoot is narrowly endemic to the upper Tennessee River System. It historically occupied only three river reaches and, therefore, its conservation can be achieved with fewer populations than the historically wider-ranging oyster mussel. We have concluded that identification of critical habitat that would provide for the number of populations outlined in Table 1 for each species is essential to their conservation.

TABLE 1.—NUMBER OF DISTINCT VIABLE STREAM POPULATIONS OF THE FIVE CUMBERLANDIAN MUSSELS REQUIRED BEFORE DELISTING CAN OCCUR AS OUTLINED IN RECOVERY PLAN (SERVICE 2004)

Species	Number of populations required for delisting
Cumberland elktoe	7
Oyster mussel	9
Cumberlandian combshell	9
Purple bean	5
Rough rabbitsfoot	4

Our approach to delineating specific critical habitat units, based on the recovery strategy outlined above, focused first on considering the historical ranges of the five mussels. We evaluated streams and rivers within the historical ranges of these five mussels for which there was evidence that these species had occurred there at some point (*i.e.*, museum collection records). Within the historical range of these species, we found that a large proportion of the streams and rivers in the Tennessee and Cumberland River Basins that historically supported these mussels have been modified by existing dams and their impounded waters. Extensive portions of these drainages, including the Cumberland and Tennessee River main stems, segments of the Holston River and Powell River, and numerous tributaries of these rivers, cannot be considered essential to the conservation of these species because they no longer provide the physical and biological features that are essential for their conservation (*see* "Primary Constituent Elements" section). We also did not consider several streams with single site occurrence records of a single species as essential to the conservation of these species because these areas exhibited limited habitat availability, isolation, degraded habitat, and/or low management value or potential (*e.g.*, Cedar Creek, Colbert County, Alabama; Little Pigeon River, Sevier County, Tennessee). Similarly, we did not consider as essential areas from which there have been no collection records of these species for several decades (*e.g.*, portions of the upper Holston River System in Tennessee and Virginia, Buffalo River, Little South Fork of the Cumberland River, Laurel River).

We then identified 13 stream or river reaches (units) within the historical ranges of these species for which our data (*i.e.*, collection records over the last 15 years, expert opinion) indicate that one or more of the five mussel species are present along with the primary constituent elements (*see* Table 2, Index map). These units total approximately 885 rkm (550 rmi) in Alabama, Kentucky, Mississippi, Tennessee, and Virginia. We believe that these areas support darters, minnows, sculpins, and other fishes that have been identified as hosts or potential hosts for one or more of the mussels, as evidenced by known fish distributions (Etnier and Starnes 1993), the persistence of the mussels over extended periods of time, or field evidence of recruitment (S.A. Ahlstedt pers. comm. 2002, Butler pers. comm. 2002). We consider all of these 13 reaches essential for the conservation of these five mussels. As discussed in the recovery plan, recovery in the near future is not likely for these five mussel species in their currently reduced and fragmented state. Nonetheless, it is essential to include in this designation these 13 reaches within the historical range of all five mussels that still contain mussels and the primary constituent elements.

We then considered whether these essential areas were adequate for the conservation of these five mussels. As indicated in the recovery plan, threats to the five species are compounded by their limited distribution and isolation and it is unlikely that currently occupied habitat is adequate for the conservation of all five species. Conservation of these species requires expanding their ranges into currently unoccupied portions of their historical habitat because small, isolated, fragmented aquatic populations, as discussed previously, are subject to chance catastrophic events and to changes in human activities and land-use practices that may result in their elimination. Larger, more contiguous populations can reduce the threat of extinction.

Each of the 13 habitat units is currently occupied by one or more of the five listed mussels. Because portions of the historical range of each of the five mussels are shared with two or more of the other mussel species, there is considerable overlap between species' current and historical distribution within the 13 habitat units. This offers opportunities to increase each species' current range and number of extant populations into units currently occupied by other listed species included in this designation. For example, the oyster mussel historically inhabited seven units and currently inhabits three. Successful reintroduction of the species into units that they historically occupied (and that are currently occupied by another one or more of the five mussels) would expand the number of populations, thereby reducing the threat of extinction.

We believe that the habitat designation in these 13 units is essential to the conservation of all five mussels and that the 13 units encompass sufficient habitat necessary for the recovery of three of these five species (*e.g.*, Cumberland elktoe, purple bean, rough rabbitsfoot). However, we do not believe that the 13 units provide sufficient essential habitat for the conservation of the oyster mussel and Cumberlandian combshell, based on the number of viable populations required for conservation and recovery of these more widespread species (Table 1). For example, these 13 units include occupied habitat for four existing oyster mussel populations and include unoccupied habitat in four other areas that could support oyster mussel populations. Our recovery plan, however, requires nine viable populations of the oyster mussel before it may be delisted. Therefore, we have determined it is essential to identify all opportunities outside our 13 units to conserve the oyster mussel and Cumberlandian combshell.

We then considered free-flowing river reaches that historically contained the Cumberlandian combshell and oyster mussel but that have had no collection records for the past 15 years, and that, resulting from water quality and quantity improvements, likely contain suitable habitat for these mussels. Through our analysis, we identified four such reaches that contain one or more of the primary continuant elements, and are separated by dams and impoundments from free-flowing habitats that contain extant populations of oyster mussels and Cumberlandian combshells. These areas are the lower French Broad River below Douglas Dam to its confluence with the Holston River, Sevier and Knox counties, Tennessee; the free-flowing reach of the Holston River below Cherokee Dam to its confluence with the French Broad River, Jefferson, Grainger, and Knox Counties, Tennessee; the Tennessee River main stem below Wilson Dam in Colbert and Lauderdale counties, Alabama; and a stretch of the lower Rockcastle River in Laurel, Rockcastle, and Pulaski Counties, Kentucky. Natural recolonization of these areas by these two species is unlikely; however, these species can be reintroduced into these areas to create the additional viable populations necessary to conserve and recover the species. We have therefore concluded that these four reaches are also essential to the conservation of the

oyster mussel and Cumberlandian combshell.

Although we have concluded that they are essential, we are not designating critical habitat in any of these four reaches due to their current or potential status as NEP areas. Section 10(j) of the Act states critical habitat shall not be designated for any experimental population determined to be not essential to the continued existence of the species. On June 14, 2001, we published a final rule to designate NEP status under section 10(j) of the Act for the reintroduction of 16 federally listed mussels (including the oyster mussel and Cumberlandian combshell) to the free-flowing reach below Wilson Dam, in the Tennessee River (66 FR 32250). Therefore, we are not designating critical habitat for the oyster mussel and Cumberlandian combshell in the Tennessee River main stem below Wilson Dam in Colbert and Lauderdale Counties, Alabama.

In addition, we are actively considering the remaining three reaches (the lower French Broad, lower Holston, and Rockcastle Rivers) for designation as NEPs in order to facilitate the reintroduction of the oyster mussel and Cumberlandian combshell, as well as numerous other listed mussels, fishes, and snails. Therefore, while we recognize their likely importance to our recovery strategy for these species, we are not designating these three river reaches as critical habitat. A further discussion of these areas can be found below (*see* "Exclusions under 4(b)(2)" section).

In summary, the habitat contained within the 13 units described below and the habitat within the four historical reaches designated or under consideration for NEP status constitute our best determination of areas essential for the conservation, and eventual recovery, of these five Cumberlandian mussels. We are designating as critical habitat 13 habitat units encompassing approximately 885 rkm (550 rmi) of stream and river channels in Alabama, Mississippi, Tennessee, Kentucky, and Virginia. Each of these units is occupied by one or more of the five mussels. Although these 13 units represent only a small proportion of each species' historical range, these habitat units include a significant proportion of the Cumberlandian Region's remaining highest-quality free-flowing rivers and streams and reflect the variety of small-stream-to-large-river habitats historically occupied by each species. Because mussels are naturally restricted by certain physical conditions within a stream or river reach (*e.g.*, flow, stable substrate), they may be unevenly distributed within these habitat units. Uncertainty on upstream and downstream distributional limits of some populations may have resulted in small areas of occupied habitat excluded from, or areas of unoccupied habitat included in, the designation.

The habitat areas contained within the units described below constitute our best evaluation of areas needed for the conservation of these species at this time. Critical habitat may be revised for any or all of these species should new information become available.

Special Management Consideration or Protection

When designating critical habitat, we assess whether the areas determined to be essential for conservation may require special management considerations or protections. All 13 critical habitat units identified in this final designation may require special management considerations or protection to maintain geomorphic stability, water quantity or quality, substrates, or presence of fish hosts. All of these units are threatened by actions that alter the stream slope (*e.g.*, channelization, instream mining, impoundment) or create significant changes in the annual water or sediment budget (*e.g.*, urbanization, deforestation, water withdrawal); and point and/or nonpoint source pollution that results in contamination, nutrification, or sedimentation. Habitat fragmentation, population isolation, and small population size compounds these threats to the species. Various activities in or adjacent to each of the critical habitat units described in this final rule may affect one or more of the primary constituent elements that are found in the unit. These activities include, but are not limited to, those listed below in the "Effects of Critical Habitat" section as "Federal Actions That May Affect Critical Habitat and Require Consultation." None of the critical habitat units is presently under special management or protection provided by a legally operative, adequate plan or agreement for the conservation of these mussels. These threats may render the habitat less suitable for these five mussels, therefore, we have determined that the critical habitat units may require special management or protection. At this time, special management considerations under 3(5)(a) of the Act warrant designating these units as critical habitat.

Critical Habitat Designation

In accordance with our recovery plan, protection of the habitat in these units and their surviving populations is essential to the conservation of the five mussels. The areas that we are designating as critical habitat for the five mussels provide one or more of the primary constituent elements described above. Table 2 summarizes the location and extent of critical habitat and whether or not that critical habitat is currently occupied or unoccupied. All of the designated areas require special management considerations to ensure their contribution to the conservation of these mussels. For each stream reach designated as a critical habitat unit, the upstream and downstream boundaries are described in general detail below; more precise estimates are provided in the "Regulation Promulgation" section of this rule.

*TABLE 2.—APPROXIMATE RIVER DISTANCES, BY DRAINAGE AREA, FOR OCCUPIED AND UNOCCUPIED CRITICAL HABITAT FOR THE FIVE ENDANGERED MUSSEL SPECIES

Species, stream (unit), and State	Currently occupied		Currently unoccupied	
	River kilometers	River miles	River kilometers	River miles
Cumberland elktoe:				
Rock Creek (Unit 8), KY	17	11	.....	.....
Big South Fork (Unit 9), TN, KY	43	27	.....	.....
North Fork White Oak Creek (Unit 9), TN	11	7	.....	.....
New River (Unit 9), TN	14.5	9	.....	.....
Clear Fork (Unit 9), TN	40	25	.....	.....
White Oak Creek (Unit 9), TN	10	6	.....	.....
Bone Camp Creek (Unit 9), TN	6	4	.....	.....

*TABLE 2.—APPROXIMATE RIVER DISTANCES, BY DRAINAGE AREA, FOR OCCUPIED AND UNOCCUPIED CRITICAL HABITAT FOR THE FIVE ENDANGERED MUSSEL SPECIES—Continued

Species, stream (unit), and State	Currently occupied		Currently unoccupied	
	River kilometers	River miles	River kilometers	River miles
Crooked Creek (Unit 9), TN	14.5	9	.....	.....
North Prong Clear Fork (Unit 9), TN	14.5	9	.....	.....
Sinking Creek (Unit 11), KY	13	8	.....	.....
Marsh Creek (Unit 12), KY	24	15	.....	.....
Laurel Fork (Unit 13), TN, KY	8	5	.....	.....
Total	215.5	135	.....	.....
Oyster mussel:				
Duck River (Unit 1), TN	74	46	.....	.....
Bear Creek (Unit 2), AL, MS	.....	.....	40	25
Powell River (Unit 4), TN, VA	.....	.....	154	94
Clinch River (Unit 5), TN, VA	242	150	.....	.....
Copper Creek (Unit 5), VA	.....	.....	21	13
Nolichucky River (Unit 6), TN	8	5	.....	.....
Big South Fork (Unit 9), TN, KY	.....	.....	43	27
Buck Creek (Unit 10), KY	.....	.....	58	36
Total	324	201	316	195
Cumberlandian combshell:				
Duck River (Unit 1), TN	.....	.....	74	46
Bear Creek (Unit 2), AL, MS	40	25	.....	.....
Powell River (Unit 4), TN, VA	154	94	.....	.....
Clinch River (Unit 5), TN, VA	242	148	.....	.....
Nolichucky River (Unit 6), TN	.....	.....	8	5
Big South Fork (Unit 9), TN, KY	43	27	.....	.....
Buck Creek (Unit 10), KY	58	36	.....	.....
Total	537	330	82	51
Purple bean:				
Obed River (Unit 3), TN	40	25	.....	.....
Powell River (Unit 4), TN, VA	.....	.....	154	94
Clinch River (Unit 5), TN, VA	242	148	.....	.....
Copper Creek (Unit 5), VA	21	13	.....	.....
Indian Creek (Unit 5), VA	4	2.5	.....	.....
Beech Creek (Unit 7), TN	23	14	.....	.....
Total	330	202.5	154	94
Rough rabbitsfoot:				
Powell River (Unit 4), TN, VA	154	94	.....	.....
Clinch River (Unit 5), TN, VA	242	148	.....	.....
Copper Creek (Unit 5), VA	.....	.....	21	13
Indian Creek (Unit 5), VA	4	2.5	.....	.....
Total	400	244.5	21	13

*Table 2 refers to the location and extent of critical habitat for each species. For more detail, refer to § 17.95. Table 2 will reflect totals on a species level only, because units are listed under each species as appropriate.

Critical Habitat Unit Descriptions

The critical habitat units described below include the stream and river channels within the ordinary high-water line. As defined in 33 CFR 329.11, the ordinary high water line on nontidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas. The critical habitat does not include existing features of the human-built environment such as water intakes and outfalls, low-level dams, bridge footings, piers and abutments, boat ramps, and exposed pipelines. As such, Federal actions limited to these areas would not trigger consultation pursuant to section 7 of the Act, unless they affect the species or destroy or adversely modify its critical habitat. We are designating the following units as critical habitat for these five mussels (refer to Table 2 for the location and extent of critical habitat designated for each species and more specifically to § 17.95, Critical habitat—fish and wildlife, at the end of this rule).

Unit 1. Duck River, Maury and Marshall Counties, Tennessee

Unit 1 encompasses 74 rkm (46 rmi) of the main stem of the Duck River channel from rkm 214 (rmi 133) (0.3 rkm (0.2 rmi) upstream of the First Street Bridge in the City of Columbia, Maury County, Tennessee, upstream to Lillard Mill Dam at rkm 288 (rmi 179), Marshall County, Tennessee. This reach of the Duck River contains a robust, viable population of the oyster mussel (Ahlstedt 1991b; Gordon 1991; S.A. Ahlstedt, pers. comm. 2002) and historically supported the Cumberlandian combshell (Hinkley and Marsh 1885; Ortmann 1925; Isom and

Yokley 1968; van der Schalie 1973; Gordon 1991). Approximately 59 percent of this Unit is now bounded by the YWMA (recently transferred from the TVA to TWRA).

Unit 2. Bear Creek, Colbert County, Alabama, and Tishomingo County, Mississippi

Unit 2 encompasses 40 rkm (25 rmi) of the main stem of Bear Creek from the backwaters of Pickwick Lake at rkm 37 (rmi 23), Colbert County, Alabama, upstream through Tishomingo County, Mississippi, ending at the Mississippi/Alabama State line. Recent mussel surveys in the Mississippi section of Bear Creek confirmed that the Cumberlandian combshell is still extant (R.M. Jones, pers. comm. 2002), and continues to be present in the Colbert County, Alabama portion of the unit (Isom and Yokley 1968; McGregor and Garner 2004). Bear Creek is in the historical range of the oyster mussel (Ortmann 1925).

Unit 3. Obed River, Cumberland and Morgan Counties, Tennessee

Unit 3 encompasses 40 rkm (25 rmi) and begins at the confluence of the Obed River with the Emory River, Morgan County, Tennessee, and continues upstream to Adams Bridge, Cumberland County, Tennessee. This unit currently contains a population of the purple bean (Gordon 1991; S.A. Ahlstedt, pers. comm. 2002) and is also within designated critical habitat for the federally listed spotfin chub (see "Existing Critical Habitat" and Table 3). Unit 3 is located within the Obed National Wild and Scenic River (ONWSR), a unit of the NPS, and the Catoosa Wildlife Management Area (CWMA), which is owned by the TWRA.

Unit 4. Powell River, Claiborne and Hancock Counties, Tennessee, and Lee County, Virginia

Unit 4 encompasses 154 rkm (94 rmi) and includes the Powell River from the U.S. 25E Bridge in Claiborne County, Tennessee, upstream to rkm 256 (rmi 159) (upstream of Rock Island in the vicinity of Pughs), Lee County, Virginia. This reach is currently occupied by the Cumberlandian combshell (Ahlstedt 1991b; Gordon 1991) and rough rabbitsfoot (Service 2004), and was historically occupied by the oyster mussel (Wolcott and Neves 1990) and the purple bean (Ortmann 1918). It is also existing critical habitat for the federally listed slender chub and yellowfin madtom (see "Existing Critical Habitat" and Table 3).

Unit 5. Clinch River and tributaries, Hancock County, Tennessee, and Scott, Russell, and Tazewell Counties, Virginia

Unit 5 totals 272 rkm (171 rmi), including 242 rkm (148 rmi) of the Clinch River from rkm 255 (rmi 159) immediately below Grissom Island, Hancock County, Tennessee, upstream to its confluence with Indian Creek in Cedar Bluff, Tazewell County, Virginia; 4 rkm (2.5 rmi) of Indian Creek from its confluence with the Clinch River upstream to the fourth Norfolk Southern Railroad crossing at Van Dyke, Tazewell County, Virginia; and 21 rkm (13 rmi) of Copper Creek from its confluence with the Clinch River upstream to Virginia State Route 72, Scott County, Virginia. The Clinch River main stem currently contains the oyster mussel, rough rabbitsfoot, Cumberlandian combshell, and purple bean (Gordon 1991; Ahlstedt and Tuberville 1997; S.A. Ahlstedt, pers. comm. 2002). Indian Creek currently supports populations of the purple bean and rough rabbitsfoot (Winston and Neves 1997; Watson and Neves 1996). Copper Creek is currently occupied by a low-density population of the purple bean and contains historical records of both the oyster mussel and rough rabbitsfoot (Ahlstedt 1981; Fraley and Ahlstedt 2001; S.A. Ahlstedt, pers. comm. 2003). Copper Creek is critical habitat for the yellowfin madtom and a portion of the Clinch River main stem section is critical habitat for both the slender chub and the yellowfin madtom (see "Existing Critical Habitat" and Table 3).

Unit 6. Nolichucky River, Hamblen and Cocke Counties, Tennessee

Unit 6 includes 8 rkm (5 rmi) of the main stem of the Nolichucky River and extends from rkm 14 (rmi 9) (approximately 0.6 rkm (0.4 rmi) upstream of Enka Dam to Susong Bridge in Hamblen and Cocke counties, Tennessee. The Nolichucky River currently supports a small population of the oyster mussel (S.A. Ahlstedt, pers. comm. 2002) and was historically occupied by the Cumberlandian combshell (Gordon 1991).

Unit 7. Beech Creek, Hawkins County, Tennessee

Unit 7 encompasses 23 rkm (14 rmi) and extends from rkm 4 (rmi 2) of Beech Creek in the vicinity of Slide, Hawkins County, Tennessee, upstream to the dismantled railroad bridge at rkm 27 (rmi 16). It supports the best remaining population of purple bean and the only remaining population of any of these species in the Holston River drainage (Ahlstedt 1991b; S.A. Ahlstedt, pers. comm. 2002).

Unit 8. Rock Creek, McCreary County, Kentucky

Unit 8 includes 17.4 rkm (11.0 rmi) of the main stem of Rock Creek and begins at the Rock Creek/White Oak Creek confluence and extends upstream to the low water crossing at rkm 25.6 (rmi 15.9) approximately 2.6 km (1.6 mi) southwest of Bell Farm in McCreary County, Kentucky. This unit, which is bounded by the DBNF and some private inholdings, is currently occupied by the Cumberland elktoe (Cicerello 1996).

Unit 9. Big South Fork and Tributaries, Fentress, Morgan, and Scott Counties, Tennessee, and McCreary County, Kentucky

Unit 9 encompasses 153 rkm (95 rmi) and consists of 43 rkm (27 rmi) of the Big South Fork of the Cumberland River main stem from its confluence with Laurel Crossing Branch downstream of Big Shoals, McCreary County, Kentucky, upstream to its confluence with the New River and Clear Fork, Scott County, Tennessee; 11 rkm (7 rmi) of North White Oak Creek from its confluence with the Big South Fork upstream to Panther Branch, Fentress County, Tennessee; 14.5 rkm (9.0 rmi) of the New River from its confluence with Clear Fork upstream to U.S. Highway 27, Scott County, Tennessee; 40 rkm (25 rmi) of Clear Fork from its confluence with the New River upstream to its confluence with North Prong Clear Fork, Morgan and Fentress Counties, Tennessee; 10 rkm (6 rmi) of White Oak Creek from its confluence with Clear Fork upstream to its confluence with Bone Camp Creek, Morgan County, Tennessee; 6 rkm (4 rmi) of Bone Camp Creek from its confluence with White Oak Creek upstream to Massengale Branch, Morgan County, Tennessee; 14.5 rkm (9.0 rmi) of Crooked Creek from its confluence with Clear Fork upstream to Buttermilk Branch, Fentress County, Tennessee; and 14.5 rkm (9 rmi) of North Prong Clear Fork from its confluence with Clear Fork upstream to Shoal Creek, Fentress County, Tennessee. The main stem of the Big South Fork currently supports the Cumberland elktoe and the best remaining Cumberlandian combshell population in the Cumberland River System (Bakaletz 1991; Gordon 1991; R.R. Cicerello, pers. comm. 2003). The main stem of the Big South Fork historically contained the oyster mussel (S.A. Ahlstedt, pers. comm. 2002; Service 2004). The *Epioblasma* mussel that currently inhabits the Big South Fork main stem, and that is occasionally

referred to as the oyster mussel, is now recognized as a sister species of the tan riffleshell (see "Taxonomy, Life History, and Distribution" section) (Service 2004; J. Jones, pers. comm. 2003). The remainder of the unit contains habitat currently occupied by the Cumberland elktoe (Call and Parmalee 1981; Bakaletz 1991; Gordon 1991). The largest population of Cumberland elktoe in Tennessee is in the headwaters of the Clear Fork System (Call and Parmalee 1981; Bakaletz 1991). The Big South Fork and its many tributaries may actually serve as habitat for one large interbreeding population of the Cumberland elktoe (Service 2004).

Unit 10. Buck Creek, Pulaski County, Kentucky

Unit 10 encompasses 58 rkm (36 rmi) and includes Buck Creek from the State Route 192 Bridge upstream to the State Route 328 Bridge in Pulaski County, Kentucky. Buck Creek is currently occupied by the Cumberlandian combshell (Gordon 1991; Hagman 2000; R.R. Cicerello, pers. comm. 2003) and historically supported the oyster mussel (Schuster *et al.* 1989; Gordon 1991). This unit is adjacent to the DBNF.

Unit 11. Sinking Creek, Laurel County, Kentucky

Unit 11 encompasses 13 rkm (8 rmi) and extends from the Sinking Creek/Rockcastle River confluence upstream to Sinking Creek's confluence with Laurel Branch in Laurel County, Kentucky. The Cumberland elktoe is present but uncommon in this Unit (R.R. Cicerello, pers. comm. 2003). This unit is primarily within land owned by the DBNF, but also includes private lands.

Unit 12. Marsh Creek, McCreary County, Kentucky

Unit 12 includes 24 rkm (15 rmi) and consists of Marsh Creek from its confluence with the Cumberland River upstream to the State Road 92 Bridge in McCreary County, Kentucky. This unit, which is bounded by lands owned by the DBNF and private landowners, currently contains the State of Kentucky's best population of Cumberland elktoe (R.R. Cicerello, pers. comm. 2003) and the best remaining mussel fauna in the Cumberland River above Cumberland Falls (Cicerello and Laudermilk 2001).

Unit 13. Laurel Fork, Claiborne County, Tennessee, and Whitley County, Kentucky

Unit 13 includes 8 rkm (5 rmi) of Laurel Fork of the Cumberland River from the Campbell/Claiborne County line upstream 11.0 rkm (6.9 rmi) through Claiborne County, Tennessee, to Whitley County, Kentucky. The upstream terminus is 3 rkm (2 rmi) upstream of the Kentucky/Tennessee State line. A "sporadic" population of Cumberland elktoe currently persists in this area (Cicerello and Laudermilk 2001).

Existing Critical Habitat

Approximately 332.0 rkm (206.5 rmi) (38 percent) of the critical habitat for the five mussels (within three units) are already designated critical habitat for the yellowfin madtom, slender chub, or spotfin chub (Table 3). The spotfin chub, slender chub, and yellowfin madtom are listed as threatened species under the Act. Our consultation history on these existing critical habitat units is provided in the "Effects of Critical Habitat Designation" section.

TABLE 3.—CRITICAL HABITAT DESIGNATION FOR THE FIVE MUSSELS THAT OVERLAP REACHES AND STREAMS THAT ARE CURRENTLY DESIGNATED CRITICAL HABITAT FOR OTHER FEDERALLY LISTED SPECIES

Unit (unit #)	Species	Reference	Length of overlap (rkm/rmi)
Obed River (3)	Spotfin chub	42 FR 45527	40/25
Powell River (4)	Yellowfin madtom, slender chub	42 FR 45527	154/94
Clinch River (5) (and Copper Creek)	Yellowfin madtom, slender chub	42 FR 45527	142.0/87.5
Total			336/206.5

Land Ownership

Streambeds of non-navigable waters and most navigable waters are owned by the riparian landowner. Waters of navigable streams are considered public waters by the States of Mississippi, Alabama, Tennessee, Kentucky, and Virginia. Table 4 summarizes primary riparian land ownership in each of the critical habitat units. Approximately 75 percent, 655 rkm (407 rmi), of stream channels designated as critical habitat are bordered by private lands.

Public land adjacent to final critical habitat units consists of approximately 230 km (143 mi) of riparian lands, including the ONWSR and the CWMA in the Obed River Unit (40 rkm (25 rmi)); DBNF in the Rock Creek, Sinking Creek, and Marsh Creek Units (30 rkm (19 rmi)); the YWMA along the Duck River Unit (43 rkm (27 rmi)); and the BSFNRRA in the Big South Fork Unit (109 rkm (68 rmi)).

TABLE 4.—ADJACENT RIPARIAN LAND OWNERSHIP IN CRITICAL HABITAT UNITS (RKM/RMI) IN THE TENNESSEE AND CUMBERLAND RIVER BASINS

Critical habitat units	Private	State	Federal
1. Duck River	31/19	43/27	.....
2. Bear Creek	40/25	.....	.....
3. Obed River	.....	32/20	8/5
4. Powell River	154/94	.....	.....
5. Clinch River and tributaries	272/171	.....	.....
6. Nolichucky River	8/5	.....	.....
7. Beech Creek	23/14	.....	.....
8. Rock Creek	.....	.....	18/11
9. Big South Fork and tributaries	44/27	.....	109/68
10. Buck Creek	58/36	.....	.....
11. Sinking Creek	8/5	.....	5/3

TABLE 4.—ADJACENT RIPARIAN LAND OWNERSHIP IN CRITICAL HABITAT UNITS (RKM/RMI) IN THE TENNESSEE AND CUMBERLAND RIVER BASINS—Continued

Critical habitat units	Private	State	Federal
12. Marsh Creek	10/6	.....	14/9
13. Laurel Fork	8/5	.....	.....
Totals	656/407	75/47	154/96

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 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. In our regulations at 50 CFR 402.2, we define destruction or adverse modification as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to: Alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory. If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a 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. Through this consultation, the action agency ensures that the permitted actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. "Reasonable and prudent alternatives" are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of 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 critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)).

Activities on Federal lands that may affect these 11 mussels or their critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the USACE under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (*e.g.*, Federal Highway Administration or Federal Emergency Management Agency funding), will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat include those that appreciably reduce the value of critical habitat to the 5 mussels. We note that such activities may also jeopardize the continued existence of the species.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to "jeopardize the continued existence" of a species are those that would appreciably reduce the likelihood of the species' survival and recovery. Actions likely to "destroy or adversely modify" critical habitat are those that would appreciably reduce the value of critical habitat to the listed species.

Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to destroy or adversely

modify critical habitat would often result in jeopardy to the species concerned when the area of the proposed action is occupied by the species concerned.

Federal agencies already consult with us on activities in areas currently occupied by the species to ensure that their actions do not jeopardize the continued existence of the species. These actions include, but are not limited to:

(1) Actions that would alter the minimum flow or the existing flow regime. Such activities could include, but are not limited to, impoundment, channelization, water diversion, water withdrawal, and hydropower generation. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of these mussels and their fish host.

(2) Actions that would significantly alter water chemistry or temperature. Such activities could include, but are not limited to, release of chemicals, biological pollutants, or heated effluents into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities could alter water conditions that are beyond the tolerances of the mussels or their fish host and result in direct or cumulative adverse affects to these individuals and their life cycles.

(3) Actions that would significantly increase sediment deposition within the stream channel. Such activities could include, but are not limited to, excessive sedimentation from livestock grazing, road construction, channel alteration, timber harvest, off-road vehicle use, and other watershed and floodplain disturbances. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of these mussels and their fish host by increasing the sediment deposition to levels that would adversely affect their ability to complete their life cycles.

(4) Actions that would significantly increase the filamentous algal community within the stream channel. Such activities could include, but are not limited to, release of nutrients into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities can result in excessive filamentous algae filling streams and reducing habitat for mussels and their fish hosts, degrading water quality during their decay, and decreasing oxygen levels at night from their respiration to levels below the tolerances of the mussels and/or their fish host. Algae can also directly compete with mussel offspring by covering the sediment that prevents the glochidia from settling into the sediment.

(5) Actions that would significantly alter channel morphology or geometry. Such activities could include but are not limited to channelization, impoundment, road and bridge construction, mining, dredging, and destruction of riparian vegetation. These activities may lead to changes in water flows and levels that would degrade or eliminate the mussels or their fish host and/or their habitats. These actions can also lead to increased sedimentation and degradation in water quality to levels that are beyond the tolerances of the mussels or their fish host.

We consider the 13 critical habitat units to be occupied by the species because at least one of the 5 mussels occurs in these units. Federal agencies already consult with us on activities in areas currently occupied by the species or if the species may be affected by the action to ensure that their actions do not jeopardize the continued existence of the species.

Previous Section 7 Consultations

We have consulted on approximately 129 Federal actions (or activities that required Federal permits) involving these five species since they received protection under the Act. Nine of these were formal consultations. Federal actions that we have reviewed include Federal land management plans, road and bridge construction and maintenance, water quality standards, recreational facility development, dam construction and operation, surface mining proposals, and issuance of permits under section 404 of the CWA. Federal agencies involved with these activities included the Corps; TVA; USFS; EPA; Office of Surface Mining, Reclamation and Enforcement; NPS; Federal Highway Administration; and the Service. The nine formal consultations that have been conducted all involved Federal projects, including five bridge replacements in Tennessee, Kentucky, and Virginia; two Federal land management plans; and the review of two scientific collecting permits for one or more of the five mussel species. None of these formal consultations resulted in a finding that the proposed action would jeopardize the continued existence of any of the five species.

In each of the biological opinions resulting from these consultations, we included discretionary conservation recommendations to the action agency. Conservation recommendations are activities that would avoid or minimize the adverse effects of a proposed action on a listed species or its critical habitat, help implement recovery plans, or develop information useful to the species' conservation.

Previous biological opinions also included nondiscretionary reasonable and prudent measures, with implementing terms and conditions, which are designed to minimize the proposed action's incidental take of these five mussels. Section 3(18) of the Act defines the term take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." Harm is further defined in our regulations (50 CFR 17.3) to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

Conservation recommendations and reasonable and prudent measures provided in previous biological opinions for these mussels have included maintaining State water quality standards, maintaining adequate stream flow rates, minimization of work in the wetted channel, restriction of riparian clearing, monitoring of channel morphology and mussel populations, sign installation, protection of buffer zones, avoidance of pollution, cooperative planning efforts, minimization of ground disturbance, use of sediment barriers, use of best management practices to minimize erosion, mussel relocation from bridge pier footprints, and funding research useful for mussel conservation. In reviewing past formal consultations, we anticipate the need in our proposed rule to reinitiate only one consultation on Federal actions as a result of this final designation. The DBNF in Kentucky since then has finalized their Forest Plan. The USFS has accounted for critical habitat designations in Rock Creek, Buck Creek, Sinking Creek, and Marsh Creek in their plan.

As mentioned in the "Existing Critical Habitat" section, 36 percent of the critical habitat being designated for these five mussels is currently designated critical habitat for the spotfin chub, yellowfin madtom, or slender chub. We have conducted 56 informal consultations involving existing critical habitat for these fish in the areas designated as critical habitat for the five mussels in the Obed River, Powell River, and Clinch River in Tennessee. All of these consultations involved both the potential adverse effects to the species and the potential adverse modification or destruction of critical habitat. These consultations, which

were similar to consultations carried out for the five mussel species, primarily included utility lines, bridge replacements and reconstructions, gravel dredging, and an oil spill on Clear Creek (a tributary of the Obed River and designated critical habitat for the spotfin chub). We have consulted on seven projects that involved existing critical habitat for the yellowfin madtom and/or slender chub in Virginia; three of these consultations were formal, involving projects such as bridge crossings on the Clinch and Powell rivers. None of these formal consultations resulted in a finding that the proposed activity would destroy or adversely modify existing critical habitat previously designated in the area.

The designation of critical habitat will have no impact on private landowner activities that do not involve Federal funding or permits. Designation of critical habitat is only applicable to activities approved, funded, or carried out by Federal agencies.

If you have questions regarding whether specific activities would constitute adverse modification of critical habitat, you may contact the following Service field offices:

Alabama Field Office (251–441–5181)
Kentucky Field Office (502–695–0468)
Mississippi Field Office (601–965–4900)
Tennessee Field Office (931–528–6481)
Southwest Virginia Field Office (276–623–1233).

Exclusions Under Section 4(b)(2)

Section 4(b)(2) of the Act requires that we designate critical habitat on the basis of the best scientific and commercial information available and that we consider the economic impact, effects to national security, and any other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat based on these and other reasons (*e.g.*, the preservation of conservation partnerships) if the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in the extinction of the species. We have prepared an economic analysis that is consistent with the ruling of the 10th Circuit Court of Appeals in *New Mexico Cattle Growers Association* v. *U.S. Fish and Wildlife Service*, 248 F. 3d 1277 (10th Cir. 2001) and that was available for public review and comment during the comment period for the proposed rule. The final economic analysis is available from our Web site at *http://cookeville.fws.gov*. Since the critical habitat designation involves no Tribal lands and no lands pertinent to national security and includes no areas presently under special management or protection provided by a legally operative, adequate plan or agreement for the conservation of these mussels, we believe, other than economics and preservation of conservation partnerships, there are no other relevant impacts to evaluate under section 4(b)(2).

Based on the best available information, including the prepared economic analysis, we have excluded three river reaches: the free-flowing reach of the French Broad River below Douglas Dam to its confluence with the Holston River, Sevier and Knox Counties, Tennessee; the free-flowing reach of the Holston River below Cherokee Dam to its confluence with the French Broad River, Jefferson, Grainger, and Knox Counties, Tennessee; and the free-flowing reach of the Rockcastle River from the backwaters of Cumberland Lake upstream to Kentucky Route 1956 Bridge, in Laurel, Rockcastle, and Pulaski Counties, Kentucky, because of their potential status as NEP areas for the oyster mussel and Cumberlandian combshell. When these river reaches are designated NEP areas and the oyster mussel and Cumberlandian combshell are reintroduced, these two species will be treated as species proposed for listing. However, these areas are already occupied by other federally listed species, namely the Cumberland bean mussel in the Rockcastle and pink mucket mussel and snail darter in the Holston and French Broad Rivers; thus the oyster mussel and Cumberlandian combshell will receive protections from these other listed species. Furthermore, these exclusions will preserve existing conservation partnerships and facilitate (through increased public support) the successful reintroduction of these species, as well as 18 other federally listed species, into their historic habitat. We therefore continue to find that the benefits of excluding these areas outweigh the benefits of designating them as critical habitat. For more information on this exclusion, please refer to the proposed rule to designate critical habitat (June 3, 2003; 68 FR 33234). We have concluded, after careful analysis of the best available information including the economic analysis, to exclude the 3 areas listed above and include the remaining 13 units that we have determined are essential to the conservation of the species in this final designation of critical habitat. The Tennessee River below Wilson Dam was not proposed for critical habitat because it is an established NEP for the oyster mussel and Cumberlandian combshell. Under section 10(j) of the Act, we cannot designate critical habitat for nonessential experimental populations.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not reviewed this rule. We prepared an economic analysis of this action. The draft economic analysis was made available for public comment and we considered those comments during the preparation of this rule. The economic analysis indicates that this rule will not have an *annual* economic effect of $100 million or more; the economic analysis indicates that this rule will have an annual economic effect of $0.7 to $1.6 million. This rule is not expected to adversely affect an economic sector, productivity, jobs, the environment, or other units of government. Under the Act, critical habitat may not be destroyed or adversely modified by a Federal agency action; the Act does not impose any restrictions related to critical habitat on non-Federal persons unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency. Because of the potential for impacts on other Federal agencies' activities, we reviewed this action for any inconsistencies with other Federal agency actions. We believe that this rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients, except those involving Federal agencies, which would be required to ensure that their activities do not destroy or adversely modify designated critical habitat. As discussed above, we do not anticipate that the adverse modification prohibition (from critical habitat designation) will have any significant economic effects such that it will have an annual economic effect of $100 million or more. The final rule follows the requirements for designating critical habitat required in the Act.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996),

whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the 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 that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA also amended the RFA to require a certification statement. We are hereby certifying that this rule will not have a significant effect on a substantial number of small entities.

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 consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result.

The economic analysis determined whether this critical habitat designation potentially affects a "substantial number" of small entities in counties supporting critical habitat areas. It also quantified the probable number of small businesses that experience a "significant effect." SBREFA does not explicitly define either "substantial number" or "significant economic impact." Consequently, to assess whether a "substantial number" of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in the area. Similarly, the analysis considers the relative cost of compliance on the revenues/profit margins of small entities in determining whether or not entities incur a "significant economic impact." Only small entities that are expected to be directly affected by the designation are considered in this portion of the analysis. This approach is consistent with several judicial opinions related to the scope of the RFA (*Mid-Tex Electric Co-Op, Inc.* v. *FERC* and *American Trucking Associations, Inc.* v. *EPA).*

The economic analysis identified activities that are within, or will otherwise be affected by, section 7 of the Act for the mussels. Third parties are not involved in several of the activities potentially affected by section 7 implementation for the mussels (*i.e.*, only the Action agency and the Service are involved in the consultation). Of the remaining activities potentially affected by section 7 implementation for the mussels and involving a third party, many have no directly-regulated small business or government involvement. Private entities are forecast to incur 15 percent of the costs. State and local governments are expected to incur 50 percent of the costs. Project modification costs are associated with road and bridge construction and maintenance and dams/reservoirs. The costs associated with road and bridge construction and maintenance are expected to be borne directly by or passed on to the Federal government. The costs associated with dams/reservoirs are expected to be borne by municipal utilities and passed on to the consumer. Thus, small entities should not be directly impacted by section 7 implementation for these affected projects: road and bridge construction and maintenance; agricultural activities; utilities construction and maintenance; activities in National Forests, National Parks, Wild and Scenic Rivers, and National River and Recreation Areas; coal mining; gravel dredging and excavation; oil and gas development; power plants; dams/reservoirs; water quality activities; and conservation and recreation activities (see the economic analysis for a detailed analysis of affected projects).

To determine if the rule 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). We applied the "substantial number" test individually to each industry to determine if certification is appropriate. In estimating the number of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies; non-Federal activities are not affected by the designation. Federal agencies are already required to consult with the Services under section 7 of the Act on activities that they fund, permit, or implement that may affect the five mussels.

Federal agencies must also consult with us if their activities may affect designated critical habitat. However, we believe this will result in only minimal additional regulatory burden on Federal agencies or their applicants because consultation would already be required because of the presence of the listed mussel species. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process and trigger only minimal additional regulatory impacts beyond the duty to avoid jeopardizing the species.

Since the five mussels were listed (1997), we have conducted nine formal consultations involving one or more of these species. These formal consultations, which all involved Federal projects, included five bridge replacements, two Federal land management plans, an intra-agency review of the Wilson Dam NEP and associated collecting permits, and an intra-agency review of collection permits needed by researchers involved in endangered mussel propagation. These nine consultations resulted in non-jeopardy biological opinions.

We also reviewed approximately 129 informal consultations that have been conducted since these five species were listed involving private businesses and industries, counties, cities, towns, or municipalities. At least 15 of these were with entities that likely met the definition of small entities. These informal consultations concerned activities such as excavation or fill, docking facilities, transmission lines, pipelines, mines, and road and utility development authorized by various Federal agencies, or review of NPEDS permit applications to State water quality agencies by developers, municipalities, mines, businesses, and others. Informal consultations regarding the mussels usually resulted in recommendations to employ best management practices for sediment control, relied on current State water quality standards for protection of water quality, and resulted in little to no modification of the proposed activities.

In reviewing these past informal consultations and the activities involved in light of proposed critical habitat, we do not believe the outcomes would have been different in areas designated as critical habitat.

In summary, we have considered whether this designation would result in a significant economic impact on a substantial number of small entities and find that it would not. Informal consultations on approximately 129 activities in the Tennessee and Cumberland River Basins, by businesses and governmental jurisdictions that might affect these species and their habitats, resulted in little to no economic effect on small entities. In the seven years since the five mussels were listed, there have been no formal consultations regarding actions by small entities. This does not meet the definition of "substantial." In addition, we see no indication that the types of activities we review under section 7 of the Act will change significantly in the future. There would be no additional section 7 consultations resulting from this rule as all 13 of the critical habitat units are currently occupied by one or more listed mussels, so the consultation requirement has already been triggered. Future consultations are not likely to affect a substantial number of small entities. This rule would result in major project modifications only when proposed activities with a Federal nexus would destroy or adversely modify critical habitat. While this may occur, it is not expected to occur frequently enough to affect a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for these five mussels will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2))

Under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 *et seq.*), this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Please refer to the final economic analysis for a discussion of the effects of this determination.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The Office of Management and Budget has provided guidance for implementing this executive order that outlines nine outcomes that may constitute "a significant adverse effect" when compared without the regulatory action under consideration:

- Reductions in crude oil supply in excess of 10,000 barrels per day (bbls);
- Reductions in fuel production in excess of 4,000 bbls per day;
- Reductions in coal production in excess of 5 million tons per year;
- Reductions in natural gas production in excess of 25 million Mcf per year;
- Reductions in electricity production in excess of 1 billion kilowatts per year or in excess of 500 megawatts of installed capacity;
- Increases in energy use required by the regulatory action that exceed the thresholds above;
- Increases in the cost of energy production in excess of one percent;
- Increases in the cost of energy distribution in excess of one percent; or
- Other similarly adverse outcomes.

Five of these criteria are relevant to this analysis: (1) Potential reductions in crude oil supply; (2) potential reductions in coal production; (3) potential reductions in natural gas production; (4) potential increases in the cost of energy production; and (5) potential increases in the cost of energy distribution. The following analysis determines whether these five relevant criteria are likely to experience "a significant adverse effect" as a result of section 7 implementation for the mussels.

Evaluation of Whether Section 7 Implementation Will Result in Reductions in Crude Oil Supply, Coal Production, and Natural Gas Production

Section 7 consultations with respect to oil, gas, and coal operations are anticipated to occur within four Tennessee counties containing proposed critical habitat for the mussels; Cumberland, Fentress, Morgan, and Scott Counties. Exhibit C–1, C–2, and C–3 provide an analysis of whether the energy industry, specifically, crude oil, natural gas, and coal producers, are likely to experience "a significant adverse effect" as a result of section 7 implementation for the mussels.

TABLE 5.—HISTORIC CRUDE OIL PRODUCTION (FENTRESS, MORGAN, AND SCOTT COUNTIES, TENNESSEE, AND MCCREARY COUNTY, KENTUCKY)

[bbls (barrels)]

Year	McCreary County	Fentress County	Morgan County	Scott County	Total bbls	Total bbls/day
1997	1,457	29,193	65,585	69,198	165,433	453
1998	2,365	25,973	50,870	60,340	139,548	382
1999	3,850	26,603	55,275	63,420	149,148	409
2000	3,998	14,114	35,259	49,758	103,129	283
2001	5,702	31,920	45,147	48,683	131,452	360
Average	3,475	25,561	50,427	58,280	137,742	377

As Table 5 illustrates, the Tennessee and Kentucky counties containing proposed critical habitat collectively produce less than 500 bbls of crude oil on a daily basis. Therefore, should section 7 implementation cause the abandonment of future development of 35 to 50 oil wells within McCreary, Fentress, Morgan or Scott Counties, it is unlikely that crude oil supply will drop by more than the threshold of 10,000 bbls per day. In fact, the entire States of Kentucky and Tennessee together produce less oil than the 10,000 bbls threshold (Kentucky produced 7,671 bbls per day in 2001 and Tennessee produced 1,059 bbls per day).

As Table 6 illustrates, the Tennessee and Kentucky counties containing proposed critical habitat collectively produce less than 0.8 million Mcf of natural gas on an annual basis. Therefore, should section 7 implementation cause the abandonment of future development of 35 to 50 natural gas wells within McCreary, Fentress, Morgan or Scott counties, it is unlikely that natural gas production will decrease by more than the threshold of 25 million Mcf per year.

TABLE 6.—HISTORIC NATURAL GAS PRODUCTION (FENTRESS, MORGAN, AND SCOTT COUNTIES, TENNESSEE, AND MCCREARY COUNTY, KENTUCKY)

[Mcf (thousand cubic feet)]

Year	McCreary County	Fentress County	Morgan County	Scott County	Total Mcf	Total million Mcf
1997	22,340	64,401	301,328	331,072	719,141	0.7
1998	43,263	75,408	289,483	314,213	722,367	0.7
1999	139,950	62,494	298,609	335,990	837,043	0.8
2000	217,974	55,018	277,140	307,739	857,871	0.9
2001	229,874	46,422	280,191	245,831	802,318	0.8
Average	130,680	60,749	289,350	306,969	787,748	0.8

As Table 7 illustrates, the Tennessee counties containing proposed critical habitat collectively produce approximately 0.4 million tons of coal on an annual basis. Therefore, should section 7 implementation cause the abandonment of future development of any two mines within Cumberland, Fentress, Morgan or Scott County, it is unlikely that coal production will decrease by more than the threshold of 5 million tons per year. In fact, the entire State of Tennessee produces less coal than the 5 million ton threshold (the State produced 3.3 million tons in 2001).

TABLE 7.—HISTORIC COAL PRODUCTION (CUMBERLAND, FENTRESS, MORGAN, AND SCOTT COUNTIES, TENNESSEE)

[thousand short tons]

Year	Cumberland County	Fentress County	Morgan County	Scott County	Total thousand short tons	Total tons
1997	0	288	56	108	452	452,000
1998	86	211	11	47	355	355,000
1999	256	3	8	168	435	435,000
2000	265	12	31	59	367	367,000
2001	268	83	0	22	373	373,000
Average	175	119	21	81	396	396,400

Evaluation of Whether Section 7 Implementation Will Result in a Reduction in Electricity Production in Excess of 500 Megawatts of Installed Capacity

Installed capacity is "the total manufacturer-rated capacity for equipment such as turbines, generators, condensers, transformers, and other system components" and represents the maximum rate of flow of energy from the plant or the maximum output of the plant. The Old Columbia dam has 0.3 megawatts (MW) of installed capacity and in five years may have 0.6 MW of installed capacity. The average annual generation of the Dam is 1,994,400 KWhr and may increase to 3,555,000 KWhr in the next five years.

The total installed capacity of the Old Columbia Dam is 0.6 MW (600 KW) of hydroelectricity. The average annual generation at these facilities could be up to 3.6 million KWhr. The impact threshold for installed capacity is 500 MW (500,000 KW) and the threshold for annual generation is one billion KWhr. The impact to hydropower production is therefore not expected to surpass the threshold of 500 MW.

Evaluation of Whether Section 7 Implementation Will Result in an Increase in the Cost of Energy Production in Excess of One Percent

In order to determine whether implementation of section 7 of the Act will result in an increase in the cost of energy production, this analysis considers the maximum possible increase in energy production costs. Under the high cost scenario, all decreased hydropower generation is substituted with the more expensive, but most common, coal production. Coal production has production costs of $0.02 per kilowatt-hour, $0.01 greater than the cost of hydropower production. Under this scenario, $36,000 in additional production costs will be incurred, an increase in production costs of approximately 0.002 percent. This analysis therefore does not anticipate an increase in the cost of energy production in excess of one percent. Table 8 summarizes the cost of energy production in Tennessee according to two scenarios, Scenario I in which there is no change due to critical habitat, and Scenario II in which the lost power generation due to the designation of critical habitat is substituted with coal production.

TABLE 8.—AVERAGE PRODUCTION AND ASSOCIATED COSTS FOR ENERGY PRODUCERS IN TENNESSEE

Fuel type	Net generation (1000 KWhrs)	Weighted average of total production (percent)	Production costs ($/KWhr)	Total costs (1,000 dollars)
SCENARIO I				
Hydro	5,665,000	5.91	0.01	56,650
Gas	648,000	0.68	0.04	25,920
Coal	62,349,000	65.00	0.02	1,246,980
Petroleum	549,000	0.57	0.02	10,980
Nuclear	25,825,000	26.92	0.02	516,500
Total	95,191,800	99.08		1,857,030
SCENARIO II				
Hydro	5,661,445	5.90	0.01	56,614
Gas	648,000	0.68	0.04	25,920
Coal	62,352,555	65.01	0.02	1,247,051
Petroleum	549,000	0.57	0.02	10,980
Nuclear	25,825,000	26.92	0.02	516,500
Total	95,191,800	99.08		1,857,065

(Note: totals may not sum because of rounding.)

Evaluation of Whether Section 7 Implementation Will Result in an Increase in the Cost of Energy Distribution in Excess of One Percent

TVA anticipates 38 informal consultations on transmission line construction and maintenance with respect to the mussels during the next ten years. The total administrative costs incurred by TVA as a result of section 7 implementation are $35,000, while costs associated with project modifications are anticipated to total $38,000. In 2002, total operating expenses for TVA were $5.2 billion. Thus, the total costs incurred by TVA as a result of section 7 over ten years ($73,000) are less than one ten-thousandth of one percent of TVAs operating expenses. The impact to energy distribution is therefore not anticipated to exceed the one percent threshold.

Based on the above analysis, this rule is not a significant regulatory action under Executive Order 12866, and it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) 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, tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC 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.

(b) We do not believe that this rule will significantly or uniquely affect small governments. This determination is based on the economic analysis conducted for this designation of critical habitat for these five mussel species. As such, a Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630 ("Government Actions and

Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of designating approximately 885 rkm (550 rmi) in 13 river and stream reaches in Alabama, Mississippi, Tennessee, Kentucky, and Virginia as critical habitat for these five mussel species in a takings implication assessment. The takings implications assessment concludes that this final designation of critical habitat does not pose significant takings implications.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policies, we requested information from, and coordinated development of this critical habitat designation with, appropriate State resource agencies in Alabama, Mississippi, Tennessee, Kentucky, and Virginia. The impact of the designation on State and local governments and their activities was fully considered in the economic analysis. The designation of critical habitat for these five species imposes no additional restrictions to those currently in place, and, therefore, has little additional impact on State and local governments and their activities. The designation may provide some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning, rather than waiting for case-by-case section 7 consultations to occur.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We designate critical habitat in accordance with the provisions of the Act. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of these 5 mussels.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain new or revised collections of information that require OMB approval under the Paperwork Reduction Act. Information collections associated with certain permits pursuant to the Endangered Species Act are covered by an existing OMB approval, and are assigned clearance No. 1018–0094, with an expiration date of July 31, 2004. Detailed information for Act documentation appears at 50 CFR 17. 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

We have determined that we do not need to prepare an Environmental Assessment or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We are not aware of any Tribal lands essential for the conservation of the five mussels. Therefore, the critical habitat for the five mussels does not contain any Tribal lands or lands that we have identified as impacting Tribal trust resources.

References Cited

A complete list of all references cited in this final rule is available upon request from the Tennessee Field Office (see **ADDRESSES** section).

Author

The author of this notice is the Tennessee Field Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Final Regulation Promulgation

■ For the reasons outlined in the preamble, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

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 § 17.11(h), revise each of the entries here listed, in alphabetical order under "CLAMS" in the List of Endangered and Threatened Wildlife, so that they read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
CLAMS							
*	*	*	*	*	*	*	
Bean, Purple	*Villosa perpurpurea*	U.S.A. (TN, VA)	NA	E	602	17.95 (f)	NA
*	*	*	*	*	*	*	
Combshell, Cumberlandian.	*Epioblasma brevidens.*	U.S.A. (AL, KY, MS, TN, VA).	NA	E	602	17.95 (f)	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
Elktoe, Cumberland	*Alasmidonta atropurpurea.*	U.S.A. (KY, TN)	NA	E	602	17.95 (f)	NA
*	*	*	*	*	*	*	
Mussel, oyster	*Epioblasma capsaeformis.*	U.S.A. (AL, GA, KY, MS, NC, TN, VA).	NA	E	602	17.95 (f)	NA
*	*	*	*	*	*	*	
Rabbitsfoot, rough ...	*Quadrula cylindrica strigillata.*	U.S.A. (TN, VA)	NA	E	602	17.95 (f)	NA
*	*	*	*	*	*	*	

■ 3. In § 17.95, at the end of paragraph (f), add an entry for five Cumberland and Tennessee River Basin mussels species to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(f) *Clams and snails.*

* * * * *

Five Tennessee and Cumberland River Basin mussels species: Purple bean (Villosa perpurpurea), Cumberlandian combshell (Epioblasma brevidens), Cumberland elktoe (Alasmidonta atropurpurea), oyster mussel (Epioblasma capsaeformis), and rough rabbitsfoot (Quadrula cylindrica strigillata).

(1) The primary constituent elements essential for the conservation of the purple bean (*Villosa perpurpurea*), Cumberlandian combshell (*Epioblasma brevidens*), Cumberland elktoe (*Alasmidonta atropurpurea*), oyster mussel (*Epioblasma capsaeformis*), and rough rabbitsfoot (*Quadrula cylindrica strigillata*) are those habitat components that support feeding, sheltering, reproduction, and physical features for maintaining the natural processes that support these habitat components. The primary constituent elements include:

(i) Permanent, flowing stream reaches with a flow regime (i.e, the magnitude, frequency, duration, and seasonality of discharge over time) necessary for normal behavior, growth, and survival of all life stages of the five mussels and their host fish;

(ii) Geomorphically stable stream and river channels and banks;

(iii) Stable substrates consisting of mud, sand, gravel, and/or cobble/boulder, with low amounts of fine sediments or attached filamentous algae;

(iv) Water quality (including temperature, turbidity, oxygen content, and other characteristics) necessary for the normal behavior, growth, and survival of all life stages of the five mussels and their host fish; and

(v) Fish hosts with adequate living, foraging, and spawning areas for them.

(2) Critical habitat unit descriptions and maps.

(i) Index map. The index map showing critical habitat units in the States of Mississippi, Alabama, Tennessee, Kentucky, and Virginia for the five Tennessee and Cumberland River Basin mussels follows:

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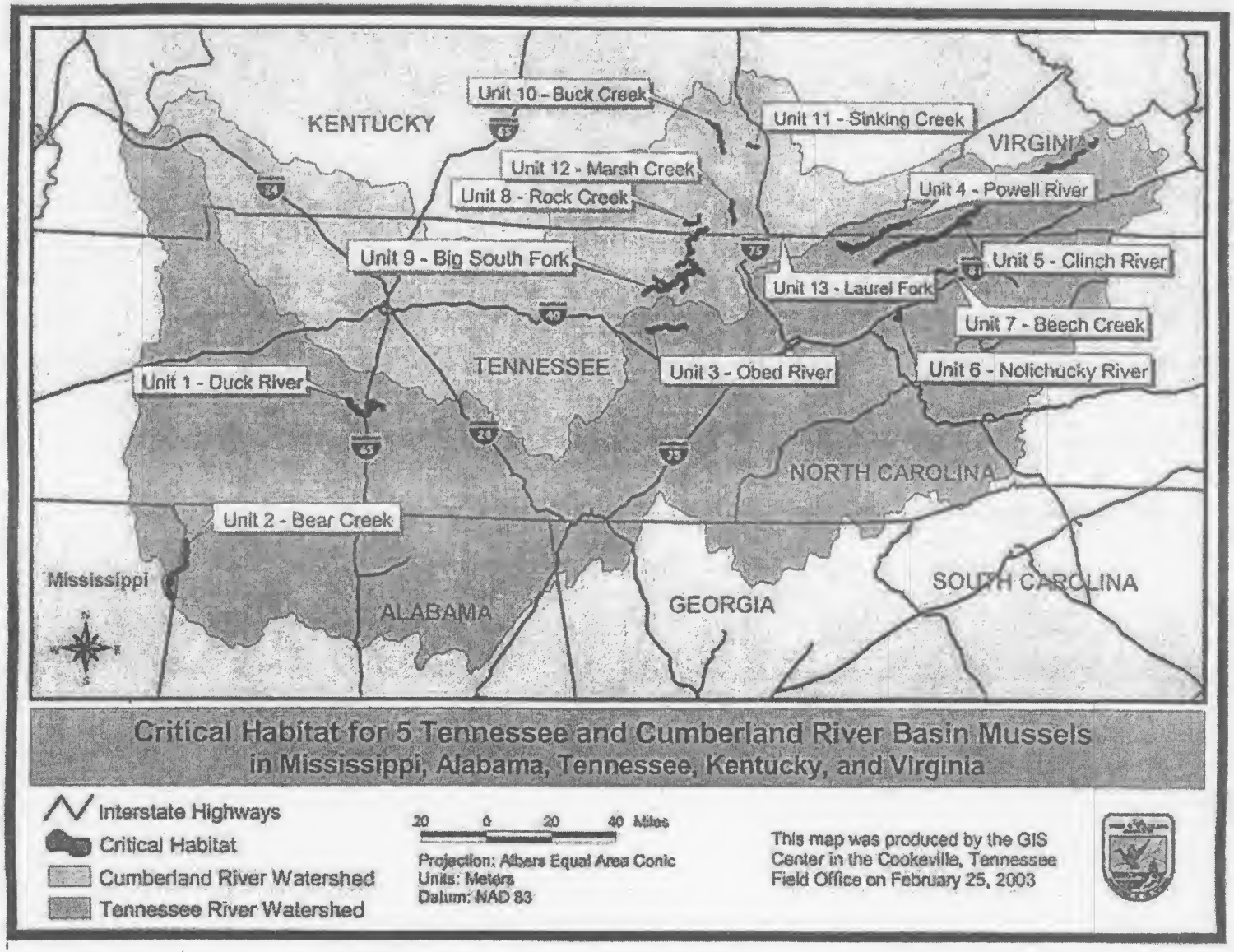

Unit 10 - Buck Creek
KENTUCKY
Unit 11 - Sinking Creek
VIRGINIA
Unit 12 - Marsh Creek
Unit 8 - Rock Creek
Unit 4 - Powell River
Unit 9 - Big South Fork
Unit 5 - Clinch River
Unit 13 - Laurel Fork
Unit 7 - Beech Creek
TENNESSEE
Unit 3 - Obed River
Unit 6 - Nolichucky River
Unit 1 - Duck River
NORTH CAROLINA
Unit 2 - Bear Creek
Mississippi
ALABAMA
GEORGIA
SOUTH CAROLINA
Critical Habitat for 5 Tennessee and Cumberland River Basin Mussels
in Mississippi, Alabama, Tennessee, Kentucky, and Virginia
Interstate Highways
Critical Habitat
Cumberland River Watershed
Tennessee River Watershed
20 0 20 40 Miles
Projection: Albers Equal Area Conic
Units: Meters
Datum: NAD 83
This map was produced by the GIS Center in the Cookeville, Tennessee Field Office on February 25, 2003

(ii) Table of protected species and critical habitat units. A table listing the protected species, their respective critical habitat units, and the States that contain those habitat units follows. Detailed critical habitat unit descriptions and maps appear below the table.

TABLE OF FIVE TENNESSEE AND CUMBERLAND RIVER BASIN MUSSELS, THEIR CRITICAL HABITAT UNITS, AND STATES CONTAINING THOSE CRITICAL HABITAT UNITS

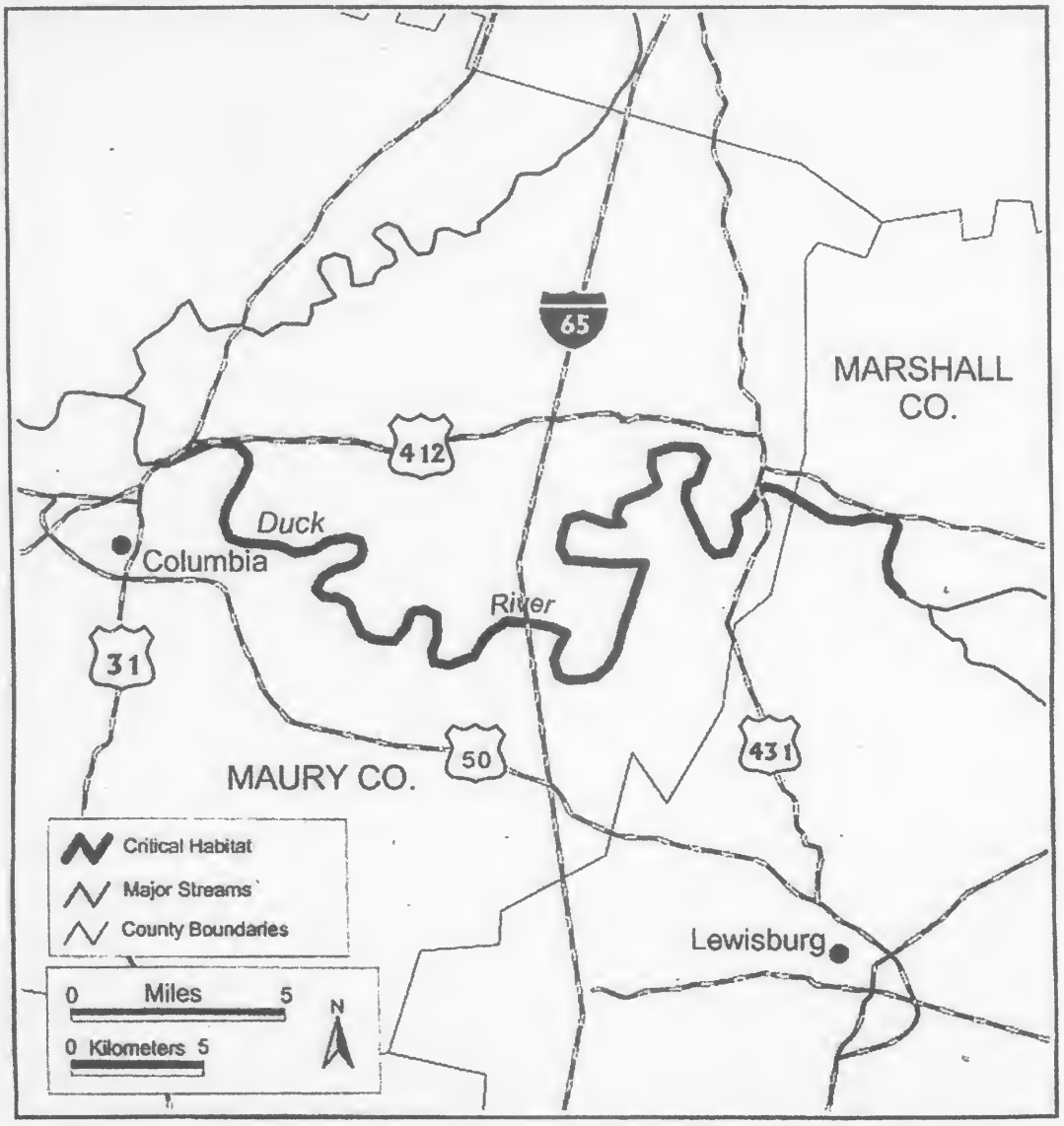
Species	Critical habitat units	States
purple bean (*Villosa perpurpurea*).	Units 3, 4, 5, 7	TN, VA
Cumberlandian combshell (*Epioblasma brevidens*).	Units 1, 2, 4, 5, 6, 9, 10.	AL, KY, MS, TN, VA
Cumberland elktoe (*Alasmidonta atropurpurea*).	Units 8, 9, 11, 12, 13.	KY, TN
oyster mussel (*Epioblasma capsaeformis*).	Units 1, 2, 4, 5, 6, 9,10.	AL, KY, MS, TN, VA
rough rabbitsfoot (*Quadrula cylindrica strigillata*).	Units 4, 5	TN, VA

(iii) Unit 1. Duck River, Marshall and Maury Counties, Tennessee. This is a critical habitat unit for the oyster mussel and Cumberlandian combshell.

(A) Unit 1 includes the main stem of the Duck River from rkm 214 (rmi 133) (0.3 rkm (0.2 rmi) upstream of the First Street Bridge) (−87.03 longitude, 35.63 latitude) in the City of Columbia, Maury County, Tennessee, upstream to Lillard Mill Dam at rkm 288 (rmi 179) (−86.78 longitude, 35.58 latitude), Marshall County, Tennessee.

(B) Map of Unit 1 follows:

Unit 1 - Duck River: Critical Habitat for Oyster mussel and Cumberlandian combshell

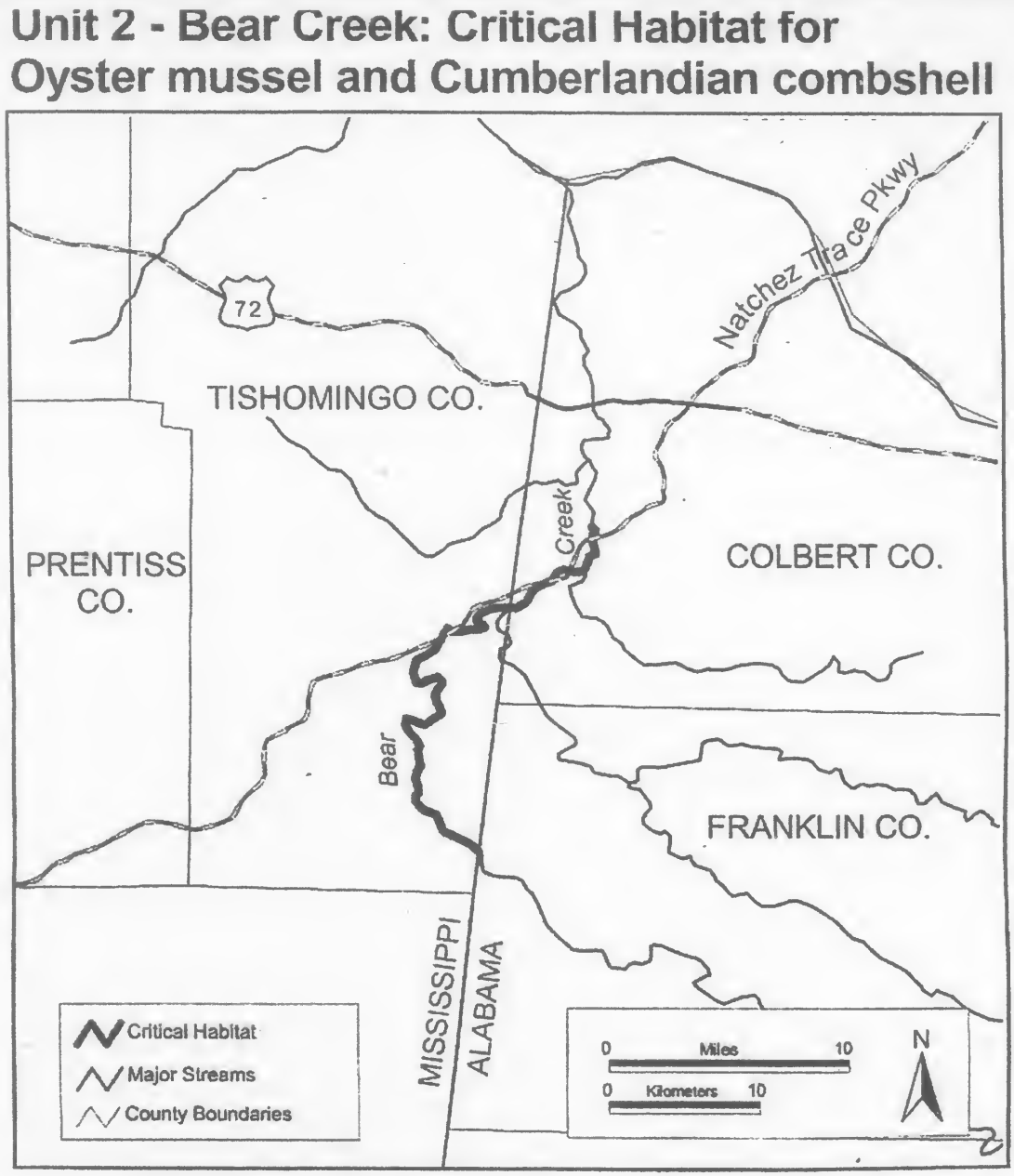


This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

(iv) Unit 2. Bear Creek, Colbert County, Alabama, and Tishomingo County, Mississippi. This is a critical habitat unit for the oyster mussel and Cumberlandian combshell.

(A) Unit 2 consists of the main stem of Bear Creek from the backwaters of Pickwick Lake at rkm 37 (rmi 23) (-88.09 longitude, 34.81 latitude), Colbert County, Alabama, upstream through Tishomingo County, Mississippi, ending at the Mississippi/Alabama State line.

(B) Map of Unit 2 follows:

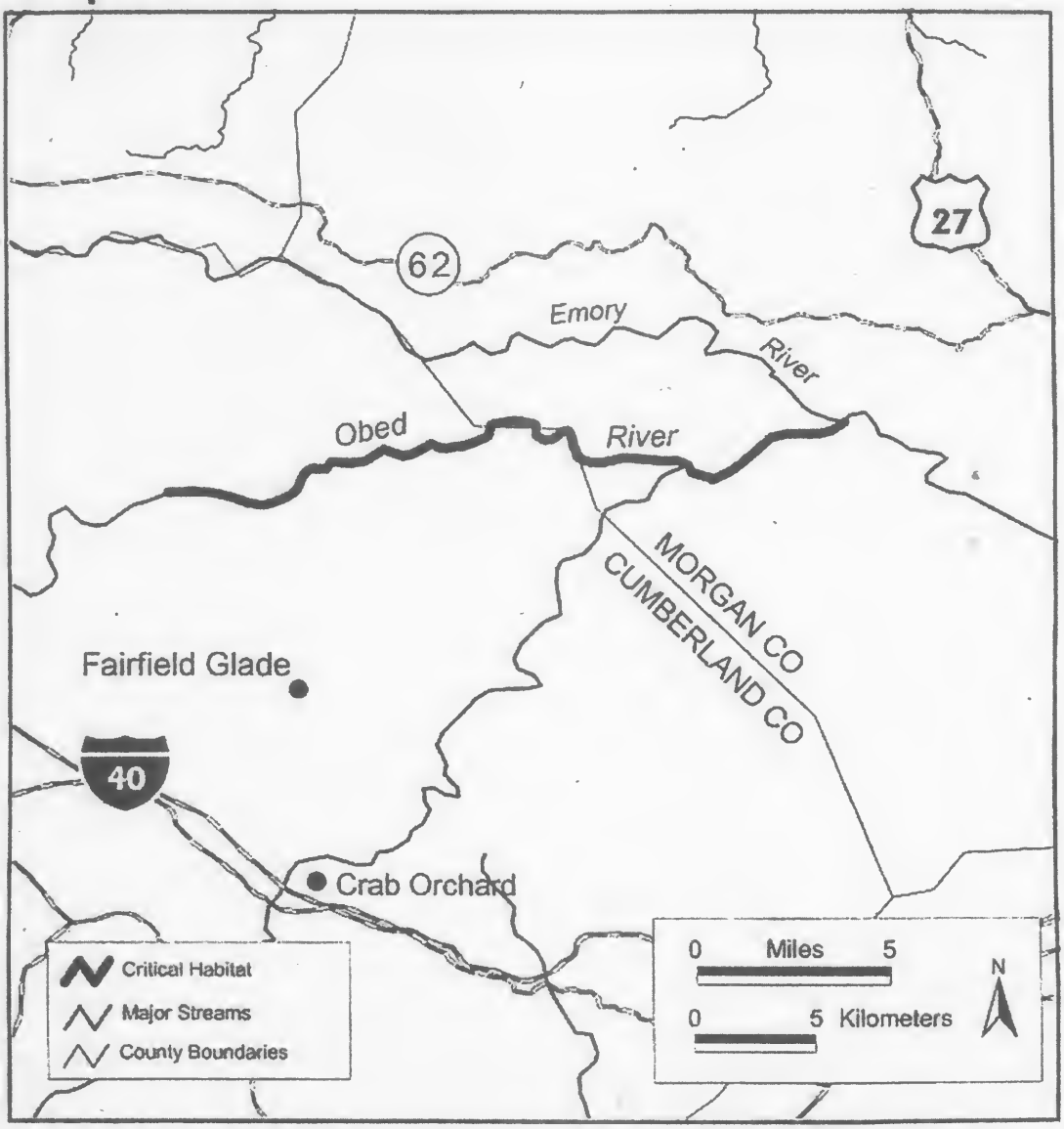


(v) Unit 3. Obed River, Cumberland and Morgan Counties, Tennessee. This is a critical habitat unit for the purple bean.

(A) Unit 3 includes the Obed River main stem from its confluence with the Emory River (-84.69 longitude, 36.09 latitude), Morgan County, Tennessee, upstream to Adams Bridge, Cumberland County, Tennessee (-84.95 longitude, 36.07 latitude).

(B) Map of Unit 3 follows:

Unit 3 - Obed River: Critical Habitat for Purple bean



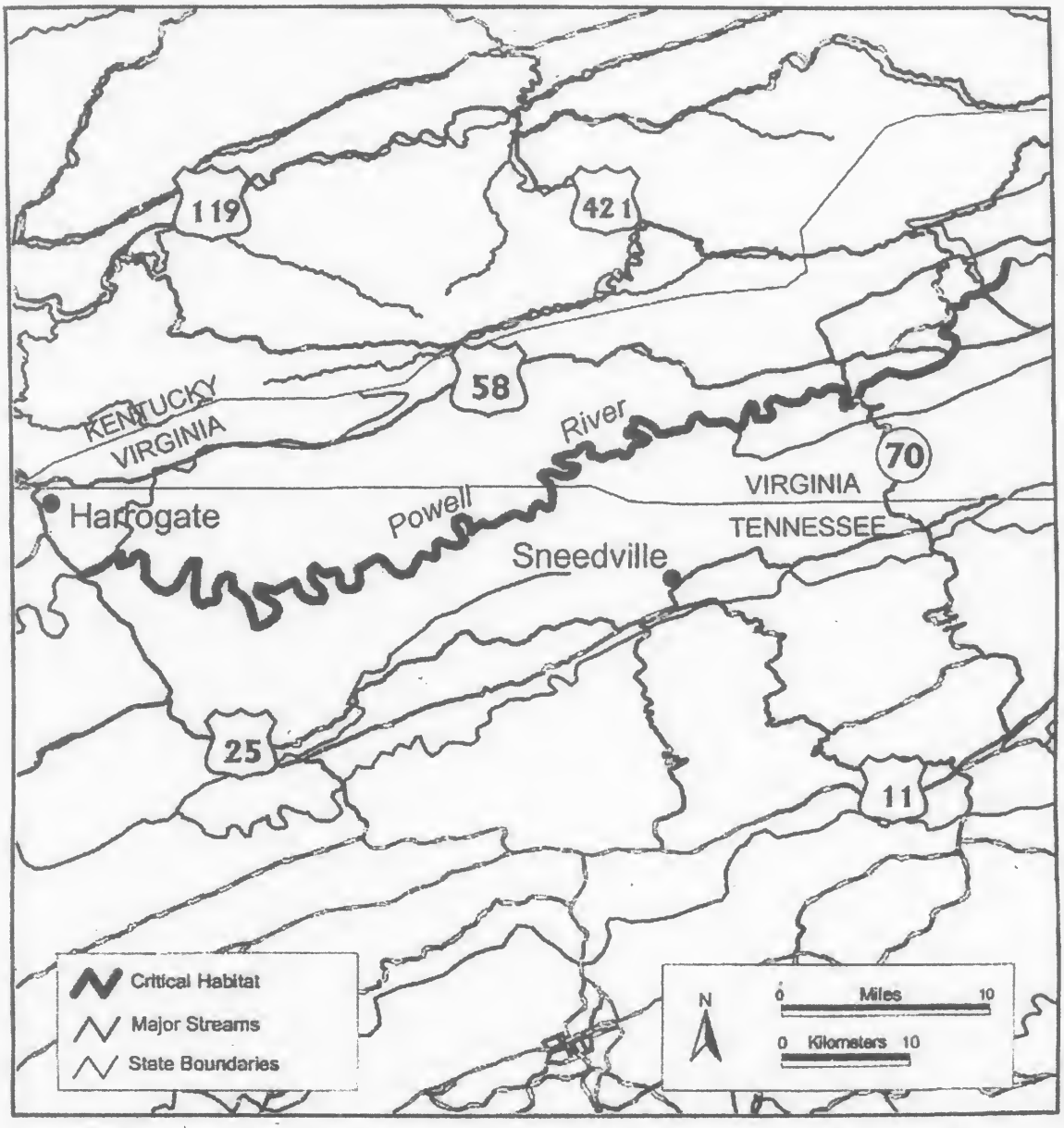
This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

(vi) Unit 4. Powell River, Claiborne and Hancock Counties, Tennessee, and Lee County, Virginia. This is a critical habitat unit for the purple bean, Cumberlandian combshell, oyster mussel, and rough rabbitsfoot.

(A) Unit 4 includes the main stem of the Powell River from the U.S. 25E bridge in Claiborne County, Tennessee (-83.63 longitude, 36.53 latitude), upstream to river mile 159 (upstream of Rock Island in the vicinity of Pughs) Lee County, Virginia.

(B) Map of Unit 4 follows:

Unit 4 - Powell River: Critical Habitat for Purple bean, Cumberlandian combshell, Oyster mussel, and Rough rabbitsfoot



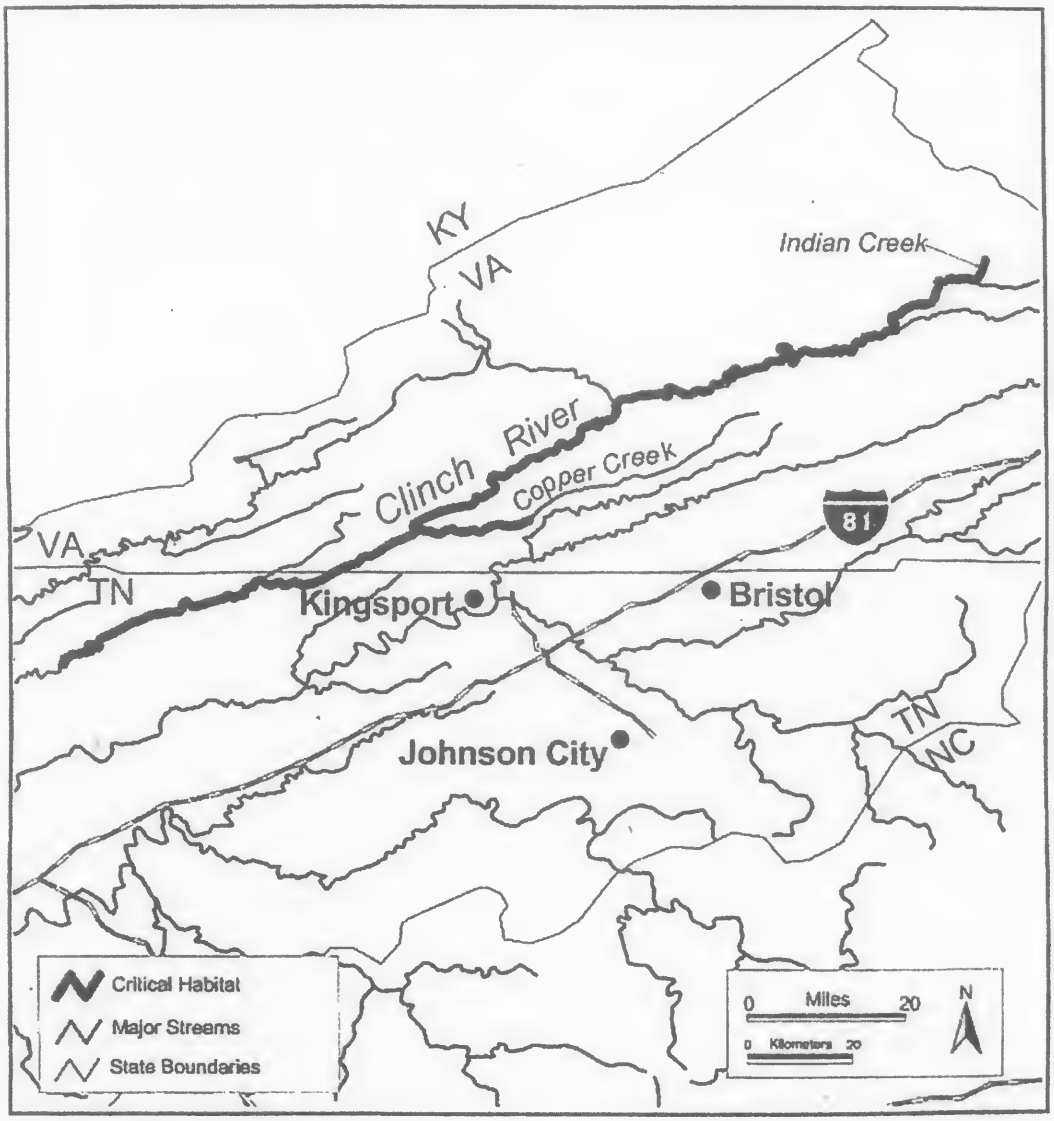
This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

(vii) Unit 5. Clinch River, Hancock County, Tennessee, and Scott, Russell, and Tazewell Counties, Virginia; Copper Creek, Scott County, Virginia; and Indian Creek, Tazewell County, Virginia. This is a critical habitat unit for the purple bean, Cumberlandian combshell, oyster mussel, and rough rabbitsfoot.

(A) Unit 5 includes the Clinch River main stem from rkm 255 (rmi 159) (−83.36 longitude, 36.43 latitude) immediately below Grissom Island, Hancock County, Tennessee, upstream to its confluence with Indian Creek in Cedar Bluff, Tazewell County, Virginia (−81.80 longitude, 37.10 latitude); Copper Creek in Scott County, Virginia, from its confluence with the Clinch River (−82.74 longitude, 36.67 latitude) upstream to Virginia State Route 72 (−82.56 longitude, 36.68 latitude); and Indian Creek from its confluence with the Clinch River upstream to the fourth Norfolk Southern Railroad crossing at Van Dyke, Tazewell County, Virginia (−81.77 longitude, 37.14 latitude).

(B) Map of Unit 5 follows:

Unit 5 - Clinch River: Critical Habitat for Purple bean, Cumberlandian combshell, Oyster mussel, and Rough rabbitsfoot.



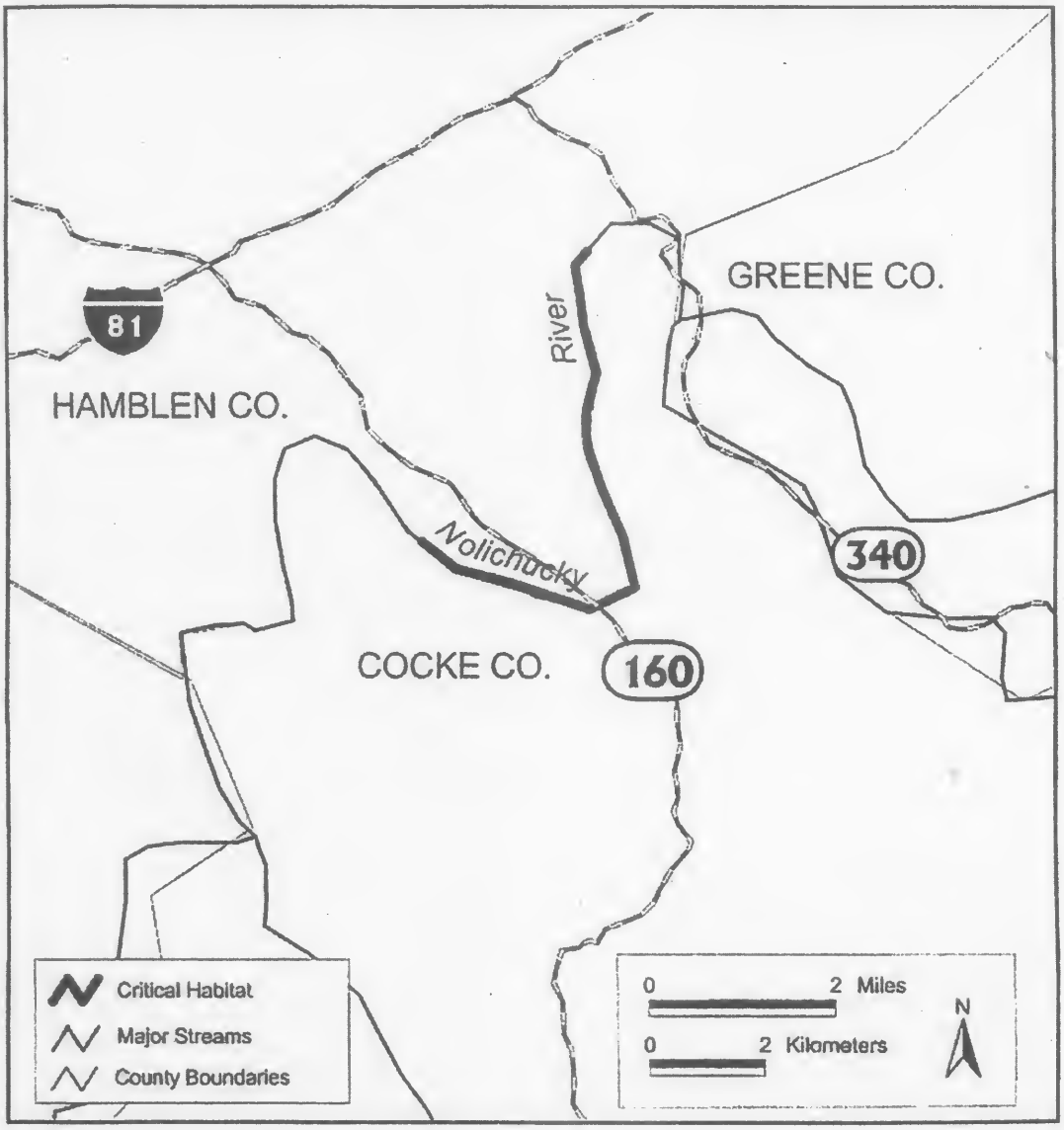
This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

(viii) Unit 6. Nolichucky River, Hamblen and Cocke Counties, Tennessee. This is a critical habitat unit for the Cumberlandian combshell and oyster mussel.

(A) Unit 6 consists of the main stem of the Nolichucky River from rkm 14 (rmi 9) (−83.18 longitude, 36.18 latitude) (approximately 0.6 rkm (0.4 rmi) upstream of Enka Dam) upstream to Susong Bridge (−83.20 longitude, 36.14 latitude) in Hamblen and Cocke Counties, Tennessee.

