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4. An introduction to the finding aids of the FR/CFR system.

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

WHEN: Tuesday, October 20, 2009
9 a.m.–12:30 p.m.

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

RESERVATIONS: (202) 741–6008

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DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580–AB09

Scales; Accurate Weights, Repairs, Adjustments or Replacements After Inspection

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture's Grain Inspection, Packers and Stockyards Administration (GIPSA) is amending one section of the regulations under the Packers and Stockyards Act (P&S Act) to incorporate by reference the 2009 edition of the National Institute of Standards and Technology (NIST) Handbook 44, ''Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices,'' and to require that scales used by stockyard owners, market agencies, dealers, packers, and live poultry dealers to weigh livestock, livestock carcasses, live poultry, or feed for the purposes of purchase, sale, acquisition, payment, or settlement, meet applicable requirements of the 2009 edition of NIST Handbook 44. GIPSA is also amending that section of the regulations to add ''swine contractors'' to the list of regulated entities to which the section applies.

DATES: Effective November 19, 2009. The incorporation by reference of a certain publication listed in this rule is effective as of November 19, 2009.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Policy and Litigation Division, P&SP, GIPSA, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720–7363, *s.brett.offutt@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

GIPSA enforces the P&S Act, as amended (7 U.S.C. 181 *et seq.*). The Secretary of Agriculture, is authorized (7 U.S.C. 228) to issue regulations necessary to carry out the provisions of the P&S Act.

The regulations under the P&S Act have specific requirements for (1) scales that regulated entities use for weighing livestock, poultry or feed and (2) packers purchasing livestock on a carcass grade, weight, or grade and weight basis.

The Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171) (Act) amended the P&S Act to add ''swine contractor'' as a regulated entity. Section 10502 of the Act defined swine contractor as ''* * * any person engaged in the business of obtaining swine under a swine production contract for the purpose of slaughtering the swine or selling the swine for slaughter, if (a) the swine is obtained by the person in commerce; or (b) the swine (including products from the swine) obtained by the person is sold or shipped in commerce.''

GIPSA believes that adding ''swine contractor'' to specific sections of the regulations will dispel confusion among swine contractors regarding which regulations under the P&S Act are applicable to them. It will also allow GIPSA to more easily identify and enforce violations of the P&S Act.

Notice of Proposed Rulemaking and Final Action

GIPSA published a Notice of Proposed Rulemaking in the **Federal Register** (74 FR 22841) on May 15, 2009, seeking comments on amending the regulations issued under the P&S Act to do the following: (1) Incorporate by reference the 2009 edition of the National Institute of Standards and Technology (NIST) Handbook 44, ''Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices;'' (2) require that scales used by stockyard owners, market agencies, dealers, packers, and live poultry dealers to weigh livestock, livestock carcasses, live poultry, or feed for the purposes of purchase, sale, acquisition, payment, or settlement, meet applicable requirements of the 2009 NIST Handbook 44; and, (3) add ''swine contractors'' to the list of regulated entities to which the section applies. Because GIPSA received no comments on the proposed rule during the 60-day comment period, which ended on July 14, 2009, we are amending § 201.71 of the regulations under the P&S Act (9 CFR 201.71) to incorporate by reference the 2009 edition of NIST Handbook 44. We are also amending § 201.71(a) to state that swine contractors must operate, maintain, and test scales according to the requirements of the 2009 edition of Handbook 44, Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices. In addition, we are amending § 201.71(b) to require that swine contractors use scales equipped with a printing device, which shall record weight values on a scale ticket or other document. Finally, we are amending § 201.71(d) to require that swine contractors use only scales that are found, upon testing and inspection, to be in a condition to give accurate weights.

GIPSA believes that adding ''swine contractor'' as a regulated entity to section 201.71 makes that section of the regulations consistent with other regulations under the P&S Act regarding regulated entities that have been amended to include swine contractors.

Options Considered

We considered the option of not adding swine contractors to the regulations while continuing to protect their interests indirectly through the regulation of packers, dealers, and market agencies. We determined that this option, however, was contrary to the intent of Congress, which amended the P&S Act to give GIPSA specific authority over swine contractors. We also considered not revising the regulations under the P&S Act regarding the standards for operating, maintaining, and testing scales and standards for electronic devices. We determined that this option, however, would not provide up-to-date standards under the P&S regulations for electronic devices as new technology emerges, nor would it provide consistency with the standards imposed by the States' departments of weights and measures.

Effects on Regulated Entities

This final rule makes it clear that swine contractors as well as other regulated entities must operate,

maintain, and test scales according to the requirements of the 2009 edition of NIST Handbook 44, and use scales that are in good condition and equipped with a printing device to record weight values. Since regulated entities are required under State law to comply with NIST Handbook 44, there are no new costs or burden to comply.

Executive Order 12866 and Regulatory Flexibility Act

The Office of Management and Budget (OMB) has designated this rule as not significant for the purposes of Executive Order 12866.

Pursuant to the requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), GIPSA has considered the economic impact of this action on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS).[1] This final rule affects swine contractors, most of which are either slaughterers or processors of swine with more than 500 employees (NAICS code 311611), or are producers with more than $750,000 in annual sales (NAICS code 112210), and do not meet the applicable size standards for small entities under the Small Business Act (13 CFR 121.201). Therefore, we have determined that this final rule will not have a significant economic impact on a substantial number of small entities as defined in the RFA and are not providing an initial regulatory flexibility analysis.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. These actions are not intended to have retroactive effect. This final rule will not pre-empt state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this final rule.

Paperwork Reduction Act

This final rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). It does not involve collection of new or additional information by the federal government.

E-Government Act Compliance

GIPSA is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 9 CFR Part 201

Swine, Hogs, Livestock, Measurement standards, Incorporation by reference.

■ For the reasons set forth in the preamble, we amend 9 CFR part 201 to read as follows:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 7 U.S.C. 181–229c.

■ 2. In § 201.71, paragraphs (a), (b) and (d) are revised to read as follows:

§ 201.71 Scales; accurate weights, repairs, adjustments or replacements after inspection.

(a) All scales used by stockyard owners, swine contractors, market agencies, dealers, packers, and live poultry dealers to weigh livestock, livestock carcasses, live poultry, or feed for the purposes of purchase, sale, acquisition, payment, or settlement shall be installed, maintained, and operated to ensure accurate weights. Such scales shall meet applicable requirements contained in the General Code, Scales Code, and Weights Code of the 2009 edition of the National Institute of Standards and Technology (NIST) Handbook 44, ''Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices,'' which is hereby incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of approval and a notice of any change in these materials will be published in the **Federal Register**. All approved material is available for inspection at the National Archives and Records Administration (NARA). For more information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Also, it is available for inspection at USDA, GIPSA, P&SP, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720–7363. The handbook is for sale by the National Conference of Weights & Measures (NCWM), 1135 M Street, Suite-110, Lincoln, Nebraska, 68508. Information on these materials may be obtained from NCWM by calling 402–434–4880, by e-mailing *nfo@ncwm.net,* or on the Internet at *http://www.nist.gov/owm.*

(b) All scales used by stockyard owners, swine contractors, market agencies, dealers, packers, and live poultry dealers to weigh livestock, livestock carcasses, live poultry, or feed for the purpose of purchase, sale, acquisition, payment, or settlement of livestock or live poultry and all scales used for the purchase, sale acquisition, payment, or settlement of livestock on a carcass weight basis shall be equipped with a printing device which shall record weight values on a scale ticket or other document.

* * * * *

(d) No scales shall be operated or used by any stockyard owners, swine contractors, market agencies, dealers, packers, or live poultry dealers to weigh livestock, livestock carcasses, live poultry, or feed for the purposes of purchase, sale, acquisition, payment, or settlement of livestock, livestock carcasses or live poultry unless it has been found upon test and inspection, as specified in § 201.72, to be in a condition to give accurate weight. If a scale is inspected or tested and adjustments or replacements are made to a scale, it shall not be used until it has been inspected and tested and determined to meet all accuracy requirements specified in the regulations in this section.

Alan R. Christian,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. E9–25040 Filed 10–19–09; 8:45 am]

BILLING CODE 3410–KD–P

[1] See: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2009–BT–TP–0020]

RIN 1904–AC09

Energy Conservation Program: Repeal of Test Procedures for Televisions

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (DOE) repeals the regulatory

provisions establishing the test procedure for televisions under the Energy Policy and Conservation Act (EPCA). The test procedure has been made obsolete by the transition from analog to digital television in the United States, effective June 13, 2009.

DATES: *Effective Date:* This rule is effective October 20, 2009.

ADDRESSES: The public may review copies of all materials related to this rulemaking at the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Ron Lewis, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 950 L'Enfant Plaza, SW., Room 6057, Washington, DC 20585–0121, (202) 586–8423, e-mail: *Ronald.Lewis@ee.doe.gov*.

Eric Stas, Esq., GC–72, U.S. Department of Energy, Office of General Counsel, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–5827, e-mail: *Eric.Stas@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

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I. Authority and Background

Title III of the Energy Policy and Conservation Act (42 U.S.C. 6291 *et seq.*; EPCA) sets forth a variety of provisions designed to improve energy efficiency. Part A [1] of title III (42 U.S.C. 6291–6309) establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' The consumer products subject to this program (hereafter ''covered products'') include televisions. Under EPCA, the overall program consists essentially of testing, labeling, and Federal energy conservation standards.

Section 323 of EPCA (42 U.S.C. 6293) sets forth generally applicable criteria and procedures for DOE's adoption and amendment of test procedures. It states, for example, that ''[a]ny test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use, * * * or estimated annual operating cost of a covered product during a representative average use cycle or period of use, as determined by the Secretary [of Energy], and shall not be unduly burdensome to conduct.'' (42 U.S.C. 6293(b)(3)) Manufacturers of covered products must use test procedures prescribed under EPCA as the basis for establishing and certifying to DOE that their products comply with energy conservation standards adopted under EPCA. (42 U.S.C. 6295(s))

EPCA also specifies that State law providing for the disclosure of information with respect to any measure of energy consumption is superseded to the extent that such law requires testing or the use of any measure of energy consumption or energy descriptor in any manner other than provided under section 323 of EPCA. (42 U.S.C. 6297(a)(1)(A); 42 U.S.C. 6297(f)(3)(G)) Therefore, in the absence of a Federal test procedure or accompanying conservation standard, States may prescribe their own test procedures and standards pursuant to applicable State law. *Id.*

II. Discussion

The existing test procedure to measure the energy efficiency of television sets is codified at 10 CFR 430.23(h) and 10 CFR Subpart B, Appendix H, and the sampling plan, that is, the specific requirements for the number of units to be tested, is set forth at 10 CFR 430.24(h).

The existing test procedure is appropriate for measuring the energy efficiency of only analog television sets. In the Digital Television Transition and Public Safety Act of 2005, 47 U.S.C. 309 note, as amended by the DTV Delay Act of 2009, 47 U.S.C. 609 note, Congress directed the Federal Communications Commission to terminate all licenses for full-power television stations in the analog television service, and to require the cessation of broadcasting by full-power stations in the analog television service, by June 13, 2009. Given that the June 2009 deadline set by Congress for the transition to digital television has passed, the existing test procedure and sampling plan are obsolete.

Regulatory definitions of ''television set'', ''color television set'', and ''monochrome television set'' are set forth at 10 CFR 430.2. ''Television set'' is defined simply as ''a color television set or a monochrome television set''. ''Color television set'' is defined as ''an electrical device designed to convert incoming broadcast signals into color television pictures and associated sound'', and ''monochrome television set'' is defined as ''an electrical device designed to convert incoming broadcast signals into monochrome television pictures and associated sound''. The definitions are not affected by the transition from analog to digital television in the United States because the broadcast signals they reference encompass both analog and digital signals.

The Department of Energy received petitions from the California Energy Commission (Commission or CEC) and the Consumer Electronics Association (CEA) related to the existing television test procedure. The Commission petitioned for repeal of the regulatory provisions establishing the test procedure and defining ''television set''. CEA petitioned for replacement of the existing test procedure with the test procedure adopted by the International Electrochemical Commission, IEC 62087–2008(E), published in September 2008.

In response to these petitions, and as a result of the transition to digital television discussed above, DOE is repealing the existing television test procedure and the regulatory provision specifying requirements for the number of units to be tested pursuant to the test procedure (*i.e.*, the sampling plan). DOE will maintain the regulatory definitions because they continue to be appropriate notwithstanding the transition to digital television, and because television sets are listed as a covered product in EPCA. (42 U.S.C. 6292(12))

DOE will soon begin a rulemaking process to establish a new Federal test procedure and a new Federal energy-efficiency standard for televisions. In establishing a new test procedure, DOE will give serious consideration to the suggestion made by CEA that DOE adopt IEC 62087–2008(E).

III. Procedural Requirements

A. Executive Order 12866

Today's regulatory action is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866,

[1] This part was originally titled Part B; however, it was redesignated Part A after Part B was repealed by Public Law 109–58.

''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. Administrative Procedure Act

The Department of Energy finds good cause to waive notice and comment on these regulations pursuant to 5 U.S.C. 533(b)(B), and the 30-day delay in effective date pursuant to 5 U.S.C. 553(d). Notice and comment are unnecessary and contrary to the public interest because this final rule is repealing a test procedure that has been made obsolete by act of Congress. A delay in effective date is unnecessary and contrary to the public interest for these same reasons. Therefore, these regulations are being published as final regulations and are effective October 20, 2009.

C. National Environmental Policy Act

DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. This rule amends an existing rule without changing its environmental effect, and, therefore, is covered by the Categorical Exclusion A5 found in appendix A to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that must be proposed for public comment, unless the agency certifies that the rule will have no significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site at *http://www.gc.doe.gov*. Because a notice of proposed rulemaking is not required under the Administrative Procedure Act or other applicable law, the Regulatory Flexibility Act does not require certification or the conduct of a regulatory flexibility analysis for this rule.

E. Paperwork Reduction Act

This rulemaking imposes no new information or recordkeeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

F. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For proposed regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate.'' UMRA also requires an agency plan for giving notice and opportunity for timely input to small governments that may be affected before establishing a requirement that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at *http://www.gc.doe.gov*). Today's final rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

G. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's rule would have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is unnecessary to prepare a Family Policymaking Assessment.

H. Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. DOE has examined this final rule and determined that it would not preempt State law and would have no 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. Executive Order 13132 requires no further action.

I. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

J. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action is not a significant regulatory action under Executive Order 12866 or any successor order; would not have a significant adverse effect on the supply, distribution, or use of energy; and has not been designated by the Administrator of OIRA as a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Executive Order 12630

Pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 15, 1988), DOE has determined that this rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

M. Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91), the Department of Energy must comply with section 32 of the Federal Energy Administration Act of 1974 (Pub. L. 93–275), as amended by the Federal Energy Administration Authorization Act of 1977 (Pub. L. 95–70). (15 U.S.C. 788) Section 32 provides that where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Department of Justice and the Federal Trade Commission concerning the impact of the commercial or industry standards on competition. This final rule to repeal the test procedure for determining the energy efficiency of television sets does not authorize or require the use of any commercial standards. Therefore, no consultation with either DOJ or FTC is required.

N. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of today's rule before its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

IV. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on October 2, 2009.

Henry Kelly,

Principal Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

■ For the reasons stated in the preamble, part 430 of chapter II of title 10, Code of Federal Regulations, is amended as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for Part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

§ 430.23 [Amended]

■ 2. Section 430.23 is amended by removing and reserving paragraph (h).

§ 430.24 [Amended]

■ 3. Section 430.24 is amended by removing and reserving paragraph (h).

Appendix H [Removed and Reserved]

■ 4. Appendix H to subpart B of part 430 is removed and reserved.

[FR Doc. E9–25170 Filed 10–19–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 61, 91, and 141

[Docket No. FAA–2006–26661; Amendment Nos. 61–124A, 91–309A, and 141–12A]

RIN 2120–AI86

Pilot, Flight Instructor, and Pilot School Certification; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The Federal Aviation Administration (FAA) is making several corrections to its ''Pilot, Flight Instructor, and Pilot School Certification'' final rule published in the **Federal Register** on August 21, 2009. The FAA corrections include standardizing certain part 61 time period durations from ''60 days'' to now read ''2 calendar months.'' We are also correcting an omission and errors to the prerequisite eligibility requirements for use of flight simulators. Additionally, we are correcting the duration of a student pilot certificate to 60 calendar months for a student pilot seeking a sport pilot certificate. Finally, we are correcting a sentence in the preamble to conform with the final rule regarding the use of flight training devices.

DATES: These corrections are effective on October 20, 2009.

FOR FURTHER INFORMATION CONTACT: John D. Lynch, Certification and General Aviation Operations Branch, AFS–810, General Aviation and Commercial Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3844; e-mail to *john.d.lynch@faa.gov*.

For legal interpretative questions about this final rule, contact: Michael Chase, AGC–240, Office of Chief Counsel, Regulations Division, Federal

Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3110; e-mail to *michael.chase@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA published a final rule in the **Federal Register**, entitled ''Pilot, Flight Instructor, and Pilot School Certification'' on August 21, 2009 (74 FR 42500). That final rule made revisions to the training, qualification, certification, and operating rules for pilots, flight instructors, ground instructors, and pilot schools in part 61, part 91, and part 141. The FAA's intention was to update and clarify certain training and qualification rules for pilots, flight instructors, ground instructors, and pilot schools ensuring a better understanding of those rules relating to aircraft operations in the National Airspace System (NAS). However, the published final rule contained some inadvertent errors that we are now correcting.

In the amendatory instructions to § 61.3, we stated that we were revising paragraph (c)(2)(xii). However, paragraph (c)(2)(xii) is a new subparagraph in § 61.3. We are correcting the amendatory instruction to state that we are adding the new paragraph.

We revised § 61.39(a)(6)(i) to change the time period from ''60 days'' to read ''2 calendar months.'' Since the publication of the final rule, the FAA has received numerous inquiries about this difference where § 61.39(a)(6)(i) reads ''2 calendar months'' and other sections reference ''60 days.'' This conforming change should have been in the published final rule. For these reasons, we are now correcting §§ 61.99, 61.109, 61.129, and 61.313 to revise the references to ''60 days'' to read ''2 calendar months.'' We are also adding clarifying language to these sections that the flight training must be conducted with an authorized instructor, which is the intent of § 61.39(a)(6)(1) and the definition of ''flight training'' in § 61.1. This correction will parallel §§ 61.99, 61.109, 61.129, and 61.313 with the new § 61.39(a)(6)(i), as originally intended.

In the preamble to the final rule, we stated: ''The requirement that a minimum of a Level 5 flight training device be used if a flight training device is used for the practical test conforms with existing FAA policy.'' (*Id.* at 42522.) This sentence is not correct. The sentence should read: ''The requirement that a minimum of a Level 5 flight training device be used if a flight simulator is used for any portion of the practical test conforms with existing FAA policy.'' This corrected sentence now parallels § 61.64(b)(4), (d)(4), and (f)(4).

In the final rule, we intended to consolidate and clarify the uses of flight simulators and flight training devices from § 61.63(e), (f), and (g) and § 61.157(g), (h), and (i) into a new § 61.64 without substantive changes to the uses of or prerequisite eligibility requirements to flight simulators and flight training devices. However, the language used in § 61.64(a)(1)(iii), (c)(1)(iii), and (e)(1)(iii) requires the use of a qualified and approved Level C flight simulator if a flight simulator is used for ''any portion of the practical test.'' This change from the previous requirement in § 61.63 and § 61.157 was not intended. We are correcting § 61.64(a)(1)(iii), (c)(1)(iii), and (e)(1)(iii) to require the use of a qualified and approved Level C flight simulator if a flight simulator is used for the entire practical test, as previously required.

Additionally, when we established § 61.64(a)(2) and § 61.64(a)(3), we inadvertently omitted one of the prerequisite eligibility requirements from old § 61.63(e)(4)(ii)(C) and § 61.157(g)(3)(ii)(C). We are correcting § 61.64(a)(2) and § 61.64(a)(3) to add the previously available prerequisite option for pilots who have logged ''at least 2,000 hours of flight time, of which 500 hours is in turbine-powered airplanes of the same class of airplane for which the type rating is sought.''

In the final rule, we inadvertently omitted the clarifying phrase ''as appropriate'' in § 61.64(a)(4). To prevent any confusion as to the intent of the rule, we are adding the clarifying phase ''as appropriate'' in § 61.64(a)(4). This section applies when the applicant does not meet the prerequisite eligibility requirement for either a turbojet airplane or a turbo-propeller type rating.

We are making a formatting revision to the rule text in § 61.64(a)(4)(i), (c)(3)(i), and (e)(3)(i) by replacing the period at the end of the paragraph and replace it with semicolon and adding the word ''or''. We are also modifying the text in § 61.64(a)(4)(ii), (c)(3)(ii), and (e)(3)(ii). These changes will clarify that the rule still provides for partial use of the aircraft for performing the preflight inspection, normal takeoff, normal instrument landing system approach, missed approach, and normal landing tasks, or the applicant will receive the supervised operating experience.

We are also making a minor correction to § 61.19(b)(3). Section 61.19(b)(3) provides that for student pilots seeking a glider or balloon rating that the student pilot certificate does not expire until 60 calendar months after the month of the date issued, regardless of the person's age. Because a sport pilot certificate holder is not required to hold a medical certificate, we are including student pilots seeking a sport pilot certificate in this rule.

We are also making a further clarification to § 61.157(f)(2)(ii) and (iii). The purpose of this correction is to clarify that an Aircrew Program Designee or Training Center Evaluator may be authorized to conduct competency and/or proficiency checks required under part 121, part 135, or subpart K of part 91.

Corrections

In the FR Document E9–19353 that appeared in the **Federal Register** on Friday, August 21, 2009, make the following corrections:

A. Correction to the Preamble

1. On page 42522, third column, fifth complete paragraph, revise the first sentence to read, ''The requirement that a minimum of a Level 5 flight training device be used if a flight simulator is used for any portion of the practical test conforms with existing FAA policy.''

B. Corrections to the Regulatory Text

§ 61.3 [Corrected]

■ 1. On page 42546, third column, revise amendatory instruction 4 to read as follows:

■ 4. Amend § 61.3 by revising paragraphs (a) introductory text, (a)(1), (a)(2)(i), (b) introductory text, (b)(1), (c)(1), (c)(2)(ii), (c)(2)(iii), (c)(2)(v) introductory text, (c)(2)(xi), (f)(1)(i), (f)(2)(i), (f)(2)(ii), (g)(1)(i), (g)(2)(i), and (g)(2)(ii) and by adding a new paragraph (c)(2)(xii) to read as follows:

■ 2. On page 42547, second column, in the amendment to § 61.19, revise paragraph (b)(3) to read as follows:

§ 61.19 Duration of pilot and instructor certificates.

* * * * *

(b) * * *

(3) For student pilots seeking a glider rating, balloon rating, or a sport pilot certificate, the student pilot certificate does not expire until 60 calendar months after the month of the date issued, regardless of the person's age.

* * * * *

■ 3. On page 42553, first and second columns, in the amendment to § 61.64;

■ A. Revise paragraph (a)(1)(iii);

■ B. Remove the word ''or'' after the semicolon in paragraph (a)(2)(iii);

■ C. Remove the period after paragraph (a)(2)(iv) and add ''; or'' in its place;

■ D. Add paragraph (a)(2)(v);
■ E. Remove the word ''or'' after the semicolon in paragraph (a)(3)(iii);
■ F. Remove the period after paragraph (a)(3)(iv) and add ''; or'' in its place;
■ G. Add paragraph (a)(3)(v);
■ H. Amend paragraph (a)(4) introductory text by adding the phase ''as appropriate'' after the phrase ''of this section'';
■ I. Remove the period after paragraph (a)(4)(i) and add ''; or'' in its place;
■ J. Revise paragraph (a)(4)(ii);
■ K. Remove the period after paragraph (c)(3)(i) and add ''; or'' in its place;
■ L. Revise paragraph (c)(3)(ii);
■ M. Remove the period after paragraph (e)(3)(i) and add ''; or'' in its place;
■ N. Revise paragraph (e)(3)(ii);
■ O. Revise paragraph (c)(1)(iii); and
■ P. Revise paragraph (e)(1)(iii).

The corrections read as follows:

§ 61.64 Use of a flight simulator and flight training device.

(a) * * *

(1) * * *

(iii) At a minimum, must be qualified and approved as a Level C flight simulator if the applicant performs the entire practical test in a flight simulator; and

* * * * *

(2) * * *

(v) Have logged at least 2,000 hours of flight time, of which 500 hours were in turbine-powered airplanes of the same class of airplane for which the type rating is sought.

(3) * * *

(v) Have logged at least 2,000 hours of flight time, of which 500 hours were in turbine-powered airplanes of the same class of airplane for which the type rating is sought.

(4) * * *

(ii) The applicant's pilot certificate will be issued with a limitation that states:

''The [name the category, class, and type of airplane rating (if a type rating is applicable)] is subject to additional pilot in command limitations,'' and the applicant is restricted from serving as pilot in command in that category, class, and type of airplane rating (if a type rating is applicable).

* * * * *

(c) * * *

(1) * * *

(iii) At a minimum, must be qualified and approved as a Level C flight simulator if the applicant performs the entire practical test in a flight simulator; and

* * * * *

(3) * * *

(ii) The applicant's pilot certificate will be issued with a limitation that states: ''The [name the helicopter class and type of helicopter rating (if a type rating is applicable)] is subject to additional pilot in command limitations,'' and the applicant is restricted from serving as pilot in command in that helicopter class and type of helicopter rating (if a type rating is applicable).

* * * * *

(e) * * *

(1) * * *

(iii) At a minimum, must be qualified and approved as a Level C flight simulator if the applicant performs the entire practical test in a flight simulator; and

* * * * *

(3) * * *

(ii) The applicant's pilot certificate will be issued with a limitation that states: ''The [name of the category and powered-lift rating (if a type rating is applicable)] is subject to additional pilot in command limitations,'' and the applicant is restricted from serving as pilot in command in that category and type of powered-lift rating (if a type rating is applicable).

* * * * *

■ 4. On page 42558, first column, add new instruction 29a with an amendment to § 61.99 to read as follows:
■ 29a. Amend § 61.99 by revising paragraph (a)(2) to read as follows:

§ 61.99 Aeronautical experience.

(a) * * *

(2) Three hours of flight training with an authorized instructor in the aircraft for the rating sought in preparation for the practical test within the preceding 2 calendar months from the month of the test.

* * * * *

■ 5. On page 42558, second column, revise amendatory instruction 32 and its amendments to § 61.109 to read as follows:
■ 32. Amend § 61.109 by revising paragraphs (a)(4), (a)(5)(ii), (b)(4), (b)(5)(ii), (c)(3), (c)(4)(ii), (d)(3), (d)(4)(ii), (e)(4), (e)(5)(ii), (f)(1)(i), (f)(2)(ii), (g)(3), (h)(1)(i), (h)(2)(i), (i)(3), and (j)(3) to read as follows:

§ 61.109 Aeronautical experience.

(a) * * *

(4) 3 hours of flight training with an authorized instructor in a single-engine airplane in preparation for the practical test, which must have been performed within the preceding 2 calendar months from the month of the test; and

(5) * * *

(ii) One solo cross country flight of 150 nautical miles total distance, with full-stop landings at three points, and one segment of the flight consisting of a straight-line distance of more than 50 nautical miles between the takeoff and landing locations; and

* * * * *

(b) * * *

(4) 3 hours of flight training with an authorized instructor in a multiengine airplane in preparation for the practical test, which must have been performed within the preceding 2 calendar months from the month of the test; and

(5) * * *

(ii) One solo cross country flight of 150 nautical miles total distance, with full-stop landings at three points, and one segment of the flight consisting of a straight-line distance of more than 50 nautical miles between the takeoff and landing locations; and

* * * * *

(c) * * *

(3) 3 hours of flight training with an authorized instructor in a helicopter in preparation for the practical test, which must have been performed within the preceding 2 calendar months from the month of the test; and

(4) * * *

(ii) One solo cross country flight of 100 nautical miles total distance, with landings at three points, and one segment of the flight being a straight-line distance of more than 25 nautical miles between the takeoff and landing locations; and

* * * * *

(d) * * *

(3) 3 hours of flight training with an authorized instructor in a gyroplane in preparation for the practical test, which must have been performed within the preceding 2 calendar months from the month of the test; and

(4) * * *

(ii) One solo cross country flight of 100 nautical miles total distance, with landings at three points, and one segment of the flight being a straight-line distance of more than 25 nautical miles between the takeoff and landing locations; and

* * * * *

(e) * * *

(4) 3 hours of flight training with an authorized instructor in a powered-lift in preparation for the practical test, which must have been performed within the preceding 2 calendar months from the month of the test; and

(5) * * *

(ii) One solo cross country flight of 150 nautical miles total distance, with full-stop landings at three points, and one segment of the flight consisting of a straight-line distance of more than 50 nautical miles between the takeoff and landing locations; and

* * * * *

(f) * * *

(1) * * *

(i) 20 flights in a glider in the areas of operations listed in § 61.107(b)(6) of this part, including at least 3 training flights with an authorized instructor in a glider in preparation for the practical test that must have been performed within the preceding 2 calendar months from the month of the test; and

* * * * *

(2) * * *

(ii) 3 training flights with an authorized instructor in a glider in preparation for the practical test that must have been performed within the preceding 2 calendar months from the month of the test.

(g) * * *

(3) Three hours of flight training with an authorized instructor in an airship in preparation for the practical test within the preceding 2 calendar months from the month of the test; and

* * * * *

(h) * * *

(1) * * *

(i) At least one training flight with an authorized instructor in a gas balloon in preparation for the practical test within the preceding 2 calendar months from the month of the test;

* * * * *

(2) * * *

(i) At least two training flights of 1 hour each with an authorized instructor in a balloon with an airborne heater in preparation for the practical test within the preceding 2 calendar months from the month of the test;

* * * * *

(i) * * *

(3) Three hours of flight training with an authorized instructor in a powered parachute in preparation for the practical test, which must have been performed within the preceding 2 calendar months from the month of the test; and

* * * * *

(j) * * *

(3) Three hours of flight training with an authorized instructor in a weight-shift-control aircraft in preparation for the practical test, which must have been performed within the preceding 2 calendar months from the month of the test; and

* * * * *

■ 6. On page 42558, third column, revise amendatory instruction 34 and its amendments to § 61.129 to read as follows:

■ 34. Amend § 61.129 by revising paragraphs (a)(3)(i), (a)(3)(iii), (a)(3)(iv), (a)(3)(v), (a)(4) introductory text, (b)(3)(i), (b)(3)(iii), (b)(3)(iv), (b)(3)(v), (c)(3)(i) through (iv), (c)(4) introductory text, (d)(3)(i) through (iv), (d)(4) introductory text, (e)(3)(i) through (iv), (e)(4) introductory text, (f)(1)(i), (f)(2)(i), (g)(2) introductory text, (g)(3), (g)(4)(i) through (iii), (h)(4)(i)(A), (h)(4)(ii)(A), and (i)(3) to read as follows:

§ 61.129 Aeronautical experience.

(a) * * *

(3) * * *

(i) Ten hours of instrument training using a view-limiting device including attitude instrument flying, partial panel skills, recovery from unusual flight attitudes, and intercepting and tracking navigational systems. Five hours of the 10 hours required on instrument training must be in a single engine airplane;

* * * * *

(iii) One 2-hour cross country flight in a single engine airplane in daytime conditions that consists of a total straight-line distance of more than 100 nautical miles from the original point of departure;

(iv) One 2-hour cross country flight in a single engine airplane in nighttime conditions that consists of a total straight-line distance of more than 100 nautical miles from the original point of departure; and

(v) Three hours in a single-engine airplane with an authorized instructor in preparation for the practical test within the preceding 2 calendar months from the month of the test.

(4) Ten hours of solo flight time in a single engine airplane or 10 hours of flight time performing the duties of pilot in command in a single engine airplane with an authorized instructor on board (either of which may be credited towards the flight time requirement under paragraph (a)(2) of this section), on the areas of operation listed under § 61.127(b)(1) that include—

* * * * *

(b) * * *

(3) * * *

(i) Ten hours of instrument training using a view-limiting device including attitude instrument flying, partial panel skills, recovery from unusual flight attitudes, and intercepting and tracking navigational systems. Five hours of the 10 hours required on instrument training must be in a multiengine airplane;

* * * * *

(iii) One 2-hour cross country flight in a multiengine airplane in daytime conditions that consists of a total straight-line distance of more than 100 nautical miles from the original point of departure;

(iv) One 2-hour cross country flight in a multiengine airplane in nighttime conditions that consists of a total straight-line distance of more than 100 nautical miles from the original point of departure; and

(v) Three hours in a multiengine airplane with an authorized instructor in preparation for the practical test within the preceding 2 calendar months from the month of the test.

(c) * * *

(3) * * *

(i) Five hours on the control and maneuvering of a helicopter solely by reference to instruments using a view-limiting device including attitude instrument flying, partial panel skills, recovery from unusual flight attitudes, and intercepting and tracking navigational systems. This aeronautical experience may be performed in an aircraft, flight simulator, flight training device, or an aviation training device;

(ii) One 2-hour cross country flight in a helicopter in daytime conditions that consists of a total straight-line distance of more than 50 nautical miles from the original point of departure;

(iii) One 2-hour cross country flight in a helicopter in nighttime conditions that consists of a total straight-line distance of more than 50 nautical miles from the original point of departure; and

(iv) Three hours in a helicopter with an authorized instructor in preparation for the practical test within the preceding 2 calendar months from the month of the test.

(4) Ten hours of solo flight time in a helicopter or 10 hours of flight time performing the duties of pilot in command in a helicopter with an authorized instructor on board (either of which may be credited towards the flight time requirement under paragraph (c)(2) of this section), on the areas of operation listed under § 61.127(b)(3) that includes—

* * * * *

(d) * * *

(3) * * *

(i) 2.5 hours on the control and maneuvering of a gyroplane solely by reference to instruments using a view-limiting device including attitude instrument flying, partial panel skills, recovery from unusual flight attitudes, and intercepting and tracking navigational systems. This aeronautical experience may be performed in an aircraft, flight simulator, flight training device, or an aviation training device;

(ii) One 2-hour cross country flight in a gyroplane in daytime conditions that consists of a total straight-line distance of more than 50 nautical miles from the original point of departure;

(iii) Two hours of flight training during nighttime conditions in a

gyroplane at an airport, that includes 10 takeoffs and 10 landings to a full stop (with each landing involving a flight in the traffic pattern); and

(iv) Three hours in a gyroplane with an authorized instructor in preparation for the practical test within the preceding 2 calendar months from the month of the test.

(4) Ten hours of solo flight time in a gyroplane or 10 hours of flight time performing the duties of pilot in command in a gyroplane with an authorized instructor on board (either of which may be credited towards the flight time requirement under paragraph (d)(2) of this section), on the areas of operation listed in § 61.127(b)(4) that includes—

* * * * *

(e) * * *

(3) * * *

(i) Ten hours of instrument training using a view-limiting device including attitude instrument flying, partial panel skills, recovery from unusual flight attitudes, and intercepting and tracking navigational systems. Five hours of the 10 hours required on instrument training must be in a powered-lift;

(ii) One 2-hour cross country flight in a powered-lift in daytime conditions that consists of a total straight-line distance of more than 100 nautical miles from the original point of departure;

(iii) One 2-hour cross country flight in a powered-lift in nighttime conditions that consists of a total straight-line distance of more than 100 nautical miles from the original point of departure; and

(iv) 3 hours in a powered-lift with an authorized instructor in preparation for the practical test within the preceding 2 calendar months from the month of the test.

(4) Ten hours of solo flight time in a powered-lift or 10 hours of flight time performing the duties of pilot in command in a powered-lift with an authorized instructor on board (either of which may be credited towards the flight time requirement under paragraph (e)(2) of this section, on the areas of operation listed in § 61.127(b)(5) that includes—

* * * * *

(f) * * *

(1) * * *

(i) Three hours of flight training in a glider with an authorized instructor or 10 training flights in a glider with an authorized instructor on the areas of operation listed in § 61.127(b)(6) of this part, including at least 3 training flights in a glider with an authorized instructor in preparation for the practical test within the preceding 2 calendar months from the month of the test; and

* * * * *

(2) * * *

(i) Three hours of flight training in a glider or 10 training flights in a glider with an authorized instructor on the areas of operation listed in § 61.127(b)(6) of this part including at least 3 training flights in a glider with an authorized instructor in preparation for the practical test within the preceding 2 calendar months from the month of the test; and

* * * * *

(g) * * *

(2) Thirty hours of pilot in command flight time in airships or performing the duties of pilot in command in an airship with an authorized instructor aboard, which consists of—

* * * * *

(3) Forty hours of instrument time to include—

(i) Instrument training using a view-limiting device for attitude instrument flying, partial panel skills, recovery from unusual flight attitudes, and intercepting and tracking navigational systems; and

(ii) Twenty hours of instrument flight time, of which 10 hours must be in flight in airships.

(4) * * *

(i) Three hours in an airship with an authorized instructor in preparation for the practical test within the preceding 2 calendar months from the month of the test;

(ii) One hour cross country flight in an airship in daytime conditions that consists of a total straight-line distance of more than 25 nautical miles from the point of departure; and

(iii) One hour cross country flight in an airship in nighttime conditions that consists of a total straight-line distance of more than 25 nautical miles from the point of departure.

* * * * *

(h) * * *

(4) * * *

(i) * * *

(A) Two training flights of 2 hours each in a gas balloon with an authorized instructor in preparation for the practical test within the preceding 2 calendar months from the month of the test;

* * * * *

(ii) * * *

(A) Two training flights of 1 hour each in a balloon with an airborne heater with an authorized instructor in preparation for the practical test within the preceding 2 calendar months from the month of the test;

* * * * *

(i) * * *

(3) Except when fewer hours are approved by the FAA, an applicant for the commercial pilot certificate with the airplane or powered-lift rating who has completed 190 hours of aeronautical experience is considered to have met the total aeronautical experience requirements of this section, provided the applicant satisfactorily completed an approved commercial pilot course under part 142 of this chapter and the approved course was appropriate to the commercial pilot certificate and aircraft rating sought.

■ 7. On page 42560, third column, in the amendment to § 61.157, revise paragraphs (f)(2)(ii) and (iii) to read as follows:

§ 61.157 Flight proficiency.

* * * * *

(f) * * *

(2) * * *

(ii) An Aircrew Program Designee who is authorized to perform proficiency and/or competency checks for the air carrier whose approved training program has been satisfactorily completed by the pilot applicant.

(iii) A Training Center Evaluator with appropriate certification authority who is also authorized to perform the portions of the competency and/or proficiency checks required by paragraph (f)(1) of this section for the air carrier whose approved training program has been satisfactorily completed by the pilot applicant.