(B) Map of Unit 6 follows:

Unit 6 - Nolichucky River: Critical Habitat for Cumberlandian combshell and Oyster mussel



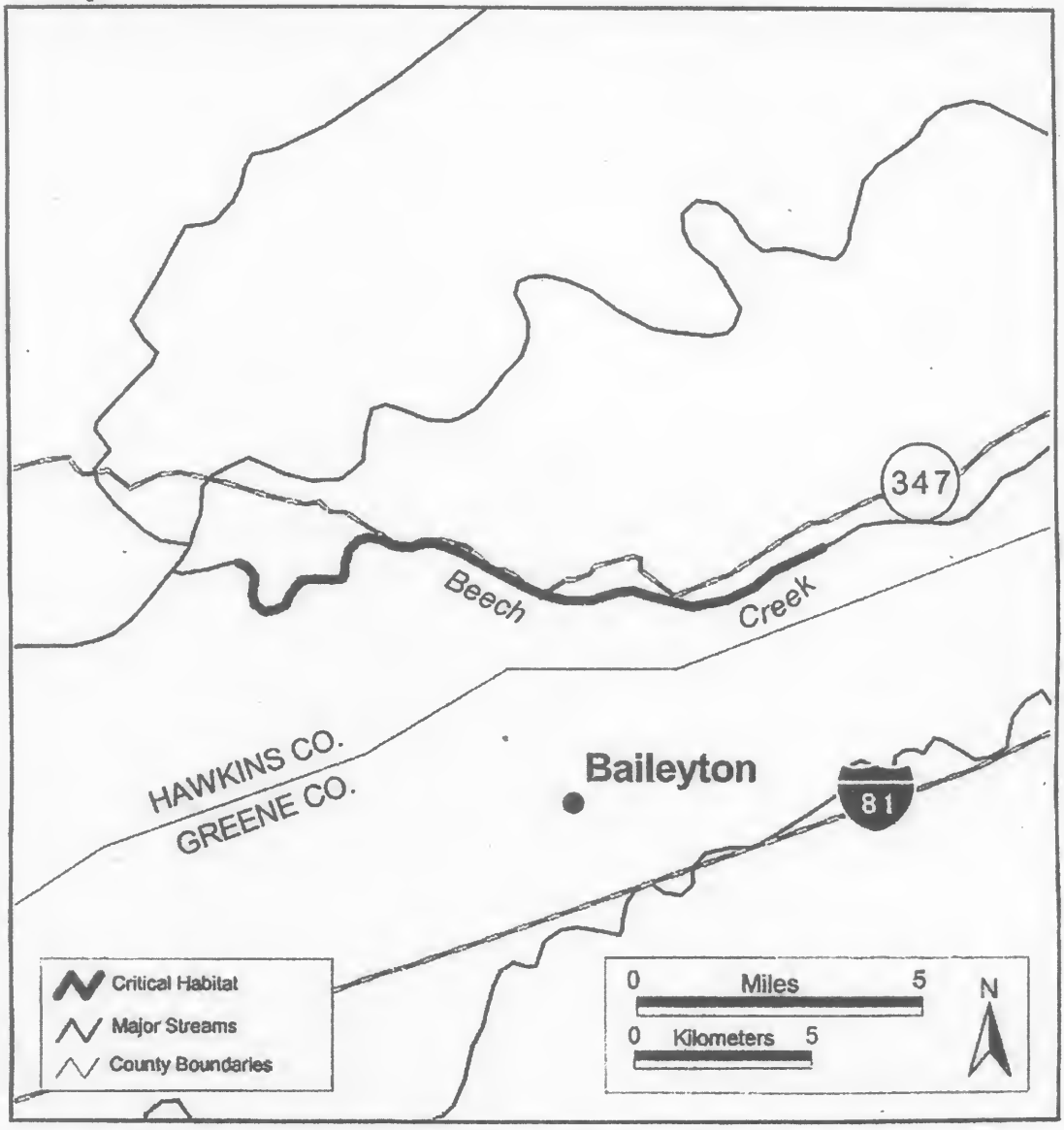
This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

(ix) Unit 7. Beech Creek, Hawkins County, Tennessee. This is a critical habitat unit for the purple bean.

(A) Unit 7 includes the Beech Creek main stem from rkm 4 (rmi 2) (−82.92 longitude, 36.40 latitude) of Beech Creek (in the vicinity of Slide, Tennessee) upstream to the dismantled railroad bridge at rkm 27 (rmi 16) (−82.77 longitude, 36.40 latitude).

(B) Map of Unit 7 follows:

Unit 7 - Beech Creek: Critical Habitat for Purple bean



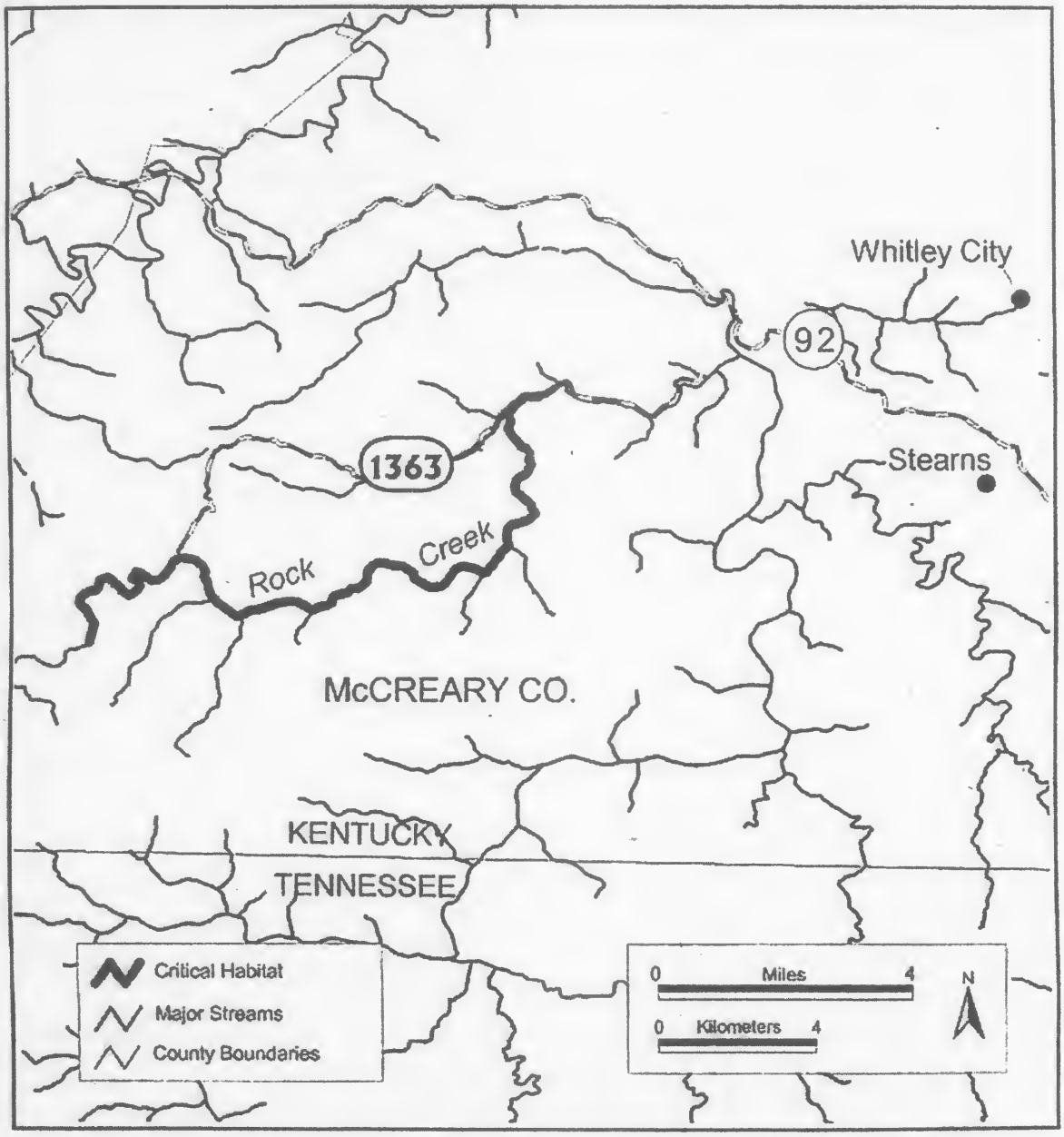
This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

(x) Unit 8. Rock Creek, McCreary County, Kentucky. This is a critical habitat unit for the Cumberland elktoe.

(A) Unit 8 includes the main stem of Rock Creek from its confluence with White Oak Creek (−84.59 longitude, 36.71 latitude), upstream to the low-water crossing at rkm 25.6 (rmi 15.9) approximately 2.6 km (1.6 mi) southwest of Bell Farm (−84.69 longitude, 36.65 latitude), McCreary County, Kentucky.

(B) Map of Unit 8 follows:

Unit 8 - Rock Creek: Critical Habitat for Cumberland elktoe



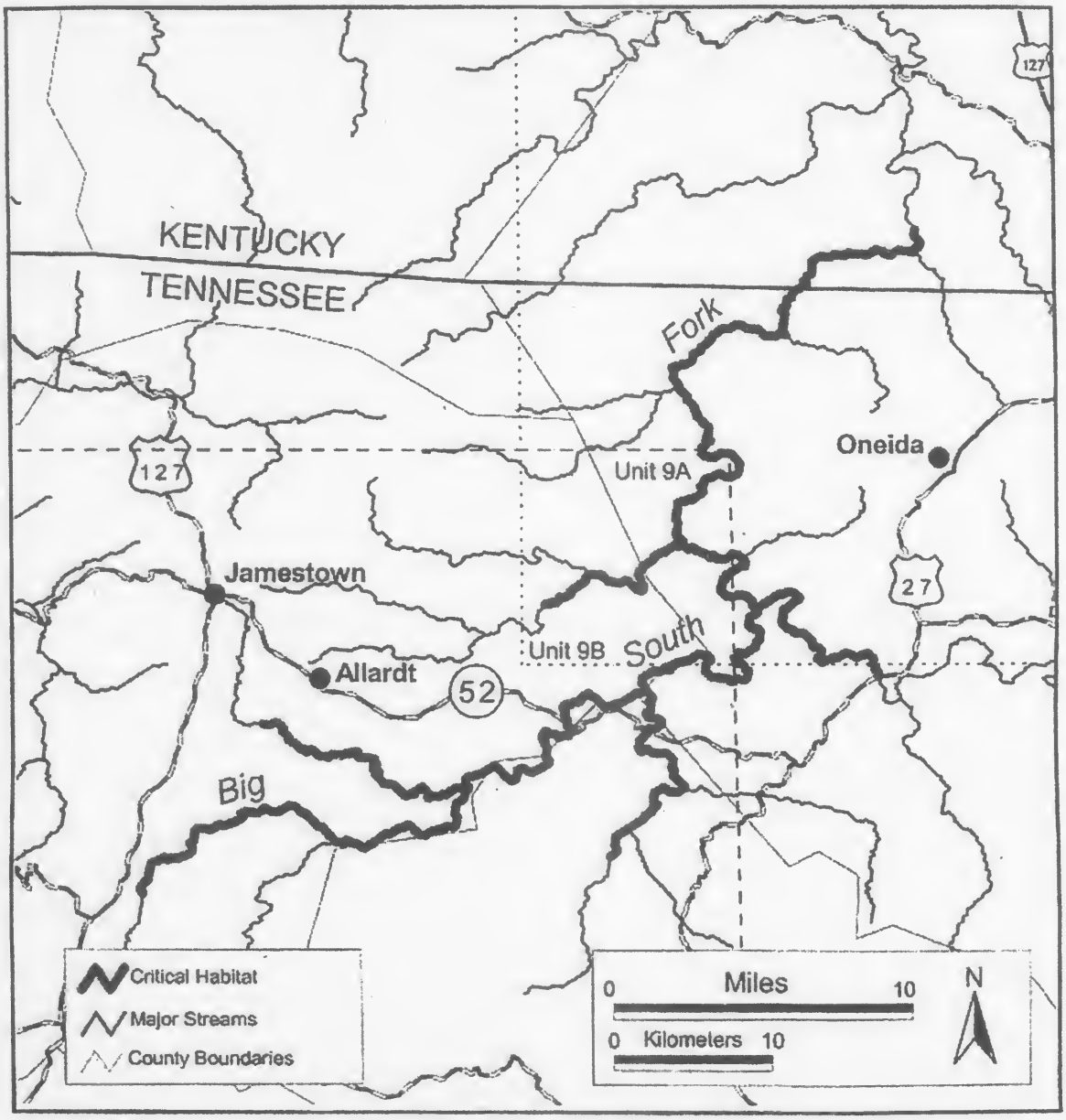
This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

(xi) Unit 9. Big South Fork of the Cumberland River and its tributaries, Fentress, Morgan, and Scott Counties, Tennessee, and McCreary County, Kentucky. This is a critical habitat unit for the Cumberlandian combshell, Cumberland elktoe, and oyster mussel.

(A) Unit 9 consists of the Big South Fork of the Cumberland River main stem from its confluence with Laurel Crossing Branch (−84.54 longitude, 36.64 latitude), McCreary County, Kentucky, upstream to its confluence with the New River and Clear Fork, Scott County, Tennessee; North White Oak Creek from its confluence with the Big South Fork upstream to Panther Branch (−84.75 longitude, 36.42 latitude), Fentress County, Tennessee; New River from its confluence with Clear Fork upstream to U.S. Highway 27 (−84.55 longitude, 36.38 latitude), Scott County, Tennessee; Clear Fork from its confluence with the New River upstream to its confluence with North Prong Clear Fork, Morgan and Fentress Counties, Tennessee; White Oak Creek from its confluence with Clear Fork upstream to its confluence with Bone Camp Creek, Morgan County, Tennessee; Bone Camp Creek from its confluence with White Oak Creek upstream to Massengale Branch (−84.71 longitude, 36.28 latitude), Morgan County, Tennessee; Crooked Creek from its confluence with Clear Fork upstream to Buttermilk Branch (−84.92 longitude, 36.36 latitude), Fentress County, Tennessee; and North Prong Clear Fork from its confluence with Clear Fork upstream to Shoal Creek (−84.97 longitude, 36.26 latitude), Fentress County, Tennessee.

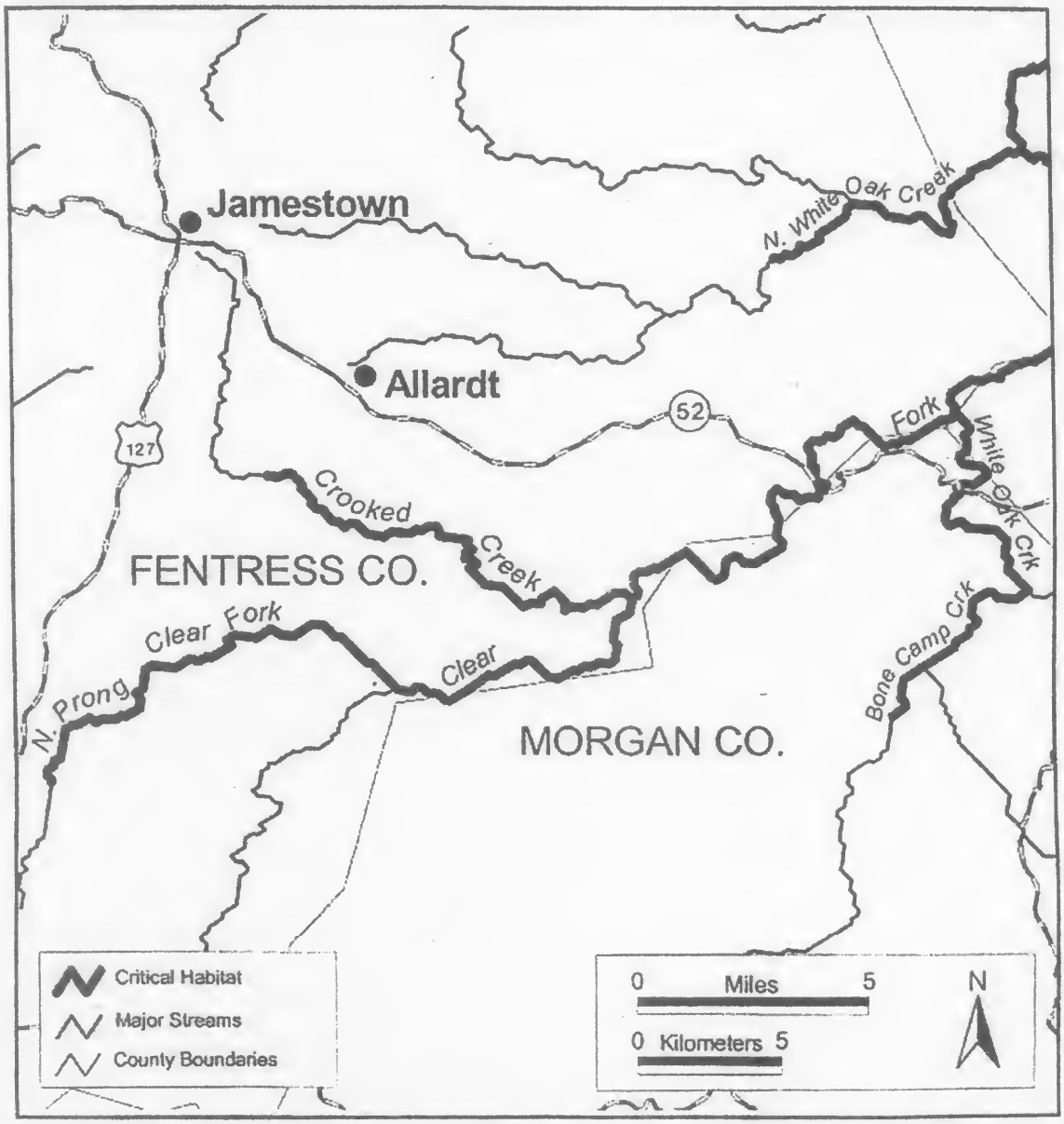
(B) Maps of Unit 9 follow:

Unit 9 - Big South Fork: Critical Habitat for Cumberlandian combshell, Cumberland elktoe, and Oyster mussel



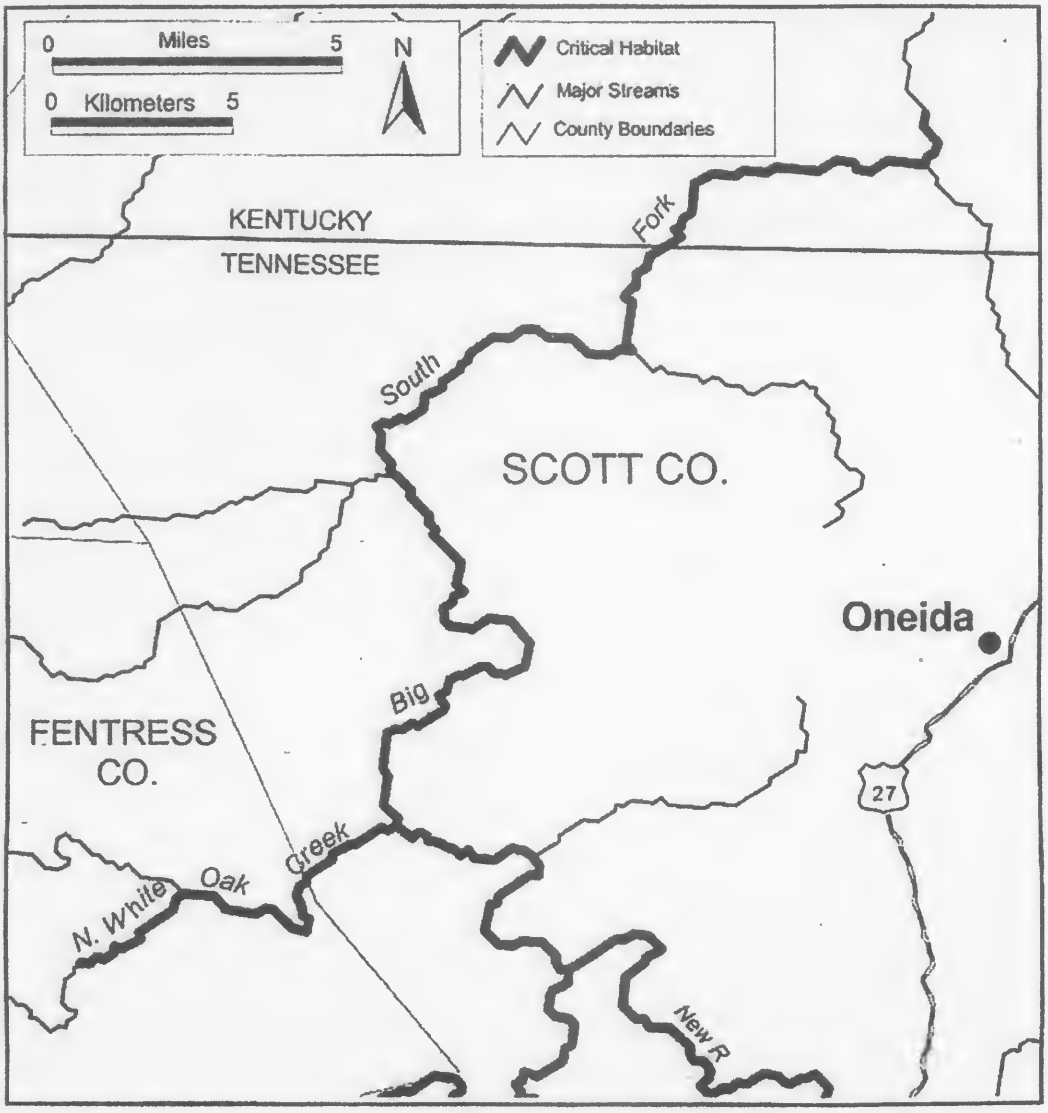
This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

Unit 9A - Big South Fork: Critical Habitat for Cumberlandian combshell, Cumberland elktoe, and Oyster mussel



This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

Unit 9B - Big South Fork: Critical Habitat for Cumberlandian combshell, Cumberland elktoe, and Oyster mussel



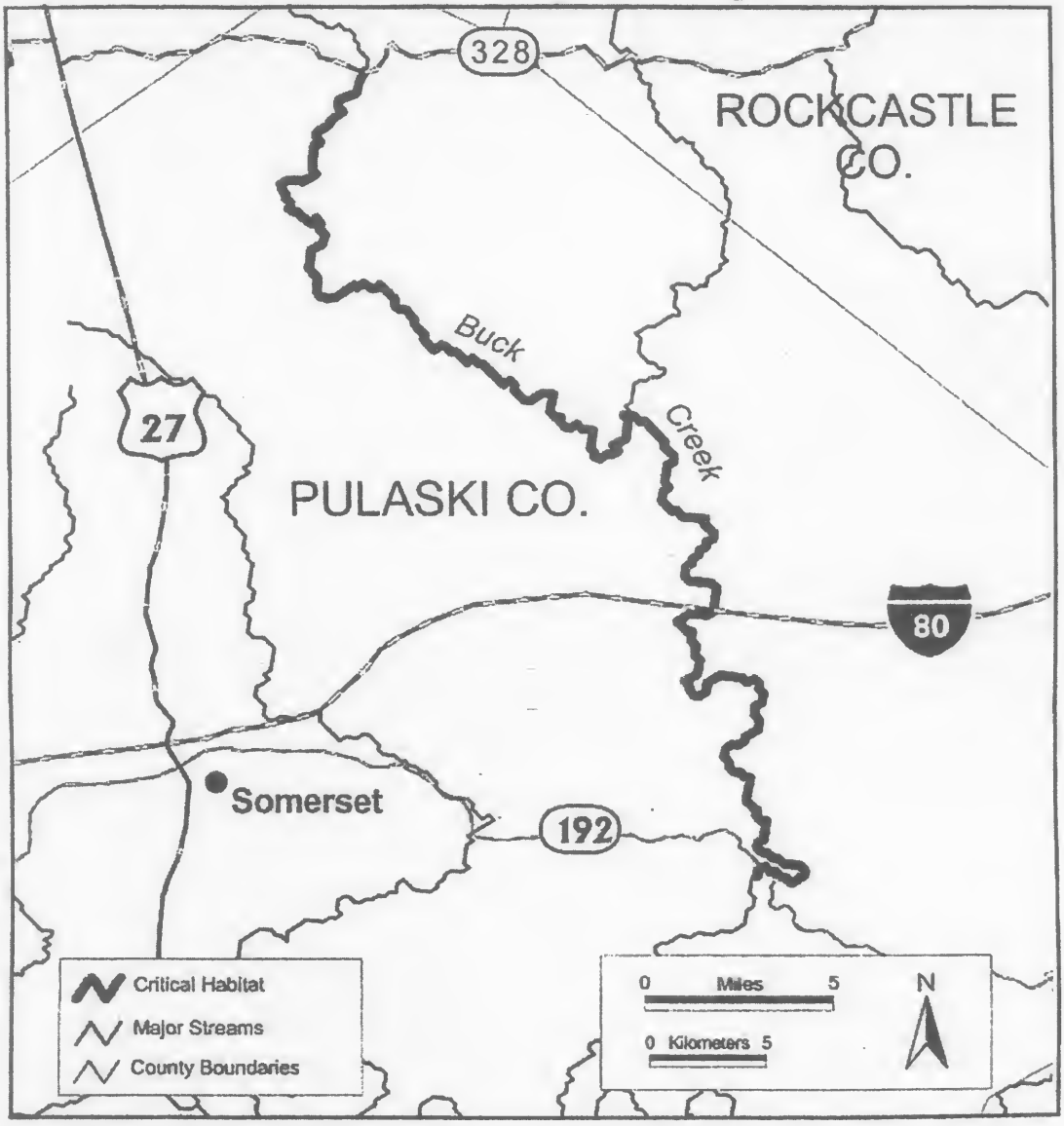
This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

(xii) Unit 10. Buck Creek, Pulaski County, Kentucky. This is a critical habitat unit for the Cumberlandian combshell and oyster mussel.

(A) Unit 10 includes the Buck Creek main stem from the State Road 192 Bridge (−84.43 longitude, 37.06 latitude) upstream to the State Road 328 Bridge (−84.56 longitude, 37.32 latitude) in Pulaski County, Kentucky.

(B) Map of Unit 10 follows:

Unit 10 - Buck Creek: Critical Habitat for Cumberlandian combshell and Oyster mussel



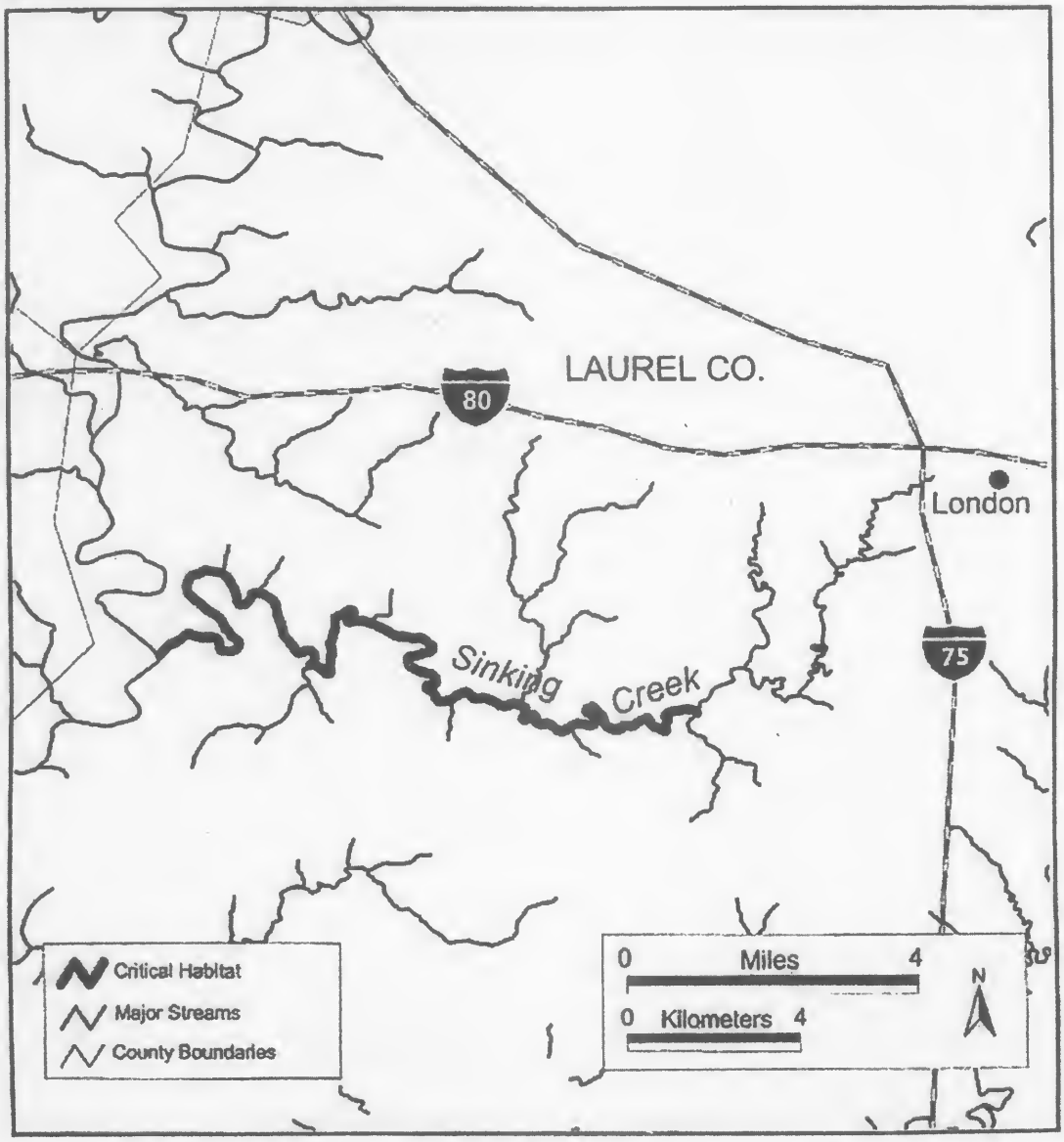
This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

(xiii) Unit 11. Sinking Creek, Laurel County, Kentucky. This is a critical habitat unit for the Cumberland elktoe.

(A) Unit 11 includes the main stem of Sinking Creek from its confluence with the Rockcastle River (−84.28 longitude, 37.10 latitude) upstream to its confluence with Laurel Branch (−84.17 longitude, 37.09 latitude) in Laurel County, Kentucky.

(B) Map of Unit 11 follows:

Unit 11 - Sinking Creek: Critical Habitat for Cumberland elktoe



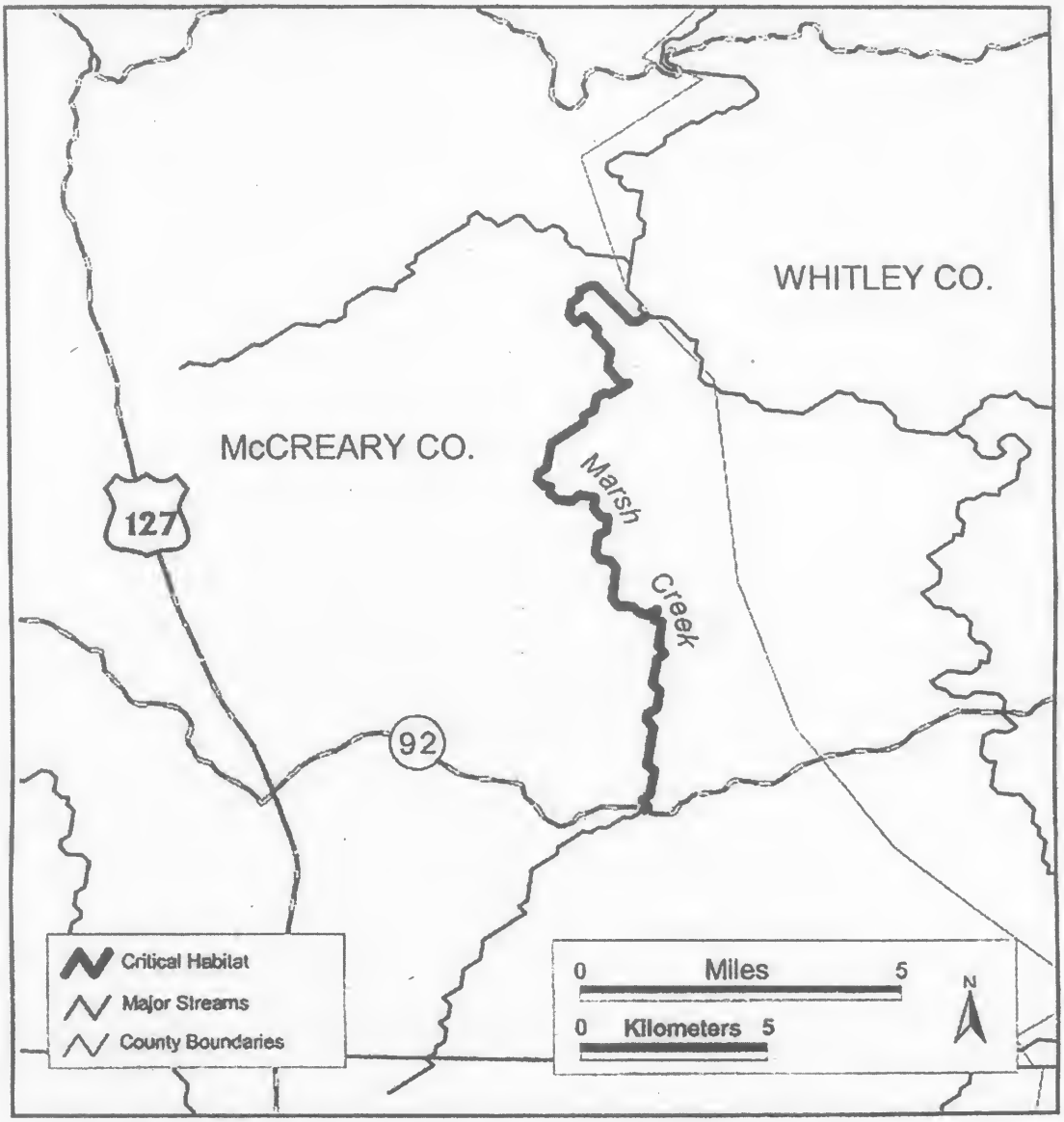
This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

(xiv) Unit 12. Marsh Creek, McCreary County, Kentucky. This is a critical habitat unit for the Cumberland elktoe.

(A) Unit 12 includes the Marsh Creek main stem from its confluence with the Cumberland River (−84.35 longitude, 36.78 latitude) upstream to State Road 92 Bridge (−84.35 longitude, 36.66 latitude) in McCreary County, Kentucky.

(B) Map of Unit 12 follows:

Unit 12 - Marsh Creek: Critical Habitat for Cumberland elktoe



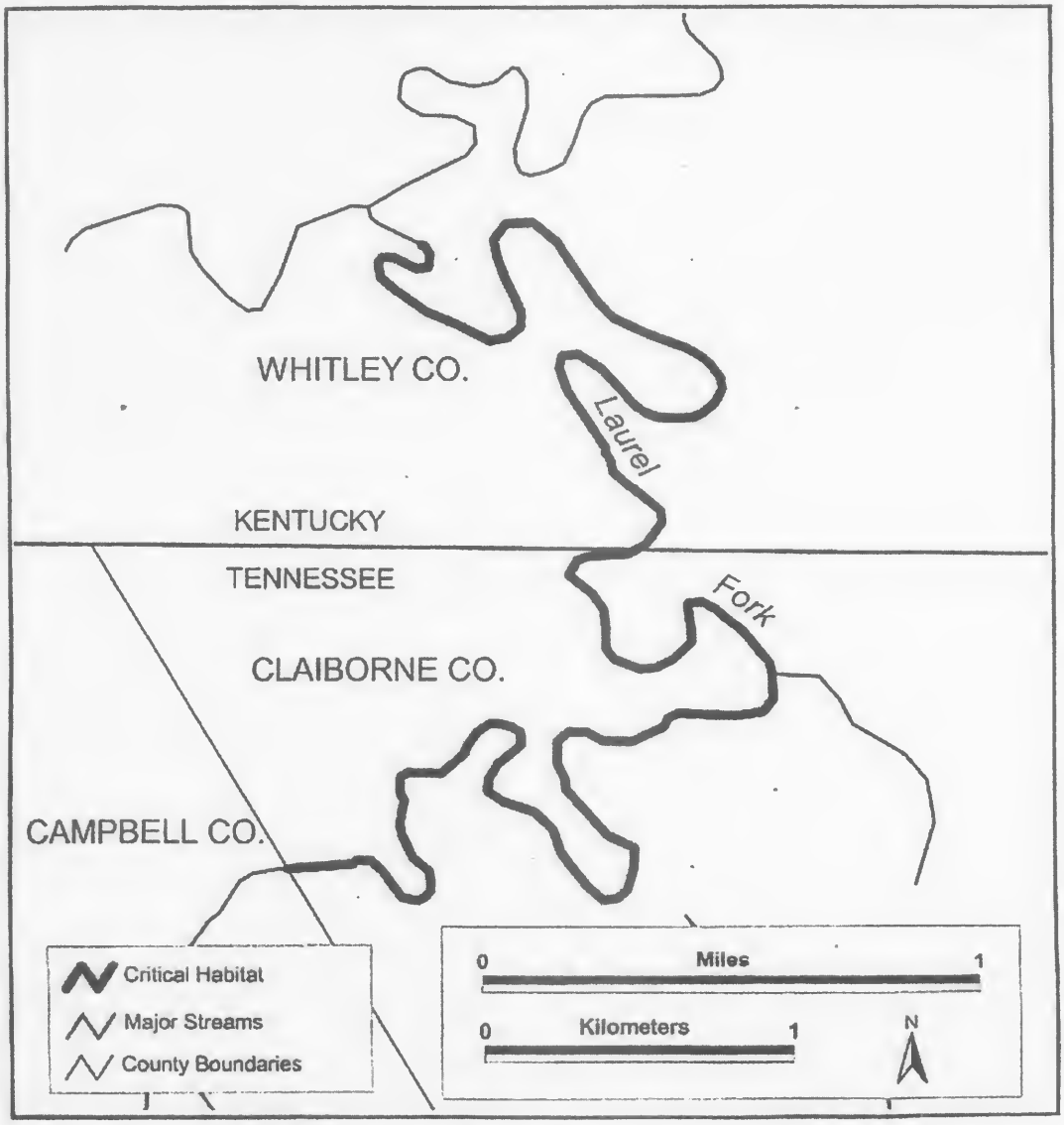
This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

(xv) Unit 13. Laurel Fork, Claiborne County, Tennessee, and Whitley County, Kentucky. This is a critical habitat unit for the Cumberland elktoe.

(A) Unit 13 includes the main stem of the Laurel Fork of the Cumberland River from the boundary between Claiborne and Campbell Counties (−84.00 longitude, 36.58 latitude) upstream to rkm 11 (rmi 6.85) in Whitley County, Kentucky. The upstream terminus is 3 rkm (2 rmi) upstream of the Kentucky/Tennessee State line (−84.00 longitude, 36.60 latitude).

(B) Map of Unit 13 follows:

Unit 13 - Laurel Fork: Critical Habitat for Cumberland elktoe



This map is provided for illustrative purposes of critical habitat only. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions.

* * * * *

Dated: August 17, 2004.

Craig Manson,

Assistant Secretary, Fish, Wildlife, and Parks.

[FR Doc. 04–19340 Filed 8–30–04; 8:45 am]

BILLING CODE 4310–55–C

Federal Register

Tuesday,
August 31, 2004

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AG29

Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat under the Endangered Species Act of 1973, as amended (Act), for the Mexican spotted owl (*Strix occidentalis lucida*) (owl). The owl inhabits canyon and forest habitats across a range that extends from southern Utah and Colorado, through Arizona, New Mexico, and west Texas, to the mountains of central Mexico. We designate approximately 3.5 million hectares (ha) (8.6 million acres (ac)) of critical habitat in Arizona, Colorado, New Mexico, and Utah, on Federal lands. Section 7 of the Act requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to destroy or adversely modify designated critical habitat. As required by section 4 of the Act, we considered economic and other relevant impacts prior to making a final decision on what areas to designate as critical habitat.

DATES: This final rule is effective September 30, 2004.

ADDRESSES: The complete supporting record for this rule is on file at the New Mexico Ecological Services Field Office, 2105 Osuna Road NE, Albuquerque, New Mexico 87113. You may view the complete file for this rule, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Susan MacMullin, New Mexico Ecological Services Field Office, at the above address; telephone 505/346–2525, facsimile 505/346–2542.

SUPPLEMENTARY INFORMATION:

Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. Additionally, we have also found that comparable conservation can be achieved by implementation of laws and regulations obviating the need for critical habitat. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 36 percent (445 species) of the 1,244 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,244 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, and the section 10 incidental take permit process. The Service believes it is these measures that may make the difference between extinction and survival for many species.

We note, however, that a recent 9th Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service*, has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. We are currently reviewing the decision to determine what effect it may have on the outcome of consultations pursuant to Section 7 of the Act.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been overwhelmed with lawsuits regarding designation of critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA), all are part of the cost of critical habitat designation. None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this final rule. For more information on the owl, refer to the final listing rule of March 16, 1993 (58 FR 14248), the two previous final critical habitat rules of June 6, 1995 (60 FR 29913) and February 1, 2001 (66 FR 8530), and the

Recovery Plan for the Mexican Spotted Owl (Recovery Plan) (Service 1995). However, some of this information is discussed in our analyses below, such as the description of the primary constituent elements.

Two primary reasons were cited for listing the owl as threatened in 1993: (1) Historical alteration of its habitat as the result of timber management practices, specifically the use of even-aged silviculture, and the threat of these practices continuing; and (2) the danger of catastrophic wildfire. The Recovery Plan for the owl outlines management actions that guide land management agencies in efforts to remove recognized threats and recover the owl. This critical habitat designation is based on recovery needs and guidelines identified in the Recovery Plan.

The Recovery Plan provides for three levels of habitat management: protected areas, restricted areas, and other forest and woodland types. We define protected areas to include all known owl sites (Protected Activity Centers [PACs]), and all areas in mixed-conifer or pine-oak types with slopes greater than 40 percent where timber harvest has not occurred in 20 years, and all legally and administratively reserved lands, such as Wilderness Areas or Research Natural Areas. Protected areas can also include steep-walled canyon habitat. Owl PACs are delineated around known owl sites. PACs include a minimum of 600 acres (ac) (243 hectares [ha]) that includes the best nesting and roosting (*i.e.*, resting) habitat in the area. A PAC contains the nest site, a roost grove commonly used during the breeding season in the absence of a verified nest site, or the best nesting/roosting habitat if both nesting and roosting information are lacking and the most proximal and highly used foraging areas (Service 1995). Areas outside of PACs, including restricted areas, provide additional habitat appropriate for foraging. Restricted areas include mixed-conifer forest, pine-oak forest, and riparian areas where potential nesting and roosting habitat exist. Canyons may also contain restricted areas. The Recovery Plan provides less specific management guidelines for these areas. The Recovery Plan does not provide owl-specific guidelines for "other forest and woodland habitat."

The owl occupies a broad geographical area, but does not occur uniformly throughout its range (Service 1995). Instead, the owl occurs in disjunct localities that correspond to isolated mountain systems and canyons. The owl is frequently associated with mature mixed-conifer, pine-oak, and riparian forests (Ganey *et al.* 1988, Skaggs and Raitt 1988, Ganey and Balda 1989, Gutierrez and Rinkevich 1991, Willey 1993, Fletcher and Hollis 1994, Ganey and Dick 1995, Gutierrez *et al.* 1995, Seamans and Gutierrez, 1995, and Ward *et al.* 1995). Mature mixed-conifer forests are mostly composed of Douglas-fir (*Psuedotsuga menziesii*), white fir (*Abies concolor*), limber pine (*Pinus flexilis*) or blue spruce (*Picea pungens*). Pine-oak forests are mostly composed of ponderosa pine (*Pinus ponderosa*) and Gambel oak (*Quercus gambellii*). Riparian forests are dominated by various species of broadleaved deciduous trees and shrubs (Service 1995). These riparian forests can be important linkages between otherwise isolated subpopulations of owls (Service 1995).

Owls are also found in canyon habitat dominated by vertical-walled rocky cliffs within complex watersheds including tributary side canyons. Rock walls include caves, ledges, and other areas that provide protected nest and roost sites (Gutierrez and Rinkevich 1991). Canyon habitat may include small isolated patches or stringers of forested vegetation including stands of mixed-conifer, ponderosa pine, pine-oak, pinyon-juniper, and/or riparian vegetation in which owls regularly roost and forage. Owls are usually found in areas with some type of water source (*i.e.*, perennial stream, creeks, and springs, ephemeral water, small pools from runoff, reservoir emissions) (Gutierrez and Rinkevich 1991). Even small sources of water such as small pools or puddles create humid conditions (Geiger 1965 *in* Gutierrez and Rinkevich 1991).

Owls are highly selective for roosting and nesting habitat, but forage in a wider array of habitats (Service 1995, Ganey and Balda 1994, and Seamans and Gutierrez 1995). Roosting and nesting habitat exhibit certain identifiable features, including large trees (those with a trunk diameter of 12 inches (in) (30.5 centimeters (cm)) or more (*i.e.* high tree basal area)), uneven-aged tree stands, multi-storied canopy, a tree canopy creating shade over 40 percent or more of the ground (*i.e.* moderate to high canopy closure), and decadence in the form of downed logs and snags (standing dead trees) (Ganey and Balda 1989; Ganey and Dick 1995; Grubb *et al.* 1997; Tarango *et al.* 1997; Peery *et al.* 1999; Ganey *et al.* 2000; and Geo-Marine 2004). Canopy closure is typically greater than 40 percent (Ganey and Balda 1989; Fletcher 1990; Zwank *et al.* 1994; Grubb *et al.* 1997; Tanrango *et al.* 1997; Ganey *et al.* 1998; Young *et al.* 1998; Ganey *et al.* 2000; and Geo-Marine 2004).

All nests reported by Zwank *et al.* (1994), Seamans and Gutierrez (1995), and Geo-Marine (2004) were in either mixed-conifer or Douglas-fir habitat. Roost and nest trees were the oldest and largest within tree stands (Ganey and Balda 1989, 1994, and, Seamans and Gutierrez 1995). Owls use areas that contain a number of large trees of different types including mixed-conifer and pine-oak with smaller trees under the canopy of the larger trees. These types of areas provide vertical structure and high plant species richness that are important to owls. (FO) (Ganey and Dick 1995; Seamans and Gutierrez 1995; and Ganey *et al.* 2003). Tarango *et al.* (1994) and Ganey *et al.* (2000) recorded seven or more tree species at roost sites. Therefore, we believe that mixed-conifer dominated by Douglas-fir, pine-oak, and riparian forests with high tree diversity are important to the owl.

Juvenile owls disperse in September and October, into a variety of habitats ranging from high-elevation forests to pinyon-juniper woodlands and riparian areas surrounded by desert grasslands (Gutierrez *et al.* 1995; Arsenault *et al.* 1997; and Willey and C. van Riper 2000). Observations of long-distance dispersal by juveniles provide evidence that they use widely spaced islands of suitable habitat which are connected at lower elevations by pinyon-juniper and riparian forests. As a result of these movement patterns, isolated populations may have genetic significance to the owl's conservation (Keitt *et al.* 1995; Guteirrez and Harrison 1996; Seamans *et al.* 1999; and Willey and C van Riper 2000). Owls have been observed moving across open low desert landscapes between islands of suitable breeding habitat (Arsenault *et al.* 1997; Ganey *et al.* 1998; and Willey 1998). Owl movements were also observed between "sky island" mountain ranges in New Mexico (Gutierrez *et al.* 1996). Therefore, contiguous stands or islands of suitable mixed-conifer, pine-oak, and riparian forests are important to the owl.

Owl foraging habitat includes a wide variety of forest conditions, canyon bottoms, cliff faces, tops of canyon rims, and riparian areas (Gutierrez and Rinkevich 1991 and Willey 1993). Ganey and Balda (1994) reported that owls foraged more frequently in unlogged forests containing uneven-aged stands of Douglas-fir and white fir, with a strong component of ponderosa pine, than in managed forests. The primary owl prey species are woodrats (*Neotoma* spp.), peromyscid mice (*Peromyscus* spp.), and microtine voles

(*Microtus* spp.) (Service 1995; Young *et al.* 1997; Delaney *et al.* 1999; Seamans and Gutierrez 1999). Mexican woodrats (*N. mexicana*) are typically found in areas with considerable shrub or understory tree cover and high log volumes, or rocky outcrops associated with pinyon-juniper woodlands (Sureda and Morrison 1998 and Ward 2001). Sureda and Morrison (1998) and Ward (2001) found deer mice (*P. maniculatus*) to be more abundant and widespread in the 60 to 100 year old stands of mixed-conifer forests. Mexican voles (*M. mexicanus*) are associated with mountain meadows and high herbaceous cover, primarily grasses; whereas, long-tailed voles (*M. longicaudus*) are found in dry forest habitats with dense herbaceous cover, primarily forbs, many shrubs, and limited tree cover (Ward 2001). High levels of owl reproductive success and production may be due to prey abundance (Delaney *et al.* 1999). Ward and Block (1995) documented an increase in owl production when moderate to high levels of woodrats, peromyscid mice, and voles, were consumed. A diverse prey base is dependant on availability and quality of diverse habitats. Owl prey species need adequate levels of residual plant cover, understory cover, and high log volume. Therefore, a wide variety of forest and vegetative conditions are important to the owl and its prey.

Historic population size estimates and range of the owl are not known; however, present population size and distribution are thought to be similar (Service 1995). Ninety-one percent of known owls existing in the United States between 1990 and 1993 occurred on land administered by the FS, the primary administrator of lands supporting owls (Service 1995). Most owls have been found within the 11 National Forests of Arizona and New Mexico. It is unknown why Colorado and Utah support fewer owls.

In 2002, FS reported 987 PACs in Arizona and New Mexico (FS 2002). Additional surveys are likely to document more owls on FS and other lands. For example, Geo-Marine (2004) reported an additional 26 activity centers not previously designated by the Gila National Forest. Current information suggests there are 15 PACs in Colorado, 105 PACs in Utah, and 43 PACs on National Park Service (NPS) lands in Arizona, therefore, 1,176 PACs have been identified. Based on this number of owl sites, we believe that the total known owl numbers on Federal lands in southwestern United States range from 1,176 or 2,352, depending on whether one bird or a pair occupies the PAC.

Seamans *et al.* (1999) reported evidence of 10 percent or greater population declines in central Arizona and west-central New Mexico. Both populations experienced lower survival rates in the late 1990s. Gutierrez *et al.* (2003) concluded that with four additional years of data on these same populations, the decline observed by Seamans *et al.* (1999) on the Arizona study area was temporary, whereas the decline in New Mexico appeared to be continuing. Wide population fluctuations may be common for populations of owls (Gutierrez *et al.* 2003).

The final listing rule for the owl stated that the Southwestern Region of the FS managed timber primarily under a shelterwood harvest regime. A shelterwood cut is an even-aged regeneration cutting in which new tree seedlings are established under the partial shade of remnant seed trees. Thus, this harvest method produces even-aged stands rather than the uneven-aged, multi-layered stands most often used by the owl for nesting and roosting. In addition, at the time of the listing, the shelterwood silviculture system called for even-aged conditions in perpetuity. In 1996, the Southwest Region of the FS incorporated the Mexican Spotted Owl Recovery Plan guidelines as management direction into their Forest Plans. Thus, the management plans for the Southwestern Region of the FS include biological goals consistent with the Recovery Plan for the owl, thereby eliminating one of the primary threats to the owl on FS lands identified in the final listing rule.

Another primary reason cited for listing the owl as threatened in 1993 was the danger of catastrophic wildfire. Bond *et al.* (2002) described short-term effects of wildfires on spotted owls throughout the species' range. The authors reported that relatively large wildfires that burned nest and roost areas appeared to have little short-term (1-year) effect on survival, site fidelity, mate fidelity, and reproductive success of spotted owls, as rates were similar to estimates independent of fire. However, Elliot (1995), MacCracken *et al.* (1996), and Gaines *et al.* (1997) reported in some cases, large stand replacing wildfires appeared to have a negative effect on owls. Jenness (2000) reported low- to moderate-severity fires did not adversely affect owls. Bond *et al.* (2002) hypothesized that spotted owls may withstand the immediate, short-term effects of fire occurring at primarily low to moderate severities within their territory. The USDA Forest Service (FS) reported similar results following the 2002 Lakes Fire in the Jemez Mountains of north-central New Mexico. Thus, prescribed burning and other forest management activities could be an effective tool to reduce fire risk and restore forests to natural conditions with perhaps short-term impacts to owls. For example, prescribed fire may prove useful in the creation or maintenance of habitat for owls or their prey (Gutierrez *et al.* 2003). Bond *et al.* (2002) cautioned that programmatic prescribed burning in owl territories could not be justified solely on their observations. Manipulative experiments are needed to evaluate effects of fire (or other forest management activities) on owls (Bond *et al.* 2002).

Previous Federal Actions

We published a final rule listing the owl as a threatened species on March 16, 1993 (58 FR 14248). For more information on the previous critical habitat designations and other actions related to the owl, refer to the final rule published in the **Federal Register** on February 1, 2001 (66 FR 8530). The final rule excluded all National Forest Service (FS) lands in Arizona and New Mexico and certain Tribal lands and designated critical habitat on approximately 1.9 million hà (4.6 million ac). On August 27, 2001, the Center for Biological Diversity filed a complaint challenging our decision to exclude these lands from the final designation of critical habitat for the owl.

On January 13, 2003, the United States District Court for the District of Arizona, (*Center for Biological Diversity* v. *Norton,* Civ. No. 01–409 TUC DCB), ruled that our final designation of critical habitat for the owl violated the Act, as well as the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). The Court ordered us to repropose critical habitat within 3 months and finalize within 6 months from the date of the order. The Court also stated that the current critical habitat designation for the owl (*i.e.*, that promulgated by 66 FR 8530 and codified at 50 CFR 17.95) shall remain in effect and be enforced until such time as we publish a new final designation of critical habitat for the owl. In a subsequent order, on February 18, 2003, the original deadlines were extended to allow until October 13, 2003, to repropose critical habitat for the owl and until April 13, 2004, to publish a new final designation of critical habitat. On October 10, 2003, the Court ruled that it would permit a limited extension and ordered the parties to meet and confer within 15 days of the order to prepare a reasonable

timeline for compliance with the January 13, 2003, order. The Court also indicated that a notice reopening the comment period on the July 2000 proposal is appropriate. On October 30, 2003, the parties submitted a Joint Proposed Timeline and Memorandum of Dispute to the Court. On November 12, 2003, the Court adopted our proposed timeline and required us to submit a notice to the **Federal Register** on November 7, 2003, reopening the comment period on the July 21, 2000, proposed designation of critical habitat for the owl. The parties agreed that this notice would solicit comment regarding all of the lands proposed for designation that were not included in the 2001 final designation. The Court's order also required us to submit the final critical habitat designation to the **Federal Register** on August 20, 2004.

On November 18, 2003 (68 FR 65020), we reopened the public comment period on our July 21, 2000, proposed rule to designate critical habitat for the owl (65 FR 45336). The proposal included approximately 5.5 million hectares (ha) (13.5 million acres (ac)) in Arizona, Colorado, New Mexico, and Utah, mostly on Federal lands. On November 12, 2003, the United States District Court for the District of Arizona (*Center for Biological Diversity* v. *Norton,* Civ. No. 01–409 TUC DCB) ordered the Service to submit a final rule for designation of critical habitat for the owl to the **Federal Register** by August 20, 2004. On March 26, 2004, we published a notice of availability of the final draft economic analysis and the final draft environmental assessment and opened a 30-day comment period (69 FR 15777). During this comment period, we held one informational meeting in Las Cruces, New Mexico, to provide an opportunity to the public to ask us questions. We have prepared this designation pursuant to the November 12, 2003, Court order.

We contacted appropriate State and Federal agencies, Tribes, county governments, scientific organizations, and other interested parties and invited them to comment. As noted in the previous designation, we published newspaper notices inviting public comment and announcing the public hearings in newspapers (66 FR 8530). We also held six public hearings on the proposed rule: Sante Fe (August 14, 2000) and Las Cruces (August 15, 2000), New Mexico; Tucson (August 16, 2000) and Flagstaff (August 17, 2000), Arizona; Colorado Springs, Colorado (August 21, 2000); and Cedar City, Utah (August 23, 2000), and an informational meeting in Las Cruces (April 21, 2004), New Mexico. Transcripts of the hearings are available for inspection (see **ADDRESSES** section).

Summary of Comments and Recommendations

As noted above, on November 18, 2003, we reopened the public comment period on the July 21, 2000, proposed rule. In the following section, we categorize and respond to applicable, substantive comments received during all four of the public comment periods.

We solicited seven independent expert ornithologists who are familiar with this species to peer review the proposed critical habitat designation. However, only two of the peer reviewers submitted comments. Both responding peer reviewers supported the proposal. We also received a total of 27 oral and 859 written comments (the majority of written comments were in the form of printed postcards). Of those oral comments, 10 supported critical habitat designation, 14 were opposed to designation, and 3 provided additional information but did not support or oppose the proposal. Of the written comments, 764 supported critical habitat designation, 65 were opposed to designation, and 30 were neutral but provided information. We reviewed all comments received for substantive issues and new data regarding critical habitat and the owl. We address all comments received during the comment periods and public hearing testimony in the following summary of issues. Comments of a similar nature are grouped into issues.

Issue 1: Biological Concerns

(1) *Comment:* The wording of the attributes of the primary constituent elements is not consistent with the definitions of forest cover types as described in the Recovery Plan, and there is a high potential for confusion over exactly which areas are included in the proposed designation. Do all of the primary constituent elements have to be present for the area to be considered critical habitat, or just one? The constituent elements described are vague (violating 50 CFR Sec. 424.12(c)) and should include the required greater detail defining what constitutes critical habitat. The boundaries are impossible to identify.

Our Response: As stated in the critical habitat designation section, the critical habitat designation is consistent with the Recovery Plan and includes areas within the mapped boundaries that are protected or restricted habitat and include one or more of the primary constituent elements. Protected habitat is areas where owls are known to occur or are likely to occur. Protected habitat includes: (1) 600 acres around known owl sites within mixed conifer forests or (2) pine-oak forests with slopes greater than 40 percent and where timber harvest has not occurred in the past 20 years. Restricted habitat includes areas outside of protected habitat which owls utilize for foraging and dispersing. Restricted habitat includes mixed conifer forest, pine-oak forest and riparian habitat types.

We also clarified the definitions and use of the terms protected and restricted habitat for the purposes of identifying critical habitat and the primary constituent elements of critical habitat in this rule (see "Primary Constituent Elements" section below). During the comment periods, we requested, but did not receive, any information regarding refinements to the primary constituent elements. However, given the concern expressed by commenters that the primary constituent elements were vague, we reanalyzed existing information and refined the primary constituent elements. This final rule describes the specific areas and primary constituent elements essential to the conservation of the owl based on the best available information.

We did receive information from a variety of sources to allow further analysis on whether particular critical habitat units, or portions thereof, contained or lacked one or more primary constituent elements. This information allowed us to refine our maps (see "Changes to Proposed Rule" section below). Further, while we welcome and encourage additional studies on the biological requirements of the owl, we believe the best available information has been used in defining the areas and primary constituent elements necessary for the species' conservation. Nevertheless, we recognize that not all of the developed land areas within the boundaries of the designation will contain the habitat components essential to the conservation of the species. For this reason, some developed lands are excluded by definition (see the "Regulation Promulgation" section below).

Critical habitat units are defined by geographic information system coverages and associated Universal Transverse Mercator (UTM) coordinates. This information can be obtained from our Web site at *http://ifw2es.fws.gov/mso/* or by contacting our New Mexico Ecological Services Field Office (see **ADDRESSES**).

(2) *Comment:* Some areas proposed as critical habitat units contain a considerable amount of land that is not suitable for or occupied by owls, and

therefore, the areas should be mapped more accurately. Some commenters also questioned whether 13.5 million acres are needed for owls. Including areas not essential to the owl in designated critical habitat limits management options and diverts scarce resources from meaningful tasks, including efforts which will benefit the recovery of the owl, such as fire abatement projects.

Our Response: All of the areas that are designated as critical habitat contain primary constituent elements and are considered essential for the conservation the species. We clarified the primary constituent element descriptions to assist landowners and managers in identifying areas containing these elements. However, a lack of precise habitat location data and the massive scope of the designation did not allow us to conduct the fine-scale mapping necessary to physically exclude all of the areas that do not contain primary constituent elements of critical habitat. Nevertheless, we worked with a variety of stakeholders to refine the critical habitat boundaries in many areas (see "Summary of Changes From Proposed Rule" section below). Changes in this final rule that decrease the boundaries of many units are based on additional information received during the public comment period. Critical habitat is defined as those areas within the mapped boundaries. However, as described in the "Section 7 Consultation" section below, consultation would occur when the action agency determines that activities they sponsor, fund, or authorize may affect areas defined as protected or restricted habitat that contain one or more of the primary constituent elements.

(3) *Comment:* Lack of forest management has resulted in successional and structural changes to forests throughout the range of owl. Designation and management of critical habitat will place an additional burden on land management agencies, further inhibiting their ability to prevent or suppress catastrophic wildfire, one of the greatest threats to the forest types this species inhabits. The risk and intensity of wildfire will increase. Therefore, designating critical habitat seems contradictory to the owl's recovery. A prohibition on forest management activities will also reduce the amount of water runoff from the watershed.

Our Response: We concur with the commenter that loss of habitat from catastrophic wildfire is one of the main threats to the owl. Consequently, management actions taken to reduce the risk and potential size of high-severity wildfires are recognzed as a vital component of owl recovery (Service 1995). The economic analysis concluded that some projects proposed within the wildland urban interface (WUI) may be delayed because of the Recovery Plan recommendation that fuel treatments occur during the non-breeding season (September 1 to February 28). For this and other reasons, we are excluding from this final designation of critical habitat for the owl lands defined by the 157 WUI projects and the Penasco WUI project area identified by the FS as the highest priority for fuel treatments because they are "at imminent risk of catastrophic wildlife." These 157 WUI projects were evaluated by us in our programmatic biological opinion and the Penasco WUI project area was evaluated by us under a separate opinion (Service 2001 and Service 2002) (see "Exclusions under Section 4(b)(2) of Act" section). For the areas within the designation that may also be considered for fuel treatment projects, as described in the economic analysis and environmental assessment, critical habitat designation may delay some projects, but has not and is not anticipated to prevent actions that alleviate the risk of wildfire, nor will it have an effect on suppression activities because the Recovery Plan supports and provides guidance on fuel reduction activities. In addition, we also have developed alternative approaches to streamlining section 7 consultation for hazardous fuels treatment projects (Service 2002), including a consideration of the benefits of these activities to the owl and its habitat (Service 2002a).

The maintenance of mature forest attributes in mixed conifer and pine-oak habitat types over a portion of the landscape and in areas that support existing owl territories is important to the recovery of the owl; however, critical habitat designation does not emphasize the creation of these features where they do not currently exist. It also does not preclude the proactive treatments necessary to reduce the risk of catastrophic fire. Clearly, the loss of owl habitat by catastrophic fire is counter to the intended benefits of critical habitat designation.

Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Activities that may result in the destruction or adverse modification of critical habitat may also jeopardize the continued existence of the species. Due to the reliance on guidelines from the Recovery Plan for section 7 consultation standards, it is anticipated that the designation of critical habitat likely will not require any additional restrictions as a result of section 7 consultations, including projects designed to reduce the risk of wildfire (see "Effects of Critical Habitat Designation" section below). Furthermore, we expect that some activities may be considered to be of benefit to owl habitat and, therefore, would not be expected to adversely modify critical habitat or place an additional burden on land management agencies. Examples of activities that could benefit critical habitat may include some protective measures such as fire suppression, prescribed burning, brush control, snag creation, and certain silvicultural activities such as thinning. We note that fires are a natural part of the fire-adapted ecosystem in which the owl has evolved. The owl Recovery Team and numerous others have recognized the importance of allowing fire to return to southwestern forests, and the policy of widespread fire suppression is well documented as a source of declining forest health.

We agree that many plant communities have undergone successional and structural changes as a result of past and current management practices. These practices include, to varying degrees, the combined effects of long-term and widespread fire suppression, reduction in surface fuels, rates of tree overstory removal and regeneration treatments on cycles shorter than those found in natural disturbance regimes, inadequate control of tree densities responding to fire suppression and tree harvest, and in xeric forest types, decreases in the proportion of the landscape in stands composed of more fire resistant large-diameter trees. We also agree that vegetative structural and landscape changes may require proactive management to restore an appropriate distribution of age classes, control regeneration densities, and reintroduce some measure of natural disturbance processes such as fire events. This may include prescribed fire and thinning treatments, restoration of the frequency and spatial extent of such disturbances as regeneration treatments, and implementation of prescribed natural fire management plans where feasible. We consider use of such treatments to be compatible with the ecosystem management of habitat mosaics and the best way to reduce the threats of catastrophic wildfire. We will fully support land management agencies in addressing the management of fire to

protect and enhance natural resources under their stewardship.

(4) *Comment:* The designation of critical habitat for the owl will conflict with the management objectives of other animal and plant species and ecosystem management. The designation of critical habitat will surely have an impact on many other species of wildlife.

Our Response: Critical habitat management primarily focuses on the maintenance of habitat features in mixed conifer (forest stands with the overstory generally composed of white fir, Douglas fir, ponderosa pine, limber pine, blue spruce, white pine, and quaking aspen) and pine-oak habitat types (forest stands that generally exhibit a ponderosa pine or Chihuahua pine overstory and a Gamble's oak understory) that support owls, and the maintenance of good riparian forests (Service 1995). It does not require the creation of these features where they do not currently exist. The methods conserve the desired measure of diversity vary, but are designed to maintain existing mature/old forest characteristics while allowing some degree of timber harvest and management of other objectives such as tree density control and prescribed fire. Older forests provide favorable environments for diverse assemblages of plants and animals. The maintenance of the primary constituent elements of critical habitat will provide and enhance biological diversity. Therefore, critical habitat management does not preclude managing for other objectives or other species. In addition, critical habitat does not preclude adaptive management or the incorporation of new information on the interaction between natural disturbance events and forest ecology. We continue to support sound ecosystem management and the maintenance of biodiversity.

As outlined in our final environmental assessment, in areas that contain owl habitat, native fish, wildlife, and plants may directly or indirectly benefit as a result of ecosystem protections provided through the conservation of the owl and the associated requirements of section 7 of the Act.

(5) *Comment:* How does the critical habitat designation correspond to the reasons why the owl is listed?

Our Response: The two primary reasons for listing the owl as threatened were historical alteration of its habitat as the result of timber management practices, and the threat of these practices continuing; and the risk of catastrophic wildfire (58 FR 14248). The Recovery Plan outlines management actions that land managers should undertake to remove recognized threats and recover the owl. This critical habitat designation is consistent with the Recovery Plan's goals, and therefore contributes to the reduction in the threats that necessitated listing the owl.

(6) *Comment:* Your list of constituent elements and condemnation of even-aged silviculture suggests that the constituent elements must occur on every acre of the 13.5 million acres. There appears to be an attempt to idealize and maximize owl populations over a very large area. The owl is flexible, adaptable, and capable of doing well and surviving with less.

Our Response: The determination of primary constituent elements and designation of critical habitat is consistent with the purposes of critical habitat provisions in the Act and the Recovery Plan's goals. In the Recovery Plan, we outline steps necessary to remove the owl from the list of threatened species. The Recovery Plan recognizes that owls nest, roost, forage, and disperse in a diverse array of biotic communities. The Recovery Plan provides realistic goals for the recovery of the species (including a significant increase in owl population numbers), and these goals are flexible in that they provide local land managers discretion to make site-specific decisions, including silviculture management. Nevertheless, critical habitat does not create the requirement to create primary constituent elements outside of where they currently occur.

(7) *Comment:* Designation of critical habitat is not needed to conserve the owl, because there is information that shows the spotted owl is doing very well; a year ago you were in the process of delisting the spotted owl, because it was doing well. What happened to that activity?

Our Response: We never proposed nor began the process of delisting the owl. In fact, some populations of owl may be declining (Seamans *et al.* 1999). Guitierrez (2003) found that the owl population studied by Seamans *et al.* (1999) in Arizona may be stable, but the New Mexico population in the same study was likely declining. On September 23, 1993, and April 1, 1994, we announced separate 90-day findings on two petitions to remove the owl from the list of endangered and threatened wildlife (FR 58 49467 and FR 59 15361, respectively). We found that the petitions did not present substantial scientific or commercial information indicating that delisting the owl was warranted. However, should sufficient information become available to us that warrants a status review or a change in status, we will undertake such efforts as appropriate.

(8) *Comment:* The designation of critical habitat will not provide any additional conservation benefit to the owl, which is already protected under section 7. Several commenters also questioned whether the designation of critical habitat will improve conservation of the owl because the current Recovery Plan is being implemented.

Our Response: We agree that designation of critical habitat provides little to no additional regulatory benefit in areas already managed compatibly with owl recovery (see "Designation of Critical Habitat Provides Little Additional Protection to Species"). The Recovery Plan for the owl was finalized in December 1995 (Service 1995). This plan recommends recovery goals, strategies for varying levels of habitat protection, population and habitat monitoring, a research program to better understand the biology of the owl, and implementation procedures. In addition, we have continued working with the owl Recovery Team since the plan was finalized. We believe this critical habitat designation is consistent with the Recovery Plan and recommendations of those team members. Nevertheless, many land managers are currently following the Recovery Plan that provides guidance for conserving habitat of the owl. Thus, the designation may provide little regulatory benefit to the species.

(9) *Comment:* One commenter stated that not enough information is known about the total habitat requirements of the species to define critical habitat. Further study of population trends, habitat requirements, and comprehensive monitoring are necessary to promote long-term conservation and recovery. Other commenters suggested that the designation is based upon flawed and outdated information, and that we should have relied upon recent models that predict owl habitat.

Our Response: Section 4(b) of the Act states "The Secretary shall make determinations [of critical habitat] * * * solely on the basis of the best scientific and commercial data available * * *" We considered the best scientific information available to us at this time, as required by the Act. This designation is based upon a considerable body of information on the biology of the owl, as well as effects from land-use practices on their continued existence. Based upon newly available information, coordination with land managers and stakeholders, and input received during the public

comment period, we have made revisions to the areas designated as critical habitat, which are reflected in this final rule (see "Summary of Changes From the Proposed Rule" section). We are not aware of any reliable information that is currently available to us that was not considered in this designation process. This final determination constitutes our best assessment of areas needed for the conservation of the species. Much remains to be learned about this species; should credible, new information become available which contradicts this designation, we will reevaluate our analysis and, if appropriate, propose to modify this critical habitat designation, depending on available funding and staffing. We must make this determination on the basis of the information available at this time, and we may not delay our decision until more information about the species and its habitat are available (*Southwest Center for Biological Diversity* v. *Babbitt*, 215 F.3d 58 (D.C. Cir. 2000)). Finally, we are also in the process of revising the current Recovery Plan. The Recovery Team anticipates that the revised Recovery Plan will be available during late 2005 (S. Rinkevich, Service, pers. comm., 2004). The revision will likely include much of the same guidance as the current Recovery Plan, but will also include recent information to further assist land managers in reducing the threats to the owl.

(10) *Comment:* In Colorado, the owl has been found only in canyon habitats and on rocky outcrops. We suggest that narrow, steep-walled canyons (greater than 40 percent slopes) or prominent rocky outcrops less than 9,500 feet (2,896 meters) in elevation be considered constituent elements for critical habitat in Colorado. Much of the area currently proposed as critical habitat does not contain such habitats and does not contribute to the conservation of the species. Pinyon-juniper habitat in Colorado is used by owls for roosting, foraging, and wintering. The final designation should include these areas, especially on Fort Carson.

Our Response: Designated critical habitat for the owl in Colorado already encompasses the commenter's suggestion. For example, protected habitat includes areas with slopes greater than 40 percent. Additionally, one of the primary constituent elements for canyon habitat includes canyon walls containing crevices, ledges, or caves. The critical habitat in Colorado is essential for the conservation of the species because it provides landscape connectivity within and among critical habitat units.

The designation only includes lands within protected or restricted areas and includes mixed conifer, pine-oak, and riparian habitat types as they are defined in the Recovery Plan (Service 1995). As noted above, we could not enlarge the final designation to add pinyon-juniper habitat that was not included in the proposed rule. Pinyon-juniper habitat falls within other forest and woodland types in the Recovery Plan (Service 1995). It should be noted that the Recovery Plan does not provide specific management guidelines for other forest and woodland types. However, the lack of specific guidelines does not imply that we regard these types as unimportant for the recovery of the owl. These areas would continue to be subject to section 7 consultation requirements if they are used by owls and a project has the potential to affect the species or its habitat.

(11) *Comment:* The "Utah" owls are a sub-species with unique genetic variations that may require different habitat and other life requirements.

Our Response: The Service recognizes that owls use both canyon and forest habitats. This is why the primary constituent elements are provided for both forests and canyons. However, we are not aware of any information in the scientific literature or provided by biologists researching the owl to indicate that owls in Utah are genetically different from *Strix occidentalis lucida*.

(12) *Comment:* The Carson National Forest contains high-elevation areas within proposed critical habitat that are not occupied by the owl. These areas should be refined or excluded from the designation.

Our Response: Based upon the most recent PAC information, we have refined the final designation to exclude all of the proposed critical habitat units that are not essential to the conservation of the species. This included a large portion of the Carson National Forest where owl surveys have been conducted through 400,000 acres (161,874 hectares) since 1988 and have yet to find an owl outside of the Jicarilla Ranger District (FS 2004). We are designating two critical habitat units on the Jicarilla Ranger District based upon public comments and the best scientific and commercial information. Nevertheless, these two critical habitat units contain WUI project areas that are not included in the designation, because these project areas are specifically excluded due to human health and safety concerns from the imminent risk of catastrophic wildfire (see "Exclusions Under Section 4(b)(2)" and "Regulation Promulgation" sections).

This designation of critical habitat does not mean that habitat outside the designation is unimportant or may not be required for recovery. For example, we recognize that the Carson National Forest is part of the southern Rocky Mountains, New Mexico Recovery Unit (RU) and contains protected and restricted habitat. Although many hypotheses have been suggested as to why the majority of this National Forest is apparently unoccupied (*e.g.*, high elevation, climatic conditions, etc.), we are unable to draw firm conclusions. A great deal of effort has been expended by owl biologists to survey potential habitat in this area and have only documented owls on the Jicarilla Ranger District. Other historic owl records have been difficult to verify, and are currently considered by the FS and others to be "questionable" (FS 2004). The most serious threat to the owl in this portion of its range is wildfire, which would be unaffected by a designation of critical habitat (Service 1995). Consequently, we cannot conclude that, outside of the two units we are designating as critical habitat, the remaining proposed critical habitat on the Carson is essential to the conservation of the owl because we have not found PACs in these areas.

Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 take prohibition, as determined on the basis of the best available information at the time of the action.

Issue 2: Procedural and Legal Compliance

(13) *Comment:* The designation of critical habitat will place an additional burden on land management agencies above and beyond what the listing of the species would require. The number of section 7 consultations will increase; large areas where no owls are known to occur will now be subject to section 7 consultation and will result in a waste of time and money by the affected agencies. Many Federal agencies have been making a "no effect" call within unoccupied suitable habitat. Now, with critical habitat there will be "may effect" determinations, and section 7 consultation will be required if any of the constituent elements are present.

Our Response: If a Federal agency funds, authorizes, or carries out an action that may affect either the owl or its critical habitat, the Act requires that

the agency consult with us under section 7 of the Act. For a project to affect critical habitat, it must affect the primary constituent elements, which are defined in the regulation section in this final rule.

Our view is and has been that any Federal action that affects owl habitat as defined by the Recovery Plan should be considered a situation that "may affect" the owl and should undergo section 7 consultation (Service 1996). This is true whether or not critical habitat is designated, even when the particular project site within the larger geographical area occupied by the species is not known to be currently occupied by an individual owl (*e.g.*, projects on the Carson National Forest). All areas designated as critical habitat are essential to the conservation of the species, so Federal actions affecting primary constituent elements of the owl should undergo consultation. As in the past, the Federal action agency will continue to make the determination as to whether their project may affect a species or designated critical habitat.

(14) *Comment:* Many commenters expressed concern that the Recovery Plan is not being implemented, and that federally funded or authorized activities (*i.e.*, logging, grazing, dam construction, etc.) within owl habitat are not consistent with recovery for the species and/or are not undergoing section 7 consultation for potential impacts to the owl.

Our Response: We are not aware of instances where action agencies have not consulted with us on actions that may affect the species or its habitat. We have consulted with Federal agencies on numerous projects since we issued the Recovery Plan. The Recovery Plan recognizes, as do we, that agencies must make management decisions for multiple use objectives. Thus, agencies consult with us under section 7 when they propose actions that are both consistent and inconsistent with Recovery Plan recommendations (*i.e.*, when they propose actions that may affect the species or critical habitat) (Service 1996). However, there have only been two consultations to date that have concluded that a proposed action is likely to jeopardize the continued existence of the owl (*i.e.*, the November 25, 1996, biological opinion on the existing forest plans and the June 13, 1996, biological opinion on the releases of site specific information).

(15) *Comment:* One commenter believes that the designation of critical habitat for the owl conflicts with the Federal Land Policy and Management Act of 1976, the Mining and Minerals Policy Act of 1970, the National Materials and Minerals Policy, Research, and Development Act of 1980, and other State and county policies and plans within the four States.

Our Response: We read through the comments and information provided concerning the various acts and policies; however, the commenter failed to adequately explain the rationale for why they believe critical habitat designation conflicts with the above Federal laws and policies or other State and County policies and plans. We are unaware of any conflicts with the cited laws, policies, and plans. However, we do recognize that significant conservation can be achieved by implementing these laws, which may obviate the need to designate critical habitat, especially when these laws are providing such conservation benefits.

(16) *Comment:* The FS and Bureau of Land Management (BLM) provided Geographic Information System (GIS) coverages and requested that we revise or exclude critical habitat units based upon lack of protected or restricted habitat and primary constituent elements. The suggested revisions are based upon digital elevation models, elevation, vegetation, owl surveys, and land management designations (*i.e.*, wilderness study areas). There was an expressed concern that much of the area within the proposed critical habitat boundaries does not contain one or more primary constituent elements to meet the definition of critical habitat and should not be included.

Our Response: We considered the information provided by the commenters and designated only those lands that were determined to be essential for the conservation of the owl (see "Summary of Changes From the Proposed Rule" section).

Critical habitat is defined as the areas within the mapped boundaries. However, as described in the "Section 7 Consultation" section below, consultation would occur when the action agency determines that activities they sponsor, fund, or authorize may affect areas defined as protected or restricted habitat that contain one or more of the primary constituent elements.

(17) *Comment:* Some commenters expressed concern that there are areas containing owls, but these were not within the critical habitat boundaries. Additional areas not identified in the proposed rule should be designated critical habitat. The Service should designate additional sites in Colorado, specifically Mesa Verde National Park, Boulder Mountain Parks, Red Rocks, Glenwood Canyon, and other deep, narrow canyon systems throughout the State.

Our Response: The critical habitat designation did not include some areas that are known to have widely scattered owl sites, low population densities, and/or unknown or marginal habitat quality, which are not considered to be essential to this species' conservation. Section 3(5) of the Act state that, "Except in those certain circumstances * * * critical habitat shall not include the entire geographical area which can be occupied by a species, rather only those areas essential for the conservation of the species. Additionally, section 4(b)(4) of the Act and the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) requires that areas designated as critical habitat must first be proposed as such. Thus, we cannot make additions in this final rule to include areas that were not included in the proposed rule. Designation of such areas would require a new or revised proposal and subsequent final rule.

(18) *Comment:* Why are areas included in the designation that are not presently occupied by the owl?

Our Response: The areas designated are within the geographical area occupied by the species because the critical habitat designation is devised around the majority of known owl nesting sites. The designation includes both protected and restricted habitat, as defined in the Recovery Plan, and contains the primary constituent elements as identified herein. We consider protected areas to be occupied on a more permanent basis and restricted areas are considered to be temporally occupied. We have included these areas in the designation based on information contained within the Recovery Plan that finds them to be essential to the conservation of the species because they currently possess the essential habitat requirements for nesting, roosting, foraging, and dispersal.

In section 3(5)(A) of the Act, critical habitat is defined as "(i) the specific areas within the geographical area occupied by the species on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside of the geographical area occupied by the species * * * [that] are essential to the conservation of the species". Pursuant to the Act and our implementing regulations, we must determine whether the designation of critical habitat for a given species is prudent and determinable. If it is both, then we

conduct a focused analysis to determine and delineate the specific areas, within the geographical area occupied by the species that contain the physical and biological features essential to the conservation of the species. Once these areas are defined, a determination is then made as to whether additional specific areas outside of the geographical area occupied by the species are required for the conservation of the species. In conducting our analyses, we use the best scientific and commercial data available. Our analyses take into consideration specific parameters including (1) space for individual and population growth and normal behavior; (2) food, water, air, light, minerals or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproductions, rearing of offspring, germination or seed dispersal; and (5) habitats that are protected from disturbance or are representative of the historical or ecological distribution of the species (50 CFR 424.12(b)). Consequently, we do take into consideration all available information concerning a species, its habitat, ecology, and threats and conduct an analysis to determine which specific areas are essential to its conservation. This final designation of critical habitat for the owl has been developed using the approach discussed above and constitutes our best assessment of the areas essential to its conservation.

(19) *Comment:* If land has dual ownership of private and Federal, is it critical habitat? The land in question is under private ownership and the mineral rights are owned by the BLM.

Our Response: The surface ownership is what would contain the primary constituent elements of critical habitat. Because the surface ownership is private and we are not including private land in this designation (see "Criteria for Identifying Critical Habitat Units" section below for further explaination), we would not consider the lands to be designated critical habitat. However, if a Federal agency (*e.g.*, BLM) funds, authorizes, or carries out an action (*e.g.*, mineral extraction) that may affect the owl or its habitat, the Act requires that the agency consult with us under section 7 of the Act. This is required whether or not critical habitat is designated for a listed species.

(20) *Comment:* Fort Carson, Colorado, provided information during the comment period that indicated the owl is not known to nest on the military installation and the species is a rare winter visitor. Protected or restricted habitat is also not known to exist on Fort Carson. In 2003, the Service reviewed and approved Fort Carson's final Integrated Natural Resources Management Plan (INRMP) that includes specific guidelines and protection measures for the owl. The INRMP includes measures to provide year-round containment and suppression of wildland fire and the establishment of a protective buffer zone around each roost tree. Other comments indicated that owls frequently use Fort Carson in the winter and the installation is an important winter foraging and roosting area.

Our Response: Fort Carson completed their final INRMP on April 8, 2003, which includes specific guidelines for protection and management for the owl. Thus, we are excluding this area from the final designation of critical habiat for the owl pursuant to section 4(a)(3) of the Act.

(21) *Comment:* How will the exclusion of certain lands (*e.g.*, State, private, Tribal) affect recovery and delisting of the owl?

Our Response: In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, we are required to base critical habitat designation on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements) that are essential to conservation of the species and that may require special management considerations or protection. We designated critical habitat for those lands we determined are essential to conservation of the owl. We did not include certain lands (*e.g.*, State, private, and Tribal) because we determined these areas are not essential to the conservation of the owl or because the benefits of excluding the specific areas pursuant to section 4(b)(2) of the Act outweigh the benefits of their inclusion. Because the majority of owls are known from Federal land, the exclusion of State, private, and Tribal lands in the designation of critical habitat for the owl will not affect the recovery and future delisting of the species. Whether or not a species has designated critical habitat, it is protected both from any actions resulting in an unlawful take and from Federal actions that could jeopardize the continued existence of the species. Moreover, our environmental assessment of this designation pursuant to NEPA found that our existing policy requires consultation on actions in suitable habitat outside of PACs regardless of critical habitat designation. In practice, critical habitat designation is unlikely to trigger section 7 consultations that would not occur in its absence. This is because Federal agencies are following the Recovery Plan and consulting with us on impacts to both protected and restricted habitat.

(22) *Comment:* The areas proposed as critical habitat in Colorado make up 4.2 percent of the total proposed critical habitat. Much of the areas proposed in Colorado do not contain the primary constituent elements for critical habitat for the owl. It is difficult to understand how the small amount of habitat proposed in Colorado is essential for the survival and recovery of the owl. The current tree stocking levels, species composition, and stand structure of areas proposed as critical habitat in Colorado do not currently, nor are they likely to, meet the definition of restricted "threshold" habitat as defined in the Recovery Plan.

Our Response: We carefully reviewed and considered the information provided by the commenter concerning this issue. We agree that not all of the land within the critical habitat boundaries in Colorado or elsewhere supports protected or restricted habitat. To the extent possible, we attempted to exclude from final critical habitat those area that did not support the primary constituent elements for the owl or protected or restricted habtiat. However, we may not have been able to exclude all such areas from the final designation. Federal actions limited to these areas would not be reviewed under section 7, unless they affect the species and/or the primary constituent elements in adjacent critical habitat.

(23) *Comment:* The statement that continued grazing in upland habitat will not adversely affect or modify critical habitat is unsubstantiated and is counter to FS information that suggests grazing may affect owl prey and increase the susceptibility of owl habitat to fire.

Our Response: Although the effects of livestock and wild ungulate grazing on the habitat of owl prey species is a complex issue, there exists some knowledge regarding the effects of grazing and small mammals frequently consumed by owls and plant communities inhabited by the owl's prey (Ward and Block 1995; Ward 2001). The Recovery Plan summarizes the effects of grazing to owls in four broad categories: (1) Altered prey availability; (2) altered susceptibility to fire; (3) degradation of riparian plant communities; and (4) impaired ability of plant communities to develop into owl habitat. In general, predicting the magnitude of grazing effects on owls and their habitats requires a better understanding of the relationship between owl habitat and grazing (Service 1995a). Nevertheless, grazing in

upland habitat has the potential to adversely impact the owl.

It is also important to note that grazing usually does not occur within mixed conifer habitat because livestock generally remain within meadows or riparian areas. In this example, the primary constituent elements within mixed conifer habitat are not likely to be substantially or significantly affected by grazing. Thus, the impacts to nest/roost and other mixed conifer habitat within PACs will likely be insignificant and discountable.

When grazing activities involve Federal funding, a Federal permit, or other Federal action, consultation is required when such activities have the potential to adversely affect the owl or its critical habitat. The consultation will analyze and determine to what degree the species is impacted by the proposed action.

(24) *Comment:* What is being done by Federal agencies to minimize the impact from wild ungulates on owl habitat (*e.g.*, elk grazing)?

Our Response: The Federal agencies use their discretion when selecting specific management strategies and activities. Consequently, a variety of techniques could be applied to manage range condition targets. The specifics are beyond the scope of this designation. In general, allowable forage use guidance for given range conditions and management strategies are typically developed through site specific NEPA analysis for individual allotments, and must be consistent with the applicable FS's Forest Plan Resource, BLM's Resource Management Plan, or other Agencies' management direction at the time they are issued (*e.g.*, FS see 36 CFR 219.10). Moreover, it is our understanding that the Federal action agency must consider the effect from all grazing activities (*i.e.*, livestock and wild ungulates) when they authorize grazing permits and manage and protect long-term range conditions consistent with their own range management regulations. Nevertheless, it is the responsibility of State game and fish agencies to manage elk. As noted throughout this final rule, when a Federal agency funds, authorizes, or carries out an action that may affect either the owl or its critical habitat, the Act requires that the agency consult with us under section 7.

(25) *Comment:* A premise for the proposed rule is that the Service was ordered by the court on March 13, 2000, to designate critical habitat by January 15, 2001. The court may not order critical habitat to be designated. Rather, the court may order the Service to make a decision on whether to designate critical habitat. The designation of critical habitat is an action that is ultimately discretionary, and the Service must apply the criteria in the Act and its regulations to decide whether to designate critical habitat. Thus, the Service should seek correction of that Court order and reconsider whether and to what extent critical habitat should be designated.

Our Response: The March 2000 court decision ordered us to repropose critical habitat for the owl and then publish a new final designation. Because we had already previously proposed and finalized critical habtiat for the owl (60 FR 29914, June 6, 1995), we already determined that critical habitat pursuant to the Act and implementing regulations was both prudent and determinable. Thus, the court would be within its jurisdiction to order us to repropose and publish a new final rule.

(26) *Comment:* Are lands within a National Park that are already protected, but proposed as wilderness areas, considered critical habitat?

Our Response: Yes, we consider lands that are within critical habitat boundaries as critical habitat, regardless of whether they are currently designated as wilderness.

(27) *Comment:* Military aircraft overflights and ballistic missile testing activities have no adverse effect on owl critical habitat.

Our Response: We believe that low-level military aircraft overflights could potentially affect the owl. However, the designation of critical habitat will not impede the ability of military aircraft to conduct overflights nor to conduct ballistic missile testing activities. Activities such as these will not require additional section 7 consultation beyond compliance related to the species. To clarify, proposed low-level military aircraft overflights that could potentially affect the owl will be reviewed during the consultation process for the species listing as they have in the past.

(28) *Comment:* Explain the rationale for excluding, by definition, State and private lands from the proposed designation; there are documented nesting sites for the owl in Colorado located on State-leased lands; State and private lands should be included; the majority of owl locations are from Federal lands because no one is doing surveys on private and State lands.

Our Response: Although we are aware of some owl locations on State and private lands, the majority of owl locations are from Federal and Tribal lands. Thus, we believe that owl conservation can best be achieved by management of Federal and Tribal lands, and determined that State and private lands are not essential to the species' recovery. We have therefore, not included State and private lands in this designation of critical habitat for the owl.