* * * * *

■ 8. On page 42562, third column, add new instruction 48a with an amendment to § 61.313 to read as follows:

■ 48a. Amend § 61.313 by revising paragraphs (a)(1)(iv), (b)(1)(ii), (c)(1)(ii), (d)(1)(iv), (e)(1)(iv), (f)(1)(ii), (g)(1)(v), and (h)(1)(iv) to read as follows:

§ 61.313 What aeronautical experience must I have to apply for a sport pilot certificate?

* * * * *

If you are applying for a sport pilot certificate with * * *	Then you must log at least * * *	Which must include at least * * *
(a) * * *	(1) * * *	(iv) 3 hours of flight training with an authorized instructor on those areas of operation specified in § 61.311 in preparation for the practical test within the preceding 2 calendar months from the month of the test.
(b) * * *	(1) * * *	(ii) 3 hours of flight training with an authorized instructor on those areas of operation specified in § 61.311 in preparation for the practical test within the preceding 2 calendar months from the month of the test.
(c) * * *	(1) * * *	(ii) 3 hours of flight training with an authorized instructor on those areas of operation specified in § 61.311, in preparation for the practical test within the preceding 2 calendar months from the month of the test.
(d) * * *	(1) * * *	(iv) 3 hours of flight training with an authorized instructor on those areas of operation specified in § 61.311 in preparation for the practical test within the preceding 2 calendar months from the month of the test.
(e) * * *	(1) * * *	(iv) 3 hours of flight training with an authorized instructor on those areas of operation specified in § 61.311 in preparation for the practical test within the preceding 2 calendar months from the month of the test.
(f) * * *	(1) * * *	(ii) 3 hours of flight training with an authorized instructor on those areas of operation specified in § 61.311 in preparation for the practical test within the preceding 2 calendar months from the month of the test.
(g) * * *	(1) * * *	(v) 3 hours of flight training with an authorized instructor on those areas of operation specified in § 61.311 in preparation for the practical test within the preceding 2 calendar months from the month of the test.
(h) * * *	(1) * * *	(iv) 3 hours of flight training with an authorized instructor on those areas of operation specified in § 61.311 in preparation for the practical test within the preceding 2 calendar months from the month of the test.

Issued in Washington, DC, on October 15, 2009.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. E9–25133 Filed 10–19–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0311; Airspace Docket No. 09–ANM–3]

RIN 2120–AA66

Establishment of VOR Federal Airway V–626; UT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes VOR Federal Airway 626 (V–626) located between the Myton, UT, Very High Frequency Omnidirectional Range/Tactical Air Navigation (VORTAC) and the Salt Lake City terminal area. This route will improve aircraft flow during busy traffic periods into the Salt Lake City terminal area, and provide a more precise means of navigation and reduce controller workload.

DATES: *Effective Dates:* 0901 UTC, December 17, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

On May 4, 2009, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to establish a Federal Airway in Utah (74 FR 20443). Interested parties were invited to participate in this rulemaking effort by submitting written comments on this proposal to the FAA. No comments were received in response to this request. Currently the navigational signal on the proposed 267 degree radial is not sufficient to support the segment of the airway. Due to the weak navigational signal coverage on the 267 degree radial, the FAA revised the radial from the 267 degree radial to the 264 degree radial respectively.

The Rule

The FAA is amending Title 14 Code of Federal Regulations (14 CFR) part 71 to establish VOR Federal Airway 626 (V–626) from the Myton, UT, VORTAC, to the Salt Lake City terminal area. This new route will provide a more precise means of navigation and reduce controller workload.

Domestic VOR Federal Airways are published in paragraph 6010(a) of FAA Order 7400.9T, signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The domestic VOR Federal Airway listed in this document will be published subsequently in that Order.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is

so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes a VOR Federal Airway in Utah.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' paragraph 311a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p.389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–626 [New]

From Myton, UT, to int Myton 264 and Fairfield VORTAC 126

* * * * *

Issued in Washington, DC, on October 14, 2009.

Kelly J. Neubecker,

Acting Manager, Airspace and Rules Group.

[FR Doc. E9–25084 Filed 10–19–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2009–0700; Airspace Docket No. 09–AWP–4]

RIN 2120–AA66

Modification of Restricted Areas and Other Special Use Airspace; Fallon, NV

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the time of designation and using agency of nine restricted areas located in the vicinity of the Fallon Naval Air Station (NAS), Fallon, NV, as part of a Department of the Navy initiative to standardize the operating hours throughout the Fallon Airspace Complex. The times of use are being expanded to meet the critical need of the Navy for additional nighttime training, and the using agency changes are administrative in accordance with a Navy realignment of functions. Additionally, this action modifies the times of use of the four military operation areas (MOAs) in the Fallon Airspace Complex. Unlike restricted areas, which are designated under 14 CFR part 73, MOAs are not rulemaking airspace actions. The MOA changes described here were published in the National Flight Data Digest (NFDD). The Navy requested these airspace changes to provide additional night training time to meet combat readiness requirements currently being carried out in accordance with 14 CFR 99.7.

DATES: *Effective Date:* 0901 UTC, December 17, 2009.

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

On September July 15, 2009, the FAA published in the **Federal Register** a notice of proposed rulemaking to modify Restricted Areas and other Special Use Airspace; Fallon, NV (74 FR 47150). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received.

Section 73.48 of 14 CFR part 73 was republished in FAA Order 7400.8R, dated February 5, 2009.

The Fallon Airspace Complex consists of nine restricted areas and four MOAs in the vicinity of the Fallon NAS, NV. Restricted areas are regulatory airspace designations, under Title 14 Code of Federal Regulations (14 CFR) part 73, which are established to confine or segregate activities considered hazardous to non-participating aircraft. A MOA is a non-rulemaking type of special use airspace (SUA) established to separate or segregate certain non-hazardous military flight activities from aircraft operating in accordance with instrument flight rules (IFR), and to identify for visual flight rules (VFR) pilots where those activities are conducted. IFR aircraft may be routed through an active MOA only when air traffic control can provide approved separation from the MOA activity. VFR pilots are not restricted from flying in an active MOA, but are advised to exercise caution while doing so.

Unlike restricted areas, which are designated through rulemaking procedures, MOAs are non-rulemaking airspace areas that are established administratively and published in the NFDD. Normally, MOA proposals are not published in a NPRM, but instead, are advertised for public comment through a nonrule circular that is distributed by an FAA Service Center office to aviation interests in the affected area. However, when a non-rulemaking action is connected to a rulemaking action, FAA procedures allow for the non-rulemaking proposal to be included in the NPRM. In such cases, the NPRM replaces the nonrule circularization requirement. Because the MOAs are an integral part of the Fallon Airspace Complex, they are being included in this Rule.

The SUA changes are described in the following sections.

MOA Changes:

Churchill Low MOA, NV

Times of use. 0715 to 2245 Monday through Friday and 0800 to 1800 Saturday; other times by NOTAM.

Churchill High MOA, NV

Times of use. 0715 to 2245 Monday through Friday and 0800 to 1800 Saturday; other times by NOTAM.

Ranch High MOA, NV

Times of use. 0715 to 2245 Monday through Friday and 0800 to 1800 Saturday; other times by NOTAM.

Ranch MOA, NV

Times of use. 0715 to 2245 Monday through Friday and 0800 to 1800 Saturday; other times by NOTAM.

The Rule

The FAA is amending to 14 CFR part 73 to modify the designated times of use to restricted areas R–4803, Fallon; R–4804A & B, Twin Peaks; R–4810, Desert Mountain; R–4812, Sand Springs; R–4813A & B, Carson Sink; and R–4816 North & South, Dixie Valley, NV. Specifically, the FAA is changing the current wording to include the phrase ''other times by NOTAM''. This will allow the Navy to train between 2330 hours and 0715 hours local to meet their training requirements. The Navy is currently meeting these night training requirements in accordance with 14 CFR 99.7, Special Security Instructions. This action also reflects the using agency name change to USN, Naval Strike and Air Warfare Center, Fallon, NV.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies restricted area airspace at Fallon NAS, Fallon, NV.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with, FAA Order 1050.1E, Environmental Impacts: Policies and Procedures, paragraph 307e. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—SPECIAL USE AIRSPACE

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 73.48 [Amended]

■ 2. § 73.48 is amended as follows:

* * * * *

R–4803 Fallon, NV [Amended]

* * * * *

By removing the current times of designation and using agency and substituting the following:

Time of designation. 0715 to 2330 local time daily; other times by NOTAM.

Using agency. USN, Naval Strike and Air Warfare Center, Fallon, NV.

R–4804A Twin Peaks, NV [Amended]

* * * * *

By removing the current times of designation and using agency and substituting the following:

Time of designation. 0715 to 2330 local time daily; other times by NOTAM.

Using agency. USN, Naval Strike and Air Warfare Center, Fallon, NV.

R–4804B Twin Peaks, NV [Amended]

* * * * *

By removing the current times of designation and using agency and substituting the following:

Time of designation. Intermittent 0715 to 2330 local time daily; other times by NOTAM.

Using agency. USN, Naval Strike and Air Warfare Center, Fallon, NV.

* * * * *

R–4810 Desert Mountains, NV [Amended]

* * * * *

By removing the current times of designation and using agency and substituting the following:

Time of designation. 0715 to 2330 local time daily; other times by NOTAM

Using agency. USN, Naval Strike and Air Warfare Center, Fallon, NV.

* * * * *

R–4812 Sand Springs, NV [Amended]

By removing the current times of designation and using agency and substituting the following:

Time of designation. 0715 to 2330 local time daily; other times by NOTAM

Using agency. USN, Naval Strike and Air Warfare Center, Fallon, NV.

R–4813A Carson Sink, NV [Amended]

* * * * *

By removing the current times of designation and using agency and substituting the following:

Time of designation. 0715 to 2330 local time daily; other times by NOTAM

Using agency. USN, Naval Strike and Air Warfare Center, Fallon, NV.

R–4813B Carson Sink, NV [Amended]

* * * * *

By removing the current times of designation and using agency and substituting the following:

Time of designation. Intermittent 0715 to 2330 local time daily; other times by NOTAM.

Using agency. USN, Naval Strike and Air Warfare Center, Fallon, NV.

R–4816N Dixie Valley, NV [Amended]

* * * * *

By removing the current times of designation and using agency and substituting the following:

Time of designation. 0715 to 2330 local time daily; other times by NOTAM

Using agency. USN, Naval Strike and Air Warfare Center, Fallon, NV.

R–4816S Dixie Valley, NV [Amended]

* * * * *

By removing the current times of designation and using agency and substituting the following:

Time of designation. 0715 to 2330 local time daily; other times by NOTAM

Using agency. USN, Naval Strike and Air Warfare Center, Fallon, NV.

* * * * *

Issued in Washington, DC, on October 14, 2009.

Kelly J. Neubecker,

Acting Manager, Airspace and Rules Group.

[FR Doc. E9–25077 Filed 10–19–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PART 4

[CBP Dec. 09–40]

RIN 1505–AB71

Foreign Repairs to American Vessels

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

ACTION: Final rule.

SUMMARY: This document amends the Customs and Border Protection (CBP) regulations in title 19 of the Code of Federal Regulations (19 CFR) to update provisions relating to the declaration, entry, and dutiable status of repair expenditures made abroad for certain vessels. The principal changes set forth in this document involve: conforming the regulations to statutory changes that provide an exemption from vessel repair duties for the cost of certain equipment, repair parts, and materials; and adding a provision to advise that certain free trade agreements between the United States and other countries may limit the duties due on vessel repair expenditures made in foreign countries that are parties to those agreements.

DATES: Final rule effective October 20, 2009.

FOR FURTHER INFORMATION CONTACT: Glen Vereb, Regulations and Rulings, Office of International Trade, (202) 325–0212.

SUPPLEMENTARY INFORMATION:

Background

Under section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466), purchases for or repairs made to certain vessels while they are outside the United States are subject to declaration, entry and payment of ad valorem duty. These requirements are effective upon the first arrival of affected vessels in the United States or Puerto Rico. The vessels subject to these requirements include those documented under U.S. law for the foreign or coastwise trades, as well as those which were previously documented under the laws of some foreign nation or are undocumented at the time that foreign shipyard repairs are performed, but which exhibit an intent to engage in those trades under CBP interpretations. The regulations implementing 19 U.S.C. 1466 are found in § 4.14 of the CBP regulations (19 CFR 4.14).

Explanation of Amendments

Section 4.14(a), CBP regulations, states that, under 19 U.S.C. 1466, ''purchases for or repairs made to certain vessels while they are outside the United States, including repairs made while those vessels are on the high seas, are subject to declaration, entry, and payment of duty.'' However, section 1554 of the Miscellaneous Trade and Technical Corrections Act of 2004 (Pub. L. 108–429, 118 Stat. 2434) amended 19 U.S.C. 1466(h) by adding a new paragraph (4) providing for an exemption from the declaration, entry, and duty requirements of the statute for the cost of equipment, repair parts, and materials that are installed on certain vessels by members of the regular crew of such vessels while the vessels are on the high seas. As this amendment exempted most repairs performed while vessels are on the high seas from the assessment of vessel repair duties, CBP is amending the first sentence of § 4.14(a) to remove the words ''including repairs made while those vessels are on the high seas''.

Section 1631 of the Pension Protection Act of 2006 (Pub. L. 109–280, 120 Stat. 1164) amended 19 U.S.C. 1466(h)(4) to expand the exemption created by the 2004 amendment discussed above by also including the cost of equipment, repair parts, and materials that are installed on certain vessels by members of the regular crew of such vessels while the vessels are in foreign waters or in a foreign port, provided the installation does not involve foreign shipyard repairs by foreign labor. CBP is further amending § 4.14(a) of the CBP regulations in this document to add a provision reflecting the above 2004 and 2006 statutory changes.

Section 4.14(a) also provides that certain expenditures for vessel repairs and purchases made in Israel, Canada, and Mexico (countries that are parties to free trade agreements with the United States) are not subject to vessel repair duties, although they must be declared and entered. CBP believes it would be useful for the CBP regulations to indicate that other free trade agreements may also limit the duties due on vessel repair expenditures made in foreign countries that are parties to those agreements. Accordingly, this document amends § 4.14(a) by adding a sentence to that effect.

For purposes of clarity and transparency, CBP is making the above-discussed changes to § 4.14(a) as part of an overall reorganization of that paragraph. Specifically, CBP is dividing § 4.14(a) into three separate subparagraphs that are headed ''General'', ''Expenditures not subject to declaration, entry, or duty'', and ''Expenditures subject to declaration and entry but not duty''.

CBP also is amending § 4.14 by replacing the word ''Customs'' with the term ''CBP'' each place that it appears to reflect the change in the agency name and by replacing an incorrect reference to ''office'' in paragraph (f) with the correct word ''agency''.

Inapplicability of Notice and Delayed Effective Date Requirements

The amendments set forth in this final rule document merely implement statutory changes and reorganize the CBP regulations relating to vessel repairs. Therefore, pursuant to 5 U.S.C. 553(b)(B) and (d)(3), CBP has determined that it would be unnecessary to delay publication of this rule in final form pending an opportunity for public comment and that there is good cause for this final rule to become effective immediately upon publication.

Regulatory Flexibility Act and Executive Order 12866

Because a notice of proposed rulemaking is not required, the provisions of the Regulatory Flexibility Act, as amended (5 U.S.C. 601 *et seq.*), do not apply to this rulemaking. This document does not meet the criteria for a ''significant regulatory action'' as specified in Executive Order 12866.

Signing Authority

This document is being issued in accordance with § 0.1(a)(1) of the CBP regulations (19 CFR 0.1(a)(1)), pertaining to the authority of the Secretary of the Treasury (or his/her delegate) to approve regulations related to certain CBP revenue functions.

List of Subjects in 19 CFR Part 4

Customs duties and inspection, Entry procedures, Repairs, Reporting and recordkeeping requirements, Vessels.

Amendments to the Regulations

■ Accordingly, for the reasons set forth above, CBP is amending Part 4 of the CBP regulations (19 CFR part 4) as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

■ 1. The general authority citation for Part 4 and the specific authority citation for § 4.14 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624, 2071 note; 46 U.S.C. 501, 60105.

Section 4.14 also issued under 19 U.S.C. 1466, 1498;

* * * * *

■ 2. In § 4.14:

■ a. Paragraph (a) is revised;

■ b. Paragraph (d) is amended by removing the word ''Customs'' each place it appears and adding, in its place, the term ''CBP'';

■ d. Paragraph (e) is amended by removing the word ''Customs'' in the first sentence and adding, in its place, the term ''CBP'';

■ e. Paragraph (f) is amended by removing the word ''office'' in the tenth sentence and adding, in its place, the word ''agency'';

■ f. Paragraph (h) is amended by removing the word ''Customs'' in the first sentence of the introductory text and adding, in its place, the term ''CBP''; and

■ g. Paragraph (j)(1) is amended by removing the word ''Customs'' in the last sentence and adding, in its place, the term ''CBP''.

Revised paragraph (a) reads as follows:

§ 4.14 Foreign equipment purchases by, and repairs to, American vessels.

(a) *General provisions and applicability*—(1) *General.* Under section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466), purchases for or repairs made to certain vessels while they are outside the United States are subject to declaration, entry, and payment of ad valorem duty. These requirements are effective upon the first arrival of affected vessels in the United States or Puerto Rico. The vessels subject to these requirements include those documented under the U.S. law for the foreign or coastwise trades, as well as those which were previously documented under the laws of some foreign nation or are undocumented at the time that foreign shipyard repairs are performed, but which exhibit an intent to engage in those trades under CBP interpretations. Duty is based on actual foreign cost. This includes the original foreign purchase price of articles that have been imported into the United States and are later sent abroad for use.

(2) *Expenditures not subject to declaration, entry, or duty.* The following vessel repair expenditures are not subject to declaration, entry, or duty:

(i) Expenditures made in American Samoa, the Guantanamo Bay Naval Station, Guam, Puerto Rico, or the U.S. Virgin Islands because they are considered to have been made in the United States;

(ii) Reimbursements paid to members of the regular crew of a vessel for labor expended in making repairs to vessels; and

(iii) The cost of equipment, repair parts, and materials that are installed on a vessel documented under the laws of the United States and engaged in the foreign or coasting trade, if the installation is done by members of the regular crew of such vessel while the vessel is on the high seas, in foreign waters, or in a foreign port, and does not involve foreign shipyard repairs by foreign labor.

(3) *Expenditures subject to declaration and entry but not duty.* Under separate provisions of law, the cost of labor performed, and of parts and materials produced and purchased in Israel are not subject to duty under the vessel repair statute. Additionally, expenditures made in Canada or in Mexico are not subject to any vessel repair duties. Furthermore, certain free trade agreements between the United States and other countries also may reduce the duties on vessel repair expenditures made in foreign countries that are parties to those agreements, although the final duty amount may depend on each agreement's schedule for phasing in those reductions. In these situations and others where there is no liability for duty, it is still required, except as otherwise required by law, that all repairs and purchases be declared and entered.

* * * * *

Jayson P. Ahern,

Acting Commissioner, Customs and Border Protection.

Approved: October 15, 2009.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

[FR Doc. E9–25220 Filed 10–19–09; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 20

[TD 9468]

RIN 1545–BC56

Guidance Under Section 2053 Regarding Post-Death Events

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the amount deductible from a decedent's gross estate for claims against the estate under section 2053(a)(3) of the Internal Revenue Code (Code). In addition, the regulations update the provisions relating to the deduction for certain state death taxes to reflect the statutory amendments made in 2001 to sections 2053(d) and 2058. The regulations primarily will affect estates of decedents against which there are claims outstanding at the time of the decedent's death.

DATES: *Effective Date:* The regulations are effective on October 20, 2009.

Applicability Dates: For dates of applicability, see §§ 20.2051–1(c), 20.2053–1(f), 20.2053–3(e), 20.2053–4(f), 20.2053–6(h), 20.2053–9(f), and 20.2053–10(e).

FOR FURTHER INFORMATION CONTACT: Karlene M. Lesho, (202) 622–3090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 2001 of the Code imposes a tax on the transfer of the taxable estate, determined as provided in section 2051, of every decedent, citizen, or resident of the United States. Section 2031(a) generally provides that the value of the decedent's gross estate shall include the value at the time of decedent's death of all property, real or personal, tangible or intangible, wherever situated. Section 2051 provides that the value of the taxable estate is determined by deducting from the value of the gross estate the deductions provided for in sections 2051 through 2058. Pursuant to section 2053(a), ''the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts: (1) For funeral expenses, (2) for administration expenses, (3) for claims against the estate, and (4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate, as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.''

The amount an estate may deduct for claims against the estate has been a highly litigious issue. See the Background in the notice of proposed rulemaking published in the **Federal Register** on April 23, 2007 (REG–143316–03, 72 FR 20080). Unlike section 2031, section 2053(a) does not contain a specific directive to value a deductible claim at its value at the time of the decedent's death. Section 2053 specifically contemplates expenses such

as funeral and administration expenses, which are only determinable after the decedent's death.

The lack of consistency in the case law has resulted in different estate tax treatment of estates that are similarly situated, depending only upon the jurisdiction in which the executor resides. The Treasury Department and the IRS believe that similarly-situated estates should be treated consistently by having section 2053(a)(3) construed and applied in the same way in all jurisdictions.

Accordingly, in an effort to further the goal of effective and fair administration of the tax laws, the Treasury Department and the IRS published proposed regulations in the **Federal Register** on April 23, 2007. In formulating the proposed rule, the Treasury Department and the IRS carefully considered: The statutory framework and legislative history of section 2053 and its predecessors; the existing regulatory provisions under section 2053, particularly those that are generally applicable to all amounts deductible under section 2053; the numerous judicial decisions involving an issue under section 2053(a)(3) and the analysis and conclusion in each; and, the practical consequences of various possible alternatives for determining the amount deductible under section 2053(a)(3).

The proposed regulations proposed amendments to the regulations under section 2053 to clarify that events occurring after a decedent's death are to be considered when determining the amount deductible under all provisions of section 2053 and that deductions under section 2053 generally are limited to amounts actually paid by the estate in satisfaction of deductible expenses and claims. The proposed regulations also proposed amendments to address more specifically issues involving final court decisions, settlements, protective claims, reimbursed amounts, claims that are potential, unmatured, or contested, claims involving multiple defendants, claims by a family member or beneficiary of a decedent's estate, unenforceable claims, recurring payments, and the changes made to section 2053(d) in 2001.

Written comments were received on the proposed regulations and a public hearing was held on August 6, 2007. After careful consideration of the written and oral comments, the proposed regulations are adopted as revised by this Treasury decision. In addition, the Treasury Department and the IRS plan to issue additional guidance, including additional proposed regulations, in order to respond to certain comments and emerging issues that the Treasury Department and the IRS believe merit further consideration, as indicated in the Summary.

The comments and revisions to the proposed regulations are discussed in this preamble.

Summary of Comments and Explanation of Revisions

1. Comments Relating to Prop. Reg. § 20.2051–1

One commentator suggested that the sentence relating to the computation of the taxable estate of a decedent who was not a citizen or resident of the United States should continue to reference the regulations under section 2106, and not the regulations under section 2051. The final regulations restore the reference to the regulations under section 2106.

2. Comments Relating to the Standard for Deductibility Set Forth in the Proposed Regulation

The proposed regulations generally provide that only claims actually paid by the estate may be deducted under section 2053(a)(3). Many commentators disagreed with this approach and suggested that claims against a decedent's estate be valued on the basis of what was reasonably known on the date of the decedent's death. These commentators cited the line of cases following the decision in *Ithaca Trust* v. *Commissioner,* 279 U.S. 151 (1929), to support the same valuation rule for both claims against the estate and claims for inclusion purposes under section 2031. Commentators were concerned that the approach of the proposed regulations could lengthen the process of estate administration (on account of the anticipated increase in the need for protective claims), cause tax motivations to factor into litigation strategy, and produce liquidity shortfalls in estates with both claims by and claims against a decedent. The divergence of court opinions on this issue is evidence that the proper way to deduct claims against an estate is a very difficult issue. After giving serious consideration to the comments submitted on this issue, the Treasury Department and the IRS continue to believe that a deduction for claims under section 2053(a)(3) only for amounts actually paid by the estate most closely aligns with the legislative intent behind section 2053 and its predecessors and best furthers the goal of effective and fair administration of the tax laws. Accordingly, the final regulations generally maintain the approach of the proposed regulations.

Notwithstanding the adherence to the general approach of the proposed regulations, however, the Treasury Department and the IRS acknowledge that, as was pointed out in many of the comments, there are practical difficulties associated with each of the alternatives, including the approach taken in the proposed regulations. In order to make the practical application of the approach more administrable, the final regulations include several exceptions to the approach of the proposed regulations. The final regulations include an exception for claims against the estate with respect to which there is an asset or claim includible in the gross estate that is substantially related to the claim against the estate. See paragraph 10 of this ''Summary of Comments and Explanation of Revisions'' and § 20.2053–4(b). The final regulations also include an exception for claims against the estate that, collectively, do not exceed $500,000 (not including those deductible as ascertainable amounts). See paragraph 5 of this ''Summary of Comments and Explanation of Revisions'' and § 20.2053–4(c). Although both exceptions provide an opportunity to claim a deduction at the time of filing the United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706), in each case, the amount of the deduction is subject to adjustment to reflect post-death events, consistent with the general approach of the regulations.

3. Comments Relating to the Effect of a Court Decree in Prop. Reg. § 20.2053–1(b)(2)

The proposed regulations changed the language regarding a court decree from ''the court passes upon the facts upon which deductibility depends'' to ''the court reviewed the facts relating to the expenditures.'' A commentator suggested that such a change in language may give the unintended impression that this constitutes a substantive change. Thus, these final regulations remove the language of the proposed regulations and reinstate the original language.

A commentator also requested that an example be added to clarify that the last sentence of Prop. Reg. § 20.2053–1(b)(2)(i) would apply to jurisdictions in which a court approves the administration of an estate without specifically approving expenses and claims, absent a challenge from an interested party. The final regulations include such an example.

Some commentators recommended the removal of the requirement that a

settlement be within the range of reasonable outcomes under applicable state law in order for a settlement amount to be deductible because the requirement places the Commissioner or a court in the position of having to evaluate the legal merits of a claim adjudicated in another court proceeding. The commentators also maintained that the requirement is superfluous in light of the existing requirements that the settlement resolve a bona fide issue in an active and genuine contest and that adverse parties negotiate at arm's length. The final regulations eliminate the separate requirement that the settlement be within the range of reasonable outcomes under applicable state law.

Some commentators claimed that the rules relating to settlements did not recognize that, in some instances, the cost of defending a claim and the delay associated with litigating the claim will factor into the decision to settle a claim. The final regulations clarify that a deduction will not be denied for a settlement amount otherwise deductible under section 2053 if an estate can establish that the cost of defending the claim or contesting the expense, the delay associated with litigating such claim or expense, or another significant factor will impose a higher burden on the estate relative to the amount paid to settle the claim or the contested expense.

4. Comments Relating to the Rule for Estimated Amounts in Prop. Reg. § 20.2053–1(b)(4)

The rule provided in Prop. Reg. § 20.2053–1(b)(4) involving estimated amounts is now provided in § 20.2053–1(d)(4) of these final regulations and the paragraph heading is changed from ''[e]stimated amounts'' to ''[e]xception for certain ascertainable amounts.'' The final regulations use a consistent description of the rule contained in § 20.2053–1(d)(4) where applicable in the remainder of the regulation. No substantive change is intended; rather, the modified paragraph heading in the final regulations is intended to describe the substance of the rule more accurately.

A commentator noted that use of the language ''will be paid'' in Prop. Reg. § 20.2053–1(b)(4) may be inconsistent with the language in Prop. Reg. § 20.2053–3(b)(1) (''may reasonably be expected to be paid'') and in Prop. Reg. § 20.2053–4(b)(7)(i) (claims cannot be estimated if there is ''reasonable likelihood that full satisfaction of the liability will not be made''). The commentator suggested modification of the language in Prop. Reg. § 20.2053–1(b)(4) to incorporate the reasonableness standard found in the other sections and requested conforming changes throughout the regulation for consistency purposes. The final regulations do not add a reasonableness component to the standard for meeting the ''will be paid'' requirement, although the final regulations clarify that a deduction is allowed under the rule for deducting certain ascertainable amounts to the extent that the Commissioner is reasonably satisfied that the amount to be paid is ascertainable with reasonable certainty and will be paid. The final regulations use consistent language where applicable in describing the standard for meeting the ''will be paid'' requirement in each reference to the rule for deducting certain ascertainable amounts.

In addition, some commentators requested clarification on whether the rule previously provided in Prop. Reg. § 20.2053–1(b)(4) applies not only to claims but to administration expenses as well. The final regulations make the requested clarification and § 20.2053–1(d)(4) provides that the rule for deducting certain ascertainable amounts applies to both a claim and an expense.

A commentator suggested that the statement in Prop. Reg. § 20.2053–1(b)(4) prohibiting a deduction for ''a vague or uncertain estimate'' be omitted because it puts forth a subjective standard open to a wide range of interpretations. The Treasury Department and the IRS believe that the rule previously provided in Prop. Reg. § 20.2053–1(b)(4), now provided in § 20.2053–1(d)(4) of these final regulations, sets forth clear requirements for determining the amount allowable as a deduction under section 2053. Because the statement in Prop. Reg. § 20.2053–1(b)(4) merely clarifies this rule, the statement has been retained in the final regulations.

A commentator suggested that the language in Prop. Reg. § 20.2053–1(b)(4), indicating that a deduction in advance of payment will be disallowed if the payment is thereafter waived or otherwise left unpaid, negates the purpose of allowing a deduction for an estimated amount and should be deleted. However, the Treasury Department and the IRS believe that there is an important difference. The rule for deducting certain ascertainable amounts previously provided in Prop. Reg. § 20.2053–1(b)(4), and now provided in § 20.2053–1(d)(4) of these final regulations, provides an estate with the opportunity to claim a deduction at the time of filing Form 706, even though the amount ultimately allowable as a deduction under this rule will take into account events occurring after the date of a decedent's death. The ability to deduct an ascertainable amount does not change the general rule that the amount of the deduction is to reflect post-death events.

Some commentators questioned whether the proposed regulations impose a duty on the executor to report amounts that were claimed as deductions on the estate tax return, but were subsequently not paid or not paid in full, and whether such a duty could be enforced after the period of limitations on assessment has expired. The Treasury Department and the IRS did not intend for the proposed regulations to impose a duty on the executor that could be enforced after the expiration of the period of limitations on assessment. As a result, the final regulations eliminate this provision. The final regulations also include a provision clarifying the period during which post-death events will be considered.

5. Comments Relating to Protective Claims

A commentator expressed concern that the protective claim procedures in the proposed regulations would result in increased administrative costs and a delay in the administration of the estate because filing a protective claim effectively would keep the period of limitations open to the extent of the amount of the claim for refund. The Treasury Department and the IRS believe that protective claims for refund are an appropriate and necessary component of these regulations, as they provide a mechanism to ensure that the deductibility rule provided for in these regulations is implemented in a fair and equitable manner. Nevertheless, the Treasury Department and the IRS acknowledge that the commentator's concern is valid. In an effort to make the regulation more administrable for both taxpayers and the Commissioner, the final regulations in § 20.2053–4(c) include an exception for claims against the estate that do not exceed, in the aggregate, $500,000. Because the purpose of this provision is to provide certain relief from the need to file a protective claim, a claim is not eligible for this provision unless the entire amount of the claim may be covered within this cap. This rule allows an estate a deduction on Form 706 for claims against the estate. However, consistent with the general approach of the final regulations, the amount of the deduction is subject to adjustment to reflect post-death events. To address the commentator's concern regarding the

effect of a protective claim for refund on the applicable period of limitations, the Treasury Department and the IRS are issuing, concurrent with this regulation, a Notice announcing the IRS's decision to limit the review of a return, in certain circumstances, when a timely-filed claim for refund of estate taxes that is based on a deduction under section 2053 ripens after the expiration of the limitations period on assessment.

Some commentators requested more detailed guidance on the procedures for filing a protective claim for refund. In response to this comment, the final regulations include a provision under § 20.2053–1(d)(5) to explain the protective claim for refund process. The Treasury Department and the IRS also intend to provide, by publication in the Internal Revenue Bulletin, further procedural guidance on protective claims for refund due to section 2053 claims or expenses. In addition, a commentator suggested that Form 706 be revised to incorporate a protective claim for refund so that a separate form need not be filed. The Treasury Department and the IRS believe this suggestion will make the final regulations more administrable and are contemplating amending Form 706 to implement this suggestion.

Another commentator suggested that the IRS be lenient in granting extensions of time to pay the estate tax under section 6161 when an estate is confronting a liquidity issue arising from the inability to deduct a claim that is the subject of a protective claim for refund. Although in many cases the illiquidity resulting from a not-yet-deductible claim may be reasonable cause for granting an extension of time to pay the estate tax for purposes of section 6161, the Treasury Department and the IRS believe that any regulatory provision implementing this suggestion would be outside the scope of this regulation.

6. Comments Relating to the Effect on the Marital and Charitable Deductions

Some commentators requested clarification of the impact of the approach taken in the proposed regulations on the marital and charitable deductions in estates where a claim or expense is payable in whole or in part from a bequest that qualifies for the marital or charitable deduction. Commentators requested that the final regulations include a rule confirming that, if a claim or expense is the subject of a protective claim for refund under section 2053 and is payable out of a fund that meets the requirements for a charitable or marital deduction under section 2055 or 2056, respectively, the charitable or marital deduction will not be reduced by the amount of the claim or expense until the amount is actually paid. In the interest of enhancing the administrability of these regulations, such a rule is included in § 20.2053–1(d)(5)(ii). The Treasury Department and the IRS view this rule as similar to the rules in the regulations under sections 2055 and 2056 that provide, respectively, for the reduction of the value of the charitable or marital share by the amount of estate transmission expenses paid from the charitable or marital share. For purposes of the estate tax charitable deduction under section 2055, a claim or expense that is the subject of a protective claim for refund under section 2053 will not render the charitable deduction, to the extent of the amount of that claim or expense, contingent and thus nondeductible under section 2055.

7. Comments Relating to Reimbursements, Prop. Reg. § 20.2053–1(b)(3)

The proposed regulations provide that a deduction is not allowed to the extent that the expense or claim is or could be compensated for by insurance or is or could be otherwise reimbursed. A commentator recommended that the final regulations explain the method by which an executor may establish that there is no available reimbursement either from another party or insurance. In response to this comment, the final regulations provide that an executor may certify on Form 706 that no reimbursement is available for a claim or expense if the executor neither knows nor reasonably should have known of the availability of any such reimbursement.

Additionally, some commentators recommended that the final regulations reflect the possibility that the cost of obtaining the reimbursement might outweigh the benefit of reimbursement. In response, the final regulations provide that an executor need not reduce the amount of a claim or expense deductible under section 2053 by the amount of a potential reimbursement if the executor provides a reasonable explanation on Form 706 for his or her reasonable determination that the burden of necessary collection efforts would outweigh the anticipated benefits from those efforts.

8. Comments Relating to Deduction for Expenses of Administering Estate Under Prop. Reg. § 20.2053–3

A commentator recommended removing from Prop. Reg. § 20.2053–3(b) and (c) any language restating the general requirements for deductibility set forth in Prop. Reg. § 20.2053–1 and the general rules regarding protective claims. The commentator suggested that duplicating the language in Prop. Reg. § 20.2053–3(b) and (c) was unnecessary and perhaps confusing. In response, the final regulations remove the language that merely restates the general rules set forth in Prop. Reg. § 20.2053–1.

Some commentators recommended omitting the sentence in Prop. Reg. § 20.2053–3(d)(3) that prohibits a deduction for expenses incurred merely for the purpose of unreasonably extending the time for payment, or incurred other than in good faith. The commentators stated that a situation where litigation has been intentionally prolonged other than in good faith is rare and unlikely to occur. Furthermore, the commentators expressed concern that the rule may subject the estate's legal strategy to IRS inquiry. Finally, the commentators maintained that it would be extremely difficult to prove that litigation expenses have not been incurred to unreasonably extend the time for payment or other than in good faith. The Treasury Department and the IRS find these comments persuasive and additionally believe that including this sentence in the final regulations is not necessary because expenses incurred merely for the purpose of unreasonably extending the time for payment or other than in good faith will not be considered actually and necessarily incurred in the administration of the decedent's estate and, therefore, are not deductible for that reason.

9. Comments Relating to Claims Against the Estate, Prop. Reg. § 20.2053–4(a)

The proposed regulations provide that deductible claims against a decedent's estate are limited to legitimate and bona fide claims. A commentator stated that the terms ''legitimate'' and ''bona fide'' in Prop. Reg. § 20.2053–4(a)(1) are redundant. The final regulations remove the term ''legitimate'' and provide that deductible claims against a decedent's estate are limited to bona fide claims.

A commentator requested clarification that the Commissioner shall be bound in the same manner as the estate to consider events occurring after the date of a decedent's death when determining the amount deductible by the decedent's estate. The Treasury Department and the IRS believe that the rule of Prop. Reg. § 20.2053–4(a)(2) sets forth a general principle that governs the determination of the amount deductible against a decedent's estate, and that therefore is binding on both estates and the Commissioner. Accordingly, no change is believed to be necessary.

10. Comments Relating to Claims and Counterclaims

Some commentators, citing fairness and liquidity concerns, suggested allowing a deduction for a claim against the estate on the initial filing of Form 706 if the value of the gross estate includes a claim in the same or a substantially-related matter or includes an asset integrally related or subject to the claim against the estate. The Treasury Department and the IRS find this suggestion persuasive when a decedent's substantially-related claim against a third party or a decedent's integrally-related asset constitutes a significant percentage of the gross estate. The final regulations under § 20.2053–4(b) provide that the current value of a claim against the estate with respect to which there is one or more substantially-related claims or integrally-related assets that are included in a decedent's gross estate may be deducted on Form 706, provided that the related claim or asset of the estate constitutes at least 10 percent of the decedent's gross estate, the value of each such claim against the estate is determined from a ''qualified appraisal'' performed by a ''qualified appraiser'' (within the meaning of section 170 of the Code and the corresponding regulations), and the value of each such claim against the estate is subject to adjustment to reflect post-death events. The deductible amount of each such claim is limited to the value of the related asset or claim included in the gross estate. The amount of the claim against the estate in excess of this limitation may be the subject of a protective claim for refund.

11. Comments Relating to Prop. Reg. § 20.2053–4(b)(4), Claims by Family Members, Related Entities, or Beneficiaries

The proposed regulations include a rebuttable presumption that claims by a family member of the decedent, a related entity, or a beneficiary of the decedent's estate or a revocable trust are not legitimate and bona fide. Many commentators requested that the rebuttable presumption be removed from the regulation. A commentator suggested that the presumption be replaced by a provision requiring close scrutiny of claims by family members, related entities, or beneficiaries. Although such claims are in fact closely scrutinized during the examination of a return, the Treasury Department and the IRS believe that a regulatory provision prescribing the level of scrutiny to be given a particular item is not appropriate for this regulation.