(29) *Comment:* Several commenters asked whether projects that have obtained a biological opinion pursuant to section 7 of the Act would be required to reinitiate consultation to address the designation of critical habitat. Will the FS have to reinitiate consultation on their Forest Plans when critical habitat is designated?

Our Response: In the case of projects that have undergone section 7 consultation and where that consultation did not address potential destruction or adverse modification of critical habitat for the owl, reinitiation of section 7 consultation may be required. The only exception is the consultation covering the 157 WUI project areas and the Penasco WUI project area that are not included in the designation, because the lands covered by these projects are specifically excluded due to human health and safety concerns from the imminent risk of catastrophic wildfire (see Exclusions Under Section 4(b)(2) and Regulations sections). As described in the 4(b)(8) discussion below, we expect that projects that do not jeopardize the continued existence of the owl will not likely destroy or adversely modify its critical habitat and no additional modification to the project would be required because the projects will be evaluated under the guidelines set by the Recovery Plan for both jeopardy to the species and adverse modification of critical habitat. This has been the case for those projects where the FS has completed conferencing on critical habitat (see Effect of Critical Habitat Designation section below).

(30) *Comment:* The El Paso Natural Gas Company questioned whether the designation of critical habitat will require consultation for routine maintenance and operations. For example, if a linear pipeline project crosses State, private, and FS lands, will consultation be required?

Our Response: Federal agencies are already required to consult with us on activities with a Federal nexus (*i.e.*, when a Federal agency is funding, permitting, or in some way authorizing a project) when their activities may affect the species. As discussed in response to Comment 29 above, and elsewhere in this rule, we do not anticipate additional requirements beyond those required by listing the owl as threatened. For routine maintenance and operations of public utilities or if a

linear pipeline project crosses State, private, and FS lands and does not affect the species or critical habitat, consultation will not be required. If maintenance activities would affect primary constituent elements of critical habitat and there is a Federal nexus, then section 7 consultation will be necessary.

(31) *Comment:* Several commenters questioned what the phrase, "may require special management considerations" means, and asked what kind of management activities might be implemented?

Our Response: Critical habitat is defined in section 3(5)(A) of the Act as "(i) the specific areas within the geographical area occupied by the species, at the time it is listed * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection* * *" While the Act or our implementing regulations do not define the phrase "may require special management or protection," we believe that in this final rule we have identified in general terms the types of special management and protection that the physical or biological features (*i.e.*, primary constituent elements) for the owl may require (refer to *Special* Management Considerations or Protections section). Additionally, the Recovery Plan includes guidelines that we believe also address special management considerations.

(32) *Comment:* Maps and descriptions provided are vague and violate the Act and 50 CFR Sec. 424.12(c).

Our Response: The maps published in the **Federal Register** are for illustration purposes only, and the amount of detail that can be provided on the maps published in the **Federal Register** is limited. While the legal descriptions published with the maps are specific and detailed to the areas being designated, we recognize that these descriptions may not be the most user-friendly. However, more detailed maps and GIS digital files of areas designated as critical habitat for the owl are available from the New Mexico Ecological Services Field Office (see **ADDRESSES** section). If additional clarification is necessary, please contact the New Mexico Ecological Services Field Office (see **ADDRESSES** section).

(33) *Comment:* Additional public hearings were requested during the public comment period for the purpose of presenting information and receiving comments.

Our Response: Earlier in this rule we discuss the extent by which we have attempted to engage the public in this rulemaking through public comment periods, public meetings, and news releases. More recently, on April 21, 2004, we held an informational meeting in Las Cruces, New Mexico. During this meeting, the Service and our contractors were present to answer participant's detailed questions. Due to the abbreviated timeframe to complete this final designation, we were not able to extend or reopen the public comment period or hold additional public hearings. However, due to our extensive efforts in attempting to involve the public in this rulemaking process, we believe that we have allowed for adequate opportunity for the public to provide information and comments to us.

(34) *Comment:* The Salt River Project, Arizona, questioned the current Service policy of excluding areas from the proposed designation prior to the areas being proposed, when the Act's implementing regulations require that the Secretary shall, after proposing designation, consider exclusion of areas for economic or other relevant impacts (50 CFR 424.19).

Our Response: The July 21, 2000 (65 FR 45336), proposed rule for the owl did not exclude any areas under section (4)(b)(2) of the Act. In our November 18, 2003 (68 FR 65020), notice reopening the comment period, we provided a preliminary 4(b)(2) analysis for tribal lands and indicated that we anticipated excluding tribal lands from the final designation based on our working relationship with the tribes and the fact that we had either received their owl management plans or would receive them shortly. However, this was only a preliminary analysis and no exclusions pursuant to section 4(b)(2) of the Act have been made until this final rule.

(35) *Comment:* The Service's conclusion that some unoccupied areas are essential to the conservation of the owl is questionable given that implementing regulations indicate the unoccupied habitat should only be designated when occupied areas are not adequate to ensure the conservation of the species (50 CFR 424.12(e)). The Service did not make a formal finding that occupied areas would be inadequate.

Our Response: Based on our analysis of the best available scientific and commercial data, we determined that all areas included in this designation are essential for the conservation of the species and within the geographical area occupied by the species (see response to comment 18 and "Criteria Used to Identify Critical Habitat" section below). Because the specific areas being designated are within the geographical area occupied by the species, we (*i.e.*, the Secretary of Interior) are not required to make a separate determination as to whether the lands included in the designation are essential to the conservation of the owl.

(36) *Comment:* The Service's definition of adverse modification of critical habitat in the proposed rule is inconsistent with the *Sierra Club* v. *U.S. Fish and Wildlife Service* (245 F.3d 434, U.S. Circuit Court of Appeals for the Fifth Circuit).

Our Response: Recent appellate court decisions (*i.e.*, *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, 245 F.3d 434 (Fifth Circuit, March 15, 2001); Gifford *Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 03–35279, 2004 U.S. App. Lexis 16215 (Ninth Circuit, August 6, 2004)), found our definition of adverse modification to be invalid. In response to these decisions, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species (See "Effects of Critical Habitat Designation" section). However, section 7 consultations for the owl and its critical habitat meet the standards articulated in these judicial decisions because guidelines for habitat management from the Recovery Plan for the owl are used to establish habitat management during section 7 consultations.

(37) *Comment:* How will the Service determine when the owl is recovered? Nowhere in the proposed rule does the Service articulate when protections under the Act will no longer be necessary.

Our Response: Critical habitat can assist in the recovery of a species, but does not achieve nor define what is needed for recovery. Recovery goals and criteria are defined by an operable plan. For example, the delisting criteria identified in the Recovery Plan (Service 1995) include: (1) The population in the three most populated Recovery Units (*i.e.*, upper Gila Mountains, Basin and Range East and Basin and Range West) must be stable or increasing after 10 years of monitoring; (2) scientifically-valid habitat monitoring protocols are designed and implemented to assess: (a) Gross changes in habitat quantity across the range of the species, and (b) habitat modifications and trajectories within treated stands; and (3) a long-term management plan is in place to ensure appropriate management for the species and its habitat. When these criteria are satisfied, we will evaluate the subspecies to determine if delisting may be warranted.

(38) *Comment:* The Service notes in the February 1, 2001, final rule that the 4.6 million acres (1.9 million hectares)

designated was likely over inclusive because the short deadline did not allow the fine-scale mapping necessary to physically exclude all of the areas that do not contain suitable habitat. Did the Service refine its mapping of critical habitat during the past three years since the proposed rule was published and shouldn't the Service be soliciting comments based on maps that more accurately depict the area the Service will treat as critical habitat?

Our Response: We refined our maps delineating the boundaries of critical habitat for the owl after considering public comments and information received from a variety of sources including the FS, BLM, and State agencies (*See* "Summary of Changes From the Proposed Rule" section). While we believe these maps to be much more refined, because of data limitations and time and resource constraints, we were not able to remove all specific areas that do not contain one or more of the primary constituent elements for the owl.

(39) *Comment:* The Service should readopt the February 2001 final rule to designate critical habitat for the owl.

Our Response: We have based this current final designation of critical habitat for the owl on our February 2001 final rule. We have, however, refined the previous designation based on the best available scientific and commercial data, public comments, and current policy. Please see the "Summary of Changes From the Proposed Rule" section below.

(40) *Comment:* The Service should also exclude areas that are covered by habitat conservation plans, safe harbor agreements, and other private lands covered by similar voluntary programs.

Our Response: As discussed throughout this final rule, we have determined that there are no private lands that have been determined to be essential to the conservation of the owl, and therefore included in this designation. The conservation programs that the commenter has raised are solely for private landowners. Since we have not included private lands in this designation, then exclusions of lands based on these conservation programs are not directly relevant.

(41) *Comment:* When you post a document on the internet, you limit the public's ability to comment because many people do not have a computer.

Our Response: In our proposed rule, and subsequent published notices and outreach materials concerning this rulemaking, we provided alternative procedures to obtain the documents, including mailing hard copies of documents when they are requested and obtaining hard copies from the New Mexico Fish and Wildlife Office. We believe that we have made all appropriate documents and information adequately available to the public for review and comment.

(42) *Comment:* Failure to designate FS lands will miss an opportunity to educate the public on the owl.

Our Response: In *Sierra Club* v. *Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that heightened public awareness of the plight of listed species and their habitats may facilitate conservation efforts. We agree with these findings. The proposed and final rules identify all areas that are essential to the conservation of the owl, regardless of whether all of these areas are included in the regulatory designation. Consequently, we believe that the informational benefits are provided.

(43) *Comment:* The FS in Region 3 is currently failing to implement its guidelines to protect the owl, and thus reconsultation is required even without critical habitat. Critical habitat would provide for reconsultation in an efficient and consistent manner.

Our Response: The FS in Region 3 has submitted a biological assessment to the Service on April 8, 2004, and requested reinitiation of the programmatic consultation for the 1996 Regional Land and Resource Management Plan Amendment that incorporated Recovery Plan guidelines for managing habitat of the species.

(44) *Comment:* Land management agencies have the necessary tools to manage habitat for the owl without designating critical habitat. Local support for the conservation of the species is required or you will not achieve recovery.

Our Response: We agree that the support of the public is essential to achieve recovery of this species. In excluding some areas from the designation, we are recognizing and acknowledging that conservation can be achieved outside of a critical habitat designation (*see* "Exclusions Under Section 4(b)(2)" section).

(45) *Comment:* The FS amended their National Forest Plans in Arizona and New Mexico in 1996 to conform to the Recovery Plan. These plans are still valid and in use, indicating that designation of critical habitat on FS lands in these states is not necessary. The National Forests in Arizona have amended their land and resource management plans to incorporate the Recovery Plan. Consistent with the Service's justification for not designating critical habitat on certain Tribal lands because habitat management plans are still valid and being implemented on these lands, the designation of critical habitat on FS lands may not be necessary because of existing land and resource management plans that are responsive to owl conservation.

Our Response: In our 2001 designation (66 FR 8530), we reached this conclusion and determined that FS lands in Arizona and New Mexico did not meet the definition of critical habitat because special management was already being provided through their land and resource management plans. Thus, we did not designate these lands, as well as the tribal lands of the Mescalero Apache and the Navajo Nation, as critical habitat because we felt that "additional" special management was not needed. However, on January 13, 2003, the United States District Court for the District of Arizona (*Center for Biological Diversity* v. *Norton*, Civ. No. 01–409 TUC DCB) rejected our conclusion and ruled that our final rule designating critical habitat for the owl violated the Act, as well as the APA. The Court did not agree with our interpretation of the definition of critical habitat (*i.e.* that essential areas may not be included in critical habitat because special management is already being provided) and, in addition, the Court ruled that even if we follow the Service's interpretation, the management provided by the FS was inadequate to justify excluding these lands. On November 12, 2003, the United States District Court for the District of Arizona, (*Center for Biological Diversity* v. *Norton*, Civ. No. 01–409 TUC DCB), ordered the Service to submit a new final rule for designation of critical habitat for the owl to the **Federal Register** by August 20, 2004. We have prepared this designation pursuant to that Court order.

(46) *Comment:* Private property and water rights will be taken as a result of the designation. The Service did not indicate or reveal that property rights were factored into any analyses.

Our Response: The mere promulgation of a regulation, like the enactment of a statute, does not take private property unless the regulation on its face denies the property owners all economically beneficial or productive use of their land (*Agins* v. *City of Tiburon*, 447 U.S. 255, 260–263 (1980); *Hodel* v. *Virginia Surface Mining*

and Reclamation Ass'n, 452 U.S. 264, 195 (1981); *Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003, 1014 (1992)). The Act does not automatically restrict all uses of critical habitat, but only imposes requirements under section 7(a)(2) on Federal agency actions that may result in destruction or adverse modification of designated critical habitat. This requirement does not apply to private actions that do not need Federal approvals, permits or funding. Furthermore, as discussed above, if a biological opinion concludes that a proposed action is likely to result in destruction or modification of critical habitat, we are required to suggest reasonable and prudent alternatives. In addition, State and private lands are not included in this designation by definition. In accordance with Executive Order 12630, we conclude that this designation does not have significant takings implications (see "Required Determinations" section below). As noted in our response to comment (88), we have also considered and reviewed information contained in our records, as well as in the economic and environmental analyses, as to whether holders of grazing permits may be impacted by the designation. At this time, we are unaware of any instances where grazing permit holders will be so substantially impacted as to constitute a "taking" of property under the 5th Amendment.

(47) *Comment:* The Service did not consider the indirect effect of critical habitat designation on adjacent lands that are not designated. For example, designation might affect fire suppression activities on nearby critical habitat, which could increase the risk of catastrophic wildfire on lands that are not within the designation.

Our Response: We have a special category of section 7 consultation, and corresponding regulations (50 CFR 402.05) called "Emergency Consultations." The consultation process does not affect the ability of an agency to respond to emergency events such as suppression of wildfire. During emergency events, our primary objective is to provide recommendations for minimizing adverse effects to listed species without impeding response efforts. Protecting human life and property comes first every time. Consequently, no constraints for protection of listed species or their critical habitat are ever recommended if they place human lives or structures (*e.g.,* houses) in danger. We are currently working with many of our Federal partners to provide technical assistance, coordination, and, in some instances, section 7 consultation for proactive projects to reduce the potential for emergency events (*e.g.,* WUI fuels management).

Issue 3: National Environmental Policy Act (NEPA) Compliance and Economic Analysis

(48) *Comment:* Several commenters questioned the adequacy of the Environmental Assessment (EA) and other aspects of our compliance with NEPA. They believe the Service should prepare an Environmental Impact Statement (EIS) on this action.

Our Response: The commenters did not provide sufficient rationale to explain why they believed the EA was inadequate and an EIS necessary. One of the purposes of an environmental assessment is to briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact (40 CFR 1508.9). An EIS is required only in instances where a proposed Federal action is expected to have a significant impact on the human environment. In order to determine whether designation of critical habitat would have such an effect, we prepared an EA of the effects of the proposed designation. We made the draft EA available for public comment on March 26, 2004, and published a notice of its availability in the **Federal Register** (69 FR 15777). Following consideration of public comments, we prepared a final EA which determined that the critical habitat designation for the owl does not constitute a major Federal action having a significant impact on the human environment. That determination is the basis for our Finding of No Significant Impact (FONSI). Both the final EA and FONSI are available for public review (see **ADDRESSES** section).

(49) *Comment:* Sierra, Lincoln, Otero, Counties, New Mexico, and the Coalition of Arizona/New Mexico Counties asked to be part of the NEPA process and were concerned that the Service would not have "important information" to complete the environmental assessment or economic analysis. These parties believe that they were not afforded the opportunity to participate in the NEPA process as required by the CEQ implementing regulations (40 CFR 1501.6; 1508.5) or the January 30, 2002, CEQ Memorandum for the Heads of Federal Agencies discussing cooperating agencies and procedural requirements of NEPA (CEQ Memorandum). We received several requests to hold public hearings to solicit comments on the draft environmental assessment and draft economic analysis. The Coalition of Arizona and New Mexico counties requested that a hearing be held close to or in each affected member county.

Our Response: The CEQ regulations require that Federal agencies responsible for preparing NEPA analyses and documentation do so "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. As detailed below, we attempted to engage these parties in the NEPA process, to meet the spirit and intent of cooperating agency status. We believe that the NEPA process was conducted consistent with the CEQ implementing regulations and the CEQ Memorandum. For example, we held stakeholder meetings on November 6 and 7, 2003, in Albuquerque and Phoenix to solicit relevant information for our analyses. Moreover, on November 18, 2003, we reopened the comment period on the July 21, 2000, proposed rule to designate critical habitat for the owl (68 FR 65020). As such, we mailed a copy of the **Federal Register** notice and a letter describing our intent to conduct a new NEPA analysis to all interested parties, including the commenters. On January 27, 2004, we responded to requests from these parties by inviting them to participate in the NEPA process and providing contact information for our NEPA and economic analysis contractors, so that they could communicate directly with them. The Service and our contractors conducting the economic analysis also contacted Otero County, New Mexico, in February 2004, to request any socioeconomic or other information. None of the parties provided any data to the Service or our contractors.

On March 26, 2004, we mailed copies of the draft environmental assessment and the draft economic analysis to these parties requesting their expert review, and providing an invitation to work with each of the parties to address any concerns or issues. We also invited them to a public informational meeting in Las Cruces, New Mexico, on April 20, 2004. This meeting provided an opportunity for public input and allowed the Service to answer any questions concerning the proposed rule, the draft environmental assessment, or the draft economic analysis. The parties did not provide any information to us, did not attend the public informational meeting, and did not contact us to schedule any additional meetings or provide information.

(50) *Comment:* The draft economic analysis failed to adequately estimate the potential economic impacts to landowners regarding various forest management and other activities.

Our Response: In our economic analysis, we attempted to address potential economic impacts from the designation on landowners and activities, including forest management activities. The analysis was based upon the best data available to our contractors. We subsequently released our draft analysis for public review and comment to specifically seek input from affected landowners, agencies, jurisdictions, and governments. Our final analysis incorporates or addresses any new information and issues raised in the public comments. Please refer to our final economic analysis of the designation for a more detailed discussion of these issues.

(51) *Comment:* Several commenters voiced concern that they were not directly contacted for their opinions on the economic impacts of critical habitat designation.

Our Response: It was not feasible to contact every potential stakeholder in order for us to develop a draft economic analysis. We believe we were able to understand the issues of concern to the local communities based on public comments submitted on the proposed rule and draft economic analysis, on transcripts from public hearings, and from detailed discussions with Service representatives, and from data otherwise available to us and our contractors. To clarify issues, we solicited information and comments from representatives of Federal, State, Tribal, and local government agencies, as well as some private landowners, and requested comments from all interested parties, including landowners we were unable to contact directly.

(52) *Comment:* The opportunity for public comment on the draft Economic Analysis and draft Environmental Assessment was limited.

Our Response: We announced the availability of these documents in the **Federal Register** on March 26, 2004, and opened a 30-day public comment period for the draft Economic Analysis, draft Environmental Assessment, and proposed rule. On November 13, 2003, the United States District Court for the District of Arizona, (*Center for Biological Diversity* v. *Norton,* Civ. No. 01–409 TUC DCB), extended the original deadlines for designating critical habitat and ordered us deliver the final rule to the **Federal Register** on August 20, 2004. We believe that sufficient time was allowed for the public to review and provide comment on these documents given the time frame ordered by the court.

(53) *Comment:* Your draft Economic Analysis did not consider watersheds, water rights, State water rights, adjudication with Texas on water rights, or the effect on water rights of any of the people within those watersheds.

Our Response: While we appreciate the concerns raised by the commenter about water rights, we do not have any specific information that leads us to believe that the designation of critical habitat for the owl will have any impact on water rights of any kind. Further, it is our interpretation that the commenter did not adequately explain their rationale as to why they believed critical habitat for the owl will impact watersheds or water rights.

(54) *Comment:* The draft economic analysis and proposed rule do not comply with Executive Order 12866, which requires each Federal agency to assess the costs and benefits of proposed regulations.

Our Response: We determined that this rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. Thus, a cost-benefit analysis is not required for purposes of Executive Order 12866 (see "Required Determinations" section).

(55) *Comment:* The draft economic analysis, draft environmental assessment, and proposed rule failed to adequately estimate and address the potential economic and environmental consequences and how timber, fuel wood, land acquisition and disposal, oil and gas development, and mining would be impacted by the designation.

Our Response: In our proposed rule and subsequent notices reopening the comment period on the proposal and draft economic analysis, we solicited information and comments associated with the potential impacts of designating critical habitat for the owl. Further, our economic analysis contractor conducted a variety of interviews to understand and estimate the types of potential impacts and costs that were perceived to stem from owl conservation. We reviewed all comments received during the public comment periods and have concluded that further information was not provided on how the designation of critical habitat would result in economic or environmental consequences beyond those already addressed in the economic analysis, environmental assessment, or this final rule.

(56) *Comment:* One commenter questioned whether publishing the proposed rule prior to releasing the environmental assessment violated the intent of NEPA by being pre-decisional. The Service did not consider a reasonable range of alternatives in the NEPA analysis.

Our Response: Alternative I in the environmental assessment was to finalize the designation of critical habitat as described in the proposed rule published in the **Federal Register** on July 21, 2000 (65 FR 45336). The draft EA also considered a no-action alternative and two other action alternatives. We believe the alternatives in our EA were sufficient, the document was consistent with the spirit and intent of NEPA, and it was not pre-decisional.

(57) *Comment:* The assumption applied in the economic analysis that the designation of critical habitat will cause no impacts above and beyond those caused by listing of the species is faulty, legally indefensible, and contrary to the Act. "Adverse modification" and "jeopardy" are different, will result in different impacts, and should be analyzed as such in the economic analysis.

Our Response: We have conducted a new analysis of the economic impacts of designating these areas, in a manner that is consistent with the ruling of the 10th Circuit Court of Appeals in *New Mexico Cattle Growers Ass'n* v. *USFWS,* 248 F.3d 1277 (10th Cir. 2001). As this economic analysis details, we included an analysis of "co-extensive" effects. As such, the economic analysis does not focus only on section 7 impacts.

(58) *Comment:* The proposed designation of critical habitat targets private property and will impose economic hardship on private landowners. There is an expressed concern that the proposed critical habitat designation would have serious financial implications for grazing and sources of revenue that depend upon Federal "multiple-use" lands. The designation will have harmful impacts on the quality of life, education, and economic stability of small towns. Anticipated effects on private property from habitat conservation plans under section 10 of the Act are not explained.

Our Response: As indicated in our proposal and this final rule, critical habitat for the owl is not being designated on private lands. Further, as stated in the economic analysis, the proposed rule to designate critical habitat for the owl is adding few, if any, new requirements to the current regulatory process. Since consultations for the adverse modification of the owl's critical habitat and jeopardy to the species are based upon determinations of consistency with the owl's Recovery Plan, the listing of the owl itself initiated the requirement for consultation. The critical habitat designation is unlikely to result in

additional requirements not already in place due to the species' listing.

(59) *Comment:* The Service did not engage in a good faith effort to develop and collect information regarding the full range of economic impacts consistent with recent case law (*New Mexico Cattlegrowers Association* v. *United States Fish and Wildlife Service,* 248 F.3d 1277 (10 Circuit 2001) and *Home Builders Association of Northern California* v. *United States Fish and Wildlife Service,* 268 F. Supp. 2d 1197 (E.D. Cal. 2003)).

Our Response: We believe the public was provided the opportunity to comment on all aspects of this designation and the associated documents (*See* response to comment 49 and "Previous Federal Action" section), and that this final rule and associated economic analysis and EA are consistent with current case law. The fact that this issue was raised during the public comment period reinforces our belief that we did provide "a good faith effort."

(60) *Comment:* The final rule designating critical habitat must include an explanation of the cost/benefit analysis for both why an area was included and why an area was excluded. The economic analysis fails to acknowledge the benefits of protecting the owls (*i.e.*, healthier watershed). One commenter also stated that economic benefits such as recreation and tourism dollars should be included.

Our Response: We did not have specific, scientifically credible data related to the benefits of designating critical habitat for the owl on the lands that are being designated. Because of this lack of data, we were not able to conduct an economic benefits analysis as the commenter suggested. However, if this data were available we would consider it in our analysis.

As we undertake the process of designating critical habitat for a species, we first evaluate lands defined by those physical and biological features essential to the conservation of the species within the geographical area occupied by the species for inclusion in the designation pursuant to section 3(5)(A) of the Act. Secondly, we evaluate lands defined by those features to assess whether they may require special management considerations or protection. Next we evaluate lands outside the geographical area occupied by the species to determine if any specific area is essential to the conservation of the species. The resulting lands in the designation are determined to be essential to the conservation of the species, for which justification for their inclusion and the potential benefits to the species from the designation are discussed throughout our proposed rule and this final rule. Accordingly, we believe that the biological and conservation benefits afforded the species by the inclusion of lands determined to be essential to the conservation of the species have been thoroughly explained.

Pursuant to section 4(b)(2) of the Act, we are required to take into consideration the economic impact, National Security, and any other relevant impact of specifying any particular area as critical habitat. We also may exclude any area from critical habitat if we determine that the benefits of such exclusion outweighs the benefits of specifying such area as part of the critical habitat, providing that the failure to designate such area will not result in the extinction of the species. We use information from our economic analysis, or other sources such as public comments, management plans, *etc.*, to conduct this analysis. For us to consider excluding an area from the designation, we are required to determine that the benefits of the exclusion outweighs the benefits (*i.e.*, biological or conservation benefits) of including the specific area in the designation. This is not simply a cost/benefit analysis, however. This is a policy analysis, and can include consideration of the impacts of the designation, the benefits to the species of the designation as well as policy considerations such as National Security, Tribal relationships, impacts on conservation partnerships and other public policy concerns. This evaluation is done on a case-by-case basis for particular areas based on the best available scientific and commercial data. A discussion of this analysis and any resulting exclusions is in this final designation.

(61) *Comment:* The Service should exclude Federal and Tribal lands that are currently covered by management plans for the owl. Failure to exclude areas from critical habitat that are subject to voluntary protection measures for the owl will undercut the attractiveness and usefulness of the full range of conservation tools and make management/conservation far less effective.

Our Response: It has been our policy to recognize voluntary conservation efforts and support those programs and partnerships. As such we have excluded from the designation of critical habitat for the owl areas covered by conservation plans for that owl that have been determined to provide a conservation benefit to the owl and its habitat (*See* "Exclusions Under Section 4(b)(2)" section below).

(62) *Comment:* The Service's economic analysis is too large in scope to evaluate those effects attributed solely to critical habitat because it analyzed all cost associated with "owl conservation measures." It is not clear how the Service could attribute impacts either exclusively or coextensively to critical habitat under this framework.

Our Response: The inclusion of economic costs related to listing and provisions of the Act, other than the critical habitat designation, have been quantified in the final economic analysis. This analysis includes co-extensive costs as well as costs related to the previous and current critical habitat designations.

(63) *Comment:* The economic analysis does not explain why a 10-year time period was selected. One commenter believes that the timeframe of ten years used in the analysis is too short and is inconsistent with other economic studies.

Our Response: To produce credible results, the economic analysis must consider impacts that are reasonably foreseeable. Based on available data, a ten-year timeframe was most fitting for this analysis. Federal and Tribal land use management agencies affected by this designation generally do not have specific plans for projects beyond ten years; thus, forecasting beyond ten years would increase the subjectivity of estimating potential impacts in this case. In addition, with respect to the timber industry in this region, detailed regional forecasts of activity in this industry beyond ten years are limited. The 10-year time horizon was also selected because the Recovery Plan is premised upon a similar time horizon.

(64) *Comment:* The economic analysis severely overinflates the costs attributable to grazing and other potential impacts.

Our Response: The commenter did not provide any data for us to consider and did not explain why he or she believes our estimates to be inadequate. Still, the economic analysis used the best information available to estimate potential impacts, while indicating that some of our assumptions were likely to be conservative and overstate effects. We understand that the public wants to know more about the kinds of costs section 7 consultations impose and frequently believes that critical habitat designation could require additional project modifications. Because of the potential uncertainty about the economic costs resulting from critical habitat designations, we believe it is reasonable to estimate the upper bounds of the cost of project modifications on the basis of the economic costs of

project modifications that would be required by consultation. The final economic analysis provides a detailed study concerning the potential effects of the designation of critical habitat for the owl, and we believe it is in compliance with the Tenth Circuit's decision in *New Mexico Cattle Growers Ass'n* v. *U.S. Fish and Wildlife Service,* 248 F.3d 1277.

(65) *Comment:* One commenter notes that the "national perspective" example of efficiency effects discussed in the text box on page 1–4 could be used as an excuse not to analyze the economic impact of critical habitat designation on local areas. In addition, this commenter suggests that the report should include both regional economic and efficiency impacts for all economic sectors affected by the owl from a critical habitat designation. Another commenter suggested that regional economic impacts should have been calculated for impacts related to the oil and gas industry.

Our Response: As noted in the referenced text box on page 1–4, there are several valid measures of economic impact. These include efficiency effects, which consider changes in national economic well-being, and distributional effects, including impacts to the economies of specific regions. Both efficiency effects and distributional effects are considered in the economic analysis. Specifically, impacts to the timber industry were measured as regional economic impacts (as discussed in the text box on page 3–2), while impacts to the grazing industry were measured as efficiency effects. In the economic analysis, regional economic impacts were not calculated for the grazing industry since the magnitude of expected impacts from owl-related restrictions on grazing was modest relative to the size of the grazing industry in the affected regions. Specifically, the forecast impact on grazing represents a loss of less than one-quarter of one percent of the grazing activity in New Mexico and Arizona. This is based on the loss of animal unit months (AUMs) calculated in the analysis compared to the total number of AUMs grazed in New Mexico and Arizona. However, in response to comments received and in order to provide additional information to interested parties, in the final economic analysis, the grazing section (Section 4) has been revised to include a discussion of regional economic impacts.

Similarly, the economic analysis did not calculate regional economic impacts related to the oil and gas industry because the magnitude of potential impacts was small in relation to the regional oil and gas economic activity. However, the analysis has been revised to include further discussion of economic impacts resulting from delays of oil and gas activities for owl conservation. Further research suggests that before drilling can commence, two years of surveys must be completed, which may delay drilling activities. While operators may sometimes be able to plan ahead, often it is difficult to build two years into the planning process, so drilling may effectively be delayed, depending on when owl surveys are completed and drilling can commence. This postponement may result in regional economic impacts. Based on available information, past impacts due to drilling delays have been limited, and the extent to which delays will result in impacts in the future is subject to a variety of uncertainties. Future impacts will depend on the number of wells delayed by owl conservation efforts, the production and success rates of future wells, and future costs to develop wells, all of which are not known with certainty. Discussion of potential future regional economic impacts from delays to oil and gas activities has been added to Section 7.2 of the final economic analysis.

(66) *Comment:* Several commenters ask how the economic analysis could be used to determine areas that might be excluded, stating that the level of aggregation of results doesn't allow for decision-making and "distorts the analysis." In addition, commenters note that the analysis does not break down the impacts to the county level.

Our Response: Given the nature of the designation (including only Federal and Tribal lands) and the data available to estimate economic impacts, results were presented at the management unit level (for example, by National Forest for FS lands, see Exhibits ES–2, ES–3, 3–3, 3–10, 3–11, 3–13, 4–5, 4–6, 4–7, 4–8, 5–5, 5–6, 7–7, 7–8). This level of detail allows for direct comparison of economic impacts with biological benefits, and thus the information presented can be considered, along with other factors, in deciding whether to exclude an area from the designation. While results are not given for each county individually, in the summary of results (Exhibits ES–2 and ES–3), the counties in which each unit is located are listed. Therefore, the report does provide information for parties interested in impacts at the county level.

(67) *Comment:* Several commenters believe that the economic analysis focused on section 7 consultations and therefore failed to disclose true impacts. One of these commenters states that the report fails to discuss "listing of the owl and attendant section 9 protections," Another commenter believes that the Service only addressed incremental economic costs to Federal Agencies involved in section 7 consultations and failed to analyze "impacts of critical habitat designation to current cultural or historical land management practices involving agriculture, silviculture or recreation." Another commenter states that it is misleading to discuss impacts from 1992 since primary economic impacts stem from the listing of the owl, not the designation of critical habitat.

Our Response: The commenters are incorrect in stating that the analysis focused on section 7 consultation and incremental impacts and failed to discuss impacts that stem from listing and other protections. The methodological approach and scope of the economic analysis is presented in Section 1 of the report. As this section details, the economic analysis complies with direction from *New Mexico Cattle Growers Ass'n* v. *U.S. Fish and Wildlife Service,* 248 F.3d 1277 that, when deciding which areas to designate as critical habitat, the economic analysis informing that decision should include "co-extensive" effects. As such, the economic analysis does not focus only on section 7 impacts. As stated on page ES–1, "This analysis considers the potential economic effects of owl conservation activities in the proposed critical habitat designation. Actions undertaken to meet the requirements of other Federal, State, and local laws and policies may afford protection to the owl and its habitat, and thus contribute to the efficacy of critical habitat-related conservation and recovery efforts. Thus, the impacts of these activities are relevant for understanding the full impact of the proposed critical habitat designation." The inclusion of impacts related to listing and provisions of the Act other than section 7 are discussed in Section 1.2, Scope of the Analysis. The past and ongoing, and future costs related to owl conservation activities that have been quantified in the final economic analysis include co-extensive costs as well as costs related to the previous and current designations. Past costs resulting from owl conservation efforts are included since they represent co-extensive effects of critical habitat designation that have occurred since the listing of the species.

In addition, the report addresses impacts to agriculture in Section 4, Economic Impacts to Livestock Grazing Activities. Silviculture is addressed in Section 3, Economic Impacts to the Timber Industry, and recreation is

addressed in Section 7.1, Impacts to Recreational Activities.

(68) *Comment:* One commenter states that the economic analysis consistently overstates costs to an extent considered arbitrary and capricious. Other commenters believe that the costs are understated because the analysis fails to consider impacts beyond section 7.

Our Response: The methodology and assumptions used to arrive at estimates of economic impacts are detailed in the report in Section 1, Exhibit ES–6, and Exhibit 3–14. Due to uncertainties regarding impacts, a range of estimates is presented, based on the best scientific and commercial information available at the time the analysis was being conducted. The data sources utilized in the report are discussed in Section 1.4 and specific citations are provided throughout the report and in the Reference list. In addition, the report has been reviewed by three independent technical advisors, all of whom found the approaches used to analyze impacts were appropriate.

(69) *Comment:* One commenter questions the method for determining "co-extensive" costs. The commenter is unclear if costs defined as co-extensive would necessarily be required under critical habitat alone. The commenter raises two examples of types of costs that it did not feel should be considered co-extensive, including costs related to FS measures for implementing Recovery Plan and costs related to Tribe's management plans. In particular, the commenter believes that because the Tribes' management plans will remain in place whether or not critical habitat is designated on Tribal lands, these costs should not be considered co-extensive with the designation.

Our Response: In order to comply with direction from the *New Mexico Cattle Growers Ass'n* v. *U.S. Fish and Wildlife Service* (248 F.3d 1277), the economic analysis addresses "co-extensive" effects of this designation. The economic analysis considers all impacts that result from efforts to protect owl and its habitat (referred to as "owl conservation activities"). As stated on page ES–1, "Actions undertaken to meet the requirements of other Federal, State, and local laws and policies may afford protection to the owl and its habitat, and thus contribute to the efficacy of critical habitat-related conservation and recovery efforts. Thus, the impacts of these activities are relevant for understanding the full impact of the proposed critical habitat." The scope of the analysis is discussed in Section 1.2 of the report. Costs related to implementation of the Recovery Plan, such as impacts resulting from owl-related standards and guidelines included in the Forest Service's Land and Resource Management Plans, are considered "co-extensive" because they result directly from the listing of the species. These impacts are addressed in Sections 3 and 4 of the report. In addition, the Tribe's owl management plans were likely created as a result of the listing of the species and the previous designations, and therefore are considered co-extensive effects of critical habitat for the purposes of this analysis. Impacts related to Tribe's owl management plans are addressed in Section 6 of the economic analysis.

(70) *Comment:* A commenter suggests that the phrase "owl conservation efforts" be defined in the Executive Summary.

Our Response: The phrase "owl conservation activities" is defined in Section 1 of the report as "efforts to protect owl and its habitat." The phrase "owl conservation efforts" is used interchangeably with 'owl conservation activities' in the report. Text has been added to the final economic analysis to clarify these phrases at the beginning of the Executive Summary.

(71) *Comment:* A commenter questions the appropriate baseline for the statement in the report that additional impacts due to critical habitat are unlikely. This commenter believes impacts from previous designation should not be included in the baseline. Another commenter thought that the economic analysis should consider the devastating impacts that have already occurred within the Lincoln National Forest as a result of "ongoing attempts at critical habitat designation that started in 1980s"; this commenter also provides estimates of present value revenue from forest products for south central New Mexico from the 1930s through the 1960s.

Our Response: This comment refers to the following statement on page ES–5 of the economic analysis: "For the most part, this analysis does not anticipate that designation of critical habitat for the owl will result in additional economic impacts above and beyond the current regulatory burden." This statement relates to impacts from this rulemaking specifically. The final economic analysis is not limited to quantifying the incremental, or "additional" impacts of critical habitat. Instead, in order to comply with direction from *New Mexico Cattle Growers Ass'n* v. *U.S. Fish and Wildlife Service,* 248 F.3d 1277, the results presented in the economic analysis include "co-extensive" effects of designation, as discussed in Response #3 and in Section 1 of the report. Impacts on the timber industry related to past designations were included in the past and ongoing impacts addressed in Section 3 of the final economic analysis.

With regard to the figures on present value of revenues from forest products for south central New Mexico, these estimates are for time periods prior to the listing of the owl. As the commenter notes, the industry experienced marked declines in revenues during this period. The economic analysis provided a similar discussion of the historical context for the timber industry in the southwest in Section 2.5.

(72) *Comment:* One commenter raises a number of questions with regard to the structure and content of the final economic analysis, including the following: How many economic statistics were sampled? What was the sampling intensity? What was the level of replication? What is the statistical design? What hypotheses are being tested? What variables were statistically significant between costs and impacts?

Our Response: The models used to calculate economic impacts related to owl conservation activities are based on a reliable sample of economic data. For example, the final economic analysis utilizes a software package called IMPLAN to estimate the total economic effects of the reduction in economic activity in the timber, grazing, and oil and gas industries in the study area. IMPLAN is commonly used by State and Federal agencies for policy planning and evaluation purposes. The model draws upon data from several Federal and State agencies, including the Bureau of Economic Analysis and the Bureau of Labor Statistics. In addition, a wide range of statistical data were utilized in order to gain an understanding of the economic environment in the areas and industries affected by this designation. The data sources relied upon are detailed in the references at the end of the report, and discussed in Section 1.4 Information Sources. Factors that may introduce uncertainty and bias into the analysis (*i.e.*, level of confidence in the results) are discussed throughout the report, and are summarized in Exhibit ES–6.

(73) *Comment:* One commenter raises a number of questions with regard to the structure and content of the final economic analysis, including the following: Were private stakeholders and communities solicited for input throughout the study period? How long was the study period?

Our Response: Private stakeholders have been solicited for input throughout the preparation of the economic

analysis, as evidenced by various communications and data sources relied upon in the report. The data sources relied upon are detailed in the references at the end of the report, and discussed in Section 1.4, Information Sources. The Service undertook various efforts to solicit public comment from the general public and stakeholders in particular. This included meetings held with Action agencies in Albuquerque and Phoenix, to provide information to the economic consultants. In addition, the economic consultants met with each of the Tribes whose lands were included in the proposed designation.

(74) *Comment:* One commenter raises a number of questions with regard to the structure and content of the final economic analysis, including the following: How were impacts determined? What economic and social parameters are being measured? What methods were used to analyze the economic and social data? What additional assumptions of critical habitat economic impacts beyond the assumed direct relationship of Federal agencies were used? What are the direct, induced and indirect economic cost impacts to affected communities from owl critical habitat designation? What were the results? How much variability was explained by the data?

Our Response: The final economic analysis discusses in detail how impacts were determined, the economic parameters measured, the analytical methods used, the assumptions underlying the analysis, and the results; please refer to the report for this information.

(75) *Comment:* One commenter questions what the peer review process is with regard to the final economic analysis.

Our Response: The report was reviewed by three independent technical advisors: Dr. Delworth Gardner, Resource & Agricultural Economics Specialist, Brigham Young University (Livestock Grazing), Dr. David Brookshire, Natural Resource and Environmental Economics Specialist, University of New Mexico (southwestern U.S. resource economics), and Dr. Roger Sedjo, Resources for the Future (Timber). These reviewers were each asked to read sections of the draft report, based on their expertise, and to provide feedback on the analytical methodology and the validity of the results. This feedback was then incorporated into the final draft report, as appropriate.

(76) *Comment:* Several commenters state that private property issues are not addressed in the economic analysis. In particular, one commenter states that costs to the private sector related to section 7 or section 10 are not explained or analyzed. For example, one commenter states that non-Federal landowners who voluntarily implement owl recovery management plans and apply for an incidental take will now have a Federal nexus. In addition, this commenter states that several counties will have more than 90 percent of their private land with critical habitat management impositions. Another commenter believes that the report should address the impacts of development of private land around the designation if rancher forced to sell due to AUM restrictions on Federal lands. Also, one commenter commends the Service for including impacts on HCPs or other section 10 permit efforts.

Our Response: Private property is specifically excluded from the designation. However, the analysis does consider the impacts of private entities developing Habitat Conservation Plans (HCP) under section 10 of the Act. Based on available data, there are no HCPs in place for the owl; however, there is one HCP under development by a private party for gravel mining activities in Colorado. Impacts related to this HCP are discussed in Section 7.3.1 of the final economic analysis. In addition, to the extent that private parties involved in grazing or timber activities on Federal lands are affected by owl related conservation activities, these impacts have been captured in the regional impact analyses of the timber and grazing industries. These analyses are presented in Sections 3 and 4 of the final economic analysis, respectively. The report also analyzes direct ranch level income effects resulting from reductions in permitted or authorized AUMs on Federal lands. These effects are summarized in Section 4 of the economic analysis. As noted in Section 1.2.3 of the final economic analysis, because the designation excludes private property, significant changes to private property values associated with public attitudes about critical habitat designation (known as "stigma" impacts) are not expected.

(77) *Comment:* Two commenters question the validity of personal communications as a data source.

Our Response: A wide variety of data sources are utilized in the economic analysis. The report provides clear referencing of the data relied upon for the analysis. The data sources relied upon are detailed in the references at the end of the report, and discussed in Section 1.4, Information Sources. Wherever possible, information provided by informed parties was confirmed by published data sources. Given the nature of the analysis, however, the use of published data sources is not always possible. The economic analysis has been based on the best scientific and commercial information, which includes discussions with informed parties and stakeholders, as well as published data sources. In addition, the report has been reviewed by three independent reviewers, including specialists in southwestern resource economics, timber issues, and livestock grazing issues.

(78) *Comment:* Several commenters note the economic analysis should assess social impacts associated with the designation. Commenters are concerned that the analysis did not mention social impact to rural areas or discuss the social benefits of grazing.

Our Response: The economic analysis is focused on analyzing the costs associated with owl conservation activities and is not intended to provide an analysis of social or cultural impacts. However, the environmental assessment did address social impacts (please refer the environmental assessment).

(79) *Comment:* One commenter raises a number of questions with regard to the structure and content of the final economic analysis and environmental assessment including the following: What are the cumulative socioeconomic and cultural impact costs to affected communities from owl critical habitat designation? What disproportionate burdens on affected minorities were identified and analyzed?

Our Response: Cumulative effects are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions" (40 CFR § 1508.7).

Cumulative effects are disclosed in section 3.11, where it is stated that: "Effects of proposed critical habitat designation on most resource areas are generally similar under each of the action alternatives, and vary only in terms of potential area of effect. These effects consist primarily of the potential for minor changes to projects resulting from reinitiation of consultation and implementation of discretionary conservation recommendations. These potential impacts are not likely to result in any cumulative effects, when added to the effects of existing section 7 consultations for other species and existing land management plans and policies." The cumulative effects analysis was clarified that critical habitat designation is unlikely to result

in additional project modifications compared to the existing condition (*i.e.* project modification resulting from consultation on effects to the species). Cumulative effects from any of the critical habitat designation alternatives are therefore improbable.

The heading of section 3.10 was changed to *Environmental Justice and Social Conditions*. In fact, the U.S. Fish and Wildlife Service's checklist for social impacts was used in preparation of the EA (*http://www.fws.gov/r9esnepa/NEPA%20Handbook%20TOC.pdf*). The EA was edited to specifically list the concerns outlined in the checklist and briefly discuss those that were considered relevant. Impacts to minority and low income populations were disclosed in section 3.10 of the draft EA.

The economic analysis considered impacts resulting from all activities related to conservation of the owl. However, the EA found that these impacts would occur regardless of critical habitat designation because all suitable habitat outside of PACs (is already considered in consultations on effects to the species.

(80) *Comment:* One commenter is concerned that the socioeconomic statistics presented in the economic analysis do not include production agriculture. The commenter notes that the data used in the analysis were derived from County Business Patterns data that does not accurately portray the role of the agricultural production sector. The commenter suggests using data from the U.S. Department of Commerce, Bureau of Economic Analysis' Regional Economic Information System.

Our Response: The commenter is referring to data presented in Exhibits 2–4 and 2–5 of the report for the counties within the critical habitat designation. These data are presented to give the reader an overview of the economy in the region affected by the designation. These data were considered the best scientific and commercial data available for the purpose of providing a general overview. The Agriculture, Forestry, Hunting, and Fishing category in these tables is defined by the U.S. Census Bureau as consisting of establishments primarily engaged in growing crops, raising animals, harvesting timber, and harvesting fish and other animals from a farm, ranch, or their natural habitats (NAICS Code 11). The commenter is correct that these figures do not include agricultural production. However, a more detailed overview of agriculture production in the region focusing on livestock grazing is presented in Section 2.3 of the report. While the Regional Economic Information System provides earnings by industry data, this information is not reported consistently for the counties within the study area for the most recent time period. Many of the county industry earnings are not reported for 2001 to avoid disclosing confidential information, or because the data was not available. The County Business Pattern data was more consistently available for the counties within the study period for the most recent time period; thus, this data was presented in the report.

(81) *Comment:* One commenter requests further information regarding the citation in footnote 41, especially with regard to data on earnings and total employment.

Our Response: This comment refers to a reference included in the discussion of the regional agriculture industry in Section 2.6 of the report. The reference is correct for data on earnings, based on livestock receipts as a share of total commodity receipts, which was obtained from the USDA National Agricultural Statistics Service for Arizona, Colorado, New Mexico, and Utah. However, as the commenter notes, the employment data referred to in the text is from a different data source. Statements about employment in the livestock industry are based on data from the U.S. Census Bureau's County Business Patterns. The footnote has been revised in the final report to more accurately cite the basis for the statements regarding earnings and employment.

(82) *Comment:* Several commenters question how timber impacts could be analyzed when there is no longer any timber industry in the region. Another commenter notes that many of the mills cited as being in operation are processing firewood and pellets, and operate on wood from WUI projects that have minimal if any impact on owls.

Our Response: As discussed in Section 2.5 of the economic analysis, the number of mills in operation and the amount of timber harvested from National Forests in the region have both declined significantly over the past 10 years. However, the analysis of impacts on the timber industry is based on a range of estimates of National Forest areas where timber harvest is restricted as a result of owl conservation efforts. For the upper-bound estimate, the analysis considers a scenario under which the industry would be capable of harvesting and processing timber from these lands. Thus, the impacts represent timber-related economic output and jobs that would have been available if owl conservation efforts did not occur. Results of the timber industry analysis are presented in Section 3 of the economic analysis.

Data on mills operating in the region, some of which are producing fuelwood and pellets, was provided by FS Region 2 and is included in the analysis in Exhibit 2–9. The commenter correctly notes that WUI projects are providing a source of supply for operating mills in the region.

(83) *Comment:* One commenter discusses how the cessation of logging activities has impacted taxpayers and social structure in affected communities in New Mexico. The commenter believes that the study minimizes the local impacts by averaging the damage.

Our Response: Clearly the decline of the timber industry has had significant economic impacts on local communities in New Mexico and Arizona. The report is focused on the impacts of owl conservation activities, rather than the overall impacts of the decline of the timber industry. As a result, the economic analysis quantifies the regional economic impacts associated with restrictions on logging in National Forests due to owl conservation efforts. The results of the regional economic impact analysis of the timber industry is presented in Sections 3.2.2 and 3.3.2 of the report.

(84) *Comment:* One commenter states that Tribes outside designation could be affected by owl conservation efforts, and these impacts should be included in the analysis. For example, the commenter believes Tribes outside of the designation could be affected by increased wildfire risk and secondary impacts affecting the regional economy. Another commenter states that they did not see where economic impacts were evaluated for the Ute Tribe.

Our Response: Tribes located outside of the proposed designation were not expected to experience direct economic impacts related to the designation, and therefore these Tribes are not specifically addressed in the analysis. However, to the extent that there are regional economic impacts related to restrictions on timber and grazing activities, if impacts to Tribes are likely, these have been captured in the regional economic impact analyses of these industries. These analyses are presented in Sections 3 and 4 of the final economic analysis, respectively. In addition, Section 5 presents an analysis of impacts to fire management activities that may result from owl conservation activities, including a discussion of the potential for increased wildfire risk.

(85) *Comment:* One commenter states that the Navajo sawmill—Navajo Forest Products Industries (NFPI) was not shutdown in July of 1994 due to issues

related to the owl, but rather was shutdown due to financial mismanagement.

Our Response: Based on available information, the injunction on timber harvest on Navajo lands was one of the factors contributing to the demise of NFPI in 1994. However, there were likely other factors contributing to the shutdown of the mill operations. This final economic analysis was not altered in its assumption that the lack of availability of timber from Navajo lands was a factor in the shutdown of the mill based on this comment letter. However, in response to this comment, the economic analysis has been revised to attribute the NFPI shutdown to a variety of factors, including the cessation of timber harvest on Navajo lands.

(86) *Comment:* One commenter notes that the termination of logging activities and the subsequent fuel load build-up over time has produced the potential for wildfires that could devastate the entire Lincoln National Forest. This commenter provides supporting information including estimates of lost timber value, costs of fire management activities, data on average number of acres destroyed per fire from 1960–2002, and fire suppression costs.

Our Response: The issue of impacts to fire management activities is discussed in Section 5 of the economic analysis. The data provided by the commenter on the average number of acres destroyed per fire is consistent with the data presented in Exhibit 5–1 and discussed in Section 5.1.1, Wildfire in the Southwest. The data estimating costs of fire management activities and lost timber value have been noted. As discussed in Section 5.2.3, Project Modifications Associated with Fire Suppression Activities, if a wildfire occurs, consultation takes place after the fact; therefore, fire suppression activities are not affected by owl conservation, as indicated in Exhibit 5–4. The potential for increased wildfire risk resulting from owl conservation efforts is discussed in Section 5 of the economic analysis. However, models for quantifying the impacts of increased wildfire risk are not available at a scale that would allow us to address the impact of owl conservation efforts. Therefore, these impacts are not quantified in the report.

(87) *Comment:* One commenter notes that owl protections prevent effective forest and watershed treatment which results in unnecessary fire fighting costs and destruction of water delivery, water quality impacts and infrastructure destroyed or damaged. The commenter believes the loss of environmental services should have been included in the analysis.

Our Response: The impacts of owl conservation activities on forest management and treatment are considered in Section 5 of the report. The resulting impacts are summarized in Exhibit 5–4. As illustrated in this exhibit, fire suppression activities are not expected to be modified as a result of owl conservation activities. As discussed in this section, the analysis found that restrictions on thinning and vegetation removal in PACs could have some economic impact.

(88) *Comment:* Several commenters state that regional economic impacts in areas where livestock grazing may be affected should be considered. Commenters note that there are indirect and induced effects on the regional economy that result from lost output in the range livestock or ranching sector. Commenters state that the economic analysis does not show actual economic burden to ranchers and county budgets. One commenter states that critical habitat will cause a reduction in cattle numbers and be detrimental to the New Mexico economy. This commenter provides information on reduced cattle numbers in Catron County, New Mexico, and the potential impacts of reductions in cattle in that County.

Our Response: As stated in Section 4 of the analysis, the estimated annual reduction in grazing anticipated to result from owl conservation measures represents approximately 0.14 percent of the annual AUMs grazed in affected states. This estimate includes impacts that are likely to result from numerous causes unrelated to the Act, but which could not be separated due to their temporal and spatial correlation with owl-related activities. To assume that a reduction in AUMs in owl critical habitat areas will result in an accompanying decrease in livestock production region-wide requires the assumption that no substitutions in forage will be made to adjust for the reductions in AUMs authorized in owl critical habitat areas. This is unlikely, given the well-documented behavior of ranchers wishing to maintain existing herds. For example, Rimbey *et al.* (2003) states that when faced with changes to public forage availability, ranchers "would do everything they could do to maintain their existing herd. Depending upon when the reductions occurred during the year, the ranchers identified alternatives for maintaining herd size and remaining in business: purchase (or not sell) additional hay (to replace forage in winter, early spring or late fall), and look for private pasture and rangeland leases (summer forage) (Rimbey *et al.* 2003). The last alternative mentioned by ranchers was the reduction in the number of cattle they would run on their ranches" (Rowe *et al.* 2001; Torell *et al.* 2001). Thus, given observed rancher behavior, it is unlikely that a reduction in permitted or authorized AUMs of Federal allotments in owl critical habitat areas would necessarily lead to a reduction in herd size, as long as replacement forage is available.

However, given the localized nature of ranching and the increasing number of restrictions on ranching behavior overall, it is possible that additional reductions that may be associated with owl conservation could occur in areas where substitute forage areas are not available, or where supplemental forage is prohibitively expensive. The economic analysis captures the value of those losses to rancher wealth by assuming that ranchers lose the value of AUMs reduced on Federal lands (*i.e.*, effectively assuming that no replacement forage is available). While assuming a region-wide reduction in AUMs equal to that estimated in the analysis is clearly conservative (*i.e.* more likely to overstate costs than understate costs), it may provide additional context for the reader who wishes to understand the potential impacts to the regional economy. As a result, a regional economic impact analysis using the IMPLAN model has been added to Section 4.3 and Section 4.5 of the analysis.

(89) *Comment:* One commenter states that permit value is not a widely used method to estimate impacts to the ranching industry. This commenter states that permit value is essentially a measure of rancher wealth based on the number of federally permitted AUMs he is allowed to graze, the value of the Federal grazing fee, and the private property and property rights owned by the permittee. This commenter also states that permit value is not recognized by the FS and only becomes a monetary transaction when the rancher sells or tries to sell his private property along with the associated grazing privileges.

Our Response: We agree with the commenter's definition of permit value as a measure of rancher wealth. Indeed, Section 4 of the economic analysis focuses on the estimation of potential lost rancher wealth that may be associated with a reduction in Federal AUMs grazed due to owl conservation efforts. This lost rancher wealth is measured in terms of lost permit value. Numerous published articles have focused on the derivation of permit value for Federal grazing permits. For

example, Torell *et al.* (2001) state that, "permit value represents the only available direct valuation of public land forage, except for a few scattered instances where public land is competitively leased. Using an appropriate capitalization rate, annualized estimates of forage value can be determined from the observed permit value." In a summary of recommended forage valuation methods, the author states that, "permit values provide a direct and site-specific estimate of forage value. Theoretically, this estimate should provide a site-specific estimate of value while considering the inherent production characteristics, regulations, and economic potential of specific allotments" (Torell *et al.* 1994). Thus, as discussed in Section 4.3.2, the revised economic analysis relies on the results of nine recent studies that attempt to measure the permit value of Federal grazing (per AUM) in order to estimate an average permit value for grazing on FS and BLM lands.

It is true that a 1970 court decision supported the government's position that ranchers "are not given title to the grazing resource and as such do not own a property right or have a corresponding economic right to permit value" (Torell *et al.* 1994). Yet, numerous published studies have found that a rancher maintains a value for holding a permit whether or not he sells his property (Torell and Doll 1991; Rowan and Workman 1992; Sunderman and Spahr 1994; Spahr and Sunderman 1995; Torell and Kincaid 1996). Thus, this analysis assumes that value is lost if a rancher is forced to reduce his AUMs grazed.

(90) *Comment:* One commenter states that the analysis overestimates impacts on grazing activity from owl, and should take the following factors into account when calculating the "bottom line" results: the number of threatened and endangered species in the allotment, existing soil and vegetation conditions, actual forage available in owl PACs, the climatic changes reducing AUMs, competition with other ungulates, and reductions in protective utilization levels accepted by range science.

Our Response: Section 4.2 of the economic analysis discusses factors that affect the number of permitted and authorized AUMs approved by FS and BLM for a given grazing allotment containing owl habitat. These factors include the presence of endangered species, tree encroachment, fire suppression, forage availability, and forage by other ungulates. The analysis states that "on a particular allotment containing owl habitat, reductions to authorized or permitted AUMs made by FS or BLM may be: (1) Directly related to owl conservation; (2) indirectly related to owl conservation; (3) not related to owl conservation at all; or (4) resulting from a combination of factors." The analysis then explains each scenario in detail, and suggests that in most cases, reductions in AUMs result from a combination of factors. The analysis also concludes that because of the spatial and temporal overlap of past reductions in AUMs with owl habitat, it is difficult to separate owl-related causes from other causes of changes that occur in owl habitat areas.

(91) *Comment:* One commenter stated that the differences in permit types such as continuous and seasonal grazing permits should be addressed.

Our Response: Continuous, or year-long, permits for grazing on Federal lands are common in the affected study area. Ranchers with year-long permits are likely to have a greater fraction of their annual forage base on Federal lands than those holding shorter, seasonal permits. This would imply that permit holders with yearlong permits may have less access to substitute forage, and thus may be more disadvantaged by AUM reductions than holders of seasonal permits. What is also implied is that an AUM of grazing in a year-long permit has greater value than an AUM in a seasonal permit. Indeed, Torell *et al.* (1994) find some evidence that permit values are greater in New Mexico, where year-long permits are common, than other states with more seasonal use (Torell *et al.* 1994). However, research has also shown that forage values vary throughout a year, and that some seasons may be more critical than others to a ranch operation (Godfrey and Bagley 1994). Thus, a rancher with a seasonal permit who relies on a particular season may also be severely affected by reductions in AUMs. A discussion of the differential effect of permit type has been added to Section 4 of the analysis.

(92) *Comment:* BLM stated that consultations are not expected to result in AUM reductions on BLM lands in Arizona.

Our Response: This statement provides support for the final economic analysis, which does not forecast any future AUM reductions on BLM lands in Arizona.

(93) *Comment:* One commenter states that the analysis erroneously included private ranch economic figures that are not in critical habitat, not in owl habitat, and not representative of ranch operations in affected areas. One commenter notes that a value of production figure was erroneously included in the permit value data. In addition, one commenter suggested that the permit values for Utah be removed from the analysis since this value has not been lost in Utah.

Our Response: Section 2.6 of the economic analysis presents economic information relevant to the livestock industry for each county affected by the proposed designation. Efforts were made to utilize site-specific data as much as possible throughout the sections of the analysis that discussed grazing. Estimates of AUM reductions were derived from consultations conducted in owl critical habitat areas. Authorized AUM estimates were derived from FS estimates in affected National Forests at the forest level. Permit value estimates were taken from recent, relevant studies in the field, primarily from areas where owl critical habitat was proposed. The two studies that provided permit value estimates for Utah were included because they were deemed relevant to this analysis. The value of production estimate has been removed from the permit value data.

(94) *Comment:* One commenter states that the costs associated with the proposed designation impacts on oil and gas activities are underestimated because the analysis did not consider owl-related restrictions on the time period available for exploration and development. The commenter believes that the owl stipulations limit the time period available for drilling to 2.5 months each year. In particular, the commenter states that owl seasonal restrictions on drilling are from March 31–August 31. The commenter notes that in Utah, BLM stipulations in designated critical habitat (and outside of critical habitat) restrict development on existing and future oil and gas leases, by preventing or limiting access to leases, which leads to less production.

Our Response: In the economic analysis, impacts to the oil and gas industry related to delays resulting from owl drilling restrictions were not analyzed in detail because these were not considered likely. In particular, based on consultation history and because the owl breeding-season restriction would not be the only limiting factor for when an operator can drill, these delays were not considered a major impact in the economic analysis. In addition, since owl critical habitat in Utah has been in place since 2001, it is likely that operators in that area are aware of owl survey requirements in order to get a permit to drill. The analysis found that, if no owl are recorded during surveys, then owl restrictions are not likely. BLM has been attaching lease notices for owl critical

habitat to oil and gas leases issued in the designation area since May 2002. These notices are part of the owl conservation activities undertaken by the BLM in order to raise awareness of owl issues at the leasing stage, and were considered in the economic analysis.

However, the analysis has been revised to include further discussion of economic impacts resulting from delays of oil and gas activities for owl conservation. Further research suggests that before drilling can commence, two years of surveys must be completed, which may delay drilling activities. While operators may sometimes be able to plan ahead, often it is difficult to build two years into the planning process, so drilling may effectively be delayed, depending on when owl surveys are completed and drilling can commence. This postponement may result in regional economic impacts. Given the relatively small role the designation plays in the total supply of oil and gas and the availability of substitute sources of supply, national efficiency effects are not predicted. Of the active wells in Utah and New Mexico, less than one-half of one percent is in the proposed designation. However, localized regional economic impacts are possible, especially if producers are unable to shift production to other locations within the region.

Based on available information, past impacts due to drilling delays have been limited; and the impact of delays in the future is subject to a variety of uncertainties. Future impacts will depend on the number of wells delayed by owl conservation efforts, the availability of substitute drilling locations within the region, the production and success rates of future wells, and future costs to develop wells, all of which are not known with certainty. Discussion of potential future regional economic impacts from delays to oil and gas activities has been added to Section 7.2 of the final economic analysis.

(95) *Comment:* One commenter states that delays related to owl restrictions will preclude oil and gas development. The commenter goes on to detail the economic impacts of not drilling wells. The commenter believes that the economic impacts of not drilling a well impact the operator, the community and the public. The commenter provides a net present value estimate of $400,000 for an individual well in the Stone Cabin area that encompasses part of CP–15.

Our Response: The economic analysis does not estimate impacts related to the prohibition of drilling wells because this activity has not been prohibited in the past and is not anticipated to be prohibited in the future as a result of owl conservation. While the timing of drilling activities may be impacted as a result of owl conservation efforts, operators who hold oil and gas leases in the designation are not expected to be prohibited from drilling. Reductions in the supply of oil and gas or increases in the price of these commodities is unlikely given the relatively small role the designation plays in the total supply of oil and gas and the availability of substitute sources of supply. Of the active wells in Utah and New Mexico, less than one-half of one percent is in the proposed designation. However, in response to public comments and as a result of additional information gathered since the final draft report was published, Section 7.2 of the economic analysis has been revised to include further discussion of future impacts related to project modifications and potential regional economic impacts of delays in oil and gas well drilling projects, as a result of owl conservation activities.

(96) *Comment:* One commenter believes that with respect to the oil and gas industry, the Service did not analyze "hidden social costs of the Act" such as the costs of reduced or terminated business activities and jobs, increased costs to provide services, and lower tax revenues from reduced or terminated business and personal income. The commenter further states that project delays or curtailment caused by the designation will have a ripple effect throughout local, state, regional and U.S. economies. In addition, the commenter provides estimates for local impacts based on analysis of drilling wells in Uintah and Duchesne counties in Utah.

Our Response: In the economic analysis, regional economic impacts were not considered likely to result from owl conservation activities in the case of the oil and gas industry because of the small portion of the industry affected by the designation. As the commenter notes, the amount of owl critical habitat within the existing and projected oil and gas fields of Utah is negligible at best. Of the active wells in Utah and New Mexico, less than one-half of one percent are in the proposed designation. While there is some potential for project delays due to owl conservation activities, it is possible that employees are able to find other work in the region, as the critical habitat represents a small amount of the local oil and gas industry. Given the current high price of natural gas (which is expected to continue), the resources (*e.g.*, equipment and labor) needed to develop this commodity are in high demand. Thus, even if development of certain wells in the designation is delayed, resources would likely be employed elsewhere, or would only remain unused for a short period of time.

However, based on public comment and additional research, the final economic analysis includes a regional economic impact analysis for impacts on the oil and gas industry in Utah. The commenter notes that in Uintah County, it spends approximately $3.4 million to drill a deep well and $1.6 million to drill a shallow well. In order to estimate regional economic impacts, the analysis assumes that operators are unable to find suitable substitute drilling locations within Carbon, Emery and Uintah counties in Utah; thus, the associated economic contribution is lost to the region in that year. The direct effect of delaying the drilling of a well is estimated based on the level of spending that would be forgone in the region in that year. The regional impact analysis estimates the number of jobs and level of output that would be result from this potential loss of oil and gas activity in the region. The results of this analysis are included in Section 7.2 of the final economic analysis.

(97) *Comment:* A commenter states that the use of past costs to estimate future costs is a faulty assumption because gas development is expanding in the region. The commenter provides supporting information to illustrate the rate of expansion of oil & gas development in Utah.

Our Response: Section 7.2 of the economic analysis used estimates of past owl consultation efforts as the basis for forecasting the level of section 7 consultation efforts and surveying efforts related to oil and gas activities. The commenter is correct that gas development is expected to increase in Utah in the future, and specifically in the area where unit CP–15 lies. The commenter notes that natural gas production in Carbon County, Utah, has increased an average of 49 percent per year for the 1993 to 2002 period. Based on the BLM's August 2002 Minerals Potential Report for the Price Utah area, Coal Bed Methane development in this region is expected to increase significantly over the next ten years. Given this expected development, and based on discussions with BLM and the Service, the analysis has been revised to forecast a 300 percent increase in consultations and owl surveying efforts related to oil and gas activities in this area in the future.

(98) *Comment:* One commenter notes that, should critical habitat reduce or

delay the development of natural gas wells, the supply of natural gas would decline and thus the price paid by consumers for this commodity would increase. The commenter provides citations to several studies documenting the current supply and demand conditions of the natural gas market, as well as reference to a model that considers the price implications of changes in supply and demand on the price consumers pay for natural gas.

Our Response: While the specific number of wells that could be drilled in designated critical habitat in the future is unknown, wells affected by owl conservation represent only a small portion of expected development in the region. Of the active wells in Utah and New Mexico, less than one-half of one percent are in the proposed designation. Given the current high price of natural gas (which is expected to continue), the resources (*e.g.*, equipment and labor) needed to develop this commodity are in high demand. Thus, even if development of certain wells is delayed, resources would likely be employed elsewhere, or would only remain unused for a short period of time.

Additional primary research would be required to estimate the impact on consumers of a small change in natural gas supply, and significant uncertainty would remain regarding the impact of owl conservation on the pace of well development, the impact of reduced development on gas supplies, etc. In addition, the impact measure provided by the commenter ($8 million in savings to consumers as a result of development of one well), does not account for possible losses to existing producers as the price falls (*i.e.*, changes in producer surplus). Thus, the net change in social welfare resulting from a change in supply of natural gas could be considerably smaller than that cited by the commenter.

The final economic analysis has been modified to include qualitative discussion of the potential impact of the designation on consumers of natural gas.

(99) *Comment:* The Service fails to consider substantial key data regarding the oil and gas industry in the region including employment data, production and revenues data and project modification data.

Our Response: The economic analysis did consider these types of statistics for the oil and gas industry in the region, as demonstrated by the data included in Exhibit 7–2. This exhibit presents employment data for oil and gas extraction as well as other sectors of the economy for the four states included in the designation. Data on oil and gas production in the region is also included in the analysis and presented in Exhibit 7–1. Revenue data for oil and gas operators was not available as many of the operators in the area are private operators and this information is confidential. In addition, many of the operators in the area operate in areas more expansive than the local region. Thus, revenue data were not included in the report. In the economic analysis, project modifications were considered unlikely for oil and gas projects; therefore these data were not included. However, in response to comments and based on further research, Section 7.2 of the report has been revised to include additional discussion of potential project modifications to oil and gas activities that could result from owl conservation activities.

(100) *Comment:* One commenter believes that the analysis of small business entities in the oil and gas industry is flawed because it compares the costs that local operators must incur to comply with owl restrictions in critical habitat to costs of operations for the entire U.S. oil and gas industry. The commenter further states that although some oil and gas companies that operate within the proposed critical habitat areas are headquartered outside those areas, much of their domestic oil and gas production potential is in the Rocky Mountain Region.

Our Response: As discussed in the Section 8.3 of the economic analysis, based on a review of operators in Carbon County, Utah, the majority of operators in the oil and gas industry are headquartered outside of the region. Oil and gas companies operating in Carbon County, Utah, are located in a variety of states, including Texas, Oklahoma and Alabama, among others. To determine whether a substantial number of operators are likely to be affected, it is important to compare the affected operators to the potentially affected population of oil and gas operators. Since most of the operators in the region appear to be in a wide variety of locations across the United States, it was determined that the relevant area for purposes of this analysis is the United States.

(101) *Comment:* One commenter states that AUM reductions are not typically evenly distributed, thus there is the possibility for significant regional economic impacts if all ranches affected are in the same region.

Our Response: As discussed in the final economic analysis, Section 8.2 Livestock Grazing Small Business Impacts, information is not available to determine the specific permittees most likely to experience a reduction in authorized AUMs. The analysis estimates an annual reduction of 3,100 to 15,600 AUMs for a variety of reasons, including actions unrelated to owl conservation. Since a typical permittee grazes approximately 1,070 AUMs, this reduction would likely affect more than one permittee. In order to estimate the number of permittees potentially affected, the analysis uses two approaches. First, the analysis estimates the number of permittees that could possibly experience a complete reduction in their authorized AUMs. Second, the analysis estimates the impact on each permittee in the proposed designation, if the impacts were evenly distributed. While it may not be likely that impacts are evenly distributed, this approach provides useful information to understand the potential range of impacts on ranchers, in the absence of more specific information.

(102) *Comment:* The environmental assessment only discusses cultural impacts to Tribes. The Southwest has a diverse mix of cultures that have already been significantly impacted by owl protections.

Our Response: The commenter did not provide sufficient rationale to explain why he or she believes that cultures have been significantly impacted by owl protections. Section 3.10 was added to the environmental assessment to address environmental justice and social conditions.

(103) *Comment:* The purpose of a NEPA document is to disclose impacts not to say that additional consultations are a result of designation of critical habitat when added to, "the effects of existing section 7 consultations for other species and existing land management plans and policies." While this discloses there will be cumulative effects it does not say what those effects will be or have been.

Our Response: The cumulative effects analysis (section 3.11) was edited to clarify that critical habitat designation is unlikely to result in additional project modifications compared to the existing condition (*i.e.* project modification resulting from consultation on effects to the species). Cumulative effects from any of the critical habitat designation alternatives are therefore improbable.

(104) *Comment:* The prior economic analysis did not consider all relevant costs.

Our Response: A new economic analysis was completed to address this final designation. The previous economic analysis is not reflective of this designation or our current approach for analyzing economic impacts.

(105) *Comment:* Current owl stipulations attached to Federal oil and gas leases and other permitted activities prohibit activities between March 31 and August 31 each year. The proposed critical habitat designation is part of the growing list of barriers to Federal land access for the energy industry and will effectively prohibit oil and gas reserves from being recovered. Proposed critical habitat in Utah should be excluded from the final designation because of the "other relevant impact" to our Nation's domestic energy production, and the resulting effects to our economy and National Security.

Our Response: As detailed in our economic analysis, since the listing of the owl, there have been 2 formal and 34 informal consultations with five Federal agencies. Based upon these and other data analyzed in our economic analysis and environmental assessment, we conclude that this rule is not expected to significantly affect energy supplies, distribution, or use (see also "Executive Order 13211" section below).

We have a very good consultation history for the owl; thus, we can describe the kinds of actions that have undergone consultations. Within the proposed critical habitat designation in New Mexico, there was only one informal consultation (the Department of Energy) in 1994 and no formal consultation; within Utah, there were 34 informal and 2 formal consultations. Since the owl was federally listed, none of the projects related to oil and gas production have been stopped, delayed, or altered in a significant way resulting from section 7 consultation. Using the economic analysis and our consultation history, we find that impacts to our "Nation's domestic energy production" resulting from the designation of critical habitat will not be significant and should have no effect on National Security.

(106) *Comment:* The Coalition of Arizona and New Mexico Counties suggests that all FS lands suitable for timber harvest and all Federal lands identified as having high risk for catastrophic wildfire be excluded from designated critical habitat.

Our Response: We recognize the risk of catastrophic wildfire to areas within the WUI and have excluded 157 project areas that were included in a programmatic consultation completed by the Region 3 of the FS and the Penasco WUI project area that we evaluated under a separate opinion (see "Exclusions Under Section 4(b)(2)" section below). Projects covered by the programmatic consultation and the separate opinion for the Penasco project area were determined by the FS as areas "at imminent risk of catastrophic wildfire" (Service 2001 and Service 2002). We are designating protected and restricted habitat based upon information in the Recovery Plan (Service 1995), which would include "lands suitable for timber harvest" because these areas are essential to the conservation of the owl.

In 1996, the 11 National Forest Plans in the Southwestern Region of the FS were amended to add specific standards and guidelines for the owl, grazing, and other management prescriptions (Forest Plan Amendments) (FS 1995, 1996b). Standards and guidelines are the bounds and constraints within which all FS management activities are to be carried out in achieving Forest Plan objectives (FS 1996b, p. 87). The language and intent of the Forest Plan Amendments were to incorporate the recommendations of the Recovery Plan (Service 1995) to provide primary direction for site-specific project design (FS 1995) (*i.e.*, the Forest Plan Amendments are applied through project level environmental analysis and decisions). It is important to note that the FS indicated the designation of critical habitat within protected or restricted habitat is not likely to result in a regulatory burden substantially above that already in place because they are already managing for the habitat by following their Forest Plan Amendments (K. Menasco, USDA FS, pers. comm., 2003).

Issue 4: Tribal Issues

(107) *Comment:* Why are Tribal lands included in the proposed designation?

Our Response: In our proposal to designate critical habitat, we found that lands of the Mescalero Apache, San Carlos Apache, and Navajo Nation likely met the definition of critical habitat with respect to the owl, and portions of those lands were proposed as critical habitat. However, we worked with the tribes in developing measures adequate to conserve owls on Tribal lands. The Mescalero Apache Tribe, San Carlos Apache Tribe, and Navajo Nation completed management plans for the owl that are generally consistent with the Recovery Plan. We have excluded all Tribal lands from final critical habtiat for the owl because the benefits of their exclusion outweigh the benefits of including these lands within the designation (see "Exclusions Under Section 4(b)(2)" section).

(108) *Comment:* The Mescalero Apache Tribe believes the Service did not adequately consider how the designation of critical habitat on Tribal lands will benefit the owl or how the designation will impact the Mescalero Apache Reservation.

Our Response: We did not include the Mescalero Apache or other Tribal lands in the final designation of critical habitat for the owl.

(109) *Comment:* The San Carlos Apache Tribe owl management plan is not an adequate basis for the Service to exclude their lands from designated critical habitat.

Our Response: We have determined that the conservation measures and benefits provided the owl and it habitat by the San Carlos Apache Tribe's managment plan, along with the cooperative partnership between the Tribe and the Service provide sufficient justification for excluding the Tribal lands from the final designation of critical habitat for the owl (See Exclusions Under Section 4(b)(2) section below).

(110) *Comment:* The Service's exclusion of the White Mountain Apache, Jicarilla Apache, and portions of the San Carlos Apache (Malay Gap) Tribal lands is not legally sound, given that *Center for Biological Diversity* v. *Norton* dismissed the Service's conclusions that additional special management is not required if adequate management or protection is currently in place.

Our Response: The White Mountain Apache, Jicarilla Apache, and portions of the San Carlos Apache (Malay Gap) lands are not included within the current designation because they were not proposed as critical habitat for the owl (65 FR 45336). We find these lands are not essential to the conservation of the species.

(111) *Comment:* The Service's section 4(b)(2) analysis considers the potential adverse impact of designating critical habitat on working relationships; however, such impacts should not take precedence over all other considerations (*i.e.*, the benefits of including areas within the designation). Where an area is essential to the conservation of the species, adverse impacts should be considered, but should not be the sole reason for excluding the area.

Our Response: We agree. That is why we are required to balance the benefits of including an area in a critical habitat designation against the benefits of excluding an area from that designation (see "Exclusions Under Section 4(b)(2)" section).

(112) *Comment:* Did the Service: (1) Receive an unredacted version of the San Carlos Apache owl plan; (2) has the Tribal council or the Service approved the plan; and (3) for what time period is the plan effective?

Our Response: We received a redacted version of the San Carlos Apache managment plan for the owl. The Tribal Council has approved the plan, and there is no expiration date for the plan.

(113) *Comment:* It is not clear what law or regulation occasioned the Tribes to prepare and implement their owl management plans, or whether they are legally required to continue implementing these plans with or without critical habitat.

Our Response: The plans were voluntarily prepared with technical assistance from the Service. It is our understanding that the Tribes will continue implementing the plans and revise them as appropriate.

(114) *Comment:* The Categorical exclusion of Tribes from the designation is inconsistent with the requirements of section 4 of the Act.

Our Response: We have carefully examined the merits of excluding Tribal lands from this designation on a case-by-case basis. Please see "Exclusions Under Section 4(b)(2)" section for our detailed analysis and rationale for exclusions of tribal lands from this designation.

(115) *Comment:* The Southern Ute Indian Tribe believes that the establishment and maintenance of strong working relationships with all Tribes warrants the exclusion of all Tribal lands from the designation. The Hualapai Tribe indicated that it is inappropriate for the Service to designate critical habitat on Indian lands, where Tribes have the expertise, capacity, and regulations to protect endangered species on their lands. The BIA Southwest Region commented that the existing owl management plan for the Mescalero Apache has protected and effectively conserved the species on Tribal lands; including this area as critical habitat would undermine the Tribe's status as a sovereign nation, increase workloads for the Tribe and BIA, preclude commercial use of the forest, and contribute to the increase risk of catastrophic wildfire. The BIA also indicated that designating critical habitat on Tribal lands would adversely affect the Service's working relationship with all Tribal governments.

Our Response: After conducting an analysis under section 4(b)(2) of the Act, we concluded that the benefits of excluding the San Carlos Apache, Mescalero Apache, and Navajo Nation lands from the final designation of critical habitat for the owl outweigh the benefits to the owl and its habitat from their inclusion. Accordingly, we have excluded all Tribal lands from this final designation of critical habitat for the owl.

(116) *Comment:* The Navajo Nation Forest Management Plan and owl plan provide no documented benefit to the species because neither plan complies with the Recovery Plan.

Our Response: Please see our discussion of the Navajo Nation Forest Management Plan in the "Exclusions Under Section 4(b)(2)" section below.

(117) *Comment:* Contrary to statements in the draft environmental assessment, there are no known owl nest or roost sites, no known populations, and no known occupied areas of any sort on the Jicarilla Apache Nation's lands.

Our Response: The data concerning owl occurrences on the lands of the Jicarilla Apache Nation that is currently within Service files and the supporting record for this indicate that there are only two known records for the owl on the Jicarilla Apache Nation's lands. Both records are from the 1980s. Since then, extensive surveys have been conducted, but did not locate any additional owls. These lands are not considered essential to the conservation of the owl. The description of alternatives in the environmental assessment was edited to correct this error.

Issue 5: Other Relevant Issues

(118) *Comment:* The designation of critical habitat would constitute a "government land grab." The owl is merely the vehicle by which environmental groups plan to stop harvest of "old growth" forests.

Our Response: The designation of critical habitat has no effect on non-Federal actions taken on private or State lands, even if the land is within the mapped boundary of designated critical habitat, because these lands were specifically excluded from the designation. We believe that the designation of critical habitat for the owl does not impose any additional restrictions on land managers/owners within those areas designated as critical habitat, beyond those imposed due to the listing of the owl. All landowners are responsible to ensure that their actions do not result in the unauthorized take of a listed species, and all Federal agencies are responsible to ensure that the actions they fund, permit, or carry out do not result in jeopardizing the continued existence of a listed species, regardless of where the activity takes place.

We also note that this designation is consistent with the Recovery Plan. While the Recovery Plan does not explicitly protect "old-growth" forests, it does recommend that large trees and other forest attributes that may be found in "old-growth" forests be retained to the extent practicable within certain forest types. Large trees are important ecosystem components, have been much reduced in the Southwest, and take many decades to replace once they are lost.

As detailed below, the 11 National Forest Plans in the Southwestern Region of the FS were amended in 1996 to add specific standards and guidelines for the owl, grazing, and old-growth (Forest Plan Amendments) (FS 1995, 1996b). The FS has previously indicated that the Forest Plan Amendments are non-discretionary actions that must be implemented by each of the 11 National Forests in the Southwestern Region (Service 2004). We also note that site-specific decisions must be consistent with the applicable Forest Plan at the time they are issued, and fall under the authority of the National Forest Management Act of 1976 (36 CFR 219).

(119) *Comment:* The owl by its very name is not exclusive to the United States. Typical of most Mexican fauna entering the United States, it appears rarer than it really is. Therefore, it is Mexico's duty to protect it.

Our Response: The Mexican spotted owl was determined to be threatened throughout its range in the United States and Mexico, and we are obligated by statue (the Act) to provide regulatory protection for the species, if warranted, regardless of the protection measures afforded the species in Mexico. Furthermore, according to CFR 402.12(h) "Critical habitat shall not be designated within foreign countries or in other areas outside of the United States jurisdiction", and shall only be designated for a listed species in the boundaries of the United States to the maximum extent prudent and determinable.

(120) *Comment:* Why were the public hearings in Utah held in the southwestern part of the State when most of the critical habitat is in the southeastern portion?

Our Response: The Act requires that at least one public hearing be held if requested. We held six public hearings throughout the four state region. We selected Cedar City, Utah, for a hearing location because of its proximity to four of the five proposed critical habitat units in the State.

(121) *Comment:* The designation of critical habitat abrogates the Treaty of Guadalupe Hidalgo. You do not have constitutional authority to do so.

Our Response: The Treaty of Guadalupe Hidalgo resulted in grants of land made by the Mexican government in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States.

These grants of land were respected as valid, to the same extent that the same grants would have been valid within the territories if the grants of land had remained within the limits of Mexico. The designation of critical habitat has no effect on non-Federal actions taken on private land (*e.g.*, land grants), even if the private land is within the mapped boundary of designated critical habitat because we have not included State and private lands in this designation of critical habitat for the owl by definition. Critical habitat has possible effects on activities conducted by non-Federal entities only if they are conducting activities on Federal lands or that involves Federal funding, a Federal permit, or other Federal action (*e.g.*, grazing permits). If such a Federal nexus exists, we will work with the applicant and the appropriate Federal agency to ensure that the project can be completed without jeopardizing the species or adversely modifying critical habitat. Therefore we do not believe that designation of critical habitat for the owl abrogates any treaty of the United States.

(122) *Comment:* Many commenters were concerned that the designation of critical habitat would prohibit recreational and commercial activities from taking place.

Our Response: As stated in the economic analysis and this final rule, we do not believe the designation of critical habitat will have significant adverse economic effects on any landowner above and beyond the effects of listing of the species. It is correct that projects funded, authorized, or carried out by Federal agencies, and that may affect critical habitat, must undergo consultation under section 7 of the Act. This provision includes commercial activities. However, as stated elsewhere in this final rule, we do not expect the result of those consultations to result in any restrictions that would not be required as a result of listing the owl as a threatened species.

Designation of critical habitat does not preclude commercial projects or activities such as riparian restoration, fire prevention/management, or grazing if they do not cause an adverse modification of critical habitat. We will work with Federal agencies that are required to consult with us under section 7 of the Act to ensure that land management will not adversely modify critical habitat.

(123) *Comment:* The Federal Highway Administration (FHA) requested that we exclude roadways and adjacent rights-of-way from the final designation because of economic impacts and delays. These areas typically provide poor or marginal habitat for the owl.

Our Response: We did not exclude adjacent rights-of-way from the final designation, but note that existing roads, other paved areas, and areas that do not contain one or more primary constituent elements are not considered critical habitat. If adjacent lands meet the definition of protected or restricted habitat and contain primary constituent elements, then they would still be considered critical habitat. The additional administrative costs for consultation are included in the economic analysis. We do not anticipate delays associated with the FHA projects and the designation of critical habitat. Compliance with section 7 could range from simple concurrence, which is usually completed within 30 days, to formal consultation, which could take up to 135 days. Formal consultation would only be necessary if the action would have an adverse effect on the critical habitat. Designation of critical habitat in areas essential to the conservation of the owl is not likely to result in a regulatory burden substantially above that already in place due to the presence of the species. To streamline the regulatory process, the FHA may request section 7 consultation at a programmatic level for activities that would result in adverse effects to critical habitat.

Adjacent rights-of-way contain habitat essential to the conservation of the owl if they contain one or more primary constituent elements. Therefore, we cannot justify excluding these particular areas from the designation.

(124) *Comment:* Impacts to international migratory waterfowl treaties are not addressed by the Service in the economic analysis or environmental assessment.

Our Response: We do not believe that the designation of critical habitat for the owl impacts internaltional migratory waterfowl treaties and consequently did not take these treaties into consideration when conducting our economic or environmental analyses. Further, the commenter did not provide any data for us to consider and did not adequately explain the rationale why international migratory waterfowl treaties would be affected by the critical habitat designation.

Summary of Changes From the Proposed Rule

Based upon our review of the public comments, the economic analysis, environmental assessment, issues addressed at the informational meeting and any new relevent information that may have become available since the publication of the proposal, we reevaluated our critical habitat proposal and made changes as appropriate. Other than minor clarifications and incorporation of additional information on the species' biology, this final rule differs from the proposal as follows:

(1) We attempted to clarify the definitions and use of protected and restricted habitat and the attributes of primary constituent elements of critical habitat in this rule.

(2) In the proposed rule we stated that all administratively reserved lands (*i.e.*, lands that have been administratively withdrawn from commercial activities, such as wilderness or research natural areas) would be considered critical habitat and included "designated" wilderness areas.

(3) We modified some of our critical habitat units based upon information submitted during the public comment period. Some critical habitat units have been removed from the designation because we determined, based on the best available information, that they did not contain areas essential to the conservation of the owl. The majority of refinements were conducted to remove, to the extent possible, those areas that did not contain protected or restricted habitat and primary constituent elements.

(4) The boundary of Unit BR–W–7 in Arizona was discovered to be mapped incorrectly. We have changed the boundary for this unit and have verified the boundaries for all units to ensure that they are correct;

(5) We excluded 157 WUI project areas and the Penasco WUI project area on FS lands in Arizona and New Mexico because the benefits of excluding these lands outweigh the benefits of their inclusion.

(6) No Tribal lands are designated, including Canyon de Chelly and Navajo National Monument administered by the NPS, because the benefits of excluding the lands from the designation outweigh the benefits of their inclusion pursuant to section 4(b)(2) of the Act;

(7) Fort Carson, Colorado, Fort Huachuca, Arizona, and the U.S. Naval Observatory Flagstaff Station, Arizona, are excluded because they have final INRMPs and are consistent with the 2004 National Defense Authorization Act (Pub. L. 108–136, November 2003), Section 318, Military Readiness and Conservation of Protected Species which amended section 4(a)(3) of the Act;

(8) Fort Wingate Army Depot, New Mexico, is excluded from the designation because it does not contain

areas that are essential to the conservation of the species; and

Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as—(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection and; (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. The term "conservation," as defined in section 3(3) of the Act, means "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary" (*i.e.*, the species is recovered and removed from the list of endangered and threatened species).

Section 4(b)(2) of the Act requires that we base critical habitat designation on the best scientific and commercial data available, taking into consideration the economic impact, impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation if we determine that the benefits of exclusion outweigh the benefits of including the areas as critical habitat, provided the exclusion will not result in the extinction of the species.

In order to be included in a critical habitat designation, the habitat must first be "essential to the conservation of the species." Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Section 4 requires that we designate critical habitat at the time of listing and based on what we know at the time of the designation. When we designate critical habitat at the time of listing or under court-ordered deadlines, we will often not have sufficient information to identify all areas of critical habitat. We are required, nevertheless, to make a decision and thus must base our designations on what, at the time of designation, we know to be critical habitat.

Within the geographical area occupied by the species, we will designate only areas currently known to be essential. We will not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. If the information available at the time of designation does not show that an area provides essential life cycle needs of the species, then the area should not be included in the critical habitat designation.

Our regulations state that, "The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species" (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific and commercial data available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, and biological assessments or other unpublished materials (*i.e.* gray literature).

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, all should understand that critical habitat designations do *not* signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under Section 7(a)(1) and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the Section 9 take prohibition, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Primary Constituent Elements

In accordance with sections 3(5)(A) and 4(b) of the Act and regulations at 50 CFR 424.12, we are required to base critical habitat designation on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements) that are essential to conservation of the species and that may require special management considerations or protection. Such general requirements include, but are not limited to—space for individual and population growth, and for normal behavior; food, water, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The primary constituent elements essential to the conservation of the owl include those physical and biological features that support nesting, roosting, and foraging. These elements were determined from studies of owl behavior and habitat use throughout the range of the owl (see "Background" section above). Although the vegetative communities and structural attributes used by the owl vary across the range of the subspecies, they consist primarily of mixed conifer forests or canyons. The mixed-conifer, pine-oak communities and canyon habitat appear to be the most frequently used community throughout most portions of the subspecies' range (Skaggs and Raitt 1988; Ganey and Balda 1989, 1994;

Gutierrez and Rinkevich 1991, Service 1995). Although the structural characteristics of owl habitat vary depending on uses of the habitat (*e.g.*, nesting, roosting, foraging) and variations in the plant communities over the range of the subspecies, some general attributes are common to the subspecies' life-history requirements throughout its range.

Protected areas include all known owl sites (PACs), all areas in mixed-conifer and pine-oak types with greater than 40 percent slopes where timber harvest has not occurred in the past 20 years and administratively reserved lands, such as Wilderness Areas or Research Natural Areas. Restricted habitat includes mixed-conifer forest, pine-oak forest, and riparian areas adjacent to or outside of protected areas. These habitat areas are used by resident (*i.e.*, territorial) owls for foraging, since the 600 acres recommended for PACs include on average 75 percent of nighttime foraging locations of radioed birds. The restricted areas also provide habitat for non-territorial birds (often referred to as "floaters"), to support dispersing juveniles, and to provide replacement nest/roost habitat on the landscape through time. For example, restricted habitat can succeed to protected habitat by replacing protected habitat that has been lost by fire or decay, thereby providing additional protected habitat that will assist in the conservation of the owl. These areas are essential to the conservation of the species because they encompass habitat that is required by the owl to complete its life cycle and are needed for recovery. Other forest and woodland types (ponderosa pine, spruce-fir, pinyon-juniper, and aspen) are not expected to provide nesting or roosting habitat for the owl (except when associated with rock canyons). Thus, activities in areas defined as other forest and woodland types would not require section 7 consultation unless specifically delineated within PACs.

The minimum mapping unit for this designation does not exclude all developed areas, such as buildings, roads, bridges, parking lots, railroad tracks, other paved areas, the lands that support these features, and other lands unlikely to contain the primary constituent elements. Federal actions limited to these areas would not trigger a section 7 consultation, unless they affect protected or restricted habitat and one or more of the primary constituent elements in adjacent critical habitat.

Canyon habitats used for nesting and roosting are typically characterized by cooler conditions found in steep, narrow canyons, often containing crevices, ledges, and/or caves. These canyons frequently contain small clumps or stringers of ponderosa pine, Douglas-fir, white fir, and/or pinyon-juniper. Deciduous riparian and upland tree species may also be present. Adjacent uplands are usually vegetated by a variety of plant associations including pinyon-juniper woodland, desert scrub vegetation, ponderosa pine-Gamble oak, ponderosa pine, or mixed-conifer. Owl habitat may also exhibit a combination of attributes between the forested and canyon types. Section 7 consultation may be required in adjacent vegetated uplands when there are one or more primary constituent elements present within these areas that meet the definition of protected or restricted habitat. The primary constituent elements for these adjacent vegetated uplands are identified below under forest habitats. We anticipate that Federal agencies will use their expertise and discretion in determining whether adjacent vegetated lands (*i.e.*, rims or mesa tops) contain one or more of the primary constituent elements.

Space for Individual and Population Growth and Normal Behavior

Owls have been recorded in the Arizona, Colorado, New Mexico, and Utah, particularly mature mixed-conifer forests, pine-oak forests, and canyon habitat (Skaggs and Raitt 1988; Ganey *et al.* 1988; Ganey and Balda 1989a; Gutierrez and Rinkevich 1991; Willey 1993; Fletcher and Hollis 1994; Seamans and Gutierrez 1995; Gutierrez *et al.* 1995; Ward *et al.* 1995; Geo-Marine 2004), primarily above 6,000 ft and below 9,350 ft elevation (Zwank *et al.* 1994; Seamans and Gutierrez 1995; Tarango *et al.* 1997; Young *et al.* 1998; Geo-Marine, Inc. 2003, 2004). These vegetative communities appear to be especially important (Ganey and Balda 1989; 1994; Fletcher 1990; Zwank *et al.* 1994; Seamans and Gutierrez 1995; Grubb *et al.* 1997; Tarango *et al.* 1997; Young *et al.* 1998; Geo-Marine, Inc. 2003, 2004). Slope angles range from 0 to 67 degrees (Tarango *et al.* 1997, Geo-Marine, Inc. 2003). Mature mixed-conifer forests, pine-oak forests, and canyon habitat are characterized by the presence of a variety of large trees, down and dead woody material, and a diversity of plant species and vegetation layers. These communities include, but are not limited to, Douglas-fir, white fir, limber pine, or blue spruce forest. Owls are also found in pine-oak, and in riparian forests dominated by various species of broadleaved deciduous trees and shrubs (Service 1995).

Steep narrow canyons sometimes associated with riparian forests or scattered trees are utilized by owls in southern Utah, northern Arizona, and northern New Mexico (Service 1995, Gutierrez and Rinkevich 1991). Canyon habitat is also found in southeastern New Mexico and southwest Texas. Owls have been documented using riparian drainages for nesting, roosting, and dispersal (Gutierrez and Rinkevich 1991; Willey 1998). Drainages throughout these areas concentrate available moisture, influencing the diversity and structure of the vegetation. Even small sources of water such as tiny pools or puddles create humid conditions that may influence the use of an area by owls (Geiger 1965 *in* Gutierrez and Rinkevich 1991). In canyon habitats, riparian sites are characterized by various species of broadleaved deciduous trees and shrubs that typically grow bigger and occur in higher densities within the drainages.

Most owls are considered non-migratory throughout their range. Research and monitoring (Zwank *et al.* 1994) have documented year-round occupancy of known home ranges (the area used by owls throughout the year). However, researchers have documented seasonal movements by owls. Some individuals occupied the same area year-round, some remained in the same general area but exhibited shifts in habitat use patterns, and some migrate considerable distances 12–31 miles (mi) (20–50 kilometers [km]) during the winter, generally migrating to more open habitat at lower elevations (Ganey and Balda 1989b; Willey 1993; Ganey *et al.* 1998). Bond *et al.* (2002) reported high site fidelity within eleven spotted owl territories in California, Arizona, and New Mexico following wildfires. Therefore, it is important that owls have home ranges of adequate size to provide for their life history requirements throughout the entire year.

Owl dispersal patterns have been documented. The onset of juvenile dispersal is sudden and in various directions (Arsenault *et al.* 1997; Willey and C. van Riper 2000). Juvenile dispersal takes place in September and October, with 85 percent leaving in September (Gutierrez *et al.* 1995; Arsenault *et al.* 1997; Willey and C. van Riper 2000). Ganey *et al.* (1998) found dispersing juveniles in a variety of habitats ranging from high-elevation forests to pinyon-juniper woodlands and riparian areas surrounded by desert grasslands. In Arizona, New Mexico, and Utah, owls were observed moving across open low desert landscapes between islands of suitable breeding habitat (Ganey *et al.* 1998; Arsenault *et al.* 1997; Willey 1998). Trees of appropriate size and spacing appear to be necessary for successful dispersal,

but specific data describing this habitat structure are not available. Forsman *et al.* (1984) and Geo-Marine (2004) have reported high site fidelity by owls. Once dispersing male owls settle in a territory (the area defended by an owl), they rarely make additional movements outside of their home range. However, Arsenault *et al.* (1997) reported that three sub-adult females paired temporarily with adult males in their first summer, but left in the fall, suggesting that dispersal can continue through an owl's second year.

Sufficient habitat must occur within owl home ranges to provide vegetation of appropriate size and cover for roosting, sheltering, rearing, and foraging. The area must be adequate to provide for the needs of the owl on a year-round basis. Population growth can only occur if there is adequate habitat in an appropriate configuration to allow for the dispersal of owls across the landscape.

Food

Owls typically hunt from perches in trees with dense foliage using a perch-and-wait strategy; therefore, cover must be present within their home range for them to successfully hunt and survive (Service 1995). Their diverse diet includes small mammals, birds, lizards, and insects. The primary owl prey species are woodrats (*Neotoma* spp.), peromyscid mice (*Peromyscus* spp.), and microtine voles (*Microtus* spp.) (Service 1995; Young *et al.* 1997; Delaney *et al.* 1999; Seamans and Gutierrez 1999). Research indicates that woodrats are the most important prey species based on relative biomass (Young *et al.* 1997; Delaney *et al.* 1999; Grubb *et al.* 1999; Seamans and Gutierrez 1999). However, owls also utilize different groups of prey species on a seasonal basis. The density of annual plants and grasses, as well as shrubs, may be important to enhancing the owl's prey base (Ward and Block 1995; Delaney *et al.* 1999; Ward 2001). Vegetation communities which provide a diversity of structural layers and plant species likely contribute to the availability of prey for owls (Willey 1993; Gutierrez and Rinkevich 1991). Therefore, conservation of the owl should include consideration of the habitat needs of prey species, including structural and species diversity. Owl habitat must provide sufficient prey base and cover from which to hunt in an appropriate configuration and proximity to nest and roost sites.

Water

Owls are typically found in close proximity to water (Ganey and Balda 1989; Zwank *et al.* 1994; Ganey *et al.* 1998; Young *et al.* 1998; Geo-Marine 2004). Even small sources of water such as tiny pools or puddles create humid microsites that may influence an owl's use of an area (Geiger 1965 *in* Gutierrez and Rinkevich 1991). Gutierrez and Rinkevich (1991) reported that owls in Zion National Park were always in areas with some type of water source (*i.e.*, perennial stream, creeks, and springs, ephemeral water, small pools from runoff, reservoir emissions). Over 80 percent of the nests located by Forsman (1976) were within 984 ft (300 m) of permanent water. Barrows (1981) reported spotted owls roosting close to surface water in xeric sites in the San Bernardino National Forest. Geo-Marine (2004) reported finding most owls within 531 ft (162 m) from the nearest stream and all owls within 0.25 mi (0.4 km) of a stream. Tarango *et al.* (1997) reported cliff-roost site ranges of 33 ft (10 m) to 722 ft (220 m) from the nearest spring. Tree-roost sites ranged from 50 to 991 ft (15 to 302 m) to the nearest spring (Tarango *et al.* 1997). Owls have not been reported to drink water, so it is likely that owls meet much of their biological water requirements through the prey they consume. However, the presence of water does provide related benefits to owls as the availability of water may contribute to improved vegetation diversity and structure which improves cover and possibly prey availability.

Reproduction and Rearing of Offspring

Male and female owls began roosting together in February and began nesting in March (Zwank *et al.* 1994; Service 1995). Territories in mature mixed-conifer forests and pine-oak forests normally contain several potential nest and roost trees (Ganey and Balda 1989b; Ganey *et al.* 1999; Geo-Marine 2003, 2004). Canyon habitat normally contains several potential nesting cavities, crevices, and ledges. Hence, mature coniferous trees, riparian vegetation, and cavities, crevices, and rock ledges may be important criteria for habitat selection. Recent information throughout the owl's range indicate nests were predominately located in mature coniferous trees (mostly Douglas-fir) (Ganey 1988; Fletcher and Hollis 1994; Zwank *et al.* 1994; Seamans and Gutierrez 1995; Young *et al.* 1998; Peery *et al.* 1999; Ganey *et al.* 2000; Geo-Marine, Inc. 2003, 2004) and cavities, crevices and ledges in canyon habitat (Gutierrez and Rinkevich 1991).

Owls exhibit a high degree of site fidelity once territories (the area defended) and home ranges (the area used throughout the year) have been established (Forsman *et al.* 1984, Bond *et al.* 2002; Geo-Marine 2003, 2004). Therefore, it is important that habitat characteristics within territories and home ranges be maintained over time in order for them to remain suitable. This is important for established owl PACs, as well as new sites established by dispersing owls.

Large trees also provide protection against predators, cover for foraging, and thermal cover (Gutierrez 1985; Carey *et al.* 1992; Service 1995; Ganey and Dick 1995; Ganey *et al.* 1997; Delaney *et al.* 1999; Geo-Marine 2003, 2004). Predators include great horned owls (*Bubo virginianus*) and northern goshawk (Gutierrez *et al.* 1995). Owls may be particularly vulnerable to predation and other threats during and shortly after fledging (Geo-Marine 2003, 2004). Therefore, cover near nest sites may be important for young to fledge successfully. Conditions which promote the proliferation of great horned owls (reducing overstory and canopy cover) may contribute to this mortality factor. Habitat that provides for successful reproduction and rearing of young provides large trees, high basal area of large diameter trees (*e.g.*, in mixed-conifer about 140 sq ft basal area per ac, with 20 or more trees per ac that are 18 in dbh or greater), high canopy cover (*e.g.*, 40 or greater), uneven aged trees (*e.g.*, 3 or more age classes), multistory layers and high volume of down and dead woody material of adequate size to provide nesting structures in proximity to foraging, roosting, sheltering and dispersal habitats, in addition to adequate cover for protection from climatic elements and predators in an appropriate configuration in relation to the nest site.

We determined the primary constituent elements for the owl from studies of their habitat requirements (see "Background" section above) and the information provided in the Recovery Plan and references therein (*e.g.*, Skaggs and Raitt 1988; Ganey *et al.* 1988; Ganey and Balda 1989a; Gutierrez and Rinkevich 1991; Willey 1993; Fletcher and Hollis 1994; Seamans and Gutierrez 1995; Service 1995; Gutierrez *et al.* 1995; Recovery Plan; Ward *et al.* 1995; Willey 1998; Geo-Marine 2004). Since owl habitat can include both canyon and forested areas, we identified primary constituent elements in both areas.

We have made some changes to the description of the primary constitute elements listed in the proposed rule in order to make them easier to understand; however, we did not alter their meaning. The primary constituent elements which occur for the owl

within mixed conifer, pine-oak, and riparian forest types that provide for one or more of owl's habitat needs for nesting, roosting, foraging, and dispersing are in areas defined by:

A. Primary constituent elements related to forest structure:

(1) a range of tree species, including mixed conifer, pine-oak, and riparian forest types, composed of different tree sizes reflecting different ages of trees, 30 percent to 45 percent of which are large trees with a trunk diameter of 12 inches (0.3 meters) or more when measured at 4.5 feet (1.4 meters) from the ground;

(2) a shade canopy created by the tree branches covering 40 percent or more of the ground; and

(3) large dead trees (snags) with a trunk diameter of at least 12 inches (0.3 meters) when measured at 4.5 feet (1.4 meters) from the ground.

B. Primary constituent elements related to maintenance of adequate prey species:

(1) High volumes of fallen trees and other woody debris;

(2) A wide range of tree and plant species, including hardwoods; and

(3) Adequate levels of residual plant cover to maintain fruits, seeds, and allow plant regeneration.

The forest habitat attributes listed above usually are present with increasing forest age, but their occurrence may vary by location, past forest management practices or natural disturbance events, forest type, productivity, and plant succession. These characteristics may also be observed in younger stands, especially when the stands contain remnant large trees or patches of large trees from earlier stands. Certain forest management practices may also enhance tree growth and mature stand characteristics where the older, larger trees are allowed to persist.

Steep-walled rocky canyonlands are typically within the Colorado Plateau RU, but also occur in other RUs. Canyon habitat is used by owls for nesting, roosting, and foraging and includes landscapes dominated by vertical-walled rocky cliffs within complex watersheds, including many tributary side canyons. These areas typically include parallel-walled canyons up to 1.2 mi (2 kilometers (km)) in width (from rim to rim), with canyon reaches often 1.2 mi (2 km) or greater, and cool north-facing aspects. Rock walls must include caves, ledges, and fracture zones that provide protected nest and roost sites. Breeding sites are located below canyon rims; however, it is known that owls use areas outside of the canyons (*i.e.*, rims and mesa tops). Owls nest and roost primarily on cliff faces using protected caves and ledges, and forage in canyon bottoms, on cliff faces and benches, and along canyon rims and adjacent lands. Although it is difficult to rely upon vegetation alone to identify canyon habitat, these areas frequently contain small clumps or stringers of mixed-conifer, ponderosa pine, pine-oak, pinyon-juniper, and/or riparian vegetation.

C. Primary constituent elements related to canyon habitat include one or more of the following:

(1) presence of water (often providing cooler and often higher humidity than the surrounding areas);

(2) clumps or stringers of mixed-conifer, pine-oak, pinyon-juniper, and/or riparian vegetation;

(3) canyon wall containing crevices, ledges, or caves; and

(4) high percent of ground litter and woody debris.

The primary constituent elements identified above provide a qualitative description of those physical and biological features necessary to ensure the conservation of the owl. The range of quantitative estimates (*e.g.*, basal area, canopy closure, *etc.*) is not provided by the primary constituent elements because these vary greatly over the range of the owl. We acknowledge that if the range of these estimates were provided as part of a critical habitat designation, they could be revised if new data became available (50 CFR 424.12(g)); however, the process of new rulemaking can take years (*see* 50 CFR 424.17), as opposed to reinitiating and completing a consultation, which takes less than a few months (*see* 50 CFR 402.14). We note that the Recovery Plan and forthcoming revision provide up-to-date information for agencies to consider when determining whether a proposed project "may affect" designated critical habitat. Our existing consultation policy likewise uses the Recovery Plan to evaluate the effects of proposed projects on the owl. Additionally, formal consultation provides an up-to-date biological status of the species or critical habitat (*i.e.*, environmental baseline) which is used to evaluate a proposed action. Consequently, we believe it is more prudent to pursue the establishment of quantitative estimates (*e.g.*, basal area, canopy closure, *etc.*) through consultation. When requested, the Service will provide technical assistance in these matters.

Criteria for Identifying Critical Habitat Units

In designating critical habitat for the owl, we reviewed the overall approach to the conservation of the species undertaken by local, State, Tribal, and Federal agencies and private individuals and organizations since the species' listing in 1993. We also considered the features and overall approach identified as necessary for recovery, as outlined in the species' Recovery Plan and information in our supporting record (*e.g.*, Recovery Plan revision in prep). We reviewed the two previous final critical habitat rules (June 6, 1995, 60 FR 29914; February 1, 2001, 66 FR 8530) for the owl, habitat requirements and definitions described in the Recovery Plan, and habitat and other information provided during the comment periods, as well as utilizing our own expertise and other owl researchers. We also reviewed data in our files that were submitted during section 7 consultations and reports submitted in relation to section 10(a)(1)(A) recovery permits, peer-reviewed articles, agency reports and data provided by FS and BLM, and regional and statewide GIS coverages of PACs or other owl occurrence records.

We considered currently suitable habitat, large contiguous blocks of habitat, occupied habitat, rangewide distribution, the need for special management or protection, and adequacy of existing regulatory mechanisms when identifying critical habitat units. For the current designation, we relied primarily on the Recovery Plan to provide guidance. We are including specific protected and restricted areas, (as defined in the Recovery Plan and the "Primary Constituent Elements" section above), because they contain one or more primary constituent elements. Some lands containing these characteristics were excluded if they were not essential to the conservation of the owl or if the benefits of their exclusion from critical habtiat for the owl outweighed the benefits of their inclusion (see discussion below).

Although some State and private lands likely support mid- and higher-elevation forests that support owls and owl nesting and roosting habitat, the overwhelming majority of owl records and, therefore its range in the United States, are from Federal and Tribal lands. Therefore we do not consider State and private lands essential to the conservation of the species. As such, we are not designating these areas as critical habitat. Where feasible, we mapped critical habitat boundaries so as to exclude State and private lands. Where this was not possible, State and private areas are not included by definition in this designation. The overwhelming majority of owl records are from Federal and Tribal lands,

indicating that those lands are essential to the species' recovery.

Critical Habitat Designation

The designated critical habitat constitutes our best assessment of areas that are essential to the conservation of the owl and that may require special management or protection. The areas designated are within the geographical area occupied by the species because the critical habitat designation is devised around the majority of known owl nesting sites. The designation includes both protected and restricted habitat, as defined the Recovery Plan, and contains the primary constituent elements as identified herein. We have included these areas in the designation based on information contained within the Recovery Plan that finds them to be essential to the conservation of the species because they currently possess the necessary habitat requirements for nesting, roosting, foraging, and dispersal. Critical habitat units are designated in portions of McKinley, Rio Arriba, Sandoval, and Socorro counties in New Mexico; Apache, Cochise, Coconino, Graham, and Pima counties in Arizona; Carbon, Emery, Garfield, Grand, Iron, Kane, San Juan, Washington, and Wayne counties in Utah; and Custer, Douglas, El Paso, Fremont, Huerfano, Jefferson, Pueblo, and Teller counties in Colorado. Detailed digital files of each unit can be obtained by contacting the New Mexico Ecological Services Field Office (see **ADDRESSES** section).

We did not designate some areas that are known to have widely scattered owl sites, low owl population densities, and/or marginal habitat quality, which are not considered to be essential to this species' conservation. These areas include Dinosaur National Park in northwest Colorado; Mesa Verde National Park, Ute Mountain Ute Reservation, Southern Ute Reservation, other FS and Bureau of Land Management (BLM) land in southwest Colorado and central Utah; and the Guadalupe and Davis Mountains in southwest Texas. We also did not include isolated mountains in northwestern Arizona, such as Mount Trumbull, due to their small size, isolation, and lack of information about owls in the area.

Fort Wingate Army Depot, New Mexico, was proposed as critical habitat for the owl. However, during the development of this final designation we found that the Depot has been closed since 1988 and part of the lands have been transferred to the Navajo and Zuni Tribes (Ferguson 2000; Department of Defense 2004). Our understanding is that the first transfer of lands from the Army to the Tribes occurred in 2000, and the rest of the lands will be transferred following remediation of contaminants (J. Jojola, BIA, pers. comm. 2004). More importantly, these lands are within critical habitat unit CP–2 that was adjusted following comments by the Cibola National Forest that the western part of the unit contains habitat that is not suitable (*i.e.*, pinyon-juniper and ponderosa pine without oak). Accordingly, we do not believe these lands contain protected or restricted habitat. For these reasons, we conclude that Fort Wingate is not essential to the conservation of the species, and these lands are not designated as critical habitat.

As reported in the proposed rule (65 FR 45336), the Southern Ute Reservation has not supported owls historically, and our assessment revealed that the Southern Ute Reservation does not support habitat essential to the species' conservation. Thus, we are not designating these lands as critical habitat because they are not essential to the conservation of the owl.

We are not designating lands of the Ute Mountain Ute Tribe as critical habitat. Due to the low owl population density and isolation from other occupied areas in Colorado, New Mexico, and Utah, the owl habitat on Tribal lands in southwestern Colorado is not believed to be essential for the conservation of the species. Thus, we are not designating these lands as critical habitat because they are not essential to the conservation of the owl. Owls in these areas will retain the other protections of the Act, such as the prohibitions of section 9 and the prohibition of jeopardy under section 7.

In addition, other Tribal lands including Picuris, Taos, and Santa Clara Pueblos in New Mexico and the Havasupai Reservation in Arizona may have potential owl habitat. However, the available information, although limited, on the habitat quality and current or past owl occupancy in these areas does not indicate that these areas are essential to the conservation of the owl. We also conclude that the Jicarilla Apache lands in New Mexico are not essential to the conservation of the owl because there are only two historic records of owls from their lands and no owls were documented during recent survey efforts (please refer to our response to Comment 117). Therefore, we are not designating these lands as critical habitat because they are not essential to the conservation of the owl.

Based upon comments and other information received, we revised the boundaries of proposed critical habitat for the owl to exclude those Federal lands that do not contain protected or restricted habitat. Further, because we have determined that lands under State and private ownership are not essential to the conservation of the owl, these lands are not being designated as critical habitat for the owl. Nonetheless, the short amount of time allowed by the court to complete this designation and available resources did not allow us to conduct the fine-scale mapping necessary to physically exclude all of the smaller and widely scattered State and private parcels. Thus, some State and private lands remain within the mapped boundaries, but by definition, these lands are not included in the designation.

This critical habitat designation does not include Tribal lands; lands under State and private ownership; 157 WUI project areas on FS lands within Arizona and New Mexico that are at high risk of catastrophic wildfire and included in the 2001 programmatic WUI biological opinion and the Penasco WUI project area that we evaluated under a separate biological opinion on FS lands in New Mexico; Fort Wingate, New Mexico; Fort Carson, Colorado; Fort Huachuca, Arizona; the U.S. Naval Observatory Flagstaff Station, Arizona; and low-density areas and other areas determined to not be essential to the conservation of the species (see Exclusions Under Section 4(b)(2)" and "Summary of Changes to Proposed Rule" sections). Except for these WUI project areas, this critical habitat designation includes FS lands in New Mexico, Arizona, Utah, and Colorado, and some other Federal lands used by owls. The approximate Federal ownership within the boundaries of owl critical habitat is shown in Table 1 below.

TABLE 1.—CRITICAL HABITAT BY LAND OWNERSHIP AND STATE IN ACRES (HECTARES)

	Arizona	New Mexico	Colorado	Utah	Total
Forest Service	3,228,145 (1,306,341)	2,056,536 (832,223)	263,026 (106,439)	156,732 (63,425)	5,704,438 (2,308,429)

TABLE 1.—CRITICAL HABITAT BY LAND OWNERSHIP AND STATE IN ACRES (HECTARES)—Continued

	Arizona	New Mexico	Colorado	Utah	Total
Bureau of Land Management	1,541	2,171	59,299	362,135	425,145
	(623)	(879)	(23,997)	(146,546)	(172,045)
National Park Service	751,261	30,817	0	1,720,727	2,502,805
	(304,015)	(12,471)	(0)	(696,331)	(1,012,816)
Department of Defense	2,041	0	0	0	2,041
	(826)	(0)	(0)	(0)	(826)
Bureau of Reclamation	0	0	0	0	0
	(0)	(0)	(0)	(0)	(0)
Other Federal[a]	55	0	0	13,264	13,319
	(22)	(0)	(0)	(5,367)	(5,390)
Total	3,983,042	2,089,523	322,326	2,252,857	8,647,749
	(1,611,827)	(845,573)	(130,437)	(911,669)	(3,499,505)
Total critical habitat units	25	20	3	5	[b]52

[a] Includes land identified in the current Utah land ownership file as Forest Service or BLM; Federal land ownership is unclear.
[b] Critical habitat unit UGM–7 is shared by Arizona and New Mexico.

Critical Habitat Unit Descriptions

Table 2 summarizes the 52 units designated as critical habitat for the owl. These areas described below are essential for the conservation of the owl. We present brief descriptions of all units below:

TABLE 2.—APPROXIMATE AREA (ACRES AND HECTARES) OF CRITICAL HABITAT BY UNIT

Critical habitat unit	Acres	Hectares
BR–E–1a	54,185	21,927
BR–E–1b	212,882	86,148
BR–E–3	44,216	17,893
BR–E–4	13,753	5,566
BR–E–5	25,642	10,377
BR–E–7	3,048	1,233
BR–W–10	10,485	4,243
BR–W–11	233,228	94,381
BR–W–12	54,220	21,941
BR–W–13	54,735	22,150
BR–W–14	52,158	21,107
BR–W–15	50,844	20,575
BR–W–16	20,999	8,498
BR–W–18	179,439	72,614
BR–W–2	55,210	22,342
BR–W–3	15,580	6,305
BR–W–4	158,624	64,191
BR–W–5	118,940	48,132
BR–W–6	51,782	20,955
BR–W–7	17,791	7,200
BR–W–8	107,838	43,639
BR–W–9	63,259	25,599
CP–1	32,469	13,139
CP–10	918,847	371,832
CP–11	260,105	105,257
CP–12	402,895	163,040
CP–13	627,267	253,838
CP–14	941,068	380,824
CP–15	21,522	8,710
CP–2	161,557	65,378
SRM–C–1a	108,545	43,925
SRM–C–1b	110,045	44,532
SRM–C–2	103,735	41,979
SRM–NM–1	85,758	34,704
SRM–NM–11	12,459	5,042
SRM–NM–12	10,495	4,247
SRM–NM–4	57,297	23,187
SRM–NM–5a	14,100	5,706
SRM–NM–5b	70,728	28,622
UGM–10	562,988	227,826
UGM–11	144,790	58,593
UGM–12	17,359	7,025
UGM–13	238,092	96,349
UGM–14	55,533	22,473
UGM–15	22,286	9,019
UGM–17	10,914	4,416
UGM–2	33,794	13,675
UGM–3	135,287	54,747
UGM–5a	666,481	269,707
UGM–5b	295,680	119,654
UGM–6	63,451	25,677
UGM–7	863,344	349,371
Total	8,647,749	3,499,505

Unit SRM–C–1a. Pike's Peak Area, El Paso, Teller, and Fremont Counties, Colorado

This unit is located west of Colorado Springs on the flanks of Pike's Peak. It contains FS (Pike Ranger District, Pike/San Isabel National Forests) and BLM (Royal Gorge Field Office) lands in size. Areas with steep slopes (greater than 40 percent slope), canyons, and rocky outcroppings with mixed-coniferous forests are included in this unit. State, private, and military lands (Cheyenne Mountain Operations Center) are not designated as critical habitat.

Unit SRM–C–1b. Wet Mountain Area, Fremont, Custer, Pueblo and Huerfano Counties, Colorado

This unit is located in the Wet Mountains, west of the City of Pueblo. It contains primarily FS lands (San Carlos District, Pike/San Isabel National Forests). Areas with steep slopes (greater than 40 percent slope), canyons, and rocky outcroppings with dense, mixed-coniferous forests are included in this unit. State and private lands are not designated as critical habitat.

Unit SRM–C–2. Devil's Head Area, Douglas and Jefferson Counties, Colorado

This unit is located near Deckers within the South Platte Ranger District of the Pike/San Isabel National Forests in Colorado. It contains primarily FS lands. Areas with steep slopes (greater than 40 percent slope), canyons, rocky outcroppings with dense (greater than 70 percent canopy), and mixed-coniferous forests are included in this unit. State and private lands are not designated as critical habitat.

Unit SRM–NM–1. Cebollita Mesa, Jemez Mountains, Sandoval County, New Mexico

This unit is located in the Jemez Mountains, in north-central New Mexico. It contains primarily FS (Jemez Ranger District, Santa Fe National Forests) lands. This unit contains mixed-conifer on steep slopes and canyons incised into volcanic rock. WUI project areas, State, and private lands are not designated as critical habitat.

Unit SRM–NM–4. Peralta, Jemez Mountains, Sandoval County, New Mexico

This unit is located in the Jemez Mountains, south of Los Alamos, in north-central New Mexico. It contains primarily FS (Jemez Ranger District, Santa Fe National Forests) lands. Areas with steep slopes (greater than 40 percent slope), canyons incised into volcanic rock, rocky outcroppings with dense, and mixed-coniferous forests are

included in this unit. WUI project areas, State and private lands are not designated as critical habitat.

Unit SRM–NM–5a. Santa Fe National Forest, Santa Fe County, New Mexico

This unit is located approximately 9 mi (14.5 km) east of Santa Fe, New Mexico, in the Sangre de Cristo Mountains, in north-central New Mexico. It contains primarily FS lands. Areas contain attributes of owl habitat with steep slopes (greater than 40 percent slope), canyons, and rocky outcroppings with dense, mixed-coniferous forests. WUI project areas, State and private lands are not designated as critical habitat.

Unit SRM–NM–5b. Santa Fe National Forest, San Miguel, Mora Counties, New Mexico

This unit is located approximately 18 mi (29 km) west of Las Vegas, New Mexico, in the Sangre de Cristo Mountains, in north-central New Mexico. It contains primarily FS (Pecos/Las Vegas Ranger Districts, Santa Fe National Forests) lands. Areas contain attributes of owl habitat with steep slopes (greater than 40 percent slope), canyons, and rocky outcroppings with dense, mixed-coniferous forests. State and private lands are not designated as critical habitat.

Unit SRM–NM–11. Jicarilla Division, Carson National Forest, New Mexico

This unit is located approximately 40 mi (64 km) east and 12 mi (19 km) south of Bloomfield, in northwestern New Mexico. It contains primarily FS (Jicarilla Division, Carson National Forest) lands. Areas with steep slopes (greater than 40 percent slope), canyons, and rocky outcroppings with dense, mixed-coniferous forests are included in this unit. This unit contains mixed-conifer on steep slopes and canyons incised into volcanic rock. WUI project areas, State and private lands are not designated as critical habitat.

Unit SRM–NM–12. Jicarilla Division, Carson National Forest, New Mexico

This unit is located approximately 40 mi (64 km) east and 6 mi (9.6 km) north of Bloomfield, New Mexico, in northwestern New Mexico. It contains primarily FS (Jicarilla Division, Carson National Forest) lands. Areas with steep slopes (greater than 40 percent slope), canyons, and rocky outcroppings with dense, mixed-coniferous forests are included in this unit. This unit contains mixed-conifer on steep slopes and canyons incised into volcanic rock. WUI project areas, State, private, and Tribal lands are not designated as critical habitat.

Unit CP–1. Mount Taylor, Cibola, and McKinley Counties, New Mexico

This unit is located approximately 12 mi (19 km) northeast of Grants, in west-central New Mexico. It contains primarily FS (Mount Taylor Ranger District, Cibola National Forests) lands. Habitat is naturally fragmented into disjunct canyon systems or isolated mountain ranges. Areas with steep slopes (greater than 40 percent slope), canyons, and rocky outcroppings with dense, mixed-coniferous forests are included in this unit. This unit contains mixed-conifer and canyons habitat that contain attributes of owl habitat. State and private lands are not designated as critical habitat.

Unit CP–2. Zuni Mountains, Cibola, and McKinley Counties, New Mexico

This unit is located approximately 30 mi (48 km) southeast of Gallup, in west-central New Mexico. It contains primarily FS (Mount Taylor Ranger District, Cibola National Forests) lands. Habitat is naturally fragmented into disjunct canyon systems or isolated mountain ranges. Areas with steep slopes (greater than 40 percent slope), canyons, and rocky outcroppings with dense, mixed-coniferous forests are included in this unit. This unit contains mixed-conifer and canyons habitat that contain attributes of owl habitat. State, private, and military lands are not designated as critical habitat.

Unit CP–10. Arizona Strip, and Kaibab National Forest, Coconino County, Arizona

This unit is located in northwestern Arizona, and is predominantly within the boundaries of Kaibab National Forest and Grand Canyon National Park. The majority of this unit contains steep-walled canyon habitat, but the unit also contains forested habitat within the North Kaibab Ranger District and Grand Canyon National Park. State, and private lands are not designated as critical habitat.

Unit CP–11. Iron, Washington, and Kane Counties, Utah

This unit is located in Iron, Washington, and Kane Counties in southwest Utah, approximately 22 mi (35 km) northeast of St. George. Canyons and steep-sloped mixed conifer habitats are included. Foraging and dispersal habitat are also present. State and private lands are not designated as critical habitat

Unit CP–12. Kaiparowits Plateau, Kane, and Garfield Counties, Utah

This Unit is in the vicinity of the Kaiparowits Plateau and the Cockscomb, in Kane and Garfield Countjes. Canyons and steep-sloped mixed conifer habitats are included. Foraging and dispersal habitat are also present. State and private lands are not designated as critical habitat.

Unit CP–13. Glen Canyon Reef, Kane, Garfield, and Wayne Counties, Utah

This unit occurs in Wayne, Garfield, Kane, and San Juan Counties, Utah. It is primarily in the Waterpocket Fold landform extending to Lake Powell. Canyons and steep-sloped mixed conifer habitats are included. Foraging and dispersal habitat are also present. State, private, and Triballands are not designated as critical habitat.

Unit CP–14. Dark Canyon Primitive and Wilderness, San Juan, Wayne, and Grand Counties, Utah

This Unit lies in Wayne, Garfield, San Juan, and Grand Counties, Utah. It includes the Dark Canyon Primitive and Wilderness areas of the BLM and FS, respectively. Canyons and steep-sloped mixed conifer habitats are included. Foraging and dispersal habitat are also present. State and privatelands are not designated as critical habitat.

Unit CP–15. West Tavaputs Plateau

This unit is located approximately 30 mi (48 km) east of Price, in Carbon and Emery Counties. Situated in the West Tavaputs Plateau, it is located largely along the Desolation Canyon area of the Green River. Canyons and steep-sloped mixed conifer habitats are included in this Unit. Foraging and dispersal habitat are also present. State and privatelands are not designated as critical habitat.

Unit BR–E–1a. White Mountain, Lincoln/Cloudcroft in Lincoln Counties, New Mexico

This unit is located in the Sacramento Mountains, New Mexico. It contains primarily Lincoln National Forests lands. Habitat includes ponderosa pine, mixed-conifer, and spruce fir forests and is patchy distributed throughout the higher mountain ranges. State and private lands are not designated as critical habitat. WUI project areas, State, private, and Tribal lands are not designated as critical habitat.

Unit BR–E–1b. Lincoln/Cloudcroft in Otero County, New Mexico

This unit is located in the Sacramento Mountains, New Mexico. It contains primarily FS (Sacramento Ranger District, Lincoln National Forests) lands.

Habitat includes ponderosa pine, mixed-conifer, and spruce fir forests and is patchy distributed throughout the higher mountain ranges. WUI project areas, Penasco BO project area, State, private, and Tribal lands are not designated as critical habitat..

Unit BR–E–3. Capitan Mountains

This unit is located in the Capitan Mountains, north of Capitan, New Mexico. It contains primarily FS (Smokey Bear Ranger District, Lincoln National Forest) lands. Habitat includes ponderosa pine, mixed-conifer, and spruce fir forests and is patchily distributed. State and private lands are not designated as critical habitat.

Unit BR–E–4. Carrizo in Lincoln County, New Mexico

This unit is located in the Carrizo Mountains, 7 mi (11 km) east of Carrizozo, New Mexico. It contains primarily FS (Smokey Bear Ranger District, Lincoln National Forest) lands. Habitat includes ponderosa pine, mixed-conifer, and spruce fir forests and is patchy distributed. State and private lands are not designated as critical habitat.

Unit BR–E–5. Manzano Mountains, Torrance County, New Mexico

This unit is located in the Manzano Mountains, approximately 24 mi (38.6 km) east of Belen, New Mexico. It contains primarily Cibola National Forest lands. Habitat includes ponderosa pine, mixed-conifer, and spruce fir forests and is patchily distributed. WUI project areas, State and private lands are not designated as critical habitat.

Unit BR–E–7. Sandia Mountain, New Mexico

This unit is located in the Sandia Mountains, 12 mi (19 km) east of Albuquerque, New Mexico. It contains primarily Cibola National Forest lands. Habitat includes ponderosa pine, mixed-conifer, and spruce fir forests and is patchy distributed. WUI project areas, State and private lands are not designated as critical habitat.

Unit BR–W–2. Prescott National Forest, Yavapai County, Arizona

This unit is located south of Prescott, Arizona, on the Prescott National Forest. The northwestern arm of the unit encompasses the area south of Iron Springs and runs south to near Mount Francis. The area located due south of Prescott, Arizona, encompasses Maverick and Lookout Mountains to the west, and stretches east, just beyond the Gila-Salt Meridian. The southernmost portion of this unit includes part of Crooks Canyon. WUI project areas, State and private lands are not designated as critical habitat.

Unit BR–W–3. Prescott National Forest, Yavapai County, Arizona

This unit is located in the Bradshaw Mountains on the Prescott National Forest, and is approximately centered on Crown King, Arizona. The unit runs north to the south slope of Tuscumbia Mountain and runs southeast to the north slope of Lane Mountain. WUI project areas, State and private lands are not designated as critical habitat.

Unit BR–W–4. Tonto National Forest, Yavapai, Gila, and Maricopa Counties, Arizona

This unit is located within the Mazatzal Wilderness on the Tonto National Forest, Arizona. The unit begins in the north at North Peak and runs south encompassing the Mazatzal Mountains south to Buckhorn Mountain. State and private lands are not designated as critical habitat.

Unit BR–W–5. Tonto National Forest, Gila County, Arizona

This unit is located on the Tonto National Forest, Arizona, and runs southeast from Pine Mountain, towards Greenback Peak, south to Round Mountain. The area includes the northern half of the Salome Wilderness and the Sierra Ancha Wilderness. State and private lands are not designated as critical habitat.

Unit BR–W–6. Pinal Mountains Area, Gila County, Arizona

This unit is located south of Miami and Globe, Arizona. It is south of U.S. Highway 60 and west of State Highway 77. It is centered on the Pinal Mountains and contains much of the owl habitat within that mountain range. It is primarily on the Globe Ranger District of the Tonto National Forest. It also contains a small portion of BLM lands. WUI project areas, State, private, and BLM lands are not designated as critical habitat.

Unit BR–W–7. Santa Teresa Mountains Area, Graham County, Arizona

This unit is located south of the San Carlos Indian Reservation and north of Klondyke, Arizona. It is centered on the Santa Teresa Mountains and contains much of the owl habitat within that mountain range. It is primarily on the Safford Ranger District of the Coronado National Forest. State, private, BLM, and Tribal lands are not designated as critical habitat.

Unit BR–W–8. Pinaleno Mountains Area, Graham County, Arizona

This unit is located southwest Safford, Arizona. It is centered on the Pinaleno Mountains and contains much of the owl habitat within that mountain range. It is primarily on the Safford Ranger District of the Coronado National Forest. WUI project areas, State and private lands are not designated as critical habitat.

Unit BR–W–9. Galiuro Mountains Area, Graham County, Arizona

This unit is located south of Klondyke, Arizona. It is centered on the Galiuro Mountains and contains much of the owl habitat within that mountain range. It is on the Safford Ranger District of the Coronado National Forest. State, private and BLM lands are not designated as critical habitat.

Unit BR–W–10. Winchester Mountains Area, Cochise County, Arizona

This unit is located northwest of Willcox, Arizona. It is centered on the Winchester Mountains and contains much of the owl habitat within that mountain range. It is primarily on the Safford Ranger District of the Coronado National Forest. State, private, and BLM lands are not designated as critical habitat.

Unit BR–W–11. Santa Catalina and Rincon Mountains Area, Pima and Pinal Counties, Arizona

This unit is located north and east of Tucson, Arizona. It is centered on the Santa Catalina and Rincon Mountains and contains much of the owl habitat within those mountain ranges. It is primarily on the Santa Catalina Ranger District of the Coronado National Forest. WUI project areas, State and privatelands are not designated as critical habitat.

Unit BR–W–12. Santa Rita Mountains Area, Santa Cruz ,and Pima Counties, Arizona

This unit is located west of Sonoita, Arizona. It is centered on the Santa Rita Mountains and contains much of the owl habitat within that mountain range. It is primarily on the Nogales Ranger District of the Coronado National Forest. State and private lands are not designated as critical habitat.

Unit BR–W–13. Atascosa and Pajarito Mountains Area, Santa Cruz County, Arizona

This unit is located west of Nogales, Arizona. It is centered on the Atascosa and Pajarito Mountains and contains much of the owl habitat within those mountain ranges. It is primarily on the

Nogales Ranger District of the Coronado National Forest. State and private lands are not designated as critical habitat.

Unit BR–W–14. Patagonia Mountains Area, Santa Cruz County, Arizona

This unit is located south of Patagonia, Arizona. It is centered on the Patagonia Mountains and contains much of the owl habitat within that mountain range. It is primarily on the Sierra Vista Ranger District of the Coronado National Forest. WUI project areas, State and private lands are not designated as critical habitat.

Unit BR–W–15. Huachuca Mountains Area, Cochise County, Arizona

This unit is located west and south of Sierra Vista, Arizona. It is centered on the Huachuca Mountains and contains much of the owl habitat within that mountain range. It is on the Sierra Vista Ranger District of the Coronado National Forest. WUI project areas, State, private, and military lands are not designated as critical habitat.

Unit BR–W–16. Whetstone Mountains Area, Cochise County, Arizona

This unit is located southwest of Benson, Arizona. It is centered on the Whetstone Mountains and contains much of the owl habitat within that mountain range. It is primarily on the Sierra Vista Ranger District of the Coronado National Forest. State and private lands are not designated as critical habitat.

Unit BR–W–18. Chiricahua Mountains Area, Cochise County, Arizona

This unit is located northeast of Douglas, Arizona. It is centered on the Chiricahua Mountains and contains much of the owl habitat within that mountain range. It is on the Douglas Ranger District of the Coronado National Forest. WUI project areas, State and privatelands are not designated as critical habitat.

Unit UGM–2. Magdalena Mountains, Soçorro County, New Mexico

This unit is located in the Magdalena Mountains, 6 mi (9.6 km) south of Magdalena, New Mexico. It contains primarily FS (Magdalena Ranger District, Cibola National Forests) lands. This unit contains ponderosa pine, mixed-conifer, spruce fir, stringers of deciduous riparian forests. WUI project areas, State and private lands are not designated as critical habitat.

Unit UGM–3. San Mateo Mountains, Socorro County, New Mexico

This unit is located in the San Mateo Mountains, 36 mi (58 km) southwest of Magdalena, New Mexico. It contains primarily FS (Magdalena Ranger District, Cibola National Forests) lands. This unit contains ponderosa pine, mixed-conifer, spruce fir, stringers of deciduous riparian forests. WUI project areas, State and private lands are not designated as critical habitat.

Unit UGM–5a. Gila National Forest, Catron, and Grant Counties, New Mexico

This unit is located in the Gila Mountains, north of Silver City, New Mexico. It contains primarily Gila National Forests lands. This unit contains ponderosa pine, mixed-conifer, spruce fir, stringers of deciduous riparian forests. WUI project areas, State and private lands are not designated as critical habitat.

Unit UGM–5b. Gila National Forest, Sierra, Catron, and Grant Counties, New Mexico

This unit is located in the Gila Mountains, approximately 30 mi (48 km) west of Truth or Consequences, New Mexico. It contains primarily Gila National Forests lands. This unit contains ponderosa pine, mixed-conifer, spruce fir, stringers of deciduous riparian forests. WUI project areas, State and private lands are not designated as critical habitat.

Unit UGM–6. Gila Mountains, Catron County, New Mexico

This unit is located in the Gila Mountains, North of Silver City, New Mexico. It contains primarily FS (Reserve Ranger District, Gila National Forests) lands. This unit contains ponderosa pine, mixed-conifer, spruce fir, stringers of deciduous riparian forests. WUI project areas, State and private lands are not designated as critical habitat.

Unit UGM–7. Apache-Sitgreaves and Gila National Forests, Catron County, New Mexico, Graham and Greenlee Counties, Arizona

This unit is located in the Mogollon Rim in Arizona and New Mexico. It contains primarily FS lands . This unit contains ponderosa pine, mixed-conifer, spruce fir, stringers of deciduous riparian forests. WUI project areas, State, private, and Tribal lands are not designated as critical habitat.

Unit UGM–10. Coconino National Forest, Apache-Sitgreaves National Forest, and Tonto National Forests, Coconino, Gila, and Yavapai Counties, Arizona

This unit is located north, northwest, east, and southeast of Payson, Arizona. The western boundary of this unit runs parallel to the Yavapai County—Coconino County line, south to the Mogollon Rim. The southwest boundary runs along the Mogollon Rim. To the north, the unit encompasses the Coconino County portion of West Clear Creek and runs east along Jacks Canyon on the Coconino National Forest. The unit includes portions of West Chevelon, Chevelon, and Wildcat Canyons on the Apache-Sitgreaves National Forest and extends from Heber, Arizona, through the Apache-Sitgreaves National Forest, south along the Tonto National Forest boundary to Gentry Mountain. State and private lands are not designated as critical habitat.

Unit UGM–11. Coconino National Forest, Coconino and Yavapai Counties, Arizona

This unit is located south of Mountainaire, Arizona and runs south-southeast, encompassing Howard, Mormon, and Hutch Mountains. To the west, the unit parallels Interstate 17, skirting Stoneman Lake. The southern boundary runs from east of Apache Maid Mountain to Happy Jack, Arizona, south to Willow Valley Dam. The unit does not include Mormon Lake and the area due south to Double Cabin Park. WUI project areas, State and private lands are not designated as critical habitat.

Unit UGM–12. Coconino National Forest, Coconino County, Arizona

This unit is located east of Flagstaff, Arizona. WUI project areas, State and private lands are not designated as critical habitat.

Unit UGM–13. Coconino National Forest, Kaibab National Forest, Prescott National Forest, and Camp Navajo Army Depot; Coconino and Yavapai Counties, Arizona

This unit is located approximately between Williams and Flagstaff, Arizona, to the north, and runs south to the Mogollon Rim. The western portion of the unit encompasses the area south of Williams, Arizona, south to the Mogollon Rim. This area includes Bill Williams Mountain, Sycamore Canyon Wilderness, and Volunteer Canyon. WUI project areas, State, private, and the Naval Observatory Flagstaff Station are not designated as critical habitat.

Unit UGM–14. Coconino National Forest, Coconino County, Arizona

This unit is located due north of Flagstaff, Arizona, and encompasses the San Francisco Peaks. The unit also includes the Hochderffer Hills, O'Leary Peak, the Dry Lake Hills, and Elden

Mountain. WUI project areas, State and private lands are not designated as critical habitat.

Unit UGM–15. Kaibab National Forest, Coconino County, Arizona

This unit is located northwest of Flagstaff, Arizona. The unit is located west of U.S. Highway 180 and encompasses the area from Kendrick Peak northwest to Wild Horse Canyon. State and private lands are not designated as critical habitat.

Unit UGM–17. Kaibab National Forest, Coconino County, Arizona

This unit is located north of Parks, Arizona, and includes Sitgreaves Mountain, RS Hill, and Government Hill. State and private lands are not designated as critical habitat.

Special Management Considerations or Protection

As we undertake the process of designating critical habitat for a species, we first evaluate lands defined by those physical and biological features essential to the conservation of the species for inclusion in the designation pursuant to section 3(5)(A) of the Act. We then evaluate lands defined by those features to assess whether they may require special management considerations or protection. As discussed elsewhere in this final rule, the two primary reasons that are cited for listing the owl as threatened in 1993 include: (1) historical alteration of its habitat as the result of timber management practices, specifically the use of even-aged silviculture, and the threat of these practices continuing; and (2) the danger of catastrophic wildfire. As discussed in the background section above, the Forest Service in Arizona and New Mexico have amended their Forest Plans to address the threat of even-aged silviculture, however, the risk of catastrophic wildfire remains a significant threat to the owl.

The Recovery Plan for the owl outlines management actions that guide land management agencies in efforts to remove recognized threats and recover the owl. The Service has an existing policy for both owls and critical habitat that identifies using the Recovery Plan for section 7 consultations. Our policy indicates that an action in critical habitat that affects primary constituent elements may affect critical habitat and, therefore, must be consulted upon. In general, if a proposed action is in compliance with the Recovery Plan, we consider the effects to be insignificant and discountable and not likely to adversely affect the species or its critical habitat (*i.e.*, an informal consultation). Conversely, those activities not in compliance with the Recovery Plan are likely to adversely affect the species or its critical habitat (*i.e.*, formal consultation). Actions on Federal lands that we reviewed in past consultations on effects to the owl include land management plans; land acquisition and disposal; road construction, maintenance, and repair; timber harvest; livestock grazing and management; fire/ecosystem management projects (including prescribed natural and management ignited fire); powerline construction and repair; campground and other recreational developments; and access easements. We expect that the same types of activities will be reviewed in section 7 consultations for designated critical habitat. Thus, we believe the areas being designated as critical habitat will require some level of management and/or protection to address the current and future threats to the owl and maintain the primary constituent elements essential to its conservation in order to ensure the overall conservation of the species.

Exclusions Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate critical habitat on the basis of the best scientific information available, and that we consider the economic impact, National Security, and any other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat if the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in the extinction of the species. For the reasons discussed below, our analysis of the following: (1) Mescalero Apache, San Carlos Apache, and Navajo Nation lands; and (2) 157 WUI project areas, including the Rio Penasco II vegetation management project on the Sacramento Ranger District, Lincoln National Forest (discussed below), on FS lands that are categorized as being "at imminent risk of catastrophic wildfire", concludes that the benefits of excluding these areas from the designation of critical habitat for the owl outweigh the benefits of including them. Therefore, we are not including these lands within the critical habitat designation for the owl.

We have also completed an analysis of the economic impacts of designating these areas as critical habitat. The economic analysis was conducted in a manner that is consistent with the ruling of the 10th Circuit Court of Appeals in *N.M. Cattle Growers Ass'n* v. *USFWS*, 248 F.3d 1277 (2001). It was available for public review and comment during the comment periods for the proposed rule. The final economic analysis is available from our Web site at *http://ifw2es.fws.gov/mso/* or by contacting our New Mexico Ecological Services Field Office (*see* **ADDRESSES** section).

As detailed below, we have excluded 157 WUI project areas and the Penasco WUI project area,all Tribal lands, and the majority of military lands. As such we anticipate no impact to National Security, Tribal lands, partnerships, or habitat conservation plans from this critical habitat designation.

Wildland Urban Interface (WUI) on Forest Service (FS) Lands

During the comment period we received requests to exclude lands that are included within WUI areas of National Forests. Pursuant to section 4(b)(2) of the Act, this request prompted us to take into consideration the health and human safety risk of State, private, and Tribal lands adjacent to FS lands that are at imminent risk of catastrophic wildfire (FS 2001; Service 2001; 66 FR 43384). We consider the human health and safety risk of these lands as an "other relevant impact."

The WUI projects that we evaluated are those that were identified in the February 21, 2001, programmatic biological assessment and evaluation for WUI fuel treatment (programmatic BA) (FS 2001; *http://www.fs.fed.us/r3/wui/*). The programmatic BA analyzed effects to 32 threatened, endangered, and proposed species, including effects to the owl and its habitat from 157 WUI projects. The resulting April 10, 2001, programmatic biological opinion (programmatic BO) found that the WUI projects would be individually implemented by the FS during site-specific (*i.e.*, project-level) review of the amount of material (*i.e.*, fuels) that are within a project and the potential of a fire starting, as documented in their NEPA analyses. Only those projects that the FS documents as "at imminent risk of catastrophic wildfire" are covered by the programmatic BO (Service 2001). The FS proposed treatments to keep fires on the ground, where suppression efforts can be more effective. These activities were proposed to occur at two intensity levels within owl habitat. Treatments within 0.5 mi (0.8 km) of private lands may be intensive (*e.g.*, reducing basal area in mixed conifer habitat to between 40 to 60 ft^2 [3.7 to 5.6 m^2]), whereas treatments outside the 0.5 mi (0.8 km) buffer around private lands must comply with the Recovery Plan (Service 1995, 2001). Our analysis of the database for the projects (*http://www.fs.fed.us/r3/wui/*) indicates that 26

of the projects resulted in a "may affect, not likely to adversely affect" determination, whereas 132 projects resulted in a "may affect, likely to adversely affect" determination for the owl. Although one project, the Rio Penasco II vegetation management project on the Sacramento Ranger District, Lincoln National Forest, was analyzed in the programmatic BO (Penasco BO), the FS reinitiated this individual consultation because the project included additional actions that were not covered by the programmatic BO. The Penasco BO analyzed the effect of take of the owl from implementing an experimental management approach and rigorous monitoring program that will provide information useful for guiding future forest thinning projects and assessing potential impacts to owl habitat and prey. This project was recommended by the Recovery Plan and endorsed by the Recovery Team leader and other other Recovery Team members (Service 1995, 2002). We are also excluding the area covered by the Penasco BO.

(1) Benefits of Inclusion

The benefits of including the lands covered by these 157 project areas and the Penasco WUI project area in Arizona and New Mexico in critical habitat for the owl would result from the requirement under section 7 of the Act that Federal agencies consult with us to ensure that any proposed actions do not destroy or adversely modify critical habitat. As noted above, the programmatic BO and Penasco BO for these projects was finalized in 2001 and 2002, respectively, at which time we concluded that the proposed actions are not likely to jeopardize the continued existence of the owl. The programmatic BO and Penasco BO analyzed effects to owl habitat from the proposed activities to reduce the risk of catastrophic wildfire. One of the main sources of information in these consultations was the Recovery Plan, which is also one of the primary sources of information for this designation. Because we have an existing policy for both owls and critical habitat that identifies using the Recovery Plan for section 7 consultations, including these 157 WUI project areas and the Penasco WUI project area within the designation likely will not affect our resulting analyses. As fully described in the environmental assessment, our policy indicates that an action in critical habitat that affects primary constituent elements may affect critical habitat and, therefore, must be consulted upon. In general, if a proposed action is in compliance with the Recovery Plan, we consider the effects to be insignificant and discountable and not likely to adversely affect the species or its critical habitat (*i.e.*, an informal consultation). Conversely, those activities not in compliance with the Recovery Plan are likely to adversely affect the species or its critical habitat (*i.e.*, formal consultation). In this case, we have already completed formal consultation for these 157 WUI projects and the Penasco WUI project area using the definitions of owl habitat as identified in the Recovery Plan. If the 157 WUI project areas and the Penasco WUI project area were included within the designation, the FS would be required to reinitiate consultation, where we would analyze the potential impacts of the proposed projects on protected or restricted areas. Because a reinitiation of this consultation would use the same definitions of owl habitat (*i.e.*, protected or restricted habitat), it is unlikely that this process would result in additional protections for the owl. Thus, we believe that a duplicative analysis would only result in potential delays for the implementation of these projects. It is important to note that if any of the 157 WUI projects are not consistent with programmatic BO or if the Penasco WUI project is not consistent with the BO covering this project area, due to a change in the proposed action, the FS would reiniate the consultation based on the listing of the owl.

Critical habitat designation of these WUI project areas could potentially provide some benefit to the species. For example, the environmental assessment found that consultations may be more standardized with respect to analysis of impacts to primary constituent elements because the habitat-based guidelines of the Recovery Plan would be applied formally to key features of habitat. The environmental assessment also found that designation would add a monitoring component to the consultation process for cumulative impacts to habitat (*i.e.*, similar to the section 7 rangewide take monitoring that currently occurs for the species). Nevertheless, we do not believe that these 157 WUI project areas and the Penasco WUI project area would receive these additional benefits from being included within the designation of critical habitat for the owl because standardized impacts to owl habitat have already been programmatically analyzed by comparing the proposed action to the habitat-based guidelines of the Recovery Plan. Further, the FS is currently required to have an annual monitoring and review of the individual and combined impact of each year's projects, including those implemented under the Penasco BO.

We find sufficient regulatory and protective conservation measures in place from the current programmatic BO and Penaco BO. For these reasons, we find that little additional benefit through section 7 consultation would occur as a result of the overlap between current policy and existing information.

In *Sierra Club* v. *Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that heightened public awareness of the plight of listed species and their habitats may facilitate conservation efforts. We agree with these findings; however, we believe that there would be little additional informational benefit gained from including these 157 WUI project areas or the Penasco WUI project area within the designation because they were included in the proposed rule and discussed in this final rule. Consequently, we believe that the informational benefits are already provided even though these projects are not designated as critical habitat.

(2) Benefits of Exclusion

As discussed in the "Background" section of this rule, the two primary reasons for listing the owl as threatened in 1993: (1) Historical alteration of its habitat as the result of timber management practices, specifically the use of even-aged silviculture, and the threat of these practices continuing; and (2) the danger of catastrophic wildfire. The Recovery Plan for the owl outlines management actions to remove recognized threats and recover the owl.

We recognize that wildfires on National Forest lands in the southwestern region have increased in size and intensity over the last 15 years (FS 2004). According to the FS, an overwhelming majority of the areas identified in the programmatic BA occur in fire condition class 2 or 3, indicating moderate-to-high fire severity with severe consequences to the ecosystem and human life and property (FS 2001). Without treatment, the loss of endangered species habitat from catastrophic wildfire will likely be much greater and have more adverse affects. For example, the FS reported that approximately 45 owl PACs were significantly modified on FS lands by wildfire between 1996 and 2001 (FS 2001). We note that within the Upper Gila Mountains RU, high-to-moderate-

intensity stand-replacing fires affected 84 PACs from 1995 to 2002 (Service 2004). One fire in particular, the 2002 Rodeo-Chediski, burned 55 PACs (Service 2002). The 157 WUI projects and the Penasco WUI project involve reducing fuel loads to protect human life, property, and natural resources (FS 2001). These project areas include critical communications sites, municipal watersheds, high voltage transmission lines, observatories, church camps, scout camps, research facilities, and other structures. The areas also include residential communities at imminent risk from wildfire (FS 2001). As noted below, by excluding these project areas from the designation of critical habitat, the programmatic BO and the Penasco BO will not have to be reinitiated and will not require any additional compliance with section 7 consultation. Thus, this exclusion will allow the FS to proceed without any delays associated with the FS having to reinitate consultation on the programmatic BO and Penasco BO. We believe it is extremely important to allow these project to proceed due to the fact that these areas have been identified as areas at risk of moderate-to-high fire severity with severe consequences to the ecosystem and human life and property (FS 2001).

Loss of habitat from catastrophic wildfire is also one of the two main threats to the owl. Consequently, management actions taken to reduce risk and potential size of high-severity wildfires are recognized as a vital component of owl recovery (Service 1995). For example, the Recovery Plan includes guidelines for both mechanical thinning and prescribed fire in protected and restricted habitat (Service 1995). The Recovery Team has also refined guidelines to assist land managers implementing fuel management activities to reduce the risk of stand-replacing wildfires (Service 2001). We also have developed alternative approaches to streamlining section 7 consultation for hazardous fuels treatment projects (Service 2002), including a consideration of the benefits of these activities to the owl and its habitat (Service 2002a). We believe the exclusion of these 157 WUI project areas and the Penasco WUI project area from critical habitat for the owl is consistent with these recovery guidelines. Following these guidelines, we balanced the anticipated effects of the projects against the effects that will result if no action is taken. For example, we analyzed these projects in the programmatic BO and Penaco BO because we anticipated short-term adverse effects to the owl, but believe that the proposed actions will result in long-term benefits by reducing the risk of wildfire on these and adjacent lands.

The economic analysis concluded that impacts on fire management activities are likely to be greatest in areas where WUI lands overlap with owl critical habitat. Our economic analysis found that there may be a decrease in effectiveness of actions taken to reduce the risk of catastrophic wildfire in WUI areas due to: (1) Possible delays of fuel reduction treatments in PACs (*i.e.*, breeding season restrictions); (2) avoiding the 100-ac (40.5-ha) core area of PACs; and (3) reduced thinning in PACs. Breeding season restrictions, avoidance of the 100-ac (40.5-ha) core area, and reduced thinning in PACs are recommendations made under the jeopardy standard when a project is proposed in a PAC; however, because consideration was given collectively to all "owl conservation activities" in the economic analysis these costs were also analyzed. Using the programmatic BO, this overlap was estimated to be about 4 percent (134,000 ac [54,228 ha]). By excluding these project areas from the designation of critical habitat, the programmatic BO and Penasco BO will not have to be reinitiated and will not require any additional compliance with section 7 consultation. Thus, exclusion of these areas from the designation will avoid any delays associated with the FS having to reinitate consultation on the programmatic BO and Penasco BO or having to reiniate consulation on a project by project basis on these completed section 7 consulations.

Critical habitat is often viewed negatively by the public since it is not well understood and there are many misconceptions about how it affects private landowners (Patlis 2001). During the public comment period, one of the most common issues was that designation of critical habitat could impede efforts to reduce the risk of wildfire on National Forest lands and surrounding communities. The development of the forest restoration projects often involves a variety of stakeholders, including private landowners. Throughout the stakeholder-based planning process, Federal land managers must build trust among diverse and competing interests by encouraging open dialogue regarding various forest management issues. If these 157 WUI project areas and the Penasco WUI project area were included in the critical habitat designation, we conclude that the introduction of additional Federal (*e.g.*, a new regulation from the Service) influence could jeopardize the trust and spirit of cooperation that has been established over the last several years. The designation of critical habitat would be expected to adversely impact our, and possibly other Federal land managers", working relationship with private landowners, and we believe that additional Federal regulation of these high-fire risk areas through critical habitat designation would be viewed as an unwarranted and unwanted intrusion.

We believe it is important for recovery of this species that the public understand that the conservation-related activities for the owl that are proposed by Federal agencies are complementary with forest restoration activities to reduce threats to public and private lands (*e.g.*, *see* Carson Forest Watch 2004). Additionally, the support of the public will also be required as Federal land managers propose fuels reduction activities that will alter the current structure of forests while reducing the threats from stand-replacing wildfires. For example, in many places throughout the southwest, people are often opposed to forest restoration activities if it alters their aesthetic views of forested lands. To this end, as Federal land managers develop treatments to reduce this risk (*i.e.*, prescribed fire, mechanical thinning, *etc.*), it is critical that the public understand and support such activities. We find that the exclusion of these WUI project areas from the designation will improve public support for overall forest restoration activities, which will provide benefits to the owl. For these reasons, we find that significant benefits result from excluding these 157 WUI project areas and the Penasco WUI project area from designation of critical habitat.

In summary, we believe that the benefits of excluding the 157 WUI project areas and the Penasco WUI project area from critical habitat for the owl outweigh the benefits of their inclusion in critical habitat. Including these areas may result in some benefit through additional consultations with FS, whose activities may affect critical habitat. However, overall this benefit is minimal because evaluation of affects to the critical habitat would result in the same conservation recommendations as the programmatic BO and Penasco BO which have already been completed. On the other hand, an exclusion will greatly benefit the overall recovery of the owl by reducing the risk of catastrophic wildfire, one of the greatest threats to the species. An exclusion would also assist Recovery efforts by garnering greater public acceptance of owl conservation activities. Thus, we believe that an exclusion of these 157 WUI

project areas and the Penasco WUI project area outweighs any benefits that could be realized through them being designated as critical habitat for the owl. Consequently, we have not included these 157 project areas or the Penasco WUI project area within this critical habitat designation pursuant to section 4(b)(2) of the Act on the basis of human health and saftey concerns and for the purpose of future fuel reduction consultations. We also find that the exclusion of these lands will not lead to the extinction of the species, nor hinder its recovery because these projects have already been evaluated under the guidelines set by the Recovery Plan for the owl for both jeopardy to the species and adverse modification of critical habtiat.

American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act

We describe here authorities and policies that the Service follows when consulting with Tribes on issues related to endangered and threatened species. We believe that we fullfilled our responsibilities to the Tribes as further discussed in our exclusion analysis below. In accordance with the Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2), we believe that fish, wildlife, and other natural resources on Tribal lands are better managed under Tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable. Based on this philosophy, we believe that, in many cases, designation of Tribal lands as critical habitat provides very little additional benefit to threatened and endangered species.

Tribal governments protect and manage their resources in the manner that is most beneficial to them. Each of the three affected Tribes exercises legislative, administrative, and judicial control over activities within the boundaries of their respective lands. Additionally, they all have natural resource programs and staff, and have enacted Mexican spotted owl management plans. In addition, as trustee for land held in trust by the United States for Indian Tribes, the BIA provides technical assistance to the Tribes on forest management planning and oversees a variety of programs on Tribal lands. Owl conservation activities have been ongoing on Tribal lands included in the proposed critical habitat designation and will continue with or without critical habitat designation.

Tribal Conservation/Management Plans

In this section, we first provide the specifics of the owl Management/Conservation Plans that were developed by the San Carlos Apache Tribe, Navajo Nation, and Mescalero Apache Tribe (Mescalero Apache 2000, San Carlos Apache 2003, Navajo Nation 2000). These plans were all admitted to the supporting record during the November 2003 open comment period for the proposed rule (68 FR 65020). After this introduction, we analyze the benefits of including the Tribes' lands within the critical habitat designation and the benefits of excluding these areas.

(1) *Mexican Spotted Owl Conservation Plan for the San Carlos Apache (SCA) Indian Reservation (Conservation Plan):* The SCA staff developed a tribal owl conservation plan, and their Tribal Council has subsequently approved it. In November 2003, we received a redacted version of the SCA Conservation Plan (San Carlos Apache Tribe 2003). We reviewed the SCA Conservation Plan and agree with the Tribe and BIA, that the application of owl conservation management principles provided by the Recovery Plan should be beneficial for the owl and its habitat on SCA lands (San Carlos Apache Tribe 2003, BIA 2003).

SCA conducts owl surveys to evaluate and design projects that minimize or avoid impacts to the owl and its habitat. The Tribe also conducts periodic surveys within PACs to determine occupancy. Owls are found across the northern third of the SCA Indian Reservation; however, most suitable nesting and foraging habitat is in remote, inaccessible areas. Although these areas have very little overlap with commercial forest operations, owl habitat has generally been deferred from timber harvests since the listing of the owl. Nevertheless, this continual monitoring of habitat and species occupancy provides current GIS and other information to manage the overall forest resources.

The SCA's primary timber management practice is uneven-aged silviculture systems, using single-tree selection methods. The key factor considered in the SCA Conservation Plan is that there is very little overlap between forested lands currently considered practical for commercial harvesting operations and forested lands considered to be owl habitat. Thus, the majority of the high-potential breeding habitat (steep slopes, mixed-conifer) receives little or no timber management.

The SCA Conservation Plan addresses identified threats to owl habitat by maintaining sufficient suitable habitat across the landscape and by using site-specific retention of complex forest structure following timber harvest in those few areas where owl habitat and timber management overlap. Nest/roost habitats, primarily in mixed-conifer and steep slope areas, are not managed for timber extraction and will remain as suitable nest/roost habitat. Foraging habitat will be managed almost entirely by uneven-aged timber harvest methods. Timber sales, thinning, and fuelwood projects are conducted within some owl habitat to extract resources, improve or maintain current habitat conditions, and increase forest health (*e.g.* controlling dwarf mistletoe and bark beetles). Like the Recovery Plan, the SCA Conservation Plan adopts site-specific management to address protected, restricted, and reserved habitat and limits disturbance within owl PACs. PACs are at least 600 ac (243 ha) in size and established around known nest/roost sites. For example, prescribed fires and thinning are deferred from PACs during the breeding season (San Carlos Apache Tribe 2003). We find that the SCA Conservation Plan generally follows the Recovery Plan guidelines for owl habitat protection.

Wildfire is considered to be the greatest threat to owl habitat on the SCA Reservation. Steep slopes and canyons occupied by the owl are especially at risk. The SCA Indian Reservation Wildland Fire Management Plan Programmatic Environmental Assessment (Fire Management Plan) identifies fire reintroduction to fire-adapted and fire-dependent ecosystems. Natural and prescribed fire and mechanical treatments are used to manage forest resources. The Fire Management Plan objectives include: (1) Limiting the risk of harm to threatened and endangered species or their habitat; (2) reducing fuel accumulation to acceptable levels; (3) maintaining an ecologically proper amount of leaf litter, duff, organic matter, and woody material in each biotic community; (4) thinning dense vegetation; and (5) using fire in fire-adapted and fire-dependent ecosystems.

The Tribe indicated that projects will continue to go through NEPA, including the development of a biological assessment for any actions that may affect the owl. Suitable nesting and roosting habitat, as well as foraging habitat, on the reservation has been mapped and PACs have been

established for all known owl pairs. Thus, any impacts from management activities to either PACs or owl habitat will trigger section 7 consultation due to the Federal involvement of the BIA, regardless of critical habitat designation, since the areas are presently occupied by the owl.

The SCA Tribe participates on the Upper Gila RU workgroup, which ensures the timely sharing of management information. The Tribe also developed a Statement of Relationship with us that was approved by the Tribal Council and formally identifies and fosters our working relationship through government-to-government consultations and activities. The formal signing ceremony between the Service and the Tribe is being planned.

During our discussions with the Tribe for the economic analysis, the Tribe advised us that their lands are actively managed for commercial timber harvest to provide materials for their sawmill. Any delays or reductions in timber harvest stemming from a designation of critical habitat could result in fewer jobs and revenue for the SCA.

The designation of critical habitat would be expected to adversely impact our working relationship with the SCA Tribe. The Tribe believes that additional Federal regulation through critical habitat designation is unwarranted and an unwanted intrusion into their tribal natural resource programs. Our working relationship with the SCA Tribe has been extremely beneficial in implementing natural resource programs of mutual interest, including programs on other Tribal lands (*e.g.*, Jicarilla Apache, White Mountain Apache, Southern Ute). Because the SCA Tribe is committed to implementing these activities, we find that the SCA Conservation Plan provides significant conservation benefits to the owl.

(2) *The Navajo Nation Management Plan for the Mexican Spotted Owl (Navajo MSO Management Plan):* The Navajo Nation stated in their November 9, 2000, letter to the Service conveying the Navajo MSO Management Plan for the owl, that it was developed to meet the Service's desire to "support tribal measures that preclude the need for federal conservation regulations." The Navajo MSO Management Plan was approved by the Navajo Nation Council, which has oversight of the Division of Natural Resources and is empowered to establish Navajo Nation policy with respect to natural resources. The Navajo MSO Management Plan describes the Navajo Nation's management scheme that has been in effect since the listing of the owl: the known and potential habitat for the owl on the Navajo Nation; threats to the species; and future management practices. Except for the few exceptions detailed below, the Navajo MSO Management Plan follows the recommendations of the Recovery Plan.

We have received a redacted version of the Navajo MSO Management Plan (Navajo Nation 2000). We reviewed the document in early 2001 and again for this final rule and find that it provides a conservation benefit to the owl and its habitat. The Navajo MSO Management Plan is designed to effectively manage the owl on the Navajo Nation using accepted conservation techniques, especially those recommended in the Recovery Plan. The following practices are used to protect and manage the owl on the Navajo Nation: (1) Mandatory pre-action owl protocol surveys; (2) Federal agency section 7 consultations for proposed projects; (3) establishment of 600-ac (243-ha) PACs around all recent and historic owl sites; and (4) the Tribal project approval process, including requiring that all non-Federal activities avoid taking owls (Navajo Nation 2000). To date, very few projects have altered owl habitat on the Navajo Nation and none have occurred without section 7 consultation.

The Navajo MSO Management Plan also lists the following threats to the owl and possible management responses to minimize the majority of these impacts: (1) Abandoned mine reclamation; (2) commercial timber harvest; (3) fire management; (4) fuelwood harvest; (5) grazing; (6) homesite development; (7) coal mining; (8) recreation; (9) road building and reconstruction; and (10) other developments and activities.

We initiated formal consultation on the Navajo MSO Management Plan in 2003, and provided a draft biological opinion to the BIA and the Navajo Nation. The Navajo MSO Management Plan follows nearly all of the recommendations of the Recovery Plan, except for those detailed below. The economic analysis also found that the BIA expects to undergo several large-scale consultations with the Service in the near future for various related management plans, including continuing consultation on the Navajo Forest Management Plan (which is a programmatic plan for timber harvesting) and the Navajo Nation Fire Management Plan. The Navajo Forest Management Plan is still undergoing review by the BIA. The Service will also be completing formal consultation on the plans.

The Recovery Plan recommendations that will not be followed include those that address: (1) Grazing within other forest and woodland types; (2) uncontrolled grazing within riparian communities of restricted areas; and (3) small amounts of uncontrolled recreation. In addition, there is no pine-oak forest habitat, as defined in the Recovery Plan, on lands of the Navajo Nation; therefore, there is no need for it to be addressed in the Navajo Nation's MSO Management Plan. We acknowledge that those activities enumerated above do not follow the recommendations of the Recovery Plan, but still find that compliance with the other aspects of the Recovery Plan provides conservation benefits to the owl. We reached this conclusion because we anticipate that when the BIA issues grazing permits and determines that the activities "may affect" the owl, they will consult with us. We do not consult with the Navajo Nation on uncontrolled grazing or recreation because there is no Federal nexus or discretion that would require section 7 consultation. Thus, critical habitat would not affect the outcome of these activities.

The recommendations of the Recovery Plan will be followed by the Tribe for nearly all actions that occur within PACs (except unregulated grazing and recreation). Other examples of measures to minimize or avoid impacts include deferred treatments of areas during the owl's breeding season (March 1 through August 31), a 0.25 mi (0.4 km) buffer of nesting or roosting habitat, and the development of a 100-ac (40.5-ha) no habitat alteration core area around known nest or roost sites during March 1 through August 31. Moreover, the Navajo MSO Management Plan minimizes impacts associated with human activities, and controlled burns would be planned to follow the Recovery Plan recommendations for protected and restricted habitat and other forest and woodland types.

The Navajo Nation currently participates on the Colorado Plateau Recovery Unit Working Team. This relationship allows ideas, information, and concerns to be incorporated into management actions for the recovery of the owl. Participation in this working team also facilitates dialogue between other land management agencies, the Service, and the Navajo Nation.

Similar to other Tribes (see discussion above), the Navajo Nation officials have indicated that the designation of critical habitat on their lands would be expected to adversely impact the working relationship with the Service, which has been extremely beneficial in implementing natural resource programs of mutual interest.

(3) *The Mexican Spotted Owl Management Plan for the Mescalero Apache Reservation (Mescalero MSO Management Plan):* The Mescalero MSO Management Plan and accompanying Biological Assessment was adopted and approved by the Mescalero Apache Tribal Council in August 2000 (Mescalero Apache 2000).

The Mescalero MSO Management Plan provides for maintenance and/or improvement of essential habitat features and manages for the long-term conservation of the species on their lands. Specific guidelines are provided concerning forest management, livestock grazing, and recreation that are designed to maintain current owl populations while allowing levels of resource outputs that meet Tribal desires and provide for a healthy ecosystem. In addition, a number of Tribal forest management practices and methods provide protection to the owl and promote forest biodiversity. These include, but are not limited to, retention of the hardwood component in all areas that are harvested; retention of all snags that are not hazardous to human life; protection of habitat on steep slopes; emphasis on uneven-aged silvicultural techniques; and provisions for special management areas such as riparian and reserve/wilderness areas.

The following are used to protect and manage the owl on the Mescalero Tribal lands: (1) Surveys to determine occupancy; (2) Federal agency section 7 consultations for proposed projects; (3) establishment of 400-ac (162-ha) PACs around owl sites; (4) three levels of habitat management: Protected areas, unoccupied project areas (which we consider restricted areas), and other forest and woodland types; (5) the establishment of 100-ac (40.5-ha) core areas around nest trees or roost groves where no trees are harvested; (6) no trees are harvested within a 250-ac (101-ha) area within PACs during the breeding season (March 1 through August 31); and (7) additional management guidelines are also incorporated, for example, addressing steep slopes, road building, and unevenaged silvicultural methods. We formally consulted with the BIA on the implementation of the Mescalero MSO Management Plan and concluded the project would not jeopardize the continued existence of the owl (Service 2001). The Mescalero MSO Management Plan is designed to manage the owl on the Mescalero Nation generally following the tenets recommended in the Recovery Plan. We reviewed the document in early 2001 and again for this final rule and find that it provides a conservation benefit to the owl. In addition, our economic analysis found that the Mescalero Apache Tribe expects that the designation could affect its timber industry, potentially impacting $5 million in sawmill revenues and 160 jobs.

The BIA indicated and we also found in our discussions with the Mescalero Apache Tribe, which occurred during the development of the economic analysis, that the designation of critical habitat could be expected to adversely impact our working relationship with the Mescalero Apache Tribe. The BIA and Mescalero Apache Tribe also indicated and we agree that Federal regulation through critical habitat designation would be viewed as an unwarranted and unwanted intrusion into tribal natural resource programs. Our working relationship with the Mescalero Apache Tribe has been extremely beneficial in implementing natural resource programs of mutual interest. Similar to Navajo Nation and San Carlos Apache, the Mescalero Apache also participate on a RU working group, the Basin and Range East. This relationship allows ideas, information, and concerns to be incorporated into management actions for the recovery of the owl. Participation in this working team also facilitates dialogue between other land management agencies, the Service, and the Mescalero Nation. This relationship provides a benefit to all parties involved in the conservation of the owl.

The Benefits of Exclusion Outweigh the Benefits of Inclusion

We provide the following analysis related to these tribal lands; as required by 16 U.S.C. § 1533(b)(2) [hereafter ("4(b)(2)"]:

(1) Benefits of Inclusion

Few additional benefits would be derived from including Tribal lands of the Mescalero Apache, San Carlos Apache, and the Navajo Nation in a critical habitat designation of the owl beyond what will be achieved through the implementation of their management plans. The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat. However, we conclude that few regulatory benefits to the owl would be gained from a designation of critical habitat on San Carlos Apache and Navajo Tribal lands because the existing section 7 jeopardy analyses review projects for their consistency with the Recovery Plan and adverse modification analyses use the same approach. These Tribes have already agreed under the terms of the owl management plan to evaluate the potential impacts of any proposed projects on protected and restricted areas within these Tribal lands following the criteria in the Recovery Plan for the owl and would use the same definitions of owl habitat (*i.e.*, protected or restricted habitat) for adverse modification analyses. Accordingly, we find the consultation process for a designation of critical habitat is unlikely to result in additional protections for the owl on San Carlos Apache and Navajo Tribal lands.

As discussed above, we formally consulted with the BIA on the implementation of the Mescalero MSO Management Plan and concluded in a programmatic biological opinion that the project would not jeopardize the continued existence of the owl (Service 2001). Thus, the Mescalero Tribe is not required to consult under the jeopardy standard on individual projects that fall within the guidelines of the Tribes MSO Management Plan, as they are covered under our programmatic biological opinion. As discussed above, our programmatic consultation evaluated potential impacts to protected and restricted habitat based on the guidelines in the Recovery Plan for the owl. Thus, we believe that a designation of critical habitat in this case is unlikely to result in additional protections for the owl on Mescalero Tribal lands, even if consultation on critical habitat were to occur in the future.

Another possible benefit is that the designation of critical habitat can help to educate the public regarding potential conservation value of an area, and may focus efforts by clearly delineating areas of high conservation value for the owl. Any information about the owl and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. These Tribes are currently working with the Service to address habitat and conservation needs for the owl. Additionally, we anticipate that these Tribes will continue to actively participate in RU working groups, providing for the timely exchange of management information. The educational benefits important for the long-term survival and conservation of the owl are being realized. Educational benefits will continue on these lands if they are excluded from the designation, because the management/conservation plans already recognize the importance of those habitat areas to the owl.

For these reasons, then, we believe that designation of critical habitat would have few additional benefits beyond those that will result from continued consultation under the jeopardy standard.

(1) Benefits of Exclusion

The benefits of excluding tribal lands of the Mescalero Apache Tribe, San Carlos Apache Tribe, and the Navajo Nation from designated critical habitat are more significant. They include: (1) The advancement of our Federal Indian Trust obligations and our deference to tribes to develop and implement tribal conservation and natural resource management plans for their lands and resources, which includes the owl; (2) the maintenance of effective working relationships to promote the conservation of the owl and its habitat; (3) the allowance for continued meaningful collaboration and cooperation in RU working groups; (4) the provision of conservation benefits to forest and canyon ecosystems and the owl and its habitat that might not otherwise occur; and (5) the reduction or elimination of administrative and/or project modification costs as analyzed in the economic analysis.

Through the years since the owl was listed as threatened, we have met with Tribes to discuss how each might be affected by the designation of critical habitat. As such, we established effective working relationships with the Mescalero Apache Tribe, San Carlos Apache Tribe, and the Navajo Nation. As part of our relationship, we provided technical assistance to each of these Tribes to develop measures to conserve the owl and its habitat on their lands. These measures are contained within the tribal management/conservation plans that we have in our supporting record for this decision (see discussion above). These proactive actions were conducted in accordance with Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2). We believe that these Tribes should be the governmental entities to manage and promote the conservation of the owl on their lands. During our meetings with each of these Tribes, we recognized and endorsed their fundamental right to provide for tribal resource management activities, including those relating to forest and canyon ecosystems.

The designation of critical habitat would be expected to adversely impact our working relationship with the Mescalero Apache, San Carlos Apache, and Navajo Nation. In fact, during our discussions with each of the Tribes, we were informed that critical habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. To this end, we found that each Tribe would prefer to work with us on a Government-to-Government basis. For these reasons, we believe that our working relationships with the Mescalero Apache, San Carlos Apache, and Navajo Nation would be better maintained if these tribes are excluded from the designation of critical for the owl. We view this as a substantial benefit.

We indicated in the proposed rule (July 21, 2000; 65 FR 45336) that the Mescalero Apache, San Carlos Apache, and Navajo Nation were working on owl management plans. Similarly, in the reopening of the comment period on this rule (November 18, 2003; 68 FR 65020), we asked for information and comments concerning our preliminary conclusions regarding the exclusion of Tribal lands under section 4(b)(2) of the Act. During the comment period, we received input from these three Tribes, and the Southern Ute Tribe, White Mountain Apache Tribe, Hualapai Tribe, BIA's Southwestern Regional Office, BIA's Western Regional Office, and Jicarilla Apache Tribe. All of these commenters expressed the view that designating critical habitat for the owl on the Mescalero Apache, San Carlos Apache, and Navajo Nation lands would adversely affect the Service's working relationship with all Tribes. Many noted the beneficial cooperative working relationships between the Service and Tribes have assisted in the conservation and recovery of listed species and other natural resources. For example, the Service's relationship with Mescalero Apache resulted in the successful prosecution of an owl take case under section 9 of the Act, related to an arsonist in 2002 (Service 2002). They indicated that critical habitat designation on the Mescalero Apache, San Carlos Apache, and Navajo Nation would amount to additional Federal regulation of sovereign Nations' lands, and would be viewed as an unwarranted and unwanted intrusion into Tribal natural resource programs. We conclude that our working relationships with these Tribes on a government-to-government basis have been extremely beneficial in implementing natural resource programs of mutual interest, and that these productive relationships would be compromised by critical habitat designation of these Tribal lands.

In addition to management/conservation actions described above for the conservation of the owl, we anticipate future management/conservation plans to include conservation efforts for other listed species and their habitat (*e.g.*, southwestern willow flycatcher). We believe that many Tribes and Pueblos are willing to work cooperatively with us to benefit other listed species, but only if they view the relationship as mutually beneficial. Consequently, the development of future voluntarily management actions for other listed species will likely be contingent upon whether these Tribal lands are designated as critical habitat for the owl. Thus, a benefit of excluding these lands would be future conservation efforts that would benefit other listed species.

The economic analysis found that the BIA has conducted 13 informal and 5 formal consultations for the owl on Tribal lands since 1993 and estimates that same number for the next 10 years. The economic analysis also estimated 3 informal consultations would occur with the NPS for Navajo National Monument and none would occur with Canyon de Chelly. Potentially affected activities include administrative efforts, timber harvest, fire management, grazing, coal mining and recreation. Total estimated administrative and project modification costs of these consultations ranged from $110,000 to $1.1 million (BIA) and $12,000 to $248,000 (NPS). These consultations would occur regardless of whether critical habitat is designated, because the species occupies these lands and section 7 consultations under the jeopardy standards will still be required for activities affecting the owl. The economic analysis estimated that total administrative and project modification costs over the next ten years for the BIA ranged from $113,000 to $1,111,000. The costs attributed to critical range from slightly higher to substantially higher. The BIA indicated that critical habitat designation could place "a significant financial burden" upon Tribes. For example, they found that the Mescalero Apache Tribe could be burdened with more governmental constraints and a lack of funds to comply with section 7. As discussed above, we already evaluate the potential impacts of any proposed projects on protected or restricted areas; however, any additional costs that may be

incurred as a result of a designation of critical habitat are avoided if we exclude the Tribe from the designation of critical habitat. We find this to be a significant financial benefit for these Tribes, the Service, and the BIA.

The economic analysis found that designation of critical habitat and continued efforts to protect the owl may impact timber harvest, which could affect all three Tribes in the future. For example, the Mescalero Agency, BIA, indicated that additional section 7 consultation efforts and the potential delay of projects resulting from section 7 consultation of critical habtiat could affect timber harvest on Mescalero Apache lands. In particular, for the Mescalero and the San Carlos, both of which are actively managing their lands for commercial timber harvest and have interests in operating sawmills, any reduction in timber harvest could result in fewer jobs and revenues for the Tribes. The Mescalero Apache Tribe indicated that the designation could affect its timber industry, potentially impacting $5 million in sawmill revenues and 160 jobs. Commercial timber harvests on Navajo Nation lands were enjoined by the Arizona District Court in *Silver* v. *Thomas*, CIV 94–337–PHX–RGS (D.AZ 1994) until a new forest management plan is completed. This process is still ongoing, so that the Navajo are not currently able to undertake commercial timber operations. However, the Tribe has indicated its intention to continue these types of efforts once the current injunction is lifted. The exclusion of Tribal lands from this designation will avoid any potential future economic impacts related to the designation of critical habitat.

In summary, the benefits of including the Mescalero Apache, San Carlos Apache, and Navajo Nation in the critical habitat designation are limited to a potential benefit gained through the requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat and potential educational benefits. However, as discussed in detail above, we believe these benefits are provided for through other mechanisms. The benefits of excluding these areas from being designated as critical habitat for the owl are more significant, and include encouraging the continued development and implementation of the tribal management/conservation measures such as monitoring, survey, and fire-risk reduction activities that are planned for the future or are currently being implemented. These programs will allow the Tribes to manage their natural resources to benefit forest and canyon ecosystems for the owl, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of these areas will likely also provide additional benefits to the owl and other listed species that would not otherwise be available due to the Service's ability to encourage and maintain cooperative working relationships with other Tribes and Pueblos. We find that the benefits of excluding these areas from critical habitat designation outweigh the benefits of including these areas.