Other commentators stated that the presumption is inconsistent with the burden of proof provision of section 7491 and that such a presumption should apply only when the facts indicate possible collusion. After careful consideration, the Treasury Department and the IRS have concluded that the rebuttable presumption in the proposed regulations does not conflict with section 7491.

Some commentators maintained that the presumption is unfair and unwarranted because the proposed regulations and the burden of proof provisions adequately deter the manipulation of claims by family members, related entities or beneficiaries. The Treasury Department and the IRS carefully considered these comments and, in response to the enumerated concerns with the creation of a rebuttable presumption, have removed the presumption from the final regulations. Instead, the final regulations continue to include the generally applicable requirement that any claim or expense deductible under section 2053 must be bona fide in nature, but also include a paragraph that (as suggested by a commentator) provides a nonexclusive list of factors indicative of the bona fide nature of a claim or expense involving a family member, related entity, or beneficiary of the estate of a decedent.

12. Comments Relating to Payments in Prop. Reg. § 20.2053–4(b)(5)

A commentator suggested removing the rule in Prop. Reg. § 20.2053–4(b)(5) providing that claims that are unenforceable prior to or at the decedent's death are not deductible even if paid. The Treasury Department and the IRS believe that this rule is mandated by the statutory requirement that only amounts allowable by the laws of the jurisdiction under which the estate is being administered may be deducted from the value of the gross estate. Therefore, this suggestion has not been adopted.

13. Comments Relating to Recurring Payments in Prop. Reg. § 20.2053–4(b)(7)

The proposed regulations provide that certain recurring, noncontingent obligations may be deducted as estimated amounts. Some commentators suggested that not allowing an estate to deduct the value of a contingent obligation is inefficient and inequitable because it forces the estate to remain open unless the estate purchases a commercial annuity. The Treasury Department and the IRS acknowledge that a contingent obligation may extend the period of estate administration unless the estate purchases a commercial annuity to satisfy the obligation or makes distributions that are encumbered by the contingent obligation. However, the Treasury Department and the IRS believe that allowing a deduction for a noncontingent recurring payment as an ascertainable amount (deductible under § 20.2053–1(d)(4) of the final regulations), but not allowing a deduction for a contingent recurring payment until paid is a necessary component of the rules of deductibility provided for in these regulations. Nevertheless, the Treasury Department and the IRS believe that the purchase of a commercial annuity (with a cost determined by the market and based on the particular contingency) to fund a contingent obligation should be deemed to be substantially equivalent to a reasonably ascertainable (and thus deductible) noncontingent obligation for purposes of section 2053 and these regulations.

Some commentators requested clarification on whether death or remarriage is considered a contingency with respect to decedent's obligation to make a recurring payment. The final regulations clarify that, for purposes of section 2053, an obligation subject to death or remarriage is treated as a noncontingent obligation under § 20.2053–4(d)(6)(i).

Some commentators suggested that the disparate treatment afforded noncontingent obligations (deduction for present value of obligations) versus contingent obligations (dollar-for-dollar deduction as paid) is inequitable and produces an inconsistent result without meaningful justification. These commentators requested that the final regulations allow an estate to choose between deducting the present value of a noncontingent recurring payment on the estate tax return, or instead deducting the amounts paid in the same manner as provided for a contingent obligation (after filing an appropriate protective claim for refund). The Treasury Department and the IRS find the arguments against the disparate treatment of noncontingent and contingent obligations to be persuasive. The final regulations eliminate the disparate treatment by removing the present value limitation applicable only to noncontingent recurring payments. The Treasury Department and the IRS believe that the issue of the appropriate use of present value in determining the amount of the deduction allowable under section 2053 merits further consideration. The final regulations

reserve § 20.2053–1(d)(6) to provide future guidance on this issue.

A commentator requested clarification on whether the rule in Prop. Reg. § 20.2053–4(b)(7) will or will not apply to mortgages and other indebtedness under a note. The final regulations clarify that the rules applicable to recurring payments do not apply to payments made in connection with a mortgage or other indebtedness described in § 20.2053–7.

Finally, a commentator requested further guidance on the commercial annuity provision; specifically, whether the executor must transfer ownership of the purchased annuity to the creditor or to a third party who will use the annuity to make payments to the creditor, or whether granting the creditor a security interest in the annuity is sufficient in order for the amount paid for the annuity to be deductible under section 2053. For income tax purposes, the transfer of the annuity is likely to cause immediate gain recognition of the entire amount to the transferee unless the annuity meets several specific requirements. In light of the purpose and intent of these regulations, the Treasury Department and the IRS believe that the purchase of a commercial annuity, and the nonrefundable and generally significant costs involved in that purchase, should be sufficient to permit a deduction of the cost of the annuity for purposes of section 2053. For these reasons, the final regulations clarify that the estate may be permitted to own the annuity.

Special Analyses

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

Drafting Information

The principal author of these regulations is Karlene M. Lesho, Office of the Associate Chief Counsel (Passthroughs and Special Industries). Other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 20 is amended as follows:

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

■ **Paragraph 1.** The authority citation for part 20 continues to read in part as follows:

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

■ **Par. 2.** Section 20.2051–1 is revised to read as follows:

§ 20.2051–1 Definition of taxable estate.

(a) *General rule.* The taxable estate of a decedent who was a citizen or resident (see § 20.0–1(b)(1)) of the United States at death is determined by subtracting the total amount of the deductions authorized by sections 2053 through 2058 from the total amount which must be included in the gross estate under sections 2031 through 2044. These deductions are in general as follows—

(1) Funeral and administration expenses and claims against the estate (including certain taxes and charitable pledges) (section 2053).

(2) Losses from casualty or theft during the administration of the estate (section 2054).

(3) Charitable transfers (section 2055).

(4) The marital deduction (section 2056).

(5) Qualified domestic trusts (section 2056A).

(6) Family-owned business interests (section 2057) to the extent applicable to estates of decedents.

(7) State death taxes (section 2058) to the extent applicable to estates of decedents.

(b) *Special rules.* See section 2106 and the corresponding regulations for special rules regarding the computation of the taxable estate of a decedent who was not a citizen or resident of the United States. See also § 1.642(g)–1 of this chapter concerning the disallowance for income tax purposes of certain deductions allowed for estate tax purposes.

(c) *Effective/applicability date.* This section applies to the estates of decedents dying on or after October 20, 2009.

■ **Par. 3.** Section 20.2053–1 is amended by:

■ 1. Revising paragraphs (a), (b)(2), (b)(3), and adding paragraph (b)(4).

■ 2. Redesignating paragraph (d) as paragraph (e).

■ 3. Adding paragraphs (d) and (f).

The revisions and additions read as follows:

§ 20.2053–1 Deductions for expenses, indebtedness, and taxes; in general.

(a) *General rule.* In determining the taxable estate of a decedent who was a citizen or resident of the United States at death, there are allowed as deductions under section 2053(a) and (b) amounts falling within the following two categories (subject to the limitations contained in this section and in §§ 20.2053–2 through 20.2053–10)—

* * * * *

(b) * * *

(2) *Bona fide requirement*—(i) *In general.* Amounts allowed as deductions under section 2053(a) and (b) must be expenses and claims that are bona fide in nature. No deduction is permissible to the extent it is founded on a transfer that is essentially donative in character (a mere cloak for a gift or bequest) except to the extent the deduction is for a claim that would be allowable as a deduction under section 2055 as a charitable bequest.

(ii) *Claims and expenses involving family members.* Factors indicative (but not necessarily determinative) of the bona fide nature of a claim or expense involving a family member of a decedent, a related entity, or a beneficiary of a decedent's estate or revocable trust, in relevant instances, may include, but are not limited to, the following—

(A) The transaction underlying the claim or expense occurs in the ordinary course of business, is negotiated at arm's length, and is free from donative intent.

(B) The nature of the claim or expense is not related to an expectation or claim of inheritance.

(C) The claim or expense originates pursuant to an agreement between the decedent and the family member, related entity, or beneficiary, and the agreement is substantiated with contemporaneous evidence.

(D) Performance by the claimant is pursuant to the terms of an agreement between the decedent and the family member, related entity, or beneficiary and the performance and the agreement can be substantiated.

(E) All amounts paid in satisfaction or settlement of a claim or expense are reported by each party for Federal income and employment tax purposes, to the extent appropriate, in a manner that is consistent with the reported nature of the claim or expense.

(iii) *Definitions.* The following definitions apply for purposes of this paragraph (b)(2):

(A) *Family members* include the spouse of the decedent; the grandparents, parents, siblings, and lineal descendants of the decedent or of the decedent's spouse; and the spouse and lineal descendants of any such grandparent, parent, and sibling. Family members include adopted individuals.

(B) A *related entity* is an entity in which the decedent, either directly or indirectly, had a beneficial ownership interest at the time of the decedent's death or at any time during the three-year period ending on the decedent's date of death. Such an entity, however, shall not include a publicly-traded entity nor shall it include a closely-held entity in which the combined beneficial interest, either direct or indirect, of the decedent and the decedent's family members, collectively, is less than 30 percent of the beneficial ownership interests (whether voting or non-voting and whether an interest in stock, capital and/or profits), as determined at the time a claim described in this section is being asserted. Notwithstanding the foregoing, an entity in which the decedent, directly or indirectly, had any managing interest (for example, as a general partner of a partnership or as a managing member of a limited liability company) at the time of the decedent's death shall be considered a related entity.

(C) *Beneficiaries* of a decedent's estate include beneficiaries of a trust of the decedent.

(3) *Court decrees and settlements*—(i) *Court decree.* If a court of competent jurisdiction over the administration of an estate reviews and approves expenditures for funeral expenses, administration expenses, claims against the estate, or unpaid mortgages (referred to in this section as a ''claim or expense''), a final judicial decision in that matter may be relied upon to establish the amount of a claim or expense that is otherwise deductible under section 2053 and these regulations provided that the court actually passes upon the facts on which deductibility depends. If the court does not pass upon those facts, its decree may not be relied upon to establish the amount of the claim or expense that is otherwise deductible under section 2053. It must appear that the court actually passed upon the merits of the claim. This will be presumed in all cases of an active and genuine contest. If the result reached appears to be unreasonable, this is some evidence that there was not such a contest, but it may be rebutted by proof to the contrary. Any amount meeting the requirements of this paragraph (b)(3)(i) is deductible to the extent it actually has been paid or will be paid, subject to any applicable limitations in this section.

(ii) *Claims and expenses where court approval not required under local law.* A deduction for the amount of a claim or expense that is otherwise deductible under section 2053 and these regulations will not be denied under section 2053 solely because a local court decree has not been entered with respect to such amount, provided that no court decree is required under applicable law to determine the amount or allowability of the claim or expense.

(iii) *Consent decree.* A local court decree rendered by consent may be relied on to establish the amount of a claim or expense that is otherwise deductible under section 2053 and these regulations provided that the consent resolves a bona fide issue in a genuine contest. Consent given by all parties having interests adverse to that of the claimant will be presumed to resolve a bona fide issue in a genuine contest. Any amount meeting the requirements of this paragraph (b)(3)(iii) is deductible to the extent it actually has been paid or will be paid, subject to any applicable limitations in this section.

(iv) *Settlements.* A settlement may be relied on to establish the amount of a claim or expense (whether contingent or noncontingent) that is otherwise deductible under section 2053 and these regulations, provided that the settlement resolves a bona fide issue in a genuine contest and is the product of arm's-length negotiations by parties having adverse interests with respect to the claim or expense. A deduction will not be denied for a settlement amount paid by an estate if the estate can establish that the cost of defending or contesting the claim or expense, or the delay associated with litigating the claim or expense, would impose a higher burden on the estate than the payment of the amount paid to settle the claim or expense. Nevertheless, no deduction will be allowed for amounts paid in settlement of an unenforceable claim. For this purpose, to the extent a claim exceeds an applicable limit under local law, the claim is deemed to be unenforceable. However, as long as the enforceability of the claim is at issue in a bona fide dispute, the claim will not be deemed to be unenforceable for this purpose. Any amount meeting the requirements of this paragraph (b)(3)(iv) is deductible to the extent it actually has been paid or will be paid, subject to any applicable limitations in this section.

(v) *Additional rules.* Notwithstanding paragraph (b)(3)(i) through (iv) of this section, additional rules may apply to the deductibility of certain claims and expenses. See § 20.2053–2 for additional rules regarding the deductibility of funeral expenses. See § 20.2053–3 for additional rules regarding the deductibility of administration expenses. See § 20.2053–4 for additional rules regarding the deductibility of claims against the estate. See § 20.2053–7 for additional rules regarding the deductibility of unpaid mortgages.

(4) *Examples.* Unless otherwise provided, assume that the amount of any claim or expense is paid out of property subject to claims and is paid within the time prescribed for filing the ''United States Estate (and Generation-Skipping Transfer) Tax Return,'' Form 706. The following examples illustrate the application of this paragraph (b):

Example 1. Consent decree at variance with the law of the State. Decedent's (D's) estate is probated in State. D's probate estate is valued at $100x. State law provides that the executor's commission shall not exceed 3 percent of the probate estate. A consent decree is entered allowing the executor's commission in the amount of $5x. The estate pays the executor's commission in the amount of $5x. For purposes of section 2053, the executor may deduct only $3x of the $5x expense paid for the executor's commission because the amount approved by the consent decree in excess of $3x is in excess of the applicable limit for executor's commissions under local law. Therefore, for purposes of section 2053, the consent decree may not be relied upon to establish the amount of the expense for the executor's commission.

Example 2. Decedent's (D's) estate is probated in State. State law grants authority to an executor to administer an estate without court approval, so long as notice of and a right to object to a proposed action is provided to interested persons. The executor of D's estate (E) proposes to sell property of the estate in order to pay the debts of D. E gives requisite notice to all interested parties and no interested person objects. E sells the real estate and pays a real estate commission of $20x to a professional real estate agent. The amount of the real estate commission paid does not exceed the applicable limit under State law. Provided that the sale of the property was necessary to pay D's debts, expenses of administration, or taxes, to preserve the estate, or to effect distribution, the executor may deduct the $20x expense for the real estate commission under section 2053 even though no court decree was entered approving the expense.

Example 3. Claim by family member. For a period of three years prior to D's death, D's niece (N) provides accounting and bookkeeping services on D's behalf. N is a CPA and provides similar accounting and bookkeeping services to unrelated clients. At the end of each month, N presents an itemized bill to D for services rendered. The fees charged by N conform to the prevailing market rate for the services rendered and are comparable to the fees N charges other

clients for similar services. The amount due is timely paid each month by D and is properly reported for Federal income and employment tax purposes by N. In the six months prior to D's death, D's poor health prevents D from making payments to N for the amount due. After D's death, N asserts a claim against the estate for $25x, an amount representing the amount due for the six-month period prior to D's death. D's estate pays $25x to N in satisfaction of the claim before the return is timely filed and N properly reports the $25x received by E for income tax purposes. Barring any other relevant facts or circumstances, E may rely on the following factors to establish that the claim is bona fide: (1) N's claim for services rendered arose in the ordinary course of business, as N is a CPA performing similar services for other clients; (2) the fees charged were deemed to be negotiated at arm's length, as the fees were consistent with the fees N charged for similar services to unrelated clients; (3) the billing records and the records of D's timely payments to N constitute contemporaneous evidence of an agreement between D and N for N's bookkeeping services; and (4) the amount of the payments to N is properly reported by N for Federal income and employment tax purposes. E may deduct the amount paid to N in satisfaction of the claim.

* * * * *

(d) *Amount deductible*—(1) *General rule.* To take into account properly events occurring after the date of a decedent's death in determining the amount deductible under section 2053 and these regulations, the deduction for any claim or expense described in paragraph (a) of this section is limited to the total amount actually paid in settlement or satisfaction of that item (subject to any applicable limitations in this section). However, see paragraph (d)(4) of this section for the rules for deducting certain ascertainable amounts; see § 20.2053–4(b) and (c) for the rules regarding the deductibility of certain claims against the estate; and see § 20.2053–7 for the rules regarding the deductibility of unpaid mortgages and other indebtedness.

(2) *Application of post-death events.* In determining whether and to what extent a deduction under section 2053 is allowable, events occurring after the date of a decedent's death will be taken into consideration—

(i) Until the expiration of the applicable period of limitations on assessment prescribed in section 6501 (including without limitation at all times during which the running of the period of limitations is suspended); and

(ii) During subsequent periods, in determining the amount (if any) of an overpayment of estate tax due in connection with a claim for refund filed within the time prescribed in section 6511(a).

(3) *Reimbursements.* A deduction is not allowed to the extent that a claim or expense described in paragraph (a) of this section is or could be compensated for by insurance or otherwise could be reimbursed. If the executor is able to establish that only a partial reimbursement could be collected, then only that portion of the potential reimbursement that reasonably could have been expected to be collected will reduce the estate's deductible portion of the total claim or expense. An executor may certify that the executor neither knows nor reasonably should have known of any available reimbursement for a claim or expense described in section 2053(a) or (b) on the estate's United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706), in accordance with the instructions for that form. A potential reimbursement will not reduce the deductible amount of a claim or expense to the extent that the executor, on Form 706 and in accordance with the instructions for that form, provides a reasonable explanation for his or her reasonable determination that the burden of necessary collection efforts in pursuit of a right of reimbursement would outweigh the anticipated benefit from those efforts. Nevertheless, even if a reasonable explanation is provided, subsequent events (including without limitation an actual reimbursement) occurring within the period described in § 20.2053–1(d)(2) will be considered in determining the amount (if any) of a reduction under this paragraph (d)(3) in the deductible amount of a claim or expense.

(4) *Exception for certain ascertainable amounts*—(i) *General rule.* A deduction will be allowed for a claim or expense that satisfies all applicable requirements even though it is not yet paid, provided that the amount to be paid is ascertainable with reasonable certainty and will be paid. For example, executors' commissions and attorneys' fees that are not yet paid, and that meet the requirements for deductibility under § 20.2053–3(b) and (c), respectively, are deemed to be ascertainable with reasonable certainty and may be deducted if such expenses will be paid. However, no deduction may be taken upon the basis of a vague or uncertain estimate. To the extent a claim or expense is contested or contingent, such a claim or expense cannot be ascertained with reasonable certainty.

(ii) *Effect of post-death events.* A deduction under this paragraph (d)(4) will be allowed to the extent the Commissioner is reasonably satisfied that the amount to be paid is ascertainable with reasonable certainty and will be paid. In making this determination, the Commissioner will take into account events occurring after the date of a decedent's death. To the extent the amount for which a deduction was claimed does not satisfy the requirements of this paragraph (d)(4), and is not otherwise deductible, the deduction will be disallowed by the Commissioner. If a deduction is claimed on Form 706 for an amount that is not yet paid and the deduction is disallowed in whole or in part (or if no deduction is claimed on Form 706), then if the claim or expense subsequently satisfies the requirements of this paragraph (d)(4) or is paid, relief may be sought by filing a claim for refund. To preserve the estate's right to claim a refund for amounts becoming deductible after the expiration of the period of limitation for the filing of a claim for refund, a protective claim for refund may be filed in accordance with paragraph (d)(5) of this section.

(5) *Protective claim for refund*—(i) *In general.* A protective claim for refund under this section may be filed at any time before the expiration of the period of limitation prescribed in section 6511(a) for the filing of a claim for refund to preserve the estate's right to claim a refund by reason of claims or expenses that are not paid or do not otherwise meet the requirements of deductibility under section 2053 and these regulations until after the expiration of the period of limitation for filing a claim for refund. Such a protective claim shall be made in accordance with guidance that may be provided from time to time by publication in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*)). Although the protective claim need not state a particular dollar amount or demand an immediate refund, a protective claim must identify each outstanding claim or expense that would have been deductible under section 2053(a) or (b) if such item already had been paid and must describe the reasons and contingencies delaying the actual payment of the claim or expense. Action on protective claims will proceed after the executor has notified the Commissioner within a reasonable period that the contingency has been resolved and that the amount deductible under § 20.2053–1 has been established.

(ii) *Effect on marital and charitable deduction.* To the extent that a protective claim for refund is filed with respect to a claim or expense that would have been deductible under section 2053(a) or (b) if such item already had been paid and that is payable out of a share that meets the requirements for a

charitable deduction under section 2055 or a marital deduction under section 2056 or section 2056A, or from a combination thereof, neither the charitable deduction nor the marital deduction shall be reduced by the amount of such claim or expense until the amount is actually paid or meets the requirements of paragraph (d)(4) of this section for deducting certain ascertainable amounts or the requirements of § 20.2053–4(b) or (c) for deducting certain claims against the estate.

(6) [Reserved].

(7) *Examples.* Assume that the amounts described in section 2053(a) are payable out of property subject to claims and are allowable by the law of the jurisdiction governing the administration of the estate, whether the applicable jurisdiction is within or outside of the United States. Assume that the claims against the estate are not deductible under § 20.2053–4(b) or (c). Also assume, unless otherwise provided, that none of the limitations on the amount of the deduction described in this section apply to the deduction claimed under section 2053. The following examples illustrate the application of this paragraph (d):

Example 1. Amount of expense ascertainable. Decedent's (D's) estate was probated in State. State law provides that the personal representative shall receive compensation equal to 2.5 percent of the value of the probate estate. The executor (E) may claim a deduction for estimated fees equal to 2.5 percent of D's probate estate on the Form 706 filed for D's estate under the rule for deducting certain ascertainable amounts set forth in paragraph (d)(4) of this section, provided that the estimated amount will be paid. However, the Commissioner will disallow the deduction upon examination of the estate's Form 706 to the extent that the amount for which a deduction was claimed no longer satisfies the requirements of paragraph (d)(4) of this section. If this occurs, E may file a protective claim for refund in accordance with paragraph (d)(5) of this section in order to preserve the estate's right to claim a refund for the amount of the fee that is subsequently paid or that subsequently meets the requirements of paragraph (d)(4) of this section for deducting certain ascertainable amounts.

Example 2. Amount of claim not ascertainable. Prior to death, Decedent (D) is sued by Claimant (C) for $100x in a tort proceeding and responds asserting affirmative defenses available to D under applicable local law. C and D are unrelated. D subsequently dies and D's Form 706 is due before a final judgment is entered in the case. The executor of D's estate (E) may not claim a deduction with respect to C's claim on D's Form 706 under the special rule contained in paragraph (d)(4) of this section because the deductible amount cannot be ascertained with reasonable certainty. However, E may file a timely protective claim for refund in accordance with paragraph (d)(5) of this section in order to preserve the estate's right to subsequently claim a refund at the time a final judgment is entered in the case and the claim is either paid or meets the requirements of paragraph (d)(4) of this section for deducting certain ascertainable amounts.

Example 3. Amount of claim payable out of property qualifying for marital deduction. The facts are the same as in *Example 2* except that the applicable credit amount, under section 2010, against the estate tax was fully consumed by D's lifetime gifts, D is survived by Spouse (S), and D's estate passes entirely to S in a bequest that qualifies for the marital deduction under section 2056. Even though any amount D's estate ultimately pays with respect to C's claim will be paid from the assets qualifying for the marital deduction, in filing Form 706, E need not reduce the amount of the marital deduction claimed on D's Form 706. Instead, pursuant to the protective claim filed by E, the marital deduction will be reduced by the claim once a final judgment is entered in the case. At that time, a deduction will be allowed for the amount that is either paid or meets the requirements of paragraph (d)(4) of this section for deducting certain ascertainable amounts.

* * * * *

(f) *Effective/applicability date.* This section applies to the estates of decedents dying on or after October 20, 2009.

■ **Par. 4.** Section 20.2053–3 is amended by:

■ 1. Revising paragraph (b)(1) and the second sentence of paragraph (b)(2).

■ 2. Revising paragraph (c)(1) and the second sentence of paragraph (c)(2).

■ 3. Revising the second sentence of paragraph (d)(1) and the first sentence of paragraph (d)(2).

■ 4. Adding paragraphs (d)(3) and (e).

The revisions and additions read as follows:

§ 20.2053–3 Deductions for expenses of administering estate.

* * * * *

(b) *Executor's commissions*—(1) Executors' commissions are deductible to the extent permitted by § 20.2053–1 and this section, but no deduction may be taken if no commissions are to be paid. In addition, the amount of the commissions claimed as a deduction must be in accordance with the usually accepted standards and practice of allowing such an amount in estates of similar size and character in the jurisdiction in which the estate is being administered, or any deviation from the usually accepted standards or range of amounts (permissible under applicable local law) must be justified to the satisfaction of the Commissioner.

(2) * * * If, however, the terms of the will set forth the compensation payable to the executor for services to be rendered in the administration of the estate, a deduction may be taken to the extent that the amount so fixed does not exceed the compensation allowable by the local law or practice and to the extent permitted by § 20.2053–1.

* * * * *

(c) *Attorney's fees*—(1) Attorney's fees are deductible to the extent permitted by § 20.2053–1 and this section. Further, the amount of the fees claimed as a deduction may not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate, the law and practice in the jurisdiction in which the estate is being administered, and the skill and expertise of the attorneys.

(2) * * * A deduction for reasonable attorney's fees actually incurred in contesting an asserted deficiency or in prosecuting a claim for refund will be allowed to the extent permitted by § 20.2053–1 even though the deduction, as such, was not claimed on the estate tax return or in the claim for refund.

* * *

* * * * *

(d) * * *

(1) * * * Expenses necessarily incurred in preserving and distributing the estate, including the cost of storing or maintaining property of the estate if it is impossible to effect immediate distribution to the beneficiaries, are deductible to the extent permitted by § 20.2053–1. * * *

(2) Expenses for selling property of the estate are deductible to the extent permitted by § 20.2053–1 if the sale is necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate, or to effect distribution. * * *

(3) Expenses incurred in defending the estate against claims described in section 2053(a)(3) are deductible to the extent permitted by § 20.2053–1 if the expenses are incurred incident to the assertion of defenses to the claim available under the applicable law, even if the estate ultimately does not prevail. For purposes of this paragraph (d)(3), ''expenses incurred in defending the estate against claims'' include costs relating to the arbitration and mediation of contested issues, costs associated with defending the estate against claims (whether or not enforceable), and costs associated with reaching a negotiated settlement of the issues.

(e) *Effective/applicability date.* This section applies to the estates of decedents dying on or after October 20, 2009.

■ **Par. 5.** Section 20.2053–4 is revised to read as follows:

§ 20.2053–4 Deduction for claims against the estate.

(a) *In general*—(1) *General rule.* For purposes of this section, liabilities imposed by law or arising out of contracts or torts are deductible if they meet the applicable requirements set forth in § 20.2053–1 and this section. To be deductible, a claim against a decedent's estate must represent a personal obligation of the decedent existing at the time of the decedent's death. Except as otherwise provided in paragraphs (b) and (c) of this section and to the extent permitted by § 20.2053–1, the amounts that may be deducted as claims against a decedent's estate are limited to the amounts of bona fide claims that are enforceable against the decedent's estate (and are not unenforceable when paid) and claims that—

(i) Are actually paid by the estate in satisfaction of the claim; or

(ii) Meet the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts.

(2) *Effect of post-death events.* Events occurring after the date of a decedent's death shall be considered in determining whether and to what extent a deduction is allowable under section 2053. See § 20.2053–1(d)(2).

(b) *Exception for claims and counterclaims in related matter*—(1) *General rule.* If a decedent's gross estate includes one or more claims or causes of action and there are one or more claims against the decedent's estate in the same or a substantially-related matter, or, if a decedent's gross estate includes a particular asset and there are one or more claims against the decedent's estate integrally related to that particular asset, the executor may deduct on the estate's United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) the current value of the claim or claims against the estate, even though payment has not been made, provided that—

(i) Each such claim against the estate otherwise satisfies the applicable requirements set forth in § 20.2053–1;

(ii) Each such claim against the estate represents a personal obligation of the decedent existing at the time of the decedent's death;

(iii) Each such claim is enforceable against the decedent's estate (and is not unenforceable when paid);

(iv) The value of each such claim against the estate is determined from a ''qualified appraisal'' performed by a ''qualified appraiser'' within the meaning of section 170 of the Internal Revenue Code and the corresponding regulations;

(v) The value of each such claim against the estate is subject to adjustment for post-death events; and

(vi) The aggregate value of the related claims or assets included in the decedent's gross estate exceeds 10 percent of the decedent's gross estate.

(2) *Limitation on deduction.* The deduction under this paragraph (b) is limited to the value of the related claims or particular assets included in decedent's gross estate.

(3) *Effect of post-death events.* If, under this paragraph (b), a deduction is claimed on Form 706 for a claim against the estate and, during the period described in § 20.2053–1(d)(2), the claim is paid or meets the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts, the claimed deduction is subject to adjustment to reflect, and may not exceed, the amount paid on the claim or the amount meeting the requirements of § 20.2053–1(d)(4). If, under this paragraph (b), a deduction is claimed on Form 706 for a claim against the estate and, during the period described in § 20.2053–1(d)(2), the claim remains unpaid (and does not meet the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts), the claimed deduction is subject to adjustment to reflect, and may not exceed, the current valuation of the claim. A valuation of the claim will be considered current if it reflects events occurring after the decedent's death. With regard to any amount in excess of the amount deductible under this paragraph (b), an estate may preserve the estate's right to claim a refund for claims that are paid or that meet the requirements of § 20.2053–(1)(d)(4) after the expiration of the period of limitation for filing a claim for refund by filing a protective claim for refund in accordance with the rules in § 20.2053–1(d)(5).

(c) *Exception for claims totaling not more than $500,000*—(1) *General rule.* An executor may deduct on Form 706 the current value of one or more claims against the estate even though payment has not been made on the claim or claims to the extent that—

(i) Each such claim against the estate otherwise satisfies the applicable requirements for deductibility set forth in § 20.2053–1;

(ii) Each such claim against the estate represents a personal obligation of the decedent existing at the time of the decedent's death;

(iii) Each such claim is enforceable against the decedent's estate (and is not unenforceable when paid);

(iv) The value of each such claim against the estate is determined from a ''qualified appraisal'' performed by a ''qualified appraiser'' within the meaning of section 170 of the Internal Revenue Code and the corresponding regulations;

(v) The total amount deducted by the estate under this paragraph (c) does not exceed $500,000;

(vi) The full value of each claim, rather than just a portion of that amount, must be deductible under this paragraph (c) and, for this purpose, the full value of each such claim is deemed to be the unpaid amount of that claim that is not deductible after the application of §§ 20.2053–1 and 20.2053–4(b); and

(vii) The value of each claim deducted under this paragraph (c) is subject to adjustment for post-death events.

(2) *Effect of post-death events.* If, under this paragraph (c), a deduction is claimed for a claim against the estate and, during the period described in § 20.2053–1(d)(2), the claim is paid or meets the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts, the amount of the allowable deduction for that claim is subject to adjustment to reflect, and may not exceed, the amount paid on the claim or the amount meeting the requirements of § 20.2053–1(d)(4). If, under this paragraph (c), a deduction is claimed for a claim against the estate and, during the period described in § 20.2053–1(d)(2), the claim remains unpaid (and does not meet the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts), the amount of the allowable deduction for that claim is subject to adjustment to reflect, and may not exceed, the current value of the claim. The value of the claim will be considered current if it reflects events occurring after the decedent's death. To claim a deduction for amounts in excess of the amount deductible under this paragraph (c), the estate may preserve the estate's right to claim a refund for claims that are not paid or that do not meet the requirements of § 20.2053–1(d)(4) until after the expiration of the period of limitation for the filing of a claim for refund by filing a protective claim for refund in accordance with the rules in § 20.2053–1(d)(5).

(3) *Examples.* The following examples illustrate the application of this paragraph (c). Assume that the value of each claim is determined from a ''qualified appraisal'' performed by a ''qualified appraiser'' and reflects events occurring after the death of the decedent (D). Also assume that each claim represents a personal obligation of D that existed at D's death, that each claim is enforceable against the decedent's

estate (and is not unenforceable when paid), and that each claim otherwise satisfies the requirements for deductibility of § 20.2053–1.

Example 1. There are three claims against the estate of the decedent (D) that are not paid and are not deductible under § 20.2053–1(d)(4) or paragraph (b) of this section: $25,000 of Claimant A, $35,000 of Claimant B, and $1,000,000 of Claimant C. The executor of D's estate (E) may not claim a deduction under this paragraph with respect to any portion of the claim of Claimant C because the value of that claim exceeds $500,000. E may claim a deduction under this paragraph for the total amount of the claims filed by Claimant A and Claimant B ($60,000) because the aggregate value of the full amount of those claims does not exceed $500,000.

Example 2. There are three claims against the estate of the decedent (D) that are not paid and are not deductible under § 20.2053–1(d)(4) or paragraph (b) of this section; specifically, a separate $200,000 claim of each of three claimants, A, B and C. The executor of D's estate (E) may claim a deduction under this paragraph for any two of these three claims because the aggregate value of the full amount of any two of the claims does not exceed $500,000. E may not deduct any part of the value of the remaining claim under this paragraph because the aggregate value of the full amount of all three claims would exceed $500,000.

Example 3. As a result of an automobile accident involving the decedent (D) and A, D's gross estate includes a claim against A that is valued at $750,000. In the same matter, A files a counterclaim against D's estate that is valued at $1,000,000. A's claim against D's estate is not paid and is not deductible under § 20.2053–1(d)(4). All other section 2053 claims and expenses of D's estate have been paid and are deductible. The executor of D's estate (E) deducts $750,000 of A's claim against the estate under § 20.2053–4(b). E may claim a deduction under this paragraph (c) for the total value of A's claim not deducted under § 20.2053–4(b), or $250,000. If, instead, the value of A's claim against D's estate is $1,500,000, so that the amount not deductible under § 20.2053–4(b) exceeds $500,000, no deduction is available under this paragraph (c).

(d) *Special rules*—(1) *Potential and unmatured claims.* Except as provided in § 20.2053–1(d)(4) and in paragraphs (b) and (c) of this section, no estate tax deduction may be taken for a claim against the decedent's estate while it remains a potential or unmatured claim. Claims that later mature may be deducted (to the extent permitted by § 20.2053–1) in connection with a timely claim for refund. To preserve the estate's right to claim a refund for claims that mature and become deductible after the expiration of the period of limitation for filing a claim for refund, a protective claim for refund may be filed in accordance with § 20.2053–1(d)(5). See § 20.2053–1(b)(3) for rules relating to the treatment of court decrees and settlements.

(2) *Contested claims.* Except as provided in paragraphs (b) and (c) of this section, no estate tax deduction may be taken for a claim against the decedent's estate to the extent the estate is contesting the decedent's liability. Contested claims that later mature may be deducted (to the extent permitted by § 20.2053–1) in connection with a claim for refund filed within the time prescribed in section 6511(a). To preserve the estate's right to claim a refund for claims that mature and become deductible after the expiration of the period of limitation for filing a claim for refund, a protective claim for refund may be filed in accordance with § 20.2053–1(d)(5). See § 20.2053–1(b)(3) for rules relating to the treatment of court decrees and settlements.

(3) *Claims against multiple parties.* If the decedent or the decedent's estate is one of two or more parties against whom the claim is being asserted, the estate may deduct only the portion of the total claim due from and paid by the estate, reduced by the total of any reimbursement received from another party, insurance, or otherwise. The estate's deductible portion also will be reduced by the contribution or other amount the estate could have collected from another party or an insurer but which the estate declines or fails to attempt to collect. See further § 20.2053–1(d)(2).

(4) *Unenforceable claims.* Claims that are unenforceable prior to or at the decedent's death are not deductible, even if they are actually paid. Claims that become unenforceable during the administration of the estate are not deductible to the extent that they are paid (or will be paid) after they become unenforceable. However, see § 20.2053–1(b)(3)(iv) regarding a claim whose enforceability is at issue.

(5) *Claims founded upon a promise.* Except with regard to pledges or subscriptions (see § 20.2053–5), section 2053(c)(1)(A) provides that the deduction for a claim founded upon a promise or agreement is limited to the extent that the promise or agreement was bona fide and in exchange for adequate and full consideration in money or money's worth; that is, the promise or agreement must have been bargained for at arm's length and the price must have been an adequate and full equivalent reducible to a money value.

(6) *Recurring payments*—(i) *Noncontingent obligations.* If a decedent is obligated to make recurring payments on an enforceable and certain claim that satisfies the requirements for deductibility under this section and the payments are not subject to a contingency, the amount of the claim will be deemed ascertainable with reasonable certainty for purposes of the rule for deducting certain ascertainable amounts set forth in § 20.2053–1(d)(4). If the recurring payments will be paid, a deduction will be allowed under the rule for deducting certain ascertainable amounts set forth in § 20.2053–1(d)(4) (subject to any applicable limitations in § 20.2053–1). Recurring payments for purposes of this section exclude those payments made in connection with a mortgage or indebtedness described in and governed by § 20.2053–7. If a decedent's obligation to make a recurring payment is contingent on the death or remarriage of the claimant and otherwise satisfies the requirements of this paragraph (d)(6)(i), the amount of the claim (measured according to actuarial principles, using factors set forth in the transfer tax regulations or otherwise provided by the IRS) will be deemed ascertainable with reasonable certainty for purposes of the rule for deducting certain ascertainable amounts set forth in § 20.2053–1(d)(4).

(ii) *Contingent obligations.* If a decedent has a recurring obligation to pay an enforceable and certain claim but the decedent's obligation is subject to a contingency or is not otherwise described in paragraph (d)(6)(i) of this section, the amount of the claim is not ascertainable with reasonable certainty for purposes of the rule for deducting certain ascertainable amounts set forth in § 20.2053–1(d)(4). Accordingly, the amount deductible is limited to amounts actually paid by the estate in satisfaction of the claim in accordance with § 20.2053–1(d)(1) (subject to any applicable limitations in § 20.2053–1).

(iii) *Purchase of commercial annuity to satisfy recurring obligation to pay.* If a decedent has a recurring obligation (whether or not contingent) to pay an enforceable and certain claim and the estate purchases a commercial annuity from an unrelated dealer in commercial annuities in an arm's-length transaction to satisfy the obligation, the amount deductible by the estate (subject to any applicable limitations in § 20.2053–1) is the sum of—

(A) The amount paid for the commercial annuity, to the extent that the amount paid is not refunded, or expected to be refunded, to the estate;

(B) Any amount actually paid to the claimant by the estate prior to the purchase of the commercial annuity; and

(C) Any amount actually paid to the claimant by the estate in excess of the

annuity amount as is necessary to satisfy the recurring obligation.

(7) *Examples.* The following examples illustrate the application of paragraph (d) of this section. Except as is otherwise provided in the examples, assume—

(i) A claim satisfies the applicable requirements set forth in § 20.2053–1 and paragraph (a) of this section, is payable from property subject to claims, and the amount of the claim is not subject to any other applicable limitations in § 20.2053–1;

(ii) A claim is not deductible under paragraphs (b) or (c) of this section as an exception to the general rule contained in paragraph (a) of this section; and

(iii) The claimant (C) is not a family member, related entity or beneficiary of the estate of decedent (D) and is not the executor (E).