As noted above, the Service may exclude areas from the critical habitat designation only if it is determined, "based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." Here, we have determined that exclusion of the Mescalero Apache, San Carlos Apache, and Navajo Nation from the critical habitat designation will not result in the extinction of the owl. First, activities on these areas that may affect the owl will still require consultation under section 7 of the Act. 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 listed species. Therefore, even without critical habitat designation on these lands, activities that occur on these lands cannot jeopardize the continued existence of the owl. Second, each of the Tribes have committed to protecting and managing according to their management/conservation plans and natural resource management objectives. In short, the Tribes have committed to greater conservation measures on these areas than would be available through the designation of critical habitat. With these natural resource measures, we have concluded that this exclusion from critical habitat will not result in the extinction of the owl, chiefly because the management/conservation plans are generally based on the habitat-management tenets of the Recovery Plan. Accordingly, we have determined that the Mescalero Apache, San Carlos Apache, and Navajo Nation should be excluded under subsection 4(b)(2) of the Act because the benefits of excluding these lands from critical habitat for the owl outweigh the benefits of their inclusion and the exclusion of these lands from the designation will not result in the extinction of the species.

Lands Owned by Navajo Nation and Managed by National Park Service (NPS)

During our review of the Navajo Management Plan for the owl, we found that there is a unique land ownership of Navajo National Monument and Canyon de Chelly wherein the land is owned by the Navajo Nation, but under the management authority and administration of the NPS. We found that this unique situation was envisioned by the Navajo Management Plan: "* * * lands administered by the NPS are subject to the same laws as elsewhere on the Navajo Nation, and are then subject to this [Management] Plan." After our previous designation, we found that the designation on these lands created confusion. In fact, we were unable to accurately map the units within and outside of Navajo National Monument and Canyon de Chelly to depict the distinction of management authority. We also found in our reanalysis of the Navajo Management Plan that the Navajo Fish and Wildlife Department will assist NPS managers, as requested, with developing or maintaining consistent land-use policies that incorporate these owl management tenets. We consider these lands to be within the existing Navajo Management Plan and therefore excluded from the designation. Nevertheless, the NPS would still be required to consult under section 7 jeopardy provisions on any projects conducted within these areas that would affect the owl.

Relationship to Section 4(a)(3) of the Act

The Sikes Act Improvements Act of 1997 (Sikes Act) requires 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 there. Each INRMP includes an assessment of the ecological needs on the installation, including needs 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. We consult with the military on the development and implementation of INRMPs for installations with listed species and critical habitat.

The 2004 National Defense Authorization Act (Pub. L. 108–136, November 2003), in Section 318, Military Readiness and Conservation of Protected Species (Defense Authorization Act) makes the following amendment to section 4(a)(3) of the Act: 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 INRMP 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. Therefore, lands essential to the conservation of a species that are owned or managed by DOD and covered by INRMPs are excluded from critical habitat designations if they meet that criteria.

The Camp Navajo Army Depot, Arizona, was proposed as critical habitat. We have been providing technical assistance to Camp Navajo Army Depot for the last 3 years regarding the development of their INRMP and natural resources on the installation. The INRMP was finalized in late 2001. However, the INRMP was finalized without seeking signatures from our Region 2 Regional Director and the State Director of the Arizona Game and Fish Department (AGFD) (Service 2001). Per the Sikes Act and the Army's regulations, the INRMP is only final when the Service and AGFD (concurring agencies) have signed off on the INRMP. Because the INRMP was completed without signatures from concurring agencies, and when we reviewed early drafts we found that it did not provide a conservation benefit to the owl, we find Camp Navajo Army Depot's INRMP does not conform to the Defense Authorization Act. Moreover, we did not receive any comments from Camp Navajo Army Depot regarding the proposed designation. Because the base currently contains protected and restricted habitat and primary constituent elements, we find these lands to be essential to the conservation of the owl. For these reasons, these lands are designated as critical habitat.

U.S. Naval Observatory Flagstaff Station, Arizona, was proposed as critical habitat. We reviewed their final INRMP in 2001 and concluded that it provides a benefit to the species. The INRMP provides management direction for the owl on this installation. Thus, we are not including this area in the final designationof critical habtiat for the owl pursuant to section 4(a)(3) of the Act.

Fort Carson, Colorado, was proposed as critical habitat for the owl. Fort Carson completed their final INRMP on April 8, 2003, which includes specific guidelines for protection and management for the owl. We have reviewed their final INRMP relative to whether the plan provides a benefit to the subject species. It is our determination that the final INRMP for Fort Carson provides a benefit to the owl. Thus, we are not including Fort Carson in the final designation of critical habtiat for the owl pursuant to section 4(a)(3) of the Act.

Fort Huachuca was proposed as critical habitat, but completed an INRMP in 2001. The plan helps guide natural resources management on Fort Huachuca, while supporting the military's mission. In 2002, we completed a biological opinion for Fort Huachuca on all installation activities, including its INRMP (Service 2002a). Fort Huachuca conducts owl monitoring and surveys and its projects are designed to be consistent with and complement the Recovery Plan (Service 2002a). We found that the proposed action was not likely to jeopardize the continued existence of the owl or adversely modify designated critical habitat. Because the INRMP provides a benefit to the owl, Fort Huachuca is not included in the designation of critical habitat for the owl pursuant to section 4(a)(3) of the Act.

Effect of Critical Habitat Designation

Section 7 Consultation

The regulatory effects of a critical habitat designation under the Act are triggered through the provisions of section 7, which applies only to activities conducted, authorized, or funded by a Federal agency (Federal actions). Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR 402. We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species. Individuals, organizations, States, local governments, and other non-Federal entities are not affected by the designation of critical habitat unless their actions occur on Federal lands, require Federal authorization, or involve Federal funding. Please refer to the proposed rule to designate critical habitat for the owl for a detailed discussion of section 7 of the Act in relation to the designation of critical habitat (65 FR 45336; July 21, 2000). Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Activities on Federal lands that may affect the owl or its critical habitat will require section 7 consultation. Activities on State or private lands requiring a permit from a Federal agency, such as a permit from the FS, or some other Federal action, including funding (*e.g.*, Federal Highway Administration, Federal Aviation Administration, or Federal Emergency Management Agency) will continue to be subject to the section 7 consultation process only for actions that may affect the owl, but not for critical habitat because areas under State or private ownership are not included in the critical habitat designation by definition. Similarly, Tribal lands that we did not designate as critical habitat will also continue to be subject to the section 7 consultation process only for actions that may affect the owl. The FS WUI project areas that we excluded from this designation have already been analyzed through the consultation process and biological opinions. Other projects within these areas will continue to be consulted upon for potential effects to the owl and critical habitat. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded or regulated do not require section 7 consultation.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory.

We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain a biological opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as a biological opinion if the critical habitat is designated and if no significant new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)).

Regulations at 50 CFR 402.16 also require Federal agencies to reinitiate consultation in instances where we have already reviewed an action for its effects on a listed species if critical habitat is subsequently designated. Consequently, some Federal agencies may request reinitiation of consultation or

conferencing with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy critical habitat.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may adversely modify such habitat, or that may be affected by such designation. Activities that may result in the destruction or adverse modification of critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for the conservation of the owl is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species.

A number of Federal agencies or departments fund, authorize, or carry out actions that may affect the owl and its critical habitat. Among these agencies are the FS, BIA, BLM, Department of Defense, Department of Energy, NPS, and Federal Highway Administration. We have reviewed and continue to review numerous activities proposed within the range of the owl that are currently the subject of formal or informal section 7 consultations. Actions on Federal lands that we reviewed in past consultations on effects to the owl include land management plans; land acquisition and disposal; road construction, maintenance, and repair; timber harvest; livestock grazing and management; fire/ecosystem management projects (including prescribed natural and management ignited fire); powerline construction and repair; campground and other recreational developments; and access easements. We expect that the same types of activities will be reviewed in section 7 consultations for designated critical habitat.

Actions that would be expected to both jeopardize the continued existence of the owl and destroy or adversely modify its critical habitat would include those that significantly and detrimentally alter the species' habitat over an area large enough that the likelihood of the owls' persistence and recovery, either range-wide or within a RU, is significantly reduced. Thus, the likelihood of an adverse modification or jeopardy determination would depend on the baseline condition of the RU and the baseline condition of the species as a whole. Some RUs, such as the Southern Rocky Mountains-New Mexico and Southern Rocky Mountains-Colorado, support fewer owls and owl habitat than other RUs and, therefore, may be less able to withstand habitat-altering activities than RUs with large contiguous areas of habitat supporting higher densities of owls.

Actions not likely to destroy or adversely modify critical habitat include activities that are implemented in compliance with the Recovery Plan, such as thinning trees less than 9 inches (23 centimeters) in diameter in PACs; fuels reduction to abate the risk of catastrophic wildfire; "personal use" commodity collection such as fuelwood, latillas and vigas, and Christmas tree cutting; livestock grazing that maintains good to excellent range conditions; and most recreational activities including hiking, camping, fishing, hunting, cross-country skiing, off-road vehicle use, and various activities associated with nature appreciation. We do not expect any restrictions to those activities as a result of this critical habitat designation. In addition, some activities may be considered to be of benefit to owl habitat and, therefore, would not be expected to adversely modify critical habitat. Examples of activities that could benefit critical habitat may include some protective measures such as fire suppression, prescribed burning, brush control, snag creation, and certain silvicultural activities such as thinning. In 2001, the Recovery Team noted that there is currently not enough information to provide specific targets or quantities for the retention of key habitat components during fuels reduction activities in restricted habitat (Service 2001). However, current research is increasing our knowledge (*e.g.*, see Ganey *et al.* 2003; May and Gutierrez 2002). Consequently, managers should use their discretion and site-specific information to balance fuels management prescriptions with the conservation of the owl. Nevertheless, we are aware that some activities, such as prescribed burns, have been conducted and data indicate that primary constituent elements have been retained (*e.g.*, see Service 2002; Grand Canyon National Park Prescribed Fire).

If you have questions regarding whether specific activities will likely constitute destruction or adverse modification of critical habitat, contact the State Supervisor, New Mexico Ecological Services Field Office (see **ADDRESSES** section). If you would like copies of the regulations on listed wildlife or have questions about prohibitions and permits, contact the U.S. Fish and Wildlife Service, Division of Endangered Species, P.O. Box 1306, Albuquerque, New Mexico 87103 (telephone 505–248–6920; facsimile 505–248–6788).

Effects on Tribal Trust Resources From Critical Habitat Designation on Non-Tribal Lands

In complying with our Tribal trust responsibilities, we communicated with all tribes potentially affected by the designation of critical habitat for the owl. We solicited and received information from the tribes (see discussion above) and arranged meetings with the tribes to discuss potential effects to them or their resources that may result from critical habitat designation. Please refer to the economic analysis and environmental assessment where the potential impacts are reviewed.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial data available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We based this designation on the best available scientific information, and believe it is consistent with the Recovery Plan and recommendations of those team members. We utilized the economic analysis, and took into consideration comments and information submitted during the public hearing and comment periods to make this final critical habitat designation. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species.

The economic effects already in place due to the listing of the owl as threatened is the baseline upon which we analyzed the economic effects of the designation of critical habitat. The critical habitat economic analysis examined the potential economic effects of efforts to protect the owl and its critical habitat. The economic effects of a designation were evaluated by measuring changes in national, regional, or local indicators. A draft analysis of the economic effects of the proposed owl critical habitat designation was prepared and made available for public review (65 FR 63047; March 26, 2004). Because of the regulatory history, additional consultations resulting from this rulemaking are expected to be minimal. The Recovery Plan, providing extensive guidance on owl conservation, was published in 1995. Thus, as discussed in our economic analysis, action agencies have been aware of the owl and are already consulting on a

wide range of activities within the designation. Therefore, we concluded in the final analysis, which reviewed and incorporated public comments, that no significant economic impacts (*i.e,* will not have annual effect on the economy of $100 million or more or affect the economy in a material way as defined by Office of Management and Budget and discussed further in the "Required Determinations" section below) are expected from critical habitat designation above and beyond that already imposed by listing the owl. A copy of the economic analysis is included in our supporting record and may be obtained by contacting the New Mexico Ecological Services Field Office (see **ADDRESSES** section) of from our Web site *http://ifw2es.fws.gov/mso/.*

Impacts associated solely with this rulemaking are expected to result in additional administrative costs to Action agencies due to additional consultation and documentation requirements. These additional administrative costs are expected to be on the order of $72,000 to $238,000 annually. Based on a review of consultation records, there has not been a measurable increase in the number of consultations occurring annually in those areas where owl critical habitat was finalized in 2001. Some additional administrative costs are expected for discussing adverse modification in the consultation documentation and for reinitiating consultations. Based on discussions with land management agency personnel, these costs will be small, as the amount of additional work associated with these efforts is not expected to be significant. In particular, our economic analysis found that FS Region 3 personnel are already managing owl habitat in compliance with Recovery Plan guidance, indicating this rulemaking will not result in additional impacts, with the exception of a slight increase in administrative efforts. Moreover, FS personnel Regions 2 and 4 believe that for activities within the designation, the cost of having to address the owl in their required environmental documentation is only a minor cost because little activity is occurring or planned within the designation. Additionally, the BLM in Colorado and Arizona indicated that critical habitat has been designated since 2001 and has not resulted in any significant increase in workload. Finally, the BLM in Utah indicated that only limited impacts on oil and gas activities related to this rulemaking are expected in the future because owl-related delays in drilling activities would be expected even in the absence of this designation.

The amount of additional administrative costs attributable to this rulemaking (*i.e.*, that would not occur absent the designation), is likely to be only a portion of the total forecast administrative costs. The future administrative costs attributable solely to this rulemaking are expected to be on the order of 25 percent of total forecast administrative costs of $72,000 to $238,000 annually. Based on a review of consultations that have occurred in the areas where critical habitat was designated in 2001 and on discussions with land management personnel and affected entities, additional future project modification costs are unlikely to occur under this current designation. Therefore, the incremental costs associated with this rulemaking are expected to be minimal.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. We prepared an economic analysis of this action to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat. The draft economic analysis was made available for public comment and we considered those comments during the preparation of this final rule. The economic analysis indicates that this rule will not have an annual economic effect of $100 million or more or adversely affect any economic sector, productivity, competition, jobs, the environment, or other units of government.

Under the Act, critical habitat may not be destroyed or adversely modified by a Federal agency action; the Act does not impose any restrictions related to critical habitat on non-Federal persons unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency. Because of the potential for impacts on other Federal agencies' activities, we reviewed this action for any inconsistencies with other Federal agency actions. Based on our economic analysis and information related to implementing the listing of the species such as conducting section 7 consultations, we believe that this designation will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency, nor will it materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the 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. SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA also amended the RFA to require a certification statement. We are hereby certifying that this rule will not have a significant effect on a substantial number of small entities.

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 defined at 13 CFR 121.201. Small businesses that are potentially impacted by the critical habitat designation for the owl, as identified in the final economic analysis, include the timber industry (*i.e.*, timber tract operations, logging, support activities for forestry, wood producer manufacturing, and pulpmills); livestock grazing industry (*i.e.*, beef cattle ranching and farming); oil and gas industry (*i.e.*, oil and gas extraction); and rock quarry industry (*i.e.*, stone mining and quarrying).

SBREFA does not explicitly define either "substantial number" or "significant economic impact." Consequently, to assess whether a "substantial number" of small entities is

affected by this designation, this analysis considers the relative number of small entities likely to be impacted in the area. Similarly, this analysis considers the relative cost of compliance on the revenues/profit margins of small entities in determining whether or not entities incur a "significant economic impact." Only small entities that are expected to be directly affected by the designation are considered in this portion of the analysis. This approach is consistent with several judicial opinions related to the scope of the RFA (*Mid-Tex Electric Co-op Inc.* v. *F.E.R.C.*, 773 F.2d 327 (D.C. Cir. 1985) and *American Trucking Associations, Inc.* v. *U.S. E.P.A.*, 175 F.3d 1027, (D.C. Cir. 1999)).

To determine if the rule would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (*e.g.*, grazing, oil and gas production, timber harvesting, etc.). We applied the "substantial number" test individually to each industry to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies; non-Federal activities are not affected by the designation. Federal agencies are already required to consult with us under section 7 of the Act on activities that they fund, permit, or implement that may affect the owl.

The primary projects and activities by private entities that might be directly affected by the designation include the timber industry, livestock grazing industry, oil and gas industry, and rock quarry industry. Based on the final economic analysis we address the potential impacts to small businesses in each of these industries below.

Timber Industry Small Business Impacts

Limited data are available on the number of timber-related small businesses in the region or the average revenues of small businesses in this industry. Available data suggest that approximately 84 percent of timber-related businesses in the affected region are small businesses. The timber industry in the southwest has declined over the past 10 years due to a variety of factors, including owl related conservation activities. These factors include changes in the FS forest timber sales program at the national level, injunctions that halted timber sales in the region, and changes in regional FS forest management objectives. Since 1992, at least 15 mills have closed in the region, leaving approximately 15 sawmills currently operating in Arizona and New Mexico with an annual capacity of 61 MMBF. Timber harvest within FS Region 3 forests has declined over the past 15 years from an annual harvest of 148 MMBF per year, to the current level of 20 MMBF harvested in 2002. Lumber production in the region has seen similar declines. Current lumber production in the four corners region was 187 MMBF in 2002.

Without owl-related conservation efforts, up to an additional 60 MMBF per year in timber harvest could have been available to the timber industry from FS Region 3 forests. This forecast high-end impact translates into approximately 78 MMBF in lost lumber production per year. As these are ongoing annual impacts related to past conservation actions, the timber industry has likely already adjusted to the reduced level of timber harvest from the national forests. Thus, future impacts to existing timber-related businesses in the region, all of whom are likely to be small businesses, are unlikely. These impacts would only occur if owl conservation efforts resulted in additional reductions in timber supply, above the forecast upper bound estimates. Given the current level of timber sales from FS Region 3 national forests, it is worth noting that sawmills operating in the region are likely dependent on either Tribal or private timber sources for their supply.

Livestock Grazing Small Business Impacts

Approximately 1,500 permittees grazed cattle on FS Region 3 forests during the past three years (2000 to 2002) and most of these operations are small businesses. Of these, approximately 850 permittees graze in the area proposed as critical habitat in FS Region 3 national forests. For purposes of this analysis, these are all assumed to be small entities. A number of these ranchers will be impacted by ongoing owl conservation activities, which, along with other factors including drought, result in limitations on the number of authorized animal unit months (AUMs) permitted on FS Region 3 lands. The expected reduction in AUMs is based on an examination of historical grazing levels and section 7 consultations. The number of AUMs grazing in proposed owl critical habitat is assumed to be proportional by acreage to the total number of AUMs grazed in a particular NF. The economic analysis finds that reductions in AUMs as a result of owl conservation measures, elk, and other threatened and endangered species may range from 10 percent to 50 percent for allotments that cross owl protected activity centers. In addition, future impacts are limited to those allotments that have yet to undergo NEPA analysis and associated section 7 consultation. Based on these assumptions, the estimated annual reduction is approximately 3,100 to 15,600 AUMs on FS Region 3 lands.

Because information is not available on the specific permittees most likely to experience a reduction in authorized AUMs, the analysis uses two approaches to estimate impacts on small businesses related to reductions in AUMs. First, this analysis estimates the number of permittees that could possibly experience a complete reduction in their authorized AUMs. Second, the analysis estimates the impact on each permittee in the critical habitat designation, if the impacts were evenly distributed. Based on information on authorized AUMs and number of permittees on FS Region 3 lands, the typical permittee grazes approximately 1,070 AUMs. Given this, a forecast annual reduction in AUMs of 3,100 to 15,600 is equivalent to the total AUMs grazed by 3 to 15 permittees. Thus, if the total impacts were to affect the smallest number of permittees, less than two percent of grazing permittees in critical habitat would be affected. If the impacts of a reduction in AUMs were evenly distributed across all 850 permittees in critical habitat. This would result in an annual reduction of 4 to 19 AUMs per permittee. Given that permittees typically graze approximately 1,070 AUMs, this represents a reduction of less than two percent of AUMs per permittee.

Oil and Gas Industry Small Business Impacts

Impacts to oil and gas extraction from owl conservation activities have the potential to impact some small businesses operating in the New Mexico and Utah region. Based on historical consultation records, impacts on oil and gas operations in the past as a result of owl conservation efforts have been limited. However, given expected growth of oil and gas operations and exploration in the proposed critical habitat designation in Utah, there is some potential for small businesses to experience greater impacts in the future. Expected future impacts on the oil and gas industry include administrative costs, project modification costs, and regional impacts resulting from delays to drilling activities.

Estimated impacts related to administrative efforts and project modifications are likely to be minimal on a per-business basis. Project modifications specific to oil and gas activities are forecast to range from $1,000 to $25,000 per company. However, some small businesses in this industry will likely experience localized impacts related to the owl and the critical habitat designation. For example, as discussed in its comments, Bill Barrett Corporation (BBC) spent approximately $94,000 to conduct surveys for owl in a project area within previously finalized owl critical habitat in Utah. This corporation estimates that owl surveys cost them from $3 to $6 an acre.

There is also some potential for future project modifications to include directional drilling, which could mean greater impacts to small businesses in the New Mexico and Utah area. However, the extent to which directional drilling may be required in order to protect the owl and its habitat is currently unknown; this drilling method has not been required in the past, and is not widely used in the region.

Estimated impacts related to delays caused by owl surveying efforts or breeding season restrictions could affect operators in the CP–15 critical habitat unit in Utah, on BLM lands. While regional economic impacts resulting from owl-related delays are estimated, the analysis expects that producers will likely shift production to other locations, if not in the region than elsewhere; thus, producer surplus losses are not expected. However, if oil and gas producers are unable to shift production elsewhere, up to five companies could be impacted per year, assuming each delayed well belonged to an individual company. The impact of the loss of one well would depend on the finances of the company. Currently, the majority of the leases in the area are held by BBC, a small business, based in Denver, Colorado. BBC estimates that a typical well in the area has a net present value of $400,000. If five wells are delayed each year, this could be considered the equivalent of precluding drilling of five wells if substitute drilling locations are unavailable. If all five wells belonged to BBC, this could result in an annual impact of $2.0 million. In comparison, BBC estimates that its revenues from production in one area (the Southern Uintah Basin) are in excess of $65 million per year.

Based on a review of operators in Carbon County, Utah, the majority of operators in this industry are headquartered outside of Utah. Oil and gas companies operating in Carbon County, Utah, likely to be directly impacted by owl related conservation efforts are located in a variety of States, including Texas, Oklahoma and Alabama, among others. Therefore, the relevant area for purposes of this analysis is the U.S.

There are approximately 7,680 small businesses in the oil and gas extraction sector in the U.S. The total number of oil and gas businesses operating in the critical habitat designation in New Mexico and Utah is likely in the range of 150 operators. Given the large number of oil and gas businesses nationwide, the number of potentially affected small businesses is only a small portion of small oil and gas businesses nationwide.

Stone Mining and Quarrying Industry Small Business Impacts

Impacts to small businesses in this industry resulting from owl conservation efforts are likely to be limited to one rock quarry operator. The quarry project area falls within critical habitat, but is not included in the designation by definition since it is private property, and is permitted through the State. While there is no Federal nexus, the quarry operator has been in negotiation with the Service for an Incidental Take Permit under section 10 of the Act. This activity is voluntary, and while it is related to the owl, it would likely occur with or without the critical habitat designation. The private operator of this quarry expects to incur various costs resulting from owl conservation activities, including $60,000 to $450,000 in one time costs and $10,000 per year in ongoing monitoring costs. Because this party is a small business with limited revenues, these expenditures represent a considerable impact to this business. Available information indicates that this operator is one of 11 businesses (of which nine are small businesses) in this industry in the affected Colorado counties.

Based on the experience of this operator, there is some likelihood that other quarries adjacent to owl habitat may experience impacts related to owl conservation activities. However, a review of consultation records and communication with Service staff indicate other quarry operations are not occurring in the critical habitat designation or adjacent to owl habitat. Therefore, additional small businesses in the stone mining industry are not expected to experience impacts resulting from owl conservation efforts.

In summary, potential impacts from restrictions on grazing on Federal lands are likely to affect some small businesses. Small business impact estimates are based on information provided by affected parties as well as information on small businesses in the region. While small business impacts on existing timber-related small businesses are unlikely, small ranchers in the region may experience some impacts. If the total impacts were to affect the least number of ranchers, no more than 15 ranchers (less than two percent of grazing permittees) would be affected. However, if the impacts were evenly distributed, owl conservation could result in a reduction of up to 19 AUMs per rancher (a reduction of less than two percent of AUMs per permittee). Impacts to small businesses in the natural gas industry from owl-related delays are not expected as long as substitute drilling locations are available. However, if gas producers are unable to shift production elsewhere, up to five companies could be impacted per year, assuming each delayed well belonged to an individual company. The impact of the loss of one well would depend on the finances of the company. Also, one small entity operating a rock quarry may experience impacts related to preparation of a habitat conservation plan for owl, but we believe these costs are associated to the listing of the owl and not the critical habitat designation, since private land is not included by definition in this critical habitat designation.

Federal agencies must also consult with us if their activities may affect designated critical habitat. However, we believe this will result in minimal additional regulatory burden on Federal agencies or their applicants because Federal agencies are already consulting on both protected and restricted habitat pursuant to existing management agreements, and consultations use the standards from the owl recovery plan which addresses habitat management issues. Thus, as stated in the Executive Summary of our Economic Analysis, no additional economic impacts, with the exception of some additional administrative costs related to addressing critical habitat in future consultation efforts, are anticipated from the designation of critical habitat for the owl.

Designation of critical habitat could result in an additional economic burden on small entities due to the requirement to reinitiate consultation for ongoing Federal activities. However, since the owl was listed in 1993, we have conducted a variety of informal and formal consultations involving this species. Most of these consultations involved Federal projects or permits to

businesses that do not meet the definition of a small entity (*e.g.*, federally sponsored projects).

In summary, we have considered whether this rule would result in a significant economic effect on a substantial number of small entities. We have concluded that this final designation of critical habitat for the owl would not affect a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for the owl will not have a significant economic impact on a substantial number of small entities, and a final regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2))

Under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C 801 *et seq.*), this designation of critical habitat for the owl is not considered to be a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in our economic analysis, we believe that this rule will not have an effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises, nor will the rule have a significant economic impact on a substantial number of small entities. Refer to the final economic analysis for additional discussion of the effects of this determination.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The purpose of this requirement is to ensure that all Federal agencies "appropriately weigh and consider the effects of the Federal Government's regulations on the supply, distribution, and use of energy. The OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute "a significant adverse effect" when compared without the regulatory action under consideration. One of these criteria is relevant to this analysis—increases in the cost of energy distribution in excess of one percent. Based on our economic analysis of this designation of critical habitat for the owl, we conclude that the impact to energy distribution is not anticipated to exceed the one percent threshold. Please refer to the economic analysis where the potential impacts are reviewed. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) 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, Tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or Tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC 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 who receive Federal funding, assistance, permits or 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.

(b) We do not believe that this rule will significantly or uniquely affect small governments. This determination is based on information from the economic analysis conducted for this designation of critical habitat for the owl and the fact that critical habitat is only being designated on Federal lands. As such, a Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of designating critical habitat for the owl in a takings implications assessment. The takings implications assessment concludes that this final designation of critical habitat for the owl does not pose significant takings implications.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policy, the Service requested information from, and coordinated development of this critical habitat designation with appropriate State resource agencies in New Mexico, Arizona, Colorado, and Utah. The impact of the designation on State and local governments and their activities was fully considered in the economic analysis. As discussed above, the designation of critical habitat for the owl would have little incremental impact on State and local governments and their activities.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not

unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act, as amended. This rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs that are essential for the conservation of the owl.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

This rule does not contain new or revised information collection for which Office of Management and Budget approval is required under the 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 OMB control number.

National Environmental Policy Act

Our position is that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), *cert. denied* 116 S. Ct. 698 (1996). However, when the range of the species includes States within the Tenth Circuit, such as that of the owl, pursuant to the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we undertake a NEPA analysis for critical habitat designation. We completed an environmental assessment and finding of no significant impact on the designation of critical habitat for the owl.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. The critical habitat for owl does not contain any Tribal lands or lands that we have identified as impacting Tribal trust resources.

References Cited

A complete list of all references cited in this proposed rule is available upon request from the New Mexico Ecological Services Field Office (see **ADDRESSES** section).

Authors

The primary authors of this notice are the New Mexico Ecological Services Field Office staff (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.95(b) by revising critical habitat for the Mexican spotted owl (*Strix occidentalis lucida*) in the same alphabetical order as this species occurs in § 17.11(h).

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) *Birds.* * * *

Mexican Spotted Owl (*Strix occidentalis lucida*)

(1) Critical habitat units for the States of Arizona, Colorado, New Mexico, and Utah are depicted on the maps below. Larger maps and digital files for all four States and maps of critical habitat units in the State of New Mexico are available at the New Mexico Ecological Services Field Office, 2105 Osuna N.E., Albuquerque, New Mexico 87113, telephone (505) 346–2525. For the States of Arizona, Colorado, and Utah, maps of the critical habitat units specific to each State are available at the following Service offices—Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, Arizona 85021, telephone (602) 640–2720; Colorado State Sub-Office, 764 Horizon Drive South, Annex A, Grand Junction, Colorado 81506, telephone (970) 243–2778; and Utah Ecological Services Field Office, Lincoln Plaza, 145 East 1300 South, Suite 404, Salt Lake City, Utah 84115, telephone (801) 524–5001.

(2) Critical habitat units are designated in portions of McKinley, Rio Arriba, Sandoval, and Socorro Counties in New Mexico; Apache, Cochise, Coconino, Graham, and Pima Counties in Arizona; Carbon, Emery, Garfield, Grand, Iron, Kane, Washington, and Wayne Counties in Utah; and Custer, Douglas, El Paso, Fremont, Huerfano, Jefferson, Pueblo, and Teller Counties in Colorado.

(3)(i) The primary constituent elements essential to the conservation of the owl include those physical and biological features that support nesting, roosting, and foraging. These elements were determined from studies of owl behavior and habitat use throughout the range of the owl. Although the vegetative communities and structural attributes used by the owl vary across the range of the subspecies, they consist primarily of mixed conifer forests or canyons. The mixed-conifer, pine-oak communities and canyon habitat appear to be the most frequently used community throughout most portions of the subspecies' range (Skaggs and Raitt 1988; Ganey and Balda 1989, 1994; Gutierrez and Rinkevich 1991, Service 1995). Although the structural characteristics of owl habitat vary depending on uses of the habitat (*e.g.*, nesting, roosting, foraging) and variations in the plant communities over the range of the subspecies, some general attributes are common to the subspecies' life-history requirements throughout its range.

(ii) Protected and restricted habitat are two of the three types of owl habitat discussed in the Recovery Plan and are used as the basis for defining critical habitat. Protected areas include known owl sites (PACs), areas in mixed-conifer and pine-oak types with greater than 40 percent slopes where timber harvest has not occurred in the past 20 years and administratively reserved lands, such as Wilderness Areas or Research Natural Areas. Restricted habitat includes mixed-conifer forest, pine-oak forest, and riparian areas outside of protected areas. This final rule does not include all areas that meet the definition of protected and restricted habitat.

(iii) Canyon habitats used for nesting and roosting are typically characterized by cooler conditions found in steep, narrow canyons, often containing crevices, ledges, and/or caves. These canyons frequently contain small clumps or stringers of ponderosa pine, Douglas-fir, white fir, and/or pinyon-juniper. Deciduous riparian and upland

tree species may also be present. Adjacent uplands are usually vegetated by a variety of plant associations including pinyon-juniper woodland, desert scrub vegetation, ponderosa pine-Gamble oak, ponderosa pine, or mixed-conifer. Owl habitat may also exhibit a combination of attributes between the forested and canyon types.

(iv) The primary constituent elements for the Mexican spotted owl are:

(A) Primary constituent elements related to forest structure:

(*1*) A range of tree species, including mixed conifer, pine-oak, and riparian forest types, composed of different tree sizes reflecting different ages of trees, 30 percent to 45 percent of which are large trees with a trunk diameter of 12 inches (0.3 meters) or more when measured at 4.5 feet (1.4 meters) from the ground;

(*2*) A shade canopy created by the tree branches covering 40 percent or more of the ground; and

(*3*) Large dead trees (snags) with a trunk diameter of at least 12 inches (0.3 meters) when measured at 4.5 feet (1.4 meters) from the ground.

(B) Primary constituent elements related to maintenance of adequate prey species:

(*1*) High volumes of fallen trees and other woody debris;

(*2*) A wide range of tree and plant species, including hardwoods; and

(*3*) Adequate levels of residual plant cover to maintain fruits, seeds, and allow plant regeneration.

(C) Primary constituent elements related to canyon habitat include one or more of the following:

(*1*) Presence of water (often providing cooler and often higher humidity than the surrounding areas);

(*2*) Clumps or stringers of mixed-conifer, pine-oak, pinyon-juniper, and/or riparian vegetation;

(*3*) Canyon wall containing crevices, ledges, or caves; and

(*4*) High percent of ground litter and woody debris.

(4) Lands located within the mapped boundaries of the critical habitat designation that are not included in this designation, and are therefore excluded by definition, include: State and private lands, 157 wildland urban interface projects and the Penasco WUI project area that contain owls or habitat on Forest Service lands that are identified in the Wildland Urban Interface database located at *http://www.fs.fed.us/r3/wui/* and addressed in the April 10, 2001, final biological opinion on the Forest Service's proposed wildland urban interface fuel treatments in New Mexico and Arizona and the September 27, 2002, final biological opinion on the Rio Penasco II Non-Programmatic Vegetation Management Project and Forest Plan Amendment. The final biological opinions are available from the New Mexico Ecological Services Field Office, 2105 Osuna Road NE, Albuquerque, NM 87113.

(5) Critical habitat is defined as those areas within the mapped boundaries. Federal actions within the mapped boundaries would not trigger a section 7 consultation unless they may affect the owl or affect protected or restricted habitat, which includes canyon habitat, and one or more of the primary constituent elements.

(6) The minimum mapping unit for this designation does not exclude all developed areas, such as buildings, roads, bridges, parking lots, railroad tracks, other paved areas, the lands that support these features, and other lands unlikely to contain the primary constituent elements. Federal actions limited to these areas would not trigger a section 7 consultation, unless they affect protected or restricted habitat and one or more of the primary constituent elements in adjacent critical habitat.

(7) Overview map of general locations of critical habitat for the Mexican spotted owl follows:

BILLING CODE 4310–55–P

BILLING CODE 4310–55–C

(8) Unit CP–11: Iron, Kane and Washington Counties, Utah. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 297559, 4124515; 297559, 4124522; 297544, 4125594; 297542, 4125750; 297752, 4126144; 298143, 4126877; 297730, 4127816; 297245, 4127922; 297129, 4128530; 297328, 4129243; 297496, 4129846; 297579, 4130145; 298368, 4131761; 298202, 4132446; 298068, 4133000; 298370, 4133520; 298672, 4134040; 298744, 4134165; 298790, 4134258; 298806, 4134293; 299283, 4135270; 299573, 4135867; 299964, 4136668; 300932, 4138655; 301504, 4139828; 301910, 4141797; 302276, 4142843; 302275, 4144196; 302383, 4144529; 302483, 4144841; 302777, 4145751; 302811, 4145858; 302934, 4146076; 303102, 4146375; 303292, 4147338; 302950, 4147352; 303169, 4148987; 303615, 4148973; 303666, 4149230; 303943, 4150618; 304079, 4151296; 304941, 4152281; 305131, 4152499; 305267, 4152673; 305550, 4153035; 305550, 4153090; 305591, 4153088; 305903, 4153467; 305975, 4153579; 306070, 4153701; 306160, 4153878; 306405, 4154361; 306557, 4154663; 306827, 4155196; 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(9) Unit CP–12: Garfield and Kane Counties, Utah. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 408069, 4128328; 406756, 4130867; 406758, 4130871; 405255, 4133778; 405252, 4133779; 403907, 4136384; 403911, 4136648; 404221, 4156463; 404971, 4156463; 404943, 4155271; 404943, 4154868; 404541, 4154868; 404536, 4154056; 404934, 4154051; 404934, 4153649; 404934, 4153258; 404902, 4152448; 405727, 4152436; 405748, 4153232; 405758, 4153641; 406160, 4153638; 406552, 4153634; 406552, 4154036; 406914, 4154031; 406904, 4153208; 407708, 4153208; 407704, 4152819; 407695, 4152127; 408031, 4152084; 407937, 4152818; 407835, 4153615; 407716, 4153837; 407403, 4154425; 407323, 4154574; 406580, 4155967; 406326, 4156444; 405768, 4156452; 405771, 4156654; 405481, 4156666; 404223, 4156553; 404241, 4157680; 404240, 4157680; 404285, 4160505; 405035, 4160490; 405060, 4161299; 404297, 4161299; 404322, 4162912; 405064, 4162905;

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(10) Unit CP–13: Garfield, Kane, San Juan and Wayne Counties, Utah. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 472564, 4238946; 472114, 4239906; 472119, 4239906; 471348, 4241554; 471341, 4241558; 468748, 4247103; 468749, 4247106; 468547, 4247538; 468548, 4248952; 468538, 4249758; 467731, 4249800; 473736, 4252795; 487782, 4235585; 487786, 4234473; 487767, 4232922; 487761, 4232017; 487765, 4231274; 487767, 4230462; 487776, 4229633; 487795, 4228173; 488053, 4227230; 488514, 4227203; 489397, 4227216; 489367, 4226392; 489368, 4225681; 489435, 4225632; 490892, 4224307; 490989, 4224219; 491048, 4224166; 492184, 4222847; 493246, 4221747; 495664, 4220576; 495831, 4220223; 496237, 4218321; 496424, 4217447; 496726, 4217284; 496916, 4217180; 497265, 4217201; 497265, 4217203; 499527, 4212443; 499851, 4211761; 499923, 4210841; 499953, 4210461; 500209, 4208958; 501162, 4207822; 501272, 4206613; 499843, 4205221; 500643, 4205064; 502034, 4204961; 502267, 4204432; 502628, 4203608; 502667, 4203549; 503801, 4201849; 504524, 4201933; 505862, 4199288; 506524, 4197980; 507943, 4195176; 509105, 4192876; 509658, 4191781; 511807, 4187529; 511240, 4186679; 512193, 4185726; 512685, 4185794; 515452, 4180329; 514920, 4180148; 514325, 4180620; 513955, 4182324; 513114, 4184008; 512354, 4183983; 511861, 4183966; 511040, 4184295; 510737, 4184811; 510137, 4185835; 509234, 4185691; 509275, 4184233; 508803, 4184110; 507982, 4184008; 508166, 4183597; 508638, 4183084; 509131, 4182817; 509624, 4182550; 510055, 4182160; 510060, 4182121; 510137, 4181544; 511225, 4180641; 510568, 4180497; 509152, 4180990; 508023, 4181421; 506175, 4181975; 504204, 4181667; 504307, 4180867; 504389, 4180005; 504512, 4179697; 505005, 4178547; 505231, 4177316; 506175, 4175797; 506298, 4174709; 506586, 4173107; 507366, 4171260; 507571, 4170008; 508207, 4169412; 509152, 4169063; 509767, 4169310; 510568, 4169289; 511369, 4168550; 511759, 4168940; 511928, 4169010; 512108, 4169084; 512785, 4169002; 513175, 4168653; 513750, 4169084; 513728, 4169306; 513647, 4170110; 512990, 4170829; 511882, 4171301; 511430, 4171711; 510548, 4171424; 510137, 4172122; 510028, 4172529; 509973, 4172738; 509480, 4173682; 509346, 4174093; 509193, 4174565; 509501, 4174914; 510771, 4174202; 510856, 4174154; 511163, 4174103; 511471, 4174052; 512272, 4174072; 512785, 4173908; 513175, 4173969; 512662, 4174873; 512377, 4175158; 511818, 4175717; 511574, 4175961; 510835, 4176248; 510856, 4176987; 512190, 4177849; 513278, 4178055; 514325, 4177664; 515331, 4177808; 515988, 4176576; 515659, 4175591; 515967, 4174996; 516460, 4175098; 517117, 4175139; 517433, 4174403; 516114, 4173193; 516556, 4172131; 517103, 4170775; 518093, 4169236; 518679, 4172131; 519759, 4171841; 520142, 4171087; 523090, 4166746; 522930, 4165754; 522307, 4164948; 521611, 4164288; 522417, 4162639; 523070, 4162320; 523834, 4160038; 523846, 4160001; 524165, 4159713; 525460, 4158543; 525456, 4159725; 525454, 4160502; 527337, 4160516; 530733, 4155527; 530856, 4155346; 530851, 4155346; 531372, 4154583; 531373, 4154587; 531530, 4154356; 531527, 4154356; 531780, 4153985; 531780, 4153988; 532018, 4153639; 532016, 4153639; 532320, 4153194; 532321, 4153194; 532701, 4152635; 532830, 4152446; 532771, 4149731; 532771, 4149731; 532737, 4148174; 532737, 4148148; 532710, 4146893; 532709, 4146893; 532579, 4140895; 532579, 4140895; 532550, 4139551; 532543, 4139239; 532517, 4138126; 527293, 4138109; 527144, 4137429; 527174, 4133071; 527657, 4133140; 528134, 4132481; 527319, 4131744; 527183, 4131690; 527206, 4128444; 529284, 4128443; 529516, 4128952; 529762, 4129383; 530091, 4130142; 530666, 4130163; 531405, 4130430; 531887, 4130463; 531687, 4128954; 531240, 4128500; 531237, 4128443; 531619, 4128443; 531584, 4128177; 531510, 4127622; 531510, 4127622; 531033, 4124040; 530838, 4122583; 530767, 4122049; 530699, 4122147; 530781, 4122968; 530755, 4123259; 530223, 4123283; 530112, 4123219; 530036, 4123215; 529847, 4123103; 529621, 4122959; 529325, 4122775; 528757, 4122917; 527951, 4123796; 526741, 4124419; 526625, 4124355; 526616, 4124359; 526234, 4124173; 526226, 4124133; 526082, 4124053; 525847, 4123525; 525788, 4123393; 525865, 4123205; 526051, 4122749; 526192, 4122404; 527360, 4121834; 527369, 4121835;

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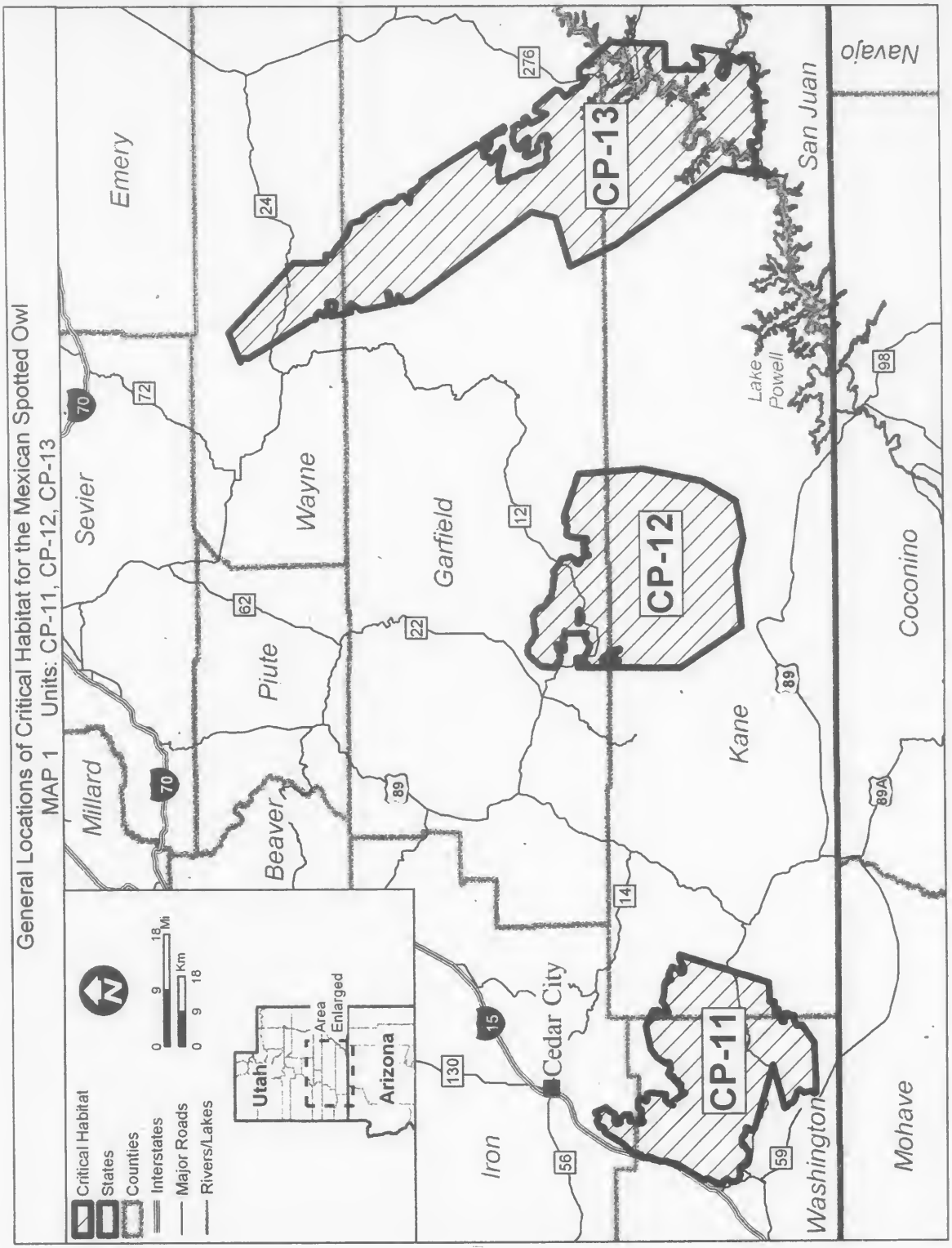
(11) Map 1 of Units CP 11, 12, and 13 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(12) Unit CP–14: Garfield, Grand, San Juan and Wayne Counties, Utah. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 545963, 4193288; 544535, 4197215; 544521, 4197384; 544457, 4197429; 542451, 4202951; 543662, 4211925; 543942, 4212093; 545159, 4212397; 547028, 4212745; 548028, 4213267; 545768, 4214657; 544113, 4215270; 544393, 4217350; 544610, 4218961; 545291, 4224025; 546362, 4224698; 546507, 4225521; 545682, 4226939; 546203, 4230818; 546221, 4230950; 547549, 4231967; 548162, 4232437; 549097, 4233152; 552926, 4236083; 553634, 4235343; 554851, 4235907; 556372, 4235386; 557067, 4234430; 559371, 4234256; 559965, 4235038; 560935, 4235342; 562326, 4234734; 563630, 4233821; 561990, 4233080; 561804, 4232996; 560476, 4232494; 559849, 4232257; 559110, 4231736; 560935, 4230780; 562065, 4229737; 562268, 4229305; 562413, 4228998; 563633, 4229297; 564716, 4229563; 566280, 4230866; 566356, 4230934; 566820, 4231352; 567150, 4231649; 567669, 4232549; 568186, 4233444; 568397, 4233470; 569982, 4233666; 570539, 4233735; 570300, 4234180; 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(13) Unit CP–15: Carbon and Emery Counties, Utah. 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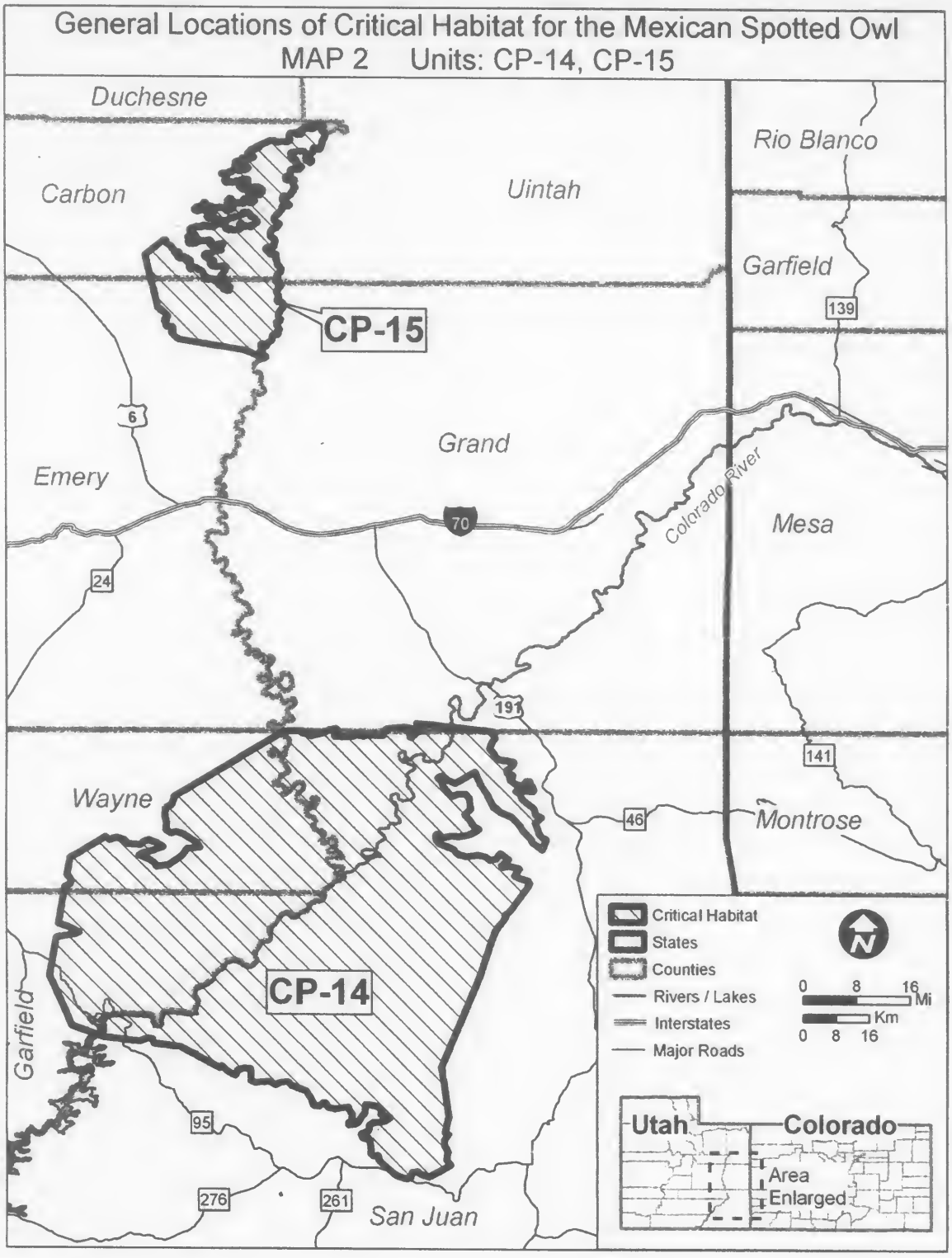
(14) Map 2 of Units CP14 and 15 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(15) Unit SRM–C–1a: El Paso, Fremont and Teller Counties, Colorado. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 479847, 4281034; 479834, 4281086; 479831, 4281675; 479911, 4281924; 479973, 4282118; 480023, 4282278; 480069, 4282493; 480126, 4282759; 480139, 4282791; 480229, 4283019; 480490, 4283115; 480703, 4283184; 480710, 4283186; 480961, 4283264; 481112, 4283311; 481190, 4283335; 481512, 4283470; 481602, 4283508; 481711, 4283554; 481713, 4283547; 481873, 4283495; 481938, 4283474; 482047, 4283439; 482077, 4283429; 482464, 4283304; 482842, 4283183; 482863, 4283176; 483264, 4283046; 483374, 4283011; 483506, 4282968; 483632, 4282928; 483660, 4282919; 483677, 4282914; 483829, 4282864; 484019, 4282803; 484149, 4282761; 484474, 4282657; 484684, 4282589; 484983, 4282493; 485125, 4282447; 485183, 4282428; 485414, 4281926; 485419, 4281914; 485440, 4281870; 485936, 4280791; 486152, 4280322; 486156, 4280313; 486191, 4280237; 486267, 4280073; 486404, 4279774; 486988, 4278505; 487163, 4278125; 487546, 4277291; 488005, 4277492; 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(16) Unit SRM–C–1b: Custer, Fremont, Huerfano and Pueblo Counties, Colorado. 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(17) Unit SRM–C–2: Douglas and Jefferson Counties, Colorado. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 470167, 4351527; 469279, 4352413; 469313, 4352506; 469347, 4352614; 469332, 4352698; 469357, 4352779; 469397, 4352858; 469445, 4352944; 469468, 4353023; 469470, 4353115; 469436, 4353220; 469427, 4353326; 469447, 4353445; 469505, 4353540; 469569, 4353602; 469641, 4353666; 469678, 4353702; 469732, 4353719; 469791, 4353733; 469912, 4353777; 470014, 4353819; 470091, 4353864; 470177, 4353901; 470260, 4353925; 470372, 4353953; 470405, 4354012; 470398, 4354105; 470411, 4354170; 470516, 4354233; 470563, 4354274; 470664, 4354349; 470753, 4354367; 470804, 4354390; 470877, 4354459; 470972, 4354458; 471070, 4354478; 471154, 4354491; 471271, 4354530; 471349, 4354549; 471446, 4354536;

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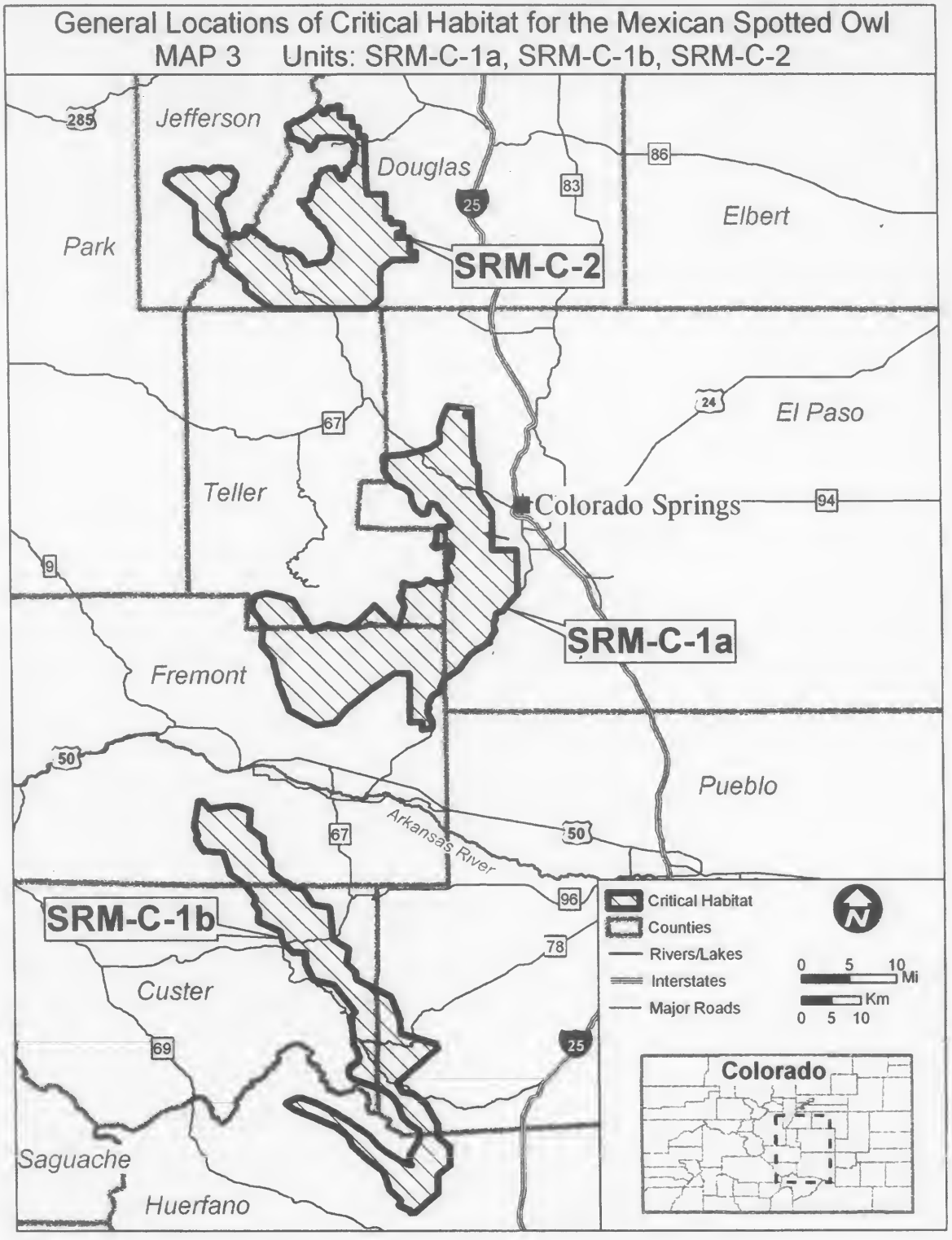
(18) Map 3 of Units SRM–C–1a, SRM–C–1b, SRM–C–2 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(19) Unit CP–10: Coconino and Mohave Counties, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 331333, 4016457; 331307, 4016427; 331269, 4016369; 331208, 4016311; 331207, 4016310; 331192, 4016288; 331108, 4016166; 331070, 4016091; 331047, 4016022; 331034, 4015893; 330994, 4015753; 330975, 4015715; 330958, 4015651; 330931, 4015581; 330832, 4015231; 330810, 4015182; 330794, 4015145; 330207, 4014534; 330094, 4014456; 330063, 4014417; 330019, 4014384; 329939, 4014306; 329860, 4014257; 329746, 4014215; 329710, 4014174; 329688, 4014160; 329643, 4014138; 329578, 4014088; 329575, 4014084; 329227, 4013852; 328597, 4013963; 328024, 4014187; 327948, 4014233; 327936, 4014236; 327888, 4014248; 327814, 4014274; 327791, 4014290; 327735, 4014313; 327709, 4014315; 327698, 4014314; 327489, 4014395; 327057, 4014295; 327007, 4014214; 326972, 4014193; 326913, 4014130; 326803, 4013977; 326769, 4013908; 326741, 4013852; 326712, 4013744; 326707, 4013728; 326705, 4013725; 326701, 4013714; 326670, 4013630; 326665, 4013617; 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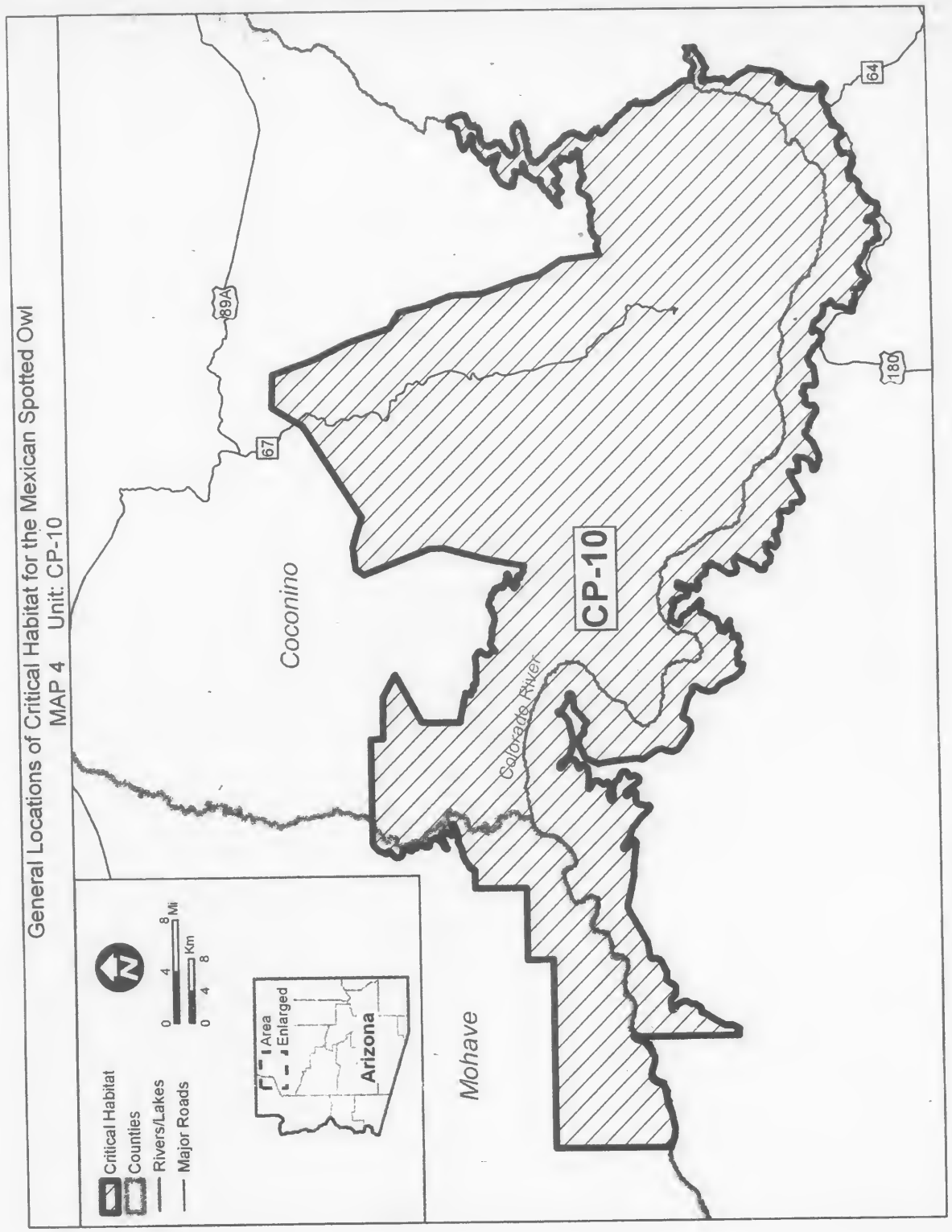
332049, 4003595; 332037, 4003577; 332034, 4003568; 332023, 4003547; 332019, 4003543; 332007, 4003511; 331991, 4003485; 331990, 4003472; 331986, 4003461; 331986, 4003450; 331978, 4003440; 331974, 4003427; 331965, 4003414; 331961, 4003399; 331957, 4003396; 331947, 4003370; 331932, 4003347; 331923, 4003326; 331895, 4003243; 331894, 4003234; 331867, 4003183; 331864, 4003176; 331861, 4003165; 331854, 4003156; 331848, 4003139; 331829, 4003100; 331772, 4003102; 331772, 4003108; 331557, 4003111; 331169, 4003128; 331390, 4016473; 331332, 4016402; 331333, 4016457.

(20) Map 4 of Unit CP–10 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(21) Unit UGM–11: Coconino County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 440555, 3867784; 439948, 3867665; 438672, 3869239; 439565, 3870499; 439363, 3871373; 438544, 3872187; 438845, 3873221; 438344, 3874683; 438880, 3875854; 440269, 3877126; 439974, 3880192; 441812, 3880545; 442601, 3881867; 445205, 3882160; 446732, 3881296; 447812, 3881355; 448153, 3881373; 448119, 3881199; 447806, 3879608; 448137, 3879253; 448319, 3879058; 449269, 3878038; 448792, 3876581; 445643, 3876000; 447030, 3874198; 447181, 3873122; 447546, 3871929; 448318, 3871958; 448613, 3871970; 449444, 3872002; 450105, 3873152; 450632, 3873663; 451428, 3873129; 452183, 3872644; 452679, 3873137; 453657, 3873717; 454673, 3873092; 455488, 3872812; 456202, 3871048; 455994, 3870043; 455926, 3869715; 455734, 3868790; 454498, 3866847; 455463, 3865769; 455567, 3865258; 455629, 3864953; 455667, 3864767; 455691, 3864650; 455773, 3864243; 455497, 3861579; 457715, 3857347; 456015, 3856761; 457446, 3854641; 455706, 3852431; 456783, 3851594; 457361, 3848953; 457369, 3848918; 457532, 3848172; 459307, 3847641; 460172, 3848881; 460246, 3852620; 458835, 3853156; 459224, 3855351; 459118, 3860201; 459101, 3860997; 459080, 3861940; 462441, 3863166; 463821, 3861764; 464265, 3859942; 465430, 3858880; 465743, 3856487; 467996, 3853856; 468252, 3850765; 470755, 3846001; 469328, 3840104; 471640, 3837528; 469164, 3835000; 465075, 3840417; 464280, 3842075; 463367, 3843310; 459927, 3843081; 456285, 3841449; 453138, 3841254; 451590, 3843054; 453634, 3844493; 451745, 3846332; 453348, 3848114; 453348, 3848114; 453397, 3848169; 453419, 3849283; 453357, 3849290; 453173, 3849312; 449364, 3849769; 446253, 3850141; 447649, 3851045; 447556, 3851293; 446780, 3853347; 445308, 3853962; 445775, 3855869; 444922, 3857947; 442554, 3859506; 443373, 3864746; 446739, 3867731; 447607, 3869263; 445365, 3871434; 444732, 3869246; 442601, 3868145; 441302, 3867932; 440596, 3867793; 440555, 3867784.

(22) Unit UGM–12: Coconino County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 442807, 3888790; 442408, 3889809; 443087, 3891467; 444209, 3891655; 447067, 3890772; 448310, 3890192; 447938, 3891163; 448491, 3891922; 448816, 3892075; 450485, 3892859; 450732, 3892975; 451941, 3893265; 452120, 3893308; 452474, 3893393; 453906, 3892926; 455892, 3891860; 458836, 3893683; 459541, 3893668; 459694, 3893665; 459692, 3893612; 459654, 3892389; 458455, 3891708; 457493, 3891839; 456424, 3890425; 456437, 3889423; 454748, 3886658; 452808, 3885654; 451296, 3889099; 450342, 3888531; 449076, 3885046; 446462, 3886495; 445027, 3887676; 444909, 3888198; 444171, 3888915; 443013, 3888267; 442923, 3888496; 442843, 3888698; 442834, 3888722; 442807, 3888790.

(23) Unit UGM–13: Coconino and Yavapai Counties, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 384110, 3892005; 384399, 3892116; 384809, 3892001; 385557, 3891792; 387416, 3893765; 387671, 3895341; 386848, 3896697; 387923, 3898302; 388012, 3899046; 388747, 3898489; 391128, 3899159; 391187, 3899175; 392053, 3899144; 392707, 3898213; 392753, 3898148; 392980, 3897823; 393127, 3897614; 393286, 3897388; 393342, 3897817; 393666, 3900292; 396947, 3900031; 398360, 3899918; 399630, 3899817; 400675, 3899734; 400788, 3899725; 400968, 3899365; 401170, 3898961; 401871, 3897556; 402275, 3896747; 402360, 3896577; 402372, 3896553; 403184, 3894927; 405595, 3894938; 405637, 3898089; 408421, 3898095; 408323, 3890950; 407197, 3890970; 407197, 3891619; 405593, 3891658; 405598, 3893275; 404723, 3893287; 403955, 3893298; 403765, 3892539; 402652, 3888095; 402568, 3887760; 402196, 3886276; 408649, 3885648; 406277, 3888492; 406054, 3889323; 407822, 3888904; 408742, 3889210; 409298, 3889524; 410752, 3888988; 410913, 3888928; 410957, 3888767; 411066, 3888372; 411329, 3887410; 411757, 3887292; 412321, 3887136; 412567, 3887068; 413131, 3886913; 413385, 3886988; 416560, 3887930; 416735, 3889584; 416774, 3889954; 416880, 3890953; 418965, 3891590; 420615, 3891231; 422076, 3891160; 423521, 3890731; 423205, 3890064; 423206, 3890059; 423238, 3888958; 422954, 3888451; 422923, 3888397; 422516, 3887671; 421301, 3887518; 420023, 3887357; 419698, 3887206; 418965, 3886865; 418029, 3886430; 416677, 3885801; 417223, 3885218; 417452, 3884974; 417299, 3884324; 418026, 3883945; 418696, 3883595; 419377, 3883240; 419669, 3882439; 419833, 3881991; 419846, 3881956; 419668, 3881397; 419460, 3880745; 419666, 3880618; 421155, 3879699; 421900, 3880383; 421950, 3880429; 422886, 3880499; 424013, 3880583; 424484, 3880396; 424558, 3880367; 426531, 3879587; 428775, 3878290; 429895, 3880009; 430930, 3880776; 431744, 3881378; 432079, 3881627; 431691, 3883646; 431398, 3885172; 431091, 3886773; 430940, 3887559; 430771, 3888439; 430466, 3890026; 431294, 3894896; 431582, 3894798; 432802, 3894382; 433588, 3894114; 436030, 3893282; 436079, 3893265; 436058, 3891679; 436037, 3890074; 436037, 3890042; 435828, 3890053; 435825, 3889208; 435821, 3888441; 435814, 3886859; 435807, 3885230; 435802, 3884097; 437068, 3882819; 437069, 3882808; 437387, 3879131; 436810, 3875461; 435792, 3873850; 434777, 3873121; 434509, 3872923; 434197, 3872748; 434010, 3872663; 433749, 3872488; 433569, 3872299; 433409, 3872132; 433345, 3872008; 433342, 3871970; 433063, 3871882; 432870, 3871889; 432725, 3871859; 432594, 3871810; 432487, 3871853; 432458, 3871865; 432337, 3871940; 432316, 3871952; 432238, 3871826; 432211, 3871613; 432289, 3871520; 432454, 3871504; 432535, 3871477; 432493, 3871328; 432568, 3871185; 432556, 3871063; 432437, 3871061; 432305, 3871101; 432314, 3871004; 432369, 3870876; 432365, 3870739; 432320, 3870646; 432192, 3870476; 432117, 3870386; 432072, 3870007; 432014, 3869766; 431865, 3869628; 431774, 3869420; 431681, 3869294; 431623, 3869162; 431582, 3869061; 431604, 3868713; 431523, 3868591; 431532, 3868436; 431625, 3868359; 431629, 3868206; 431660, 3867977; 431688, 3867794; 431684, 3867636; 431670, 3867542; 431763, 3867366; 431848, 3867251; 431955, 3867237; 432000, 3867153; 432016, 3867003; 432203, 3866856; 432387, 3866706; 432458, 3866632; 432611, 3866671; 432699, 3866630; 432646, 3866396; 432642, 3866290; 432729, 3866291; 432826, 3866306; 432906, 3866223; 432935, 3866053; 433013, 3865991; 433020, 3865907; 433080, 3865812; 433166, 3865768; 433219, 3865704; 433307, 3865594; 433336, 3865472; 433327, 3865368; 433398, 3865293; 433427, 3865161; 433500, 3865048; 433595, 3864877; 433680, 3864769; 433761, 3864697; 433844, 3864607; 433899, 3864541; 434014, 3864636; 434107, 3864724; 434194, 3864749; 434280, 3864733; 434335, 3864616; 434326, 3864488; 434345, 3864354; 434382, 3864239; 434430, 3864226; 434548, 3864344; 434653, 3864396; 434725, 3864421; 434822, 3864443; 434831, 3863113; 433199, 3863115; 433163, 3863115; 431612, 3863116; 431634, 3864721; 431008, 3864734; 430982, 3864915; 430920, 3865058; 430963, 3865319;

430403, 3865533; 430298, 3865463; 430191, 3865434; 430129, 3865379; 430091, 3865310; 429941, 3865314; 429927, 3865230; 429868, 3865165; 429971, 3865055; 429976, 3865041; 430021, 3864927; 430032, 3864754; 428892, 3864747; 428883, 3864391; 428825, 3864391; 427278, 3864387; 427311, 3867603; 425718, 3867581; 425676, 3866040; 424009, 3866059; 422408, 3866076; 416051, 3866147; 416099, 3869358; 411238, 3869408; 411263, 3870863; 411263, 3870872; 410612, 3870871; 408607, 3870865; 408524, 3870865; 407845, 3870865; 406655, 3870865; 406655, 3870848; 406657, 3870664; 406584, 3870665; 397178, 3870757; 397222, 3873617; 397235, 3874212; 397246, 3874743; 397155, 3874744; 393100, 3874783; 393075, 3874809; 390725, 3877271; 391788, 3879487; 388671, 3877810; 388584, 3879496; 389654, 3880410; 390102, 3883073; 391850, 3884907; 392270, 3886872; 384616, 3883841; 384622, 3888947; 381586, 3890248; 382512, 3891386; 384110, 3892005.

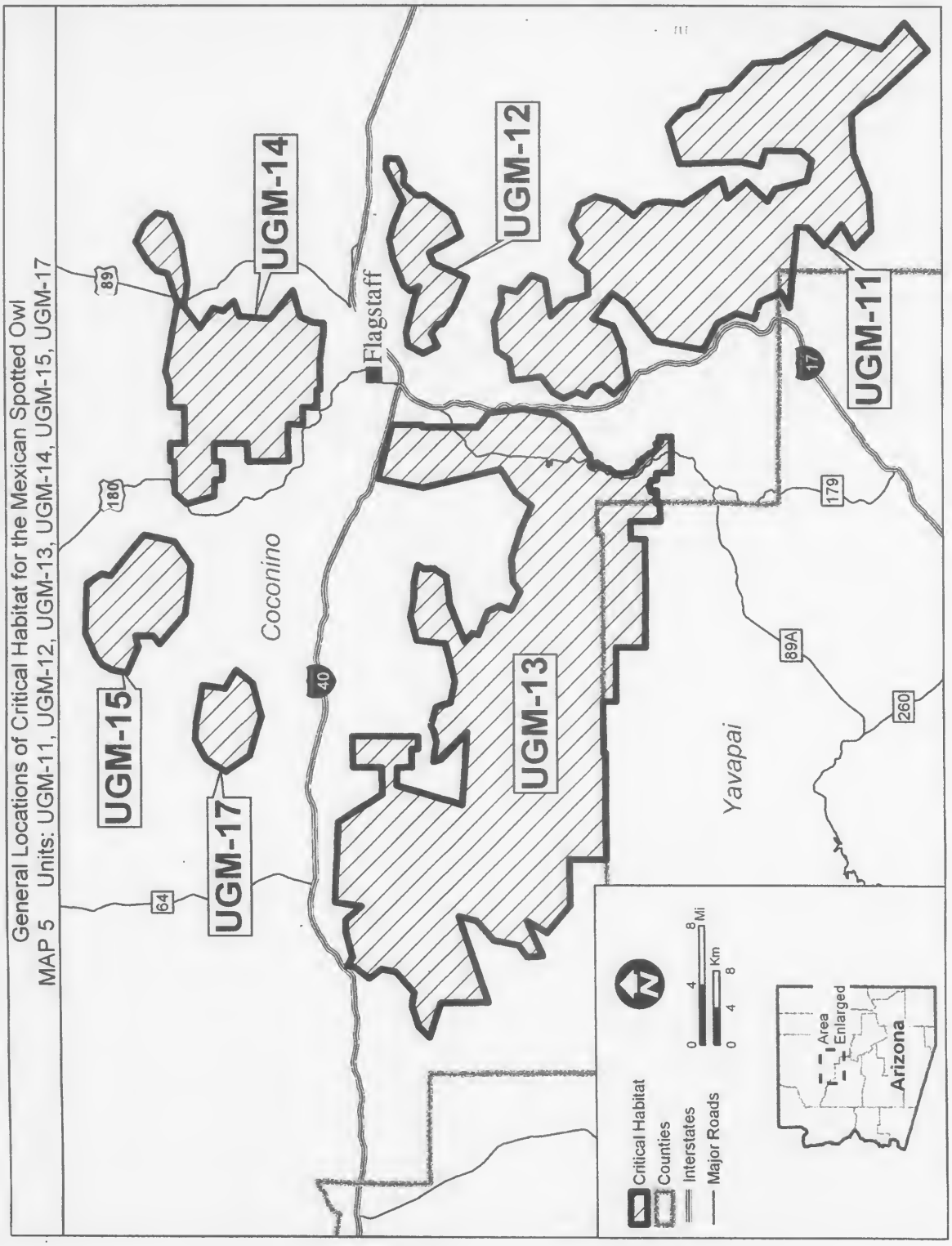
(24) Unit UGM–14: Coconino County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 431250, 3912678; 429840, 3912707; 429178, 3915731; 430134, 3917006; 432950, 3917000; 432974, 3917453; 434588, 3917462; 434568, 3915841; 437741, 3915840; 437781, 3917436; 439705, 3917411; 440982, 3917887; 447001, 3916500; 449636, 3917591; 449866, 3918741; 450732, 3919719; 452459, 3920956; 453963, 3920064; 454986, 3918674; 454716, 3917250; 452393, 3916014; 448816, 3915397; 447005, 3915718; 446667, 3915778; 446588, 3915705; 445339, 3914556; 445000, 3914244; 444948, 3914196; 444798, 3914059; 444995, 3913893; 446514, 3912609; 446277, 3911517; 447111, 3910340; 445777, 3909733; 445550, 3906450; 448011, 3903940; 445696, 3903140; 445166, 3901714; 445128, 3900680; 444392, 3900616; 441808, 3901050; 439249, 3901090; 439254, 3901395; 437653, 3901426; 437713, 3902989; 436154, 3902989; 436174, 3904591; 434542, 3904640; 434081, 3904620; 432938, 3904572; 432938, 3904588; 432930, 3909036; 434536, 3909056; 434535, 3912645; 434336, 3912647; 433697, 3912653; 432949, 3912661; 432927, 3911756; 432866, 3911758; 431655, 3911796; 431454, 3911803; 431315, 3911807; 431308, 3912398; 431304, 3912677; 431250, 3912678.

(25) Unit UGM–15: Coconino County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 416524, 3921257; 414194, 3922523; 414504, 3924217; 414986, 3925238; 415762, 3925942; 417761, 3926972; 421638, 3926807; 422167, 3926784; 423010, 3925116; 422852, 3924194; 423020, 3924020; 423237, 3923792; 423682, 3923328; 426450, 3920440; 425814, 3917158; 425811, 3917144; 425676, 3917029; 423721, 3915371; 423266, 3915442; 419372, 3916043; 416746, 3918908; 417464, 3919598; 417483, 3921525; 417330, 3921481; 417134, 3921424; 416811, 3921331; 416534, 3921252; 416524, 3921257.

(26) Unit UGM–17: Coconino County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 412399, 3914408; 412529, 3914376; 413029, 3914252; 412753, 3911806; 413822, 3910980; 413872, 3910942; 414343, 3910578; 413144, 3908846; 410237, 3907936; 408962, 3908485; 406801, 3909246; 405360, 3911860; 406510, 3913985; 408253, 3915089; 409017, 3915082; 409269, 3915025; 409707, 3915070; 412399, 3914408.

(27) Map 5 of Units UGM–11, UGM–12, UGM–13, UGM–14, UGM–15, UGM–17 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(28) Unit BR–W–2: Yavapai County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 356305, 3825646; 358322, 3824515; 359465, 3823875; 360241, 3821642; 360592, 3820631; 360643, 3820483; 360968, 3820394; 361318, 3820299; 362162, 3820068; 362225, 3820051; 363842, 3820025; 365430, 3819989; 365499, 3819988; 367074, 3819945; 367134, 3819944; 367839, 3819947; 368673, 3819951; 368744, 3819951; 368433, 3821565; 368429, 3821583; 368890, 3821620; 369064, 3821634; 369073, 3821618; 370511, 3819021; 373296, 3819405; 374409, 3818567; 374502, 3818497; 374529, 3818429; 374596, 3818262; 377074, 3817620; 376336, 3815122; 376795, 3813912; 377052, 3813650; 377189, 3813511; 377191, 3813508; 377316, 3813382; 377331, 3813366; 377385, 3813311; 377403, 3813293; 377536, 3813158; 377979, 3812706; 378118, 3812564; 378273, 3812407; 378402, 3812276; 378404, 3812268; 378631, 3811092; 380232, 3809808; 379730, 3808508; 379183, 3805713; 378195, 3804688; 376878, 3804699; 375008, 3806073; 373433, 3805479; 373218, 3804330; 373320, 3803986; 373380, 3803786; 373745, 3802556; 373385, 3801892; 371428, 3803582; 370528, 3802157; 370344, 3801865; 370236, 3801818; 369517, 3801509; 368869, 3804220; 367026, 3803442; 366540, 3806173; 365168, 3806735; 363783, 3807763; 365716, 3808660; 366873, 3809197; 367026, 3809268; 367205, 3809351; 367040, 3809405; 367026, 3809409; 366838, 3809471; 366450, 3809598; 366235, 3809668; 364201, 3810333; 363758, 3811781; 362803, 3813353; 363305, 3814596; 363310, 3814609; 363459, 3814679; 365000, 3815410; 365041, 3814084; 367950, 3813665; 368294, 3814647; 368341, 3815354; 368368, 3815760; 368371, 3815813; 368399, 3816220; 368435, 3816767; 368050, 3817116; 367686, 3817447; 367224, 3817866; 367003, 3818066; 366852, 3817906; 366304, 3817324; 366184, 3817196; 365936, 3816933; 364689, 3816393; 363199, 3817339; 362247, 3815740; 360227, 3816891; 358549, 3816429; 356998, 3817190; 356751, 3818720; 357035, 3819250; 356371, 3821124; 354342, 3822434; 352831, 3824154; 355375, 3827416; 356684, 3827522; 356229, 3825688; 356305, 3825646.

(29) Unit BR–W–3: Yavapai County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 375424, 3783805; 374448, 3784614; 374280, 3786601; 373036, 3787905; 373528, 3788764; 369920, 3789249; 369861, 3790669; 371010, 3792347; 372497, 3792183; 373309, 3791519; 375579, 3793336; 377223, 3791582; 377376, 3791419; 377654, 3791122; 379408, 3788525; 377603, 3786980; 382659, 3785262; 382618, 3783715; 379329, 3781514; 378121, 3780247; 376499, 3780878; 376336, 3781280; 376246, 3781503; 376144, 3781754; 376023, 3782053; 376045, 3782090; 376142, 3782255; 376208, 3782367; 376495, 3782855; 376776, 3783333; 376776, 3783333; 376826, 3783419; 376814, 3783419; 376631, 3783423; 376023, 3783436; 375865, 3783439; 375845, 3783455; 375508, 3783735; 375424, 3783805.

(30) Unit BR–W–4: Gila, Maricopa and Yavapai Counties, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 449290, 3762292; 449291, 3762318; 449812, 3762326; 449773, 3773513; 448962, 3773519; 448963, 3778413; 450582, 3778403; 450592, 3778989; 455800, 3778971; 457013, 3778966; 457006, 3778357; 460254, 3778355; 460218, 3770276; 463866, 3770290; 463787, 3762219; 464637, 3760732; 464606, 3754312; 467744, 3754282; 467712, 3741403; 469349, 3741392; 469332, 3733601; 472554, 3733579; 472532, 3732786; 473358, 3732781; 473359, 3728811; 474975, 3728815; 474946, 3725285; 476925, 3725262; 476932, 3722008; 474955, 3722003; 474926, 3722390; 474178, 3722393; 460475, 3722445; 460518, 3732017; 459275, 3732036; 459679, 3747972; 453163, 3760795; 449268, 3760833; 449290, 3762292.

(31) Unit BR–W–5: Gila County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 488801, 3759572; 489472, 3759492; 494663, 3758878; 499780, 3758926; 506408, 3758963; 506419, 3755736; 511217, 3755727; 511242, 3750889; 512841, 3750889; 512802, 3734891; 499895, 3734881; 495104, 3734880; 494629, 3748526; 492967, 3747884; 492659, 3749197; 489577, 3752840; 486043, 3752088; 484830, 3754365; 485304, 3758289; 487174, 3759764; 488801, 3759572.

(32) Unit UGM–10: Coconino, Gila and Navajo Counties, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 449888, 3814008; 449915, 3817735; 449933, 3826486; 451266, 3826501; 451293, 3826837; 455290, 3827413; 457100, 3826480; 459734, 3825551; 461176, 3825746; 462612, 3826565; 462938, 3828378; 463780, 3828985; 464532, 3829529; 465975, 3830570; 469647, 3831071; 469753, 3831258; 471916, 3831264; 471919, 3832808; 473364, 3832794; 474420, 3831883; 475239, 3831829; 475759, 3832219; 476170, 3832527; 479151, 3834759; 479879, 3835305; 489681, 3842646; 492215, 3842629; 492014, 3842425; 491477, 3841418; 491355, 3841135; 491218, 3840928; 490799, 3840482; 490412, 3839995; 490267, 3839732; 490232, 3839564; 490115, 3839311; 489889, 3838869; 489795, 3838646; 489706, 3838342; 489614, 3837821; 489688, 3837345; 489720, 3837032; 489850, 3836789; 490010, 3836559; 490094, 3836296; 490087, 3836113; 490030, 3835750; 489953, 3835400; 489955, 3835103; 489952, 3834813; 490005, 3834525; 490005, 3834525; 490008, 3834342; 489986, 3834184; 489920, 3833666; 489878, 3833357; 489873, 3833082; 489861, 3832922; 489852, 3832805; 489832, 3832546; 489772, 3832407; 489713, 3832334; 489673, 3831975; 490016, 3832008; 490264, 3832031; 490749, 3832133; 491388, 3832241; 491624, 3832301; 491725, 3832327; 492170, 3832556; 492674, 3832821; 493358, 3833261; 498035, 3834259; 499241, 3834516; 499880, 3834652; 499899, 3836158; 499947, 3836114; 506387, 3830214; 505236, 3828152; 503391, 3828078; 501427, 3827077; 501241, 3825759; 501126, 3824943; 501121, 3824901; 501445, 3824220; 501484, 3824139; 502532, 3821940; 501759, 3819065; 502520, 3818020; 502560, 3817878; 502693, 3817756; 502777, 3817567; 503244, 3817344; 503444, 3817088; 503563, 3817022; 503694, 3816842; 503737, 3816782; 503531, 3816565; 503490, 3816380; 503517, 3816031; 503597, 3815893; 503670, 3815203; 503717, 3814757; 503809, 3814456; 503834, 3813778; 503913, 3813456; 503594, 3812858; 503529, 3811815; 499859, 3809245; 499088, 3809014; 499402, 3806472; 499038, 3805209; 498291, 3804040; 499898, 3802686; 499889, 3803739; 500328, 3803728; 500307, 3802152; 501900, 3802136; 501905, 3800531; 503524, 3800529; 503534, 3798949; 506759, 3798941; 506751, 3797333; 510951, 3797331; 510956, 3795716; 513003, 3795737; 513288, 3796451; 514733, 3798172; 517935, 3798717; 518229, 3798767; 518349, 3798788; 518751, 3798856; 518848, 3798873; 519561, 3798847; 519999, 3798831; 520526, 3798812; 520594, 3798809; 521294, 3798948; 522809, 3799247; 522874, 3799260; 522852, 3803769; 522797, 3803769; 516554, 3803782; 516392, 3803782; 515736, 3803784; 515754, 3802171; 514125, 3802174; 514135, 3800558; 512536, 3800551; 512534, 3798943; 507702, 3798965; 507705, 3800537; 506749, 3800546; 506742, 3802156; 505123, 3802156; 505113, 3806979; 507698, 3806991; 507697, 3807653;

507696, 3807834; 507695, 3808593; 509311, 3808598; 509317, 3813708; 507984, 3813692; 507941, 3816822; 509697, 3816831; 509690, 3817622; 506662, 3819469; 506419, 3820690; 507248, 3821446; 507740, 3822469; 507884, 3822725; 507766, 3823218; 508085, 3824104; 508671, 3824606; 508768, 3824928; 508726, 3825624; 508795, 3825807; 509499, 3826509; 509549, 3826620; 509611, 3827028; 510098, 3828236; 510247, 3829042; 511155, 3830340; 512708, 3830875; 512698, 3823244; 511751, 3823233; 511967, 3822602; 511873, 3821347; 511808, 3817637; 511730, 3817316; 511766, 3817069; 511742, 3816803; 511887, 3816437; 512060, 3816352; 512111, 3816139; 512915, 3817019; 513233, 3817637; 513457, 3818554; 513646, 3820934; 515997, 3822206; 515956, 3826471; 517599, 3826464; 517603, 3827975; 518555, 3828635; 518872, 3829310; 519107, 3830197; 519308, 3830629; 519381, 3830995; 519477, 3831145; 519365, 3831318; 522579, 3831316; 522555, 3829682; 520967, 3829665; 520963, 3826453; 519369, 3826469; 519345, 3823251; 517540, 3823247; 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532656, 3792120; 532626, 3792123; 532323, 3792151; 532202, 3792166; 532007, 3792377; 531893, 3792879; 531718, 3792923; 531670, 3792882; 531644, 3792892; 531620, 3792881; 530999, 3793134; 530997, 3793137; 530986, 3793139; 530785, 3793221; 530290, 3793229; 529969, 3793456; 529974, 3793372; 529887, 3793424; 529884, 3793308; 529672, 3793139; 529554, 3792938; 529564, 3792796; 529465, 3792643; 529297, 3792586; 529249, 3792514; 528894, 3792416; 528502, 3792569; 528433, 3792566; 528408, 3792578; 527748, 3792560; 527755, 3792523; 527759, 3792495; 527605, 3792348; 527571, 3792341; 527211, 3792069; 527140, 3792060; 527104, 3792059; 527071, 3792053; 527047, 3792043; 527032, 3792042; 526363, 3792477; 526307, 3792471; 526307, 3792479; 525950, 3792430; 525547, 3792383; 525526, 3792371; 525483, 3792365; 525461, 3792351; 525349, 3792299; 525334, 3792292; 524939, 3792071; 524122, 3792589; 524084, 3792561; 524056, 3792578; 523978, 3792521; 523948, 3792499; 523745, 3792344; 522867, 3791677; 522828, 3791533; 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489528, 3816788; 488310, 3814613; 486884, 3813756; 485660, 3811326; 482801, 3810475; 481521, 3810836; 480095, 3811847; 478150, 3811835; 478148, 3810253; 478896, 3810051; 478906, 3810048; 478906, 3810058; 478903, 3810132; 478965, 3810200; 479019, 3809979; 479102, 3809804; 479219, 3809687; 479324, 3809560; 479326, 3809443; 479338, 3809399; 479391, 3809403; 479417, 3809405; 479419, 3809406; 479494, 3809429; 479577, 3809361; 479646, 3808544; 479702, 3808443; 479821, 3808502; 479887, 3808516; 479972, 3808527; 480021, 3808590; 480108, 3808572; 480177, 3808484; 480353, 3808340; 480443, 3808176; 480517, 3808049; 480525, 3807840; 480515, 3807806; 480448, 3807579; 480328, 3807327; 478767, 3806838; 477908, 3805908; 476577, 3806513; 476836, 3809024; 475778, 3809506; 475310, 3808223; 475232, 3808008; 475170, 3807838; 475134, 3807741; 474722, 3806613; 474617, 3806325; 474580, 3806305; 473402, 3805688; 472487, 3804633; 471272, 3804467; 467389, 3805095; 464984, 3804479; 463956, 3805158; 463086, 3805732; 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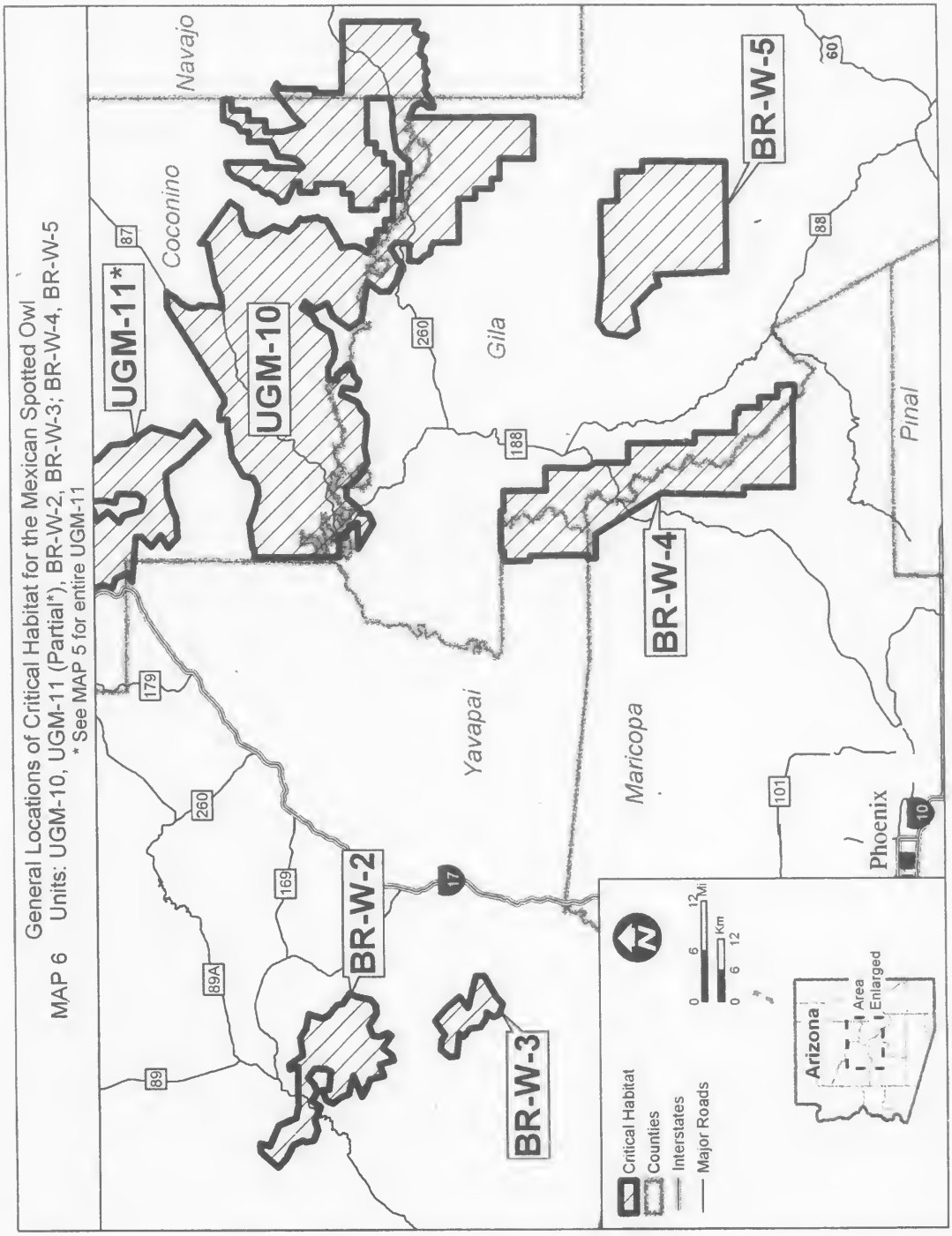
451348, 3810223; 451212, 3810223; 449862, 3810219; 449888, 3814008.

(33) Map 6 of Units UGM–10, UGM–11, BR–W–2, BR–W–3, BR–W–4, BR–W–5 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(34) Unit BR–W–6: Gila County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 502563, 3688203; 502472, 3688558; 503028, 3688560; 505222, 3688567; 505464, 3688568; 507739, 3688575; 507738, 3690190; 510945, 3690190; 510945, 3693314; 511469, 3693312; 514602, 3693294; 516623, 3693291; 516797, 3693291; 520407, 3693286; 520885, 3693285; 520886, 3692876; 520889, 3691663; 520890, 3691295; 520892, 3690482; 521237, 3690484; 521801, 3690487; 524673, 3690505; 524765, 3690226; 525012, 3689882; 525243, 3689154; 525260, 3688504; 524821, 3687594; 524845, 3687232; 524342, 3686349; 524206, 3685899; 524020, 3685666; 523530, 3684299; 523464, 3684031; 523222, 3683456; 523169, 3683183; 522563, 3681980; 522253, 3681860; 521862, 3681049; 521428, 3680900; 521271, 3680575; 520855, 3680388; 520712, 3679727; 520423, 3679231; 520409, 3679207; 516839, 3679214; 513042, 3679221; 512904, 3679221; 512904, 3679221; 512901, 3679081; 511666, 3679079; 509705, 3679076; 509692, 3683753; 506122, 3683760; 506116, 3685369; 503292, 3685378; 502563, 3688203.

(35) Unit BR–W–7: Graham County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 564004, 3637710; 563939, 3637710; 563933, 3638274; 563860, 3645199; 563858, 3645381; 563855, 3645636; 563804, 3645635; 563731, 3645634; 562808, 3645614; 562806, 3645614; 562806, 3645614; 562806, 3645725; 562805, 3645947; 562802, 3646509; 562777, 3652160; 562777, 3652175; 563020, 3652089; 564323, 3651519; 564326, 3651519; 565935, 3651203; 567541, 3650716; 568165, 3650527; 568713, 3650361; 568759, 3650360; 568773, 3650355; 569187, 3650339; 569222, 3645713; 568679, 3645711; 568725, 3637758; 564004, 3637710.

(36) Unit BR–W–8: Graham County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 583233, 3620330; 583212, 3621944; 583151, 3626680; 583401, 3626675; 583354, 3628249; 583392, 3628258; 583378, 3629880; 583376, 3630156; 584952, 3630155; 588503, 3630151; 589303, 3630150; 591377, 3630148; 593484, 3630146; 594612, 3630153; 594613, 3629877; 594615, 3628191; 602575, 3628234; 602608, 3626647; 607400, 3626702; 607399, 3625279; 608979, 3625289; 609014, 3625289; 609014, 3625214; 609024, 3621885; 610611, 3621917; 610622, 3618693; 615448, 3618719; 615463, 3617116; 615360, 3617097; 615535, 3605983; 609123, 3605951; 609079, 3609245; 605856, 3609212; 605805, 3612411; 599370, 3612343; 599358, 3613913; 596152, 3613923; 596121, 3615530; 593616, 3615630; 592914, 3615618; 592879, 3617187; 592863, 3617187; 592075, 3617171; 591680, 3617163; 588074, 3617092; 588074, 3617150; 588052, 3618764; 586433, 3618745; 583254, 3618708; 583233, 3620330.

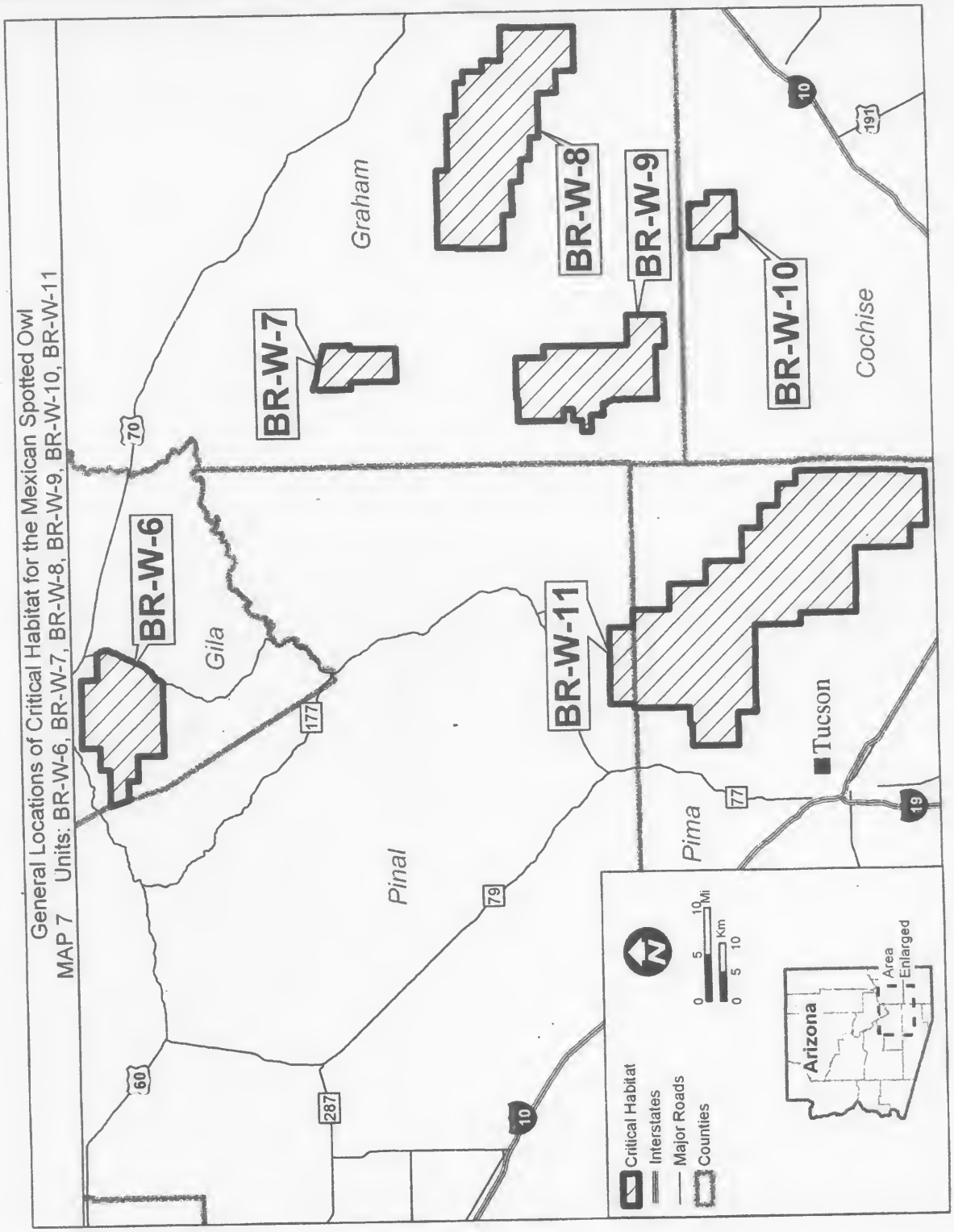
(37) Unit BR–W–9: Graham County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 556421, 3604014; 556408, 3605608; 558028, 3605625; 558046, 3607166; 559646, 3607168; 559603, 3608785; 558001, 3608771; 557953, 3616701; 561191, 3616719; 561191, 3616879; 567170, 3616937; 567197, 3616938; 567199, 3616157; 567209, 3612096; 568817, 3612098; 568963, 3597642; 573391, 3597666; 573386, 3596111; 573397, 3591152; 571779, 3591098; 568689, 3591045; 568678, 3592648; 565423, 3592613; 565038, 3592609; 563401, 3592592; 561805, 3592575; 561080, 3592568; 561080, 3592716; 561072, 3596030; 561059, 3597565; 560980, 3597567; 560991, 3597707; 561073, 3598166; 560999, 3599049; 560918, 3599217; 560931, 3599353; 561015, 3599852; 561031, 3600150; 560773, 3600585; 560730, 3600800; 560726, 3600932; 560693, 3601086; 560530, 3601333; 560342, 3601396; 560285, 3601521; 560406, 3601652; 560455, 3601779; 560455, 3601947; 558793, 3601884; 558807, 3604026; 558009, 3604007; 556422, 3603969; 556421, 3604014.

(38) Unit BR–W–10: Cochise County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 583134, 3586498; 583134, 3586515; 585314, 3586524; 586969, 3586532; 587918, 3586536; 588543, 3586539; 589526, 3586543; 589581, 3586544; 589610, 3583360; 591156, 3583371; 591197, 3583371; 591202, 3582973; 591207, 3582553; 591238, 3580094; 591258, 3578562; 591203, 3578561; 590787, 3578557; 588013, 3578524; 585977, 3578501; 584826, 3578487; 584806, 3580043; 584784, 3581691; 583144, 3581693; 583134, 3586498.

(39) Unit BR–W–11: Pima and Pinal Counties, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 514911, 3577908; 514911, 3579513; 513299, 3579494; 513301, 3579425; 510084, 3579429; 510070, 3587414; 513203, 3587409; 513213, 3587806; 515756, 3587828; 515737, 3595910; 515769, 3597398; 515771, 3597455; 515781, 3597458; 516364, 3597456; 516348, 3601612; 523670, 3601584; 523700, 3601584; 523847, 3601583; 524718, 3601580; 524888, 3601579; 525226, 3601578; 527106, 3601570; 527602, 3601568; 527599, 3599823; 527598, 3599046; 527596, 3597485; 529153, 3597489; 530166, 3597492; 530166, 3597448; 530150, 3595953; 530150, 3595894; 530144, 3593493; 530143, 3592692; 530139, 3591088; 533840, 3591100; 533896, 3591100; 533896, 3591090; 533914, 3584720; 537057, 3584724; 537129, 3584724; 537129, 3584720; 537164, 3578312; 541921, 3578321; 541989, 3578322; 541995, 3575111; 541995, 3575108; 543529, 3575115; 544714, 3575120; 545213, 3575122; 545219, 3571911; 545604, 3571911; 545611, 3571911; 546758, 3571911; 548441, 3571912; 548448, 3570312; 548455, 3568714; 550368, 3568713; 550462, 3552466; 550386, 3552469; 550393, 3549425; 550123, 3549406; 550131, 3546085; 547604, 3546045; 547604, 3546045; 546823, 3546033; 544053, 3545989; 544053, 3545989; 543676, 3545983; 543593, 3545982; 542799, 3545971; 542107, 3545961; 542105, 3546739; 542099, 3548862; 539055, 3548865; 538961, 3552054; 538960, 3552062; 538960, 3552079; 538930, 3558568; 532696, 3558536; 531089, 3558591; 529459, 3558562; 529446, 3566577; 529443, 3568326; 527829, 3568335; 527814, 3570720; 527779, 3576331; 523008, 3576308; 523011, 3576333; 518112, 3576344; 516500, 3576333; 516451, 3576332; 514910, 3576301; 514911, 3577908.

(40) Map 7 of Units BR–W–6, BR–W–&, BR–W–8, BR–W–9, BR–W–10, BR–W–11 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(41) Unit BR–W–12: Pima and Santa Cruz Counties, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 507223, 3503540; 507222, 3503923; 507210, 3510178; 507207, 3511768; 512012, 3511765; 512029, 3513951; 519839, 3513903; 519837, 3512331; 521448, 3512331; 521449, 3510746; 521449, 3510719; 521401, 3510722; 521421, 3505894; 523047, 3505896; 523072, 3501065; 522922, 3501073; 522908, 3500031; 522901, 3499595; 522855, 3496282; 515042, 3496240; 514862, 3496239; 514865, 3497440; 514866, 3497889; 513642, 3497872; 513603, 3500692; 511274, 3500691; 508826, 3500533; 507228, 3500531; 507223, 3503540.

(42) Unit BR–W–13: Santa Cruz County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 477926, 3480116; 477928, 3480684; 477929, 3480849; 478021, 3480850; 478107, 3480851; 494123, 3481043; 494135, 3477657; 494138, 3476848; 494150, 3473565; 494152, 3472791; 494157, 3471435; 499874, 3471475; 499889, 3466508; 499817, 3466508; 499817, 3466480; 498245, 3466472; 497297, 3466470; 495684, 3466467; 494117, 3466463; 492789, 3466461; 490859, 3467185; 490607, 3467281; 489534, 3467696; 487987, 3468296; 487718, 3468379; 487625, 3468408; 487119, 3468605; 486539, 3468831; 485841, 3469087; 485158, 3469336; 483741, 3469870; 480405, 3471135; 478429, 3471883; 477890, 3472085; 477926, 3480116.

(43) Unit BR–W–14: Santa Cruz County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 519717, 3479120; 519716, 3479312; 519711, 3479968; 519709, 3480151; 519672, 3485029; 519664, 3485029; 519513, 3485029; 519483, 3486642; 522819, 3486657; 522893, 3486657; 522885, 3487427; 524131, 3488287; 524147, 3488298; 525321, 3488300; 531914, 3488306; 531925, 3485072; 531918, 3481902; 530998, 3481895; 530999, 3481193; 530999, 3480920; 531000, 3480388; 531000, 3480347; 531004, 3476755; 531005, 3476102; 531005, 3475514; 531006, 3474993; 531006, 3474694; 527806, 3474669; 527813, 3470555; 527814, 3470236; 527814, 3469850; 528731, 3469858; 528828, 3469859; 529037, 3469861; 529271, 3469863; 530617, 3469875; 530755, 3469876; 531025, 3469879; 531051, 3466622; 531051, 3466611; 525892, 3466603; 525599, 3466603; 525500, 3466603; 523661, 3466616; 523601, 3466616; 523537, 3466616; 522993, 3466622; 521376, 3466615; 521373, 3466615; 519814, 3466612; 519763, 3473144; 519717, 3479120.

(44) Unit BR–W–15: Cochise County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 551116, 3487040; 551113, 3487713; 551093, 3491442; 551093, 3491449; 551211, 3491450; 551212, 3491450; 552165, 3491456; 552165, 3491421; 552169, 3491401; 552175, 3491388; 552219, 3491333; 552254, 3491282; 552267, 3491252; 552276, 3491209; 552256, 3491131; 552248, 3491093; 552251, 3491070; 552248, 3491052; 552221, 3490915; 552210, 3490879; 552164, 3490748; 552167, 3490711; 552190, 3490678; 552211, 3490637; 552218, 3490607; 552221, 3490580; 552229, 3490555; 552255, 3490510; 552275, 3490482; 552369, 3490379; 552474, 3490285; 552486, 3490258; 552489, 3490245; 552514, 3490210; 552537, 3490188; 552625, 3490145; 552649, 3490127; 552669, 3490103; 552673, 3490087; 552690, 3490048; 552698, 3490041; 552754, 3489991; 552780, 3489953; 552817, 3489837; 552821, 3489831; 552836, 3489809; 552844, 3489802; 552890, 3489799; 552892, 3489797; 552983, 3489792; 553004, 3489786; 553020, 3489775; 553039, 3489759; 553052, 3489745; 553070, 3489731; 553151, 3489699; 553207, 3489686; 553225, 3489678; 553233, 3489669; 553238, 3489658; 553229, 3489564; 553240, 3489399; 553247, 3489368; 553255, 3489350; 553265, 3489314; 553269, 3489293; 553268, 3489274; 553255, 3489255; 553241, 3489246; 553213, 3489231; 553211, 3489208; 553223, 3489179; 553236, 3489164; 553247, 3489157; 553381, 3489035; 553420, 3488995; 553448, 3488949; 553449, 3488938; 553448, 3488905; 553452, 3488891; 553465, 3488872; 553497, 3488850; 553560, 3488818; 553580, 3488799; 553593, 3488781; 553645, 3488695; 553662, 3488672; 553690, 3488624; 553701, 3488608; 553710, 3488597; 553779, 3488540; 553781, 3488513; 553778, 3488505; 553751, 3488473; 553740, 3488449; 553724, 3488407; 553719, 3488385; 553714, 3488332; 553723, 3488300; 553730, 3488284; 553736, 3488278; 553808, 3488251; 553840, 3488235; 553853, 3488225; 554071, 3488064; 554091, 3488046; 554099, 3488027; 554102, 3488010; 554097, 3487945; 554094, 3487931; 554103, 3487892; 554114, 3487862; 554170, 3487781; 554208, 3487734; 554225, 3487705; 554274, 3487664; 554322, 3487644; 554329, 3487643; 554361, 3487638; 554475, 3487587; 554484, 3487585; 554516, 3487586; 554524, 3487583; 554532, 3487581; 554562, 3487581; 554575, 3487570; 554580, 3487563; 554603, 3487488; 554617, 3487463; 554629, 3487450; 554647, 3487437; 554755, 3487375; 554822, 3487332; 554859, 3487303; 554885, 3487271; 554917, 3487245; 554949, 3487229; 554975, 3487224; 555000, 3487224; 555023, 3487219; 555059, 3487219; 555075, 3487225; 555116, 3487259; 555120, 3487257; 555149, 3487231; 555154, 3487219; 555159, 3487213; 555166, 3487189; 555168, 3487147; 555177, 3487122; 555186, 3487107; 555217, 3487065; 555350, 3486896; 555398, 3486844; 555440, 3486803; 555478, 3486774; 555507, 3486749; 555545, 3486730; 555593, 3486694; 555595, 3486686; 555594, 3486678; 555588, 3486673; 555578, 3486667; 555532, 3486654; 555497, 3486638; 555480, 3486625; 555468, 3486611; 555466, 3486608; 555456, 3486592; 555445, 3486578; 555394, 3486526; 555345, 3486481; 555322, 3486453; 555313, 3486436; 555258, 3486375; 555227, 3486363; 555189, 3486355; 555166, 3486343; 555155, 3486334; 555135, 3486294; 555128, 3486263; 555126, 3486228; 555128, 3486198; 555145, 3486079; 555143, 3486020; 555158, 3485947; 555151, 3485912; 555133, 3485888; 555108, 3485866; 555041, 3485828; 555021, 3485801; 555030, 3485637; 555023, 3485606; 555028, 3485571; 555042, 3485536; 555064, 3485499; 555084, 3485469; 555134, 3485415; 555151, 3485378; 555141, 3485354; 555117, 3485333; 555072, 3485304; 555054, 3485289; 555040, 3485266; 555025, 3485231; 555020, 3485195; 555019, 3485195; 555007, 3485145; 555007, 3485134; 555013, 3485116; 555059, 3485052; 555063, 3485047; 555123, 3484978; 555177, 3484931; 555200, 3484907; 555255, 3484860; 555290, 3484827; 555324, 3484792; 555386, 3484722; 555420, 3484663; 555439, 3484641; 555463, 3484571; 555492, 3484548; 555531, 3484550; 555541, 3484543; 555641, 3484550; 555670, 3484539; 555688, 3484525; 555701, 3484511; 555734, 3484466; 555747, 3484442; 555779, 3484393; 555788, 3484373; 555815, 3484341; 555825, 3484336; 555864, 3484336; 555864, 3484336; 555873, 3484332; 555915, 3484331; 555970, 3484339; 556013, 3484347; 556038, 3484349; 556059, 3484351; 556066, 3484351; 556069, 3484351; 556084, 3484331; 556109, 3484261; 556158, 3484157; 556172, 3484145; 556236, 3484103; 556343, 3484010; 556372, 3483935; 556393, 3483896; 556412, 3483872; 556456, 3483836; 556484, 3483820; 556612, 3483758; 556653, 3483745; 556673, 3483742; 556689, 3483744; 556701, 3483740;

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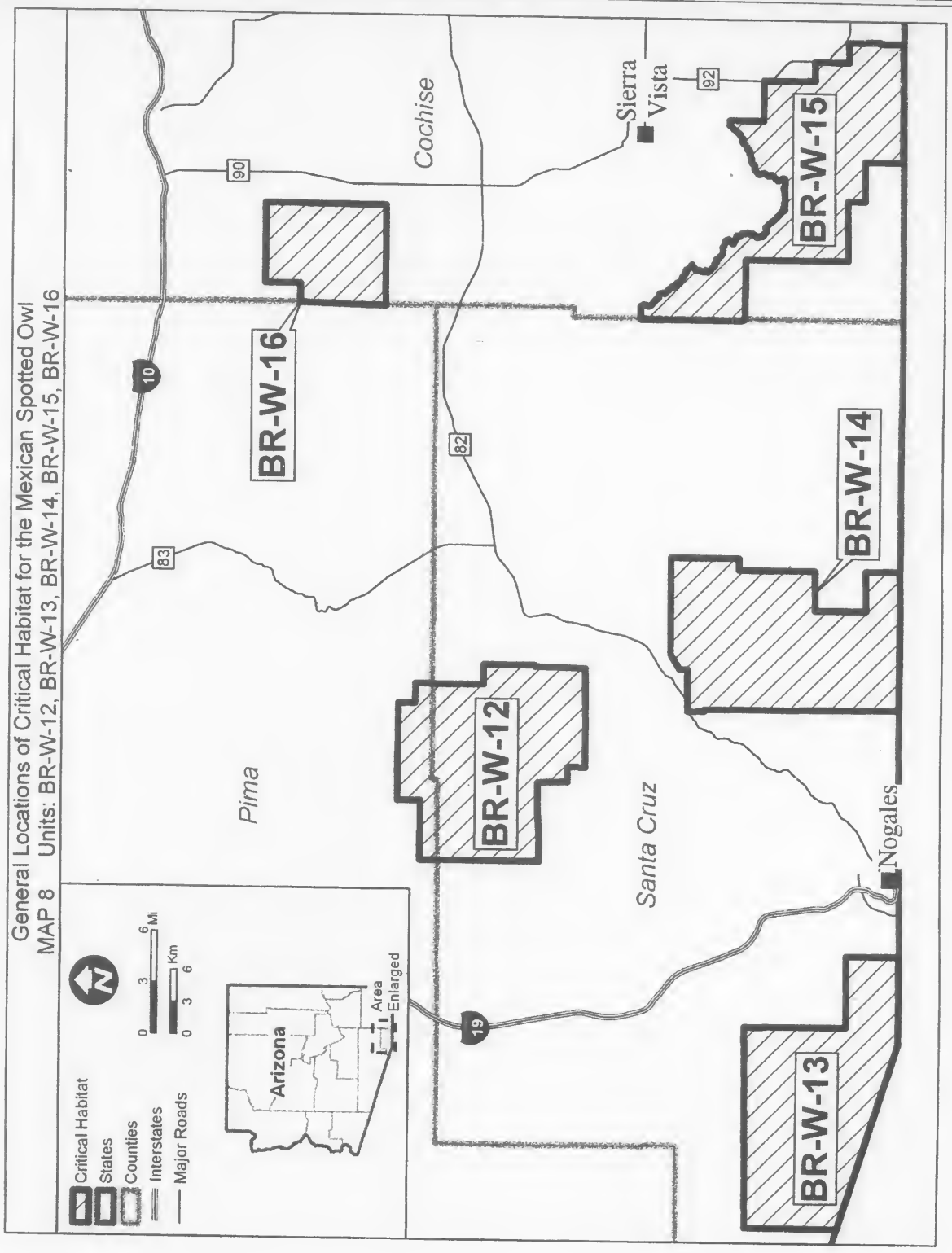
(45) Unit BR–W–16: Cochise County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 553658, 3515522; 551784, 3515503; 551921, 3523611; 553478, 3523613; 553456, 3526858; 559874, 3526897; 559870, 3524270; 559869, 3523903; 559867, 3522085; 559864, 3520470; 559859, 3517200; 559856, 3515585; 559784, 3515584; 553800, 3515524; 553658, 3515522.

(46) Map 8 of Units BR–W–12, BR–W–13, BR–W–14, BR–W–15, BR–W–16 follows:

BILLING CODE 4310–55–P

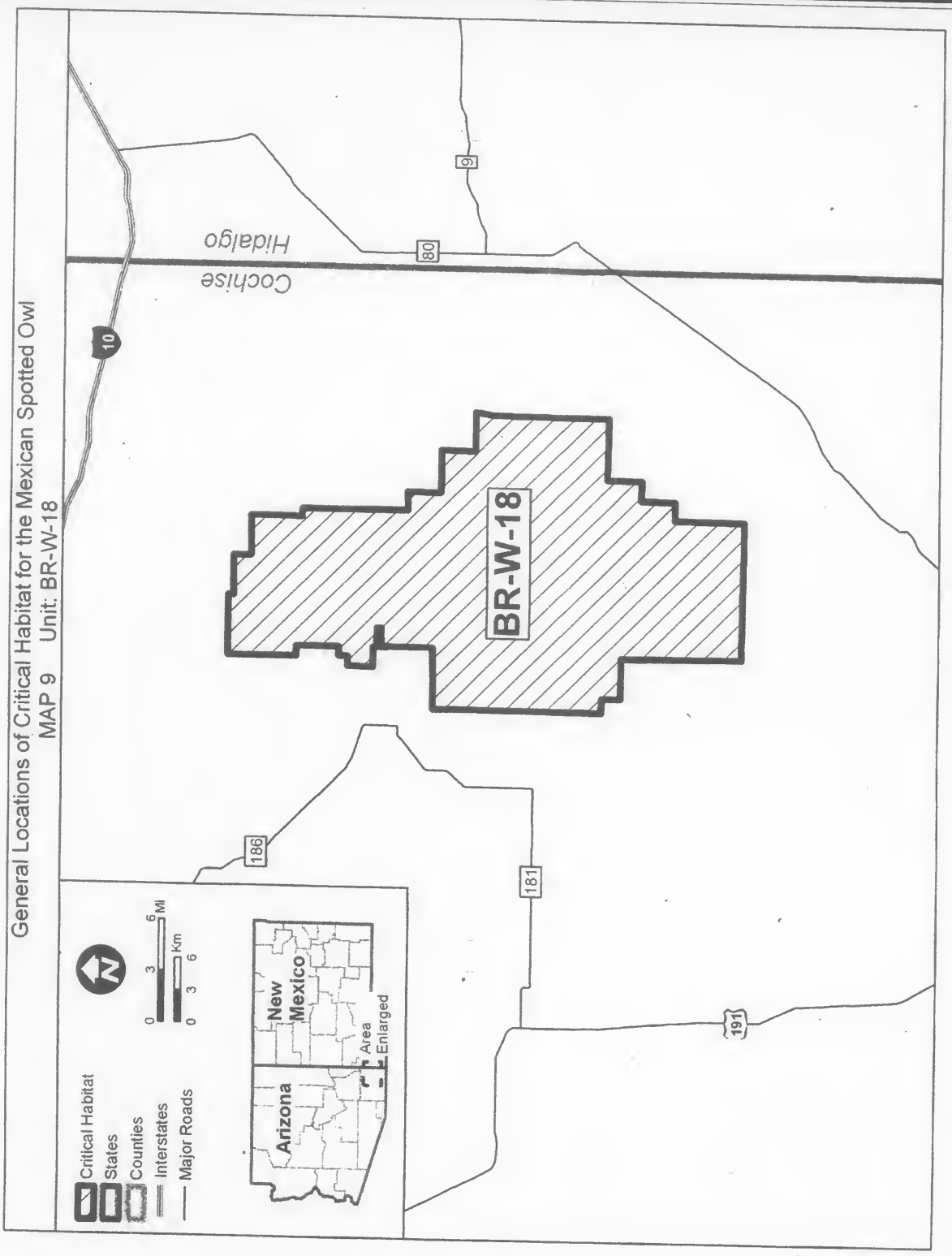


BILLING CODE 4310-55-C

(47) Unit BR–W–18: Cochise County, Arizona. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 648960, 3523725; 648920, 3528602; 648848, 3537378; 649820, 3537399; 649971, 3537403; 653796, 3537488; 653755, 3539927; 653755, 3539937; 653727, 3541596; 653719, 3541915; 653659, 3541914; 653655, 3542345; 655240, 3542389; 655236, 3542771; 655216, 3542770; 653645, 3542766; 653636, 3543146; 653301, 3543141; 652064, 3543129; 652031, 3545541; 652842, 3545544; 652842, 3545564; 652837, 3546374; 653634, 3546380; 653571, 3550389; 653524, 3550389; 652722, 3550387; 652722, 3550398; 652622, 3556842; 652622, 3556843; 652819, 3556845; 654051, 3556860; 657459, 3556903; 657463, 3556443; 657463, 3556437; 659924, 3556476; 659924, 3556476; 660697, 3556488; 660711, 3554883; 660712, 3554856; 663888, 3554897; 663956, 3554898; 663979, 3552522; 663991, 3551318; 664002, 3550121; 664003, 3550090; 664650, 3550093; 664690, 3547241; 664692, 3547099; 664765, 3541782; 664765, 3541780; 664782, 3541130; 664807, 3540120; 666311, 3540170; 666326, 3537008; 668076, 3537020; 668866, 3537026; 669285, 3537029; 669765, 3537032; 669760, 3535442; 669756, 3533833; 672909, 3533865; 672683, 3532242; 672782, 3521317; 667838, 3521314; 667846, 3518032; 666229, 3518050; 666257, 3514835; 664733, 3514823; 664787, 3508237; 657969, 3508224; 656736, 3508222; 653640, 3508215; 653519, 3514247; 653510, 3514674; 653410, 3519646; 650148, 3519639; 650133, 3521386; 648979, 3521386; 648960, 3523725.

(48) Map 9 of Unit BR–W–18 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55—C

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(50) Unit UGM–3: Socorro County, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 274867, 3713915; 271430, 3713904; 271387, 3714898; 270526, 3714924; 270565, 3716604; 269828, 3716592; 269887, 3719864; 269096, 3719824; 269096, 3720452; 266725, 3720573; 266989, 3725255; 267130, 3728073; 266360, 3728113; 266360, 3729735; 265900, 3729760; 265900, 3729780; 265900, 3729790; 265951, 3731660; 265964, 3732887; 266029, 3737385; 266042, 3741093; 263806, 3741119; 263888, 3743335; 259891, 3743458; 260537, 3744919; 261144, 3746276; 261971, 3748951; 261273, 3749662; 260084, 3750850; 260097, 3751199; 260077, 3752253; 263300, 3752212; 263280, 3752840; 266867, 3752800; 266928, 3755313; 268122, 3755128; 268164, 3756428; 270414, 3756469; 270414, 3757158; 273576, 3757117; 273576, 3756798; 273576, 3756396; 273576, 3756387; 274097, 3756387; 274246, 3756387; 274366, 3756387; 274386, 3754786; 275906, 3754766; 275905, 3754527; 275907, 3754523; 275773, 3751561; 277517, 3751535; 277487, 3748604; 277310, 3745113; 277260, 3743833; 277240, 3743318; 277184, 3741884; 277150, 3741016; 277067, 3738889; 277065, 3738832; 275805, 3738815; 275825, 3735592; 276931, 3735567; 276931, 3735557; 277629, 3735528; 277548, 3731802; 280082, 3731741; 280102, 3728660; 281683, 3728660; 281663, 3729323; 283263, 3729300; 283263, 3728883; 284804, 3728924; 284804, 3726796; 283730, 3726796; 283649, 3724019; 282027, 3724100; 281898, 3719680; 279946, 3719693; 279944, 3719335; 279942, 3719082; 279934, 3717755; 279882, 3716436; 277501, 3716436; 277118, 3716442; 277107, 3716204; 277065, 3715764; 277000, 3714886; 275440, 3714858; 275426, 3714041; 275424, 3713916; 274867, 3713915.

(51) Unit UGM–5a: Catron and Grant Counties, New Mexico. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 705365, 3704433; 705353, 3704449; 705076, 3704760; 705699, 3705313; 705491, 3705728; 704973, 3705936; 704973, 3706039; 705249, 3706247; 705699, 3706420; 706217, 3706454; 706355, 3706765; 706597, 3707284; 706839, 3707526; 707565, 3707595; 708049, 3707837; 708361, 3708045; 708741, 3708217; 708499, 3708598; 708222, 3708909; 707704, 3709358; 707635, 3710223; 707704, 3710706; 707254, 3711260; 707496, 3711882; 707635, 3712400; 707704, 3712884; 708119, 3713403; 708983, 3713403; 709571, 3713507; 710366, 3714129; 710919, 3714924; 711610, 3715477; 712267, 3716134; 713062, 3716860; 713615, 3717482; 714272, 3717793; 714687, 3718208; 714791, 3718692; 714480, 3718900; 714099, 3719003; 713996, 3719384; 714410, 3719799; 714894, 3720041; 715551, 3720559; 715966, 3720732; 716277, 3720767; 717072, 3721527; 717625, 3721942; 717902, 3722357; 718248, 3722426; 718628, 3722391; 719043, 3722426; 719388, 3722668; 720045, 3722910; 720184, 3723463; 720426, 3724120; 720737, 3724777; 721186, 3725157; 721774, 3725295; 722292, 3725676; 722604, 3726229; 722465, 3726678; 722465, 3727128; 722120, 3727404; 721566, 3727370; 721186, 3727300; 720806, 3727231; 720529, 3727370; 720529, 3727853; 720529, 3728407; 720114, 3728718; 719527, 3728960; 719250, 3729305; 718732, 3729651; 718282, 3729859; 718317, 3730170; 718697, 3730308; 718801, 3730550; 718663, 3730965; 718766, 3731449; 718593, 3731933; 718179, 3732313; 718593, 3732313; 719077, 3732071; 719665, 3731967; 719838, 3732486; 719389, 3732797; 719354, 3733212; 719630, 3733627; 719872, 3734111; 720356, 3734456; 720771, 3734733; 721324, 3735044; 721808, 3735182; 722431, 3735286; 722915, 3735182; 723191, 3734871; 723641, 3734802; 724159, 3734698; 724712, 3734595; 724851, 3735113; 724816, 3735666; 724574, 3736220; 724228, 3736358; 723986, 3736738; 723502, 3736876; 723088, 3737153; 722742, 3737706; 722500, 3738121; 722258, 3738536; 722604, 3738709; 722846, 3738639; 723226, 3738467; 723641, 3738570; 724021, 3738397; 724297, 3738121; 724781, 3738190; 725335, 3738017; 725404, 3738467; 725715, 3739020; 725888, 3739469; 726026, 3739988; 726372, 3740230; 726061, 3740506; 725819, 3740403; 725784, 3740679; 726026, 3740956; 726061, 3741129; 725680, 3741336; 725577, 3741716; 725542, 3741889; 725507, 3742339; 725473, 3742892; 725300, 3743514; 725162, 3744102; 725107, 3744566; 725654, 3744946; 726026, 3745070; 726406, 3744620; 727167, 3744033; 727651, 3743929; 728238, 3743860; 728861, 3743756; 729137, 3744171; 729448, 3744620; 729863, 3744931; 730278, 3745173; 729829, 3745450; 729379, 3745830; 729379, 3746210; 729518, 3746556; 729760, 3746487; 729794, 3746764; 730071, 3746625; 730140, 3746764; 730140, 3747075; 730416, 3746833; 730693, 3747109; 730969, 3747282; 731177, 3747835; 731142, 3748181; 730866, 3748112; 730347, 3748008; 730278, 3748354; 730313, 3748527; 730727, 3749011; 731073, 3749080; 731308, 3749374; 731350, 3749426; 731523, 3749668; 731350, 3749840; 731142, 3749633; 730900, 3749460; 730762, 3749495; 730866, 3749771; 730693, 3749737; 730209, 3749322; 729760, 3749287; 729794, 3749529; 729829, 3749771; 729898, 3749910; 729725, 3750152; 729863, 3750290; 730071, 3750394; 730451, 3750497; 730900, 3750359; 731453, 3750463; 732421, 3750463; 732940, 3750428; 733562, 3750463; 734184, 3750359; 735014, 3750290; 735533, 3750221; 736017, 3750013; 736362, 3749840; 736777, 3749702; 737054, 3749702; 737330, 3749875; 737780, 3749737; 737538, 3749426; 737365, 3749045; 737711, 3748942; 737953, 3748527; 738195, 3748700; 738506, 3749080; 738955, 3749114; 739266, 3749391; 739508, 3749218; 739750, 3749356; 740234, 3749356; 740096, 3749011; 739750, 3748803; 739197, 3748872; 738713, 3748630; 738229, 3748181; 738402, 3747628; 738229, 3747282; 738437, 3747006; 738955, 3747075; 739405, 3747317; 739647, 3747524; 739750, 3747835;

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(52) Unit UGM–5b: Catron, Grant and Sierra Counties, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 228042, 3704232; 228447, 3703956; 228993, 3703821; 229722, 3703848; 229844, 3703564; 230189, 3703544; 230384, 3703325; 230711, 3703583; 230928, 3703155; 230965, 3702599; 231542, 3702392; 231589, 3702009; 231959, 3701814; 232014, 3701569; 231854, 3701197; 232582, 3701224; 233451, 3701278; 233814, 3701568; 234539, 3701527; 234934, 3701781; 235365, 3701444; 235799, 3701177; 235670, 3700734; 235987, 3700231; 235996, 3699781; 235793, 3699273; 235869, 3698784; 236377, 3698581; 237286, 3698737; 237896, 3699117; 238282, 3699199; 238410, 3699018; 238779, 3698824; 239031, 3698982; 239309, 3699001; 239694, 3699082; 239922, 3698827; 239900, 3698447; 240093, 3698147; 239742, 3697483; 239133, 3697118; 237842, 3697360; 238398, 3695980; 237011, 3695362; 238539, 3693821; 238783, 3693575; 238778, 3693570; 238742, 3693534; 238605, 3693398; 238821, 3692936; 239328, 3692733; 239416, 3692451; 239430, 3692104; 239599, 3692025; 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(53) Unit UGM–6: Catron County, New Mexico. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 723768, 3768650; 723723, 3768559; 723377, 3768386; 722927, 3768559; 722443, 3769216; 722132, 3769803; 722063, 3769976; 721752, 3770149; 721303, 3770045; 720853, 3769976; 720508, 3770011; 720335, 3770218; 720127, 3770460; 719816, 3770357; 719505, 3770011; 719159, 3769803; 719021, 3770080; 718952, 3770391; 718779, 3770465; 719244, 3770853; 719663, 3771025; 720190, 3771186; 720276, 3771487; 720308, 3771896; 720287, 3772337; 720384, 3772702; 720222, 3772896; 720201, 3773175; 720437, 3773197; 720652, 3773283; 720998, 3773512; 721319, 3773724; 721674, 3774003; 721923, 3774352; 722029, 3774194; 722720, 3774194; 722651, 3773745; 723031, 3773675; 723481, 3773675; 723965, 3773745; 724310, 3773883; 724829, 3774228; 725209, 3774194; 725762, 3774470; 726142, 3774643; 726765, 3774298; 727076, 3774401; 727560, 3774954; 727975, 3775542; 728390, 3775715; 729012, 3776026; 729219, 3776579; 729565, 3776752; 730049, 3776718; 730498, 3777132; 730804, 3777251; 731333, 3777268; 731674, 3777098; 732261, 3777167; 732469, 3777098; 732498, 3776867; 732538, 3776545; 733108, 3776527; 733585, 3776513; 733679, 3776510; 733770, 3776147; 733783, 3776095; 734508, 3776095; 734992, 3775819; 735857, 3775542; 736410, 3775162; 737205, 3774713; 737343, 3774263; 737896, 3773710; 738346, 3772915; 738830, 3772569; 739659, 3772535; 740213, 3772638; 741422, 3772707; 742252, 3772742; 743220, 3773088; 743739, 3772949; 744637, 3772949; 745536, 3772984; 745986, 3773226; 746228, 3773606; 746400, 3773641; 746781, 3773710; 747023, 3773987; 747368, 3774574; 747887, 3774920; 748267, 3774955; 748613, 3774851; 748889, 3775335; 749097, 3775370; 749477, 3775854; 751067, 3776061; 751733, 3776138; 752416, 3776154; 752504, 3776156; 752543, 3774570; 752581, 3773005; 752583, 3772936; 754114, 3773005; 754213, 3773009; 754233, 3771420; 754587, 3771424; 755738, 3771438; 755827, 3771439; 755875, 3770043; 755988, 3766807; 756015, 3766052; 756030, 3765617; 755257, 3765597; 754386, 3765932; 753626, 3766346; 752589, 3766485; 752208, 3766554; 751793, 3766588; 750653, 3766554; 749892, 3766450; 749546, 3766415; 748648, 3766312; 748371, 3766277; 748129, 3766312; 747852, 3766346; 747680, 3766346; 747334, 3766415; 747196, 3766485; 746159, 3766554; 745329, 3766519; 745018, 3766588; 744810, 3766692; 744292, 3766623; 743877, 3766415; 743255, 3765862; 743013, 3765724; 742494, 3765378; 742416, 3765261; 741803, 3765246; 741803, 3765517; 741699, 3765793; 741492, 3766035; 741215, 3766070; 740869, 3766035; 740074, 3766104; 739694, 3766070; 739314, 3765931; 738795, 3765724; 738346, 3765828; 737793, 3765828; 736963, 3765586; 736652, 3765378; 736272, 3765309; 736133, 3765586; 735788, 3765931; 735511, 3766277; 735027, 3766623; 734543, 3767038; 734094, 3767038; 733679, 3766968; 733471, 3766865; 733160, 3766657; 732815, 3766692; 732434, 3766796; 732123, 3766899; 731708, 3767107; 731432, 3767314; 731190, 3767625; 731155, 3767660; 730637, 3767798; 729980, 3767902; 729634, 3767936; 729496, 3767660; 729188, 3767626; 728544, 3767609; 728424, 3767729; 728390, 3767936; 728390, 3768144; 728390, 3768455; 728424, 3768835; 728493, 3769112; 728459, 3769146; 728113, 3769216; 727836, 3769146; 727456, 3769146; 727283, 3769250; 727076, 3769285; 726592, 3769596; 726177, 3769734; 725901, 3769734; 725589, 3769734; 725347, 3769561; 725036, 3769285; 724621, 3769319; 724207, 3769112; 723999, 3768939; 723826, 3768766; 723817, 3768747; 723768, 3768650.

(54) Unit UGM–7: Apacha and Greenlee Counties, Arizona and Catron County, New Mexico. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 609116, 3786651; 609918, 3786651; 614036, 3786653; 616350, 3786654; 618954, 3786656; 620150, 3786656; 623650, 3786658; 625272, 3786668; 626803, 3786666; 626863, 3786665; 628450, 3786683; 628510, 3786684; 630122, 3786723; 630523, 3786724; 630550, 3786724; 631726, 3786727; 632131, 3786728; 633328, 3786733; 634899, 3786741; 634960, 3786741; 634994, 3785131; 635048, 3783516; 635048, 3783511; 636613, 3783536; 637369, 3783545; 637429, 3783546; 637455, 3782686; 637468, 3782252; 637481, 3781824; 637481, 3781818; 638243, 3781843; 638303, 3781845; 638324, 3781011; 638345, 3780197; 638356, 3779788; 638356, 3779784; 638378, 3779010; 638378, 3779006; 638389, 3778633; 638412, 3777073; 638412, 3777070; 639112, 3777066; 640039, 3777068; 640512, 3777075; 640688, 3777072; 640747, 3777071; 640710, 3776735; 640710, 3776731; 640578, 3775525; 640651, 3773957; 640732, 3773186; 640732, 3773185; 640739, 3773185; 641467, 3773146; 641527, 3773143; 641633, 3772350; 641633, 3772349; 642446, 3772304; 643374, 3772345; 643433, 3772348; 643501, 3771936; 643502, 3771930; 643861, 3771940; 643869, 3771939; 645348, 3771895; 645351, 3771895; 645351, 3771900; 645351, 3772322; 646865, 3772358; 650322, 3772441; 651904, 3772430; 653591, 3772545; 654613, 3772548; 655712, 3772552; 655743, 3772535; 656302, 3772220; 657485, 3771555; 658154, 3771178; 658757, 3770566; 662000, 3770902; 662053, 3770908; 662220, 3770701; 663343, 3769318; 663363, 3767560; 663388, 3765355; 663397, 3764567; 663406, 3763858; 663409, 3763582; 663406, 3763577; 662855, 3762564; 662629, 3762148; 662595, 3762084; 661963, 3760922; 661103, 3759340; 660980, 3759113; 660980, 3759105; 661574, 3758139; 661848, 3757693; 662248, 3757043; 662823, 3756107; 662365, 3755130; 662330, 3755056; 662209, 3754797; 664855, 3753904; 664993, 3754479; 665303, 3755763; 665457, 3756400; 667082, 3756419; 667155, 3756510; 667388, 3756801; 667357, 3756883; 667276, 3756977; 666959, 3757054; 666495, 3757389; 666149, 3757714; 665499, 3758439; 665468, 3758945; 665586, 3759464; 665697, 3759681; 665722, 3759728; 665818, 3759916; 665907, 3760054; 665931, 3760092; 665943, 3760108; 666521, 3760919; 666788, 3761297; 666858, 3761395; 666921, 3761485; 667240, 3761932; 667309, 3762135; 667311, 3762293; 667304, 3763042; 668800, 3763067; 670074, 3763088; 670193, 3763090; 671373, 3763101; 673124, 3763118; 677929, 3763218; 677930, 3763208; 677931, 3763145; 677931, 3763127; 677943, 3762588; 677965, 3761586; 678691, 3761609; 679296, 3761629; 679459, 3761634; 680322, 3761662; 680322, 3761657; 680322, 3761651; 680326, 3761441; 680322, 3761662; 680349, 3761663; 680327, 3762774; 680325, 3762909; 680305, 3763879; 680298, 3764493; 680301, 3764496; 680351, 3764533; 680317, 3765390; 680328, 3765397; 680973, 3765363; 681492, 3765294; 681837, 3765121; 682148, 3765086; 682805, 3765156; 683428, 3765398;

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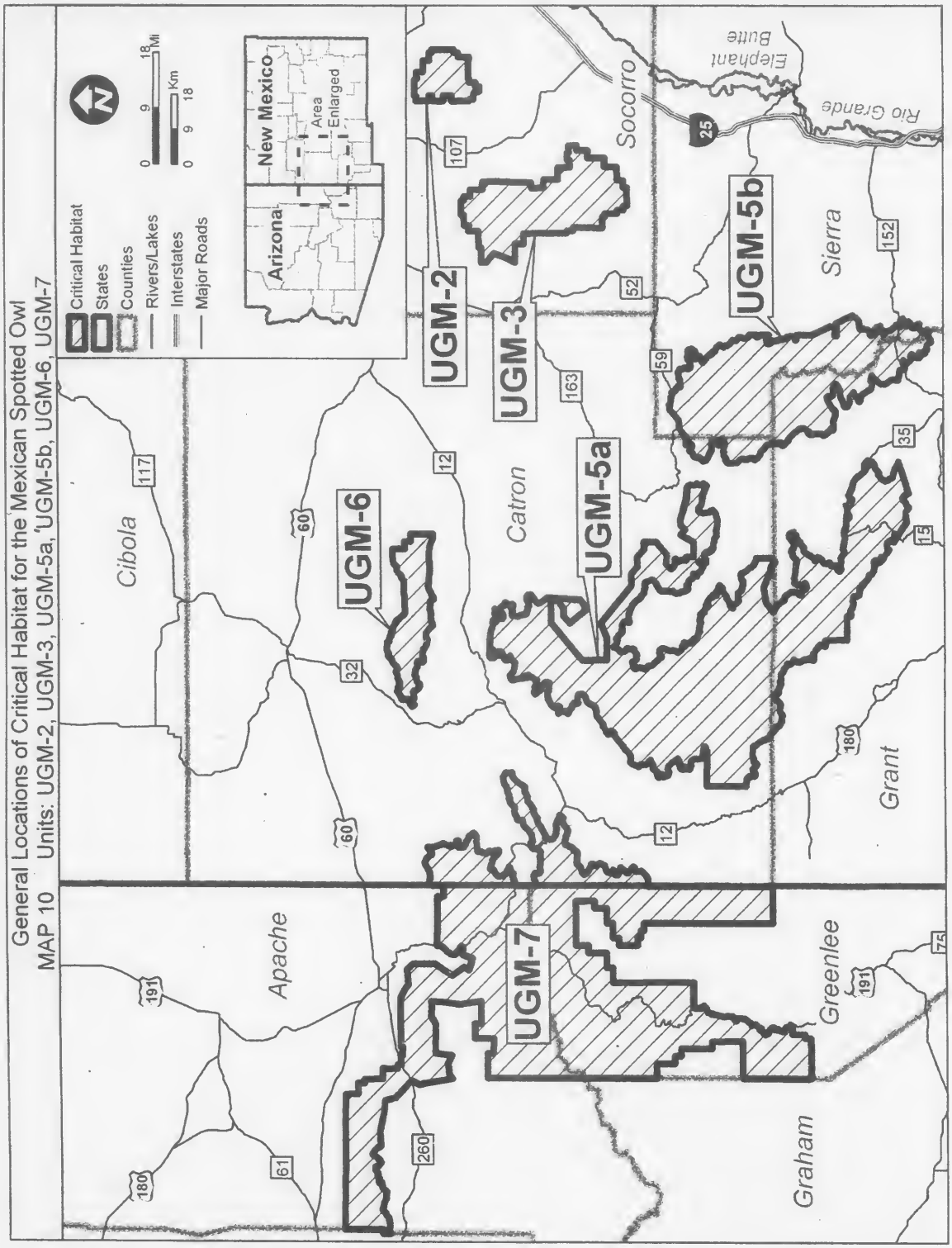
(55) Map 10 of Units UGM–2, UGM–3, UGM–5a, UGM–5b, UGM–6, UGM–7 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(56) Unit SRM–NM–1: Los Alamos County, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N):
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(57) Unit SRM–NM–4: Los Alamos County, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N):
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(58) Unit SRM–NM–5a: San Miguel and Santa Fe Counties, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 429762, 3945781; 429412, 3945784; 429238, 3946106; 428916, 3946330; 428693, 3946578; 428296, 3946925; 427800, 3947073; 427478, 3947197; 427924, 3947445; 428222, 3947718; 428246, 3947941; 427949, 3948090; 427651, 3948313; 427602, 3948586; 427676, 3948784; 427825, 3949082; 427825, 3949131; 427552, 3949503; 427850, 3949851; 427949, 3950173; 427949, 3950396; 427676, 3950619; 427880, 3950750; 428023, 3950842; 428147, 3951066; 428098, 3951289; 427998, 3951462; 427998, 3951586; 428147, 3951884; 428172, 3952107; 428494, 3952628; 428817, 3953024; 428891, 3953049; 428910, 3953079; 428923, 3953082; 429028, 3953184; 429092, 3953360; 429164, 3953471; 429412, 3953793; 429486, 3953768; 429858, 3954165; 430081, 3954711; 430106, 3954934; 430255, 3955256; 430404, 3955281; 430453, 3955702; 430875, 3956049; 431197, 3956471; 432486, 3956471; 436107, 3956471; 436107, 3954711; 436330, 3954661; 436355, 3952256; 435941, 3952173; 435543, 3952094; 433379, 3951661; 432015, 3952008; 430255, 3951760; 430404, 3948809; 431346, 3948735; 435189, 3948140; 435214, 3945735; 430014, 3945779; 429762, 3945781; 442047, 3948043; 442087, 3948796; 442149, 3949980; 442210, 3951135; 442254, 3951970; 442990, 3953600; 443126, 3953901; 443356, 3954410; 443936, 3955695; 445901, 3958234; 454877, 3967593; 455280, 3968012; 455633, 3968381; 456036, 3968801; 456808, 3969606; 457992, 3970840; 458393, 3971258; 461971, 3974988; 462092, 3975114; 465514, 3975111; 465511, 3972697; 462697, 3970445; 460398, 3968604; 459995, 3968282; 459610, 3967974; 459591, 3967959; 458765, 3967297; 458810, 3967297; 458810, 3965524; 458810, 3964775; 458810, 3964209; 458835, 3963231; 459041, 3955129; 459047, 3955129; 459073, 3954733; 459681, 3954680; 459997, 3954469; 459997, 3950378; 461080, 3948794; 460077, 3948768; 460077, 3946287; 459515, 3945647; 459493, 3945647; 459107, 3945647; 456760, 3945647; 456626, 3945647; 451001, 3945647; 450808,

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(59) Unit SRM–NM–5b: Mora and San Miguel Counties, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 442047, 3948043; 442087, 3948796; 442149, 3949980; 442210, 3951135; 442254, 3951970; 442990, 3953600; 443126, 3953901; 443356, 3954410; 443936, 3955695; 445901, 3958234; 454877, 3967593; 455280, 3968012; 455633, 3968381; 456036, 3968801; 456808, 3969606; 457992, 3970840; 458393, 3971258; 461971, 3974988; 462092, 3975114; 465514, 3975111; 465511, 3972697; 462697, 3970445; 460398, 3968604; 459995, 3968282; 459610, 3967974; 459591, 3967959; 458765, 3967297; 458810, 3967297; 458810, 3965524; 458810, 3964775; 458810, 3964209; 458835, 3963231; 459041, 3955129; 459047, 3955129; 459073, 3954733; 459681, 3954680; 459997, 3954469; 459997, 3950378; 461080, 3948794; 460077, 3948768; 460077, 3946287; 459515, 3945647; 459493, 3945647; 459107, 3945647; 456760, 3945647; 456626, 3945647; 451001, 3945647; 450808, 3945647; 450650, 3945647; 450540, 3945647; 449752, 3945647; 448966, 3945647; 447557, 3945647; 447557, 3945759; 446751, 3945664; 446150, 3945593; 444174, 3945360; 443434, 3945272; 443145, 3945695; 443115, 3945740; 442872, 3946095; 442862, 3946119; 442742, 3946399; 442687, 3946527; 442335, 3947351; 442046, 3948026; 442047, 3948043.

(60) Unit SRM–NM–11: Rio Arriba County, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 293286, 4054867; 293354, 4055394; 293500, 4055741; 293665, 4056134; 293665, 4056144; 293657, 4056537; 293646, 4057064; 293290, 4057284; 292622, 4057764; 292692, 4061164; 292657, 4061306; 292742, 4061310; 292845, 4061314; 292911, 4063617; 294206, 4064305; 295372, 4063985; 295549, 4063918; 296077, 4063770; 296334, 4064825; 297385, 4064090; 298205, 4064575; 299470, 4063803; 299436, 4063486; 299395, 4063357; 299333, 4063275; 299269, 4063255; 299200, 4063195; 299172, 4063185; 299136, 4063145; 299120, 4063115; 299116, 4063045; 299134, 4062965; 299118, 4062854; 299082, 4062765; 299074, 4062705; 299088, 4062655; 299124, 4062625; 299227, 4062584; 299253, 4062555; 299277, 4062525; 299321, 4062494; 299335, 4062465; 299329, 4062434; 299298, 4062405; 299259, 4062368; 299245, 4062354; 299176, 4062304; 299170, 4062254; 299140, 4062214; 299128, 4062174; 299094, 4062094; 299080, 4062004; 299092, 4061964; 299094, 4061924; 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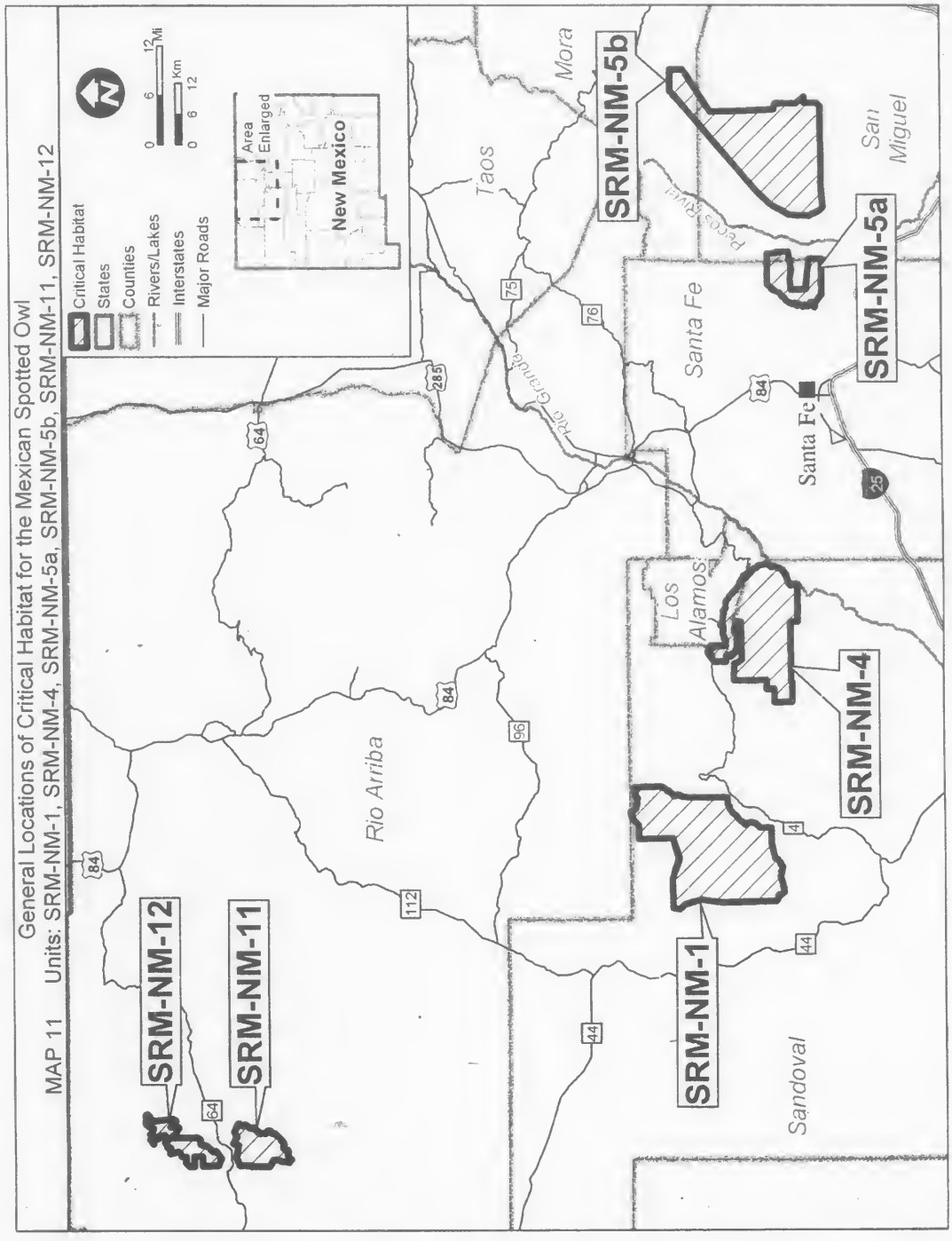
(61) Unit SRM–M–12: Rio Arriba County, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 293001, 4070471; 293002, 4070955; 293002, 4070965; 293030, 4070964; 294388, 4070936; 294459, 4070935; 294520, 4072545; 294443, 4072546; 294319, 4072549; 293002, 4072575; 293017, 4073505; 293186, 4073715; 293258, 4073885; 293365, 4074013; 293596, 4074185; 294548, 4074155; 294553, 4074282; 294562, 4074487; 294586, 4075115; 294824, 4075195; 295142, 4075295; 295198, 4075435; 295198, 4075555; 295352, 4075675; 295060, 4077255; 295150, 4077252; 295196, 4077250; 295981, 4077225; 295991, 4077795; 296391, 4077865; 296473, 4077965; 296611, 4078092; 296841, 4078225; 296923, 4078215; 297092, 4077915; 297174, 4077865; 297379, 4078015; 297517, 4078065; 297563, 4078135; 297624, 4078155; 297809, 4078155; 298013, 4078245; 297947, 4078335; 297921, 4078465; 297978, 4078725; 297962, 4078915; 298044, 4079285; 297978, 4079375; 297875, 4079425; 297819, 4079415; 297717, 4079355; 297594, 4079373; 297512, 4079515; 297481, 4079595; 297496, 4079675; 297440, 4079735; 297440, 4079795; 297537, 4079875; 297558, 4080105; 297589, 4080145; 297773, 4080345; 297379, 4080545; 297225, 4080565; 297123, 4080515; 297051, 4080465; 296903, 4080535; 296811, 4080545; 296759, 4080475; 296683, 4080485; 296718, 4080625; 296785, 4080675; 296882, 4080695; 296969, 4080772; 297036, 4080845; 297220, 4080925; 297338, 4081115; 297425, 4081125; 297614, 4080955; 297717, 4080935; 297788, 4080875; 297850, 4080755; 297952, 4080685; 298013, 4080715; 298101, 4080875; 298177, 4080935; 298213, 4081025; 298234, 4081185; 298377, 4080935; 298438, 4080785; 298531, 4080695; 298817, 4080561; 298837, 4080552; 298989, 4080527; 299193, 4080493; 299219, 4080578; 299284, 4080748; 299360, 4080962; 299381, 4081051; 299458, 4081306; 299478, 4081408; 299567, 4081578; 299672, 4081647; 299769, 4081792; 299818, 4081930; 299875, 4081966; 300008, 4081979; 300162, 4081966; 300271, 4081938; 300417, 4081918; 300680, 4081902; 300855, 4081906; 300968, 4081922; 301061, 4081946; 301158, 4081962; 301219, 4081958; 301263, 4081918; 301300, 4081784; 301348, 4081687; 301373, 4081606; 301381, 4081545; 301336, 4081505; 301259, 4081452; 301239, 4081412; 301199, 4081327; 301162, 4081234; 301081, 4081181; 300984, 4081144; 300842, 4081055; 300709, 4081015; 300494, 4080942; 300421, 4080752; 300385, 4080561; 300373, 4080298; 300361, 4080205; 300320, 4079934; 300304, 4079892; 300318, 4079702; 300343, 4079365; 300363, 4079135; 300368, 4079019; 300378, 4078725; 300389, 4078515; 300404, 4078272; 300404, 4078265; 300455, 4077515; 300496, 4076735; 300199, 4076025; 300133, 4076035; 300066, 4076115; 299974, 4076245; 300000, 4076335; 299974, 4076425; 299979, 4076535; 299948, 4076685; 299867, 4076785; 299754, 4076815; 299641, 4076805; 299483, 4076875; 299375, 4077005; 299201, 4077105; 299165, 4075535; 298976, 4075525; 298945, 4075835; 298827, 4075845; 298761, 4075805; 298561, 4075875; 298490, 4075945; 298372, 4076035; 298285, 4076075; 298234, 4076045; 298090, 4076235; 297921, 4076465; 297752, 4076655; 297717, 4076705; 297763, 4076765; 297855, 4076795; 297839, 4076825; 297742, 4076835; 297650, 4076805; 297583, 4076775; 297534, 4074906; 297522, 4073965; 297476, 4072375; 297475, 4071899; 297358, 4071705; 297200, 4071325; 297072, 4071345; 296990, 4071365; 296862, 4071255; 296759, 4071235; 296462, 4071305; 296365, 4071175; 296319, 4071045; 296288, 4070915; 296212, 4070855; 296227, 4070695; 296194, 4070559; 296155, 4070475; 296206, 4070335; 296094, 4070025; 295997, 4069915; 295899, 4069725; 295751, 4069585; 295695, 4069535; 295602, 4069455; 295587, 4069315; 295510, 4069235; 295428, 4069155; 295331, 4068975; 295172, 4068805; 295183, 4068695; 295234, 4068435; 295259, 4068255; 295224, 4068145; 295178, 4068065; 295060, 4068035; 294947, 4067985; 294819, 4067875; 294712, 4067735; 294589, 4067635; 294394, 4067535; 294318, 4067485; 294246, 4067405; 294169, 4067385; 294123, 4067335; 294123, 4067285; 292994, 4067845; 293001, 4070471.

(62) Map 11 of Units SRM–NM–1, SRM–NM–4, SRM–NM–5a, SRM–NM–5b, SRM–NM–11; SRM–NM–12 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(63) Unit BR–E–5: Torrance and Valencia Counties, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 365092, 3826902; 365104, 3830621; 364040, 3830655; 364108, 3833842; 365648, 3833814; 365637, 3837038; 367301, 3837063; 367288, 3838668; 367329, 3840270; 368968, 3840327; 368945, 3841760; 368943, 3841895; 368982, 3843548; 367367, 3843526; 367414, 3845206; 367506, 3846267; 367555, 3846882; 367569, 3847970; 367535, 3849980; 369061, 3850005; 369077, 3851589; 370691, 3851544; 370719, 3852985; 371641, 3852995; 372280, 3853055; 372309, 3852956; 372141, 3852490; 372032, 3852348; 371962, 3852208; 371940, 3852105; 371940, 3852013; 371961, 3851950; 372049, 3851887; 372640, 3851614; 372501, 3851317; 372485, 3850823; 372397, 3850303; 372070, 3849846; 371902, 3849624; 371462, 3849003; 371412, 3848438; 371416, 3848206; 371426, 3847687; 371152, 3846958; 371244, 3846656; 371542, 3846388; 371341, 3845808; 371881, 3845730; 372047, 3845257; 372146, 3845217; 372518, 3845068; 372508, 3844973; 372464, 3844540; 372392, 3843807; 371986, 3843199; 372188, 3842757; 372506, 3842356; 372570, 3842178; 372867, 3842008; 372589, 3841698; 372346, 3841455; 371902, 3841112; 371563, 3840877; 371232, 3840613; 371307, 3840592; 371324, 3840538; 371290, 3840378; 371215, 3840248; 371156, 3840202; 371144, 3840102; 371181, 3840001; 371226, 3839896; 371223, 3839812; 371118, 3839716; 371039, 3839678; 371035, 3839620; 370930, 3839574; 370903, 3839522; 370859, 3839465; 370859, 3839419; 370913, 3839360; 370859, 3839238; 370775, 3839129; 370140, 3838801; 369786, 3837009; 370314, 3836745; 370389, 3836527; 370234, 3836175; 369819, 3835701; 369878, 3835165; 369710, 3834729; 369843, 3834252; 369504, 3833744; 369371, 3833220; 370955, 3831822; 370374, 3830153; 370346, 3830136; 370323, 3830139; 370291, 3830159; 370246, 3830187; 370217, 3830203; 370193, 3830219; 370156, 3830243; 370136, 3830255; 370107, 3830263; 370066, 3830291; 370034, 3830311; 370005, 3830323; 369944, 3830359; 369903, 3830371; 369870, 3830379; 369818, 3830395; 369789, 3830403; 369724, 3830411; 369667, 3830411; 369577, 3830403; 369550, 3830397; 369523, 3830382; 369555, 3830274; 369430, 3830151; 369203, 3829930; 368507, 3829251; 368227, 3828832; 368357, 3828186; 368868, 3827901; 368968, 3827361; 368570, 3826724; 367979, 3826368; 367611, 3825959; 366127, 3824968; 366290, 3826824; 366208, 3826826; 365092, 3826850; 365092, 3826902.

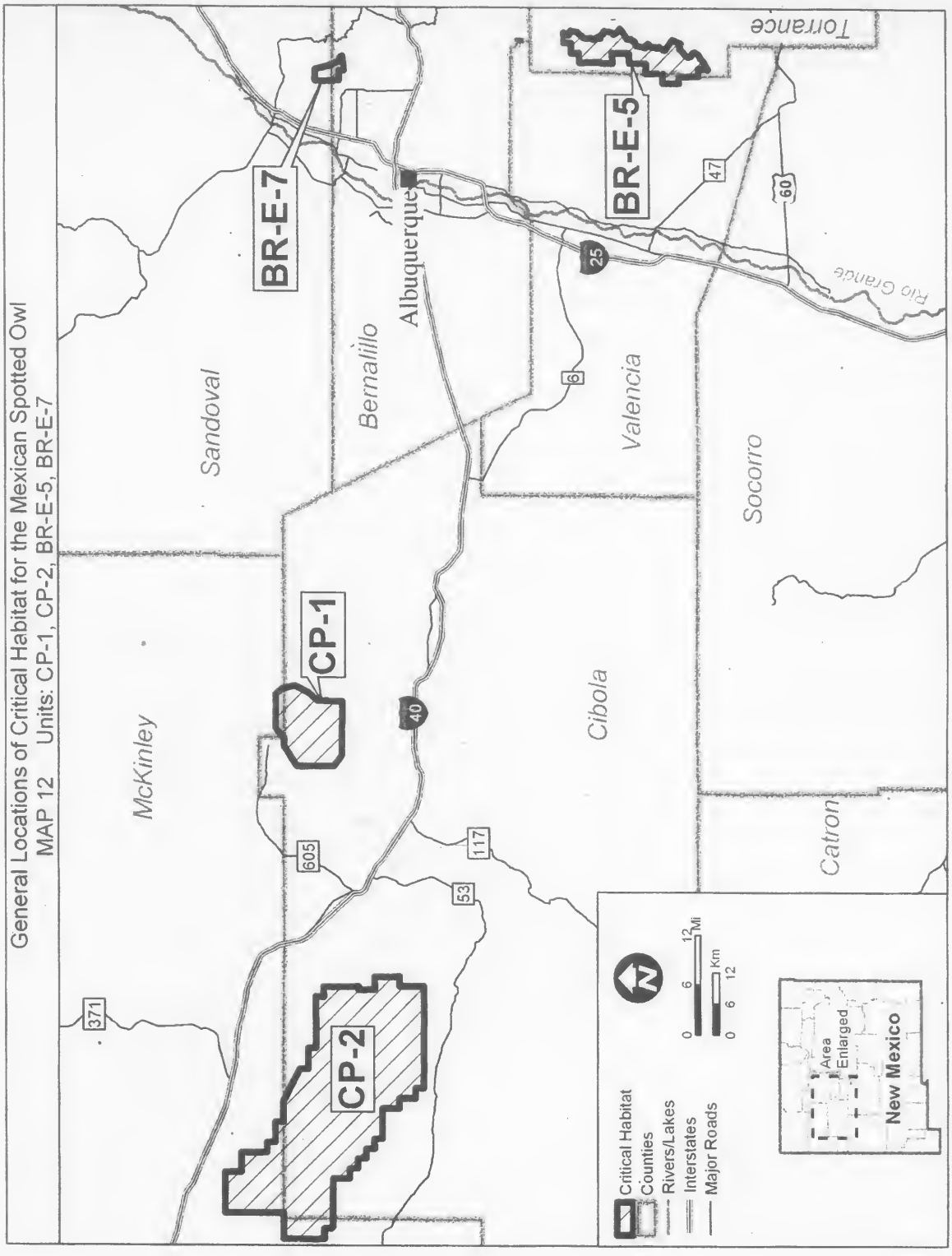
(64) Unit BR–E–7: Bernalillo and Sandoval Counties, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 366204, 3901372; 366800, 3901352; 367154, 3901340; 367154, 3901335; 367799, 3898134; 367810, 3898134; 367834, 3897988; 367956, 3897794; 368053, 3897539; 368004, 3897405; 368114, 3897247; 368284, 3896968; 368478, 3896762; 368575, 3896616; 368648, 3896543; 368806, 3896604; 368952, 3896555; 369170, 3896106; 366899, 3895790; 366912, 3896798; 365296, 3896798; 365255, 3899876; 365333, 3901401; 366204, 3901372.

(65) Unit CP–1: Cibola and McKinley Counties, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 257710, 3908619; 258624, 3909297; 259586, 3910011; 260940, 3909954; 261659, 3910684; 262023, 3911055; 262494, 3911533; 264135, 3911471; 265781, 3911397; 266891, 3911379; 267926, 3911379; 268775, 3910140; 269201, 3907724; 269215, 3907640; 268906, 3906837; 268238, 3905400; 268032, 3904988; 267780, 3904660; 266721, 3903316; 266628, 3901980; 266536, 3900123; 266484, 3898564; 266382, 3898567; 264206, 3898622; 261112, 3898761; 257848, 3898823; 257218, 3899426; 256165, 3900480; 256327, 3907593; 257710, 3908619.

(66) Unit CP–2: Cibola and McKinley Counties, New Mexico. Land bounded by the following UTM Zone 12 NAD 83 coordinates (meters E, meters N): 726998, 3906694; 726911, 3909898; 731063, 3910002; 730973, 3913262; 730751, 3921334; 731342, 3921350; 732751, 3921388; 737145, 3921506; 737148, 3921441; 737225, 3919846; 737226, 3919838; 737259, 3918276; 740333, 3918370; 740399, 3918372; 740458, 3915088; 740460, 3914972; 740570, 3913460; 742172, 3913474; 742230, 3911903; 745430, 3911976; 745460, 3910404; 747652, 3910490; 748576, 3910523; 748678, 3910526; 748764, 3910476; 749504, 3910041; 750809, 3909273; 753720, 3907560; 753922, 3907458; 753982, 3905829; 755219, 3905810; 757296, 3905891; 757392, 3904339; 758950, 3904452; 765480, 3904700; 765500, 3903108; 767113, 3903172; 767270, 3898131; 767363, 3896432; 766841, 3896396; 766959, 3893255; 768974, 3893386; 769027, 3891476; 769049, 3890953; 769080, 3889881; 769145, 3888500; 769145, 3888489; 769146, 3888483; 769069, 3888481; 767640, 3888449; 767632, 3886846; 767730, 3883642; 765599, 3883590; 764393, 3883561; 762898, 3883524; 760445, 3883514; 756446, 3883371; 754895, 3883283; 754756, 3883283; 753199, 3883280; 751598, 3883246; 751530, 3884885; 749909, 3884844; 749866, 3886412; 749866, 3886421; 749840, 3888024; 749766, 3888022; 748236, 3887984; 748173, 3889268; 748100, 3891183; 748099, 3891206; 743346, 3891104; 743293, 3892693; 741724, 3892613; 741681, 3894270; 740090, 3894245; 740046, 3895835; 739889, 3895830; 738485, 3895779; 738407, 3897391; 736802, 3897356; 736718, 3900565; 736645, 3900564; 735093, 3900547; 729089, 3900399; 728833, 3900607; 728803, 3901969; 727157, 3901993; 727116, 3902592; 727068, 3903457; 727040, 3905130; 726998, 3906694.

(67) Map 12 of Units CP–1, CP–2, BR–E–5, BR–E–7 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(68) Unit BR–E–1a: Lincoln County, New Mexico. Land bounded by the UTM Zone 13 NAD 83 coordinates (meters E, meters N): 421217, 3707734; 421218, 3707742; 421502, 3707741; 422589, 3707738; 422632, 3710940; 424217, 3710932; 424285, 3713961; 430651, 3714016; 430746, 3714017; 430726, 3712198; 430708, 3710612; 430704, 3710176; 430686, 3708626; 430686, 3708561; 430668, 3706984; 430884, 3706658; 431084, 3706530; 431935, 3705982; 432170, 3705831; 432318, 3705736; 433047, 3705268; 433816, 3704605; 434691, 3703870; 435618, 3703080; 435519, 3701625; 435491, 3701223; 435491, 3701221; 435513, 3698054; 435519, 3697267; 435425, 3696707; 435425, 3696707; 435313, 3696042; 435246, 3695644; 435178, 3695242; 435042, 3694433; 434984, 3694088; 435336, 3693260; 435240, 3693258; 433943, 3693235; 433213, 3692065; 432946, 3691638; 434314, 3689306; 434236, 3688917; 434155, 3688506; 433774, 3686592; 433883, 3685734; 433914, 3685485; 433934, 3685333; 433931, 3685333; 433909, 3685333; 433858, 3685332; 433515, 3685331; 433490, 3685331; 433123, 3685329; 432716, 3685332; 432694, 3685331; 432363, 3685334; 432365, 3685713; 432365, 3685723; 432365, 3685727; 432367, 3686101; 432367, 3686112; 432368, 3686130; 432369, 3686497; 432369, 3686508; 432369, 3686530; 432369, 3686892; 432369, 3686930; 432371, 3687288; 432372, 3687685; 432372, 3687733; 432374, 3688082; 432376, 3688478; 432376, 3688488; 432376, 3688536; 432377, 3688875; 432378, 3688938; 432380, 3689272; 432379, 3689282; 432379, 3689339; 432377, 3689665; 432376, 3689741; 432374, 3690058; 432376, 3690143; 432378, 3690454; 432381, 3690850; 432382, 3690946; 432385, 3691245; 432385, 3691347; 432388, 3691641; 432388, 3691749; 432386, 3692020; 432385, 3692150; 432384, 3692399; 432384, 3692547; 432383, 3692776; 432383, 3692788; 432382, 3692948; 432381, 3693153; 432381, 3693165; 432374, 3693350; 432367, 3693561; 432352, 3693970; 432345, 3694153; 432338, 3694379; 432322, 3694833; 432296, 3694834; 432272, 3694834; 432272, 3694843; 431457, 3694853; 430668, 3694864; 430508, 3694862; 430335, 3694864; 429935, 3694867; 427535, 3694867; 424064, 3694856; 421154, 3694846; 421180, 3701181; 421180, 3701211; 421205, 3707058; 421217, 3707734.

(69) Unit BR–E–1b: Otero County, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 420347, 3624678; 420351, 3625457; 420358, 3627047; 420377, 3631118; 421849, 3631278; 424004, 3631996; 422644, 3635288; 422676, 3635395; 422799, 3635806; 423134, 3636927; 423191, 3640003; 424590, 3641374; 426437, 3642428; 426353, 3643870; 426272, 3644321; 426211, 3644663; 425861, 3646614; 426011, 3647089; 426051, 3647217; 426120, 3647437; 425654, 3647593; 425571, 3647621; 424858, 3647860; 424458, 3647994; 424392, 3648016; 424534, 3649266; 426125, 3649675; 426319, 3649996; 426549, 3650374; 426754, 3650712; 426483, 3650720; 426088, 3650733; 422586, 3650844; 423157, 3651582; 423415, 3652001; 423517, 3651999; 423618, 3651998; 423746, 3651997; 423827, 3651996; 423920, 3651999; 424149, 3652010; 424323, 3652014; 424551, 3652023; 424564, 3652023; 424685, 3652021; 424726, 3652020; 424851, 3652018; 424948, 3652016; 425022, 3652014; 425025, 3652014; 425034, 3652014; 425129, 3652012; 425344, 3652008; 425491, 3652005; 425533, 3652004; 425739, 3652000; 425936, 3651996; 426136, 3651992; 426297, 3651989; 426340, 3651988; 426597, 3651983; 426744, 3651980; 426863, 3651978; 426932, 3651978; 427103, 3651979; 427148, 3651979; 427331, 3651979; 427373, 3651979; 427552, 3651980; 427729, 3651980; 427909, 3651979; 427955, 3651980; 428124, 3651980; 428210, 3651979; 428359, 3651982; 428556, 3651984; 428715, 3651987; 428762, 3651988; 428900, 3651990; 429166, 3651991; 429307, 3651991; 429521, 3651992; 429568, 3651992; 429970, 3651994; 430101, 3651995; 430223, 3651995; 430327, 3651996; 430371, 3651996; 430498, 3651996; 430530, 3651996; 430713, 3652002; 430773, 3652004; 430894, 3652008; 431133, 3652015; 431176, 3652016; 431283, 3652020; 431578, 3652029; 431667, 3652031; 431844, 3652030; 431943, 3652030; 432067, 3652029; 432464, 3652026; 432748, 3652023; 432817, 3652023; 433195, 3652019; 433573, 3652015; 433950, 3652011; 434353, 3652007; 434362, 3652007; 434394, 3652007; 434465, 3652003; 434773, 3651988; 435002, 3651977; 435155, 3651969; 435184, 3651967; 435273, 3651963; 435596, 3651961; 435905, 3651959; 435958, 3651959; 436396, 3651957; 436630, 3651955; 436749, 3651955; 436760, 3651955; 436797, 3651956; 437030, 3651963; 437197, 3651968; 437572, 3651978; 437581, 3651978; 437599, 3651978; 437853, 3651976; 438002, 3651975; 438385, 3651972; 438404, 3651972; 438807, 3651969; 438819, 3651969; 439195, 3651969; 439575, 3651968; 439960, 3651967; 439990, 3651967; 440344, 3651966; 440739, 3651966; 440792, 3651966; 441133, 3651965; 441198, 3651965; 441383, 3651964; 441528, 3651966; 441596, 3651967; 441922, 3651971; 442266, 3651976; 442312, 3651977; 442399, 3651978; 442516, 3651980; 442673, 3651981; 442703, 3651982; 442934, 3651984; 443080, 3651984; 443094, 3651985; 443204, 3651985; 443713, 3651989; 443875, 3651990; 444011, 3651990; 444266, 3651991; 444523, 3651990; 444652, 3651989; 444814, 3651989; 445040, 3651987; 445365, 3651987; 445399, 3651987; 445619, 3651988; 445816, 3651990; 445924, 3651991; 446099, 3651990; 446203, 3651997; 446423, 3652013; 446591, 3652024; 446670, 3652030; 446896, 3652016; 446983, 3652011; 447054, 3652006; 447227, 3652004; 447298, 3652003; 447376, 3652002; 447700, 3651997; 447769, 3651996; 447970, 3651993; 448032, 3651992; 448102, 3651991; 448162, 3651990; 448395, 3651987; 448503, 3651989; 448572, 3651991; 448837, 3651997; 448903, 3651998; 448982, 3652000; 449304, 3652007; 449391, 3652009; 449488, 3652011; 449642, 3652011; 449704, 3652011; 449801, 3652011; 449912, 3652011; 449995, 3652011; 450106, 3652012; 450193, 3652012; 450386, 3652012; 450447, 3652012; 450509, 3652013; 450586, 3652013; 450912, 3652015; 450978, 3652016; 451252, 3652017; 451266, 3652017; 451370, 3652014; 451648, 3652005; 451760, 3652002; 452055, 3651993; 452075, 3651992; 452128, 3651991; 452150, 3651991; 452503, 3651990; 452541, 3651990; 452859, 3651989; 452931, 3651989; 453293, 3651988; 453326, 3651988; 453491, 3651984; 453662, 3651980; 453695, 3651979; 453721, 3651978; 454018, 3651963; 454116, 3651962; 454465, 3651955; 454511, 3651955; 455019, 3651946; 455269, 3651941; 455297, 3651940; 455691, 3651932; 456046, 3651924; 456072, 3651923; 456084, 3651923; 456192, 3651921; 456463, 3651915; 456841, 3651907; 456875, 3651907; 456978, 3651905; 457219, 3651890; 457292, 3651886; 457597, 3651868; 457680, 3651863; 457987, 3651847; 458393, 3651846; 458483, 3651845; 458791, 3651845; 459138, 3651844; 459188, 3651844; 459287, 3651844; 459379, 3651844; 459518, 3651844; 459563, 3651813; 459730, 3651672; 460094, 3651365; 460138, 3651337; 460169, 3651318; 460535, 3651089; 460557, 3651075; 460740, 3650960; 461119, 3650723; 461119, 3650723; 459609, 3649441; 459240, 3647154; 459237, 3647130; 458926, 3647102;

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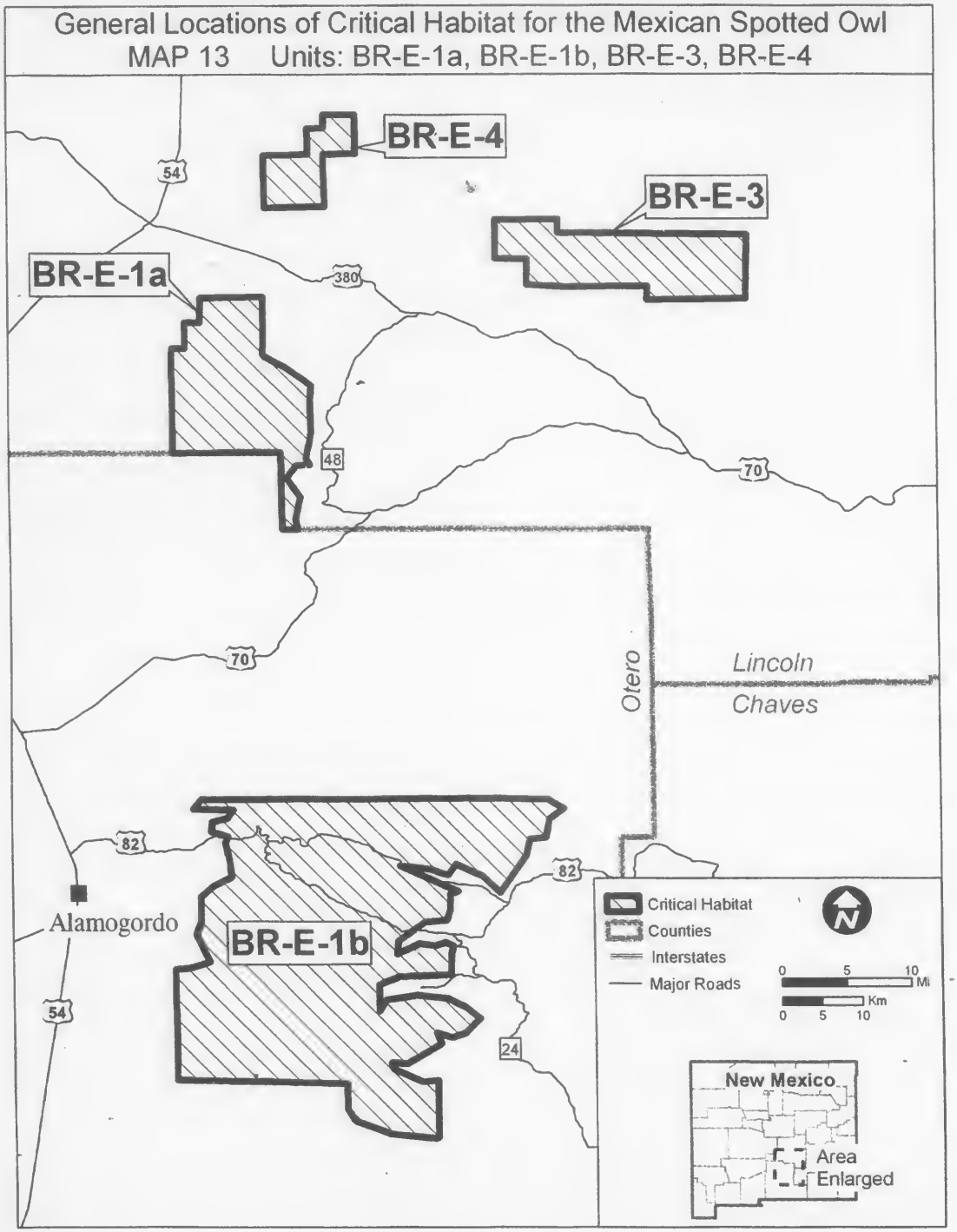
(70) Unit BR–E–3: Lincoln County, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 458082, 3715738; 458133, 3717758; 458143, 3718162; 458153, 3718548; 454858, 3718599; 454879, 3723379; 461397, 3723404; 461368, 3721736; 463332, 3721704; 463734, 3721698; 464539, 3721685; 465343, 3721673; 480804, 3721427; 480845, 3721426; 480836, 3721005; 480811, 3719802; 480756, 3717201; 480689, 3713990; 480680, 3713589; 480679, 3713534; 480673, 3713533; 475012, 3713490; 473732, 3713480; 470505, 3713455; 470598, 3715104; 461964, 3715113; 458433, 3715321; 458072, 3715343; 458082, 3715738.