Example 1. Contested claim, single defendant, no decision. D is sued by C for $100x in a tort proceeding and responds asserting affirmative defenses available to D under applicable local law. D dies and E is substituted as defendant in the suit. D's Form 706 is due before a judgment is reached in the case. D's gross estate exceeds $100x. E may not take a deduction on Form 706 for the claim against the estate. However, E may claim a deduction under § 20.2053–3(c) or § 20.2053–3(d)(3) for expenses incurred in defending the estate against the claim if the expenses have been paid in accordance with § 20.2053–1(d)(1) or if the expenses meet the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts. E may file a protective claim for refund before the expiration of the period of limitation prescribed in section 6511(a) in order to preserve the estate's right to claim a refund, if the amount of the claim will not be paid or cannot be ascertained with reasonable certainty by the expiration of this limitation period. If payment is subsequently made pursuant to a court decision or a settlement, the payment, as well as expenses incurred incident to the claim and not previously deducted, may be deducted and relief may be sought in connection with a timely-filed claim for refund.

Example 2. Contested claim, single defendant, final court decree and payment. The facts are the same as in *Example 1* except that, before the Form 706 is timely filed, the court enters a decision in favor of C, no timely appeal is filed, and payment is made. E may claim a deduction on Form 706 for the amount paid in satisfaction of the claim against the estate pursuant to the final decision of the local court, including any interest accrued prior to D's death. In addition, E may claim a deduction under § 20.2053–3(c) or § 20.2053–3(d)(3) for expenses incurred in defending the estate against the claim and in processing payment of the claim if the expenses have been paid in accordance with § 20.2053–1(d)(1) or if the expenses meet the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts.

Example 3. Contested claim, single defendant, settlement and payment. The facts are the same as in *Example 1* except that a settlement is reached between E and C for $80x and payment is made before Form 706 is timely filed. E may claim a deduction on Form 706 for the amount paid to C ($80x) in satisfaction of the claim against the estate. In addition, E may claim a deduction under § 20.2053–3(c) or § 20.2053–3(d)(3) for expenses incurred in defending the estate, reaching a settlement, and processing payment of the claim if the expenses have been paid in accordance with § 20.2053–1(d)(1) or if the expenses meet the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts.

Example 4. Contested claim, multiple defendants. The facts are the same as in *Example 1* except that the suit filed by C lists D and an unrelated third-party (K) as defendants. If the claim against the estate is not resolved prior to the time the Form 706 is filed, E may not take a deduction for the claim on Form 706. If payment is subsequently made of D's share of the claim pursuant to a court decision holding D liable for 40 percent of the amount due and K liable for 60 percent of the amount due, then E may claim a deduction for the amount paid in satisfaction of the claim against the estate representing D's share of the liability as assigned by the court decree ($40x), plus any interest on that share accrued prior to D's death. If the court decision finds D and K jointly and severally liable for the entire $100x and D's estate pays the entire $100x but could have reasonably collected $50x from K in reimbursement, E may claim a deduction of $50x together with the interest on $50x accrued prior to D's death. In both instances, E also may claim a deduction under § 20.2053–3(c) or § 20.2053–3(d)(3) for expenses incurred and not previously deducted in defending the estate against the claim and processing payment of the amount due from D if the expenses have been paid in accordance with § 20.2053–1(d)(1) or if the expenses meet the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts.

Example 5. Contested claim, multiple defendants, settlement and payment. The facts are the same as in *Example 1* except that the suit filed by C lists D and an unrelated third-party (K) as defendants. D's estate settles with C for $10x and payment is made before Form 706 is timely filed. E may take a deduction on Form 706 for the amount paid to C ($10x) in satisfaction of the claim against the estate. In addition, E may claim a deduction under § 20.2053–3(c) or § 20.2053–3(d)(3) for expenses incurred in defending the estate, reaching a settlement, and processing payment of the claim if the expenses have been paid in accordance with § 20.2053–1(d)(1) or if the expenses meet the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts.

Example 6. Mixed claims. During life, D contracts with C to perform specific work on D's home for $75x. Under the contract, additional work must be approved in advance by D. C performs additional work and sues D for $100x for work completed including the $75x agreed to in the contract. D dies and D's Form 706 is due before a judgment is reached in the case. E accepts liability of $75x but contests liability of $25x. E may take a deduction of $75x on Form 706 if the amount has been paid or meets the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts. In addition, E may claim a deduction under § 20.2053–3(c) or § 20.2053–3(d)(3) for expenses incurred in defending the estate against the claim if the expenses have been paid or if the expenses meet the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts. E may file a protective claim for refund before the expiration of the period of limitation prescribed in section 6511(a) in order to preserve the estate's right to claim a refund for any amount in excess of $75x that is subsequently paid to resolve the claim against the estate. To the extent that any unpaid expenses incurred in defending the estate against the claim are not deducted as an ascertainable amount pursuant to § 20.2053–1(d)(4), they may be included in the protective claim for refund.

Example 7. Claim having issue of enforceability. D is sued by C for $100x in a tort proceeding in which there is an issue as to whether the claim is barred by the applicable period of limitations. After D's death but prior to the decision of the court, a settlement meeting the requirements of § 20.2053–1(b)(3)(iv) is reached between E and C in the amount of $50x. E pays C this amount before the Form 706 is timely filed. E may take a deduction on Form 706 for the amount paid to C ($50x) in satisfaction of the claim. If, subsequent to E's payment to C, facts develop to indicate that the claim was, in fact, unenforceable, the deduction will not be denied provided the enforceability of the claim was at issue in a bona dispute at the time of the payment. See § 20.2053–1(b)(3)(iv). A deduction may be available under § 20.2053–3(d)(3) for expenses incurred in defending the estate, reaching a settlement, and processing payment of the claim if the expenses have been paid in accordance with § 20.2053–1(d)(1) or if the expenses meet the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts.

Example 8. Noncontingent and recurring obligation to pay, binding on estate. D's property settlement agreement incident to D's divorce, signed three years prior to D's death, obligates D or D's estate to pay to S, D's former spouse, $20x per year until S's death or remarriage. Prior to D's death, D made payments in accordance with the agreement and, after D's death, E continues to make the payments in accordance with the agreement. D's obligation to pay S under the property settlement agreement is deemed to be a claim against the estate that is ascertainable with reasonable certainty for purposes of § 20.2053–1(d)(4). To the extent the obligation to make the recurring payment is a claim that will be paid, E may deduct the amount of the claim (measured according to actuarial principles, using factors set forth in the transfer tax regulations or otherwise provided by the IRS) under the rule for deducting certain ascertainable amounts set forth in § 20.2053–1(d)(4).

Example 9. Recurring obligation to pay, estate purchases a commercial annuity in satisfaction. D's settlement agreement with T, the claimant in a suit against D, signed three years prior to D's death, obligates D or D's estate to pay to T $20x per year for 10 years, provided that T does not reveal the details of the claim or of the settlement during that period. D dies in Year 1. In Year 2, D's estate purchases a commercial annuity from an unrelated issuer of commercial annuities, XYZ, to fund the obligation to T. E may deduct the entire amount paid to XYZ to obtain the annuity, even though the obligation to T was contingent.

(e) *Interest on claim*—(1) Subject to any applicable limitations in § 20.2053–1, the interest on a deductible claim is itself deductible as a claim under section 2053 to the extent of the amount of interest accrued at the decedent's death (even if the executor elects the alternate valuation method under section 2032), but only to the extent of the amount of interest actually paid or meeting the requirements of § 20.2053–1(d)(4) for deducting certain ascertainable amounts.

(2) Post-death accrued interest may be deductible in appropriate circumstances either as an estate tax administration expense under section 2053 or as an income tax deduction.

(f) *Effective/applicability date.* This section applies to the estates of decedents dying on or after October 20, 2009.

■ **Par. 6.** Section 20.2053–5 is amended by:

■ 1. Redesignating paragraphs (a) and (b) as (a)(1) and (a)(2).

■ 2. Redesignating the introductory text as paragraph (a).

■ 3. Revising newly redesignated paragraph (a).

■ 4. Adding a new paragraph (b).

The revision and addition read as follows:

§ 20.2035–5 Deductions for charitable, etc., pledges or subscriptions.

(a) A pledge or a subscription, evidenced by a promissory note or otherwise, even though enforceable against the estate, is deductible (subject to any applicable limitations in § 20.2053–1) only to the extent that—

* * * * *

(b) *Effective/applicability date.* This section applies to the estates of decedents dying on or after October 20, 2009.

■ **Par. 7.** Section 20.2053–6 is amended by:

■ 1. Revising paragraphs (a) and (c).

■ 2. Adding paragraphs (g) and (h).

The revisions and additions read as follows:

§ 20.2053–6 Deduction for taxes.

(a) *In general*—(1) Taxes are deductible in computing a decedent's gross estate—

(i) Only as claims against the estate (except to the extent that excise taxes may be allowable as administration expenses);

(ii) Only to the extent not disallowed by section 2053(c)(1)(B) and this section; and

(iii) Subject to any applicable limitations in § 20.2053–1.

(2) See §§ 20.2053–9 and 20.2053–10 with respect to the deduction allowed for certain state and foreign death taxes.

* * * * *

(c) *Death taxes*—(1) For the estates of decedents dying on or before December 31, 2004, no estate, succession, legacy or inheritance tax payable by reason of the decedent's death is deductible, except as provided in §§ 20.2053–9 and 20.2053–10 with respect to certain state and foreign death taxes on transfers for charitable, etc., uses. However, see sections 2011 and 2014 and the corresponding regulations with respect to credits for death taxes.

(2) For the estates of decedents dying after December 31, 2004, see section 2058 to determine the deductibility of state death taxes.

* * * * *

(g) *Post-death adjustments of deductible tax liability.* Post-death adjustments increasing a tax liability accrued prior to the decedent's death, including increases of taxes deducted under this section, will increase the amount of the deduction available under section 2053(a)(3) for that tax liability. Similarly, any refund subsequently determined to be due to and received by the estate or its successor in interest with respect to taxes deducted by the estate under this section reduce the amount of the deduction taken for that tax liability under section 2053(a)(3). Expenses associated with defending the estate against the increase in tax liability or with obtaining the refund may be deductible under § 20.2053–3(d)(3). A protective claim for refund of estate taxes may be filed before the expiration of the period of limitation for filing a claim for refund in order to preserve the estate's right to claim a refund if the amount of a deductible tax liability may be affected by such an adjustment or refund. The application of this section may be illustrated by the following examples:

Example 1. Increase in tax due. After the decedent's death, the Internal Revenue Service examines the gift tax return filed by the decedent in the year before the decedent's death and asserts a deficiency of $100x. The estate pays attorney's fees of $30x in a non-frivolous defense against the increased deficiency. The final determination of the deficiency, in the amount of $90x, is paid by the estate prior to the expiration of the limitation period for filing a claim for refund. The estate may deduct $90x under section 2053(a)(3) and $30x under § 20.2053–3(c)(2) or (d)(3) in connection with a timely claim for refund.

Example 2. Refund of taxes paid. Decedent's estate timely files D's individual income tax return for the year in which the decedent died. The estate timely pays the entire amount of the tax due, $50x, as shown on that return. The entire $50x was attributable to income received prior to the decedent's death. Decedent's estate subsequently discovers an error on the income tax return and timely files a claim for refund of income tax. Decedent's estate receives a refund of $10x. The estate is allowed a deduction of only $40x under section 2053(a)(3) for the income tax liability accrued prior to the decedent's death. If D's estate had claimed a deduction of $50x on D's United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706), the deduction claimed under section 2053(a)(3) will be allowed only to the extent of $40x upon examination by the Commissioner.

(h) *Effective/applicability date.* This section applies to the estates of decedents dying on or after October 20, 2009.

■ **Par. 8.** Section 20.2053–9 is amended by:

■ 1. Adding a sentence at the end of paragraph (a).

■ 2. Revising the first and last sentences of paragraph (c).

■ 3. Adding paragraph (f).

The revisions and addition read as follows:

§ 20.2053–9 Deduction for certain State death taxes.

(a) * * * However, see section 2058 to determine the deductibility of state death taxes by estates to which section 2058 is applicable.

* * * * *

(c) * * * The election to take a deduction for a state death tax imposed upon a transfer for charitable, etc., uses shall be exercised by the executor by the filing of a written notification to that effect with the Commissioner. * * * The election may be revoked by the executor by the filing of a written notification to that effect with the Commissioner at any time before the expiration of such period.

* * * * *

(f) *Effective/applicability date*—(1) The last sentence of paragraph (a) of this section applies to the estates of decedents dying on or after October 20, 2009, to which section 2058 is applicable.

(2) The other provisions of this section apply to the estates of decedents dying on or after October 20, 2009, to which section 2058 is not applicable.

■ **Par. 9.** Section 20.2053–10 is amended by removing the language ''district director'' and adding the language ''Commissioner'' in its place in paragraph (c) and by adding a new paragraph (e) to read as follows:

§ 20.2053–10 Deduction for certain foreign death taxes.

* * * * *

(e) *Effective/applicability date.* This section applies to the estates of decedents dying on or after October 20, 2009.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

Approved: October 14, 2009.

Michael F. Mundaca,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E9–25138 Filed 10–16–09; 11:15 am]

BILLING CODE 4830–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–2190; MB Docket No. 09–160; RM–11558]

Television Broadcasting Services; Traverse City, MI

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission grants a petition for rulemaking filed by Barrington Traverse City License LLC, the permittee of station WPBN–TV, channel 7, Traverse City, Michigan, requesting the substitution of channel 47 for its allotted channel 7 at Traverse City.

DATES: This rule is effective October 20, 2009.

FOR FURTHER INFORMATION CONTACT: David J. Brown, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket No. 09–160, adopted October 7, 2009, and released October 8, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

■ 2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Michigan, is amended by adding channel 47 and removing channel 7 at Traverse City.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E9–25234 Filed 10–19–09; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

[Docket No. FWS–R9–MB–2009–0003; 91200–1231–9BPP]

RIN 1018–AW46

Migratory Bird Hunting; Approval of Tungsten-Iron-Fluoropolymer Shot Alloys as Nontoxic for Hunting Waterfowl and Coots; Availability of Final Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule; availability of final environmental assessment.

SUMMARY: We, the U.S. Fish and Wildlife Service, approve tungsten-iron-fluoropolymer shot alloys for hunting waterfowl and coots. Having completed our review of the application materials, we have concluded that these alloys are very unlikely to adversely affect fish, wildlife, or their habitats. We therefore add this shot type to the list of those approved for hunting waterfowl and coots.

DATES: This rule is effective on October 20, 2009.

ADDRESSES: You can view the final environmental assessment for this action on *http://www.regulations.gov*, or you can obtain a copy by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: George T. Allen, Division of Migratory Bird Management, 703–358–1825.

SUPPLEMENTARY INFORMATION:

Background

The Migratory Bird Treaty Act of 1918 (Act) (16 U.S.C. 703–711) and the Fish and Wildlife Improvement Act of 1978 (16 U.S.C. 712) implement migratory bird treaties between the United States and Great Britain for Canada (1916, amended), Mexico (1936, amended), Japan (1972, amended), and Russia (then the Soviet Union, 1978). These treaties protect certain migratory birds from take, except as permitted under the Acts. The Acts authorize the Secretary of the Interior to regulate take of migratory birds in the United States. Under this authority, we control hunting of migratory game birds through regulations in 50 CFR part 20.

Deposition of toxic shot and release of toxic shot components in waterfowl hunting locations are potentially harmful to many organisms. Research has shown that ingested spent lead shot

causes significant mortality in migratory birds. Since the mid-1970s, we have sought to identify shot types that do not pose significant toxicity hazards to migratory birds or other wildlife. We addressed lead poisoning in waterfowl in an environmental impact statement (EIS) in 1976, and again in a 1986 supplemental EIS. The 1986 document provided the scientific justification for a ban on the use of lead shot and the subsequent approval of steel shot for hunting waterfowl and coots that began that year, with a complete ban on lead for waterfowl and coot hunting in 1991. We have continued to consider other potential candidates for approval as nontoxic shot. We are obligated to review applications for approval of alternative shot types as nontoxic for hunting waterfowl and coots.

Tundra Composites, LLC, requested approval of tungsten-iron-fluoropolymer (TIF) shot alloys of 41.5 to 95.2 percent tungsten, 1.5 to 52.0 percent steel, and 3.5 to 8.0 percent fluoropolymer by weight as nontoxic. The tungsten and iron in this shot type have already been approved in other nontoxic shot types. The applicant did a worst-case evaluation of the potential impacts of the fluoropolymer on fish, wildlife, and their habitats.

The data from the applicant indicate that the tungsten-iron-fluoropolymer alloys will be nontoxic when ingested by waterfowl, and should not pose a significant danger to migratory birds, other wildlife, or their habitats.

Many hunters believe that some nontoxic shot types do not compare favorably to lead and that they may damage some shotgun barrels, and a small percentage of hunters have not complied with nontoxic shot regulations. Allowing use of additional nontoxic shot types may encourage greater hunter compliance and participation with nontoxic shot requirements and discourage the use of lead shot. The use of nontoxic shot for waterfowl hunting increased after the ban on lead shot (Anderson *et al.* 2000), but we believe that compliance will continue to increase with the availability and approval of other nontoxic shot types. Increased use of nontoxic shot will enhance protection of migratory waterfowl and their habitats. More important, however, is that the Fish and Wildlife Service is obligated to consider all complete nontoxic shot applications.

We have reviewed the shot under the criteria in Tier 1 of the revised nontoxic shot approval procedures contained in 50 CFR 20.134 for permanent approval of shot as nontoxic for hunting waterfowl and coots. We amend 50 CFR 20.21(j) to add TIF shot to the list of the approved types of shot for waterfowl and coot hunting.

Affected Environment

Waterfowl Population Status and Harvest

The following paragraphs provide a brief summary of information on the status and harvest of waterfowl excerpted from various reports. For more detailed information on methodologies and results, you may obtain complete copies of the various reports at the address indicated under **FOR FURTHER INFORMATION CONTACT** or from our Web site *http://www.fws.gov/migratorybirds/NewsPublicationsReports.html*.

Status of Ducks

Federal, provincial, and State agencies conduct surveys each spring to estimate the size of breeding populations and to evaluate the conditions of the habitats. These surveys are conducted using fixed-wing aircraft and helicopters and encompass principal breeding areas of North America, and cover over 2.0 million square miles. The Traditional survey area comprises Alaska, Canada, and the northcentral United States, and includes approximately 1.3 million square miles. The Eastern survey area includes parts of Ontario, Quebec, Labrador, Newfoundland, Nova Scotia, Prince Edward Island, New Brunswick, New York, and Maine, an area of approximately 0.7 million square miles.

Breeding Ground Conditions

Habitat conditions during the 2009 Waterfowl Breeding Population and Habitat Survey were characterized by above-average moisture across the southern portions of the traditional survey area, good habitat in the eastern survey area, and late spring conditions across northern survey areas. The total pond estimate (prairie Canada and U.S. combined) was 6.4 ± 0.2 million. This was 45 percent above the 2007 estimate of 4.4 ± 0.2 million ponds and 31 percent above the long-term average of 4.9 ± 0.03 million ponds. The 2009 estimate of ponds in prairie Canada was 3.6 ± 0.1 million. This was a 17 percent increase from the 2007 estimate (3.1 ± 0.1 million) and was similar to the long-term average (3.4 ± 0.03 million). The 2009 pond estimate for the northcentral U.S. of 2.9 ± 0.1 million was 108 percent above the 2007 estimate (1.4 ± 0.07 million) and 87 percent above the long-term average (1.5 ± 0.02 million).

Breeding Population Status

In the Waterfowl Breeding Population and Habitat Survey traditional survey area (strata 1–18, 20–50, and 75–77), the total duck population estimate was 42.0 ± 0.7 [SE] million birds. This estimate represents a 13 percent increase over the 2007 estimate of 37.3 ± 0.6 million birds and was 25 percent above the long-term average (1955–2008). Estimated mallard (*Anas platyrhynchos*) abundance was 8.5 ± 0.2 million birds, which was a 10 percent increase over the 2007 estimate of 7.7 ± 0.3 million birds and 13 percent above the long-term average. Estimated abundance of gadwall (*A. strepera;* 3.1 ± 0.2 million) was similar to the 2008 estimate and 73 percent above the long-term average. Estimated American wigeon abundance (*A. americana;* 2.5 ± 0.1 million) was similar to 2008 and the long-term average. Estimated abundances of green-winged teal (*A. crecca;* 3.4 ± 0.2 million) and blue-winged teal (*A. discors;* 7.4 ± 0.4 million) were similar to the 2007 estimates and well above their long-term averages (+79 percent and +60 percent, respectively). Northern shovelers (*A. clypeata;* 4.4 ± 0.2 million) were 25 percent above the 2008 estimate and remain 92 percent above their long-term average. The estimate for northern pintails (*A. acuta*) was 3.2 ± 0.2 million, which was 23 percent above the 2008 estimate of 2.6 ± 0.1 million, and 20 percent below the long-term average. Estimated abundance of redheads (*Aythya americana;* 1.0 ± 0.1 million) was similar to last year and 62 percent above the long-term average. The canvasback estimate (*A. valisineria;* 0.7 ± 0.06 million) was 35 percent above the 2008 estimate (0.5 ± 0.05 million) and similar to the long-term average. The scaup estimate (*A. affinis* and *A. marila* combined; 4.2 ± 0.2 million) was similar to that of 2008 and 18 percent below the long-term average of 5.1 ± 0.05 million.

The eastern survey area was restratified in 2005 and is now composed of strata 51–72. Estimates of mallards, scaup, scoters (black [*Melanitta nigra*], white-winged [*M. fusca*], and surf [*M. perspicillata*]), green-winged teal, American wigeon, bufflehead (*Bucephala albeola*), American black duck (*Anas rubripes*), ring-necked duck (*Aythya collaris*), mergansers (red-breasted [*Mergus serrator*], common [*M. merganser*], and hooded [*Lophodytes cucullatus*]), and goldeneye (common [*B. clangula*] and Barrow's [*B. islandica*]) all were similar to their 2008 estimates and long-term averages.

Fall Flight Estimate

The mid-continent mallard population is composed of mallards from the traditional survey area (revised in 2008 to exclude Alaska mallards), Michigan, Minnesota, and Wisconsin, and was estimated to be 10.3 ± 0.9 million in 2009. This was similar to the 2008 estimate of 9.2 ± 0.8 million.

Status of Geese and Swan

We provide information on the population status and productivity of North American Canada geese (*Branta canadensis*), brant (*B. bernicla*), snow geese (*Chen caerulescens*), Ross' geese (*C. rossii*), emperor geese (*C. canagica*), white-fronted geese (*Anser albifrons*), and tundra swans (*Cygnus columbianus*). In May of 2009, temperatures were 1–5 degrees Celsius colder than average throughout the central region of subarctic and Arctic Canada. In some locales harsh spring conditions persisted into June. In areas near Hudson Bay and the Queen Maud Gulf, goose and swan nesting activities were delayed by 1 to 3 weeks. In contrast, nesting conditions were favorable near Wrangel Island, Alaska's North Slope and eastern interior regions, parts of the Canadian high Arctic, and Newfoundland. Improved wetland abundance in the Canadian and U.S. prairies, and other temperate regions, will likely improve the production of Canada geese that nest at southern latitudes. Primary abundance indices decreased for 15 goose populations and increased for 10 goose populations in 2009 compared to 2008. Primary abundance indices for both populations of tundra swans increased in 2009 from 2008 levels. The following populations displayed significant positive trends during the most recent 10-year period ($P < 0.05$); Mississippi Flyway Giant, Aleutian, Atlantic, and Eastern Prairie Canada geese; Greater, Western Arctic/Wrangel Island, and Western Central Flyway light geese; and Pacific white-fronted geese. No populations showed a significant negative 10-year trend. The forecast for the production of geese and swans in North America for 2009 is regionally variable, but production for many populations will be reduced this year due to harsh spring conditions in much of central Canada.

Waterfowl Harvest and Hunter Activity

National surveys of migratory bird hunters were conducted during the 2007 and 2008 hunting seasons. About 1.2 million waterfowl hunters harvested 14,578,900 (±4%) ducks and 3,666,100 (±6%) geese in 2007, and harvested 13,635,700 (±4%) ducks and 3,792,600 (±5%) geese in 2008. Mallard, green-winged teal, gadwall, wood duck (*Aix sponsa*), and American wigeon were the 5 most-harvested duck species in the United States, and Canada goose was the predominant goose species in the goose harvest. Coot hunters (about 33,700 in 2007 and 31,100 in 2008) harvested 198,300 (±29%) coots in 2007 and 275,900 (+43%) in 2008.

Characterization of the Shot Type

Tungsten-iron-fluoropolymer shot has a density ranging from 8.0 to 12.5 grams per cubic centimeter (g/cm^3), and is corrosion resistant and magnetic. Tundra Composites estimates that the volume of TIF shot for use in hunting migratory birds in the United States will be approximately 330,000 pounds (150,000 kilograms, kg) per year. The 8.0 g/cm^3 alloy is approximately the same density as steel. The steel in the alloys contains up to 1.3 percent manganese, 1.2 percent silicon, and 1.2 percent carbon by weight. The shot may have a very fine residual coating of mica from production. We expect the environmental and health effects of the mica to be negligible.

TABLE 1—COMPOSITION OF TIF SHOT ALLOYS

Alloy	Density (g/cm^3)	Percent tungsten	Percent steel *	Percent fluoropolymer
1	8.0	41.5–50.6	41.6–52.0	6.1–8.0
2	9.5	61.0–68.7	24.8–34.0	5.0–6.6
3	11.0	75.2–81.8	12.5–20.5	4.3–5.7
4	12.5	85.9–96.0	1.0–10.3	3.8–5.2

* The steel contains no more than 0.25% chromium, 0.20% copper, and 0.20% nickel. In the alloys, these percentages are no more than 0.13%, 0.1%, and 0.1%, respectively.

Environmental Fate of the Tungsten and Iron in TIF Shot

The tungsten and the iron in these alloys have been approved in other nontoxic shot types (*see* ''Impact of Approval of the Shot Type''), and the submitters asserted that the alloys pose no adverse toxicological risks to waterfowl or other forms of terrestrial or aquatic life. The metals in the alloys are insoluble under normal hot and cold temperatures. Neither manufacturing the shot nor firing shotshells containing the shot will alter the metals or the fluoropolymer, or change how they dissolve in the environment.

Possible Environmental Concentrations for the Manganese and Silicon and Fluoropolymer in TIF Shot in Terrestrial Systems

Calculation of the estimated environmental concentration (EEC) of a candidate shot in a terrestrial ecosystem is based on 69,000 shot per hectare (ha) (50 CFR 20.134). These calculations assume that the shot dissolves promptly and completely after deposition. Because the tungsten and iron have been approved in other nontoxic shot types, we focus on the manganese and silicon in the alloys.

The EEC for the manganese in TIF shot would be approximately 0.11 parts per million. The maximum increase in environmental concentration for manganese in terrestrial settings would be 23.1 micrograms per liter. If the shot were completely dissolved or eroded, the EEC in soil is much less than the 50th percentile of typical background concentrations for manganese in soils of the United States.

If totally dissolved, the shot would produce a silicon concentration of 0.1082 parts per million (ppm), or 0.07 kg/ha/year. Silicon is not found free in nature, but combines with oxygen and other elements in nature to form silicates (LANL 2003; USGS 2009). Silicates constitute more than 25 percent of the Earth's crust (USGS 2009). Sand, quartz, rock crystal, amethyst, agate, flint, jasper, and opal are some of the forms in which the oxide appears (LANL 2003). Thus, the silicon from TIF shot would be insignificant.

Possible Environmental Concentrations for the Manganese, Silicon, and Fluoropolymer in the TIF Shot in Aquatic Systems

The EEC for water assumes that 69,000 number 4 shot are completely dissolved in 1 ha of water 30.48 centimeters deep. The submitter then calculates the concentration of each metal in the shot if the shot pellets dissolve completely. The analyses assume complete dissolution of the shot type containing the highest proportion of each metal in the range of alloys submitted.

The maximum EEC for manganese is 23.1 ppm. There are no U.S. Environmental Protection Agency (EPA) acute or chronic quality criteria available for manganese for freshwater or saltwater. However, the State of Colorado has acute and chronic freshwater quality criteria for manganese of 2,986 ppm and 1,650 ppm, respectively (assuming a hardness of 100 mg/L as $CaCO_3$). The manganese from TIF shot would lead to a fraction of these concentrations, so we believe that the manganese from TIF shot will not pose a threat to the environment.

The EEC for silicon from TIF shot would be 21.4 ppm. The EPA has set no acute or chronic criteria for silicon in freshwater or saltwater. Furthermore, silicates are commonly present in many soils and sediments.

For the fluoropolymer in the shot, the EEC in aquatic systems would be 273.1 ppm. We believe this value has little meaning given the insolubility of the fluoropolymer.

In Vitro Solubility Evaluation of TIF Shot

When nontoxic shot is ingested by waterfowl, both physical breakup of the shot and dissolution of the metals that comprise the shot may occur in the highly acidic environment of the gizzard. In addition to the standard Tier 1 application information (50 CFR 20.134), Tundra Composites provided the results of an *in vitro* gizzard simulation test conducted to quantify the release of metals in solution under the prevailing pH conditions of the avian gizzard. The metal concentrations released during the simulation test were, in turn, compared to known levels of metals that cause toxicity in waterfowl. The evaluation followed the methodology of Kimball and Munir (1971) as closely as possible.

The test solution pH averaged 2.01 over the 14-day test period and the average temperature of the digestion solution averaged 41.8 °C. In the test, the average amount of nickel, copper, and chromium released from 8 TIF shot/day was 0.037 mg, 0.017 mg, and 0.024 mg, respectively.

It is reasonable to expect that if the *in vitro* gizzard simulation test conditions had degraded the fluoropolymer in the TIF shot, fluoride would be present in the digestion solution. However, the fluoropolymer present in TIF shot is extremely resistant to degradation. The formation of hazardous decomposition byproducts from the fluoropolymer occurs only at temperatures over 300 °C. A representative fluoropolymer, polytetrafluoroethylene, will endure 260 °C for more than 2 years until failure due to degradation (Imbalzano 1991). The applicant concluded that the fluoride concentrations in the solution were background levels of fluoride in the digestion solution, rather than a decomposition byproduct of the fluoropolymer. This conclusion was supported by the variability and lack of a trend in the estimated fluoride concentrations (Day 0 concentrations were greater than Day 14 concentrations). Perfluorooctanoic acid (PFOA) is not used in the manufacture or formulation of the fluoropolymer present in TIF shot because it has been identified as a persistent global contaminant (EPA 2003).

The testing completed by the applicant indicates that TIF shot is highly resistant to degradation, and poses little risk to waterfowl or other biota if ingested in the field. The slow breakdown of the shot only permits metals to be released at concentrations that are substantially below toxic levels of concern in waterfowl. Furthermore, the fluoropolymer present in TIF shot will not degrade if ingested by waterfowl.

Impacts of Approval of the Shot Type

Effects of the Metals

We have previously assessed and approved various alloys containing tungsten and/or iron as nontoxic for hunting waterfowl (*e.g.* 66 FR 737, January 4, 2001; 68 FR 1388, January 10, 2003; 69 FR 48163, August 9, 2004; 70 FR 49194, August 23, 2005; 71 FR 4294, January 26, 2006). We have approved alloys of almost 100 percent of both tungsten and iron. Approval of TIF alloys raises no new concerns about approval of the tungsten or the iron in TIF shot.

Manganese

Manganese is an essential nutrient for both plants and animals. In animals, manganese is associated with growth, normal functioning of the central nervous system, and reproductive function. In plants, manganese is essential for the oxidation-reduction process (EPA 2007). Manganese compounds are important soil constituents, and the 50th percentile of typical background concentrations for manganese range from 400 kg dry weight in eastern U.S. soils to 600 kg dry weight in western U.S. soils.

One number 4 TIF shot contains approximately 0.001 gram of manganese. The geometric mean of avian No Observed Adverse Effect Level (NOAEL) values for reproduction and growth that were identified by the EPA in its derivation of an Ecological Soil Screening Level (Eco-SSL) for manganese was 179 kg of body weight per day (EPA 2007). Based upon the avian NOAEL of 179 milligrams of manganese per kilogram of body weight per day, a 2-kg bird could safely consume about 352 TIF shot per day without suffering from the consumption of the shot. Similarly for mammals, the geometric mean of mammalian NOAEL values for reproduction and growth that were identified by the EPA in its derivation of an Eco-SSL for manganese was 51.5 milligrams of manganese per kilogram of body weight per day (EPA 2007). Based upon the mammalian NOAEL of 51.5 milligrams of manganese per kilogram of body weight per day, a 1-kg mammal could safely consume approximately 50 TIF shot per day without suffering manganese toxicosis.

There are no EPA acute or chronic freshwater or saltwater criteria for manganese. However, Colorado acute and chronic freshwater criteria are 2,986 micrograms per liter and 1,650 micrograms per liter, respectively (assuming a hardness of 100 milligrams per liter as $CaCO_3$) (5 CCR 1002–31). The aquatic EEC for manganese is 23.1 micrograms per liter when we assume complete dissolution of the 69,000 shot in 1 ha of water 30.48 cm deep. Therefore, the manganese from TIF shot should not pose an environmental problem in aquatic environments.

Based upon available NOAEL values, birds and mammals would have to ingest in excess of 50 TIF shot per day before manganese toxicosis could occur. Assuming complete erosion of all shot, the EEC of manganese in soil is much less than the 50th percentile of typical background concentrations for manganese in soils of the United States. The EEC for manganese is well below both the acute and chronic criteria for fresh water from the State of Colorado, assuming complete dissolution of the shot. In sum, the manganese in TIF shot will result in very minimal estimated exposure concentrations to wetland biota.

Nickel

No reproductive or other effects were observed in mallards consuming the equivalent of 102 milligrams of nickel as nickel sulfate each day for 90 days (Eastin and O'Shea 1981). Therefore, the 0.037 milligram of nickel released from 8 TIF shot per day will pose no risk of adverse effects to waterfowl. In addition, metallic nickel likely is absorbed less from the gastrointestinal tract than is the nickel sulfate used in the mallard reproduction study.

Copper

The maximum tolerable level of dietary copper during the long-term growth of chickens and turkeys has been reported to be 300 kg (CMTA 1980). At the maximum tolerable level for chronic exposure of 300 kg for poultry, a 1.8-kg chicken consuming 100 g of food per day (Morck and Austic 1981) would consume 30 mg copper per day (16.7 milligrams of copper per kilogram of body weight per day). Since the average amount of copper released from 8 TIF shot per day would be 0.017 mg, a bird would have to ingest in excess of 1000 TIF shot to exceed the maximum tolerable level.

Dietary levels of 10.0 mg chromium(III)/kilogram for 10 weeks depressed survival in young black ducks (Haseltine *et al.* 1985), but no adverse effects were observed in chickens exposed to 100 ppm dietary chromium(VI) in a 32-day study (Rosomer *et al.* 1961). Therefore, the average amount of chromium released from 8 TIF shot/day of 0.024 mg will pose no risk of adverse effects to waterfowl.

Effects of Silicon

We found no data for assessing acute or chronic toxicity of the silicon present in TIF shot. EPA has not set acute or chronic criteria for silicon in aquatic systems. However, silicon compounds are widespread in nature, and we think it highly likely that sediments consumed incidentally by waterfowl contain silicates.

Silicon is not found free in nature, but silicates constitute more than 25 percent of the Earth's crust (USGS 2009), in sand, quartz, rock crystal, amethyst, agate, flint, jasper, and opal, among other rocks. Granite, hornblende, asbestos, feldspar, clay, and mica are among the numerous silicate minerals.

Effects of the Fluoropolymer

No data are available on acute or chronic toxicity of the fluoropolymer used in the TIF alloys. However, fluorinated organic polymers are very stable and resistant to hydrolysis (Danish Ministry of the Environment 2004). An *in vitro* gizzard simulation test conducted with 8.0 g/cm^3 TIF shot showed that the fluoropolymer used in the alloys will not degrade if ingested by waterfowl. Exposure to stable fluoropolymers does not give rise to increased free fluoride concentration in the blood in humans (Danish Ministry of the Environment 2004). Based on the information provided by the applicant and our assessment, we have little concern for problems due to organisms ingesting TIF shot or from dissolution of the shot in aquatic settings.

Effects of the Approval on Migratory Waterfowl

Allowing use of additional nontoxic shot types may encourage greater hunter compliance and participation with nontoxic shot requirements and discourage the use of lead shot. Thus, approving additional nontoxic shot types will likely result in a minor positive long-term impact on waterfowl and wetland habitats.

Effects on Endangered and Threatened Species

The impact on endangered and threatened species of approval of the TIF alloys would be very small, but positive. The metals in TIF alloys have been approved in other nontoxic shot types, and we believe that the fluoropolymer is highly unlikely to adversely affect animals that consume the shot or habitats in which the shot might be used. We see no potential effects on threatened or endangered species due to approval of these alloys.

We obtained a biological opinion pursuant to section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), prior to establishing the seasonal hunting regulations. The hunting regulations promulgated as a result of this consultation remove and alleviate chances of conflict between migratory bird hunting and endangered and threatened species.

Effects on Ecosystems

Previously approved shot types have been shown in test results to be nontoxic to the migratory bird resource, and we believe that they cause no adverse impact on ecosystems. There is concern, however, about noncompliance with the prohibition on lead shot and with potential ecosystem effects. The use of lead shot has a negative impact on wetland ecosystems due to the erosion of shot, causing sediment/soil and water contamination and the direct ingestion of shot by aquatic and predatory animals. Therefore, approval of the TIF alloys will have little impact on the resource, unless it has the small positive impact of reducing the rate of noncompliance.

Cumulative Impacts

We foresee no negative cumulative impacts of approval of the TIF alloys for waterfowl hunting. Their approval may help to further reduce the negative impacts of the use of lead shot for hunting waterfowl and coots. We believe the impacts of approval of TIF shot for waterfowl hunting in the United States should be positive.

Review of Public Comments

On August 7, 2009, we published in the **Federal Register** (74 FR 39598) a proposed rulemaking to approve this group of alloys for hunting waterfowl and coots and to make available our draft environmental assessment. We accepted public comments on our proposed rule and draft environmental assessment for 30 days, ending September 8, 2009.

We received one comment on the proposed rule. The commenter disagreed with our analysis that the proposed shot was nontoxic and claimed that the fluoropolymer in the shot should be of concern. However, as noted in the application and the environmental assessment, an *in vitro* gizzard simulation test conducted with 8.0 g/cm^3 TIF shot showed that the fluoropolymer used in the alloys will not degrade if ingested by waterfowl. Exposure to stable fluoropolymers does not give rise to increased free fluoride concentration in the blood in humans (Danish Ministry of the Environment 2004).

Thus, based on the information provided by the applicant and our assessment, TIF shot should not pose a significant danger to migratory birds, other wildlife, or their habitats due to organisms ingesting shot or from dissolution of the shot in aquatic settings. Further, we conclude that this group of alloys raises no particular concerns about deposition in the environment or about ingestion by waterfowl or predators.

Summary

Previous assessments of nontoxic shot types indicated that the iron and the tungsten from shot alloys should not harm aquatic or terrestrial systems. The solubility testing of TIF shot indicated that the negligible release of the metals from TIF shot (including the trace amounts of chromium, copper, and nickel released at low pH) will not be a hazard to aquatic systems or to biota. For these reasons, and in accordance with 50 CFR 20.134, we approve TIF

shot as nontoxic for hunting waterfowl and coots, and amend 50 CFR 20.21(j) accordingly. Our approval is based on the toxicological report, acute toxicity studies, reproductive/chronic toxicity studies, and other published research. The available information indicates that the TIF alloys should be nontoxic when ingested by waterfowl and that they pose no significant danger to migratory birds, other wildlife, or their habitats.

Literature Cited

For a complete list of the literature cited in this rule, visit *http://www.regulations.gov* or contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Effective Date of This Rule

This rule is effective upon publication in the **Federal Register**. We have determined that any further delay in allowing this additional nontoxic shot would not be in the public interest, in that a delay would preclude hunters an additional nontoxic shot option. Allowing use of additional nontoxic shot types may encourage greater hunter compliance and discourage the use of lead shot harmful to the environment. Increased use of nontoxic shot will enhance protection of migratory waterfowl and their habitats. Furthermore, tungsten-iron-fluoropolymer shot is very similar to other nontoxic shot that is already available and in use. We provided a 30-day public comment period for the August 7, 2009, proposed rule. This rule relieves restrictions by newly approving tungsten-iron-fluoropolymer shot alloys for hunting waterfowl and coots. We therefore find that ''good cause'' exists, within the terms of 5 U.S.C. 553(d)(3) of the Administrative Procedure Act, to make these regulations effective immediately upon publication.

Required Determinations

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this rule is not significant under E.O. 12866. OMB bases its determination upon the following four criteria:

a. Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

b. Whether the rule will create inconsistencies with other Federal agencies' actions.

c. Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

d. Whether the rule raises novel legal or policy issues.

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 (Pub. L. 104–121)), 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 effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions).

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We have examined this rule's potential effects on small entities as required by the Regulatory Flexibility Act, and have determined that this action will not have a significant economic impact on a substantial number of small entities. The rule will allow small entities to continue actions they have been able to take under the regulations—actions specifically designed to improve the economic viability of those entities—and, therefore, will not significantly affect them economically. We certify that because this rule will not have a significant economic effect on a substantial number of small entities, a regulatory flexibility analysis is not required.

This rule is not a major rule under the SBREFA (5 U.S.C. 804(2)).

a. This rule will not have an annual effect on the economy of $100 million or more.

b. This rule will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, Tribal, or local government agencies; or geographic regions.

c. This rule 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.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This rule will not ''significantly or uniquely'' affect small governments. A small government agency plan is not required. Actions under the regulation will not affect small government activities in any significant way.

b. This rule will not produce a Federal mandate of $100 million or greater in any year. It will not be a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings

In accordance with E.O. 12630, this rule does not have significant takings implications. A takings implication assessment is not required. This rule does not contain a provision for taking of private property.

Federalism

This rule does not have sufficient Federalism effects to warrant preparation of a Federalism assessment under E.O. 13132. It will not interfere with the ability of States to manage themselves or their funds.

Civil Justice Reform

In accordance with E.O. 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 E.O. 12988.

Paperwork Reduction Act

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. OMB has approved our collection of information associated with applications for approval of nontoxic shot (50 CFR 20.134) and assigned OMB Control Number 1018–0067, which expires April 30, 2012.

National Environmental Policy Act

Our environmental assessment is part of the administrative record for this rulemaking. In accordance with the National Environmental Policy Act (NEPA, 42 U.S.C. 4321 *et seq.*) and part 516 of the U.S. Department of the Interior Manual (516 DM), approval of TIF alloys will not have a significant effect on the quality of the human environment, nor will it involve unresolved conflicts concerning alternative uses of available resources. Therefore, preparation of an environmental impact statement (EIS) is not required.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and 512 DM 2, we have evaluated potential effects on Federally recognized Indian Tribes and have determined that there are no potential effects. This rule will not interfere with the ability of Tribes to manage themselves or their funds or to regulate migratory bird activities on Tribal lands.

Energy Supply, Distribution, or Use (E.O. 13211)

On May 18, 2001, the President issued E.O. 13211 addressing regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rulemaking is not a significant regulatory action under E.O. 12866, and it will not significantly affect energy supplies, distribution, or use. This action will not be a significant energy action, and no Statement of Energy Effects is required.

Compliance With Endangered Species Act Requirements

Section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that ''The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act'' (16 U.S.C. 1536(a)(1)). It further states that the Secretary must ''insure that any action authorized, funded, or carried out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat'' (16 U.S.C. 1536(a)(2)). We have concluded that this change to the regulations will not affect listed species.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

■ For the reasons discussed in the preamble, we amend part 20, subchapter B, chapter I of title 50 of the Code of Federal Regulations as follows:

PART 20—[AMENDED]

■ 1. The authority citation for part 20 continues to read as follows:

Authority: Migratory Bird Treaty Act, 40 Stat. 755, 16 U.S.C. 703–712; Fish and Wildlife Act of 1956, 16 U.S.C. 742a–j; Public Law 106–108, 113 Stat. 1491, Note Following 16 U.S.C. 703.

■ 2. Amend § 20.21 by revising paragraph (j) to read as follows:

§ 20.21 What hunting methods are illegal?

* * * * *

(j)(1) While possessing loose shot for muzzle loading or shotshells containing other than the following approved shot types.

Approved shot type *	Percent composition by weight	Field testing device **
Bismuth-tin	97 bismuth, and 3 tin	Hot Shot®. ***
Iron (steel)	iron and carbon	Magnet or Hot Shot®.
Iron-tungsten	any proportion of tungsten, and ≥1 iron	Magnet or Hot Shot®.
Iron-tungsten-nickel	≥1 iron, any proportion of tungsten, and up to 40 nickel	Magnet or Hot Shot®.
Tungsten-bronze	51.1 tungsten, 44.4 copper, 3.9 tin, and 0.6 iron, or 60 tungsten, 35.1 copper, 3.9 tin, and 1 iron.	Rare Earth Magnet.
Tungsten-iron-copper-nickel	40–76 tungsten, 10–37 iron, 9–16 copper, and 5-7 nickel	Hot Shot® or Rare Earth Magnet.
Tungsten-matrix	95.9 tungsten, 4.1 polymer	Hot Shot®.
Tungsten-polymer	95.5 tungsten, 4.5 Nylon 6 or 11	Hot Shot®.
Tungsten-tin-iron	any proportions of tungsten and tin, and ≥1 iron	Magnet or Hot Shot®.
Tungsten-tin-bismuth	any proportions of tungsten, tin, and bismuth.	Rare Earth Magnet.
Tungsten-tin-iron-nickel	65 tungsten, 21.8 tin, 10.4 iron, and 2.8 nickel	Magnet.
Tungsten-iron-polymer	41.5–95.2 tungsten, 1.5–52.0 iron, and 3.5-8.0 fluoropolymer	Magnet or Hot Shot®.

* Coatings of copper, nickel, tin, zinc, zinc chloride, and zinc chrome on approved nontoxic shot types also are approved.
** The information in the ''Field Testing Device'' column is strictly informational, not regulatory.
*** The ''HOT*SHOT'' field testing device is from Stream Systems of Concord, CA.

(2) Each approved shot type must contain less than 1 percent residual lead (*see* § 20.134).

(3) This shot type restriction applies to the taking of ducks, geese (including brant), swans, coots (*Fulica americana*), and any other species that make up aggregate bag limits with these migratory game birds during concurrent seasons in areas described in § 20.108 as nontoxic shot zones.

Dated: October 7, 2009.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E9–25108 Filed 10–19–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

RIN 0648–XS22

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

ACTION: Inseason action; notification of applicable Longline category incidental retention limits.

SUMMARY: NMFS has determined that the 25–mt quota available for the Atlantic bluefin tuna (BFT) Longline category Northeast Distant gear restricted area (NED) fishery has been attained. NMFS announces that the Longline category incidental BFT retention limits will apply in the NED for the remainder of the fishing year. This action applies to Atlantic Tunas Longline category permitted vessels that fish in the NED.

DATES: Effective October 20, 2009, through December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin or Brad McHale, 978–281–9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 et seq.) and the Magnuson-Stevens Fishery

Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, per the allocations established in the Consolidated Highly Migratory Species Fishery Management Plan (Consolidated HMS FMP). The latest (2008) ICCAT recommendation for western Atlantic BFT included a U.S. quota of 1,034.9 mt for 2009, including a 25 mt set-aside for bycatch of BFT related to longline fisheries in the vicinity of the ICCAT management area boundary. For management and monitoring purposes, NMFS implements this set-aside for BFT landings made in the Northeast Distant gear restricted area (NED) by Atlantic Longline category permitted vessels. The NED is the Atlantic Ocean area bounded by straight lines connecting the following coordinates in the order stated: 35°00′ N. lat., 60°00′ W. long.; 55°00′ N. lat., 60°00′ W. long.; 55°00′ N. lat., 20°00′ W. long.; 35°00′ N. lat., 20°00′ W. long.; 35°00′ N. lat., 60°00′ W. long.

Application of Longline Category Incidental BFT Retention Limits in NED

The 2009 adjusted BFT quota specifications issued pursuant to § 635.27 set a Longline category quota of 74.3 mt to be harvested incidentally from the regulatory area during the 2009 fishing year. Including the 25 mt for the NED, the total allowable quota for both categories for 2009 is 99.3 mt (74 FR 26110, June 1, 2009).

Under the BFT retention limit regulations at § 635.23(f)(3), once the 25-mt NED quota has been attained, the target catch requirements specified in § 635.23(f)(1) apply. Based on reported Longline category BFT landings, NMFS has determined that the 25-mt NED quota has been reached. As of October 6, 2009, Longline landings of BFT in the NED total 37.6 mt. Therefore, the following retention limits will apply in the NED for vessels permitted in the Atlantic Tunas Longline category, effective October 20, 2009, through December 31, 2009: One large medium or giant BFT per vessel per trip may be landed, provided that at least 2,000 lb (907 kg) of species other than BFT are legally caught, retained, and offloaded from the same trip and are recorded on the dealer weighout slip as sold. Two large medium or giant BFT per vessel per trip may be landed, provided that at least 6,000 lb (2,727 kg) of species other than BFT are legally caught, retained, and offloaded from the same trip and are recorded on the dealer weighout slip as sold. Three large medium or giant BFT per vessel per trip may be landed, provided that at least 30,000 lb (13,620 kg) of species other than BFT are legally caught, retained, and offloaded from the same trip and are recorded on the dealer weighout slip as sold. Dealers are reminded of the requirement to report all BFT received within 24 hours of landing.

The intent of this action and its timing is to prevent overharvest of the incidental quota established for the Longline category while providing sufficient time for vessels currently fishing to return to port and offload any BFT that may have been legally retained on board before this action takes effect.

NMFS will continue to monitor Longline category landings against the available Longline category quota for the 2009 fishing year and may take further action, if necessary. Any subsequent adjustments to the Longline category fishery for 2009 would be published in the **Federal Register**. In addition, fishermen may call the Atlantic Tunas Information Line at (888) 872-8862 or (978) 281-9260, or access the internet at *www.hmspermits.gov*, for fishery updates.

Classification

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause, pursuant to 5 U.S.C. 553 (b)(B) to waive prior notice and public comment for this action, as notice and comment would be impracticable and contrary to the public interest. This notice informs fishery participants of the applicable retention limits in the NED now that the 25-mt set aside for that area has been attained. This action is intended to prevent overharvest of the incidental quota established for the Longline category while providing sufficient time for vessels currently fishing to return to port and offload any BFT that may have been legally retained on board before this action takes effect. The fishery is currently underway and any delay in fishery participant notification could cause the fishery to exceed the quota and would be inconsistent with domestic and international requirements and objectives. NMFS provides notification of the applicable retention limits by publishing the notice in the **Federal Register**, transmitting an electronic notice to Atlantic HMS News subscribers, including known fishery representatives and posting the notice on *www.hmspermits.gov*. For these reasons, the AA also finds good cause to waive the 30-day delay in effective date pursuant to 5 U.S.C. 553 (d)(1) and (3).

This action is being taken under 50 CFR 635.23(f)(3) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: October 15, 2009.

Alan D. Risenhoover,

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

[FR Doc. E9–25188 Filed 10–15–09; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 74, No. 201
Tuesday, October 20, 2009

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 330

[Docket No. APHIS-2008-0076]

Environmental Impact Statement; Movement of Plant Pests, Biological Control Organisms, and Associated Articles

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service intends to prepare an environmental impact statement relative to proposed regulatory requirements that are being developed for the movement of plant pests, biological control organisms, and associated articles. This notice identifies potential issues and alternatives that will be studied in the environmental impact statement and requests public comment to further delineate the scope of those issues and alternatives.

DATES: We will consider all comments that we receive on or before November 19, 2009.

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

- *Federal eRulemaking Portal:* Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0076*) to submit or view comments.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS-2008-0076, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2008-0076.

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

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

FOR FURTHER INFORMATION CONTACT: Dr. David A. Bergsten, APHIS Interagency NEPA Contact, Environmental Services, PPD, APHIS, 4700 River Road, Unit 149, Riverdale, MD 20737-1238; (301) 734-6103.

SUPPLEMENTARY INFORMATION:

Background

The purpose of the regulations in ''Subpart —Movement of Plant Pests'' (7 CFR 330.200 through 330.212, referred to below as the regulations) is to prevent the dissemination of plant pests within the United States by regulating their importation and interstate movement.

The Animal and Plant Health Inspection Service (APHIS) is planning to revise its regulations regarding the movement of plant pests. APHIS intends to prepare an environmental impact statement (EIS) analyzing the potential environmental impacts associated with proposed regulatory requirements for movement not only of plant pests, but also of biological control organisms, and associated articles.

Under the Plant Protection Act (7 U.S.C. 7701 *et seq.*, referred to below as the Act) the Secretary of Agriculture has broad authority to carry out operations or measures to detect, control, eradicate, suppress, prevent, or retard the spread of plant pests. Section 411(a) of the Act provides that ''no person shall import, enter, export, or move in interstate commerce any plant pest, unless the importation, entry, exportation, or movement is authorized under general or specific permit and is in accordance with such regulations as the Secretary may issue to prevent the introduction of plant pests into the United States.'' Moreover, section 412(a) of the Act provides that the Secretary may prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of, among other things, any biological control organism, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into or the dissemination within the United States of a plant pest or noxious weed.

Accordingly, APHIS has the authority to regulate not only plant pests, but also biological control organisms, noxious weeds, and associated articles. APHIS is therefore considering revising the regulations to establish provisions for the movement and environmental release of biological control organisms and associated articles. APHIS is also considering revising the regulations for the movement of soil, and establishing regulations governing the biocontainment facilities in which plant pests, biological control organisms, and associated articles are held. The impacts associated with these changes to the regulations will also be analyzed in a programmatic EIS.

In addition to establishing a regulatory framework for the movement of new organisms and articles in a manner that protects U.S. agriculture, these proposed regulations would help clarify the existing requirements for the importation and domestic movement of plant pests. APHIS may also consider including within the proposed regulations other mitigating measures with the potential to equally reduce pest risk. We are requesting public comment to help us identify or confirm potential alternatives and environmental issues that should be examined in the EIS. We have identified three broad alternatives that we plan to consider in the EIS, as follows:

- Take no action. This would be characterized as no change in the existing regulations that apply to the movement of plant pests (while not contributing to the further mitigation of pest risk, the analysis of the no action alternative provides a baseline and is required by the National Environmental Policy Act and its implementing regulations).
- Revise requirements for movement of plant pests consistent with the scope of the Plant Protection Act (preferred alternative). This would be characterized by amendment or revision of the plant pest regulations to also cover biological control organisms and associated articles. It would also include revisions to the regulations for the movement of soil and the establishment

of regulations for biocontainment facilities.

● Implement a comprehensive risk reduction program (more expansive regulations to address specific risk categories). This would be characterized as a broad risk mitigation strategy that could involve various options such as increased inspection, regulations specific to a certain organism or group of related organisms, or extensive biocontainment requirements. While not the preferred alternative at this time, the risk mitigation strategy considered within this alternative could provide the basis at some point for future Agency regulatory actions, either to establish a new and more appropriate regulatory framework for the movement of plant pests, biological control organisms, and associated articles, or to augment the existing regulations with more effective mitigation measures to address the risk of such movement.

We will examine the potential effects on the human environment of each alternative. We are also interested in comments that identify other issues that should be examined in the EIS. Potential issues include other new mitigation measures, logistical considerations, environmental regulations and constraints, and harmonization of regulatory efforts.

The EIS will be prepared in accordance with: (1) The National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500-1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Comments regarding the proposed scope of the EIS are welcome and will be considered fully. When APHIS has completed a draft EIS, a notice announcing its availability and an invitation to comment on it will be published in the **Federal Register**.

Done in Washington, DC, this 14th day of October, 2009.

Kevin Shea

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–25184 Filed 10–19–09: 8:45 am]

BILLING CODE: 3410–34–S

FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2009–22]

Definition of Federal Election Activity

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission seeks comments on proposed changes to its rules regarding the definitions of ''voter registration activity'' and ''get-out-the-vote activity'' under the Federal Election Campaign Act of 1971, as amended. These proposed changes are in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays* v. *FEC*. The Commission has made no final decision on the issues presented in this rulemaking. Further information is provided in the supplementary information that follows.

DATES: Comments must be received on or before November 20, 2009. The Commission will hold a hearing on these proposed rules on Wednesday, December 16, 2009 at 9:30 a.m. and, if necessary, Thursday, December 17, 2009 at 9:30 a.m. Anyone wishing to testify at the hearing must file written comments by the due date and must include a request to testify in the written comments.

ADDRESSES: All comments must be in writing, addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and submitted in either electronic, facsimile or hard copy form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent to *FEAShays3@fec.gov*. If the electronic comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219–3923, with hard copy follow-up. Hard copy comments and hard copy follow-up of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its web site after the comment period ends. The hearing will be held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, or Attorneys Mr. David C. Adkins or Mr. Neven F. Stipanovic, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002 [1] (''BCRA'') contained extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* (''the Act''). The Commission promulgated a number of rules to implement BCRA, including rules defining the terms ''voter registration activity'' and ''get-out-the-vote activity'' (''GOTV activity'') at 11 CFR 100.24(a). The Court of Appeals for the District of Columbia Circuit found aspects of these rules invalid in *Shays* v. *FEC*, 528 F.3d 914 (D.C. Cir. 2008) (''*Shays III Appeal*''). The Commission seeks comment on proposed changes to the rules at 11 CFR 100.24 to implement the *Shays III Appeal* decision.

I. Background

A. BCRA

The Act, as amended by BCRA, and Commission regulations provide that a State, district, or local committee of a political party must pay for certain ''Federal election activities'' with either entirely Federal funds [2] or, in other instances, a mix of Federal funds and ''Levin funds.'' [3] *See* 2 U.S.C. 441i(b); 11 CFR 300.32. The Act identifies four types of activity that are subject to these funding restrictions, including ''voter registration activity''—Type I Federal election activity—and GOTV activity—Type II Federal election activity. *See* 2 U.S.C. 431(20)(A)(i) and (ii); 441i(b); 11 CFR 100.24(a)(2) and (3).[4]

Application of BCRA's Federal election activity funding restrictions for Types I and II Federal election activity is conditioned upon the timing of the activity. Voter registration activity (Type

[1] Pub. L. 107–155, 116 Stat. 81 (2002).

[2] ''Federal funds'' are funds subject to the limitations, prohibitions, and reporting requirements of the Act. *See* 11 CFR 300.2(g).

[3] ''Levin funds'' are funds raised and disbursed by State, district, or local party committees pursuant to certain restrictions. *See* 2 U.S.C. 441i(b); *see also* 11 CFR 300.2(i).

[4] In addition to GOTV activity, Type II Federal election activity also includes ''voter identification'' and ''generic campaign activity.'' *See* 2 U.S.C. 431(20)(A)(ii); 11 CFR 100.24; 100.25. Types III and IV Federal election activity are outside the scope of this rulemaking and are not discussed. They pertain to public communications that refer to a clearly identified Federal candidate and promote, support, attack or oppose a candidate for Federal office (Type III), and services provided by an employee of a State, district, or local committee of a political party who spends more than 25 percent of his or her compensated time on activities in connection with a Federal election (Type IV). Types I and II Federal election activity may be funded with a combination of Federal and Levin funds; Types III and IV Federal election activity must be funded entirely with Federal funds.

I), for example, constitutes Federal election activity, and therefore is subject to BCRA's funding restrictions, only if it is conducted ''120 days before the date a regularly scheduled Federal election is held.'' 2 U.S.C. 431(20)(A)(i). Similarly, voter identification, GOTV activity, and generic campaign activity are Federal election activity only if they are conducted ''in connection with an election in which a candidate for Federal office appears on the ballot.'' 2 U.S.C. 431(20)(A)(ii).

In BCRA, Congress chose to restrict the funds that State, district, and local party committees could use for Federal election activity because it determined that these activities influence Federal elections. *See* 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (noting, for example, that ''get-out-the-vote and voter registration drives * * * are designed to, and do have an unmistakable impact on both Federal and non-Federal elections'').

Restrictions on the funding of Federal election activity by State, district, and local party committees are critical because they prevent evasion of BCRA's restrictions on the raising and spending of non-Federal funds by national party committees and Federal candidates and officeholders. *See* Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064–65 (July 29, 2002) (''2002 Final Rule''). Indeed, in passing BCRA's Federal election activity provisions, Congress had in mind ''the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties, which then use those funds for Federal election activity.'' *See* 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

The Supreme Court upheld BCRA's Federal election activity provisions in *McConnell* v. *FEC,* 124 S. Ct. 619, 670–77 (2003). The Court found that non-Federal funds given to State, district, and local party committees could have the same corrupting influence as non-Federal funds given to the national parties and therefore held that BCRA's Federal election activity restrictions were justified by an important government interest. *Id.* at 672–73. Indeed, the Court held that BCRA's Federal election activity provisions were likely necessary to prevent ''corrupting activity from shifting wholesale to state committees and thereby eviscerating [the Act].'' *Id.* at 673.

In reaching its decision, the Court noted that BCRA regulated only ''those contributions to State and local parties that can be used to benefit federal candidates directly'' and therefore posed the greatest threat of corruption. *Id.* at 673–74. As such, the Court found BCRA's regulation of voter registration activities, which ''directly assist the party's candidates for federal office,'' and GOTV activities, from which Federal candidates ''reap substantial rewards,'' to be permissible methods of countering both corruption and the appearance of corruption. *Id.* at 674; *see also id.* at 675 (finding that voter registration activities and GOTV activities ''confer substantial benefits on federal candidates'' and ''the funding of such activities creates a significant risk of actual and apparent corruption,'' which BCRA aims to minimize).

B. Rulemakings

Although BCRA defines Federal election activity to include ''voter registration activity'' and ''GOTV activity,'' it did not specifically define those underlying terms. *See* 2 U.S.C. 431(20)(A)(ii)–(iii). Accordingly, the Commission promulgated definitions of these terms.

1. 2002 Rulemaking

The Commission first promulgated definitions of ''voter registration activity'' and ''GOTV activity'' on July 29, 2002. *See* 2002 Final Rule, 67 FR at 49067. The 2002 Final Rule defined ''voter registration activity'' as ''contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote.'' *Id.* at 49110. The Explanation and Justification (''E&J'') accompanying the rule noted that the definition was limited to ''individualized contact for the specific purpose of assisting individuals with the process of registering to vote.'' *Id.* at 49067. The Commission expressly rejected an approach whereby mere encouragement to register to vote would have constituted voter registration activity. The Commission was concerned that taking such an approach would result in ''thousands of political committees and grassroots organizations that merely encouraged voting as a civic duty, who have never been subject to Federal regulation for such conduct, [being] swept into the extensive reporting and filing requirements mandated under Federal law.'' *Id.*

The Commission similarly defined ''GOTV activity'' in 2002 as ''contacting registered voters by telephone, in person, or by other individualized means to assist them in engaging in the act of voting.'' *Id.* at 49111. In adopting this construction, the Commission sought to distinguish GOTV activity from ''ordinary or usual campaigning,'' to avoid ''federaliz[ing] a vast percentage'' of the campaign activity that a State, district, or local party committee may conduct on behalf of its candidates. *Id.* at 49067. The Commission's definition focused on actions directed toward registered voters that had the particular purpose of ''assisting registered voters to take any and all steps to get to the polls and cast their ballots, or to vote by absentee ballot or other means provided by law.'' *Id.* The definition was not intended to cover activity aimed at ''generally increasing public support for a candidate or decreasing public support for an opposing candidate.'' *Id.*

The Commission's 2002 definition of GOTV activity also expressly excluded ''any communication by an association or similar group of candidates for State and local office or of individuals holding State or local office if such communication refers only to one or more [S]tate or local candidates,'' in order to keep ''State and local candidates' grassroots and local political activity a question of State, not Federal, law.'' *Id.* The Commission declined to read BCRA as extending ''to purely State and local activity by State and local candidates'' and concluded that such ''a vast federalization of State and local activity'' required ''greater direction from Congress.'' *Id.*

The Commission's 2002 definitions of voter registration activity and GOTV activity were challenged in *Shays* v. *FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (''*Shays I District*''). The district court held that the definition of ''voter registration activity,'' which required actual assistance, was neither inconsistent with congressional intent nor an impermissible construction of BCRA. *See Shays I District*, 337 F. Supp. 2d at 100 (applying *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The court further held that the ''exact parameters'' of the regulatory definition were unclear and, therefore, it was unable to determine if the definition ''unduly compromised'' BCRA's purpose. *Id.* Nevertheless, the court found that the Commission's definition was promulgated without adequate notice and opportunity for comment, contrary to the Administrative Procedure Act; *see* 5 U.S.C. 553, and remanded the regulation to the Commission. *See Shays I District*, 337 F. Supp. 2d at 100.

The court reached similar conclusions as to the definition of ''GOTV activity,'' holding that the definition of ''voter registration activity,'' which required actual assistance, was neither inconsistent with congressional intent nor an impermissible construction of

BCRA. *Id.* at 103, 105 (applying *Chevron*). The court also concluded that there was ''ambiguity as to what acts are encompassed by the regulation,'' which rendered the court unable to determine whether the definition of ''GOTV activity'' unduly compromised BCRA. *Id.* at 105. As it had with the definition of ''voter registration activity,'' however, the court found that the Commission's definition was promulgated without adequate notice and opportunity for comment and remanded the regulation to the Commission. *See id.* at 106.

The court also found that the exemption from the GOTV activity definition for communications made by associations or groups of State or local candidates or officeholders ran contrary to Congress's clearly expressed intent. *See id.* at 104. However, the court found that BCRA provided no support for such an exemption, and it rejected all federalism concerns raised by the Commission in defense of the exemption, holding that ''Congress was sensitive to federalism concerns in drafting BCRA'' and that the Supreme Court in *McConnell* had rejected the general federalism challenge brought against BCRA's Federal election activity provisions. *Id.*

2. 2005 Rulemaking

The Commission commenced a rulemaking in 2005 to address the court's concerns, rather than appeal these aspects of *Shays I District.* Following another notice and period for comment, the Commission promulgated definitions of ''voter registration activity'' and ''GOTV activity'' that were substantially similar to those promulgated in 2002. The final rules were accompanied by an E&J that sought to address many of the *Shays I District* court's concerns. *See* Final Rules on Definition of Federal Election Activity, 71 FR 8926, 8928 (Feb. 22, 2006) (''2006 Final Rule'').

The Commission's decision to leave unchanged the core aspects of the definitions of ''voter registration activity'' and ''GOTV activity'' was based on its continued concern that definitions which captured ''mere encouragement[s]'' would be ''overly broad,'' were unnecessary ''to effectively implement BCRA,'' and ''could have an adverse impact on grassroots political activity.'' [5] Accordingly, the 2006 definitions were designed to encompass activities that actually registered persons to vote and resulted in voters going to the polls. *Id.* at 8928–29. Thus, the Commission sought to ''regulate the funds used to influence Federal elections'' and not ''incidental speech.'' *Id.*

The Commission noted in its 2006 E&J that its regulations would not lead to the circumvention of the Act precisely because they captured ''the use of non-Federal funds for disbursements that State, district, and local parties make for those activities that actually register individuals to vote.'' *Id.* Moreover, ''many programs for widespread encouragement of voter registration to influence Federal elections would be captured as public communications under Type III [Federal election activity].'' *Id.* The 2006 E&J also provided a nonexclusive list of examples of activity that would—and would not—constitute voter registration activity. *Id.*

C. Shays III

The revised definitions of voter registration activity and GOTV activity were challenged again in *Shays* v. *FEC*, 508 F. Supp. 2d. 10, 63–70 (D.D.C. 2007) (''*Shays III District''*). Analyzing the definitions of ''voter registration activity'' and ''GOTV activity,'' the district court noted that the Commission's 2006 E&J addressed only the most obvious instances of what was—and was not—covered activity but not the ''vast gray area'' of activities that State and local parties may conduct and that may benefit Federal candidates. *Shays III District*, 508 F. Supp. 2d at 65, 69–70.

Regarding GOTV activities, in particular, the district court focused on Advisory Opinion 2006–19, issued to the Los Angeles County Democratic Party Central Committee, in which the Commission concluded that a local party committee's mass mailing and pre-recorded, electronically dialed telephone calls (''robocalls'') to the party's registered voters would not constitute get-out-the-vote activity. [6] The district court stated that Advisory Opinion 2006–19 had announced a much narrower interpretation of the scope of GOTV activity than ''might otherwise [have been] presumed on the face of the definition.'' *Id.* at 69.

The district court held that the Commission's failure to address these vast gray areas, and to explain whether activities falling within them would affect Federal elections, unduly compromised BCRA's purposes. *Id.* at 65–66, 69–70. Accordingly, the court remanded the definitions to the Commission. *Id.* at 70–71.

The court of appeals upheld the lower court's decision invalidating the Commission's definitions of ''voter registration activity'' and ''GOTV activity,'' although on slightly different grounds. *See Shays III Appeal*, 528 F.3d at 931. The court of appeals recognized that the Commission had discretion to promulgate definitions that left unaddressed large gray areas of activity and to fill them in later through enforcement actions and the advisory opinion process. *See id.*

Nevertheless, the court of appeals held that the Commission's definitions of ''voter registration activity'' and ''GOTV activity'' were deficient because they served to ''create 'two distinct loopholes.' '' *Id.* The flaws in both definitions were: (1) the ''assist'' requirements, which excluded efforts that ''actively encourage people to vote or register to vote;'' and (2) the ''individualized means'' requirements, which excluded ''mass communications targeted to many people,'' and had the effect of ''dramatically narrowing which activities [were] covered'' by the rules. *Id.* Accordingly, the court of appeals concluded that the definitions would ''allow the use of soft money for many efforts that influence federal elections,'' which is directly counter to BCRA's purpose. *Id.*

The court rejected the Commission's justifications for the definitions—to exclude mere exhortations from coverage and to give clear guidance as to the scope of the rules—because the Commission could craft definitions that exclude ''routine or speech-ending exhortations'' and that provided clear guidance to State, district, and local party committees in a way that is more consistent with BCRA. *Id.* at 932. Accordingly, the court of appeals remanded the regulations to the Commission.

[5] The Commission did change other aspects of the GOTV activity definition in response to the *Shays I District* court decision. The Commission removed from the definition of ''GOTV activity'' the exemption for communications by associations and groups of State or local candidates or officeholders. *See* 2006 Final Rule, 71 FR at 8931. The Commission also removed from the examples of GOTV activity the phrase ''within 72 hours of an election,'' to clarify that the definition covered activity conducted more than 72 hours before an election. *See id.* at 8930–31.

[6] The proposed communications would have been made four or more days before the election, would have informed recipients of the date of the election, would have urged them to vote for local, but not Federal, candidates, and would not have included additional information such as the hours and location of the individual voter's polling place. The Commission concluded that the communications would provide neither actual assistance nor sufficiently individualized assistance to constitute GOTV activity and that, as a result, the communications could be funded exclusively with non-Federal funds.

II. Proposed Revisions to 11 CFR 100.24(a)(2) and 100.24(a)(3)

To comply with the court's decision in *Shays III Appeal*, the Commission proposes revising the definitions of voter registration activity and GOTV activity at 11 CFR 100.24(a)(2)–(3). The Commission seeks comment on the proposal and is particularly interested in whether the proposed definitions would satisfy the court's decision in *Shays III Appeal*. The Commission has not made any final determinations regarding which aspects of the following proposal it will adopt in the final rule.

A. General Definitions

To comply with the *Shays III Appeal* decision, the Commission proposes revising the definitions of voter registration activity and GOTV activity at 11 CFR 100.24(a)(2) and (a)(3). Specifically, the Commission's proposal would define voter registration activity as ''encouraging or assisting potential voters in registering to vote'' and would define GOTV activity as ''encouraging or assisting potential voters to vote.'' The Commission has not made a final determination to adopt these general definitions and seeks comment on them.

These proposals are intended to close the ''two distinct loopholes'' in the current definitions that were identified by the *Shays III Appeal* court as allowing the use of non-Federal funds in connection with Federal elections. *See Shays III Appeal*, 528 F.3d at 931–32. The proposed definitions would eliminate the requirement that voter registration activity and GOTV activity must actually assist persons in registering to vote or in the act of voting. Instead, the proposed definitions cover both activities that encourage voting or voter registration, as well as activities that actually assist potential voters in voting or registering to vote.

Similarly, the proposed definitions would eliminate the requirement that voter registration activity and GOTV activity be conducted by ''individualized means.'' The proposed definitions cover both activities targeted towards individual persons and activities directed at groups of persons—for example, mass mailings, all electronically dialed telephone calls (or, as they are commonly known, ''robocalls''), or radio advertisements—so long as they encourage or assist voting or voter registration.

The Commission seeks comment on whether the proposed definitions adequately address the concerns articulated by the court in the *Shays III Appeal* decision. Do they provide sufficient guidance as to which activities are covered and which are not? Do the proposed definitions, in fact, close the ''two distinct loopholes'' identified by the *Shays III Appeal* court? Alternatively, do the proposed definitions cover activity that Congress did not intend to regulate in BCRA? If so, what specific activities would be covered by the proposed rules that would not have any effect on Federal elections?

More specifically, the proposed definition of ''voter registration activity'' is intended to cover, *inter alia*, the following activities: (1) Providing an individual with a flier that reads ''Register to Vote'' and that includes the URL and address of the appropriate State or local office handling voter registration; (2) providing an individual with a voter registration form and verbally encouraging the recipient to fill out the form and submit it to the appropriate State or local office handling voter registration; or (3) mailing voter registration forms to individuals and encouraging them, in a cover letter, to fill out and submit the forms in advance of the registration deadline. Should the definition cover such activities? What, if any, additional activities should it cover?

Similarly, the proposed definition of ''GOTV activity'' is intended to cover, *inter alia*, these activities: (1) Driving a sound truck through a neighborhood that plays a message urging listeners to ''Vote next Tuesday at the Main Street community center''; (2) mailing a flier to registered voters with the date of the election but not the location of polling places or their hours of operation; and (3) making telephone calls (including robocalls) reminding the recipient of the times during which the polls are open on election day. Should the proposed definition of GOTV activity cover such activities? What, if any, additional activities should it cover?

What, if any, enforcement difficulties might the proposed definitions present?

B. Examples

Each proposed definition includes a non-exhaustive list of examples. Several activities that would either encourage or assist voter registration are provided at proposed paragraphs (a)(2)(i)(A–E). Some of the examples involve actual assistance (''assisting individuals in completing or filing [voter registration] forms'' and ''submitting on behalf of a potential voter a completed voter registration form''), while others involve encouragement of persons to register to vote (''urging individuals to register to vote * * * by any * * * means'').

Similarly, several activities that would either encourage or assist persons in voting are provided at proposed paragraph (a)(3)(i)(A)–(B). Some examples from the existing rule would be retained (such as ''offering to transport, or actually transporting, voters to the polls'') and new examples would be added to illustrate the new ''encourage'' component of the proposed definition. Informing voters of the date of an election or the times or locations of polling locations, for example, would constitute GOTV activity under the proposed definition.

The Commission has not settled on the proposed examples of voter registration activity and GOTV activity and seeks comments on them. By providing these examples, does the proposal make clear that the definitions of voter registration activity and GOTV activity would not require actual assistance? Would the examples help State, district, and local party committees distinguish activities that are covered under the proposed definitions from activities that are not covered? Do the examples clarify any potential ambiguities in the general definition? Are there other examples that should be added? Should any of the proposed examples be revised or deleted? Finally, is it clear that the lists of examples provided in the proposal are not exhaustive and that each example would, by itself, constitute voter registration activity or GOTV activity?

C. Exemption for ''Mere Exhortations''

Although the *Shays III Appeal* court required the Commission to promulgate definitions of voter registration activity and GOTV activity that included encouragements to vote and to register to vote, the court of appeals acknowledged that it would be permissible to exclude from the definitions ''routine or spontaneous speech-ending exhortations'' and ''mere exhortations * * * made at the end of a political event or speech.'' *Shays III Appeal,* 528 F.3d at 932. Accordingly, proposed 11 CFR 100.24(a)(2)(ii) and (a)(3)(ii) recognize that ''speeches'' or ''events'' that include exhortations to vote or to register to vote that are incidental to the speech or event are exempt from the regulatory definitions of GOTV activity and voter registration activity. The proposals provide examples of the types of incidental exhortations that would qualify under the exemption.

The exemption would be limited to exhortations made during a speech or at an event, such as a rally. It would not apply to exhortations made by any other means or in any other forum, such as robocalls, mailers, or television and

radio advertisements. Further, the proposed exemption would apply only if an exhortation to vote or to register to vote is incidental to the speech or event.

The Commission has not made a final determination to adopt this exemption and seeks comment on it. Does it provide clear guidance as to the activities exempted from the definitions of voter registration activity and GOTV activity? Do the examples make clear what types of statements qualify as ''mere exhortations''?

Has the Commission properly established the scope of the proposed exemption? Is it appropriate to limit the exemption to cover only those exhortations that are incidental to a speech or event? Does this requirement capture the type of ''speech-ending'' exhortations discussed by the court in the *Shays III Appeal* decision? Does the requirement that an exhortation be incidental to a speech or event create a workable and enforceable standard? How should the Commission determine whether an exhortation is incidental to a speech or event? Should the Commission consider the frequency with which a ''mere exhortation'' is offered? Is there a material difference between stating ''Vote next Tuesday'' once and stating it multiple times over the course of a speech or event?