(71) Unit BR–E–4: Lincoln County, New Mexico. Land bounded by the following UTM Zone 13 NAD 83 coordinates (meters E, meters N): 433180, 3731474; 435703, 3731516; 435695, 3732608; 435680, 3734744; 437360, 3734761; 437365, 3736365; 438907, 3736364; 439317, 3736364; 440529, 3736363; 440593, 3736363; 440591, 3735930; 440577, 3733074; 440576, 3732690; 440572, 3731908; 440570, 3731560; 440504, 3731559; 438867, 3731542; 438050, 3731533; 437280, 3731525; 437285, 3730251; 437286, 3729853; 437304, 3725086; 436850, 3725080; 436449, 3725074; 432413, 3725015; 431082, 3724995; 431083, 3725065.

(72) Map 13 of Units BR–E–1a, BR–E–1b, BR–E–3, BR–E–4 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

Dated: August 20, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–19501 Filed 8–30–04; 8:45 am]

BILLING CODE 4310–55–P

Federal Register

Tuesday,
August 31, 2004

Part IV

Department of Labor

Occupational Safety and Health Administration

Voluntary Protection Program for Construction, Draft; Notice

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Voluntary Protection Program for Construction, Draft; Notice

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Notice of proposed new program within the Voluntary Protection Programs (VPP); request for comments.

SUMMARY: OSHA requests stakeholder and public comments on a proposed new Voluntary Protection Program for Construction (VPPC), published in draft below. The program is intended to create greater opportunity for employers and employees in the construction industry to participate in and obtain the benefits of OSHA's VPP, the agency's premiere recognition program. To qualify for VPP, employers must provide exemplary worker protection by establishing effective Safety and Health Management Systems (SHMS).

DATES: Comments must be submitted by the following dates:

Hard Copy: Your comments must be postmarked by November 1, 2004.

Facsimile and Electronic Transmission: Your comments must be sent by November 1, 2004.

ADDRESSES:

Regular mail, express delivery, hand-delivery, and messenger service: You must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. C–06, Room N–2625, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210. Please contact the OSHA Docket Office at (202) 693–2350 for information about security procedures concerning the delivery of materials by express delivery, hand delivery, and messenger service. OSHA Docket Office and Department of Labor hours of operation are 8:15 a.m. to 4:45 p.m., EST.

Facsimile: If your comments, including any attachments, are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693–1648. You must include the docket number of this document, Docket No. C–06, in your comments.

Electronic: You may submit comments, but not attachments, through OSHA's Web site at the following address: *http://ecomments.osha.gov.* Information such as studies and journal articles must be submitted in triplicate hard copy to the OSHA Docket Office at the address above. The additional materials must clearly identify your electronic comments by name, date, subject, and docket number so we can attach them to your comments.

Access to Comments and Submissions: OSHA will make all comments and submissions available for inspection and copying at the OSHA Docket Office at the above address. Comments, and submissions relating to this document that are not protected by copyright, will also be available on OSHA's Web site. OSHA cautions you about submitting personal information such as Social Security numbers and birth dates. Contact the OSHA Docket Office at (202) 693–2350 for information about materials not available through the OSHA Web site and for assistance in using the Web site to locate docket submissions.

FOR FURTHER INFORMATION CONTACT: Cathy Oliver, Director, Office of Partnerships and Recognition, Occupational Safety and Health Administration, Room N3700, 200 Constitution Ave. NW., Washington, DC 20210, telephone (202) 693–2213. Electronic copies of this **Federal Register** notice, as well as news releases and other relevant documents, are available at OSHA's Web site, *http://www.osha.gov.*

I. Introduction

A. Background

The Voluntary Protection Programs (VPP), adopted by OSHA in **Federal Register** Notice 47 FR 29025, July 2, 1982, and revised in several subsequent Notices, have established the efficacy of cooperative action among government, industry, and labor to address worker safety and health issues and expand worker protection. VPP participation requirements center on comprehensive Safety and Health Management Systems (SHMS) with active employee involvement to prevent or control safety and health hazards at the worksite. Employers who qualify generally view OSHA standards as a minimum level of safety and health performance and set their own more stringent standards where necessary for effective employee protection.

The well documented success of VPP, the applicability of VPP principles to diverse industries and work situations, and the presence within its ranks of world-class models of safety and health excellence have produced a continuing stream of applications from small and large businesses. OSHA, in an effort to further reduce workplace injuries and illnesses, is committed to even greater growth of its premiere recognition program.

The construction industry, traditionally one of the nation's most hazardous, has never been able to take full advantage of the benefits of VPP participation. There are multiple reasons for the construction industry's under-representation. These include:

- VPP eligibility requirements traditionally apply to fixed worksites "controlled" by the applicant. This alone rules out many trades-oriented employers acting as subcontractors. (*e.g.*, plumbers, heating and ventilation workers, sheetrock installers, etc.) Many of these employers, nevertheless, have exceptional SHMS that proactively identify and protect their workers from hazards, regardless of where they are working.
- The short-term scope of some construction projects and the mobile nature of the construction workforce have limited participation in VPP by the construction industry.
- A construction site, with its often hazardous and frequently changing working conditions, presents unique challenges to the development and implementation of an effective SHMS.
- Construction companies have expressed concern over the burdensome paperwork process and resources necessary for application and implementation of VPP Merit or Star.

For many years, the construction community and the Advisory Committee on Construction Safety and Health (ACCSH) have urged OSHA to create a means for greater construction industry participation in VPP. Moreover, industry statistics point to the need for increased, vigorous efforts to reduce industry hazards and the resulting fatalities, injuries and illnesses within the construction industry. For example, according to the Bureau of Labor Statistics (BLS), in calendar year 2002, construction companies accounted for an estimated six percent of total private sector employment, but almost nine percent of total work-related recordable injuries and illnesses. There were 1,121 work-related fatalities involving construction work, more than 20 percent of the private sector's 5,524 fatalities reported during that year.

OSHA agrees with ACCSH and industry representatives that making VPP a feasible goal for small, medium, and large construction employers would encourage a greater number of them to implement effective SHMS. In OSHA's experience, such systems are the best way to reduce work-related injuries, illnesses, and fatalities.

OSHA therefore implemented two Star Demonstration programs to

evaluate alternative VPP criteria that, if successful, could lead to greater construction participation. The Star Demonstration for Short-Term Construction Projects, approved April 10, 1998, involved construction employers and subcontractors working at selected short-term worksites (12–18 months duration). The program tested alternative VPP eligibility requirements and procedures, and enabled OSHA to gain experience as to how such companies ensure safe and healthful work environments at multiple, short-term construction sites. The Mobile Workforce Star Demonstration Program, approved November 13, 1998, gave companies whose employees travel from one site to another (and therefore typically do not "control" the worksite) the opportunity to demonstrate their ability to provide high level safety and health protection for their mobile workforce. OSHA required participants in both programs to maintain all four of the SHMS elements of the traditional VPP—management leadership and employee involvement, worksite analysis, hazard prevention and control, and safety and health training—at a level of excellence equal to VPP's Star Program.

A successful VPP Star Demonstration Program, initiated in 1993, resulted in VPP's expanded eligibility to resident contractors at existing VPP sites. The majority of construction contractors, however, continue to operate outside VPP eligibility parameters. There presently are only 42 construction projects participating in the federally-operated VPP out of a total of 798 participants.[1]

To determine the effectiveness of these programs and the viability and feasibility of expanding VPP to more construction employers, OSHA undertook an analysis of the Star Demonstrations. In addition, over a 3-day period in December 2003, OSHA met with construction employers and trade association representatives in Washington, DC. OSHA also met in March 2004 with representatives of the Building and Construction Trades Department, AFL–CIO. The analysis; the stakeholder meetings; and ongoing discussions with ACCSH, other construction industry representatives, employee representatives, and OSHA VPP personnel indicated across the board support for a separate VPP for Construction (VPPC).

[1] These numbers are accurate as of August 2004 and include participants in VPP Star and Merit, each of the Star Demonstration Programs, and resident contractors.

OSHA now proposes to establish VPPC. The details of this proposal reflect significant input from numerous stakeholders and OSHA's own experiences with the Demonstration Programs. OSHA is grateful for the opportunity to work so closely with the construction industry to craft a program that will maintain VPP's high performance standards and, at the same time, respond to the industry's unique needs.

Once VPPC is finalized, OSHA expects to move current construction participants, including current Short-Term and Mobile Workforce Star Demonstration Participants and resident contractors, from the current VPP into the new VPPC. In rare instances where implementation of the VPPC requirements is still not feasible, and it is necessary to test alternative methods to these requirements, new Star Demonstration programs may be proposed. Section XI of this document contains procedures for applying as a Star Demonstration Program.

It has been OSHA's practice to request public comment and to give serious consideration to all feedback before implementing significant changes to the VPP. This practice continues with the agency's request for comments on its proposed VPPC.

B. Statutory Framework

The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources * * *"

Section 2(b) specifies the measures by which the Congress would have OSHA carry out these purposes. They include the following provisions that establish the legislative framework for the VPP:

"* * * (1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;"

"* * * (4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;"

"* * * (5).by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;"

"* * * (13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment."

In addition, Section 21(c) provides that the Secretary, in consultation with the Secretary of Health and Human Services, shall:

"* * * (1) provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe or unhealthful working conditions in employments covered by this Act;" and

"* * * (2) consult with and advise employers and employees, and organizations representing employers and employees as to effective means of preventing occupational injuries and illnesses.

II. Discussion of Proposed VPPC

A. Overview

OSHA seeks to continue working cooperatively with construction employers of all types and sizes to assist them in developing and implementing effective SHMS that serve to actively prevent, eliminate, and/or control workplace hazards to achieve the ultimate goal of preventing work related injuries, illnesses, and fatalities. In order to provide opportunities for all construction employers to experience the benefits of VPP participation, OSHA is redesigning the VPP requirements to better meet the needs of the construction industry. While there will be minor changes in the SHMS elements (Management Leadership and Employee Involvement, Worksite Analysis, Hazard Prevention and Control, and Safety and Health Training), the major changes fall primarily within the areas of VPP eligibility, the application process, onsite evaluation and reevaluation, and the approval process.

The broadened opportunity for participation in VPPC should serve as an incentive for increased involvement by both small construction employers and general contractors who perform a wide spectrum of work on many projects/sites. Sections C-I below contrast current VPP eligibility with proposed VPPC eligibility.

B. Definitions

1. *Baseline Hazard Analysis.* The identification and documentation of common hazards associated with a project/site, such as those found in OSHA regulations, building codes, and other recognized industry standards and for which existing controls are well known.

2. *Business Unit.* (Sometimes referred to as a company or subsidiary of a corporation or division.) An entity that is engaged in construction-related work

(typically contract work) within a designated Federal OSHA jurisdiction, and that has oversight authority for the SHMS and ultimate responsibility for assuring safe and healthful working conditions at or within projects/sites. One example of a business unit is the part of a company that bids and performs contract work and/or provides construction services for another company's plant or project.

3. *C/D/BU (Corporate, Division, or Business Unit)*—A term used to identify VPPC applicants/participants at a corporation, division, or business unit level versus a site-based level.

4. *Company.* A business entity, sometimes used interchangeably with corporation, business unit, division, general contractor, or subcontractor when referencing various aspects of VPPC.

5. *Controlling Employer.* For the purpose of VPPC a controlling employer is defined as any entity at a construction project/site (such as a general contractor or construction manager) that controls project/site operations and has ultimate responsibility for assuring safe and healthful work conditions at the project/site.

6. *Corporate Applicant/Participant.* An entity whose entire operations within a designated Federal OSHA jurisdiction are covered by the VPPC application. The entity must be engaged primarily in construction and normally must have corporate oversight authority for the SHMS, including ultimate responsibility for assuring safe and healthful working conditions at or within all projects/sites. Additional operations include the headquarters and other office buildings, maintenance facilities, warehouses, etc.

7. *Division Applicant/Participant.* (Sometimes referred to as an entity or subsidiary of a corporation.) A VPPC applicant or participant that is engaged primarily in construction, that performs contract work within a designated Federal OSHA jurisdiction, and that has corporate oversight authority for the SHMS and ultimate responsibility for assuring safe and healthful working conditions at or within projects/sites, including the activities of any divisions or business units under its control. Examples of divisions are power, refinery/chemical, heavy and highway, telecommunications, etc.

8. *Expansion Region.* Any OSHA region, other than the Primary Region, for which an applicant submits a VPPC application. A request for expansion must be coordinated through the Primary Region and Directorate of Cooperative and State Programs (DCSP) and will be contingent upon obtaining VPPC approval in the Primary Region.

9. *General Contractor.* A company that controls operations at an entire project (or controls work within a project/site) and that normally has ultimate responsibility for assuring safe and healthful working conditions at the project/site.

10. *Geographical Area.* A boundary specified by a C/D/BU VPPC applicant where active worksites will be included in the application approval process. This would normally be an OSHA Area Office or a State within Federal OSHA jurisdiction. C/D/BU VPPC applicants may also specify region-wide participation with prior approval by the appropriate OSHA Regional Administrator.

11. *Primary Region.* The OSHA region where a company initially applies for VPPC participation under C/D/BU. Once OSHA approves a company in a Primary Region, that region becomes the main contact and coordinator if the company wishes to expand its participation to other OSHA regions.

12. *Site Implementation Plan (SIP).* A brief (usually 1–5 pages) document that describes how safety and health policies and procedures are implemented and adhered to at each individual construction site or project.

13. *Special Government Employee (SGE).* SGEs are qualified employees of a VPP or VPPC participant that are trained and approved by OSHA to function as members of OSHA's onsite evaluation teams for another applicant/participant's project/site.

14. *Subcontractor.* An entity that performs work for a general contractor, prime contractor, or project manager of a construction project/site. The subcontractor controls its own work operations but does not have overall control of the project/site. Subcontractors are directly responsible for assuring safe and healthful working conditions for their employees and other employees that they control at all locations within a project/site for which they are contractually responsible.

15. *Safety and Health Management System (SHMS).* A method of preventing worker fatalities, injuries, and illnesses through the ongoing planning, implementation, integration and control of four interdependent elements: Management Leadership and Employee Involvement; Worksite Analysis; Hazard Prevention and Control; and Safety and Health Training. (For details, see Appendix A.)

16. *Temporary Employee.* Any employee who is temporarily obtained from an employment service or borrowed from another employer and whose work activities the applicant/participant directs and controls.

C. Eligibility

1. *Current Eligibility.* VPP currently accepts construction applications from the general contractor, owner, or an organization that provides overall management at a site, controls site operations, and has ultimate responsibility for assuring safe and healthful working conditions at the site. OSHA accepts VPP applications only for individual construction projects/sites that will have been in operation for at least 12 months prior to approval and have no fewer than 12 months remaining onsite.

OSHA also accepts applications from resident contractors at participating VPP projects/sites for the contractor's operations at those VPP projects/sites. For employers not fitting these categories, the only other current means for VPP participation are through the Mobile Workforce and Short-Term Construction Star Demonstration Programs.

2. *Proposed Eligibility.* All construction employers (where OSHA has jurisdiction) will be eligible to submit an application for participation in VPPC, including subcontractors, general contractors with short-term projects, construction managers, and employers with mobile workforces.

D. Safety and Health Management Systems

The VPP requires that applicants implement all elements and sub-elements of an SHMS. The four elements are: Management Leadership and Employee Involvement, Worksite Analysis, Hazard Prevention and Control, and Safety and Health Training. OSHA realizes that, due to the frequency of changing conditions at construction sites and the short-term nature of the work, the requirements for baseline hazard analysis and annual emergency evacuation drills need modification if they are to be feasible and appropriate for the construction industry. OSHA learned this through experience with the Mobile Workforce and Short-Term Construction Star Demonstration programs; these issues were part of the demonstrations' alternative means to meet Star requirements.

1. *Current SHMS Elements.* Currently, under the worksite analysis element, OSHA requires that a baseline hazard analysis be conducted to identify common health and safety hazards and the means for their prevention or control. A new baseline is not required

unless processes, equipment or procedures change.

In addition, under the hazard prevention and control element, OSHA requires that emergency procedures include an annual evacuation drill.

2. *Proposed SHMS Elements.*

a. *Baseline Hazard Analysis:* OSHA proposes to allow VPPC applicants to utilize appropriate and relevant preexisting company data collected on similar tasks at previous jobsites as a sample data baseline. If exposure profiles and work tasks remain similar, OSHA will require no further sampling. If the work processes change, OSHA will require additional sampling.

b. *Annual Emergency Evacuation Drills:* OSHA proposes to accept alternative processes or systems to ensure employees are knowledgeable of emergency evacuation procedures. This includes the applicant's development of a more in-depth written plan that describes the policies and procedures it uses and the training it requires to ensure that employees know what to do in case of an emergency. Additionally, each employee should participate in at least one emergency evacuation drill each year. Further, OSHA proposes that during the onsite evaluations, the team assess the effectiveness of the plan through its evaluation of the worksite, including employee interviews.

E. Application Process

1. Current Application Process

OSHA currently accepts applications from controlling employers who operate construction sites that will have been in operation for at least 12 months prior to approval, with no fewer than 12 months remaining onsite.

OSHA also currently accepts applications for the Short-Term Construction Star Demonstration from general contractors or construction managers with projects/sites lasting 12–18 months. This application is submitted to OSHA's National Office. After approval, the applicant submits a streamlined, less burdensome Site Implementation Plan (SIP) for each project/site.

Finally, OSHA currently accepts applications for the Mobile Workforce Star Demonstration Program; these can be submitted to either the Regional or National Office.

2. Proposed Application Process

a. *Site-Based Application Process.* In VPPC, construction employers will submit site applications for long-term (two or more years) projects for approval in the Star and Merit Programs. Examples of these projects are airports, powerhouses, stadiums, large office buildings, *etc.* Program requirements will be similar to those presently established in section III. F., G., and H. of 65 FR 45649, July 24, 2000, as amended by 68 FR 68475, December 8, 2003. The applicant will be expected to submit the required information to OSHA, including injury and illness data, and provide the required annual self-evaluation reports. The new VPPC extracts and incorporates the site-based application requirements from 65 FR 45649 with minor editorial modifications.

b. *C/D/BU Application Process.* New proposed requirements for VPPC will enable C/D/BUs with projects/sites in a defined geographic area to submit applications to OSHA. Normally a defined geographic area may not exceed one state, unless the applicant successfully negotiates a larger area with the Regional Administrator. The maximum geographic area a Regional Administrator may approve is region-wide. The application will cover work that the applicant is "contractually responsible for" or the specific scope of work the applicant is being paid to perform, rather than only work sites that the applicant actually "controls." This will place the responsibility for individual worker safety and health on the construction employer that employs the workers, whether or not the employees work on a site that is "controlled" by the employer. This is consistent with the statement of employer duties, Section 5.(a) of the Occupational Safety and Health Act of 1970, and allows a broad range of contractors performing a variety of different types of work to be eligible to apply for VPPC (for example, subcontractors, general contractors with short-term projects, mobile workforce employers, and construction managers). C/D/BU applications will be submitted to the Primary Regional Office. OSHA will only consider Expansion Regions after OSHA approves an application in the Primary Region.

F. Onsite Evaluation Process

1. *Current Evaluation Process.* In VPP, OSHA currently conducts onsite evaluations of individual construction sites after acceptance of a completed application. An OSHA evaluation team will conduct a multi-day onsite evaluation of the SHMS including an opening conference; walkthrough of the site; formal and informal interviews with management and employees; document review; and closing conference. The onsite evaluation covers all employees at the worksite including contract, subcontract, and temporary employees.

For current Mobile Workforce and Short-Term Construction Star Demonstration Program participants, OSHA conducts onsite evaluations at the corporate headquarters. For Mobile Workforce, at least two onsite evaluations are conducted. For Short-Term Construction, onsite evaluations are conducted at each project/site.

2. *Proposed Evaluation Process.*

a. *Site-Based Evaluation Process.* For site-based applicants, the onsite evaluation process will remain the same as the current process.

b. *C/D/BU Evaluation Process.* For C/D/BU applicants, a two-step evaluation process is proposed. OSHA will first conduct an onsite evaluation at the C/D/BU-headquarters offices to evaluate the C/D/BU-level safety and health policies, requirements, and management systems in place, to ensure they meet VPPC requirements. In those situations where a construction employer is additionally seeking approval in Expansion Regions, OSHA will conduct only one corporate onsite evaluation unless there are significant differences in the applicant's policies and requirements in the Expansion Regions.

In the second step, OSHA will conduct onsite evaluations at a sampling of projects/sites in each geographic area for which the applicant seeks approval. Projects/sites will be selected, at OSHA's discretion, from a list provided by the applicant. The purpose of these onsite evaluations will be to verify that the C/D/BU-level policies and requirements are being implemented appropriately at the project/site level. OSHA will conduct onsite evaluations in both the Primary and Expansion Region(s) as follows:

- When an applicant has 2–25 projects/sites in the defined geographic area, OSHA will perform 2 onsite evaluations.[2]
- When an applicant has 26–99 projects/sites in the defined geographic area, OSHA will perform 3 onsite evaluations.
- When an applicant has 100+ projects/sites in the defined geographic area, OSHA will perform 4 onsite evaluations.

The onsite evaluations will address all four SHMS elements. In addition, each individual project/site must have a Site Implementation Plan (SIP) that OSHA will review during the onsite

[2] Applicants who do not have at least two sites within a defined geographic area should not apply under C/D/BU for that geographic area. A possible exception is the approved Primary Region participant who wishes to expand into one or more regions.

evaluation and upon request thereafter. For additional details regarding SIPs, see section III.H.7.

G. Approval and Recognition Process

1. *Current Approval and Recognition Process.* Applicants with long-term construction projects/sites are currently recommended for approval by the Regional Administrator having jurisdiction over the site. The Assistant Secretary for OSHA approves all new applicants. The Regional Administrator reapproves existing participants after reevaluation. Once approved, the site is removed from OSHA's programmed inspection list. VPP recognizes individual construction site applicants in either the Star or Merit Programs.

For current Mobile Workforce and Short-Term Construction Star Demonstration Program participants, OSHA awards recognition to the corporate headquarters under Mobile Workforce and awards recognition to individual sites under Short-Term. The current Mobile Workforce and Short-Term Construction Star Demonstration Programs only provide recognition in the Star Program. There is no provision for Merit.

2. *Proposed Approval and Recognition Process.*

a. *Site-Based Approval and Recognition.* For site-based applicants, the VPPC approval and recognition process will remain the same as the current process.

b. *C/D/BU Approval and Recognition.* For C/D/BU applicants, the Regional Administrator will recommend VPPC approval and recognition at the level requested by the company in its application (for example, corporate, division, or business-unit level). The Assistant Secretary for OSHA will make the decision to approve. The Regional Administrator will approve reevaluations. For subcontractors, all work performed within the defined geographical area will qualify for an exemption from programmed inspections. For general contractors or other controlling employers, all work performed on sites within the approved geographic area will qualify for exemption from programmed inspections. OSHA will primarily base these exemptions on the site lists that participants will provide and routinely update. Sites that qualify for exemption, but for some reason do not appear on the lists (*i.e.*, the project/site is too new to have appeared on previous lists), may still receive the exemption provided that VPPC participation is verified with the inspecting official upon her/his arrival.

OSHA is proposing to have both the Star and Merit Programs available to all types of construction employers. The level of recognition achieved will depend on the degree to which the applicant meets Star or Merit requirements. Additional details regarding approval and recognition are available in section IV.

H. Reevaluation Process

1. *Current Reevaluation Process.* For Star participants, OSHA currently reevaluates the site three years after initial approval and every three to five years thereafter. For Merit participants, OSHA currently reevaluates the site 12–18 months after initial approval, and again at the end of the Merit term. OSHA reevaluates Short-Term Construction Star Demonstration Program participants every 12–18 months. For Mobile Workforce Star Demonstration program participants, the agency evaluates at least two additional worksites each year for the duration of the Demonstration.

2. *Proposed Reevaluation Process.* For VPPC Star participants, OSHA will reevaluate at 2-year intervals. For VPPC Merit participants, OSHA will reevaluate every 12–18 months.

The reevaluations will verify that the participant still is effectively meeting its responsibilities under the VPPC. For C/D/BU participants, these reevaluations will follow the chart found in section II.F.2.b. The number of reevaluations performed will be based on the number of sites within the jurisdiction at the time of the reevaluation, not the number of evaluations performed during initial approval.

OSHA may reevaluate sooner than this time frame if significant changes take place (*e.g.*, in ownership, senior level organizational structure, scope of work, injury and illness rates, or collective bargaining agreement representation) or if the company or project(s)/site(s) have experienced any other significant performance-related issues.

I. Additional Requirements

1. Corporate Oversight for C/D/BU Applicants. C/D/BU applicants must provide corporate oversight for all covered projects/sites. Corporate oversight must include provisions for each project/site ensuring that VPPC requirements are met, including an assurance that the C/D/BU-level SHMS and policies that are implemented across all projects/sites. A description of this process is required for all C/D/BU applications and will be verified by OSHA during the corporate onsite evaluation.

2. *Site Implementation Plans for C/D/BU Applicants.* A C/D/BU applicant must develop and maintain concise (normally 1–5 pages) SIPs for each listed project/site. (C/D/BU subcontractor applicants may, with the consent of the appropriate Regional Administrator, create one or more Master SIPs that will cover standard project/site procedures. Projects/sites that deviate from these procedures must have separate SIPs.) OSHA will review these SIPs during onsite evaluations and upon request thereafter.

3. *Quarterly Reports for C/D/BU Participants.* In addition to the annual self-evaluations, C/D/BU participants are required to prepare and submit quarterly reports to the appropriate OSHA Regional Office(s). Quarterly reports provide a description of any significant changes (*e.g.*, in ownership, senior level organizational structure, scope of work, injury and illness rates, or collective bargaining agreement representation) and an update of the participant's projects/sites list. (Subcontractors whose sites are in constant flux need only update their site lists for the annual reports and in preparation for scheduled onsite evaluations.) Annual self-evaluations will serve as fourth quarter reports.

4. *Injury and Illness Recordkeeping.* The requirements for site-based applicants/participants will remain the same as the current VPP: The total recordable case incidence rate (TCIR) and the days away/restricted activity/job transfer case rate (DART rate) will be calculated for the entire site. These rates must include the site injury and illness experience of all contractors, subcontractors, and temporary employees. The site must have at least one year of rates prior to approval. (See Appendix B for details.)

OSHA will require C/D/BU applicants to submit three-year corporate rates with their application. In addition, C/D/BU applicants who employ contractors, subcontractors and/or temporary employees must include these rates going back at least one year. By the end of one year of VPPC participation, the C/D/BU must maintain records that reflect two years of contractor, subcontractor and temporary employee rates. Thereafter, three years of rates must be maintained. (See Appendix B for details.)

III. VPPC Requirements

A. Eligibility

OSHA will accept VPPC applications from:

1. Construction companies engaged in long-term construction projects for

specific construction sites (site-based), and from

2. Construction companies at the corporate, division, or business unit levels in a defined geographical area (C/D/BU-based).

Both types of applicants must meet all requirements and agree to applicable assurances as set forth in section III.H of this document.

B. Cooperative Relationship

VPPC emphasizes the importance of cooperation among labor, management, and government to implement comprehensive worksite SHMS. This innovative public/private partnership helps carry out OSHA's mission "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." (Section (2)(b), Occupational Safety and Health Act of 1970, 84 STAT.1590) Labor, management, and government actively collaborate in efforts to resolve safety and health problems and reach the VPPC standards of excellence. Participating construction employers at the corporate, division, business unit, and site levels, and the employees who work cooperatively with management to ensure worksite safety and health excellence, receive official recognition from OSHA.

VPPC participants' cooperation with OSHA, and their promotion of effective SHMS, may also take such forms as presentations before meetings of labor, industry, and government groups; input in OSHA rulemaking; and participation in activities including OSHA Special Government Employees (SGEs), mentoring, outreach, and training. OSHA designates a contact person, usually the Regional VPP Manager, who coordinates each approved participant's contact with the agency.

C. Injury and Illness Performance Requirements

All applicants must meet the minimum injury and illness performance criteria as set forth in Appendix B of this document.

D. Safety and Health Management System Requirements

All applicants/participants must have implemented an effective SHMS that addresses all four elements and meets minimum requirements. The quality and degree to which an applicant has implemented the elements and sub-elements will determine whether OSHA approves the applicant for Star or Merit. The requirements for an effective SHMS are documented in Appendix A. Minimum requirements for Merit approval will be detailed in the VPPC Policies and Procedures Manual.

E. Corporate Oversight

C/D/BU applicants/participants must have established and implemented an ongoing corporate oversight system that assures each project/site maintains VPPC-level safety and health performance. This requires an effective oversight system that must include the following processes:

1. Effective communication between Corporate-level management and each project/site;

2. A means for assuring that both Corporate-level management and project/site management and employees remain committed to VPPC performance and participation;

3. An internal Corporate-level system to ensure each project/site meets VPPC requirements;

4. A process to review and analyze project/site information regarding the identification, correction, and tracking of workplace hazards;

5. A system to hold projects/sites and/or program managers accountable for SHMS deficiencies;

6. A process to review and analyze injury and illness data (including near-misses) on at least a quarterly basis;

7. Policies and procedures to protect employees from hazards at a project/site that are outside of the employer's control; and

8. A process to review SIPs to assure they adequately address applicable hazards and implement the necessary site-specific actions and procedures to protect workers.

9. A process to verify that supervisors and employees receive appropriate worker safety and health training.

F. Compliance With OSHA Standards

Each VPPC applicant must comply with all OSHA requirements. Any deficiencies related to compliance uncovered through an OSHA onsite evaluation, an internal inspection, an employee report, or any other means must be corrected promptly. Correction time frames and consequences for non-correction are detailed in III.J.

G. OSHA History

All applicants must inform OSHA of their OSHA inspection history.

Site-Based Applicants. If the project/site was inspected by OSHA within the 36-month period preceding the application, the inspection, abatement, and/or any other history of interaction with OSHA must indicate good faith attempts to improve safety and health. A project/site's inspection history must include no open investigations, no pending or open contested citations or notices under appeal at the time of application, no affirmed willful violations, and not have been subject to an Enhanced Enforcement Program activity during the prior 36 months.

C/D/BU applicants. All of the above tenets apply. However, the OSHA history will be examined for work performed by the applying entity within the defined geographical area.

Note: OSHA history pertaining to non-VPPC projects/sites of the same company will not adversely affect VPPC participation, unless it is determined that an entity's decision, program, or policy, which applies to all projects/sites, does not meet OSHA standards.

H. Assurances

Applications must be accompanied by assurances that the applicant will honor the agreed upon actions if the application is approved. The following assurances are required in both the Star and Merit Programs. All applicants must assure OSHA that they will:

1. Comply with the Act and will correct (and provide effective interim hazard protection as necessary), in a timely manner, all hazards discovered through self-inspections, employee notification, accident investigations, OSHA onsite evaluations, process hazard reviews, annual evaluations, or any other means.

2. Develop, maintain, communicate, enforce, and oversee policies and requirements that meet a level of safety and health performance consistent with VPPC requirements.

3. Allow OSHA to perform onsite evaluations of the applicant/participant's work activities (subcontractors must receive controlling entity approval), and correct any conditions identified by OSHA that are deemed to be a violation of an OSHA rule or are otherwise harmful to employees, as outlined in section III.J of this document.

4. Correct within an agreed upon time period any/all deficiencies identified during the OSHA onsite evaluation relating to compliance with OSHA requirements.

5. Meet annual and final self-evaluation requirements as described in Appendix A, section A.8.

In addition to the above assurances, C/D/BU applicants must additionally provide the following assurances:

6. In addition to the annual self-evaluations, participants will prepare quarterly reports including an updated site list and a description of significant changes (*e.g.*, in ownership, senior level organizational structure, scope of work, injury and illness rates, or collective

bargaining agreement representation) affecting VPPC participation. (Specialty trade contractors whose projects/sites are in a constant state of flux need only update their project/site lists for the annual report and in preparation for scheduled onsite evaluations.) The annual self-evaluations will serve as fourth quarter reports.

7. Develop and maintain concise (normally 1–5 pages) SIPs for each listed project/site. C/D/BU subcontractor applicants may, with the consent of the appropriate Regional Administrator, create one or more Master SIPs that will cover standard projects/sites procedures. Work that deviates from these procedures must have a separate SIP. SIPs must include, at a minimum, each of the following elements:

a. Site name and address;

b. Site manager/Project Manager (name, title, phone numbers, and e-mail address);

c. Project/site VPPC Contact (name, title, phone numbers, and e-mail address);

d. The major phases of the construction project, including projected completion time (controlling contractors only);

e. Written documentation that indicates the owner, unions (where applicable), and subcontractors at the site/project formally agree to follow VPPC requirements (controlling contractors only);

f. A written summary that indicates how Management Leadership, Employee Involvement, Worksite Analysis, Hazard Prevention and Control, and Training will be implemented onsite;

g. Written description of how the applicant's SHMS will be implemented onsite.

I. Employee Support

1. *Employee Support at Non-Union Sites.* Employee support for projects/sites that do not fall under collective bargaining agreements will be determined through OSHA interviews with employees selected by OSHA. Based on these interviews, OSHA will determine whether the projects/sites or C/D/BU meet the requirements of employee involvement and support for the VPPC application.

2. *Employee Support at Union Sites.*

a. *For Site-Based Applicants.* Options to signify employee support for participation in VPPC include:

- The authorized representative for each collective bargaining unit provides a signed statement with the application indicating that the union supports VPPC participation; or
- The president of the local Building Trades Council provides a signed statement of support on behalf of all local unions on the Council that represent employees at the site. (Unions not party to the Building and Construction Trades Department AFL/CIO, such as the United Brotherhood of Carpenters and Joiners of America, shall sign a statement independently of the other trade unions showing support for VPPC.)

OSHA will not approve an application package until it has assurance of support from authorized collective bargaining representatives working at the applicant's project/site; or, who have signed agreements with the subcontractor who is applying for VPPC.

b. *For C/D/BU applicants.* C/D/BU projects/sites must have one of the following three forms of signed support in order for the application to be processed.

- The authorized representatives from the local unions with which the C/D/BU applicant has collective bargaining agreements must provide a signed statement; or
- The president of the local Building Trades Council signs a statement of support on behalf of local unions on the Council with whom the C/D/BU applicant has collective bargaining agreements (Unions not party to the Building and Construction Trades Department AFL/CIO, such as the United Brotherhood of Carpenters and Joiners of America, shall sign a statement independently of the other trade unions showing support for VPPC.); or
- A signed statement from the President, Building and Construction Trades Department, AFL-CIO; and/or the general presidents of the respective international unions. (This option is only for C/D/BU applicants who are signatory to national collective bargaining agreements.)

OSHA recognizes the burden of obtaining 100% union support for all C/D/BU projects/sites. As a result, OSHA requires that an applicant submit estimated levels of support along with the signed support documents. OSHA will then make a case-by-case determination regarding whether or not the level of employee support is sufficient based on factors such as, but not limited to, number and percentage of employees under the umbrella of the dissenting union(s) and the length of time that employees from dissenting unions are performing work at the project/site.

J. OSHA Enforcement

1. *General.* The history of VPP demonstrates that safety and health problems discovered during OSHA contact with participants normally are resolved cooperatively. OSHA nevertheless must reserve the right, where employees' safety and health are seriously endangered, to refer the situation for review and potential enforcement action. In cases where the hazard is not controlled by the participant, and the responsible party refuses to correct the situation, OSHA will refer the situation to the Regional Administrator for review and enforcement action. For VPP applicants/participants, OSHA will inform the responsible party that a referral is being made to the Assistant Secretary and that enforcement action may result.

2. *Programmed Inspections.*

a. Participants, unless they choose otherwise, are removed from OSHA's programmed inspection lists, including any lists of targeted sites, for the duration of approved participation in the VPPC.

b. For C/D/BU participants, when OSHA conducts a programmed inspection of a construction project/site where a VPPC participant is working but not in control of the site, OSHA will not enter the work area controlled by the participant unless a hazard is apparent during the inspection. OSHA may have foreknowledge that the VPPC participant will be onsite. However, when this is not the case, the participant may declare its VPPC status to the OSHA personnel.

3. *Unprogrammed Inspections.* OSHA enforcement personnel will respond to formal complaints, referrals, all fatalities and catastrophes, and other significant events in accordance with normal OSHA enforcement procedures.

4. *Enforcement related to a VPP Onsite Evaluation.* If, during the course of the onsite evaluation of a VPPC applicant/participant, the OSHA team identifies hazards in work areas not controlled by the VPPC applicant/participant, the following actions will be taken:

a. OSHA will inform the responsible party's management of the identified hazards.

b. The responsible party must correct the identified hazard within an agreed upon time frame, not to exceed 48 hours, with interim protection provided. (In certain circumstances, OSHA may grant additional time for hazard correction as long as interim protection is provided and/or employees are removed from the hazard.)

c. Either OSHA must observe the correction or the responsible party must provide evidence of hazard correction to OSHA.

d. If the responsible party fails to correct the hazard within the agreed upon time frame, a referral to enforcement will be made.

If the OSHA team determines that the number, frequency, or severity of the hazards is so great, or an imminent danger situation exists, the team must skip steps b-d above, forgo the VPPC onsite evaluation, and refer the situation to enforcement.

K. Public Access to Company Site Records

The following documents must be maintained by OSHA for public access beginning on the day the site attains VPPC approval and continuing for so long as the site remains in VPPC:

1. *In the National Office*—Information and the general description of the SHMS from the application; approval report and subsequent evaluation reports prepared by OSHA; the Regional Administrator's letter of recommendation; transmittal memoranda to Assistant Secretary; SIPs where applicable; and the Assistant Secretary's and Regional Administrator's approval letters.

2. *In the Regional Office*—Complete VPPC application and amendments; approval report and subsequent evaluation reports; the Regional Administrator's letter of recommendation; Regional Administrator transmittal memoranda to the Assistant Secretary via the Director of Cooperative and State Programs; the Assistant Secretary's approval letters; the memorandum to the appropriate Area Director(s) removing the approved participant from the general inspection list; and related correspondence.

L. Post-Approval Contact/Assistance

1. *OSHA Contact Person.* The Contact Person for each VPPC worksite is the appropriate Regional VPP Manager or his/her designee. This person is available to assist the participant, as needed.

2. *Assistance.*

a. In some cases, such as when needed for the Merit Program, an onsite assistance visit may be scheduled to respond to employer technical inquiries.

b. Whenever there are significant changes in ownership, senior level organizational structure, scope of work, injury and illness rates, or collective bargaining agreement representation, the VPPC applicant/participant must notify OSHA's Regional Administrator with a copy to DCSP within 30 working days of the change. The Regional Administrator will decide, in conjunction with DCSP, whether to require a new signed Statement of Commitment and/or perform additional onsite evaluation(s).

c. Whenever an applicable rate (either TCIR or DART rate) of a Star Program participant exceeds all 3 most recent years of specific industry national averages published by BLS, at the discretion of the Regional Administrator, the VPPC participant may be required to develop an agreed upon 2-year rate reduction plan. If appropriate, OSHA may make an onsite assistance visit to help the site develop the plan.

M. Outreach, Mentoring and SGE Participation

The VPPC benefits from outreach, mentoring and SGE participation.

1. *Outreach.*

a. *VPPC-Related Outreach.* Participant assistance and information provided to prospective VPPC applicants, including but not limited to: conducting VPPC workshops at conferences, providing training in support of the VPPC, and serving as an advocate for VPPC in the business community.

b. *Other forms of Outreach.* Participant assistance and information provided to either other internal or external entities to promote general safety and health principles and practices, including but not limited to: participating in OSHA Strategic Partnerships and Alliances, making presentations on safety and health issues at conferences, holding community safety days, or conducting training workshops.

2. *Mentoring.*

a. *Informal Mentoring.* One-on-one assistance from a VPPC participant to a prospective VPPC applicant (from their own company or someone from another company) can be useful to help them improve their SHMS and/or prepare a VPPC application.

3. *SGE Participation.* A VPPC participant may, in its sole discretion, nominate one or more qualified employees to potentially serve as SGEs.

IV. VPPC Programs

A. VPPC Star Program

The Star Program recognizes leaders in occupational safety and health that are successfully protecting workers from death, injury, and illness by implementing comprehensive and effective SHMS and complying with OSHA regulations. Star participants willingly share their experience and expertise, and they encourage others to work toward comparable success. Star is the highest level of recognition for excellence in worker safety and health awarded by OSHA.

1. *Experience.* All elements of an SHMS needed for program success, detailed in Appendix A, must be operating for a period of 12 months, at either the site (for site-based participants) or corporate-wide/division-wide/business unit-wide (depending on the applicant) for C/D/BU applicants, prior to Star approval. In addition, C/D/BU applicants must also implement ongoing corporate oversight systems as described in III.E.

2. *Injury and Illness Performance.* To qualify for Star, an applicant's TCIR and DART rates, at the time of application, must meet the Star requirements set forth in Appendix B of this document.

3. *Safety and Health Management System.* To qualify for Star, OSHA must determine that all elements of an applicant's SHMS to be fully operative and effective in proactively preventing worker injuries and illnesses. See Appendix A for SHMS details.

4. *Terms of Participation.* The term for participation in an approved VPPC Star Program is open-ended, as long as:

- The participant continues to maintain its excellent SHMS as evidenced by favorable OSHA reevaluations every 24 months;
- The participant continues to meet all assurances as set forth in section III.H; and
- Construction activities are ongoing.

B. VPPC Merit Program

The VPPC Merit Program is aimed at entities or projects/sites that do not yet meet the qualifications for the Star Program, but have implemented a basic SHMS and want to work toward Star excellence and recognition. The eligible applicant may not have met each specific Star requirement within each element. Participation in the Merit Program is an opportunity for employers and their employees to work with OSHA to improve the quality of their SHMS and, if necessary, reduce their injury and illness rates to meet the requirements for Star. If OSHA determines that a construction employer has demonstrated the commitment and possesses the resources to achieve Star requirements within 3 years (and injury/illness rates within 2 years), Merit participation is used to set goals that, when achieved, qualify the project/site or entity for Star participation.

1. *Experience.* Each applicant must have in place before approval an active program for protecting workers that provides for conducting safety and health inspections by trained and competent employees. In addition, C/D/BU applicants must also implement ongoing corporate oversight systems as described in III.E.

2. *Injury and Illness Performance.* To qualify for the Merit Program, the applicant's TCIR and DART rates must meet the Merit requirements as set forth in Appendix B.

3. *Safety and Health Management System.* To qualify for Merit, the basic elements and sub-elements of an SHMS, set forth in Appendix A, must be operational or, at a minimum, must be in place and ready for implementation by the date of approval. If, in OSHA's judgment, the SHMS is not operating as effectively as it should, and/or deficiencies in SHMS elements and sub-elements exist, a plan and timeline to correct these problems must be in place.

4. *Terms of Participation.* OSHA will approve applicants to the Merit Program for a time period agreed upon in advance of approval, but not to exceed three years. This term will depend upon how long it is expected to take the applicant to accomplish the goals for Star participation. Merit participation is canceled at the end of the term unless approval for a second term is recommended by the Regional Administrator and is approved by the Assistant Secretary. The Regional Administrator will recommend a second term only when unanticipated unique circumstances slow the participant's progress toward accomplishing the Merit goals.

V. Application Process

Applicants must obtain and completely fill out an application. Applications are available from the Office of Partnerships and Recognition in the National Office, the VPP Manager in the appropriate Regional Office, or they can be downloaded from OSHA's Web site, *http://www.osha.gov.*

A. Application Instructions

OSHA prepares, keeps current, and makes available application instructions for VPPC. All interested parties may obtain this information from the Office of Partnerships and Recognition in the National Office, the VPP Manager in the appropriate Regional Office, or it can be downloaded from OSHA's Web site.

B. Content

1. Applicants must provide all information described in the most current version of the application instructions for VPPC.

2. If the application information is incomplete or otherwise insufficient to determine an applicant's eligibility, OSHA may request an applicant to submit an application amendment with the needed supplementary information.

3. Materials documenting the applicant's SHMS that contain trade secrets or employee privacy interests must not be included in the application. Instead, the applicant must describe such materials in the application and provide them for review during an application assistance visit and/or during the onsite evaluation.

4. All applications must, at a minimum, include the following information:

a. The applicant's official name, address, and phone number(s).

b. The name, title, address, phone/fax number(s), and e-mail address(es) of the applicant's primary VPPC contact person.

c. The applicant's safety and health policies, requirements, and management systems, and a discussion of how they meet the specific VPPC requirements described in Appendix A.

d. The applicant's recordkeeping data, including TCIR and DART rates (see Appendix B for details); and

e. A description of how the applicant communicates and enforces its safety and health policies, requirements, and management systems.

In addition to these contents, C/D/BU applicants must include the following additional information:

f. A description of the corporate oversight system(s) that the applicant uses to ensure that the SHMS is implemented effectively at all projects/sites.

g. An identification of the geographic boundaries for which the applicant is seeking VPPC status; and

h. An estimate of the number of projects/sites that will be covered in the defined geographic area.

C. Submission to OSHA

Applicants must submit their application packages to the appropriate OSHA Regional Office. Additional copies of the application package will be requested and forwarded to the National Office and/or C/D/BU Expansion Regions as appropriate. OSHA normally requires at least two copies, but the number requested may vary depending upon circumstances particular to the program and/or the applicant. The applicant should determine the actual number of copies to submit during pre-application discussions with OSHA VPPC personnel.

D. Initial OSHA Review

OSHA conducts an initial review of each VPPC application to determine whether it meets all VPPC requirements, including: injury and illness rates, a written SHMS, and any additional supporting documentation.

1. *Acceptance of Application.* a. If an application package appears to meet all VPPC requirements, it moves on to the next phase of the approval process, which is an onsite evaluation.

b. If the initial application package is incomplete, or provides insufficient evidence of VPPC qualifications, OSHA will give the applicant an opportunity to improve its application by submitting amended or additional materials. A site-based applicant will have 30 days to respond to this request. A C/D/BU applicant will have 90 days.

2. *Denial of Application.* a. If the application is incomplete or insufficient, and if after notification the applicant has not responded within either 30 or 90 days (whichever applies) to an OSHA request for more information, the agency considers the application unacceptable and notifies the applicant of that determination. The applicant may resubmit the application when it has rectified the deficiencies.

b. If, upon reviewing the application package, OSHA determines that an application does not meet VPPC requirements, OSHA will notify the applicant of that determination. The applicant may submit a new application after one year.

3. *Withdrawal of Application.* a. An applicant may withdraw a submitted application at any time. When the applicant notifies OSHA of its desire to withdraw, the original application(s) may be returned to the applicant.

b. OSHA may keep the assigned VPP Manager's marked working copy of the application for up to one year before discarding it, in order to respond knowledgeably should the applicant raise questions concerning the handling of the application. Once an applicant withdraws its application, it must submit a new application to be considered for VPPC approval.

VI. Evaluation Process

A. Evaluation Process for a Site-Based Applicant

1. *Purpose.* After completing the initial review of an application, OSHA, in its non-enforcement capacity, will perform an onsite evaluation. The purpose of the onsite evaluation is to verify that the application information is complete and accurate, and to determine whether or not the applicant meets all VPPC requirements.

2. *Preparation.* The onsite evaluation is arranged at the mutual convenience of OSHA and the applicant. The evaluation team consists of a team leader, a back-up team leader (whenever possible); and health, safety, and other specialists as required by the size of the sites, the complexity of the construction work, and inherent hazards.

3. *Duration and Scope.* a. Duration. The time required for the onsite evaluation depends on the size of the worksite, the extent of the safety and heath policies and requirements, the complexity of the site construction work, and the inherent hazards.

b. Scope. All onsite evaluations follow a three-pronged strategy that assesses an applicant's SHMS by means of document review, site walkthrough, and employee interviews. The onsite evaluation includes a review of elements found in Appendix C of this document.

B. Evaluation Process at a C/D/BU Headquarters

The purpose, preparation, duration, and scope of a C/D/BU headquarters evaluation reflect the information found in section VI.A (above) unless otherwise noted.

1. *Scope.* While a C/D/BU headquarters evaluation will follow the three-pronged approach as described in section VI.A.3.b and Appendix C, the amount of emphasis placed on the site walkthrough will depend on the scope of work at the site. The scope of the walkthrough will be at the discretion of the evaluation team leader.

C. Evaluation Process at a C/D/BU Project/Site

The purpose, preparation, duration, and scope of a C/D/BU projects/sites evaluation reflect the information found in section VI.A (above) unless otherwise noted.

1. *Preparation.* OSHA will announce the worksite evaluations in advance of arrival to assure the presence of representatives of the employer and employees or the appropriate personnel needed to aid in the evaluation. (Staff from Expansion Regions may also participate, as appropriate.) The length of advanced notice is at the discretion of the Regional Administrator but should not exceed the amount of time it takes to coordinate a successful onsite evaluation. The applicant must obtain permission from the owner, general contractor, or other controlling employer of the worksite for OSHA to come onsite to conduct the VPPC onsite evaluation. (In instances where the applicant is the general contractor or controlling employer, this will not be an issue.) Additionally, the contractor must agree to immediately correct, or include in an abatement plan, any violations identified by OSHA while evaluating the participant. Failure to comply with these assurances will result in a referral to enforcement. Detailed steps regarding how OSHA will handle non-VPPC applicant/participant violations are found in section III.J.4.

OSHA must be able to obtain access permission, along with the controlling employer assurances stated above, to a representative sample of sites in order to approve a C/D/BU applicant. The C/D/BU applicant will supply a list of sites when OSHA is ready to conduct the onsite evaluations. The list will identify any sites where OSHA access may be an issue. At that time, the Regional Administrator will determine if the list provided enables OSHA to review a good cross section of the company's operations to determine VPPC approval.

2. *Scope.* OSHA will conduct onsite evaluations in each designated geographical areas as follows:

- When an applicant has 2–25 projects/sites in the defined geographic area, OSHA will perform 2 onsite evaluations.[3]
- When an applicant has 26–99 projects/sites in the defined geographic area, OSHA will perform 3 onsite evaluations.
- When an applicant has 100+ projects/sites in the defined geographic area, OSHA will perform 4 onsite evaluations.

Projects/sites will be selected, at OSHA's discretion, from a list provided by the applicant. In addition to the documentation review list found in Appendix C, the team will also review the project/site SIP.

VII. Approval Process and Recommendations

A. Approval Process

To become an approved VPPC participant, applicants must, through their application package and onsite evaluation(s), demonstrate that they meet either the minimum Star or minimum Merit requirements, as set forth in section IV, at the site (for site-based applications) or at *all* projects/sites in the defined geographical area (C/D/BU). For C/D/BU applicants, if one of the projects/sites fails to meet minimum requirements, then OSHA will ask the applicant to withdraw.

B. OSHA Recommendations

The Primary Region is responsible for developing an approval recommendation, including SHMS improvements the applicant may need to make. This recommendation will be based on the application package and the onsite evaluation(s). This recommendation will help the Assistant Secretary make the final decision for approval into VPPC, as well as whether to approve in the Star or Merit Programs.

1. *Approval.* An applicant may be approved for either the Star or Merit Program. General approval requirements for each level are set forth in section IV.

2. *Deferred Approval.* If the onsite evaluation(s) determine that the applicant needs to take steps to come into compliance with OSHA rules, OSHA will give the applicant 48 hours to come into compliance before making a recommendation for VPPC approval to the Assistant Secretary. (At the evaluation team leader's discretion, longer periods of time may be given, up to 90 days, when interim protection is provided.) Deficiencies related to the applicant's SHMS may become the subject of Merit goals.

3. *Withdrawal.* If the Regional Administrator determines that the applicant does not meet the requirements for participation at the Merit level of VPPC, the agency will allow a reasonable amount of time (not to exceed 30 calendar days) for the applicant to withdraw its application before the Director of Cooperative and State Programs makes a denial recommendation to the Assistant Secretary.

4. *Denial.* If OSHA denies approval, the denial becomes effective on the date that the Assistant Secretary signs the denial letter informing the applicant of the decision.

An applicant may appeal the findings of the OSHA evaluation team(s) to the Assistant Secretary. The Director of Cooperative and State Programs will forward the appeal to the Assistant Secretary, along with the team's findings, Regional Administrator's recommendation of denial, and the Director's own recommendation.

Should the Assistant Secretary reject an approval recommendation made by the Director of Cooperative and State Programs and/or the Regional Administrator, the Assistant Secretary will send a letter to the applicant denying approval and explaining the rejection. The decision becomes effective on the date this letter is signed.

VIII. Recognition

When OSHA approves an applicant, it recognizes that the senior management has established, communicated, assessed, and enforced an SHMS that provides effective protection of workers at their projects/sites through the systematic implementation of VPPC's basic elements and requirements. This

[3] Applicants who do not have at least two sites within a defined geographic area should not apply under C/D/BU for that geographic area. A possible exception is the approved Primary Region participant who wishes to expand into one or more regions.

protection makes general OSHA scheduled inspections unnecessary. Therefore, OSHA removes the site (for site based applicants) and the work performed within the defined geographic area (for C/D/BU applicants) from the agency's programmed inspection lists (unless the participant chooses not to be removed).[4]

The participant receives a congratulatory letter from senior OSHA officials recognizing its approval as a VPPC organization. OSHA additionally awards the participant with a flag or banner that it can fly or otherwise display. OSHA also will make available for purchase extra flags, decals for vehicles and trailers, certificates and plaques for posting in offices, or other means to proclaim VPPC recognition and participation. The participant also may choose to use program logos on such items as letterhead, shirts, and mugs.

All VPPC participants will be recognized by OSHA in publications, newsletters, and OSHA's Web site as appropriate.

IX. Reevaluation Process

A. The Star Program

1. *Purpose.* The onsite reevaluations of Star participants are intended to:

a. Determine continued qualification for the Star Program;

b. Document results of program participation in terms of the evaluation criteria and other noteworthy aspects of the participant's SHMS; and

c. Identify any problems that have the potential to adversely affect continued Star Program qualification and determine appropriate follow-up actions.

2. *Frequency.* OSHA will perform all reevaluations at no greater than 2-year intervals after the initial Star approval. (The identification of potentially serious safety and health hazards may create the need for more frequent evaluations.) For C/D/BU participants, the number of reevaluations performed will follow the chart found in section VI.C.2. OSHA will base the number of reevaluations it performs on the number of sites within the defined geographic area at the time of the reevaluation, not the number of evaluations performed during initial approval.

3. *Scope.* OSHA's reevaluation of Star Program participants consists mainly of an abbreviated onsite evaluation. OSHA reviews documents related to SHMS implementation since the most recent evaluation, interviews employees, and walks through the project/site. The evaluation will include a review of TCIR and DART rates as described in Appendix B.

4. *Measures of Effectiveness.* The measures of effectiveness are identical to the elements described generally in Section IV.A., and with greater detail in Appendices A and B.

5. *Reevaluation Recommendations.* The OSHA onsite evaluation team makes one of the following recommendations to the Regional Administrator, and the Regional Administrator decides to:

a. Approve continued participation in the Star Program;

b. *Allow a conditional participation in the Star Program.* The VPPC onsite evaluation team may recommend this alternative if it finds that the participant has allowed one or more program elements to slip below Star quality. The participant must return its SHMS to Star quality within an agreed upon time period and must demonstrate a commitment to maintain that level of quality. A VPPC onsite evaluation team must return to determine if the participant's SHMS has again achieved Star quality. If the participant has restored and maintained full Star quality, the team recommends the participant for reapproval to the Star Program; or

c. *Recommend termination.* After considering the recommendation of the VPPC onsite evaluation team, the Regional Administrator may recommend to the Assistant Secretary that a participant be terminated if VPPC Star requirements are no longer being met. See section X for termination procedures.

B. The Merit Program

1. *Purpose.* The onsite reevaluations for Merit participants are intended to:

a. Determine whether the participant qualifies for approval to the Star Program;

b. Determine whether adequate progress has been made toward the agreed-upon Merit goals;

c. Identify any problems in the participant's SHMS or its implementation that require resolution in order to continue qualification or meet agreed-upon goals;

d. Document program improvements and/or improved results; and

e. Provide advice and suggestions for needed improvements.

2. *Frequency.* The onsite reevaluation of a Merit participant is conducted every 12–18 months. The participant may request an earlier reevaluation if it believes it has met Star Program qualifications. For C/D/BU participants, the number of reevaluations performed will follow the chart found in section VI.C.2. OSHA will base the number of reevaluations it performs on the number of sites within the defined geographic area at the time of the reevaluation, not the number of evaluations performed during initial approval.

3. *Scope.* OSHA's reevaluation of Merit Program participants consists mainly of an abbreviated onsite evaluation. OSHA reviews documents related to SHMS implementation since the most recent onsite evaluation, interviews employees, and walks through the project/site. The evaluation will include a review of TCIR and DART rates as described in Appendix B for the most recent three calendar years (when available).

4. *Measures of Effectiveness.* The measures of effectiveness are identical to the elements described generally in Section IV.B and with more detail in Appendices A and B.

5. *Reevaluation Recommendations.* The OSHA onsite evaluation team makes one of the following recommendations to the Regional Administrator and the Regional Administrator decides to:

a. Approve continued participation in the Merit Program;

b. Approve advancement to the Star Program; or

c. *Recommend termination.* After considering the recommendation of the VPPC onsite evaluation team, the Regional Administrator may recommend to the Assistant Secretary that a participant be terminated if the participant has been found to have significantly failed to maintain its SHMS at Merit quality. See section X for termination procedures.

X. Separation from VPPC

A. Project/Site Completion

A participant is separated from VPPC when:

1. *Site-Based.* Construction work at the site has been completed.

2. *C/D/BU.* All construction work in a defined geographic area has been completed and no new work is expected within a reasonable timeframe (as determined by the appropriate Regional Administrator).

B. Withdrawal

1. *Withdrawal of a Participating Site.* A participant may withdraw from VPPC for any reason, including a receipt of a notice of intent to terminate, by submitting written notification to the appropriate Regional Administrator.

[4] Sites that qualify for exemption, but for some reason do not appear on the lists (*i.e.*, the project/site is too new to have appeared on previous lists), may still receive the exemption provided that VPPC participation is verified with the inspecting official upon her/his arrival.

2. *Reapplication Following Withdrawal.*

a. If a participant withdraws its application or withdraws from the program of its own accord, and if it has met OSHA inspection history conditions and assurances, then the participant may reapply at any time.

b. If a participant withdraws its application or withdraws from the program due to an OSHA enforcement inspection, and if it has met OSHA inspection history conditions and assurances, then the participant may reapply when the agency has closed all enforcement activity.

c. If a participant withdraws its application or withdraws from the program due to withdrawal of union support, and if it has met OSHA inspection history conditions and assurances, then the participant may reapply when the Regional VPP Manager receives a new letter of union support.

C. Termination

1. *Reasons for Termination.* A participant is terminated from VPPC when:

a. Senior management or the duly authorized collective bargaining agent(s), where applicable, withdraw support for VPPC participation.

b. A participant fails to maintain its SHMS in accordance with the requirements detailed in Appendix A and B.

c. Within the designated timeframe, the participant makes no significant progress toward achieving the established Merit or Star Conditional goals.

d. The Merit term of approval has expired, and no recommendation has been made for a second term.

e. The Regional Administrator presents written evidence to the Assistant Secretary that the essential trust and cooperation among labor, management, and OSHA no longer exist, and therefore recommends termination, and the Assistant Secretary concurs. (The company may petition the Assistant Secretary to explain unusual circumstances that might allow it to continue in the program.)

f. A fatality or series of imminent danger situations occur. (The company may petition the Assistant Secretary to explain unusual circumstances that might allow it to continue in the program.)

2. *Termination Notification and Appeal or Withdrawal.* Under most circumstances, OSHA will notify a participant with its intention to terminate 30 days prior to executing the decision. During the 30-day period, the participant is entitled to appeal the decision, in writing, to the Assistant Secretary. OSHA does not provide 30 days' notice when:

a. Construction has been completed at a participating site or in a defined geographic area;

b. Other terms for termination were agreed upon during the approval process; or

c. A set period for approval is expiring.

3. *Reapplication Following Termination.* OSHA does not consider the reapplication of a terminated participant for a period of 3 years from the date of termination. Reinstatement requires reapplication.

XI. VPPC Demonstration Program

A. Program Purpose and Approval

1. The VPPC Demonstration Program provides the opportunity for construction companies and/or individual worksites to demonstrate the effectiveness of alternative methods for achieving safety and health excellence. These alternatives, if judged successful, may lead to changes in VPPC requirements. Alternatives to any current requirements and procedures may be included in a Demonstration Program so long as OSHA is convinced that all employees and contractors continue to receive VPPC quality protection.

2. The initial suggestion to develop a new Demonstration Program may come from either OSHA or any stakeholder, for example, employers, individual worksites, unions, or other organizations. Examples of possible purposes include:

a. Alternative application and approval protocols;

b. Alternatives to current injury and illness rate requirements and other performance requirements; and

c. Alternative methods for implementing the four SHMS elements.

3. A VPPC Demonstration Program may also explore the potential for a new VPPC program.

4. A formal, written proposal for a VPPC Demonstration Program will be developed at the National Office or Regional Office level and will include a detailed description of the proposed program, including:

a. The desirability of establishing the program, and how it would serve the goals of VPPC.

b. The alternative approaches to be tested, including proposed methodology and potential benefits.

c. VPPC Star or Merit requirements, if any, that participants would not be expected to meet.

d. Measures to ensure that all employees and subcontractors will receive the protection of a VPP quality safety and health management system.

e. System to evaluate the demonstration to determine its success or failure.

5. The Assistant Secretary will decide whether to approve a proposed program. The Assistant Secretary must be satisfied that the proposed alternative approach shows reasonable promise of being successful and of leading to changes in the VPPC.

6. OSHA will consider applications upon public announcement of the Assistant Secretary's decision to implement a new program. This announcement may take the form of a fact sheet, press release, entry on OSHA's Web site, or other means.

B. Qualifications for VPPC Demonstration Programs

Demonstration Program applicants must have a VPP quality safety and health management system that, at a minimum, addresses the elements and sub-elements as demonstrated in Appendix A. Applicants must also comply with 29 CFR 1926.20 requirements for construction sites. How the applicant implements these elements may be the subject of demonstration so long as the applicant ensures VPPC quality protection for all employees and contractors.

C. Term of Participation

Construction participants may be approved to a Demonstration Program for the time period agreed upon in advance of approval and subject to regular evaluation as defined in the Demonstration Program.

D. Successful VPPC Demonstration Program

If the alternatives tested in a VPPC Demonstration Program have proven successful, OSHA may choose to change the provisions of VPPC Star or Merit to incorporate the successful aspects of the demonstration. Furthermore, the successful Demonstration Program participants may be approved to VPPC Star or Merit.

1. Any change in either VPPC Star or Merit will require a decision by the Assistant Secretary that including the Demonstration Program alternatives is desirable and will result in a continuing high level of worker protection.

2. Once the Assistant Secretary makes a decision to change VPPC provisions, the change(s) become effective on the date OSHA announces them to the public.

3. When the change(s) become effective, the VPPC Demonstration participants may be approved to VPPC Star or Merit without submitting a new application or undergoing further onsite review, provided that the approval occurs no later than 18 months following the last evaluation under the Demonstration Program. If more than 18 months have elapsed, OSHA must conduct an evaluation prior to recommending the participant for approval to VPPC Star.

E. Program Termination

1. OSHA will terminate a Demonstration Program for the following reasons:

a. The Demonstration Program is likely to endanger workers at participating projects/sites;

b. It is unlikely that the Demonstration Program will result in participants' approval to the Star Program or creation of a new program;

c. The Demonstration Program period has expired; or

d. Construction work at all approved projects/sites has been completed or otherwise has stopped.

2. When a Demonstration Program ends, any participants not approved to Star are terminated from VPP for Construction.

XII. Questions for Public Feedback

OSHA has not resolved all issues raised during its discussions with stakeholders. Therefore, OSHA asks for public comment on the following questions in addition to the preceding proposal.

A. Should OSHA Continue to Rely on Its Traditional Measures of Applicant/Participant Performance, or Should It Consider Alternatives?

For example, some parties have suggested that OSHA develop a "scorecard" of leading indicators that could be used in conjunction with current injury and illness rate requirements. If OSHA were to place less reliance on rates, what should it include in a scorecard? Examples: experience modification rates, tracking of hazards and corrective actions, work practice assessment, etc.

B. Should OSHA Expand Current Performance Requirements?

Examples:

1. Specific minimum training requirements. For employees, OSHA 10-hour or equivalent training; for supervisors, OSHA 30-hour or equivalent training.

2. 100% fall protection over 6 feet for all trades/employees.

3. Prequalification for all subcontractors. For example, injury/illness rates below BLS industry averages, experience modification rates at 1 or below, written safety and health program/management system, etc.

4. Required drug testing/screening policy. For example, screening for all employees, including subcontractors and temporary employees.

5. Required daily meetings/employee safety briefings devoted to planning and safety awareness.

C. How Should OSHA Assure Union Support for VPPC Participation?

Meaningful employee involvement is a cornerstone of OSHA's Voluntary Protection Programs (VPP), and OSHA considers it essential to continue this tradition in its Voluntary Protection Program for Construction (VPPC). When some or all of a VPP participant's employees are represented by labor unions, OSHA has recognized the importance of union support for VPPC participation.

Early **Federal Register** notices required that when a VPP applicant "has a significant portion of its employees organized by one or more collective bargaining units, the authorized agent(s) must either sign the application or submit a signed statement indicating that the collective bargaining agent(s) do(es) not object to participation in the program."

The requirement for union support became more comprehensive with the July 2000 **Federal Register** notice, which provided "At sites with employees organized into one or more collective bargaining units, the authorized representative for each collective bargaining unit must either sign the application or submit a signed statement indicating that the collective bargaining agent(s) support VPP participation."

OSHA seeks public input on the question of how to assure union support for an applicant/participant's VPPC participation. We recognize the complexity of this question. At a typical construction project, multiple unions may represent workers, and different unions may represent workers at different phases of the project. Some unions may represent many workers, others only a few. Should OSHA require written support from some or all? What means should OSHA accept as demonstrations of support? Should the requirement be different for site-based applicants and C/D/BU applicants? How should OSHA respond if one of multiple authorized representatives at an approved site or C/D/BU subsequently withdraws support?

D. How Many Onsite Evaluations Should OSHA Require for C/D/BU Applicants/Participants?

Some C/D/BU applications may encompass dozens, even hundreds of worksites in a single region. Others may involve only a handful of sites. How do we formulate this requirement to ensure an adequate evaluation of the applicant's actual practices, fairness to the applicant, and feasibility in the expenditure of OSHA resources?

In this document, OSHA is considering a tiered approach for this element. The minimum required number of worksite evaluations per approved geographic area for each C/D/BU applicant will be two. (For details, see section VI.C.2) Is this a fair and adequate approach to worksite evaluations?

E. For C/D/BU applicants, this proposal requires a corporate oversight system to verify that the applicant/participant's projects/sites are maintaining VPPC-level safety and health performance. The participant must perform various specified oversight actions on an ongoing basis. (For details, see section III.E) OSHA is interested in learning whether this list of actions accurately reflects companies' safety and health oversight practices. Are there other actions companies take to assure that their worksites are operating effective safety and health management systems and successfully eliminating/controlling hazards and minimizing injuries and illnesses?

F. Some subcontractors applying to OSHA for consideration as participants in VPPC may be so small (*i.e.*, employ 10 or fewer employees) that they are not required to keep OSHA logs. Are there alternative records or indicators that small employers can use to demonstrate that their injury and illness rates are low? For example, would an employer's Experience Modification Rate (EMR) be an appropriate alternative? Please describe the potential advantages and disadvantages of any approach you suggest as an alternative.

G. The Short-Term Construction and Mobile Workforce Star Demonstration Programs conducted by OSHA showed that VPP elements may be implemented differently on construction sites than at fixed worksites. For example, standing safety and health committees may not be feasible in a mobile work environment, but other forms of employee involvement, such as regular tool box meetings, may be used instead. Are there other forms of employee involvement that are used on construction sites that have been found

to be effective? Please describe the basis for your answer.

H. Management leadership also may be evidenced differently in the construction environment than in a fixed worksite environment. What methods of demonstrating top management's accessibility and commitment have proven effective in the construction environment? Please discuss your reasons for believing that these methods are effective.

Appendix A. Safety and Health Management System Requirements

To be approved as a VPPC participant, a site-based or C/D/BU applicant must meet and be effectively performing all the elements and sub-elements of a comprehensive SHMS. The four elements are:

- Management leadership and employee involvement;
- Worksite analysis;
- Hazard prevention and control; and
- Safety and health training.

A. Management Leadership and Employee Involvement

Each applicant must be able to demonstrate top-level management leadership in the development, implementation, and ongoing operation of the project/site's SHMS. The following sub-elements are required to demonstrate this leadership:

1. Management Commitment to Safety and Health Protection. Authority and responsibility for employee safety and health must be integrated with the overall management system of the organization and must involve employees. This commitment includes:

a. Policies for worker safety and health protection that are clearly established, are communicated to and understood by employees, and, where applicable, subcontractor and temporary employees.

b. Effective and meaningful goals for safety and health are established, communicated and reviewed annually. Results-oriented objectives for meeting the goals are also established and all employees must understand the results desired and the measures planned for achieving them, especially those factors that directly apply to them.

2. Commitment to VPPC Participation. Management must clearly demonstrate commitment to meeting and maintaining the requirements of the VPPC.

3. Planning. Planning for safety and health must be a part of the overall management planning process, including pre-job planning and preparation for different phases of construction. Where applicable, subcontractors should be included as participants in the planning process.

4. Written SHMS. All four elements of a basic SHMS must be part of the written program and must also meet the requirements of 29 CFR 1926.20. All aspects of the SHMS must be appropriate to the size of the worksite and the nature of the work activity conducted. For small contractors, OSHA may waive some formal documentation requirements where the effectiveness of the systems has been evaluated and verified.

5. Visible Leadership. Managers must provide visible leadership in implementing the SHMS elements. This must include:

a. Establishing clear lines of communication with employees; subcontractors, and temporary employees;

b. Setting an example of safe and healthful behavior;

c. Creating an environment that allows for reasonable employee access to top site or company management;

d. Ensuring that all workers at the projects/sites, including, if applicable, subcontractors and temporary employees, are provided equally high quality safety and health protection;

e. Clearly defining responsibility in writing, with no unassigned areas. Each employee, at any level, must be able to describe his/her responsibility for safety and health;

f. Assigning commensurate authority to those who have safety and health responsibilities;

g. Affording adequate resources to those who have responsibility and authority. This includes such resources as time, training, personnel, equipment, budget, and access to information and experts, including appropriate access to Certified Safety Professionals (CSP), Certified Industrial Hygienists (CIH), licensed health care professionals, and other experts as needed, based on the risks at the project(s)/site(s); and

h. Holding construction site managers, supervisors, and non-supervisory employees accountable for meeting their safety and health responsibilities. In addition to clearly defining and implementing policy for authority and responsibility for safety and health protection, management leadership entails evaluating managers and supervisors annually, and operating a documented system for correcting deficient performance.

6. Employee Involvement. The company and site culture must enable and encourage effective employee involvement in the planning and operation of the safety and health management system and in decisions that affect employees' safety and health. The requirement for employee participation may be met in a variety of ways, as long as employees have at least three active and meaningful ways to participate in safety and health problem identification and resolution. This involvement must be in addition to the individual right to notify appropriate managers of hazardous conditions and practices and to have issues addressed. Examples of acceptable employee involvement include but are not limited to the following:

a. Participating in safety and health problem-solving groups;

b. Participating in audits and/or worksite inspections;

c. Participating in accident and incident investigations;

d. Developing and/or participating in employee improvement suggestion programs;

e. Training other employees in safety and health;

f. Analyzing job/process hazards;

g. Acting as safety observers;

h. Serving on safety and health committees constituted in conformance to the National Labor Relations Act.

7. Subcontractor Worker Coverage. All contractors and subcontractors working onsite must follow worksite safety and health rules and procedures applicable to their activities while at the site.

a. In addition to ensuring that subcontractors follow site safety and health rules, VPPC participants are expected to encourage their subcontractors to develop and operate effective SHMS.

b. To this end, VPPC applicants and participants must have in place a documented oversight and management system for applicable subcontractors that ensure their site employees are provided effective protection in a manner that drives improvement for their safety and health. Such a system should ensure that safety and health considerations are addressed during the subcontractor selection process and when they are working onsite.

8. Annual Self-Evaluation. Every participant must have a system for annually evaluating the operation of their SHMS. (C/D/BU participants are expected to evaluate their program annually but may evaluate all sites collectively.) Each year, by February 15, participants must send their annual self-evaluation to their designated OSHA Regional VPP Manager. This system judges success in meeting the program's goal and objectives, and assists those responsible to determine and implement changes for continually improving worker safety and health protection. The following information must be included in each annual self-evaluation:

a. The site's TCIR and DART rates for the previous calendar year, including the injury and illness experience of all subcontractors and temporary employees;

b. The total number of cases for each of the above two rates;

c. Total hours worked at participating VPP worksites;

d. Estimated average employment for the last full calendar year;

e. A copy of the most recent annual self-evaluation of the applicant's safety and health program; and

f. A description of any worksite success stories (*e.g.*, reductions in workers' compensation rates, increases in employee involvement in the program, etc.)

In addition:

g. The system must provide for an annual written narrative report with recommendations for timely improvements, assignment of responsibility for those improvements, and documentation of timely follow-up action or the reason no action was taken;

h. The evaluation must assess the effectiveness of all elements and sub-elements of the company/site's SHMS; and

i. The evaluation may be conducted by any of the following: competent site, corporate, or other private sector persons who are trained and/or experienced in performing such evaluations. The evaluation should follow any format recommended by OSHA.

9. Final Evaluation. A final evaluation must also be conducted immediately prior to

completion of construction to determine what has been learned about safety and health activities that can be used to improve the SHMS at other sites. Under C/D/BU, the company may submit a summary of these evaluations for completed work along with their annual self-evaluation.

B. Worksite Analysis. Management of a construction site SHMS must begin with a thorough understanding of all hazardous situations to which employees may be exposed and the ability to recognize and correct all hazards as they arise. This requires:

1. Procedures to ensure analysis of all newly acquired materials, equipment, facilities etc., or before beginning a new process, or phase(s) of work, to identify hazards and the means of prevention or control.

2. Comprehensive safety and health surveys at intervals appropriate for the nature of workplace operations, which include:

a. Identification of safety and health hazards by an initial comprehensive baseline survey and then subsequent surveys as needed.

b. Conduct of a Baseline Hazard Analysis, which must:

• Identify and document common safety hazards (a hazard exposure profile) associated with the site (such as those found in OSHA regulations for which existing controls are well known), and how they are controlled.

• Identify and document common health hazards (usually through initial screening using direct-reading instruments) and determine if further sampling (such as full-shift dosimetry) is needed. The employer shall sample for employee exposures to health hazards and shall base baseline determinations on the employee exposure results.

• Identify and document safety and health hazards that need additional study.

• Cover the entire worksite or location within the site, and indicate who conducted the survey and when it was completed.

In addition:

• Applicants/participants may use historical data collected from similar tasks from previous jobsites as a sample data baseline provided that the sampling was conducted under workplace conditions closely resembling the processes, type of material, control methods, work practices, and environmental conditions prevailing in the employer's current operations. Historical data must be reviewed and updated as appropriate to the type of operations performed.

• Employees are expected to have been trained appropriately and have access to the historical database before beginning a task.

• If the operation(s), equipment or material(s) that are being used on a job vary significantly from an established hazard exposure profile (*e.g.*, a change of equipment, process, personnel or a new task has been initiated that may result in additional employee exposure), a new hazard analysis must be conducted prior to beginning that task/phase to ensure appropriate hazard controls are in place, and sampling or monitoring is conducted as required.

3. Industrial Hygiene Program. Identification of health hazards and employee exposure levels accomplished through a written industrial hygiene program including a sampling rationale and strategy. The sampling strategy and rationale must be documented, include when initial screening and full shift sampling are needed/performed, and must follow nationally recognized procedures for sampling, testing and analysis. An example of developing a sampling rationale could include review of work processes, material safety data sheets, employee complaints, exposure incidents, medical records, and previous monitoring results. The sampling strategy should include baseline and subsequent surveys that assess employees' exposure through screening and full shift sampling when necessary.

4. Examination and analysis of safety and health hazards associated with routine individual jobs, processes, or phases and inclusion of the results in training and hazard control programs. This may include job hazard analysis and/or process hazard review with an emphasis on special safety and health hazards of each craft and each phase of work.

5. Examination and analysis of safety and health hazards associated with non-routine tasks (those performed less that once a year), and significant changes such as new processes, materials, and equipment must also be conducted to identify uncontrolled hazards and provide controls prior to the activity or use.

6. A system for conducting, as appropriate, routine self-inspections that follows written procedures or guidance and that results in written reports of findings and tracking of hazard elimination or control to completion.

a. For site-based participants inspections must be conducted as often as necessary, but cover the entire worksite at least weekly.

b. For C/D/BU participants, inspections must be conducted as often as necessary based on the operation, hazards associated with the tasks, and regulatory requirements. However, at a minimum an inspection must be performed and documented at least weekly for all work within the Federal OSHA jurisdiction covered by the application.

• For subcontractor C/D/BU participants it is expected that only the scope of work at assigned work areas will be included in the inspections.

7. A reliable system for employees working at the projects/sites without fear of reprisal, to notify appropriate management personnel in writing about conditions that appear hazardous and to receive timely and appropriate responses. The system must include tracking of responses and tracking of hazard elimination or control to completion.

8. An accident/incident investigation system that includes written procedures or guidance, with written reports of findings and hazard elimination or control tracking to completion. Investigations are expected to seek out root causes of the accident or event and to cover "near miss" incidents. (Root Cause Analysis education and training may be required by the contractor to fully understand how to conduct and complete a root cause analysis.)

9. A system to analyze trends at the site through a review of injury/illness experience and hazards identified through inspections, employee reports, accident investigations, and/or other means, so that patterns with common causes can be identified and the causes eliminated or controlled.

10. C/D/BU subcontractor applicants/participants must be able to demonstrate that a system is in place to correct hazards created by others if their employees are exposed. This could include providing interim protections such as temporary guards or removing employees from the hazard. The subcontractor must be able to demonstrate that these policies are understood by their employees and the controlling employer, who has ultimate responsibility for safety on the site.

C. Hazard Prevention and Control

Site hazards identified during the hazard analysis processes must be eliminated or controlled by developing and implementing the systems discussed at (2) below and by using the hierarchy provided at (3) below.

1. The hazard controls a site chooses to use must be:

a. Understood and followed by all affected parties;

b. Appropriate to the hazards of the site;

c. Equitably enforced through a clearly communicated written disciplinary system that includes procedures for disciplinary action or reorientation of managers, supervisors, and non-supervisory employees who break or disregard safety rules, safe work practices, proper materials handling, or emergency procedures;

d. Written, implemented, and updated by management as needed, and must be used by employees; and

e. Incorporated in training, positive reinforcement, and correction programs;

2. The required systems of hazard prevention and control are:

a. A system for initiating and tracking hazard elimination or control in a timely manner;

b. A written system for, and ongoing documentation of, the monitoring and maintenance of site workplace equipment such as preventive and predictive maintenance, to prevent equipment from becoming hazardous;

c. An occupational health care program that uses licensed health care professionals to assess employee health status for prevention of and early recognition and treatment of illness and injury; and that provides, at a minimum, access to certified first aid and Cardiopulmonary Resuscitation (CPR) providers, physician care, and emergency medical care for all shifts within a reasonable time and distance. Occupational health care professionals should be used as appropriate to accomplish these functions; and

d. Procedures for response to emergencies on all shifts. The applicant/participant will develop an emergency action plan commensurate with the complexity and/or proximity to outside hazards to the project/site. This will include the need to conduct emergency drills when feasible as the project progresses from phase to phase.

• OSHA realizes that it may be technically infeasible or unnecessary to conduct annual emergency drills at all projects/sites. The

Onsite evaluation team will consider the effectiveness of alternative processes or systems. The applicant's written plan will be expected to be more in depth with a strong emphasis on employee and subcontractor orientation and training, including the applicant's development of a written plan that describes the policies and procedures it uses and what training it requires to ensure that employees know what to do in case of an emergency.

• Emergency procedures must also include emergency rescue procedures for situations such as in the event of a catastrophic collapse or confined space entry.

3. The following hierarchy should govern actions to eliminate or control hazards, with engineering controls being the most desirable:

a. Engineering controls are the most reliable and effective type of controls. These are design changes that directly eliminate (ideally) or limit the severity and/or likelihood of the hazard, *e.g.* reduction in pressure/amount of hazardous material, substitution of less hazardous material, reduction of noise produced, fail-safe design, leak before burst, fault tolerance/redundancy, ergonomics, etc. Although not as reliable as true engineering controls, this category also includes protective safety devices such as guards, barriers, interlocks, grounding and bonding systems, pressure relief valves to keep pressure within a safe limit, etc. These items typically seek to reduce indirectly the likelihood of the hazard. These controls are often linked with caution and warning devices like detectors and alarms that are either automatic (do not require a human response) or manual (require a human response);

b. Administrative controls that significantly limit daily exposure to hazard by control or manipulation of the work schedule or manner in which work is performed, *e.g.*, job rotation;

c. Work Practice controls, a type of administrative control that includes workplace rules, safe and healthful work practices, and procedures for specific operations. Work Practice controls modify the manner in which an employee performs assigned work. This modification may result in a reduction of exposure through such methods as changing work habits, improving sanitation and hygiene practices, or making other changes in the way the employee performs the job.

d. Personal protective equipment.

D. Safety and Health Training

Training is necessary to reinforce and complement management's commitment to prevent exposure to hazards. All site employees must understand the hazards to which they may be exposed and how to prevent harm to themselves and others from such hazard exposure. Effective training enables employees to accept and follow established safety and health procedures. Training for safety and health must ensure that:

1. Construction company and site managers and supervisors understand their safety and health responsibilities and are able to carry them out effectively;

2. Managers, supervisors, and non-supervisory employees (including subcontractor and temporary employees) are made aware of hazards, and are taught how to recognize hazardous conditions and the signs and symptoms of workplace-related illnesses;

3. Managers, supervisors, and non-supervisory employees (including subcontractor and temporary employees) learn the site safe work procedures to follow in order to protect themselves from hazards, through training provided at the same time they are taught to do a job and through reinforcement;

4. Managers, supervisors, non-supervisory employees (including subcontractor and temporary employees), and visitors on the site understand what to do in emergency situations; and

5. Where personal protective equipment is required, employees understand that it is required, why it is required, its limitations, how to use it, and how to maintain it; and employees use it properly.

Appendix B. Injury and Illness Data and Rate Requirements

To assess a VPPC applicant/participant's injury and illness performance, OSHA compares the total case incidence rate (TCIR) and the incidence rate for days away/restricted work activity/job transfer (DART rate) to industry national averages—benchmark rates—published annually by the Bureau of Labor Statistics (BLS).

The benchmark rates that OSHA uses will depend on the applicable Standard Industrial Code (SIC)/North American Industrial Classification System (NAICS) code. This is determined by:

• The prevalent type of construction work (for general contractors, construction managers, and other controlling employers); or

• The appropriate specialty contractor code (for craft/trade contractors).

A. Rate Requirements for VPPC STAR

1. Site-based Applicants/Participants. The site-based applicant must meet the following criteria at the time of approval:

a. The project/site for which the VPPC application is being made must have been in operation for at least 12 months.

b. The project/site must be able to provide combined TCIR and DART rates from the project/site's inception through the date of application. A combined rate must include the experience of all employees, subcontractors, and temporary employees actually working on the project/site.

c. The combined TCIR and DART rates, from the project's/site's inception through the date of application, must be below at least 1 of the 3 most recent years of specific industry national averages for nonfatal injuries and illnesses at the most precise level published by the BLS. (For additional details regarding the VPP benchmark, see the **Federal Register** Notice announcing the most recent VPP revision, 68 FR 68475–68479, December 8, 2003.)

2. C/D/BU Applicants. The C/D/BU applicant must meet the following criteria at the time of approval:

a. The C/D/BU must have been in operation for at least 3 years.

b. The C/D/BU must be able to provide the following rate information:

• TCIR and DART rates that reflect the experience of C/D/BU employees during the 3 most recent calendar years.

• Combined TCIR and DART rates that reflect the experience of all employees, subcontractors, and temporary employees for the most recent calendar year.

c. Each of the above TCIR and DART rates must be below at least 1 of the 3 most recent years of specific industry national averages for nonfatal injuries and illnesses at the most precise level published by the BLS.

d. In subsequent years, the combined TCIR and DART rates will reflect a phase-in of subcontractor and temporary employee data.

• At the end of the first year of participation, participants must provide to OSHA:

► TCIR and DART rates that reflect the experience of C/D/BU employees during the 3 most recent calendar years.

► Combined TCIR and DART rates that reflect the experience of all employees, subcontractors, and temporary employees for the 2 most recent calendar years.

• At the end of the second year of participation, and for each subsequent year, participants must provide to OSHA:

► Combined TCIR and DART rates that reflect the experience of all employees, subcontractors, and temporary employees for the 3 most recent calendar years.

e. Some C/D/BU applicants may be eligible for an alternative method for calculating incidence rates. See section C below.

B. Rate Requirements for VPPC MERIT

1. Site-based Applicants. The site-based applicant must meet the following criteria at the time of approval:

a. The project/site for which the VPPC application is being made must have been in operation for at least 12 months.

b. The project/site must be able to provide combined TCIR and DART rates from the project/site's inception through the date of application. A combined rate must include the experience of all employees, subcontractors, and temporary employees actually working on the project/site.

c. If the applicant's combined TCIR and DART rates do not meet Star requirements, the applicant must have a plan to achieve Star rates, as listed above in section A.1.c of Appendix B, within 2 years. It must be programmatically and statistically feasible, as determined by OSHA, for the project/site to meet this goal.