Are there other factors that the Commission should consider in determining whether the exemption applies? For example, should the spontaneity of an exhortation play a role in making this determination, and how would the Commission determine the spontaneity of an exhortation? Does it matter at what point in a speech an exhortation is offered? Is an exhortation offered at the end of a speech different from one offered at the beginning or middle of a speech?

Further, is it proper to limit application of the exemption to incidental exhortations made at speeches and events, or should other communications be included as well? If so, what other types of activities and communications should be covered by the exemption? Should it cover direct mailings, robocalls, radio and television advertisements, and all other ''communications'' that contain incidental exhortations to vote or to register to vote? Should the exemption cover, for example, robocalls made a few days before a Federal election that detail Mayor Smith's record and exhorts listeners to ''Vote for Mayor Smith on Election Day''?[7] Would an exemption that included these types of communications be consistent with the court's opinion in *Shays III Appeal*?

Does the medium in which a statement is made affect whether it is a ''mere exhortation'' at all? Are scripted communications incapable of containing incidental exhortations? In other words, are scripted exhortations to vote or to register to vote the types of communications which the *Shays III Appeal* court was referring to in its opinion? If the exemption is expanded to cover exhortations made in other media, how could the Commission determine if they were incidental? Would such a determination be made by examining the proportion of space or time devoted to the exhortation in relation to the rest of the communication? *See, e.g.,* 11 CFR 106.1 (requiring that payments for communications discussing multiple Federal or non-Federal candidates be attributed to each candidate based on the time or space devoted to each one). Would the Commission have to establish threshold percentages that defined whether an exhortation was, in fact, incidental to a communication?

How would the proposed general definitions of ''voter registration activity'' and ''GOTV activity'' be affected by altering the scope of the exemption? Would the examples in proposed paragraphs (a)(2)(i)(A)–(E) and (a)(3)(i)(A)–(B) need to be revised if the Commission adopted a broader exemption? Would allowing a broader exemption potentially allow communications that affect Federal elections to be funded with non-Federal funds, contrary to BCRA's purpose?

This exemption is not intended to inoculate speeches or events that otherwise would meet the proposed definitions of ''voter registration activity'' or ''GOTV activity.'' For example, a speech given 60 days before an election that provides listeners with information on how to register to vote would constitute Federal election activity even if it also contains an exhortation to register to vote (such as ''Register and make your voice heard!''). Should the Commission make this limitation explicit in the rule itself? Without an explicit limitation, could the general exemption be interpreted as applying to voter registration activity or GOTV activity for reasons other than their inclusion of an exhortation? Would adding an explicit limitation be helpful or would it be redundant and therefore unnecessary?

[7] A similar communication that urged a vote for a Federal candidate would be Type III Federal election activity, *see* 11 CFR 100.24(b)(3), and would be subject to BCRA's funding restrictions for that reason, regardless of whether the activity was also deemed to be GOTV activity.

D. Exclusion of Public Communications Relating to State and Local Elections

Finally, proposed 11 CFR 100.24(a)(3)(iii) excludes from the definition of ''GOTV activity'' a ''public communication that refers solely to one or more clearly identified candidates for State or local office and notes the date of the election.'' The proposal under consideration, if adopted, would ensure that the expansion of the GOTV activity definition, which is required by the *Shays III Appeal* court, does not, in effect, render meaningless the statutory definition of ''Federal election activity,'' which specifically does not include amounts disbursed or expended for ''a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii).'' 2 U.S.C. 431(20)(B)(i); 11 CFR 100.24(c)(1).

The Commission has not made a final determination to adopt the proposed exclusion and seeks comment on it. Does the proposed exclusion correctly implement the statutory definition? Is the proposed exclusion necessary to ensure that the expansion of the definition of ''GOTV activity'' does not render meaningless the exclusion for communications that refer solely to non-Federal candidates? Is it necessary to ensure that the Commission does not federalize purely State and local campaign activity?

Conversely, would the proposed provision exclude from regulation the types of activities from which ''federal candidates reap substantial rewards''? *See McConnell,* 124 S. Ct. at 168. Similarly, is the proposed exclusion materially different from the exception for associations of State and local candidates that was included in the Commission's first definition of GOTV activities and that was invalidated by the district court in the *Shays I District* decision? *See Shays I District,* 337 F. Supp. 2d at 102–03; *see also* discussion above in part I.B–C.

E. Other Issues

In *Shays III Appeal,* the court of appeals cited Advisory Opinion 2006–19 (Los Angeles County Democratic Party Central), in which the Commission concluded that letters and pre-recorded telephone calls encouraging certain Democrats to vote in an upcoming local election did not count as GOTV activity, in part, because the communications did not provide individualized assistance to voters. *See Shays III Appeal,* 528 F.3d at 932. The court held that this overly restrictive

definition of GOTV activity was contrary to the statute. See *id.* The court did not address, however, whether communications made solely in connection with a non-Federal election may be excluded from the definition of GOTV activity or Federal election activity.

In light of the *Shays III Appeal* decision and the definitions proposed above, must the Commission explicitly supersede, in whole or in part, Advisory Opinion 2006–19? If so, should the Commission, either in its E&J or in the regulation explicitly address the circumstances involved with that advisory opinion? For example, should the E&J or final regulation acknowledge explicitly that communications made four or more days before an election are ''GOTV activity'' if they encourage or assist individuals in voting, provided that neither of the proposed exclusions at 11 CFR 100.24(a)(3)(iii) (State and local elections) or 11 CFR 100.24(c)(5) (voter identification or GOTV activity solely in connection with a non-Federal election; *see above*)—if adopted—is met? What other aspects of that advisory opinion should be addressed in a similarly explicit manner?

III. Voter Identification and GOTV Activity in Connection With a Non-Federal Election

A. Background

BCRA limits regulation of Type II FEA to activities that are conducted ''in connection with an election in which a candidate for Federal office appears on the ballot.'' *See* 2 U.S.C. 441i(b)(1); 431(20)(A)(ii). In 2002, the Commission defined ''in connection with an election in which a candidate for Federal office appears on the ballot'' generally to mean the period of time beginning on the earliest filing deadline for access to the primary election ballot for Federal candidates in each particular State, and ending on the date of the general election, up to and including any runoff date. *See* 11 CFR 100.24(a)(1)(i). For States not holding a primary election, the covered period began on January 1 of each even-numbered year. *Id.* For special elections in which Federal candidates were on the ballot, the period was deemed to begin when the date of the special election was set and to end on the date of the special election. *See* 11 CFR 100.24(a)(1)(ii).

This definition did not, however, account for municipalities, counties, and States that conducted separate, non-Federal elections within the ''in connection with an election'' time windows. As such, Type II Federal election activities conducted in connection with these non-Federal elections were subject to BCRA's restrictions. Therefore, in 2006, the Commission adopted an Interim Final Rule that revised the definition of ''in connection with an election in which a candidate for Federal office appears on the ballot'' to exclude purely non-Federal voter identification and GOTV activity. *See* Interim Final Rule on Definition of Federal Election Activity, 71 FR 14357 (Mar. 22, 2006) (''Interim Final Rule'').

The Interim Final Rule added new paragraph (a)(1)(iii) to 11 CFR 100.24 to exclude voter identification or GOTV activities that were ''in connection with a non-Federal election that is held on a date separate from a date of any Federal election'' and that refers exclusively to: (1) Non-Federal candidates participating in the non-Federal election, provided the non-Federal candidates are not also Federal candidates; (2) ballot referenda or initiatives scheduled for the date of the non-Federal election; or (3) the date, polling hours and locations of the non-Federal election. *See* 11 CFR 100.24(a)(1)(iii)(A)(1)–(3); Interim Final Rule, 71 FR at 14359–60. By its own terms, the provision expired on September 1, 2007. *See* 11 CFR 100.24(a)(1)(iii)(B); Interim Final Rule at 14358.

B. Proposal

The Commission is considering adding 11 CFR 100.24(c)(5), which would exclude from the definition of ''Federal election activity'' any voter identification activities or GOTV activities that are ''solely in connection with a non-Federal election held on a date separate from any Federal election.'' For example, a GOTV program offering to transport voters to the polls on the day of an exclusively non-Federal election would be eligible for the proposed exclusion. However, a voter identification program collecting information about voters' preferences in both a non-Federal election in March and a Federal primary in April would not qualify, since such a program would not be ''solely in connection with a non-Federal election.'' This proposal largely tracks the Interim Final Rule, although, as proposed here, it would be located in a different paragraph within 11 CFR 100.24.

The proposed rule under consideration is based on the premise that voter identification and GOTV activity for non-Federal elections held on a different date from any Federal election will have no effect on subsequent Federal elections. The Commission seeks comments, especially in the form of empirical data, on whether voter identification and GOTV efforts in connection with a non-Federal election have any meaningful effect on voter turnout in a subsequent Federal election, or otherwise confer benefits on Federal candidates. For example, if a GOTV communication provides the date of a non-Federal election and offers transportation to voters for such a non-Federal election, what effect, if any, would such activity have on a Federal election held on a separate date, that is weeks or months later?

The proposed exclusion would be narrowly drawn and not apply to activities that are also in connection with a Federal election. To that end, the Commission seeks comment on whether the exclusion should take into account the proximity of the next Federal election. For example, should the rule distinguish between situations where the next Federal election is only six days later, as opposed to six months? How much time should pass between a Federal and State or local election to ensure activities associated with the State or local election have no affect on the Federal one? Should the time required to pass be different for voter identification activity than it is for GOTV activity?

Additionally, many states currently allow voters to cast a ballot, either in person or by mail, prior to Election Day—a process known generally as ''early voting.'' *See U.S. Election Assistance Comm'n, A Voter's Guide to Federal Elections 5 (2008), available at http://www.eac.gov/voter/voter/a-voters-guide-to-federal-elections/attachment_download/file.* However, the exclusion in proposed section 100.24(c)(5) distinguishes excluded local activity, in part, based on whether the dates of Federal and non-Federal elections coincide. The Commission seeks comment on whether early voting affects the relevance of the dates on which elections are held. Do the early voting periods for Federal elections overlap with the dates of State and local elections or State and local early voting periods? Can early voters cast ballots at the same time for both Federal and State or local elections when the actual date of those elections do not coincide? How does GOTV activity for early voting in non-Federal elections affect turnout and voting patterns for early voting in Federal elections? The Commission particularly welcomes comments in the form of empirical data.

The proposed exclusion further requires that voter identification or GOTV activity refer exclusively to non-Federal candidates participating in the non-Federal election (provided that the non-Federal candidates are not also

Federal candidates); ballot referenda or initiatives scheduled for the date of the non-Federal election; or the date, polling hours, and locations of the non-Federal election. These limitations are intended to ensure that the only activity excluded from the definition of ''Federal election activity'' is solely in connection with a non-Federal election.

To effectuate this intention better, the Commission invites comments on any changes that it should make to proposed 11 CFR 100.24(c)(5). Do the proposal's limitations ensure that the exclusion covers only non-Federal activity? The Commission seeks comment on whether proposed 11 CFR 100.24(c)(5) excludes ''purely non-Federal'' activities. Is the proposed exclusion consistent with congressional intent?

Finally, the current proposal is different from previous Commission approaches to this issue. In the Interim Final Rule, and subsequently in a Notice of Proposed Rulemaking,[8] the Commission had proposed excluding non-Federal voter identification and GOTV activity from regulation by amending the definition of ''in connection with an election in which a candidate for Federal office appears on the ballot.'' The current proposal would instead address non-Federal elections by adding a new exclusion to the definition of ''Federal election activity'' at 11 CFR 100.24(c)(5). Would this approach have a different effect from the approach in the Interim Final Rule and the NPRM, and if so, should the Commission adopt the prior approach or the proposed approach? Does the Commission have the authority to add this provision, even though it is not expressly provided for in the statutory text? Alternatively, does the statute's definition of Federal election activity at 2 U.S.C. 431(20)(A), which does not include the type of activities described under proposed 11 CFR 100.24(c)(5), permit this provision?

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The basis for this certification is that this proposed rule would affect State, district, and local party committees, which are not ''small entities'' as defined in 5 U.S.C. 601. The term ''small entities'' includes not-for-profit enterprises that are ''small organizations'' under 5 U.S.C. 601(4) and 601(6). State, district, and local party committees are not-for-profit enterprises, but they are not ''small organizations'' under 5 U.S.C. 601(4) because they are not independently owned and operated and are not dominant in their field. 5 U.S.C. 601(4). State political party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arena of their States and are thus dominant in their field. District and local party committees are generally considered affiliated with the State committees and need not be considered separately. To the extent that any State party committees representing minor political parties might be considered ''small organizations,'' the number affected by this proposed rule is not substantial.

List of Subjects in 11 CFR Part 100

Elections.

For the reasons set out in the preamble, subchapter A of chapter 1 of title 11 of the *Code of Federal Regulations* is proposed to be amended as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for 11 CFR part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

2. Section 100.24 is amended by removing paragraph (a)(1)(iii), by revising paragraphs (a)(2) and (a)(3), and by adding paragraph (c)(5) to read as follows:

§ 100.24 Federal election activity (2 U.S.C. 431(20)).

(a) * * *

(2) *Voter registration activity* means encouraging or assisting potential voters in registering to vote.

(i) Except as provided in paragraph (a)(2)(ii) of this section, voter registration activity includes, but is not limited to, any of the following:

(A) Urging, whether by mail (including direct mail), in person, by telephone (including robocalls), or by any other means, potential voters to register to vote;

(B) Preparing and distributing information about registration and voting;

(C) Distributing voter registration forms or instructions to potential voters;

(D) Answering questions about how to complete or file a voter registration form, or assisting potential voters in completing or filing such forms; or

(E) Submitting a completed voter registration form on behalf of a potential voter.

(ii) A speech or event is not voter registration activity solely because it includes an exhortation to register to vote that is incidental to the speech or event, such as:

(A) ''Register and make your voice heard'';

(B) ''Don't forget to register to vote'';

(C) ''Register by September 5th''; or

(D) ''Don't forget to register to vote by next Wednesday.''

(3) *Get-out-the-vote activity* means encouraging or assisting potential voters to vote.

(i) Except as provided in paragraph (a)(3)(ii) of this section, get-out-the-vote activity includes, but is not limited to, any of the following:

(A) Informing potential voters, whether by mail (including direct mail), in person, by telephone (including robocalls), or by any other means, about:

(*1*) The date of an election;

(*2*) Times when polling places are open;

(*3*) The location of particular polling places;

(*4*) Early voting or voting by absentee ballot; or

(B) Offering to transport, or actually transporting, potential voters to the polls.

(ii) A speech or event is not get-out-the-vote activity solely because it includes an exhortation to vote that is incidental to the speech or event, such as:

(A) ''Your vote is very important'';

(B) ''Don't forget to vote'';

(C) ''Don't forget to vote on November 4th''; or

(D) ''Your vote is very important next Tuesday.''

(iii) Get-out-the-vote activity does not include a public communication that refers solely to one or more clearly identified candidates for State or local office, but does not refer to a clearly identified Federal candidate, and notes the date of the election, such as:

(A) A broadcast advertisement stating ''Vote Smith for mayor on November 4th''; or

(B) A mailer sent to at least 500 persons stating ''Get out and show your support for State Delegate Jones next Tuesday.''

* * * * *

(c) * * *

[8] *See* Notice of Proposed Rulemaking on Federal Election Activity and Non-Federal Elections, 72 FR 31473 (June 7, 2007).

(5) Voter identification or get-out-the-vote activity that is solely in connection with a non-Federal election that is held on a date on which no Federal election is held and that refers exclusively to:

(i) Non-Federal candidates participating in the non-Federal election, provided the non-Federal candidates are not also Federal candidates;

(ii) Ballot referenda or initiatives scheduled for the date of the non-Federal election; or

(iii) The date, polling hours and locations of the non-Federal election.

Dated: October 14, 2009.

On behalf of the Commission.

Steven T. Walther,

Chairman, Federal Election Commission.

[FR Doc. E9–25107 Filed 10–19–09; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0543; Airspace Docket No. 09–ACE–9]

Proposed Amendment of Class D Airspace; St Louis, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class D airspace at St Louis, MO. Additional controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAPs) at Spirit of St Louis Airport, St Louis, MO. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) operations for SIAPs at Spirit of St Louis Airport.

DATES: 0901 UTC. Comments must be received on or before December 4, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2009–0543/Airspace Docket No. 09–ACE–9, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone: (817) 321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2009–0543/Airspace Docket No. 09–ACE–9.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), part 71 by adding additional Class D airspace extending upward from the surface to and including 3000 feet MSL for SIAPs operations at Spirit of St Louis Airport, St Louis, MO. Controlled airspace is needed for the safety and management of IFR operations at the airport.

Class D airspace areas are published in Paragraph 5000 of FAA Order 7400.9T, signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class D airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would add additional controlled airspace at Spirit of St Louis Airport, St Louis, MO.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration

proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009, is amended as follows:

Paragraph 5000 Class D Airspace

* * * * *

ACE MO D St. Louis, Spirit of St. Louis Airport, MO [Amended]

St. Louis, Spirit of St. Louis Airport, MO.
(Lat. 38°39′44″ N., long. 90°39′07″ W.)

That airspace extending upward from the surface to and including 3,000 feet MSL within a 4.3-mile radius of Spirit of St. Louis Airport, and within 1 mile each side of the 258° bearing from the airport extending from the 4.3-mile radius to 4.6 miles west of the airport, excluding that airspace within the St. Louis, MO Class B airspace area. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective dates and times will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in Fort Worth, TX, on October 9, 2009.

Walter L. Tweedy,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E9–25094 Filed 10–19–09; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–2198; MB Docket No. 09–170; RM–11567]

Television Broadcasting Services; Fort Myers, FL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has before it a petition for rulemaking filed by Fort Myers Broadcasting Company (''FMBC''), the licensee of WINK–TV, channel 9, Fort Myers, Florida. FMBC requests the substitution of channel 50 for channel 9 at Fort Myers.

DATES: Comments must be filed on or before November 4, 2009, and reply comments on or before November 16, 2009.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Joseph A. Belisle, Esq., Leibowitz & Associates, PA, 4400 Biscayne Boulevard, Suite 800, Miami, FL 33137.

FOR FURTHER INFORMATION CONTACT: Adrienne Y. Denysyk, *adrienne.denysyk@fcc.gov,* Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 09–170, adopted October 8, 2009, and released October 9, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622(i) [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Florida, is amended by adding channel 50 and removing channel 9 at Fort Myers.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E9–25229 Filed 10–19–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–2180; MB Docket No. 09–178; RM–11571]

Television Broadcasting Services; Cincinnati, OH

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has before it a petition for rulemaking filed by Scripps Howard Broadcasting Company (''SHBC''), the licensee of WCPO–TV, channel 10, Cincinnati, Ohio. SHBC requests the substitution of channel 22 for channel 10 at Cincinnati.

DATES: Comments must be filed on or before November 4, 2009, and reply comments on or before November 16, 2009.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should

serve counsel for petitioner as follows: Kenneth C. Howard Jr., Esq., Baker & Hostetler LLP, 1050 Connecticut Ave., NW., Suite 1100, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Adrienne Y. Denysyk, *adrienne.denysyk@fcc.gov,* Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 09–178, adopted October 6, 2009, and released October 7, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Ohio, is amended by adding channel 22 and removing channel 10 at Cincinnati.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E9–25236 Filed 10–19–09; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 0909171277–91322–01]

RIN 0648–XR74

Endangered and Threatened Wildlife and Plants; Proposed Threatened and Not Warranted Status for Distinct Population Segments of the Spotted Seal

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

ACTION: Proposed rule; 12–month petition finding; status review, request for comments

SUMMARY: We, NMFS, have completed a comprehensive status review of the spotted seal (*Phoca largha*) under the Endangered Species Act (ESA). Based on the findings from the status review and consideration of the factors affecting this species, we conclude the spotted seal exists as three (3) distinct population segments (DPS) within the North Pacific Ocean. These are the southern, Okhotsk, and Bering DPSs. Based on consideration of information presented in the Status Review, an analysis of the extinction risk probabilities for each of these DPSs, and assessment of the factors in section 4(a)(1) of the ESA, we have determined the southern DPS is likely to become endangered throughout all or a significant portion of its range in the foreseeable future, and should be listed as a threatened species. The Okhotsk and Bering Sea DPSs are not in danger of extinction nor likely to become endangered throughout all or a significant portion of their ranges in the foreseeable future. Accordingly, we are now issuing a proposed rule to list the southern DPS of the spotted seal as a threatened species. No listing action is proposed for the Okhotsk and Bering Sea DPSs. Because the southern DPS occurs outside the United States, no critical habitat can be designated. We request comments and information related to this proposed rule and finding.

DATES: Comments and information regarding this proposed rule must be received by close of business on December 21, 2009. Requests for public hearings must be made in writing and received by December 4, 2009. Notice of the location and time of any such hearing will be published in the **Federal Register** not less than 15 days before the hearing is held.

ADDRESSES: Send comments to Kaja Brix, Assistant Regional Administrator, Protected Resources, Alaska Region, NMFS, ATTN: Ellen Sebastian. You may submit comments, identified by ''RIN 0648–XR74'' by any one of the following methods:

- Electronic submissions: Submit all electronic public comments via the Federal Rulemaking Portal website at *http://www.regulations.gov*.
- Mail: P.O. Box 21668, Juneau, AK, 99802–1668
- Fax: 907–586–7557
- Hand deliver to the Federal Building: 709 West 9th Street, Room 420A, Juneau, Alaska

INSTRUCTIONS: All comments received are a part of the public record and generally will be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. We will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, WordPerfect, or Adobe portable document file (PDF) format only.

The proposed rule, maps, status review, and other materials relating to

this proposal can be found on our Web site at: *http://www.fakr.noaa.gov/*

FOR FURTHER INFORMATION CONTACT: Kaja Brix, NMFS Alaska Region, (907) 586–7235; or Marta Nammack, NMFS, Office of Protected Resources, (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Background

On May 28, 2008, we received a petition from the Center for Biological Diversity to list the spotted seal as a threatened or endangered species under the ESA, primarily due to concern about threats to this species' habitat from climate warming and loss of sea ice. The Petitioner also requested that critical habitat be designated for spotted seals concurrent with listing under the ESA. Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) requires that when a petition to revise the List of Endangered and Threatened Wildlife and Plants is found to present substantial scientific and commercial information, we must make a finding on whether the petitioned action is (a) not warranted, (b) warranted, or (c) warranted but precluded from immediate proposal by other pending proposals of higher priority. This finding is to be made within one year of the date the petition was received, and the finding is to be published promptly in the **Federal Register**.

After reviewing the petition, the literature cited in the petition, and other literature and information available in our files, we found that the petition met the requirements of the regulations under 50 CFR 424.14(b)(2) and determined that the petition presented substantial information indicating that the petitioned action may be warranted. This finding was published on September 4, 2008 (73 FR 16617). At that time, we commenced a status review of spotted seals and solicited information pertaining to the species.

On September 8, 2009, the Center for Biological Diversity filed a lawsuit in the U.S. District Court for the District of Columbia alleging that we failed to make the requisite 12–month finding on its petition to list the spotted seal. Subsequently, the Court entered a settlement agreement under which NMFS agreed to finalize the status review and submit this 12–month finding to the Office of the **Federal Register** by October 15, 2009.

The status review is a compilation of the best available information concerning the status of spotted seals, including the past, present, and future threats to this species. The Biological Review Team (BRT) which conducted the status review was composed of expert marine mammal biologists and climate scientists from NOAA's Alaska Fisheries Science Center and Pacific Marine Environmental Lab.

ESA Statutory, Regulatory, and Policy Provisions

There were two key tasks associated with conducting the ESA status review. The first was to delineate the taxonomic group under consideration; the second was to conduct an extinction risk assessment to determine whether the petitioned species is threatened or endangered. The ESA defines the term endangered species as ''any species which is in danger of extinction throughout all or a significant portion of its range.'' The term threatened species is defined as ''any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.'' For this status review, we endeavored to assess the threats to the species to the extent such threats can be forecast into the future, keeping in mind that there is greater uncertainty the farther out the analysis extends. The potential consequences of the key threat of climate change have been projected through both 2050 and the end of the 21st century, though under widely-varying assumptions. The status review considered the climate projections through the end of the 21st-century in assessing the threats stemming from climate change, noting that there was less variation in the time period up to 2050 compared to the period between 2050 and 2100. NMFS used a similar approach to assess the extinction risks from other threats. While this review extended the climate modeling farther into the future than the one conducted during the ribbon seal status review, the two reviews' respective approaches are consistent; NMFS has not determined here that 2100 constitutes ''the foreseeable future.'' There is too much variability beyond 2050 to make that determination.

To be considered for listing under the ESA, a group of organisms must constitute a ''species'', which according to the ESA includes ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature''. The term ''distinct population segment'' (DPS) is not commonly used in scientific discourse, so the USFWS and NMFS developed the ''Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act'' to provide a consistent interpretation of this term for the purposes of listing, delisting, and reclassifying vertebrates under the ESA (61 FR 4722; February 7, 1996). We describe and use this policy below to guide our determination of whether DPSs exist for this species.

Because there is little or no information to support a quantitative assessment of the primary threats to spotted seals, our risk assessment was primarily qualitative and based upon expert opinion of the BRT members. This is a common procedure we have used in numerous other ESA listing determinations (e.g., Pacific salmon, rockfishes, etc).

Basic Species Biology

A review of the life history and ecology of the spotted seal is presented in the Status Review (Boveng *et al.*, 2009). The spotted seal (also known as the largha seal) is a close relative of the harbor seal (*Phoca vitulina*). Spotted seals are associated with ice during the spring breeding season. From March through May, spotted seals are principally found within the frontal zone of sea ice in the Bering Sea, Sea of Okhotsk, and Japan Sea. The spotted seal's coat is usually a light-colored background with dark gray and black spots scattered quite densely on the body. Little information is published on the biological characteristics of spotted seal populations. Spotted seals have a lifespan of about 30 - 35 years. They become sexually mature at 3 - 5 years of age, varying over regions and time, and adult females usually give birth every year to a single pup which is nursed for 2 - 4 weeks and then abandoned to fend for itself.

Spotted seals are widely distributed on the continental shelf of the Beaufort, Chukchi, southeastern East Siberian, Bering and Okhotsk seas, and to the south throughout the Sea of Japan and into the northern Yellow Sea. Their range extends over about 40 degrees of latitude from Point Barrow, Alaska in the north (~71 N.) to the Yangtse River, China in the south (~31 N.). The distribution of spotted seals is seasonally related to specific life history events that can be broadly divided into two periods: late-fall through spring, when whelping, nursing, breeding, and molting all take place in association with the presence of sea ice on which the seals haul out, and summer through fall, when the sea ice has melted and spotted seals remain closer to shore to use land for hauling out.

The timing of the formation and persistence of sea ice, and thus the spotted seals use of sea ice habitat, roughly varies with latitude throughout the species' range. Typically, life history

functions such as molting, breeding, and whelping occur later in the year at higher latitudes.

From late fall through spring, spotted seal habitat-use is closely associated with the distribution and characteristics of seasonal sea ice. The ice provides a dry platform away from land predators during the whelping, nursing, breeding, and molting periods. When sea ice begins to form in the fall, spotted seals start to occupy it immediately, concentrating in large numbers on the early ice that forms near river mouths and estuaries. In winter, as the ice thickens and becomes shorefast along the coasts, spotted seals move seaward to areas near the ice front with broken ice floes. Spotted seals can only make and maintain holes in fairly thin ice and have been known to travel 10 km or more over solid ice in search of cracks or open patches of water. Spotted seals usually avoid very dense, compacted ice and stay near the ice front. Recent research has also shown that, unlike spotted seals in more northerly latitudes, a portion of spotted seals in the Peter the Great Bay and the northern Yellow Sea use shore lands as haul-out sites for whelping, nursing, breeding, and molting (Wang, 1986; Trukhin, 2005; Nesterenko and Katin; 2008; Nesterenko and Katin, 2009). Spotted seal terrestrial haul-out sites are usually remote and located on isolated mud, sand, or gravel beaches, or on rocks close to shore.

Spotted seals appear to be generalist feeders with a varied diet. Most studies have found that fishes are spotted seals' primary prey. Diet and regional and seasonal differences in foods of spotted seals are related to the seasonal distribution and abundance of their principal prey species.

Species Delineation

Under our DPS policy (61 FR 4722; February 7, 1996), three elements are considered in a decision regarding the status of a possible DPS as endangered or threatened under the ESA. These are: (1) ''Discreteness of the population segment in relation to the remainder of the species to which it belongs, (2) The significance of the population segment to the species to which it belongs, and, (3) The population segment's conservation status in relation to the Act's standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).

Discreteness: A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation, (2) It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

Significance: If a population segment is considered discrete under one or more of the above conditions, its biological and ecological significance will then be considered in light of Congressional guidance (see Senate Report 151, 96th Congress, 1st Session) that the authority to list DPSs be used '' sparingly'' while encouraging the conservation of genetic diversity. In carrying out this examination, the Services will consider available scientific evidence of the discrete population segment's importance to the taxon to which it belongs. This consideration may include, but is not limited to, the following: (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon, (2) Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon, (3) Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or (4) Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics. Because precise circumstances are likely to vary considerably from case to case, it is not possible to describe prospectively all the classes of information that might bear on the biological and ecological importance of a discrete population segment.

Status: If a population segment is discrete and significant (i.e., it is a distinct population segment) its evaluation for endangered or threatened status will be based on the Act's definitions of those terms and a review of the factors enumerated in section 4(a). It may be appropriate to assign different classifications to different DPSs of the same vertebrate taxon'' (61 FR 4722; February 2, 1996).

Evaluation of Discreteness

A variety of evidence exists that is relevant to whether DPSs exist in spotted seals. Below we consider evidence from breeding concentrations, geographic barriers, breeding site fidelity, and genetics.

Eight areas of spotted seal breeding concentrations have been identified in the species' range (Figure 1). All are in the southern margins of the seasonally ice covered portions of the range.. The extent to which these areas are actually separated by gaps in the breeding distribution, at least in the Bering Sea, is not clear. Spotted seals are known to undertake foraging trips and seasonal movements of greater than 1000 km, easily sufficient to travel between adjacent breeding areas. Given this capability for long distance movements, only very large geographical barriers would have the potential for maintaining any discreteness that there may be between adjacent breeding concentrations. Distances between the Bering Sea breeding concentrations and the nearest Okhotsk Sea breeding concentrations are large relative to the distances between adjacent breeding concentrations within each of these seas, due to the great southerly extent of the Kamchatka Peninsula.

It is not known whether the peninsula may be a physical obstacle to capable travelers like spotted seals. Nonetheless, spotted seals have habits that may cause the Kamchatka Peninsula to be an effective barrier between Bering Sea and Sea of Okhotsk breeding concentrations. The seals' affinity for ice during winter, combined with the fact that the seasonal ice does not extend south to the tip of the peninsula, may help to confine spotted seals to their respective sea basins. They follow the ice front as it grows and expands to the south in autumn. In the Bering Sea, they make extensive east-west movements during the ice-covered period. But, they are not known to move extensively out of the ice field, or off of the continental shelf, at least in the Bering Sea. Therefore, the typical annual pattern would seem to be one of moving south and offshore as the ice forms, staying in the ice during the ice covered period, then moving back to the north and toward shore with the spring ice retreat. If this scenario is correct, and unless long-distance movements were undertaken during the period of extensive ice cover, the seals would be unlikely to disperse between the two seas. Most of the range of the species occurs in cold, seasonally ice covered, sub-Arctic waters, without conspicuous intrusions of warm water or conditions that would pose potential physiological barriers. There is, however, a considerable climatic difference from the southern to the northern extremes of the species' range.

Recognizing that factors causing differentiation of populations—especially behavioral factors—may be inconspicuous, the most reliable

information is likely to come from quantitative measures of genetic or morphological discontinuities. An important behavioral factor in maintaining separation of populations is natal philopatry, the tendency to reproduce in the same area as one's birthplace. Because long-term tracking of individual spotted seals has not been practical or feasible, evidence for natal philopatry must be sought indirectly, for example, by analysis of genotypic frequencies or relatedness of individuals that reflect the history of breeding dispersal. About 1 to 10 migrants per generation between breeding areas is typically sufficient to preclude genetic discreteness. Thus, strong natal philopatry is required to maintain discreteness when no other barriers exist.

Studies of differences in cranial morphology and helminth parasite fauna between putative breeding areas have been claimed to indicate population structure, but the statistical analyses were flawed and the sampling schemes and relevance of the population attributes used for these studies have also been criticized. The strength of the discreteness, and the details of which areas were reported to differ from other areas could not be relied upon until more rigorous sampling and analysis can be performed.

Genetic information, when obtained from representative samples of animals in their breeding locales is likely to be a more direct reflection of population structure, and for that reason has become a common and important tool for supplementing or replacing morphometrics and other measures in studies of both phylogeny and population structure. Genetic data on population structure do exist from four studies of spotted seals. Mitochondrial DNA were examined from 247 spotted seals, and micro-satellite DNA were examined at 18 loci from 207 spotted seals, all sampled in the Chukchi Sea, Bering Sea, northwest Pacific Ocean (i.e., off the southeast coast of the Kamchatka Peninsula), Sea of Okhotsk, Sea of Japan, and Yellow Sea. The preliminary conclusions drawn from analyses of both types of marker supported a phylogeographic break between seals of the Yellow Sea-Sea of Japan region, and seals of the Okhotsk, Bering, and Chukchi seas (O'Corry-Crowe and Bonin, 2009). Although the mtDNA haplotypic diversity was very high, that marker indicated that some structure may also exist between the Sea of Okhotsk and the Bering-Chukchi Sea seals. The nuclear markers on the other hand, did not support that structure, and even indicated that some gene flow may occur between the Yellow Sea-Sea of Japan sampling region and the Okhotsk-Bering Chukchi sampling region. The BRT placed somewhat greater weight on the mtDNA results than the micro-satellite results, which militates in favor of a discreteness finding for the southern population and is an approach that would be conservative of genetic diversity.

Genetic research found low nuclear genetic variability among 176 spotted seals from Liaodong Bay, the primary breeding area in the Yellow Sea (Han *et al.*, in press). This result was consistent with a previous report of low diversity in mtDNA haplotypes in this area. Moreover, a single base-pair insertion in the threonine tRNA gene was reported that was present in all seals from Liaodong Bay but not in samples tested from the Sea of Japan and Sea of Okhotsk, indicative of little or no immigration of females into the Yellow Sea population. Research also found high haplotypic diversity in mtDNA from 66 spotted seals sampled in three regions along the northern coasts of Hokkaido in autumn and winter. That study found no phylogenetic structure in the samples, and could not dismiss the possibility that spotted seals on the northwest Hokkaido coast during winter, in the far northeastern portion of the Sea of Japan, are part of the southern Sea of Okhotsk breeding concentration (Mizuno *et al.*, 2003). This is currently the only information available on where in the Sea of Japan to place a boundary corresponding to the genetic break suggested by the micro-satellite DNA study described above. Because no samples from the Tatar Strait have been included in genetics studies, and the samples from Hokkaido are not obviously distinct from Sea of Okhotsk samples, the population division with the most support from the genetics evidence is a line along 43° N. latitude that divides the spotted seal range into a southern segment composed of the breeding concentrations of the Yellow Sea and Peter the Great Bay, and the remaining breeding areas (Tatar Strait, southern and northern Sea of Okhotsk, Karaginsky Gulf, Gulf of Anadyr, and eastern Bering Sea) making up a separate population.

Although no single source of evidence provided unequivocal support for a division between the Bering Sea and the Sea of Okhotsk, the combined weight of evidence for discreteness found in the mtDNA results, and the strong potential that the Kamchatka Peninsula functions as a barrier between breeding populations, provides substantial support for designating the Bering Sea and Okhotsk spotted seals as separate DPSs. The BRT made this conclusion in the Status Review and we concur.

We assessed the existence and implications of international governmental boundaries between these populations (see below), and determined that considerations of cross-boundary management and regulatory mechanisms do not outweigh or contradict the proposed divisions based on physical, physiological, ecological, and behavioral grounds. Several conservation efforts have been undertaken by foreign nations specifically to protect spotted seals. In 1978, Russia established the Far Eastern Marine Reserve in Russia's Peter the Great Bay. The islands of the Reserve provide protection from human disturbance and suitable haul-out sites for spotted seals. The vast majority of the Peter the Great Bay spotted seal population uses the Marine Reserve during the spring, particularly for breeding and molting. Protection of breeding and pupping areas resulting from the establishment of the Marine Reserve may have resulted in some growth of the population. However, this population is still vulnerable to other threats outside of the reserve, such as by-catch or poaching by fishermen. Other than a permit requirement for taking any marine mammal, there is apparently no special protection for spotted seals throughout the remainder of Russia.

The South Korean government designated the spotted seal as a natural monument in 1982, an endangered species (criteria II) in 2004, and a protected species in 2007, while the Chinese government designated them as a protected species (criteria I) in 1988. In 1983, China's Liaoning provincial government banned the hunting of spotted seals, and in the early 1990s, two national protected areas were established for the protection of spotted seals in the Liaodong Bay area of China, including the Dalian National Spotted Seal Nature Reserve. However, as of 2004, no conservation action, public awareness or education programs have been carried out for the species in this region, and in 2006, the Dalian Nature Reserve's boundaries were adjusted to accommodate industrial development. So despite these protection efforts, the Liaodong Bay population continues to decline. There is no known information on spotted seals from North Korea, but it is unlikely that they are managed or protected there.

Within the Bering Sea ice front, spotted seals move east and west between U.S. and Russian waters. When the ice retreats, some individuals move

to the Alaskan coast and others move to the Russian coast. Therefore, the seals in any breeding group cannot be considered to be subject solely to the management and regulatory mechanisms of either country, and a division of the population along this international boundary would not be logical. Within the Sea of Okhotsk, the spotted seal breeding concentrations are solely within Russian waters. Finally, the conservation status and management of habitat (e.g., designation of reserves) are sufficiently similar between the Liaodong Bay and Peter the Great Bay breeding concentrations that dividing them on the basis of the China-Russia-Korea boundaries is unwarranted. In summary, considerations of cross-boundary management and regulatory mechanisms do not outweigh or contradict the divisions proposed above based on physical, physiological, ecological, and behavioral grounds.

Evaluation of Significance

Here evaluate the significance of each of the 3 potential DPSs identified above, considering each of the 4 factors as described above. In the Southern potential DPS, some unknown portion of the Yellow Sea breeding concentration whelps and nurses on shore and all or nearly all seals breeding in Peter the Great Bay apparently now do so as well. Pups born ashore have been observed to enter the water prior to weaning in Peter the Great Bay, a behavior that is not typical among pups born on ice. Although it is not clear how long these behaviors have been occurring within the southern segment of the species range, they may reflect responses or adaptations to changing conditions at the range extremes, and their uniqueness may provide insights about the resilience of the species to the effects of climate warming. The spotted seal is the only phocid inhabiting the waters of the Yellow Sea and Sea of Japan (the southern potential DPS), whereas 4 to 5 phocid species overlap with the range of spotted seals in the Sea of Okhotsk and Bering Sea.

Loss of the Okhotsk DPS would result in a substantially large, central gap in the range of the species. This DPS contains three breeding areas extending over a vast area. Similarly, the loss of either the Southern or Bering Sea DPS would result in a substantial contraction of the overall extent of the overall extent of the range. The Bering Sea DPS contains three breeding areas, and the southern DPS contains two breeding areas. Both DPSs cover vast areas.

None of the three segments under consideration for designation as DPSs could be considered to be the sole surviving naturally occurring unit of the taxon. All three segments are naturally occurring and the species is thought to inhabit its entire historic range.

The southern segment was distinguished from the other 2 potential DPSs primarily on the basis of its genetic composition. The genetic markers used for these studies are typically assumed to be selectively neutral, so the results do not indicate whether there is genetic variation between the populations that could be ecologically or evolutionarily significant.

In sum, the Southern, Okhotsk, and Bering Sea population segments are discrete because they are markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, and behavioral factors. They are significant because the loss of any of the three DPSs would result in a significant gap in the range of the taxon and they differ markedly from each other in genetic characteristics, particularly the Southern population. Further, the southern DPS exists in an ecological setting that is unusual or unique for the taxon. We are therefore proposing designation of these units as the Southern, Okhotsk, and Bering DPSs of the spotted seal (Figure 1).

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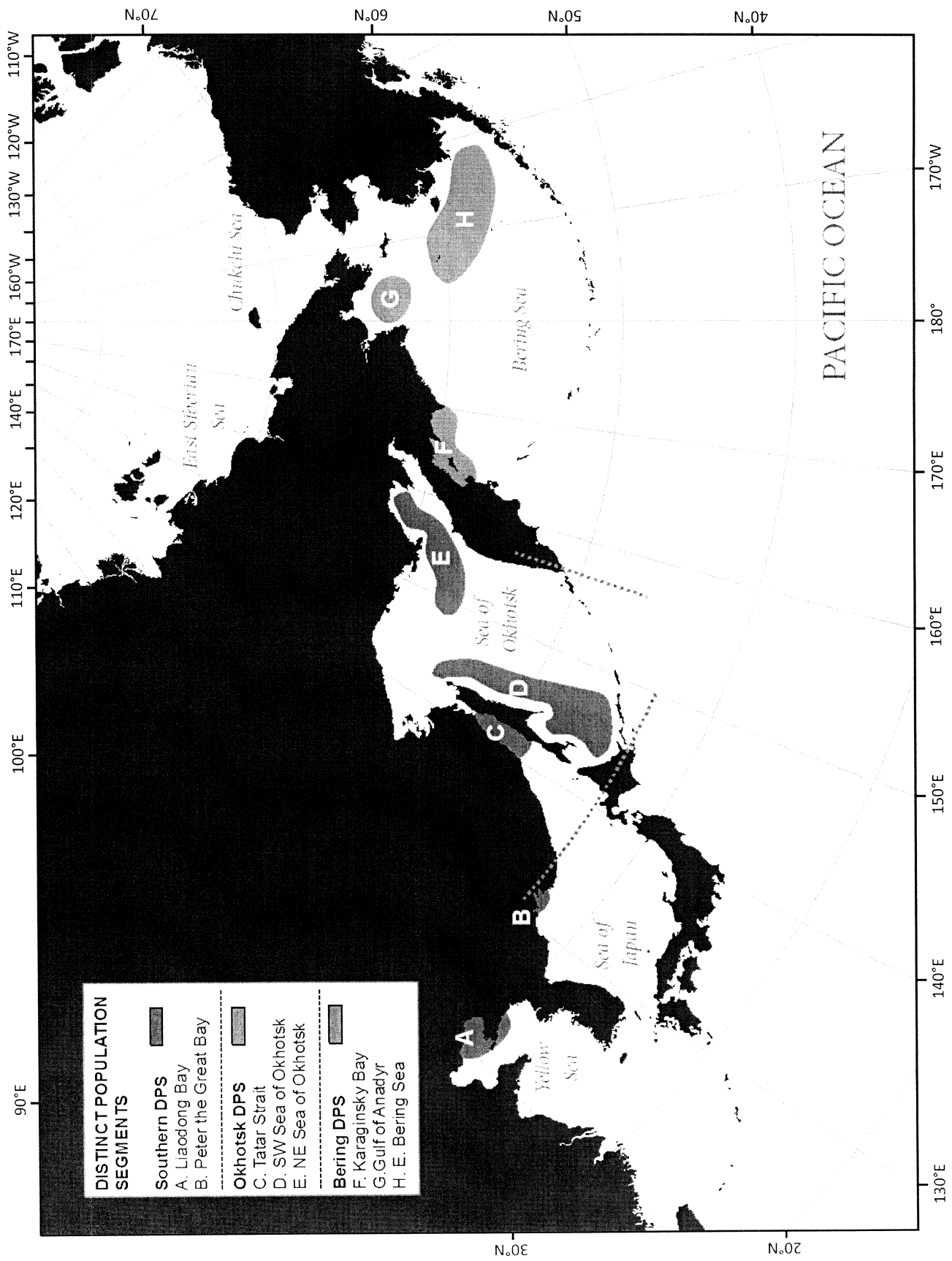

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Figure 1. Eight spotted seal breeding concentrations are currently recognized: two in the Southern Distinct Population segment (DPS), three in the Okhotsk DPS, and three in the Bering DPS. The dotted green lines are drawn along 43° N latitude and 157° E longitude, which were considered to be the boundaries between the southern and Okhotsk DPSs and the Okhotsk and Bering DPSs, respectively.

Spotted Seal Status

No accurate range-wide abundance estimates exist for spotted seals. Several factors make it difficult to accurately assess spotted seals' abundance and trends. The remoteness and dynamic nature of their sea ice habitat along with their broad distribution and seasonal movements make surveying spotted seals expensive, highly unpredictable, and logistically challenging. Additionally, the species' range crosses political boundaries and there has been limited international cooperation to conduct range-wide surveys. Details of survey methods and data are often limited or have not been published, making it difficult to judge the reliability of the reported numbers. Logistical challenges also make it difficult to collect the necessary behavioral data to make proper refinements to seal counts. Survey data were often inappropriately extrapolated to the entire survey area based on seal densities and ice concentration estimates without behavioral research to determine factors affecting habitat selection. For example, no suitable behavioral data have been available to correct for the proportion of seals in the water at the time of surveys. Spotted seal haul-out behavior likely varies based on many factors such as time of year and time of day, daily weather conditions, age and sex.

With these limitations in mind, the best scientific and commercial data available indicate that the population size of spotted seals in the Yellow Sea (Liaodong Bay) increased from about 7,100 in 1930 to a maximum of 8,137 in 1940. The population then declined over the next four decades to a minimum of 2,269 in 1979, before increasing again to about 4,500 in 1990, Despite these conservation efforts by the Chinese and South Korean governments, the Liaodong Bay population continued to decline to around 800 individuals by 2007, which is the current estimate for this population.

The Sea of Japan supports two breeding areas for spotted seals: the Tatar Strait and Peter the Great Bay. A 1970 survey reported an estimate of 8,000–11,000 spotted seals in the Tatar Strait. No other estimates were found for this area. Historic harvest records suggest that there were probably several thousand spotted seals in Peter the Great Bay at the end of the 19th century. Abundance likely decreased considerably until the 1930s as the human population and hunting increased in this region. Shipboard surveys conducted in 1968 placed the spotted seal population at roughly several hundred individuals. Recent, year-round studies have placed the most current estimate at about 2,500 spotted seals that inhabit Peter the Great Bay in the spring, producing about 300 pups annually, and now reproducing on shore rather than on ice.

The Sea of Okhotsk population was estimated at 130,000 spotted seals based on aerial surveys during 1969–1970, and was reported to have stabilized at very low levels after years of intensive commercial harvests occurring from the 1930s until 1969. A 2000 report on abundance estimates the population ranging in size between 67,000 and 268,000 animals, and stated that the multi-year average for this period was 180,000–240,000 seals. That report also suggested that the highest estimates in the mid to late 1970s (250,000–270,000) were closer to the true abundance level because survey coverage was more complete during that time. In consideration of these reported abundance estimates, we believe the current population of spotted seals in the Okhotsk DPS is, conservatively, in excess of 100,000 individuals.

Despite repeated attempts to survey the Bering Sea pack ice over the past three decades, there are no current reliable abundance estimates for spotted seals in the Bering Sea. A 1969 aerial survey reported an estimate of 135,000 spotted seals in the Bering Sea, and suggested that spotted seal numbers had remained stable since 1964. Extensive surveys of the Bering Sea ice field in 1987 produced a minimum estimate of 100,000 spotted seals. The National Marine Mammal Laboratory (NMML) conducted aerial surveys of the Bering Sea in 2007. Those data are currently being analyzed to update the current estimates of abundance for the central and eastern Bering Sea. The current estimate of abundance in the areas surveyed within the central and eastern Bering Sea is 101,568 spotted seals.

Extinction Risk Assessment

Section 4(a)(1) of the ESA and the listing regulations (50 CFR part 424) set forth procedures for listing species. We must determine, through the regulatory process, if a species is endangered or threatened because of any one or a combination of the following factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or human-made factors affecting its continued existence. These factors are discussed below with each DPS discussed sequentially under each factor. As mentioned above, because there is little or no information to support a quantitative assessment of the primary threats to spotted seals, our risk assessment was primarily qualitative and based upon expert opinion of the BRT members.

Present or threatened destruction, modification, or curtailment of the species' habitat or range

The main concern about the conservation status of spotted seals stems from the likelihood that their sea ice habitat has been modified by the warming climate and, more so, that the scientific consensus projections are for continued and perhaps accelerated warming and sea ice decline in the foreseeable future. A second major concern, related by the common driver of carbon dioxide (CO2) emissions, is the modification of habitat by ocean acidification, which may alter prey populations and other important aspects of the marine ecosystem. A reliable assessment of the future conservation status of each spotted seal DPS requires a focus on projections of specific regional conditions, especially sea ice.

Regional sea ice thickness is difficult to quantify with current sensing methods, though there is evidence for thinning ice in the Northern Hemisphere. Sea ice in the Arctic Ocean declined during the past several decades, from both thinning of undeformed ice and loss of thick ridged ice. In contrast to the Arctic Ocean, where sea ice is present year-round, the ice in the sub-Arctic seas of the spotted seal breeding range is seasonal in nature. There are no reliable time series of ice thickness for the spotted seal range in the Bering Sea and Sea of Okhotsk. The part of the thinning process in the Arctic that has been due to loss of multi-year ice is not a concern for these sub-Arctic seas that form only annual ice. Shorter ice-forming seasons in the future may produce thinner ice in situ than in the past, but a broad range of floe thicknesses would still be expected due to rafting and ridging processes.

Despite the recent dramatic reductions in Arctic Ocean multi-year

ice extent during summer, the seasonal ice in the Bering Sea is expected to continue forming annually during the winter for the foreseeable future. Although this projection is based on the best scientific and commercial information available, we recognize that it is fraught with uncertainty. We expect that the sea ice regime there will continue to be subject to large interannual variations in extent and seasonal duration, as it has throughout recorded history. There will likely be more frequent years in which ice coverage is reduced, resulting in a decline in the long-term average ice extent, but Bering Sea spotted seals will likely continue to encounter sufficient ice to support stable population growth rates for the foreseeable future. Much of the sea ice in the eastern and northern Bering Sea and the Chukchi Sea during spring is very densely compacted and heavily ridged, such that spotted seals are not found there in significant numbers during the breeding season. A decline in ice extent and thickness could conceivably result in new breeding habitat in such areas in the future, perhaps mitigating losses of previously-used habitat. Even if sea ice were to vanish completely from the Bering Sea, this population of spotted seals may adjust by relocating their breeding grounds to follow the northward shift of the annual ice front into the Chukchi Sea.

For the Sea of Okhotsk (Okhotsk DPS), and the Sea of Japan and Yellow Sea (Southern DPS), current global climate models for sea ice do not perform satisfactorily due to model deficiencies and the small size of the region compared to the spatial resolution of the climate models (Boveng *et al.*, 2009). As a result, inferences about future ice conditions in these areas were drawn indirectly from projections of air or sea surface temperatures, and thus contain greater uncertainty than the projections for the Bering Sea.

In the Southern DPS, ice thickness in the BoHai Sea and Peter the Great Bay is likely to depend more on the thickness of in situ formation because smaller wind fetches and shorter durations of ice cover would be expected to cause less ridging and rafting than in the Bering Sea and Sea of Okhotsk. Thus, a decline in ice thickness may be of consequence to spotted seals in the Southern DPS, but is not likely to be a significant concern for the Okhotsk or Bering DPSs.

We believe the loss of sea ice habitat is a significant factor with respect to the southern DPS of the spotted seal, even considering they have shown the ability to adapt to terrestrial sites. We do not find this factor to be significant in terms of the Okhotsk or Bering DPSs.

Ocean acidification, a result of increased carbon dioxide in the atmosphere, may impact spotted seal survival and recruitment through disruption of trophic regimes that are dependent on calcifying organisms. The nature and timing of such impacts are extremely uncertain. Because of spotted seals' apparent dietary flexibility, and acknowledging our present inability to predict the extent and consequences of acidification, we do not believe that this threat will cause any of the DPSs to become in danger of extinction within the foreseeable future.

Changes in spotted seal prey, anticipated in response to ocean warming and loss of sea ice and, potentially, ocean acidification, have the potential for negative impacts, but the possibilities are complex. Some changes already documented in the Bering Sea and the North Atlantic Ocean are of a nature that could be beneficial to spotted seals. For example, several fish species, including walleye pollock (Theragra chalcogramma), a common spotted seal prey, have shown northward distribution shifts and increased recruitment in response to warming, at least initially. These ecosystem responses may have very long lags as they propagate through trophic webs. Apparent flexibility in spotted seal foraging locations and habits may make these threats a lower risk than the more direct impacts from changes in sea ice.

Over-utilization for commercial, subsistence, recreational, scientific, or educational purposes

Recreational, scientific, and educational utilization of spotted seals is currently at low levels and is not projected to increase to significant threat levels in the foreseeable future for any of the DPSs. Commercial harvests by Soviet sealers were at moderate levels from the mid–1950s to the early 1990s, typically not exceeding 10,000 or 15,000 at the most, annually. Russia has established harvest quotas up to 14,800 for spotted seals in recent years, though the 2008 quota was 6,200 and no quota was listed for 2009. However, the actual harvest has likely been less than a couple thousand individuals per year because it is not currently, and not likely to become, economically viable due to lack of a significant market for skins or other parts. Subsistence harvest levels have been moderate historically in both the Bering and Okhotsk DPS, and are not anticipated to increase significantly. Therefore this factor was rated low for all three DPSs.

Diseases, parasites, and predation

A variety of pathogens (or antibodies), diseases, helminths, cestodes, and nematodes, have been found in spotted seals. The prevalence of these agents is not unusual among seals, but the population-level impact is unknown. There has been speculation about increased risk of outbreaks of novel pathogens or parasites in marine systems as climate-related shifts in species distributions lead to new modes of transmission. However, no examples directly relating climate change to increased severity or prevalence of disease have been documented. Some types of diseases may decrease in severity or prevalence with increasing temperature. Therefore, it is not currently possible to predict the consequences of climate warming on disease or pathogen biodiversity in general or on spotted seal viability in particular.

There is little or no direct evidence of significant predation on spotted seals and they are not thought to be a primary prey of any predators. Polar bears and killer whales may be the most likely opportunistic predators in the current sea ice regime, but walruses could pose a potentially greater risk if reduced sea ice conditions force this ice-associated species into closer proximity with spotted seals in the future. Also, predation risk could increase if loss of sea ice requires spotted seals to spend more time in the water or more time on shore, but predator distributions and behavior patterns may also be subject to climate-related changes, and the net impact to spotted seals cannot be predicted. This factor was rated low for all three DPSs.

Inadequacy of existing regulatory mechanisms

There is little evidence that inadequacy of existing regulatory mechanisms currently poses a significant threat to any of the spotted seal DPSs. In other words, while there are no regulatory mechanisms that effectively address reductions in sea ice habitat or ocean acidification, we do not expect this shortcoming to result in population-level impacts to any of the DPSs for the foreseeable future. Indeed, our analysis of potential threats does not assume the existence, now or in the foreseeable future, of any regulatory mechanism that would mitigate the effects of each threat.

Inadequacy or lack of stringency of mechanisms to regulate oil and gas activities in the Yellow Sea and Sea of

Okhotsk could contribute to the cumulative risk faced by the Southern and Okhotsk DPSs. However, large oil spill events are infrequent, and the ability to respond to them depends on a variety of factors, including timing, location and weather. In light of the infrequency of those events and the absence of a declining population trend despite existing oil and gas activities, we believe such activities will not place or contribute to placing the spotted seal in danger of extinction in the foreseeable future in any of the three DPSs. Therefore this factor was rated low for all three DPSs.

Other natural or human factors affecting the species' continued existence

Spotted Seals may be adversely affected by exposure to certain pollutants. Pollutants such as organochlorine compounds and heavy metals have been found in high concentrations in some Arctic. Butyltin (BT) compounds are used as antifouling agents in ship bottom paints. They are retained in all tissues, though largely in the liver rather than the blubber where PCBs and DDT accumulate. BTs have been found in spotted seals and some studies suggest marine mammals may have difficulty metabolizing these compounds. Research has also found persistent organochlorine pollutants (POPs), including flame retardant compounds like PBDEs (polybrominated diphenyl ethers); as well as DDTs (dichloro-diphenyltrichloroethanes), PCBs (polychlorinated biphenyls) and PFCs in spotted seals.

We do not believe organochlorine levels are affecting ice seal populations at this time. We have no data or model predictions of levels expected in the foreseeable future. However, current levels should be used as a baseline for future research as concentrations in surrounding Arctic regions continue to rise. Climate change has the potential to increase the transport of pollutants from lower latitudes to the Arctic through changes in ocean current patterns, highlighting the importance of continuing to monitor spotted seal contaminant levels.

As previously discussed, oil and gas activity has the potential for adverse impacts to spotted seals. Currently, there are no active offshore oil and gas developments in the U.S. Bering or Chukchi Seas. Therefore, the current risk for spotted seals to be impacted by an oil spill in U.S. waters is very low. As far as is known, spotted seals have not been affected by oil spilled as a result of industrial activities even though such spills have occurred in spotted seal habitat. Oil and gas development in the Sea of Okhotsk resulted in an oil spill in 1999, which released about 3.5 tons of oil. Also, in December 2007 approximately 2.8 million gallons (10,500 tons) of crude oil spilled into the Yellow Sea offshore of South Korea's Taean Peninsula from a tanker. The size of the oil spill was about one-fourth that of the Exxon Valdez spill in 1989, and was the largest in Korean history. It is unknown how many seals may have been affected by this spill. Incidences of oil spills are expected to increase with the on-going increase in oil and natural gas exploration/development activities in the Bohai and Yellow Seas. Accompanying growth in tanker and shipping traffic could further add to the oil spill potential. According to experts in China, the threat of future oil spills remains high.

Though the probability of an oil spill affecting a significant portion of the spotted seal population of any DPS in the foreseeable future is low, the potential impacts from such a spill could be significant, particularly if subsequent clean-up efforts were ineffective. The potential impacts would be greatest when spotted seals are relatively aggregated. For example, spotted seals in the Okhotsk Sea move to coastal haul-out sites after the sea ice melts in July. One survey reported 10,000 individuals along the Sakhalin Island coast, 30,000 individuals along the continental coast of Sea of Okhotsk, and 20,000 individuals on the western Kamchatka coast. Therefore, an oil spill along these coasts could have significant effects on local spotted seal populations. Such an event in the Bohai Sea could be particularly devastating to the Southern DPS of spotted seals.

It is important to evaluate the effects of anthropogenic perturbations, such as oil spills, in the context of historical data. Without historical data on distribution and abundance, it is not possible to measure the impacts of an oil spill on spotted seals. Population monitoring studies need to be implemented in areas where significant industrial activities are likely to occur, so that it will be possible to compare future impacts with historical patterns and thus determine the magnitude of potential effects.

In summary, the threats to spotted seals from oil and gas activities are greatest where these activities converge with coastal aggregations of the species. In particular, the spotted seals in the Bohai Sea and the Sea of Okhotsk in the Okhotsk DPS are most vulnerable to oil and gas activities, primarily due to potential oil spill impacts. Given the very low abundance of the Southern DPS and the possible consequences of a large oil spill to these seals, we considered this factor to be significant in terms of their status, causing them to be at risk of becoming endangered within the foreseeable future. However, we do not find that oil and gas activities within the range of the Okhotsk or Bering DPSs are likely to place or contribute to placing those spotted seals in danger of extinction in the foreseeable future. Therefore this factor was rated as high for the southern DPS and moderate for the Okhotsk and Bering DPSs.

Conservation Efforts

When considering the listing of a species, section 4(b)(1)(A) of the ESA requires us to consider efforts by any State, foreign nation, or political subdivision of a State or foreign nation to protect the species. Such efforts would include measures by Native American tribes and organizations, local governments, and private organizations. Also, Federal, tribal, state, and foreign recovery actions (16 U.S.C. 1533(f)), and Federal consultation requirements (16 U.S.C. 1536) constitute conservation measures. In addition to identifying these efforts, under the act and our policy implementing this provision (68 FR 15100; March 28, 2003) we must evaluate the certainty of an effort's effectiveness on the basis of whether the effort or plan establishes specific conservation objectives; identifies the necessary steps to reduce threats or factors for decline; includes quantifiable performance measures for the monitoring of compliance and effectiveness; incorporates the principles of adaptive management; is likely to be implemented, and is likely to improve the species' viability at the time of the listing determination.

International Actions and Agreements

Several conservation efforts have been undertaken by foreign nations specifically to protect spotted seals. These include: (1) Russia has established the Far Eastern Marine Reserve in Russia's Peter the Great Bay. The islands of the Reserve provide protection from human disturbance and suitable haul-out sites for spotted seals; (2) China's Liaoning provincial government has banned the hunting of spotted seals, and established two national protected areas for the protection of spotted seals in the Liaodong Bay area, including the Dalian National Spotted Seal Nature Reserve. However, in 2006, the Dalian Nature Reserve's boundaries were adjusted to accommodate industrial development; (3) Spotted seals are listed in the Second

Category (II) of the ''State Key Protected Wildlife List'' in China and listed as Vulnerable (V) in the ''China Red Data Book of Endangered Animals''; (4) Spotted seals are categorized as Critically Endangered in the Yellow Sea, but this may be a misinterpretation; (5) The spotted seal is designated a vulnerable species under the Wildlife Conservation Act of China. However, as of 2004, no conservation action, public awareness or education programs have been carried out for the species in this region; and (6) In 2000, spotted seals were afforded protected status under the Wildlife Conservation Act of South Korea. Despite this protection, the Liaodong Gulf population, shared between China and Korea, continues to decline.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is a treaty aimed at protecting species at risk from international trade. CITES regulates international trade in animals and plants by listing species in one of its three appendices. Spotted seals are not listed under CITES.

The International Union for the Conservation of Nature (IUCN) Red List identifies and documents those species most in need of conservation attention if global extinction rates are to be reduced, and is widely recognized as the most comprehensive, apolitical, global approach for evaluating the conservation status of plant and animal species. In order to produce Red Lists of threatened species worldwide, the IUCN Species Survival Commission draws on a network of scientists and partner organizations, which use a scientifically rigorous approach to determine species' risks of extinction. Because current abundance and population trends are unknown, the spotted seal is currently classified as ''Data Deficient'' on the IUCN Red List. The Red List assessment also suggests that reductions of the spotted seal population could exceed 30% in the next 30 years due to predicted reductions in its sea ice habitat, which would then meet the IUCN criterion for ''Vulnerable''.

There are no known regulatory mechanisms that effectively address reductions in sea ice habitat at this time. The primary international regulatory mechanisms addressing greenhouse gas emissions and global warming are the United Nations Framework Convention on Climate Change and the Kyoto Protocol. However, the Kyoto Protocol's first commitment period only sets targets for action through 2012. There is no regulatory mechanism governing greenhouse gas emissions in the years beyond 2012. The United States, although a signatory to the Kyoto Protocol, has not ratified it; therefore, the Kyoto Protocol is non-binding on the United States.

Domestic Regulatory Mechanisms

Several laws exist that directly or indirectly promote the conservation and protection of spotted seals. These include the Marine Mammal Protection Act of 1972, the National Environmental Policy Act, the Outer Continental Shelf Lands Act, the Coastal Zone Management Act, and the Marine Protection, Research and Sanctuaries Act.

There are currently no legal mechanisms regulating greenhouse gases in the United States. Greenhouse gas emissions have not been effectively regulated under the United State's Clean Air Act (CAA). In 2003, the EPA rejected a petition urging it to regulate greenhouse gas emissions from automobiles under the CAA. In 2007, the Supreme Court overturned the EPA's refusal to regulate these emissions and remanded the matter to the agency for further consideration (*Mass.* v. *EPA*, 549 U.S. 497 (2007)). On April 17, 2009, the EPA issued a proposed finding that greenhouse gases contribute to air pollution that may endanger public health and welfare. The proposed finding identified six greenhouse gases that pose a potential threat. However, the proposed finding does not include any proposed regulations. Before taking any steps to reduce greenhouse gases under the CAA, the EPA must conduct an appropriate process and consider public comment on the proposed finding.

At this time, NMFS is not aware of any formalized conservation efforts for spotted seals that have yet to be implemented, or which have recently been implemented, but have yet to show their effectiveness in removing threats to the species. NMFS co-manages spotted seals with the Ice Seal Committee (ISC). The ISC is an Alaska Native Organization dedicated to conserving seal populations, habitat, and hunting in order to help preserve native cultures and traditions. The ISC co-manages ice seals with NMFS by monitoring subsistence harvest and cooperating on needed research and education programs pertaining to ice seals. NMFS's National Marine Mammal Laboratory is engaged in an active research program for spotted seals. The information from new research will be used to enhance our understanding of the risk factors affecting spotted seals, thereby improving our ability to develop effective management measures for the species.

Based on our analysis of both international and domestic conservation efforts there is no certainty that these efforts will be effective in altering the status of any of the DPSs of spotted seals. Therefore, this analysis does not affect our determination of the extinction risk or ESA listing status of these DPSs.

Based on the Extinction Risk Assessment and consideration of section 4(a)(1) of the ESA and the listing regulations, we find that the Southern DPS is likely to become an endangered species within the foreseeable future and should be listed as a threatened species ,and the Bering and Okhotsk DPSs are not in danger of extinction nor of becoming endangered within the foreseeable future, and do not qualify for listing.

Significant Portion of Their Range

The ESA defines ''endangered'' and ''threatened'' in terms of both the entirety of the species (as defined under ESA to include DPSs) and relative to a ''significant portion of its range''. That is, if a species is found to be threatened or endangered within a significant portion of its range, the entire species may be listed at that level. Here we consider whether the spotted seal DPSs, treated as ''species'' for these purposes, should be listed as threatened or endangered based on their condition throughout a significant portion of their range. Having already determined from our extinction risk assessment and PECE policy analysis that the Southern DPS qualifies as a threatened species and the Bering and Okhotsk DPSs do not qualify for listing, we considered whether any subdivision of these DPS's range could be identified. If we found such a subdivision, we then considered the status of the spotted seals within that subdivision relative to the wider DPS. If we found that those seals in the subdivision may qualify as threatened or endangered, the subdivision was then assessed as to whether it could constitute a significant portion of the range of the DPS.

As discussed above, there are few data to comprehensively identify the actual range of the spotted seal. The species is known to travel over 1,000 km in foraging trips, indicating there may be considerable overlap in the range of the three DPSs. For purposes of this analysis, we considered a more functional range as suggested by the status review and based on breeding populations. We considered subdivisions within the range of each DPS based on any known biological or physical basis using information presented in the status review. This

indicated that, while certain geographical features could be identified as having significance in defining range, these features were pertinent to the identification of the three DPSs and were not of sufficient resolution to define any subdivision within any of the DPSs. The status review does, however, identify eight recognized breeding areas for the spotted seals. Each of these areas has some geographical distinction and many had significant biological distinction in terms of genetic information or behavior. Generally, spotted seals display a high degree of fidelity to breeding sites, making these areas a reasonable subdivision of the range of each DPS for this analysis.

We next considered whether the population of spotted seals within each of these breeding areas might be threatened or endangered. The Bering DPS contains the Bering Sea, Gulf of Anadyr, and Karaginsky Bay breeding areas. The best scientific and commercial information available suggests the Bering DPS exceeds 100,000. No trend data are available. The total Bering Sea breeding area is reported to have a spotted seal population of approximately 100,000. We have no abundance information for the Gulf of Anadyr or Karaginsky Bay breeding areas. While we lack specific information on each of these subdivisions, the status review concluded that the Bering DPS has persisted at a large abundance level over the past decades with no extreme fluctuations. The consequences of the potential threats to the Bering Sea population, including from climate change, have been addressed in previous sections of this proposed rule, and we have no information that would lead to a different conclusion for any of the specific subdivisions of the Bering DPS. Therefore, the spotted seal is not considered to be threatened or endangered within any of the Bering DPS subdivisions. Accordingly, even if we were to assume that each subdivision constituted a significant portion of the range, the Bering DPS of the spotted seal would not be in danger of extinction throughout a significant portion of its range.

The Okhotsk DPS contains the breeding areas Tatar Strait, Southwest Sea of Okhotsk and the Northeast Sea of Okhotsk. The best scientific and commercial information available indicates that there are approximately 100,000 spotted seals in this DPS. The Tatar Strait population was estimated at 8,000–11,000 in 1968–1969, and no other estimates were found. Like the Bering DPS, there are large gaps in our information for the Okhotsk DPS. The status review summarized the DPS as numbering around 100,000 individuals; thus demographic and genetic risks should not be a concern. This DPS is at some risk due to climate change and development (other natural or human factors affecting the species' continued existence), and those risks may exceed those of the Bering DPS. Nonetheless, we have concluded the Okhotsk DPS is not currently in danger of extinction nor likely to become so in the foreseeable future. In the absence of current information on the abundance levels or threats that may occur within each of the subdivisions of this DPS, we have no basis to conclude that the spotted seal may be considered threatened or endangered in any of those specific subdivisions. Accordingly, there is no information to suggest that this DPS is in danger of extinction throughout a significant portion of its range.

We have identified the southern DPS to include breeding areas in Liaodong Bay and Peter the Great Bay. Both of these subdivisions are subject to high levels of shipping and have actual or potential value for oil production presenting the potential for oil spills. However there have been no significant adverse effects observed due to oil and gas development to date, and it is difficult to predict future consequences because of a lack of specific information on where and how these activities would occur. We would rate these factors as low for both subdivisions.

Historic abundance in Peter the Great Bay is estimated at several thousand spotted seals, while the most current abundance figures are about 2,500, producing about 300 pups annually. The majority of these seals are now reproducing on shore rather than on ice. Because spotted seals in Peter the Great Bay do not appear to be significantly reduced and are breeding successfully on land (albeit at some increased risk due to the use of these terrestrial sites), we do not find this subdivision would warrant listing as threatened or endangered. Consideration of the other factors described in the Extinction Risk Analysis did not indicate the spotted seal population of the Peter the Great subdivision is not in danger of extinction nor of becoming endangered within the foreseeable future, and would not qualify for listing.

The most recent abundance estimate for the Liaodong Bay population of spotted seals is 800, which is significantly lower that the historic estimates (c. 1940) of over 8,000. The decline has been attributed to over hunting and habitat destruction (Woo and Yoo, 2004), and spotted seal mortalities continue in this subdivision due to fisheries by-catch, direct killing by commercial fisheries, and poaching. It is expected that seasonal ice will rarely form in this area by about the middle of the 21st century. While spotted seals appear to have some capability to accomplish breeding and molting on shore, pinnipeds are generally not well protected from predation when they are constrained by the necessity of maintaining a mother-pup bond. Also, suitable space for spotted seals to breed on land is likely limited to offshore rocks and small islands without human habitation, which may be relatively scarce here. It is clear that the Liaodong Bay spotted seals are already significantly reduced from historical levels, and if reduced further they may begin to be at significant risk from small-population threats such as demographic stochasticity and genetic problems. Based on these considerations, we find the Liaodong Bay spotted seals to be in danger of becoming extinct within the foreseeable future, and to be a threatened species. Because this finding is consistent with our listing recommendation for the southern DPS, no further analysis is necessary regarding whether Liaodong Bay constitutes a significant portion of this DPS range.

In summary, an analysis of the significant portions of the range of the identified DPSs of spotted seals does not lead to any changes from our listing recommendations.

Listing Determinations

We have reviewed the status of the spotted seal, considering the best scientific and commercial data available. We have reviewed threats and other factors to the three DPSs, and given consideration to conservation efforts and special designations for spotted seals by states and foreign nations. In consideration of all of the threats and potential threats identified above, the assessment of the risks posed by those threats, the possible cumulative impacts, and the uncertainty associated with all of these, we draw the following conclusions:

Okhotsk DPS: (1) Although accurate abundance and trend data are not available for this DPS, the best scientific and commercial data available indicates it contains more than 100,000 individuals with no strong evidence of a declining trend; (2) It is likely that reductions will occur in both the timing and extent of sea ice for this DPS; however, these changes cannot be accurately modeled and the consequences of diminished sea ice to

the seals in these areas is speculative. For example, spotted seals have demonstrated an ability to adapt to terrestrial sites, and sea ice in the Sea of Okhotsk often extends past productive shelf waters. Therefore, it is possible that any diminished extent of ice here will place the ice edge over more productive feeding habitat for the seals. Consequently, despite the expectation of a gradual decline, the Okhotsk DPS is not presently in danger of extinction nor likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. We conclude that listing them as threatened or endangered under the ESA is not warranted.

Bering DPS: (1) Although accurate abundance and trend data are not available for these DPSs, the best scientific and commercial data available indicates that each DPS contains more than 100,000 individuals with no strong evidence of a declining trend; (2) It is likely that reductions will occur in both the timing and extent of sea ice in the range of these DPSs; however, these changes cannot be accurately modeled and the consequences of diminished sea ice to the seals in these areas is speculative. While the effects of climate change may decrease suitable habitat for spotted seals in the south, such losses may be offset, in part, by increases in suitable habitat in the north. Even if sea ice were to vanish completely from the Bering Sea, this population of spotted seals may adjust by relocating their breeding grounds to follow the northward shift of the annual ice front into the Chukchi Sea. Therefore, the Bering DPS is not presently in danger of extinction nor likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. We conclude that listing them as threatened or endangered under the ESA is not warranted.

Southern DPS: (1) Abundance estimates indicate the Liaodong Bay spotted seals have been significantly reduced from historic numbers, while the Peter The Great population appears to be near historic numbers and stable; (2) projected warming by mid-century indicates reliable ice formation will cease to occur in this region; (3) there already is significant use of terrestrial habitat for breeding and whelping by spotted seals in this DPS; (4) overall, the southern DPS has been significantly reduced in number and now exists at abundance levels where additional loss would threaten this DPS through ''small population'' or demographic stochasticity effects; (5) the continued viability of using terrestrial sites is unknown, but may be limited in area or predispose spotted seals to predation and other natural and anthropogenic effects. Therefore, the Southern DPS of spotted seals is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range and we propose to list this DPS as threatened under the ESA.

Prohibitions and Protective Measures

Section 9 of the ESA prohibits certain activities that directly or indirectly affect endangered species. These prohibitions apply to all individuals, organizations and agencies subject to U.S. jurisdiction. Section 4(d) of the ESA directs the Secretary of Commerce (Secretary) to implement regulations ''to provide for the conservation of [threatened] species,'' that may include extending any or all of the prohibitions of section 9 to threatened species. Section 9(a)(1)(g) also prohibits violations of protective regulations for threatened species implemented under section 4(d). We are proposing protective regulations pursuant to section 4(d) for the southern DPS to include all of the prohibitions in Section 9(a)(1). Sections 7(a)(2) and (4) of the ESA require Federal agencies to consult with us to ensure that activities they authorize, fund, or conduct are not likely to jeopardize the continued existence of a listed species or a species proposed for listing, or to adversely modify critical habitat or proposed critical habitat. If a federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with us.

Sections 10(a)(1)(A) and (B) of the ESA provide us with authority to grant exceptions to the ESA's Section 9 ''take'' prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-Federal) for scientific purposes or to enhance the propagation or survival of a listed species. The type of activities potentially requiring a section 10(a)(1)(A) research/enhancement permit include scientific research that targets spotted seals.

Our Policies on Endangered and Threatened Wildlife

On July 1, 1994, we and FWS published a series of policies regarding listings under the ESA, including a policy for peer review of scientific data (59 FR 34270) and a policy to identify, to the maximum extent possible, those activities that would or would not constitute a violation of section 9 of the ESA (59 FR 34272). We must also follow the Office of Management and Budget Policy for peer review as described below.

Role of Peer Review

The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. Prior to a final listing, we will solicit the expert opinions of three qualified specialists, concurrent with the public comment period. Independent specialists will be selected from the academic and scientific community, Federal and state agencies, and the private sector.

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Public Law 106–554), is intended to enhance the quality and credibility of the Federal Government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. To satisfy our requirements under the OMB Bulletin, we are obtaining independent peer review of the draft status report, which supports this proposal to list three DPSs of rockfish in Puget Sound and Georgia Basin as threatened or endangered; all peer reviewer comments will be addressed prior to dissemination of the final report and publication of the final rule.

Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA

The intent of this policy is to increase public awareness of the effect of our ESA listing on proposed and ongoing activities within the species' range. We will identify, to the extent known at the time of the final rule, specific activities that will be considered likely to result in violation of section 9, as well as activities that will not be considered likely to result in violation. Because the southern DPS occurs outside of the jurisdiction of the United States, we are presently unaware of any activities that could result in violation of section 9 of the ESA.

Critical Habitat

Critical habitat is not to be designated within foreign countries or in other areas outside of United States jurisdiction (50 CFR 424.12(h)). Because the known distribution of the Southern DPS occurs in areas outside the

jurisdiction of the United States, no critical habitat will be designated as part of the proposed listing actions.

Public Hearings

50 CFR 424.16(c)(3) requires the Secretary to promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed rule to list a species. Such hearings provide the opportunity for interested individuals and parties to give opinions, exchange information, and engage in a constructive dialogue concerning this proposed rule. We encourage the public's involvement in this matter. If hearings are requested, details regarding location(s), date(s), and time(s) will be published in a forthcoming **Federal Register** notice.