2. C/D/BU Applicants. C/D/BU applicants, at the time of approval, must meet the following criteria:

a. The C/D/BU must have been in operation for at least 3 years.

b. The C/D/BU must be able to provide OSHA with the following rate information:

• TCIR and DART rates that reflect the experience of C/D/BU employees during the 3 most recent calendar years.

• Combined TCIR and DART rates that reflect the experience of all employees, subcontractors, and temporary employees for the most recent calendar year.

c. If the applicant's combined TCIR and DART rates do not meet Star requirements, the applicant must have a plan to achieve Star rates, as listed above in section A.2.c of Appendix B, within 2 years. It must be programmatically and statistically feasible, as determined by OSHA, for the C/D/BU to meet this goal.

d. In subsequent years, the combined TCIR and DART rates will reflect a phase-in of subcontractor and temporary employee data.

• At the end of the first year of participation, participants must provide to OSHA:

► TCIR and DART rates that reflect the experience of C/D/BU employees during the 3 most recent calendar years.

► Combined TCIR and DART rates that reflect the experience of all employees, subcontractors, and temporary employees for the 2 most recent calendar years.

► At the end of the second year of participation, and for each subsequent year, participants must provide to OSHA:

► Combined TCIR and DART rates that reflect the experience of all employees, subcontractors, and temporary employees for the 3 most recent calendar years.

e. Some C/D/BU applicants may be eligible for an alternative method for calculating incidence rates. See section C below.

C. Alternative Rate Calculation for Qualifying Small C/D/BU's

1. Some C/D/BU applicants, usually smaller contractors with limited numbers of employees and/or hours worked, may use an alternative method for calculating incidence rates. The alternative method allows the C/D/BU to use the best 3 out of the most recent 4 years' injury and illness experience.

2. To determine whether the C/D/BU qualifies for the alternative calculation method, do the following:

a. Using the most recent employment statistics (hours worked during the most recent calendar year by C/D/BU employees plus other employees controlled by the C/D/BU, for example, subcontractors and temporary workers), calculate a hypothetical total recordable case incidence rate for the C/D/BU assuming two cases during the year.

b. Compare that hypothetical rate to the 3 most recently published years of BLS combined injury/illness total recordable case incidence rates for the industry.

c. If the hypothetical rate (based on two cases) is equal to or higher than the national average for the C/D/BU's industry in at least 1 of the 3 years, the C/D/BU qualifies for the alternative calculation method.

3. If the C/D/BU qualifies for the alternative calculation method, it may use the best 3 of the last 4 calendar years of C/D/BU employee injury/illness experience when calculating both the 3-year TCIR and the 3-year DART rate.

Appendix C. Protocol of Onsite Evaluations

Onsite evaluations will include the following procedures:

A. An opening conference;

B. A review of Injury, illness, and fatality records of the worksite(s);

C. Recalculation and verification of the TCIR and DART rates. (For C/D/BU evaluations OSHA may request a combined rate for all projects/sites as well as for individual sites);

D. A site walkthrough, including the following elements:

1. A general assessment of safety and health conditions to determine if the SHMS adequately protects workers from the hazards at the projects/sites;

2. Verification of compliance with OSHA and VPPC requirements; and

3. Verification that the SHMS described in the application has been implemented effectively.

E. Formal and informal interviews with relevant individuals involved in directing, enforcing, and overseeing the VPPC program such as senior management personnel, safety and health management, office managers, labor relations personnel, and human resources personnel. (For union companies, advance notice to the company prior to the evaluation team visiting the office should be given so that the company has an opportunity to have one or more of the labor representatives present to be interviewed.);

F. A review of the corporate oversight system; (For C/D/BU applicants/participants only)

G. An onsite document review entailing the examination of the following documents and records (or samples) if they exist and are relevant to the application or to the SHMS (trade secret concerns are accommodated to the extent feasible):

1. Management Leadership and Employee Involvement

a. Vision and goals statements (their reference to VPP);

b. Management statements of commitment to safety and health (and VPPC);

c. Policies and requirements regarding the enforcement of safety rules;

d. Written corporate SHMS;

e. Safety and health manual(s);

f. Records that indicate resources devoted to safety and health;

g. Accountability and responsibility requirements and documentation (e.g., performance standards and appraisals); and

h. Employee involvement activities.

2. Worksite Analysis

a. Baseline safety and industrial hygiene exposure assessments and updates;

b. Employee reports/complaints regarding safety and health problems and documentation of management's response;

c. Industrial hygiene monitoring records, results, exposure calculations, analyses and summary reports;

d. Annual safety and health program evaluations and site audits that assess effectiveness, including records of follow-up activities stemming from program evaluation recommendations;

e. Self-inspection procedures, site reports, and correction tracking;

f. The OSHA Form 300 logs for the projects/sites (including contractors);

g. Accident investigation requirements, site reports, and analyses; and

h. Safety and health committee minutes.

3. Hazard Prevention and Control

a. Safety rules, emergency procedures, and examples of safe work procedures

b. Preventive maintenance program requirements;

c. Occupational health care programs and records;

d. Subcontractor safety and health program(s) and requirements (including subcontractor selection criteria);

e. Process Safety Management (PSM) documentation, if applicable; and

f. Hazard and process analysis requirements.

4. Safety and Health Training

a. Employee orientation records; and

b. Safety training records.

5. General. Other records that provide relevant documentation of VPP qualifications.

H. A closing conference.

Signed at Washington, DC, this 24th day of August, 2004.

John L. Henshaw,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 04–19730 Filed 8–30–04; 8:45 am]

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Part V

Department of Homeland Security

8 CFR Parts 215, 235 and 252
United States Visitor and Immigrant Status Indicator Technology Program ("US–VISIT"); Authority to Collect Biometric Data From Additional Travelers and Expansion to the 50 Most Highly Trafficked Land Border Ports of Entry; Interim Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 215, 235 and 252

[DHS–2007–0002]

RIN 1650–AA00

United States Visitor and Immigrant Status Indicator Technology Program ("US–VISIT"); Authority to Collect Biometric Data From Additional Travelers and Expansion to the 50 Most Highly Trafficked Land Border Ports of Entry

AGENCY: Border and Transportation Security Directorate, DHS.

ACTION: Interim rule with request for comments.

SUMMARY: The Department of Homeland Security (DHS) has established the United States Visitor and Immigrant Status Technology Program (US–VISIT), an integrated, automated entry-exit system that records the arrival and departure of aliens; verifies aliens' identities; and authenticates aliens' travel documents through comparison of biometric identifiers. On January 5, 2004, DHS implemented the first phase of US–VISIT by publishing an interim rule in the **Federal Register** at 69 FR 468. The January 5, 2004 interim rule authorized DHS to require aliens seeking to be admitted to the United States pursuant to nonimmigrant visas to provide fingerprints, photographs, or other biometric identifiers upon arrival in, or departure from, the United States at air and sea ports of entry. This interim rule expands the US–VISIT program to the 50 most highly trafficked land border ports of entry in the United States. These 50 land borders will be integrated into the US–VISIT program following identification in Notices published in the **Federal Register**, with all 50 ports of entry to be identified no later than December 31, 2004.

This interim rule also further defines the population of aliens who are required to provide biometric identifiers and other identifying information under the US–VISIT program. First, DHS may require biometric data collection from nonimmigrant aliens who are visa exempt under the Visa Waiver Program (VWP). While this interim rule provides that DHS has the authority to require Mexican nationals who present a Border Crossing Card to provide biometric data upon arrival in, or departure from, the United States, the Secretaries of DHS and the Department of State (DOS) have jointly determined that BCC travelers who are not required to be issued a Form I–94 Arrival/Departure Record at the time of admission are exempt from the US–VISIT biometric data collection requirements. Second, certain officials of the Taipei Economic and Cultural Representative Office are exempt from the US–VISIT biometric data collection requirements. Third, crewmembers applying for landing privileges may be required to provide biometric data under US–VISIT.

This interim rule also makes technical changes to US–VISIT as a result of comments received by DHS on the January 5, 2004 interim rule. Finally, DHS solicits public comment on all aspects of the operation of US–VISIT to date, as well as the expansion of US–VISIT pursuant to this interim rule.

DATES: *Effective date:* This interim rule is effective September 30, 2004.

Comment date: Written comments must be submitted on or before November 1, 2004.

ADDRESSES: Because DHS does not yet have electronic docketing capability, for the purposes of this rule, we are using the Environmental Protection Agency (EPA) Docket Management System for US–VISIT. You may submit comments identified by RIN 1615-AA00 to the Docket Management Facility at the EPA. To avoid duplication, please use only one of the following methods:

(1) Web site: *http://www.epa.gov/edocket.* Follow the instructions for submitting comments at that web site.

(2) Mail: Written comments may be submitted to Michael Hardin, Senior Policy Advisor, US–VISIT, Border and Transportation Security; Department of Homeland Security; 1616 North Fort Myer Drive, 18th Floor, Arlington, VA 22209.

(5) Federal eRulemaking portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Submitted comments may be inspected at 1616 North Ft. Myer Drive, Arlington, VA 22209, between 9 a.m. and 5 p.m., Monday through Friday except Federal holidays. Arrangements to inspect submitted comments should be made in advance by calling (202) 298–5200. You may also find this docket on the Internet at *http://www.epa.gov/edocket.* You may also access the Federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION, CONTACT: Michael Hardin, Senior Policy Advisor, US–VISIT, Border and Transportation Security, Department of Homeland Security, 1616 Fort Myer Drive, 18th Floor, Arlington, Virginia 22209, (202) 298–5200.

SUPPLEMENTARY INFORMATION: This supplementary information section is organized as follows:

I. Background

A. Statutory Authority for US–VISIT

DHS established US–VISIT in accordance with several statutory mandates that collectively require DHS to create an integrated, automated entry and exit system (entry-exit system) that records the arrival and departure of aliens; verifies the identities of aliens; and authenticates travel documents presented by such aliens through the comparison of biometric identifiers. Aliens subject to US–VISIT requirements may be required to provide fingerprints, photographs, or other biometric identifiers upon arrival in, or departure from, the United States.

The statutory mandates which authorize DHS to establish US–VISIT include, but are not limited to, the following:

- Section 2(a) of the Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA), Public Law 106–215;
- Section 205 of the Visa Waiver Permanent Program Act of 2000 (VWPPA), Public Law 106–396;

- Section 414 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107–56; and
- Section 302 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act), Public Law 107–173.

The principal law that mandates the creation of an automated entry-exit system that integrates electronic alien arrival and departure information is the Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA), Public Law 106–215 (2000), 114 Stat. 339, codified as amended at 8 U.S.C. 1365a. DMIA requires that the entry-exit system consist of the integration of all authorized or required alien arrival and departure data that is maintained in electronic format in Department of Justice (DOJ)[1] or Department of State (DOS) databases. 8 U.S.C. 1365a. Under DMIA, 8 U.S.C. 1356a(d), this integrated entry-exit system was required to be implemented at air and sea ports of entry in the United States no later than December 31, 2003, using available air and sea alien arrival and departure data as described in the statute. DMIA also requires that the system must be implemented at the 50 most highly trafficked land border ports of entry by December 31, 2004, and at all ports of entry by December 31, 2005, with all available electronic alien arrival and departure information. DMIA also requires DHS to use the entry-exit system to match the available arrival and departure data on aliens, and to prepare and submit reports to Congress on the numbers of aliens who have overstayed their periods of admission, as well as reports on the implementation of the system. 8 U.S.C. 1365a(e). DMIA authorizes the Secretary of DHS, in his discretion, to permit other Federal, State, and local law enforcement officials to have access to the entry-exit system for law enforcement purposes. 8 U.S.C. 1365a(f). In addition, section 217(h) of the Visa Waiver Permanent Program Act of 2000 (VWPPA), Public Law 106–396 (2000), 114 Stat. 1637, codified as amended at 8 U.S.C. 1187(h), requires the creation of a system that contains a record of the arrival and departure of every alien admitted under the Visa Waiver Program (VWP) who arrives and departs by air or sea. The requirements of DMIA effectively result in the integration of this VWP arrival/departure information into the primary entry-exit system component of the US–VISIT program.

In late 2001 and during 2002, Congress, following the events of September 11, 2001, passed two additional laws affecting the development of the entry-exit system: the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107–56 (2001), 115 Stat. 353; and the Enhanced Border Security and Visa Entry Reform Act of 2002 ("Border Security Act"), Public Law 107–173 (2002), 116 Stat. 553. Section 403(c) of the USA PATRIOT Act, 8 U.S.C. 1379, requires DHS and DOS jointly to develop and certify a technology standard that can be used to verify the identity of visa applicants and persons seeking to enter the United States pursuant to a visa, and to do background checks on such aliens. The technology standard shall be developed through the National Institute of Standards and Technology (NIST), in consultation with the Secretary of the Treasury, other appropriate Federal law enforcement and intelligence agencies, and Congress. The standard shall include appropriate biometric identifier standards. The USA PATRIOT Act further directs DHS and DOS to "particularly focus on the utilization of biometric technology; and the development of tamper-resistant documents readable at ports of entry." 8 U.S.C. 1365a and note.

The legislative requirements for biometric identifiers to be utilized in the context of the entry-exit system also were strengthened significantly under the Border Security Act. Section 302(a)(1) of the Border Security Act, 8 U.S.C. 1731, states that the entry-exit system must use the technology and biometric standards required to be certified by DHS and DOS under section 403(c) of the USA PATRIOT Act. Section 303(b)(1) of the Border Security Act further requires that the United States issue to aliens only machine-readable, tamper-resistant visas and other travel and entry documents that use biometric identifiers. 8 U.S.C. 1732(b)(1). Further, DHS and DOS must jointly establish document authentication and biometric identifier standards for alien travel documents from among those recognized by domestic and international standards organizations. However, unexpired travel documents that have been issued by the U.S. government that do not use biometrics are not invalidated. *Id.* Section 303(b)(2) of the Border Security Act requires the United States, by October 26, 2004, to install at all ports of entry, equipment and software that allow biometric comparison and authentication of all U.S. visas and machine-readable, tamper-resistant travel and entry documents issued to aliens, as well as passports that are issued by countries participating in the Visa Waiver Program (VWP). 8 U.S.C. 1732(b)(2). Congress recently extended this deadline for one year, until October 26, 2005, pursuant to Public Law 108–299.

In addition, any country that is designated by the United States to participate in the VWP must certify that such country has a program in place to issue tamper-resistant, machine-readable, biometric passports that comply with biometric and document identifying standards established by the International Civil Aviation Organization (ICAO). 8 U.S.C. 1732(c)(1). Section 303(c) of the Border Security Act requires that any alien applying for admission under the VWP must present a passport that is machine readable, tamper-resistant and that uses ICAO-compliant biometric identifiers, unless the unexpired passport was issued prior to that date. 8 U.S.C. 1732(c)(2).

The entry-exit system must include a database that contains alien arrival and departure data from the machine-readable visas, passports, and other travel and entry documents. 8 U.S.C. 1731(a)(2). In developing the entry-exit system, the Secretaries of DHS and DOS also must make interoperable all security databases relevant to making determinations of alien admissibility. 8 U.S.C. 1731(a)(3).

In addition, the entry-exit system component must share information with other systems required by the Border Security Act. Section 202 of the Border Security Act addresses requirements for an interoperable law enforcement and intelligence data system and requires the integration of all databases and data systems that process or contain information on aliens.

DHS's broad authority to inspect aliens under sections 235 and 215(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1225, further supports the requirements under US–VISIT that foreign nationals provide biometric identifiers and other relevant identifying information upon admission to, or departure from, the United States. Pursuant to section 215(a) of the INA

[1] Effective March 1, 2003, pursuant to the Homeland Security Act of 2002, the responsibility for maintenance of such files, along with other functions, was transferred from DOJ to DHS. For purpose of consistency throughout this interim rule, any reference to authorities or functions originally vested in the Attorney General or DOJ that were transferred to DHS or the Secretary of DHS will now be referenced as functions or authorities of DHS or the Secretary of DHS.

and Executive Order No. 13323 (69 **Federal Register** 241), the Secretary of Homeland Security, with the concurrence of the Secretary of State, has the authority to issue this interim rule which requires certain aliens to provide requested biographic identifiers and other relevant identifying information as they depart the United States. Section 101(a)(6) of the INA, 8 U.S.C. 1101(a)(6), requires that regulations promulgated by DHS to prescribe the conditions for use of "border crossing identification cards" must provide that "an alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the BCC matches the appropriate biometric characteristic of the alien." In addition, under section 214 of the INA (8 U.S.C. 1184), DHS may make compliance with US–VISIT departure procedures a condition of admission and maintenance of status for nonimmigrant aliens while in the United States.

Many other provisions within the INA also support the implementation of the US–VISIT program, such as the grounds of inadmissibility in section 212, the grounds of removability in section 237, the requirements for the VWP program in section 217, the electronic passenger manifest requirements in section 231, the requirements relating to alien crewmen located at section 251 *et seq.*, and authority for alternative inspection services in sections 286(q) and 235 of the INA and section 404 of the Border Security Act.

These statutory mandates, among other laws, collectively authorize DHS to promulgate regulations, including this interim rule, as necessary to implement US–VISIT.

B. Recommendations of the 9/11 Commission

The National Commission on Terrorist Attacks upon the United States (the Commission) was established by Congress and the President on November 22, 2002 (Public Law 107–306) to investigate the events leading up to the terrorist attacks on the United States on September 11, 2001. On July 22, 2004, the Commission published its final report, "The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States" (the Report). In its Report, the Commission recognizes the importance of screening aliens traveling to and from the United States. In addition, the Commission recommended that "[t]argeting travel is at least as powerful a weapon against terrorists as targeting their money. The United States should combine terrorist travel intelligence, operations, and law enforcement in a strategy to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility." The Report calls for the implementation of a biometric screening system and specifically refers to the implementation of US–VISIT among the Commission's many recommendations for strengthening the ability of the United States to detect and deter terrorist attacks on the United States. The Report also emphasizes the need to make US–VISIT fully operational as soon as possible and that the present timetable "may be too slow, given the possible security dangers."

This interim rule, which expands US–VISIT to the 50 most highly trafficked land borders and includes aliens traveling without visas under the VWP, will assist in meeting the goals and recommendations of the Commission.

II. Implementation of the First Phase of US–VISIT

A. Air and Sea Ports of Entry

On January 5, 2004, DHS published an interim rule in the **Federal Register** establishing US–VISIT at air and sea ports of entry designated by notice in the **Federal Register** at 69 FR 468. Also on January 5, 2004, DHS published a notice in the **Federal Register** at 69 FR 482, designating 115 airports and 14 sea ports for the collection of biometric data from certain aliens upon arrival to the United States under the US–VISIT program. Since January 5, 2004, aliens applying for admission pursuant to a nonimmigrant visa at designated air and seaports have been required to submit fingerprints and photographs.

Since its implementation at air and seaports in January 2004, US–VISIT has proven that the use of biometrics to check identity and background is a highly effective national security and law enforcement tool. US–VISIT has already prevented 196 criminal aliens from entering the United States. Further, US–VISIT has already identified 790 aliens using biometric "lookout" lists—established lists of aliens suspected of being terrorists, or having committed past criminal acts or immigration violations.

B. Exit Pilot Programs

The January 5, 2004 interim rule also authorized the Secretary of DHS to establish pilot programs at up to fifteen air or sea ports of entry, to be identified by notice in the **Federal Register**, through which DHS may require certain aliens who depart from a designated air or sea port of entry to provide specified biometric identifiers and other evidence at the time of departure. 8 CFR 215.8. On January 5, 2004, DHS published a notice in the **Federal Register** at 69 FR 482 identifying the implementation of exit pilot programs at Baltimore-Washington International Airport (BWI) and the Miami Seaport. DHS has recently implemented exit pilot programs at an additional 13 ports of departure, as identified by notice in the **Federal Register** on August 3, 2004 at 69 FR 46556.

Under the exit pilot programs at BWI and Miami, aliens departing from any of the designated departure air and sea ports are required to submit fingerprints and electronically scan their nonimmigrant visas or passports at self-serve "kiosks" which are located in the air and sea port terminals. DHS personnel are available to assist aliens with the data collection procedure as needed. To date, the process has been implemented smoothly with no significant delays for travelers.

Since early August of 2004, DHS, through the extended exit pilot program, has been testing different methods to collect the required information from aliens as they depart the United States through the designated ports of entry. DHS currently is exploring several different methods and processes for collection of information, including an "enhanced" version of the existing self-serve kiosks already in place. The enhanced version provides the alien a receipt with biometric identifiers for the alien to present to a DHS representative prior to boarding a flight or ship. Also, DHS is testing hand-held scanners, which can be taken from person to person by a DHS representative to collect biometric information, and a combination of the two systems. US–VISIT rejected several other options, including the use of Transportation Security Administration (TSA) screeners or airline personnel assisting in data collection, as unfeasible due to the potential of overwhelming the ability of these organizations to perform their already existing functions.

The exit pilot program will enable DHS to conduct a cost-benefit analysis of the different processes and determine which process allows for the most accurate and efficient collection of information from aliens departing from the United States. After careful analysis and consideration of the deployed alternatives, DHS will then evaluate which solution or solutions will be selected for additional deployment at air and sea ports.

The evaluation of the best method for collecting exit data collection will occur from August through November 2004.

The pilot programs will be evaluated based on: (1) The cost of each option, including the impact on staffing and necessary personnel; (2) how well the alternative supports all necessary aliens being processed and requisite law enforcement functions; and (3) how conducive the alternative is for tourist and commercial travel. The extended pilot program began in August 2004, where the additional methods of data collection have occurred in Chicago O'Hare airport, Baltimore/Washington International Airport, and Miami seaport. In early September 2004, US–VISIT exit pilot program will expand to additional ports of entry where additional evaluations may be made. DHS will take a flexible approach to the evaluation of the different methods of data collection, and may select one of the methods currently evaluated or a slightly modified version, depending on information gained from the pilot program. In addition, DHS may not select the same method at every port, recognizing that physical space limitations and passenger procedures are different at different ports. DHS invites comments on the existing methods being piloted, the ones previously rejected, or on any other potential technologies or methods of collecting US–VISIT exit data.

The pilot program is currently for air and sea ports of entry; at this time, no departure requirements are in place at land border ports of entry.

C. Classes of Aliens Exempted From Biometrics Requirements of US–VISIT Pursuant to the January 5, 2004 Interim Rule

The January 5, 2004 interim rule exempts certain classes of aliens from US–VISIT requirements. The exempted classes are: (i) Aliens admitted on A–1, A–2, C–3 (except for attendants, servants or personal employees of accredited officials), G–1, G–2, G–3, G–4, and NATO–1, NATO–2, NATO–3, NATO–4, NATO–5 or NATO–6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the rule, (ii) children under the age of 14, (iii) persons over the age of 79, (iv) classes of aliens the Secretary of Homeland Security and the Secretary of State jointly determine shall be exempt, and (v) an individual alien the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines shall be exempt. 8 CFR 215.8(a)(2).

III. Implementation of the Second Phase of US–VISIT

This interim rule amends DHS regulations to implement the second phase of US–VISIT by expanding the program to the 50 most highly trafficked land border ports of entry in the United States as directed under 8 U.S.C. 1365a(d)(2). This interim rule also expands the population of nonimmigrant aliens who may be subject to US–VISIT biometric data collection. Finally, this interim rule further defines the aliens who are exempt from US–VISIT biometric data collection requirements.

A. The 50 Most Highly Trafficked Land Border Ports

This interim rule authorizes the Secretary or his delegate to extend the US–VISIT biometric data collection requirements to land border ports of entry designated by notice in the **Federal Register**. Biometric data collection at time of entry will be implemented at the 50 most highly trafficked land border ports of entry by December 31, 2004. Biometric data collection at time of departure will be implemented at land border ports, through a limited number of pilot programs at locations designated by notice in the **Federal Register**. The classes of aliens required to provide biometrics are the same regardless of whether the application for admission takes place at an air, sea or land port of entry.

DHS expects to comply with the December 31, 2004 DMIA deadline for implementing the integrated entry exit system at the 50 most highly trafficked land border ports of entry. This compliance will include integration of all available arrival and departure data on aliens that currently exist in the electronic systems of DHS and DOS. This includes information from Advance Passenger Information System (APIS) and the Arrival/Departure Information System, (ADIS), as well as other systems related to air and sea inspections as well as law enforcement purposes. APIS and ADIS include information captured from passenger manifest data received from carriers and information on visa applicants and recipients received through the DataShare program with DOS.

At this time, DHS has not designated any land border ports of entry where biometric data collection is required. DHS will implement the biometric data requirements, taken at the time of alien arrival, at the 50 most highly trafficked land ports of entry within the next few months. Those land border ports will be identified through notice(s) in the **Federal Register**. Staggering the implementation of US–VISIT, starting with a few initial locations, will enable DHS to test the system and identify areas where the process for collection of biometric information may be improved. Subsequent to implementation of biometric data collection at time of entry at the 50 busiest ports, DHS will implement biometric data collection at time of departure through a limited number of pilot programs at locations designated by notice in the **Federal Register**.

This interim rule is expected to have minimal effect on the overall inspection process or inspection times for travelers at land border ports of entry. DHS, through Bureau of Customs and Border Protection (CBP) personnel, have carefully monitored the impact of US–VISIT biometric data collection on the inspection of air and sea applicants for admission, and has determined that this process takes, on average, approximately 15 additional seconds during the inspection. Similar results are expected at land border ports of entry, given the population to whom this process will apply and how it will be conducted. However, DHS, through CBP, will continue to carefully monitor the effect of US–VISIT on overall inspection times at all locations at which US–VISIT has been deployed, and will make operational adjustments as necessary.

Similarly, this interim rule is expected to have little effect on trans-border commerce. Minimal additional time or effort will be spent in the US–VISIT process and no delays or interruptions of shipments are expected as a result of this rule.

DMIA requires that DHS implement US–VISIT at the 50 most highly trafficked land border ports of entry in the United States no later than December 31, 2004. This interim rule authorizes the Secretary of DHS to extend the US–VISIT biometric data collection requirements to the 50 most highly trafficked land border ports of entry and to identify the specific land border ports separately by notice in the **Federal Register**.

This interim rule makes no changes to current regulations that control the issuance and use of the Form I–94. All current valid Forms I–94 remain in effect. DHS will verify an alien's identity using biometrics at the time of issuance of a Form I–94, or at any time DHS determines such verification is necessary. The goal of the US–VISIT program, once fully implemented, is to verify an alien's identity using biometric identifiers upon each entry and

departure through any air, land, or sea port of entry.

The fee required under 8 CFR 103.7(b)(1) and 8 CFR 235.1(f) for the issuance of a Form I–94 at a land border port of entry will still be required. This interim rule does not change any of the fee requirements. As previously stated, this interim rule merely adds designated land border ports-of-entry as a location for the collection of biometrics upon the entry of aliens required by regulation to provide them. Multiple-entry Forms I–94 will still be issued as before, with no change in the fees.

B. Inclusion of Visa Waiver Program Participants

Pursuant to section 217 of the INA, the Secretary of DHS, in consultation with the Secretary of State, may designate certain countries as VWP program countries if certain requirements are met. Those requirements include, without limitation, (i) the rate of nonimmigrant visa refusal for nationals of the country, (ii) whether the government certifies that it has a program to issue machine readable, tamper-resistant passports that comply with ICAO standards, (iii) whether the country's designation would negatively affect U.S. law enforcement and security interests, and (iv) whether the government certifies that it reports to the United States on a timely basis the theft of blank passports. The statute also sets forth requirements for continued eligibility and, where appropriate, emergency termination of program countries. Nationals of VWP countries, who are otherwise admissible, may travel to the United States and be admitted in the B–1/B–2 categories without a visa for up to ninety days.

Travelers seeking entry to the United States through the VWP comprise nearly 50% of the total number of nonimmigrant aliens who apply for admission each year by air or sea. Individual travelers are limited by statute in both purpose and duration of visit, as well as other benefits potentially available to travelers holding visas. VWP applicants must also waive any right to appeal the admissibility determination or to contest, other than on the basis of an application for asylum, any action for removal of the alien.

DHS has determined that enrolling VWP aliens in the US–VISIT program will improve public safety, national security, and the integrity of the immigration process. As with any traveler to the United States, it is important to verify the true identity of the alien and to ensure that the alien is admissible. Enrolling VWP travelers in US–VISIT reduces the risk that the VWP traveler's identity could be used by other individuals to enter the United States. By linking the alien's biometric information with the alien's travel documents, DHS reduces the likelihood that another alien could later assume the identity of an enrolled individual to gain admission to the United States. Since US–VISIT was initiated on January 5, 2004, the program has been very successful in identifying aliens whom the officer would not have known were inadmissible. Through June 2004, US–VISIT has prevented the admission of more than 196 persons traveling under non-immigrant visas that were inadmissible, including known or suspected criminals. Adding the VWP population to US–VISIT should result in additionally success in preventing criminal aliens from being admitted.

Although the Secretary of DHS may have determined that the rate of visa refusal for nationals of VWP countries is low and that the country's participation in the VWP program is consistent with U.S. law enforcement and security programs, the importance of identification verification and other security concerns require that VWP travelers be enrolled in US–VISIT.

Further, there is evidence that VWP passports are attractive to individuals seeking to avoid the security and immigration screening provided by the visa issuance process. Security concerns outside of identity fraud also have led DHS to the conclusion that enrolling VWP travelers in US–VISIT is warranted.

C. Additional Classes of Aliens Affected by Changes to the January 5, 2004 Interim Final Rule

1. TECRO Aliens

In establishing diplomatic relations with the People's Republic of China (PRC) in 1979, the U.S. Government recognized the PRC as the sole legal government of China. Both sides agreed that, within this context, the people of the United States would maintain cultural, commercial, and other unofficial relations with the people in Taiwan.

The Taiwan Relations Act (TRA) (Pub. L. 96–8) provides the legal framework for the conduct of these unofficial relations. This law provides that the Taipei Economic and Cultural Representative Office (TECRO), a private organization, is responsible for the unofficial relations between the people of the United States and the people in Taiwan. In keeping with this special status, Taiwan representatives of the TECRO, and their dependents, are added as an additional class of aliens exempt from the collection of biometric information under US–VISIT at this time. This interim rule now exempts certain officials of TECRO from US–VISIT, through amendments to 8 CFR 252.8(a)(2)(ii) and 235(d)(iv)(B).

2. Alien Crewmembers

Pursuant to section 101(a)(15)(D) of the INA, an alien may be admitted into the United States temporarily to work as a crewmember. Current DHS regulations at 8 CFR 252.1(b) provide that crewmembers are examined under the provisions of 8 CFR parts 235 and 240. This interim rule clarifies that every alien crewman applying for landing privileges in the United States is subject to the collection of biometric information pursuant to 8 CFR 235.1(d)(1)(ii) and (iii).

3. Mexican Nationals Who Present a Form DSP–150, B–1/B–2 Visa and Border Crossing Card (BCC)

Mexican nationals who travel to and from the United States may apply for a Form DSP–150, B–1/B–2 Visa and Border Crossing Card (BCC). Pursuant to 8 CFR 212.1(c)(1)(i), a visa and passport are not required of a Mexican national who is in possession of a BCC containing a machine-readable biometric identifier and who is applying for admission as a temporary visitor for business or pleasure from a contiguous territory. If the BCC traveler is applying for admission from other than a contiguous territory, he or she must present a valid passport. See 8 CFR 212.1(c)(2).

Prior to issuing a BCC to a Mexican national, DOS obtains fingerprints and a photograph from the individual and conducts a background check on the individual using biographic and biometric identifying information. Once the individual is approved, the fingerprints and photograph of the Mexican national are then embedded into the BCC. Upon admission to the United States, a CBP officer inspects the holder of a BCC to determine that he or she is the rightful bearer of the document.

Whether a BCC traveler is issued a Form I–94 Arrival/Departure Record at time of admission depends on how long the Mexican national will remain in the United States and where the Mexican national will travel while in the United States. Pursuant to 8 CFR 235.1(f)(1)(iii), if the Mexican national's admission will not exceed 30 days and the visit will be within 25 miles of the border, it is not required that the alien be issued a Form

I–94 Arrival/Departure Record. The distance restriction is increased to 75 miles if the Mexican national is admitted at a port of entry in the state of Arizona. See 8 CFR 235.1(f)(1)(v).

Pursuant to this interim rule. the Secretary of DHS or his delegate may require Mexican nationals who present a BCC at time of admission at a designated air, sea or land port of entry to provide fingerprints, photographs, or other biometric identifiers at time of entry into or departure from the United States. However, under 8 CFR parts 215.8(a)(2)(iii) and 235.1(d)(1)(iv)(C), the Secretaries of DHS and State may jointly exempt classes of aliens from the US–VISIT biometric data requirements. This interim rule constitutes notice that the Secretaries of DHS and State have jointly determined that the US–VISIT departure requirements in 8 CFR part 215.8(a)(1), and inspection requirements in 8 CFR 235.1(d)(ii), shall apply only to Mexican nationals for whom a Form I–94 is issued under 8 CFR 235.1(f)(1)(iii) or (v). This means that Mexican nationals who present a BCC at time of admission, who will stay within 25 miles of the border (75 miles if admitted at a port of entry in Arizona) and whose stay will be shorter than 30 days, are not subject to the US–VISIT biometric data collection requirements. The Secretaries of DHS and State have determined that this class of aliens should be exempt because the biometric data (fingerprints and photographs) of BCC travelers have already been captured by DOS at time of the BCC issuance, and the biometric photograph of the traveler on the BCC is compared to the facial appearance of the traveler upon admission. This exemption is temporary. DHS expects that the exemption will be phased out as US–VISIT capabilities and technologies improve.

Mexican nationals who present a BCC and who will travel beyond the geographic restrictions or remain in the United States for longer than 30 days are currently issued a Form I–94, Arrival/Departure Record and will now be subject to US–VISIT biometric requirements if they apply for admission at a designated air, sea, or land port of entry. If a BCC traveler is issued a multiple-entry Form I–94, Arrival/Departure Record, the traveler will be subject to US–VISIT biometric data requirements the next time the traveler is issued a Form I–94, Arrival/Departure Record.

IV. Comments and Changes to the January 5, 2004 Interim Rule

A. Summary of Comments

DHS received 21 comments on the January 5, 2004 interim rule. The commenters included representatives of the travel industry, including airports, airlines, and travel or transport associations. Other commenters included a national business association, a privacy organization, attorneys and an attorney association, two universities, an educational association, a personnel association, a trucking association, a manufacturer of smart cards, and a foreign government.

The following is discussion of the comments received and the Department's response.

1. Comments Regarding Implementation of US–VISIT

DHS received several comments from the public praising the implementation of US–VISIT, both in terms of its value in improving the security of the United States and its minimal effect upon travel times and the public. Many of the comments specifically praised the program as having almost no impact on travel to and from the United States. As one commenter said: "The program has been implemented successfully at 115 airports and 14 seaports for entry. To date, [we] have received no reports of significant delays. In fact, the collection of the biometric data and the security checks seem to have been integrated almost seamlessly into the inspection process." A second commenter said "We commend US–VISIT and CBP on the generally smooth implementation of the US–VISIT program at 115 airports."

2. "Good Cause" Exception to Initial Notice and Comment of the January 5, 2004 Rule

Several commenters expressed their concerns that DHS implemented US–VISIT at air and sea ports of entry by an interim rule without providing prior public notice or the opportunity to comment. As discussed in the January 5, 2004 interim rule, DHS implemented the initial phase of the US–VISIT program through an interim rule, with a request for public comment after the effective date, for two reasons: (1) The delay of the implementation of US–VISIT at air and sea ports to allow public comment would have compromised national security and thus been contrary to the public interest under the Administrative Procedure Act, 5 U.S.C. 553(b) and (d)(3), and (2) such delay would not have allowed the newly-formed Department to meet the statutory deadlines for implementation of the exit-entry system under DMIA.

One commenter also stated that, because the January 5, 2004 interim rule was not published as a notice of proposed rulemaking, DHS should provide a sunset provision in the final rule. DHS cannot implement this request. US–VISIT was established by several statutory mandates. These statutes do not contain sunset provisions. Therefore, allowing US–VISIT to expire through a sunset provision implemented in a DHS regulation would be contrary to existing law and the intent of Congress in requiring the establishment and implementation of US–VISIT.

3. Data Management Information Act (DMIA) and Task Force

One commenter objected to a statement in the **SUPPLEMENTARY INFORMATION** recommending that travelers maintain evidence of departure. The commenter stated that this recommendation violates the DMIA restriction on additional documentary requirements. The statement was made in recognition that some travelers may be concerned about evidence of a prior departure when they seek to re-enter. The statement is merely a recommendation made in the **SUPPLEMENTARY INFORMATION** and imposes no new documentary requirement on the traveler.

One commenter stated that US–VISIT should use the recommendations of the DMIA Task Force in implementing US–VISIT at land borders. The DMIA Data Management Improvement Task Force was a public/private group created by the provisions of DMIA and chartered by the Attorney General in 2002 to evaluate how the Attorney General could carry out the provisions of DMIA and improve the flow of traffic at airports, seaports, and land border ports of entry through: (1) Enhancing systems for data collection and data sharing, and (2) increasing cooperation between the public and private sectors, increasing cooperation among Federal agencies and among federal and state agencies, and modifying information technology systems. The Task Force members included the Departments of Homeland Security, Commerce, State, and Transportation, as well as several private sector organizations with knowledge of trans-border commerce.

The Task Force delivered two separate reports to Congress in 2002 and 2003 which made a series of recommendations, including one specifically aimed at the US–VISIT program, which was adopted. As recommended by the Task Force, the

deployment to land border ports will begin with pilots that will then be evaluated before additional deployments are made. As provided elsewhere in this rule, US–VISIT will be implemented at land borders in accordance with the requirements of DMIA statute and the DMIA taskforce recommendations have been reviewed accordingly. All of the Task Force reports are public and may be accessed electronically at *http://www.immigration.gov*.

One commenter stated that the DMIA Task Force should not have been disbanded. Under section 3(i) of DMIA, Congress provided authority for the termination of the Task Force to the Attorney General, now the Secretary of DHS. Through delegation to the chair of the Task Force, the Under Secretary for Border and Transportation Security, on January 27, 2004, the DHS Secretary terminated the Task Force as it had completed its mission and met the statutory requirements of DMIA. However, DHS also believes that the comment procedures of this interim rule and the January 5, 2004 interim rule allow the public to participate and have significant input into the continued development of US–VISIT.

4. Monitoring and Evaluation of US–VISIT

One commenter stated that US–VISIT should implement a process to evaluate and monitor how the program is working. Another commenter stated that such an evaluation should be made within 6 months of implementation of the program.

On January 5, 2004, DHS implemented a strict reporting procedure to monitor the passenger arrival process at all US–VISIT designated locations and has evaluated the impact of US–VISIT biometric enrollment. DHS monitors all locations on a daily basis and makes the appropriate adjustments to field operations to minimize any adverse impacts. Analyses of data indicate that deployment of US–VISIT has had minimal impact on the passenger arrival and departure process. The data indicates that the entire process consumes no more than 15 seconds per affected passenger, on average, above the time already currently required in the inspections process. Overall, there was no significant impact upon the overall clearance times. DHS continues to monitor US–VISIT at all locations on a weekly basis to ensure that the facilitative aspects of its mission continue unimpeded, making modifications where necessary.

5. Privacy Issues

One commenter representing a privacy organization raised several concerns. The commenter stated that US–VISIT should address how long information will be retained and that the program should develop guidelines for deleting records and expunging information when no longer relevant, to avoid "mission creep" (meaning using information for purposes beyond those defined by statute). The commenter also stated that the program should expunge data when the individual becomes a lawful permanent resident.

US–VISIT is currently using technology systems that have been employed by the former Immigration and Naturalization Service (now DHS) components for years. The existing legacy systems were created at different times and for different purposes, and the data within them are retained and disposed of based on those needs. Data usage and retention schedules are published for each of these systems. As US–VISIT matures and decisions are made regarding whether the existing systems will be integrated, modernized, and/or retired, the data retention periods for US–VISIT data will be reviewed and adjusted to reflect the redefined needs of DHS. DHS recognizes the importance of privacy rights and will further define the purpose of US–VISIT and the limitations on data collection, maintenance, and use through updates to the Privacy Impact Assessment.

The Privacy Impact Assessment (PIA) for US–VISIT lists the principal users of the data within DHS and notes that the information may also be shared with other law enforcement agencies at the federal, state, local, foreign, or tribal level, who, in accordance with their responsibilities, are lawfully engaged in collecting law enforcement intelligence information and/or investigating, prosecuting, enforcing, or implementing civil and/or criminal laws, related rules, regulations, or orders. This PIA is published on the DHS Web site at *http://www.dhs.gov/us-visit*.

Several commenters stated that US–VISIT must make it a priority to protect privacy and should declare specifically who has access to US–VISIT data. One of US–VISIT's primary goals is to safeguard the personal information that is being collected in a way that is responsible and respectful of privacy concerns. DHS is achieving this goal by implementing a comprehensive privacy program to ensure that personal information is protected from misuse and improper disclosure, and destroyed when no longer needed for its stated purpose. The Privacy Officer for US–VISIT provides oversight to ensure that collected data is being handled in accordance with all applicable Federal laws, regulations and Departmental policy regarding privacy and data integrity.

While it is not possible for US–VISIT to list the names of the specific entities that may be given access to the data in the future, it should be noted that access is only provided on an official basis and in accordance with the system of notices required for records within the existing systems on which US–VISIT is based.

Several commenters stated that US–VISIT should establish procedures for correcting any errors and should address how long it will take to make any corrections. US–VISIT utilizes a three-step redress process for individuals to have their records reviewed and amended or corrected based on accuracy, relevancy, timeliness, or completeness. This process includes confirming that mismatches and other errors are not retained as part of an alien's record. The first opportunity for data correction occurs at the port of entry where the CBP Officer has the ability to correct manually most biographic-related errors such as name, date of birth, flight information and document errors. A Data Integrity Team sends biometric-related errors to US–VISIT for resolution. All of this process occurs without any action required by the individual.

If the individual still has questions about the travel record, he or she can send a written request by mail or telefax to the US–VISIT Privacy Officer, Steve Yonkers, at the following address: US–VISIT, Border and Transportation Security, Department of Homeland Security, Washington, DC 20528. Phone (202) 927–5200. Fax (202) 298–5201. The Privacy Officer will review the travel record, amend or correct it as necessary, and send a response to the traveler describing the action taken, within 20 business days of receipt. If the individual is not satisfied with the action taken, he or she can appeal to the Department Chief Privacy Officer, who will review the appeal, conduct an investigation, and make a final decision on the action to be taken. This redress policy is published on the DHS Web site at *http://www.dhs.gov/us-visit*. The US–VISIT Privacy Officer can also be contacted by e-mail at *usvisitprivacy@dhs.gov*.

One commenter stated that US–VISIT should provide a receipt that the visitor had a "false positive" to protect the visitor in future travel. When visitors are processed through US–VISIT, the

fingerprints collected are checked against a biometric watch list for a possible match. If DHS determines that the match was a "false positive," no negative information is associated with the traveler history. This "false positive" will not affect future entries into the United States. That an individual may be a repeat "false positive" is possible, but not likely because the system automatically collects the highest quality fingerprints available with each new entry, reducing the possibility of a future erroneous match.

6. Databases

Several commenters made statements about the US–VISIT database. One commenter stated that the Advance Passenger Information System (APIS) regulation, as proposed, requires more information than is presently provided to US–VISIT by the carriers. One commenter stated that the regulation should clarify whether US–VISIT is receiving the information described in the supplementary information section of the January 5, 2004, interim rule. Another commenter recommended that US–VISIT create an intelligence liaison office to consolidate the watch list databases to ensure accuracy. US–VISIT has the capability to receive and collect any information required by 8 CFR 231, although as the commenter noted, not all of the data elements enumerated in the January 5, 2004 interim rule supplemental information are currently being provided by the transportation carriers.

One commenter stated that databases need to be fully integrated and that the database systems from the three immigration-related bureaus should be integrated. Two commenters stated that multiple agencies should not be asking for the same or redundant travel information. One commenter stated a concern that as US–VISIT is expanded to other groups, the capacity of the database may not be adequate and that time necessary for database and watch list searches will delay the US–VISIT process.

Under US–VISIT, information systems associated with border inspections and security are being linked. Biometric and other information will be available to appropriate staff in CBP, the Bureau of Immigration and Customs Enforcement (ICE), the Bureau of Citizenship and Immigration Services (CIS), DOS consular officers, and other staff involved with the adjudication of visa applications at overseas posts, other DHS officers, appropriate officers of the United States intelligence and law enforcement community, and DOS personnel and attorneys when needed for the performance of their duties.

Over time, US–VISIT will continue to integrate appropriate additional databases and ensure interoperability with other databases as appropriate. US–VISIT maintains a long-term vision that, working in conjunction with a prime integrator, will address these concerns, including redundant information requests. In addition, US–VISIT works closely with the National Institute of Standards and Technology (NIST), and DOS to ensure that the US–VISIT database has and maintains the ready performance and quality to hold and manage increasing data.

One commenter stated that frequent traveler programs should be utilized by US–VISIT. DHS currently utilizes several frequent traveler programs. As one example, DHS uses the INSPASS program at air ports of entry to facilitate frequent air travelers. DHS does not currently utilize a frequent-traveler program as part of US–VISIT, though classes of aliens who benefit from other programs (*e.g.* INSPASS) are currently exempt from US–VISIT. DHS will determine whether such programs will be used, and how they will be integrated with US–VISIT, as US–VISIT is expanded.

One commenter stated that more time is needed to develop the necessary infrastructure and technological capabilities and recommended that US–VISIT use small-scale operations before going nationwide. That commenter stated that NSEERS (discussed in section N, below) and SEVIS (the Student and Exchange Visitor Information System, designed to track aliens in the F, J, and M visa classifications who are attending an educational program in the United States) programs have included data entry errors, system malfunctions, and leakages of data. US–VISIT is based on existing, functional systems. The successful nationwide implementation of US–VISIT, as required by statute, demonstrates that small-scale operations were not necessary. Where DHS is still developing technologies (*e.g.* exit capabilities), DHS is piloting different methodologies in certain areas before nationwide expansion (*see* **Federal Register** notices at 69 FR 482 (January 5, 2004) and 69 FR 46556 (August 3, 2004)).

One commenter stated that SEVIS is flawed and indicated that US–VISIT should not use SEVIS to determine status or background. SEVIS has been very responsive to meeting stakeholder and users requirements and continues to make enhancements. US–VISIT receives information from many systems; no single system is relied upon for final determinations.

One commenter stated that the interim rule does not include a list of all the law enforcement databases that will be used. DHS specifically did not include a detailed list of these databases because of their sensitive nature relating to law enforcement and intelligence.

One commenter stated that IDENT (DHS' automated fingerprint identification tool) checks at consular offices and by US–VISIT should get priority over other requests for IDENT checks. US–VISIT and consular office IDENT checks are prioritized to meet the required response time for each type of check. Another commenter stated that DHS should create a separate US–VISIT biometric database instead of using IDENT, because "[by] lumping US–VISIT enrollees in with criminals, we are sending the message that aliens are criminals." DHS is not sending such a message, instead, DHS is using its available existing resources to ensure criminals are quickly identified and, if appropriate, denied entry to the United States.

7. Right to Counsel

One commenter stated that arriving aliens should have the right to counsel, stating that the US–VISIT program increases the chance for erroneous admission decisions and reinforces the need for the availability of an alien's counsel at a port of entry.

This recommendation will not be adopted at this time. The current DHS regulation at 8 CFR 292.5(b) reads, in part, "* * * nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody." DHS does not believe that the introduction of US–VISIT requires a change to the existing regulation because US–VISIT does not significantly alter the inspection or admission process for aliens.

8. Inspecting Officers

Two commenters stated that individuals accessing US–VISIT information must be trained to interpret data correctly. Another commenter stated that DHS should establish an immigration expertise officer or specialist officer at the ports-of-entry, and suggested that the specialists should be coordinated by the Offices of Chief Counsel for BCIS and the Principal Legal Advisor for ICE. The commenter stated that these steps

would help to ensure the accuracy and consistency of immigration decisions.

US–VISIT has an aggressive deployment schedule which involves training, new technology, and new primary inspection procedures. Concurrent to the US–VISIT deployment, DHS initiated a cross-training program for all officers who perform the inspection function. A training curriculum was developed specific to US–VISIT which focused on using the new US–VISIT technology, as well as the additional systems used by the inspecting officers to process travelers, along with operational procedures. Instruction was completed prior to the launch of US–VISIT and will continue and expand as US–VISIT expands. DHS is confident, therefore, that the training provided will allow each CBP officer to have and maintain proficiency in current immigration law and procedure.

9. Secondary Inspections

One commenter stated that US–VISIT should provide safeguards for secondary inspections, such as limiting the use of handcuffs and providing water. The existing procedures, which apply to secondary inspection, are designed to ensure the safety of the traveling public and our officers while ensuring that detained persons receive proper treatment. DHS does not believe that the introduction of biometric data collection as part of the inspection process necessitates a change to existing regulations and procedures governing secondary inspection and detention of certain aliens.

Another commenter stated that US–VISIT should have procedures to expedite aliens referred to secondary inspection by US–VISIT. DHS has promulgated new standard operating procedures for CBP officers responsible for addressing applicants referred to secondary inspection due to US–VISIT. The goal is to inspect and facilitate legitimate travelers as quickly as possible within current rules and regulations.

10. Resources and Staffing

Several commenters addressed the need to provide adequate staffing and equipment to avoid long lines, the need to continue to meet the 45-minute clearance requirement, and the need to have mitigation strategies to avoid delay. The Department shares the public's concerns that US–VISIT not become an impediment to legitimate travel and trade. Ensuring that an impediment does not occur is one of US–VISIT's primary goals. Accordingly, it is a DHS priority to provide optimal staffing and to minimize process wait times. DHS has procedures already in place for adequate staffing during peak processing times. Analyses of data indicate that there has been no significant increase in passenger wait times attributed to US–VISIT and that the US–VISIT process has been, for the most part, absorbed into the normal standard operating procedure. CBP will continually monitor inspection processing to reduce or avoid delays. Additional technical staff are being hired and assigned to key US–VISIT ports-of-entry to monitor the equipment to ensure that it remains in working order. All equipment and system issues are monitored closely and a central help desk is available to resolve any problems. If necessary, additional equipment is available to be deployed on short notice.

One commenter stated that employee vacancies should be filled so that adequate staffing is maintained. Employee vacancies continue to be filled through an ongoing Human Resources program. In addition, in Spring 2004, legacy Customs and Immigration Inspectors were converted to CBP Officer positions and cross-trained. As a result of this cross-training, port directors now have additional resources to maximize the staffing capabilities and flexibility at ports of entry. These resources will be used to ensure that all ports of entry are adequately staffed.

One commenter stated that the program should establish exclusive lines for travelers not subject to US–VISIT and should recalculate transfer times to account for US–VISIT. Queue management has been a long-established CBP practice. Because there has been no significant passenger processing delay, no changes to the inspection and transfer lines are required at this time.

11. Use of Form I–94, Arrival/Departure Record

Several commenters stated their views on the use of the Form I–94, Arrival/Departure Record. One commenter stated that the Form I–94 should be modified to include an electronic bar code to provide an entry/departure record, and that the Form I–94 should be usable for reentry to ease consular burden. Another commenter stated that the Form I–94 should interface with the computer systems. One commenter stated that the privacy of the Form I–94 should be preserved. Three commenters stated that the Form I–94 should be discontinued, with one of those commenters stating that US–VISIT should rely on APIS (Advance Passenger Information System) information rather than using Form I–94, and another commenter stating that the Form I–94 data was duplicative of the APIS information.

DHS is reviewing the continued use of the paper Form I–94, and is considering many of the enhancements suggested by the commenters. In addition, in conjunction with a passport, the Form I–94 currently serves an important purpose: Evidence of lawful entry and status after admission to the United States, especially in instances where access to online systems cannot be achieved. The current Form I–94 will continue to be utilized until alternatives and automated systems are developed to collect and provide the same information and have passed quality control and field-testing.

12. Eligibility for Re-entry

Several commenters addressed re-entry and the impact of the exit component on eligibility for re-entry. One commenter stated that US–VISIT should not rely on US–VISIT exit information as the basis for any adverse actions until the system is fully applied. Another commenter stated that US–VISIT should provide outreach to the public on the consequences of overstay and re-entry.

US–VISIT has taken many steps to inform the public of their responsibility to report their exit when departing from a designated port of departure. Until US–VISIT is fully implemented, DHS and DOS will review all evidence surrounding an alien's prior travel to, and departure from, the United States to determine whether the alien complied with the terms of his or her admission. Information from US–VISIT, including departure information, will be one factor relied upon by consular officers and inspectors when determining whether the alien complied with the terms of his or her admission.

In an effort to fully inform the public of the benefits and responsibilities associated with the US–VISIT program, the US–VISIT Outreach Campaign was established. The campaign includes a comprehensive package of materials and media and stakeholder outreach to heighten awareness about US–VISIT and its role in enhancing the security of U.S. citizens and visitors while facilitating legitimate travel and trade.

The US–VISIT program produces videos, pamphlets and exit cards that are made available to the public and that explain the responsibility of a visitor to 'check out' before departing the United States. The video can be seen in-flight on airlines and on-board at cruise lines at appropriate points. The pamphlets are available at U.S.

consulates and on-line at *www.dhs.gov/us-visit*. Each of these cards clearly states: "Visitors with visas who depart from a port where the departure confirmation system is in place must comply. The exit confirmation will be added to the visitor's travel records to demonstrate compliance and record the individual's status for future visits to the United States."

One commenter stated that US–VISIT should simplify procedures for aliens making subsequent trips. DHS is not altering the process for frequent travelers at this time. Part of US–VISIT's purpose is to identify aliens through biometric identifiers at the time of each admission and departure. The collection of biometrics is therefore required upon each visitor's entry and exit. DHS believes, however, that the steps required are simple enough such that the program will facilitate legitimate travel through an accurate determination of a traveler's immigration status or admissibility.

One commenter stated that the rule should clarify that aliens seeking reentry may receive a section 212(d)(3) of the Act waiver for failing to comply with departure requirements because of emergent circumstances. The January 5, 2004 interim rule states that an alien who does not comply with the departure requirements may be inadmissible under section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9). The commenter is correct that, for nonimmigrants, violations of 212(a)(9)(B) inadmissibility grounds may be waived under section 212(d)(3) of the Act, 8 U.S.C. 1182(d)(3). That interim rule did not alter an alien's eligibility to apply for a waiver under section 212(d)(3) of the Act. DHS has determined that it is not necessary to clarify the waiver authority in the codified text of the regulation.

13. Biometrics

Several commenters addressed the use of biometrics. One commenter stated the need to define better the rule's narrative statement about possible use of "other biometric identifiers." The International Civil Aviation Organization (ICAO) has stated that facial images are the mandatory biometric required for use in biometric passport applications. The ICAO standard indicates that nations may use fingerprints and iris scans in addition to facial images. US–VISIT currently collects fingerprints and facial images for use in its identity verification process, utilizing the fingerprints for the primary automated verification component. As technology evolves and international standards are refined, US–VISIT will evaluate its use of biometric information. DHS's goal is to collect enough biometric information to ensure accuracy, while minimizing the burden and intrusion upon the privacy of travelers.

Another commenter stated biometrics in foreign documents should be interoperable with US–VISIT. US–VISIT anticipates the foreign nations will utilize the guidelines established by the ICAO and International Standards Organization for biometric data. Biometric data stored in these formats are interoperable. As nations begin to employ this standard, DHS will ensure that its systems are interoperable with international biometric standards.

One commenter stated that some persons object to fingerprint collection as intrusive. The collection of fingerprints is an integral part of national security efforts. DHS recognizes that some persons could find it intrusive to provide fingerprints, but the unique ability to compare fingerprints against a biometric watch list of known terrorists, criminal offenders, and immigration violators is essential to national security. Through continued outreach and education, DHS is confident that any perceived stigma associated with providing biometric information will be minimized.

One commenter asked whether there is any possibility other biometrics would be collected. Currently, only fingerprints and facial images are envisioned as part of US–VISIT. One commenter asked for an explanation of the accommodations that will be made for visitors who cannot provide biometrics. DHS has implemented procedures for handling persons who cannot provide adequate fingerprint images from a specific finger, utilizing a specified order of taking the fingerprints. If a traveler is unable to provide any adequate fingerprints (*e.g.* due to a physical disability), DHS may rely upon other biometric identifiers, including comparison with the facial image.

One commenter recommends that US–VISIT use "smart cards." The ICAO-compliant biometric passport, which VWP countries are required to implement over the next few years, is essentially a smart card. US–VISIT intends to use this document as part of the inspection process to verify identity for persons traveling under VWP. For visa holders, the visa will not contain a chip, but instead serves as a "pointer" to information already residing in a central database. There is no need for the additional expense and process involved in producing an e-visa.

One commenter recommended the continued use of two-finger fingerprints and for DHS to not require ten fingerprints. DHS currently utilizes a two-finger scan to verify whether the alien applying for admission is the same individual to whom the DOS issued the nonimmigrant visa. DHS also utilizes a two-finger scan to determine whether the alien is identified in any watch lists or lookout databases. As the US–VISIT database grows, DHS and other federal agencies will assess the need to expand to a greater number of fingerprints in order to maintain its ability to identify criminal and other inadmissible aliens, while minimizing the number of multiple hits or false hits.

14. Crewmembers

Three commenters stated that foreign crewmembers should not be included in US–VISIT. One commenter stated that crewmembers already go through a series of background checks as part of their jobs and that requiring crewmembers to comply with US–VISIT, because of the time involved to comply, would place foreign carriers at an unfair disadvantage with carriers whose crew were primarily or exclusively U.S. citizens. Alien crewmembers are examined pursuant to the provisions of 8 CFR 252.1(b), which provides that alien crewmen are examined in accordance with the provisions of 8 CFR parts 235 and 240. The classes of aliens exempt from US–VISIT, excluding those that are age dependent, are for the diplomatic corps and for foreign nationals traveling to the United States on official business as representatives of NATO. These exemptions are based on longstanding protocols, reciprocal agreements and treaties. DHS sees no valid reason to exempt crew visa holders from the US–VISIT process. While it may be true that some airline crews go through a series of criminal background checks in order to maintain employment, this process is not equivalent to what the US–VISIT program provides. For example, US–VISIT enhances DHS' ability to ensure that the person providing the biometric is the same person who received the visa. With regard to increasing the time spent by crewmembers complying with US–VISIT, given the short time frames for inspection, DHS has seen no evidence that this process would place the foreign carriers at a competitive disadvantage. To clarify that alien crewmen are subject to US–VISIT, DHS has amended 8 CFR 252.1(c).

15. NSEERS Registration

One commenter stated that the rule needs clarity on whether National

Security Entry-Exit Registration System (NSEERS)[2] aliens are also subject to the US–VISIT requirements. At present, because biometric and biographic information is collected from NSEERS registrants at time of admission, they are not currently required to provide additional biometric data pursuant under the US–VISIT program. The arrival and departure information of NSEERS registrants will be integrated into the entry-exit system.

16. Additional Coverage of Classes of Aliens under US–VISIT

Several commenters expressed concern as to what other classes of travelers may be subject to the provisions of the January 5, 2004 interim rule and whether biometric collection will be required at all ports-of-entry. The statutory authority granted to the Secretary is to implement an automated entry-exit system that integrates electronic arrival and departure information for all aliens and that the system be deployed to all ports of entry by specific legislated dates. This interim rule is limited to the ports of entry that will be identified by notice in the **Federal Register**. The need for full deployment to all border crossings is requisite for a fully successful entry/exit system, therefore it should be expected that biometric collection and verification capabilities will be expanded to all ports of entry.

One commenter expressed concern that, as additional categories of alien visitors or additional biometrics are required, US–VISIT will not be able to meet clearance times. As stated previously, facilitating legitimate travelers is a primary DHS goal. DHS will continue to monitor the process to reduce or eliminate processing delays as US–VISIT expands to include additional categories of alien visitors (including the current expansion of US–VISIT to include VWP travelers) and additional ports of entry. While a statutorily mandated clearance time no longer exists, DHS takes very seriously its goal to facilitate the legitimate traveler, and as previously explained, DHS has taken extensive steps to ensure minimal impact due to this important security initiative. DHS further asserts that, once fully functional, US–VISIT may actually serve to expedite the processing of travelers by providing timely information demonstrating prior compliance with terms of admission.

[2] Certain aliens whose presence in the United States warrants monitoring for national security or law enforcement reasons remain subject to the NSEERS special registration procedures at 8 CFR 264.1(f) and its implementing notices. *See* 68 FR 67578.

Another commenter states that the Mexican "laser visa" (also known as Border Crossing Card, or DSP–150) holders should be exempt from US–VISIT. This interim rule addresses this issue in full in Part III of this Supplemental section.

17. Outreach, Consultation, and Public Information

Several commenters stated that US–VISIT should include extensive outreach to the public, including information on the consequences of overstay and re-entry, the exit requirements, and advising travelers abroad of US–VISIT before they commence travel.

As stated earlier in the section concerning re-entry, US–VISIT has launched an extensive outreach campaign, designed to inform and educate domestic and international audiences about US–VISIT. This campaign includes comprehensive materials and media and stakeholder outreach to heighten awareness about US–VISIT and its role in enhancing the security of U.S. citizens and international visitors while facilitating legitimate travel and trade.

The Outreach Team has created a strong brand for US–VISIT, including logo, tagline, graphics, and an overall look and feel that makes the program easily recognizable to international travelers. US–VISIT outreach materials are being developed in multiple languages, including English, Spanish, Portuguese, Japanese, Mandarin, Korean, Arabic, Haitian/Creole, Russian, Polish, Hebrew, Ukrainian, Vietnamese, French and German. The campaign currently includes the following materials: An in-flight animated video; an informational brochure, in print and electronic versions; boarding cards; airport posters and other signage; exit cards; video public service announcements; tool kits and press kits.

The Outreach Team has worked with the media to carry information about US–VISIT to critical constituents. Ongoing media relations activities include: editorial board briefings with selected domestic and foreign press, daily media monitoring and analysis, digital video conferences and other briefings with foreign press, and briefings at the New York and Washington Foreign Press Centers and at other selected events to spotlight the US–VISIT technologies and simple, fast procedures for travelers.

The Outreach Team has created a comprehensive relationship management system to keep all major stakeholders aware, informed, and educated about ongoing developments, and to assure US–VISIT responsiveness to their needs and interests.

In addressing outreach efforts, commenters stated that US–VISIT should consult with foreign governments and clarify the different requirements for inspections of those travelers with nonimmigrant visas and those who are inspected under the VWP. US–VISIT meets regularly with DOS to coordinate and discuss any changes in policy for a particular country or group of countries. US–VISIT meets regularly with Canada and Mexico to discuss immigration policies and procedures. Since this interim rule adds VWP applicants to US–VISIT, we will continue to coordinate and explain the requirements of US–VISIT with affected foreign governments.

One commenter stated that reports were received that persons were "stared at" by those travelers who were not subject to US–VISIT. The outreach program includes information on which persons are not subject to US–VISIT. With continued outreach, any unfavorable perception on the applicability of US–VISIT should decrease or be eliminated.

Another commenter stated that US–VISIT has been applied to persons not subject to US–VISIT, and that such errors need to be rectified. DHS is committed to ensuring that US–VISIT requirements are applied to the correct population of travelers. Recently, a US–VISIT program team has reviewed data to determine whether data has been collected from travelers not subject to the biometric data requirements and, if so, whether that data should be removed. DHS will continue to conduct such data reviews and correct any issues that arise.

18. Law Enforcement and Intelligence Capabilities

A commenter stated that there is nothing inherent in US–VISIT that will lead law enforcement to identify, locate and remove individuals in the United States who are engaged in terrorism or unlawful activities, and that a variety of other means is needed to enhance intelligence. Currently, biometric identifiers used by US–VISIT provide the capability to verify an alien's identity and to authenticate his or her travel documents. Individuals attempting to enter the United States fraudulently using another identity will be intercepted using biometrics and removed from the United States prior to being admitted. The alien's biometric and other information will be checked against law enforcement and intelligence data to determine whether the alien is a threat to national security

or public safety, or is otherwise inadmissible. However, as DHS receives new information concerning individuals who are risks to national security, US–VISIT will be able to ascertain whether those individual aliens are present within the United States, thereby providing a valuable law enforcement and national security tool.

Another commenter stated that US–VISIT needs procedures for detecting overstays. ICE has established a compliance unit that monitors entry-exit data available through US–VISIT, the National Security Entry-exit System (NSEERS), and other systems; analyzes overstay data; and targets individuals for field investigation. Through US–VISIT, ICE will be better able to identify aliens who overstay their period of authorized admission.

One commenter stated that DHS should not use US–VISIT as a substitute for increasing intelligence capacity. US–VISIT was not intended to supplant the existing roles of the nation's intelligence community. It was designed to meet the Congressional mandate for a system to both record the entry and exit of those individuals traveling to the United States, and to verify the identity of those individuals.

The principal law that mandates the creation of an automated entry-exit system that integrates electronic alien arrival and departure information is the DMIA. DMIA authorizes the Secretary of DHS, in his discretion, to permit other Federal, State, and local law enforcement officials to have access to the entry-exit system for law enforcement purposes; 8 U.S.C. 1365a(f). In addition, the entry-exit system component must share information with other systems as required by the Border Security Act. Section 202 of the Border Security Act addresses requirements for an interoperable law enforcement and intelligence data system and requires the integration of all databases and data systems that process or contain information on aliens. While the system must be interoperable and shared with other Federal law enforcement officials, neither the underlying laws nor any rulemaking mandates that US–VISIT serve as a substitute for increasing intelligence capacity.

19. Fees, Costs, and Fines

One commenter opposed the suggestion in the supplementary information of the rule that fees may have to be raised to cover biometric costs. Pursuant to section 286 of the INA, DHS has the authority to establish fees at a level needed to cover program costs associated with the inspections of persons at air, land and sea ports of entry. If the determination is made that a change in fees is required, DHS will implement such change in fees pursuant to the applicable requirements of the APA (5 U.S.C. 553).

One commenter stated that airlines could be subject to costs for returning illegal aliens. Another commenter requested that the rule clarify that airlines will not be subject to fines if aliens refuse to provide biometrics. Two commenters stated that airlines should not be penalized if aliens are denied re-entry because of a failure to comply with US–VISIT exit requirements. At this time, there is no change to pre-existing regulations and procedures regarding the responsibility of transportation carriers. Carriers remain responsible for the removal of applicants who are determined to be inadmissible.

However, DHS recognizes that there will be circumstances where an alien will be deemed to be inadmissible ultimately due to the implementation of US–VISIT and where the carrier could have had no prior knowledge of the alien's admissibility. An example, as provided by the commenter, is if an alien with a valid visa and passport refuses to provide biometric information upon entry. However, sections 273(c) and (e) of the INA provide for remittance, reduction, or outright waiver of any fines by the Secretary of DHS in situations where the carrier did not know, and could not have found with reasonable diligence, that an alien was inadmissible; or when the carrier screens all passengers in accordance with established procedures; or where other circumstances exist that would justify a remittance, reduction, or waiver of any fines. In making these determinations, DHS will weigh very heavily the ability of the carriers to foresee an alien's inadmissibility as it relates to US–VISIT.

20. Aliens in a Period of Stay Pursuant to a Pending Benefit Application

One commenter asked how DHS would handle aliens who left the United States after their initial period of admission expired, but otherwise complied with all aspects of US–VISIT and who had a pending benefit application at the time of departure. Pursuant to CIS policy, the timely and nonfrivolous filing of certain benefit applications will toll unlawful presence time from accruing until the adjudication of that benefit application.

As mentioned earlier, US–VISIT is an interoperable system, which can access data from other DHS systems, including the CIS system responsible for tracking immigration benefit applications. Thus, aliens who fall under this scenario described above will not be adversely impacted by US–VISIT, since the US–VISIT system will have access to the CIS benefit processing information.

21. Land Border Ports-of-Entry

Although the January 5, 2004 interim rule did not implement US–VISIT at land borders, three commenters discussed US–VISIT land border implementation in their comments. One commenter emphatically noted "we wish to make unequivocally clear that the circumstances of travel at land borders are monumentally different than at air and seaports and the hurdles are immeasurably higher." The commenter also expressed concern that DHS may not be able to meet the DMIA December 31, 2004 deadline unless DHS implemented systems that were not adequately tested, and that DHS should request that Congress provide additional time for implementing US–VISIT at land borders.

DHS recognizes that some of the challenges associated with implementing US–VISIT at land borders are potentially more complex than at air and sea ports of entry. Therefore, DHS is taking measured steps in land border implementation. For instance, the systems which encompass the US–VISIT system will have been operational for various periods of time prior to being used at land border ports of entry. Therefore, these systems have been adequately tested in an operational setting and DHS has gained proficiency in their use. DHS expects that the experience it has gained from implementing US–VISIT at air and sea ports of entry will allow it to implement US–VISIT at land ports of entry in an efficient manner.

DHS has been working to implement US–VISIT requirements at the 50 most highly trafficked land borders within the timeframe required under DMIA. As highlighted recently in the 9/11 Commission Report, there is an immediate security need to implement this phase of US–VISIT as soon as possible. Therefore, DHS will not be seeking additional time from Congress to expand US–VISIT to land borders. The implementation of US–VISIT at the 50 most highly trafficked land borders in the United States is discussed in greater detail in Section III A above.

B. Solicitation of Public Comment on the Operation of US–VISIT to Date and the Expansion of US–VISIT Pursuant to This Interim Rule

As stated previously, DHS places a great deal of importance on input from

the public on the performance and implementation of the US–VISIT program. Accordingly, DHS is soliciting comments from the public on all aspects of the current US–VISIT program, and any changes to the program as a result of this interim rule. DHS also invites comments on the implementation of the US–VISIT exit pilot programs. The pilot programs introduced three different methods of collection of identifying information pursuant to US–VISIT. DHS invites comments on the existing methods of collection of information, the methods considered and rejected by DHS (as discussed in Section II B above and in the **Federal Register** Notices published at 69 FR 482 (Jan. 5, 2004) and 69 FR 46556 (Aug. 3, 2004)), and suggested alternative methods for collection of biometric, biographic, or other identifying information under US–VISIT.

The comment filing process will use the standard procedure and instructions for filing are included at the beginning of this regulation. The comment period will be open until November 1, 2004. DHS also notes there is no plan to implement US–VISIT biometric data collection at any land border prior to the closing date for comments. Accordingly, as mentioned earlier in this supplemental section, the public will have an opportunity to comment on all land border issues prior to any US–VISIT land border implementation.

V. Regulatory Requirements

A. Good Cause Exception for an Interim Final Rule

Implementation of this rule without notice and the opportunity for public comment is warranted under the "good cause" exception found under the Administrative Procedure Act (APA) at 5 U.S.C. 553(b). The expansion of US–VISIT to the 50 most highly trafficked land borders and inclusion of aliens traveling under VWP are necessary to strengthen the ability of the United States to detect and deter aliens seeking admission into the United States who may not be lawfully admissible due to criminal records or suspected involvement in, or ties to, terrorist activities. Thus, this interim rule is integral to strengthening the security of the United States. Further, this interim rule will assist in meeting the goals and recommendations of the 9/11 Commission. Therefore, delay of the publication and effective date of this interim rule to allow for prior notice and comment would be impracticable and contrary to the public interest under 5 U.S.C. 553(b).

The immediate implementation of this second phase of US–VISIT will allow for the collection and comparison of biometric, biographic and other identifying information from aliens seeking admission into and departing from the United States through land borders. Issuing this interim rule before obtaining public comment is necessary to enhance the government's ability to identify persons who may pose a threat to homeland security.

Further, this interim rule will authorize DHS to obtain biometric information from persons traveling without visas under the VWP. Enrolling VWP travelers in US–VISIT will allow DHS to conduct biometric-based checks at time of a VWP traveler's application for admission into the United States. From a security standpoint, biometric checks are superior to biographic information checks. First, there are often a series of the same name in database checks, which can lead to confusion or mistaken identity, leading to time-consuming corrections. Second, biometric identifiers reduce the potential for fraudulent use of admission documentation.

Enrolling VWP travelers in US–VISIT freezes the traveler's identity and ties his or her identity to the travel document presented at time of initial admission. By making this link, US–VISIT greatly reduces the risk that the VWP traveler's identity could subsequently be used by another traveler seeking to enter the U.S. The biometric element provided by US–VISIT ensures that the alien is in fact presenting his or her own passport at the time of admission. As mentioned above, this biometric requirement helps to eliminate a common method of immigration fraud: assuming the identity of another by using their passport. Increasing the number of ports of entry where these checks are conducted, from air and sea to land border ports of entry, greatly increases the benefits of the process.

As discussed in Section II A above, since its implementation in January 2004, US–VISIT has proven that the use of biometrics to check identity and background is a highly effective law enforcement tool. US–VISIT has already prevented 196 criminal aliens from entering the United States, even though the program is currently operating on a limited basis. Expanding the classes of aliens subject to US–VISIT to VWP aliens immediately should result in additional aliens being identified on "lookout" lists being prevented admission or arrested as fugitives or wanted criminals. Further, expanding the program to include the major land border ports-of-entry should result in even more "hits." Accordingly, expanding both the classes of aliens subject to US–VISIT, as well as the location of ports where US–VISIT will be implemented, will have a considerable and positive effect on national security. Any delay in the implementation of this interim rule to allow for public comment may increase the opportunity for aliens who may otherwise not be admissible to the United States, due to suspected terrorist affiliations or criminal records, to enter the United States using false identifies, and false, fraudulent or stolen passports or other travel documents.

Accordingly, DHS finds that good cause exists under 5 U.S.C. 553(b) to make this interim rule effective 30 days following publication in the **Federal Register**, before closure of the 60 day public comment period. DHS nevertheless invites written comments on this interim rule, and will consider any timely comments in preparing a final rule.

DHS also finds that good cause exists under the Congressional Review Act, 5 U.S.C. 808, to implement this interim rule 30 days after publication in the **Federal Register**.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). Because good cause exists for issuing this regulation as an interim rule, no regulatory flexibility analysis is required under the RFA. Nonetheless, DHS has considered the impact of this rule on small entities and certifies that this rule will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). There is no change expected in any process as a result of this rule that would have a direct effect, either positive or negative, on a small entity.

C. Executive Order 12866

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), requires a determination whether a regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and subject to the requirements of the

Executive Order. DHS has determined that this interim rule is a "significant regulatory action" under Executive Order 12866, section 3(f) because there is significant public interest in issues pertaining to national security. Accordingly, this interim rule has been submitted to the Office of Management and Budget (OMB) for review and approval.

DHS has already performed a preliminary analysis of the expected costs and benefits of this interim rule. The anticipated benefits of this rule include: (1) Improving identification of travelers who may present threats to public safety and the national security of the United States through use of biometric identifiers; (2) enhancing the government's ability to match an alien's fingerprints and photographs to other law enforcement or intelligence data associated with identical biometrics; (3) improving the ability of the United States to identify individuals who may be inadmissible to the United States; (4) improving cooperation across international, Federal, State and local agencies through better access to data on foreign nationals who may pose a threat to the United States; (5) improving facilitation of legitimate travel and commerce by improving the timeliness and accuracy of the determination of a traveler's immigration status and admissibility; (6) enhancing enforcement of immigration laws, contributing to the increased integrity of the system of immigration in the United States, including the collection of more complete arrival and departure information on VWP travelers and aliens who seek to enter the United States through a land border port of entry; (7) reducing fraud, undetected impostors, and identity theft; and, (8) increasing integrity within the VWP program, through better data collection, tracking, and identification, allowing better compliance monitoring through increased and more accurate data.

The costs associated with implementation of this interim rule for travelers not otherwise exempt from US–VISIT requirements include an increase of approximately 15 seconds in inspection processing time per applicant over the current average inspection time of one minute, whether at a land, air, or sea port-of-entry. No significant difference is anticipated in the processing of an alien traveling with a visa as compared to a traveler without a visa under VWP.

DHS anticipates that, by December 31, 2005 when US–VISIT is required to be implemented at all land border ports of entry in the United States, approximately 3.2 million nonimmigrant applicants for Form I–94 issuance could be affected at the designated land ports-of-entry. DHS, when conducting a cost-benefit analysis for the January 5, 2004 interim rule, estimated that the time required to obtain the biometric information required under US–VISIT was approximately 15 seconds per person. Since the implementation of US–VISIT at air and sea ports on January 5, 2004, DHS has not received reports of average processing times greater than 15 seconds nor any significant delays for travelers resulting from the collection of biometric information under US–VISIT. The limited 15 second processing time was not expected to cause significant delays for travelers at air or sea ports because persons not required to provide biometrics (*e.g.* U.S. citizens, lawful permanent residents, and visa-exempt non-immigrants) generally are routed through different inspection lines, thereby easing any impact of the biometric collection process. Because the same biometric information will be obtained at land border ports of entry, through a similar secondary inspection process, DHS does not anticipate any increase in the 15 second processing time or any significant delay for travelers at land border ports of entry in the United States.

In addition, over time, the efficiency with which the process is employed will increase, and the process can be expected to improve further. While DHS does not anticipate longer wait times at land border ports of entry due to the collection and processing of biometric information under US–VISIT, DHS has developed a number of mitigation strategies, not unlike those already available to CBP under other conditions that result in backups. DHS, while not anticipating significant delays for travelers, will nevertheless develop procedures and strategies to deal with any significant delays that may occur through unanticipated and unusually heavy travel periods.

The addition of aliens traveling under the VWP was anticipated in the calculation of costs and benefits for the implementation of US–VISIT at air and sea ports pursuant to the January 5, interim rule. DHS estimated that 13 million aliens traveling to the United States through air or sea ports under VWP would be affected under US–VISIT. The number of aliens traveling through the 50 most highly trafficked land border ports of entry in the United States is estimated to be 209 million, but only slightly over 3 million will be required to obtain an I–94, either as a nonimmigrant alien with a visa or a Mexican national with a DSP–150 BCC seeking admission in the B–1/B–2 category. Thus, as a result of this rule, only approximately 3 million aliens annually seeking admission to the United States at a land border ultimately will be subject to US–VISIT requirements. DHS does not believe that the addition of VWP travelers or the 50 most trafficked land borders to US–VISIT will affect the average processing times or result in significant travel delays.

The additional costs to the Government and the public to implement the requirements of this rule are approximately $155 million for all 50 ports during fiscal year 2004, or approximately $3.1 million at each of the ports. These expenditures are required to upgrade the information technology hardware (*i.e.* desktop hardware and peripherals, upgrading local and wide area networks) at the affected ports.

D. Executive Order 13132

Executive Order 13132 requires DHS to develop a process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." Such policies are defined in the Executive Order to include rules 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."

DHS has analyzed this interim rule in accordance with the principles and criteria in the Executive Order and has determined that this interim rule 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. Therefore, DHS has determined that this interim rule does not have federalism implications. This interim rule provides for the collection by the Federal Government of biometric identifiers from certain aliens seeking to enter or depart from the United States, for the purpose of improving the administration of federal immigration laws and for national security. States do not conduct activities with which the provisions of this specific rule would interfere.

E. Executive Order 12988

This interim rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988. That Executive Order requires agencies to conduct reviews, before proposing legislation or promulgating regulations,

to determine the impact of those proposals on civil justice and potential issues for litigation. The Order requires that agencies make reasonable efforts to ensure the regulation clearly identifies preemptive effects, effects on existing federal laws and regulations, identifies any retroactive effects of the proposal, and other matters. DHS has determined that this regulation meets the requirements of Executive Order 12988 because it does not involve retroactive effects, preemptive effects, or other matters addressed in the Order.

F. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, requires Federal agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector of more than $100 million in any one year (adjusted for inflation with 1995 base year). Before promulgating a rule for which a written statement is needed, section 205 of the UMRA requires DHS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome option that achieves the objective of the rule. Section 205 allows DHS to adopt an alternative, other than the least costly, most cost-effective, or least burdensome option if DHS publishes an explanation with the final rule. This interim rule will not result in the expenditure, by State, local or tribal governments, or by the private sector, of more than $100 million annually. Thus, DHS is not required to prepare a written assessment under UMRA.

G. Small Business Regulatory Enforcement Fairness Act of 1996

This interim rule is a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804, as this interim rule will result in an annual effect on the economy of $100 million or more as the Federal government expects to spend $155 million to upgrade technology and hardware at the 50 ports of entry in 2004/2005. However, because this rule is expected to have little effect on trans-border commerce, this interim rule will not have a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, or innovation of small businesses, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

H. Trade Impact Assessment

The Trade Impact Agreement Act of 1979, 19 U.S.C. 2531–2533, prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. DHS has determined that this interim rule will not create unnecessary obstacles to the foreign commerce of the United States and that any minimal impact on trade that may occur is legitimate in light of this rule's benefits for the national security and public safety interests of the United States. In addition, DHS notes that this effort considers and utilizes international standards concerning biometrics, and will continue to consider these standards when monitoring and modifying the program.

I. National Environmental Policy Act of 1969

DHS is required to analyze the proposed actions contained in this interim rule for purposes of complying with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and Council on Environmental Quality (CEQ) regulations, 40 CFR Parts 1501–1508. An agency is not required to prepare either an environmental impact statement (EIS) or environmental assessment (EA) under NEPA if the proposed action falls within a categorical exclusion, and no extraordinary circumstances preclude use of the categorical exclusion. 40 CFR 1508.4. DHS has analyzed this interim rule and has concluded that there are no factors in the expansion of US–VISIT pursuant to this interim rule case that would limit the use of a categorical exclusion under 28 CFR part 61 App. C, as authorized under 6 U.S.C. 552(a). Therefore, DHS finds that this interim rule is categorically excluded from further environmental documentation.

J. Paperwork Reduction Act

This interim rule permits DHS to require certain aliens who cross United States borders to provide fingerprints, photograph(s), and potentially other biometric identifiers upon their arrival at designated ports or departure from designated locations. These requirements constitute an information collection under the Paperwork Reduction Act (PRA), 44 U.S.C. 507 *et seq.* OMB in accordance with the Paperwork Reduction Act has previously approved this information collection for use. The OMB Control Number for this collection is 1600–0006.

Since this rule adds a new category of aliens who must be photographed, fingerprinted, and who may be required to provide other biometric identifiers, the Department has submitted the required Paperwork Reduction Change Worksheet (OMB–83C) to the Office of Management and Budget (OMB) reflecting the increase in burden hours and the OMB has approved the changes.

In addition, this interim rule requires that the same classes of aliens who are required to provide fingerprints, photograph(s), and potentially other biometric identifiers upon their arrival at air and sea ports-of-entry under US–VISIT must also provide these biometrics when entering the United States at land border ports-of-entry. The requirement to collect these biometrics under US–VISIT are considered information collections under the Paperwork Reduction Act. OMB has previously approved the information collection requirements for US–VISIT. The OMB Control Number for this collection is 1600–0006.

K. Public Privacy Interests

As discussed in the January 5, 2004 interim rule, US–VISIT records will be protected consistent with all applicable privacy laws and regulations. Personal information will be kept secure and confidential and will not be discussed with, nor disclosed to, any person within or outside US–VISIT other than as authorized by law and as required for the performance of official duties. In addition, careful safeguards, including appropriate security controls, will ensure that the data is not used or accessed improperly. The Department's Chief Privacy Officer will review pertinent aspects of the program to ensure that these proper safeguards and security controls are in place. The information will also be protected in accordance with the Department's published privacy policy for US–VISIT. Affected persons will have a three-stage process for redress if there is concern about the accuracy of information. An individual may request a review or change, or a Department officer may determine that an inaccuracy exists in a record. A Department officer can modify the record. If the individual remains unsatisfied with this response, he or she can request assistance from the US–VISIT Privacy Officer, and can ask that

the Privacy Officer review the record and address any remaining concerns.

The Department's Privacy Office will exercise oversight of US–VISIT to ensure further that the information collected and stored in IDENT and other systems associated with US–VISIT is being properly protected under the privacy laws and guidance. US–VISIT also has a program-dedicated Privacy Officer to handle specific inquiries and to provide additional oversight of the program.

Finally, DHS will maintain secure computer systems that will ensure that the confidentiality of an individual's personal information is maintained. In doing so, the Department and its information technology personnel will comply with all laws and regulations applicable to government systems, such as the Federal Information Security Management Act of 2002, Title X, Public Law 107–296, 116 Stat. 2259–2273 (2002)(codified in scattered sections of 6, 10, 15, 40, and 44 U.S.C.); Information Management Technology Reform Act (Clinger-Cohen Act), Public Law 104–106, Div. E, codified at 40 U.S.C. 11101 *et seq.*; Computer Security Act of 1987, Public Law 100–235, 40 U.S.C. 1441 *et seq.* (as amended); Government Paperwork Elimination Act, Title XVII, Public Law 105–277, 112 Stat. 2681–749—2681–751 (1998) (codified, as amended, at 44 U.S.C. 101; 3504 note); and Electronic Freedom of Information Act of 1996, Public Law 104–231, 110 Stat. 3048 (1996)(codified, as amended, at 5 U.S.C. section 552.)

List of Subjects

8 CFR Part 215

Administrative practice and procedure, Aliens, Travel restrictions.

8 CFR Part 235

Aliens, Immigration, Registration, Reporting and Recordkeeping requirements.

8 CFR Part 252

Air Carriers, Airmen, Aliens, Maritime carriers, Reporting and recordkeeping requirements, Seamen.

■ Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 215—CONTROL OF ALIENS DEPARTING FROM THE UNITED STATES

■ 1. The authority citation for part 215 continues to read as follows:

Authority: 8 U.S.C. 1104; 1184; 1185 (pursuant to E.O. 13323, published January 2, 2004), 1365a and note, 1379, 1731–32.

■ 2. Section 215.8 is amended by:

■ a. Revising paragraph (a)(1); and

■ b. Revising paragraph (a)(2)(ii).

The revisions read as follows:

§ 215.8 Requirements for biometric identifiers from aliens on departure from the United States.

(a)(1) The Secretary of Homeland Security may establish pilot programs at land border ports-of-entry, and at up to fifteen air or sea ports-of-entry, designated through notice in the **Federal Register**, through which the Secretary or his delegate may require an alien admitted pursuant to a nonimmigrant visa, a Form DSP–150, B–1/B–2 Visa and Border Crossing Card, or section 217 of the Act, who departs the United States from a designated port-of-entry, to provide fingerprints, photograph(s) or other specified biometric identifiers, documentation of his or her immigration status in the United States, and such other evidence as may be requested to determine the alien's identity and whether he or she has properly maintained his or her status while in the United States.

(2) * * *

(ii) Aliens admitted on A–1, A–2, C–3 (except for attendants, servants, or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 visas, and certain officials of the Taipei Economic and Cultural Representative Office, who are maintaining such status at time of departure, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the requirements of paragraph (a)(1);

* * * * *

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 3. The authority citation for part 235 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323 published on January 2, 2004), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32.

■ 4. Sections 235.1 is amended by revising paragraphs (d)(1)(ii) and (d)(1)(iv)(B), as follows:

§ 235.1 Scope of examination.

* * * * *

(d) * * *

(1) * * *

(ii) The Secretary of Homeland Security or his delegate may require nonimmigrant aliens seeking admission to the United States pursuant to a nonimmigrant visa, a Form DSP–150, B–1/B–2 Visa and Border Crossing Card, or section 217 of the Act, at a port-of-entry designated by notice in the **Federal Register** to provide fingerprints, photograph(s) or other specified biometric identifiers during the inspection process. The failure of an applicant for admission to comply with any requirement to provide biometric identifiers may result in a determination that the alien is inadmissible under section 212(a)(7) of the Act, or other relevant grounds in section 212 of the Act.

* * * * *

(iv) * * *

(B) Aliens admitted on A–1, A–2, C–3 (except for attendants, servants or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5 or NATO–6 visas, and certain officials of the Taipei Economic and Cultural Representative Office, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the requirements of paragraph (d)(1)(ii);

* * * * *

PART 252—LANDING OF ALIEN CREWMEN

■ 5. The authority citation for part 252 is revised to read as follow:

Authority: 8 U.S.C. 1103, 1184, 1185 (pursuant to E.O. 13323 published on January 2, 2004) , 1258, 1281, 1282; 8 CFR part 2.

■ 6. Section 252.1(c) is revised to read as follows:

§ 252.1 Examination of crewmen.

* * * * *

(c) *Requirements for landing permits.*

Every alien crewman applying for landing privileges in the United States is subject to the provisions of 8 CFR 235.1(d)(1)(ii) and (iii), and must make his or her application in person before a Customs and Border Protection (CBP) officer, present whatever documents are required, establish to the satisfaction of the inspecting officer that he or she is not inadmissible under any provision of the law, and is entitled clearly and beyond doubt to landing privileges in the United States.

* * * * *

Dated: August 26, 2004.

Tom Ridge,

Secretary of Homeland Security.

[FR Doc. 04–19906 Filed 8–30–04; 8:45 am]

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