Public Comments Solicited

Relying on the best scientific and commercial information available, we exercised our best professional judgment in developing this proposal to list the southern DPS of spotted seals. To ensure that the final action resulting from this proposal will be as accurate and effective as possible, we are soliciting comments and suggestions from the public, other governmental agencies, the governments of China, Japan, and Russia, the scientific community, industry, and any other interested parties. Comments are encouraged on this proposal as well as on the Status Review (See **DATES** and **ADDRESSES**). We will review all public comments and any additional information regarding the status of these DPSs and will complete a final determination within 1 year of publication of this proposed rule, as required under the ESA. Final promulgation of the regulation(s) will consider the comments and any additional information we receive, and such communications may lead to a final regulation that differs from this proposal.

Classification

National Environmental Policy Act (NEPA)

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in Pacific Legal Foundation v. Andrus, 657 F. 2d 829 (6th Cir. 1981), we have concluded that NEPA does not apply to ESA listing actions (See also NOAA Administrative Order 216–6.).

Executive Order (E.O.) 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analyses required by the Regulatory Flexibility Act are not applicable to the listing process. In addition, this rule is exempt from review under Executive Order 12866. This rule does not contain a collection of information requirement for the purposes of the Paperwork Reduction Act.

Executive Order 13132, Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific directives for consultation in situations where a regulation will preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this rule.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and co-management agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. E.O. 13175 - Consultation and Coordination with Indian Tribal Governments - outlines the responsibilities of the Federal Government in matters affecting tribal interests. Section 161 of Public Law 108–199 (188 Stat. 452), as amended by section 518 of Public Law 108–447 (118 Stat. 3267), directs all Federal agencies to consult with Alaska Native corporations on the same basis as Indian tribes under E.O. 13175.

We have determined the proposed listing actions would not have tribal implications nor affect any tribal governments or issues. The southern DPS does not occur within Alaska, and therefore is not hunted by Alaskan Natives for traditional use or subsistence purposes.

References Cited

A complete list of all references cited in this rulemaking can be found on our website at *http://www.fakr.noaa.gov/* and is available upon request from the NMFS office in Juneau, Alaska (see **ADDRESSES**).

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: October 14, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 223 is proposed to be amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

1. The authority citation of part 223 continues to read as follows:

Authority: 16 U.S.C. 1531 1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

2. In § 223.102, paragraph (a)(3) is added to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

(c) * * *

Species[1]		Where Listed	Citation(s) for listing determination(s)	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
* * *	*	*	*	*
(3) Southern DPS – Spotted Seal	*Phoca largha*	The southern DPS includes all breeding populations of spotted seals south of 43 degrees north latitude in the Pacific Ocean.	[INSERT FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE]	NA
* * *	*	*	*	*

3. In Subpart B of part 223, Add § 223.211 to read as follows:

§ 223.211 Southern DPS of Spotted Seal.

Prohibitions. The prohibitions of section 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species shall apply to the Southern Distinct Population Segment of the Spotted Seal listed in § 223.102(a)(3).

[FR Doc. E9–25198 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 74, No. 201
Tuesday, October 20, 2009

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

National Agricultural Library

Notice of Intent To Seek Approval To Collect Information

AGENCY: Agricultural Research Service (ARS), USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget (OMB) regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995), this notice announces the Agricultural Research Service's intent to electronically survey farmers about the current level of effectiveness of transferring ARS developed technology to farmers and identify how to improve the technology transfer process.

DATES: Comments on this notice must be received by December 24, 2009 to be assured of consideration.

ADDRESSES: Address all comments concerning this notice to Bryan Kaphammer, Technology Transfer Coordinator, U.S. Department of Agriculture Agricultural Research Service, 2150 Centre Avenue, Building D, Fort Collins, CO 80526–8119. Comments may be sent by facsimile to (970) 492–7023, or e-mail to *bryan.kaphammer@ars.usda.gov*.

FOR FURTHER INFORMATION CONTACT: Bryan Kaphammer, telephone (970) 492–7028.

SUPPLEMENTARY INFORMATION:

Title: National Program 216 Technology Transfer Project End-users' Inputs.

OMB Number:

Expiration Date:

Type of Request: Approval for data collection from individual farmers.

Abstract: This survey contains eighteen items. The majority of the questions ask for multiple choice answers. The Agricultural Research Service's mission is to develop science based solutions to the countries agricultural problems. Transferring these solutions to the U.S. agricultural community is a major part of ARS' mission. The purpose of this short survey is to determine the current situation of transferring technology from Agricultural Research Service to farmers and identify alternatives to improve the technology transferring process and better meet the farmer's technological needs.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average five minutes per respondent.

Respondents: Individuals who are interested in joining an electronic discussion group.

Estimated Number of Respondents: 2,500 per year.

Estimated Total Annual Burden on Respondents: 12,500 minutes or 208.3 hours.

Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who respond, including the use of appropriate automated, electronic, mechanical, or other technology. Comments should be sent to the address in the preamble. All responses to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record.

Dated: October 1, 2009.

Richard Brenner,

Assistant Administrator, ARS.

[FR Doc. E9–25228 Filed 10–19–09; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Forest Service

Ketchikan Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Ketchikan Resource Advisory Committee will meet in Ketchikan, Alaska, November 18, 2009. The purpose of this meeting is to discuss potential projects under the Secure Rural Schools and Community Self-Determination Act of 2008.

DATES: The meeting will be held November 18, 2009 at 6 p.m.

ADDRESSES: The meeting will be held at the Ketchikan-Misty Fjords Ranger District Office, 3031 Tongass Avenue, Ketchikan, Alaska. Send written comments to Ketchikan Resource Advisory Committee, do District Ranger, USDA Forest Service, 3031 Tongass Ave., Ketchikan, AK 99901, or electronically to Diane Daniels, RAC Coordinator at *ddaniels@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Diane Daniels, RAC Coordinator, Ketchikan-Misty Fjords Ranger District, Tongass National Forest, (907) 228–4105.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: October 9, 2009.

Forrest Cole,

Forest Supervisor.

[FR Doc. E9–25056 Filed 10–19–09; 8:45 am]

BILLING CODE 3410–11–M

AGENCY FOR INTERNATIONAL DEVELOPMENT

Bureau for Democracy, Conflict and Humanitarian Assistance; Office of Food for Peace; Announcement of Food for Peace Title II Proposal Guidance and Program Policies Fiscal Year 2010; Notice

Pursuant to the Agricultural Trade Development and Assistance Act of 1954 (Pub. L. 480, as amended), notice

is hereby given that the Title II Proposal Guidance and Program Policies Fiscal Year 2010 will be available to interested parties for general viewing.

For individuals who wish to review this guidance, the Title II Proposal Guidance and Program Policies will be available for your review for thirty days via the Food for Peace Web site: *http://www.usaid.gov/our_work/humanitarian_assistance/ffp/guide.html* on or about October 21, 2009. Interested parties can also receive a copy of the draft guidance by contacting the Office of Food for Peace, U.S. Agency for International Development, RRB 7.06–152, 1300 Pennsylvania Avenue, NW., Washington, DC 20523–7600.

Juli Majernik,

Grants Manager, Policy and Technical Division, Office of Food for Peace, Bureau for Democracy, Conflict and Humanitarian Assistance.

[FR Doc. E9–25145 Filed 10–19–09; 8:45 am]

BILLING CODE 6116–01–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

Board for International Food and Agricultural Development; One Hundred and Fifty-Eighth Meeting

Notice of Meeting

Pursuant to the Federal Advisory Committee Act, notice is hereby given of the one hundred and fifty-eighth meeting of the Board for International Food and Agricultural Development (BIFAD). The meeting will be held from 8:30 a.m. to 4 p.m. on October 13, 2009 at the Des Moines Marriott Downtown located at 700 Grand Avenue, Des Moines, Iowa. The meeting venue is in the Marriott Hotel's Iowa Ballroom, Salons A, B, and C located on the second floor. ''Higher Education: A Critical Partner in Global Agricultural Development'' will be the central theme of BIFAD's initiatives and the October meeting.

Dr. Robert Easter, Chairman of BIFAD, will preside over the proceedings. Dr. Easter is Interim Provost and Vice Chancellor for Academic Affairs, University of Illinois at Urbana-Champaign.

With the passing of Dr. Norman Borlaug on September 12, 2009 it is most fitting that Food Security remains the central focus of BIFAD's Agenda for its 158th meeting. The Board, working closely in tandem with USAID, continues to seek ways to enhance and systematize agricultural development oriented university relationships with USAID. Within this context is the recognition that only through broad-based partnerships and multidisciplinary approaches will the US achieve priority foreign assistance goals in a dramatically changed development world. It is in the sprit of the Title XII mandates and in view of today's development realities, underpinned by complex socio-economic conditions and regional conflicts that BIFAD is leading as a ''gateway'' to the university community.

In tribute to one of the world's greatest and most humble plant scientists who labored to provide food to those in most need and because he saw food as a moral right the BIFAD will open its 158th meeting with a special tribute in his memory. Likewise the BIFAD will present a special Resolution to honor Dr. Norman E. Borlaug. The special tribute will be presented by Allen C. Christensen, past Board member and Director of the Benson Agricultural and Food Institute.

Fred Cholick, Dean and Director, College of Agriculture, Kansas State University will lead the morning's first technical session. He will present a report on the findings and recommendations coming from the BIFAD sponsored Conference of Deans (COD II). The COD II was held on June 28 and 29, 2009 in Washington, DC. Incorporating the USAID's priority on food security in foreign assistance, ''Building a Global Food Security Strategy: The Role of Higher Education in US International Development'' served as the COD II's theme. The Board will be moving forward to present the COD II results to the USAID Administrator.

At mid-morning the Board will host a dialogue on university and USAID partnership. Specifically to be addressed will be the BIFAD/USAID Strategic Partnership Memorandum of Understanding which is being developed jointly. Presenting for USAID will be Carol Grigsby, Deputy Director, Office of Development Partners, USAID. Moderating the discussion for the universities will be Jack Payne, Vice President for Extension & Outreach, Iowa State University. The objective of the MOU is to strengthen university and USAID engagement through joint activities centered around, but not limited to, food security.

Reflecting the growing reality that USAID and its partners must now implement development programs in conflict zones the Board has invited a special presentation, ''Universities and Possible Role in Counter-Insurgency: New Thinking on Civil-Military Collaboration.'' This presentation, a follow-on to one delivered at the Board's 157th meeting, (7/29/09) will focus on Afghanistan and how the Improvised Explosive Device (IED) must also be countered via strategic and long-term development interventions through education and agriculture. Julia Erdley, Science Advisor, Joint Improvised Explosive Device Defeat Organization (JIEDDO), the Pentagon will be presenting. This presentation is scheduled for 11 a.m. right after the morning break.

Concluding the morning session Kerry Bolognese, Vice-President, Association for Public and Land-Grant Universities (APLU) will provide a progress update on the Africa-US Higher Education Initiative. Kerry will discuss the status of the partnership plans, the recent conference in Ghana of awardees, and how the Initiative will result in building the higher education capacity of Sub-Saharan Africa, which will be critical to the regions long-term economic growth.

After an executive luncheon (closed to the public) the Board will re-convene. Scheduled as the afternoon's first session is a panel discussion, ''Critical Role of Minority Serving Institutions in Today's Complex Agricultural Development Environment.'' This discussion is being designed to open a new dialogue and begin exploring effective partnering with USAID. Bill DeLauder, Board member and President Emeritus, Delaware State University will be moderating the panel discussion.

Following the MSI panel Alice Pell, Professor and Provost, College of Agriculture, Cornell University, will present an update on how land-grant universities can contribute to USAID's agricultural development strategy in Afghanistan. In recent months BIFAD has been coordinating efforts with USAID's Asia Near East Bureau (ANE). Under BIFAD's lead a special symposium was held (8/19/09) discuss how land-grant universities can contribute to development in Afghanistan, including the Administration's intent to emphasize joint programming, and country level Afghan-first ownership. Experts from nine universities with Afghanistan experience met with representatives from USAID/Washington and Pakistan, the Department of State, USDA (CSREES & FAS) and NGOs.

Concluding the afternoon session the Board will hear an update and BIFAD's comments on USAID's FY 2008 Title XII Report to Congress. John Becker, Senior Policy Advisor, BIFAD Secretariat, Office of Development Partners, USAID will present the report. Also to be discussed will be the Office of Development Partners management plans to open up an early dialog with BIFAD, the universities and

Congressional staff as the report is being developed.

The Board meeting is open to the public. The Board welcomes open dialogue to promote greater focus on critical issues facing USAID, the role of universities in development, and applications of U.S. scientific, technical and institutional capabilities to international agriculture. **Note on Public Comments:** Due to time constraints public comments to the Board will be limited to two (2) minutes to accommodate as many as possible. It is preferred to have comments submitted to the Board in writing. Two periods for public comment will be provided during the Board meeting—just before lunch and adjournment.

Those wishing to attend the meeting or obtain additional information about BIFAD should contact Dr. Ronald S. Senykoff, Executive Director and Designated Federal Officer for BIFAD. Write him in care of the U.S. Agency for International Development, Ronald Reagan Building, Office of Development Partners, 1300 Pennsylvania Avenue, NW., Room 6.7–153, Washington, DC 20523–2110 or telephone him at (202) 712–0218 or fax (202) 216–3124.

Ronald S. Senykoff,

Executive Director and USAID Designated Federal Officer for BIFAD, Office of Development Partners, U.S. Agency for International Development.

[FR Doc. E9–25143 Filed 10–19–09; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF COMMERCE

Environmental Technologies Trade Advisory Committee (ETTAC)

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The Environmental Technologies Trade Advisory Committee (ETTAC) will hold a plenary meeting on October 29, 2009 at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, in Room 3407. The ETTAC will discuss environmental goods and services trade liberalization efforts in the World Trade Organization, United Nations climate negotiations in Copenhagen, and other administrative items. This is the first time this ETTAC will meet since its re-chartering in September 2009. The meeting is open to the public and time will be permitted for public comment.

Written comments concerning ETTAC affairs are welcome anytime before or after the meeting. Minutes will be available within 30 days of this meeting.

The ETTAC is mandated by Public Law 103–392. It was created to advise the U.S. government on environmental trade policies and programs, and to help it to focus its resources on increasing the exports of the U.S. environmental industry. ETTAC operates as an advisory committee to the Secretary of Commerce and the Trade Promotion Coordinating Committee (TPCC). ETTAC was originally chartered in May of 1994. It was most recently re-chartered until September 2010.

DATES: October 29, 2009.

Time: 9 a.m. to 3 p.m.

ADDRESSES: For further information phone Ellen Bohon, Office of Energy and Environmental Technologies Industries (OEEI), International Trade Administration, U.S. Department of Commerce at (202) 482–0359 or via e-mail at: *Ellen.bohon@mail.doc.gov*. This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to OEEI at (202) 482–5225.

Cheryl McQueen,

Acting Director, Office of Energy and Environmental Industries, U.S. Department of Commerce.

[FR Doc. E9–25125 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Northeast Region Dealer Purchase Reports

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before December 21, 2009.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Peter Burns, (978) 281–9144 or *reporting.ne@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

Federally-permitted dealers, and any individual acting in the capacity of a dealer, must submit to the Regional Administrator or to the official designee a detailed report of all fish purchased or received for a commercial purpose, other than solely for transport on land by one of the available electronic reporting mechanisms approved by National Marine Fisheries Service (NMFS). The information obtained is used by economists, biologists, and managers in the management of the fisheries. The data collection parameters are consistent with the current requirements for Federal dealers under the authority of the Magnuson-Stevens Fishery Conservation and Management Act. NOAA is seeking to renew Paperwork Reduction Act approval for these requirements.

II. Method of Collection

Dealers submit purchasing information through an electronic process by either one of two NMFS supplied programs or through a NMFS approved mechanism.

III. Data

OMB Control Number: 0648–0229.

Form Number: NOAA Forms 88–30 is no longer being used. Federally permitted dealers submit fishery information through electronic processes.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations; individuals or households.

Estimated Number of Respondents: 781.

Estimated Time per Response: 4 minutes per fishing trip.

Estimated Total Annual Burden Hours: 2,722.

Estimated Total Annual Cost to Public: $460,200.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the

proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 15, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–25141 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Processed Products Family of Forms

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before December 21, 2009.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Alan Lowther, (301) 713–2328 or *Alan.Lowther@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

National Oceanic and Atmospheric Administration (NOAA) annually collects information from seafood and industrial fishing processing plants on the volume and value of their processed fishery products and monthly employment figures. NOAA also collects monthly information on the production of fish meal and oil. The information gathered is used by NOAA in the economic and social analyses when proposing and evaluating fishery management actions.

II. Method of Collection

In the current survey, NOAA's National Marine Fisheries Service (NMFS) provides each processor a pre-printed form that includes the products produced by the dealer in the previous year. The dealer needs only to fill in the quantities, and add any new products, before returning the form every year. Processors have the option to use a Web-based application that allows them to submit the data electronically.

III. Data

OMB Control Number: 0648–0018.

Form Number: NOAA Forms 88–13, 88–13C.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,322.

Estimated Time per Response: 30 minutes for an Annual Processed Products Report and 15 minutes for a Fishery Products Report Fish Meal and Oil, Monthly.

Estimated Total Annual Burden Hours: 681.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 15, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–25134 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–840, A–549–822]

Certain Frozen Warmwater Shrimp From India and Thailand: Notice of Extension of Time Limits for the Preliminary Results of the Fourth Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood (India) at (202) 482–3874, or Kate Johnson (Thailand) at (202) 482–4929, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Background

On April 7, 2009, the Department of Commerce (the Department) published a notice of initiation of the administrative reviews of the antidumping duty orders on certain frozen warmwater shrimp from Brazil, India and Thailand covering the period February 1, 2008, through January 31, 2009. *See Certain Frozen Warmwater Shrimp from Brazil, India, and Thailand: Notice of Initiation of Administrative Reviews,* 74 FR 15699 (April 7, 2009).

On May 13, 2009, the Department selected respondents for individual examination in the reviews of certain frozen warmwater shrimp from India and Thailand.[1] *See* the Memorandum from Holly Phelps to James Maeder entitled ''2008–2009 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India: Selection of Respondents for Individual Review,'' and the Memorandum from Kate Johnson and David Goldberger to James Maeder entitled ''2008–2009 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand: Selection of Respondents for Individual Review.''

[1] The Department rescinded the administrative review of frozen warmwater shrimp from Brazil on June 17, 2009. *See Certain Frozen Warmwater Shrimp from Brazil: Notice of Rescission of Antidumping Duty Administrative Review,* 74 FR 28665 (June 17, 2009).

Extension of Time Limit of Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to make a preliminary determination in an administrative review within 245 days after the last day of the anniversary month of an order or finding for which a review is requested. Consistent with section 751(a)(3)(A) of the Act, the Department may extend the 245-day period to 365 days if it is not practicable to complete the review within a 245-day period. The deadline for the preliminary results of these administrative reviews is currently November 2, 2009.[2] The Department determines that completion of the preliminary results of these reviews within the statutory time period is not practicable because we are unable to complete our review of the original and/or supplemental questionnaire responses for each respondent and conduct verifications within the current timeframe. The Department thus requires additional time to conduct its analysis for each company in these reviews. Therefore, in accordance with section 751(a)(3)(A) the Act, we are extending the time period for issuing the preliminary results of these reviews until March 1, 2010. The final results continue to be due 120 days after the publication of the preliminary results.

This notice is published pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2).

Dated: October 14, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–25185 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

A–552–802

Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Amended Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 15, 2009, the Department of Commerce (''Department'') published the final results and final partial rescission of the antidumping duty administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam (''Vietnam'') covering the period February 1, 2007, through January 31, 2008. *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47191 (September 15, 2009) (''*Final Results*''). Pursuant to section 751(h) of the Tariff Act of 1930, as amended (''the Act''), and 19 CFR 351.224(e), we are amending the *Final Results* to correct a ministerial error in the name assigned to a respondent not selected for individual examination, Thuan Phuoc Seafoods and Trading Corporation, that received a separate rate.

EFFECTIVE DATE: October 20, 2009.

FOR FURTHER INFORMATION CONTACT: Irene Gorelik, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482–6905.

SUPPLEMENTARY INFORMATION:

Background

On September 15, 2009, Minh Hai Export Frozen Seafood Processing Joint–Stock Company, Soc Trang Seafood Joint Stock Company, Bac Lieu Fisheries Joint Stock Company, Thuan Phuoc Seafoods and Trading Corporation, and UTXI Aquatic Products Processing Corporation (collectively, ''SR respondents'') filed timely allegations, pursuant to 19 CFR 351.224(c)(1), that the Department made ministerial errors regarding the respective company names listed in the *Final Results*. No other interested parties filed ministerial error allegations or rebuttals to the SR respondents' ministerial error allegation.

The SR respondents allege that the Department made a ministerial error with respect to the names listed in the ''Final Results of Review'' section of the *Final Results*. Specifically, Soc Trang Seafood Joint Stock Company claims that the Department inadvertently omitted the claimed ''doing–business-as'' (''dba'') name of ''STAPIMEX'' from the Final Results. Thuan Phuoc Seafoods and Trading Corporation argues that its name abbreviated as ''Thuan Phuoc JSC'' in the Final Results is not a dba name actually used by the company. Additionally, Thuan Phuoc Seafoods and Trading Corporation argues that the Department omitted six other dba names from the *Final Results*.[1] UTXI Aquatic Products Processing Corporation argues that the Department made a ministerial error in the *Final Results* by omitting the following dba names: UTXI, UTXI Co. Ltd., Khanh Loi Seafood Factory, and Hoang Phuong Seafood Factory. Lastly, Minh Hai Export Frozen Seafood Processing Joint–Stock Company argues that the Department omitted the abbreviation ''Minh Hai Export–Jostoco'' from the *Final Results*.

Amended Final Results of Review

A ministerial error, as defined in section 751(h) of the Act, includes ''errors in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the {Secretary} considers ministerial.'' *See also* 19 CFR 351.224(f). After analyzing the SR respondents' allegations, we have determined, in accordance with section 751(h) of the Act and 19 CFR 351.224(e), that the Department made a ministerial error in the *Final Results* by unintentionally assigning to Thuan Phuoc Seafoods and Trading Corporation an abbreviated form of its name, ''Thuan Phuoc JSC,'' that was not used by the company as a trade name.[2] Therefore, we are amending the final results of administrative review of certain frozen warmwater shrimp from Vietnam for the period February 1, 2007, through January 31, 2008, to remove ''Thuan Phuoc JSC'' as an abbreviation of SR respondent, Thuan Phuoc Seafoods and Trading Corporation. Although we disagree that we made ministerial errors with respect to the other allegations referenced above, for clarification we will include dba names in these amended final results. For further explanation of our reasons, *see Amended Final Memo*. The weighted–average percentage dumping margins have not changed from the *Final Results* for any companies:

[2] The original due date for the preliminary results, October 31, 2009, is a Saturday.

[1] Thuan Phuoc, Frozen Seafoods Factory No. 32, Frozen Seafoods Fty, Frozen Seafoods Factory 32, Seafoods and Foodstuff Factory, and My Son Seafood Factory.

[2] ''For a detailed explanation, *see* ''Memorandum to James C. Doyle, Director, Office 9, through Catherine Bertrand, Program Manager, Office 9, from Irene Gorelik, Senior Analyst, Office 9; Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Allegation of Ministerial Error in the Final Results of the Third Administrative Review,'' dated concurrently with the signature date of this notice (''*Amended Final Memo*''). In the *Amended Final Memo*, the Department also addresses the ministerial error allegations brought by Minh Hai Export Frozen Seafood Processing Joint-Stock Company, Soc Trang Seafood Joint Stock Company, Bac Lieu Fisheries Joint Stock Company, and UTXI Aquatic Products Processing Corporation.

CERTAIN FROZEN WARMWATER SHRIMP FROM VIETNAM

Manufacturer/Exporter	Weighted–Average Margin (Percent)
Thuan Phuoc Seafoods and Trading Corporation[3] aka,.	
Frozen Seafoods Factory No. 32, aka,.	
Frozen Seafoods Fty, aka,.	
Thuan Phuoc, aka.	
Frozen Seafoods Factory 32, aka.	
Seafoods and Foodstuff Factory, aka.	
My Son Seafoods Factory	4.57 %
Minh Hai Export Frozen Seafood Processing Joint Stock Company, aka.	
Minh Hai Jostoco, aka.	
Minh Hai Export Frozen Seafood Processing Joint–Stock Company (''Minh Hai Jostoco''), aka.	
Minh Hai Export Frozen Seafood Processing Joint–Stock Company, aka.	
Minh Hai Joint Stock Seafood Processing Joint–Stock Company, aka.	
Minh Hai Export Frozen Seafood Processing Joint–Stock Co., aka.	
Minh Hai Export Frozen Seafood Processing Joint–Stock Company Minh Hai Jostoco	4.57 %
Soc Trang Seafood Joint Stock Company[4], aka.	
STAPIMEX	4.57 %
UTXI Aquatic Products Processing Corporation[5], aka.	
UTXI, aka.	
UTXI Co. Ltd., aka.	
UTXICO.	
Khanh Loi Seafood Factory, aka.	
Hoang Phuong Seafood Factory	4.57 %
Vietnam–Wide Rate[6]	25.76 %

[3] This company, via a CCR, has assumed the separate rate for the former entity and all other trade names associated with the former entity that had also been previously granted separate rate status. *See Frozen Warmwater Shrimp From Vietnam: Notice of Final Results of Antidumping Duty Changed Circumstances Reviews*, 74 FR 42050 (August 20, 2009) *(''Vietnam Shrimp CCR Final''); see also Final Results* and accompanying Issues and Decision Memorandum at Comment 17.

[4] This company, via a CCR, has assumed the separate rate for the former entity and all other trade names associated with the former entity that had also been previously granted separate rate status. *See Vietnam Shrimp CCR Final; see also Final Results* and accompanying Issues and Decision Memorandum at Comment 17.

[5] This company, via a CCR, has assumed the separate rate for the former entity and all other trade names associated with the former entity that had also been previously granted separate rate status. *See Vietnam Shrimp CCR Final; see also Final Results* and accompanying Issues and Decision Memorandum at Comment 17.

[6] The Vietnam-wide entity includes: AAAS Logistics; Agrimex; Amerasian Shipping Logistics Corp.; American Container Line; An Giang Fisheries Import and Export Joint Stock Company (Agifish); An Xuyen; Angiang Agricultural; Technology Service Company; Aquatic Products Trading Company; Bentre Aquaproduct Imports & Exports; Bentre Forestry and Aquaproduct Import-Export Company (''FAQUIMEX''); Bentre Frozen Aquaproduct Exports; Bentre Seafood Joint Stock; Beseaco, Binh Dinh Fishery Joint Stock; Cantho Import-Export Seafood Joint Stock Company(''Caseamex''); Can Tho Import Export Fishery Limited Company (''CAFISH''); Ca Mau Seaproducts Exploitation and Service Corporation (''SES''); Camau Seafood Fty; Can Tho Seafood Exports; Cautre Enterprises; Chun Cheng Da Nang Co., Ltd.; Co Hieu; Cong Ty Do Hop Viet Cuong; Dao Van Manh; Dong Phuc Huynh; Dragon Waves Frozen Food Fty.; Duyen Hai Bac Lieu Company (''T.K. Co.''); Duyen Hai Foodstuffs Processing Factory (''COSEAFEX''); General Imports & Exports; Hacota; Hai Ha Private Enterprise; Hai Thuan Export Seaproduct Processing Co., Ltd. ; Hai Viet; Hai Viet Corporation (''HAVICO''); Hanoi Seaproducts Import Export Corporation (''Seaprodex Hanoi''); Seaprodex Hanoi; Hatrang Frozen Seaproduct Fty; Hoa Nam Marine Agricultural; Hoan An Fishery; Hoan Vu Marine Product Co., Ltd.; Hua Heong Food Ind Vietnam; Khanh Loi Trading; Kien Gang Sea Products Import - Export Company (Kisimex); Kien Gang Seaproduct Import and Export Company (''KISIMEX''); Konoike Vinatrans Logistics; Lamson Import-Export Foodstuffs Corporation; Long An Food Processing Export Joint Stock Company (''LAFOOCO''); Lucky Shing; Nam Hai; Nha Trang Company Limited; Nha Trang Fisheries Co. Ltd.; Pataya Food Industry (Vietnam) Ltd.; Phat Loc Seafood; Phung Hung Private Business; Saigon Orchide; Sea Product; Sea Products Imports & Exports; Seafood Company Zone II (''Thusaco2''); Seafood Processing Joint Stock Company No.9 (previously Seafood Processing Imports Exports); Seafoods and Foodstuff Factory; Seaprodex; Seaprodex Quang Tri; Sonacos; Song Huong ASC Import-Export Company Ltd.; Song Huong ASC Joint Stock Company; Special Aquatic Products Joint Stock Company (''Seaspimex''); SSC; T & T Co., Ltd.; Tacvan Frozen Seafoods Processing Export Company; Thami Shipping & Airfreight; Thang Long; Thanh Long; Thanh Doan Seaproducts Import; Thien Ma Seafood; Tourism Material and Equipment Company (Matourimex Hochiminh City Branch); Truc An Company; Trung Duc Fisheries Private Enterprise; V N Seafoods; Vien Thang Private Enterprise; Viet Nhan Company; Vietfracht Can Tho; Vietnam Northern Viking Technologie Co.; Vietnam Northern Viking Technology Co. Ltd.; Vietnam Tomec Co., Ltd.; Vilfood Co.; and Vita.

Assessment Rate

The Department will determine, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries based on the amended final results. For details on the assessment of antidumping duties on all appropriate entries, *see Final Results.* The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of the amended final results of the administrative review.

Cash Deposit Requirements

The following deposit rates will be effective retroactively on any entries made on or after September 15, 2009, the date of publication of the *Final Results*, for all shipments of certain frozen warmwater shrimp from Vietnam entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be established in these amended final results of review (except, if the rate is zero or *de minimis, i.e.*, less than 0.5 percent, a zero cash deposit rate will be required for that company); (2) for previously investigated or reviewed Vietnamese and non–Vietnamese exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter–specific rate published for the most recent period; (3) for all Vietnamese exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the Vietnamese–wide rate of 25.76 percent; and (4) for all non–Vietnamese

exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Vietnamese exporters that supplied that non–Vietnamese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred, and in the subsequent assessment of double antidumping duties.

Notification of Interested Parties

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during the review period. Pursuant to 19 CFR 351.402(f)(3), failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO as explained in the administrative protective order itself. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: October 13, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–25209 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(C–570–959)

Certain Coated Paper Suitable for High–Quality Print Graphics Using Sheet–Fed Presses from the People's Republic of China: Initiation of Countervailing Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: October 20, 2009.

FOR FURTHER INFORMATION CONTACT: Yasmin Nair and Joseph Shuler, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3813 and (202) 482–1293, respectively.

SUPPLEMENTARY INFORMATION:

The Petition

On September 23, 2009, the Department of Commerce (''Department'') received a petition filed in proper form by Appleton Coated LLC, NewPage Corporation, S.D. Warren Company d/b/a Sappi Fine Paper North America, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, ''Petitioners''), domestic producers of certain coated paper suitable for high–quality print graphics using sheet–fed presses (''coated paper'').[1] In response to the Department's requests, Petitioners provided timely information supplementing the Petition on October 2, 2009, and October 6, 2009.

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (''the Act''), Petitioners allege that manufacturers, producers, or exporters of coated paper in the People's Republic of China (''PRC'') receive countervailable subsidies within the meaning of section 701 of the Act, and that such imports are materially injuring, or threatening material injury to, an industry in the United States.

The Department finds that Petitioners filed the Petition on behalf of the domestic industry because they are interested parties as defined in section 771(9)(C) and (D) of the Act, and Petitioners have demonstrated sufficient industry support with respect to the countervailing duty (''CVD'') investigation (*see* ''Determination of Industry Support for the Petition'' section below).

Period of Investigation

The period of investigation is January 1, 2008, through December 31, 2008.

Scope of Investigation

The products covered by the investigation are coated paper products from the PRC. For a full description of the scope of the investigation, please see ''Scope of Investigation,'' in Appendix I of this notice.

Comments on Scope of Investigation

During our review of the Petition, we discussed the scope with Petitioners to ensure that it is an accurate reflection of the products for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the Department's regulations (*Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments by November 2, 2009, twenty calendar days from the signature date of this notice. Comments should be addressed to Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. The period of the scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determination.

Consultations

Pursuant to section 702(b)(4)(A)(ii) of the Act, on September 23, 2009, the Department invited representatives of the Government of the PRC (''GOC'') for consultations with respect to the CVD petition. The GOC did not request such consultations, however, on October 13, 2009, the GOC's Ministry of Commerce submitted to the United States Embassy in Beijing, China comments pertaining to the Petition.

Determination of Industry Support for the Petition

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the

[1] *See* Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, as Amended: Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fred Presses from the People's Republic of China, dated September 23, 2009 (''Petition'').

petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (*see* section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. *See USEC, Inc. v. United States*, 132 F. Supp. 2d 1, 8 (Ct. Int'l Trade 2001), citing *Algoma Steel Corp., Ltd. v. United States*, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989), *cert. denied* 492 U.S. 919 (1989).

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, Petitioners offer a definition of domestic like product that includes sheeter rolls (rolls of certain coated paper intended to be slit and used in sheet–fed presses) and, therefore, is broader than the scope of the investigation, which does not include sheeter rolls. Based on our analysis of the information submitted on the record, we have determined that coated paper described in the scope of the investigation and sheeter rolls constitute a single domestic like product and we have analyzed industry support in terms of that domestic like product. For a discussion of the domestic like product analysis in this case, *see* Countervailing Duty Investigation Initiation Checklist: Certain Coated Paper from the PRC (''PRC Initiation Checklist'') at Attachment II, Analysis of Industry Support for the Petitions Covering Certain Coated Paper from the People's Republic of China and Indonesia, dated concurrently with this notice and on file in the Central Records Unit, Room 1117 of the main Department of Commerce building.

In determining whether Petitioners have standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Petition with reference to the domestic like product as defined in the Petition. To establish industry support, Petitioners provided their own 2008 shipments of the domestic like product, as well as one supporting company's (SMART Papers) 2008 shipments, and compared the total to the 2008 shipments of the entire domestic industry. *See* Volume I of the Petition, at 2–3, Exhibits I–3, I–4, and I–19, and Supplement to the AD/CVD Petitions, dated October 2, 2009, at 19–22 and Exhibit 4. Petitioners estimated total 2008 shipments of the domestic like product based on the American Forest & Paper Association annual Coated Printing Papers Survey. *See* Volume I of the Petition, at 3 and Exhibits I–3 and I–4, and Supplement to the AD/CVD Petitions, dated October 2, 2009, at 22 and Exhibit 4; *see also* PRC Initiation Checklist at Attachment II.

Our review of the data provided in the Petition, supplemental submissions, and other information readily available to the Department indicates that Petitioners have established industry support. First, the Petition established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.*, polling). *See* section 702(c)(4)(D) of the Act; *see also* PRC Initiation Checklist at Attachment II. Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petition account for at least 25 percent of the total production of the domestic like product. *See* PRC Initiation Checklist at Attachment II. Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition. Accordingly, the Department determines that the Petition was filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act. *See id.*

The Department finds that Petitioners filed the Petition on behalf of the domestic industry because they are interested parties as defined in sections 771(9)(C) and 771(9)(D) of the Act and they have demonstrated sufficient industry support with respect to the CVD investigation that they are requesting the Department initiate. *See id.*

Injury Test

Because the PRC is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to this investigation. Accordingly, the ITC must determine whether imports of the subject merchandise from the PRC materially injure, or threaten material injury to, a U.S. industry.

Allegations and Evidence of Material Injury and Causation

Petitioners allege that imports of coated paper from the PRC are benefitting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the domestic industry producing certain coated paper. In addition, Petitioners allege that subsidized imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.

Petitioners contend that the industry's injured condition is illustrated by reduced market share, underselling and price depressing and suppressing effects, increased import penetration, lost sales and revenue, reduced production, capacity, and capacity utilization, reduced shipments and inventories, reduced employment, and reduced financial performance. We have assessed the allegations and supporting evidence regarding material injury,

threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation. *See* PRC Initiation Checklist at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Petitions Covering Certain Coated Paper from the People's Republic of China and Indonesia.

Initiation of Countervailing Duty Investigation

Section 702(b) of the Act requires the Department to initiate a CVD proceeding whenever an interested party files a petition on behalf of an industry that: (1) alleges the elements necessary for an imposition of a duty under section 701(a) of the Act; and (2) is accompanied by information reasonably available to Petitioner(s) supporting the allegations.

The Department has examined the CVD petition on coated paper from the PRC and finds that it complies with the requirements of section 702(b) of the Act. Therefore, in accordance with section 702(b) of the Act, we are initiating a CVD investigation to determine whether manufacturers, producers, or exporters of coated paper in the PRC receive countervailable subsidies. For a discussion of evidence supporting our initiation determination, see Initiation Checklist.

We are including in our investigation the following programs alleged in the Petition to have provided countervailable subsidies to producers and exporters of the subject merchandise in the PRC:

A. Preferential Lending to the Coated Paper Industry

1. Policy Loans from State–Owned Commercial Banks and Government Policy Banks
2. Fast–Growth High–Yield Forestry Program Loans

B. Income Tax Programs

1. Income Tax Exemption/Reduction under ''Two–Free/Three Half'' Program
2. Local Income Tax Exemption and Reductions for ''Productive'' Foreign–Invested Enterprises (''FIEs'')
3. Income Tax Reduction for FIEs Purchasing Domestically–Produced Equipment
4. Tax Subsidies to FIEs Based on Geographic Location
5. Preferential Tax Policies for Technology or Knowledge–Intensive FIEs
6. Tax Programs for FIEs that are High or New Technology Enterprises
7. Income Tax Reductions for High–Technology Industries in Guangdong Province
8. Preferential Tax Policies for Research and Development at FIEs
9. Income Tax Credits for Domestically–Owned Companies Purchasing Domestically–Produced Equipment
10. Income Tax Exemption Program for Export–Oriented FIEs
11. Corporate Income Tax Refund Program for Reinvestment of FIE profits in Export–Oriented Enterprises
12. Exemption from City Maintenance and Construction Taxes and Education Surcharges for FIEs

C. Indirect Tax and Import Tariff Programs

1. Value Added Tax (''VAT'') and Tariff Exemptions on Imported Equipment
2. VAT Rebates on Domestically Produced Equipment
3. Domestic VAT Refunds for Companies Located in the Hainan Economic Development Zone

D. Grant Programs

1. Funds for Forestry Plantation Construction and Management
2. The State Key Technologies Renovation Project Fund
3. Loan Interest Subsidies for Major Industrial Technology Reform Projects in Wuhan
4. Funds for Water Treatment Improvement Projects in the Songhuajiang Basin
5. Special Fund for Energy Saving Technology Reform in Wuhan and Shouguang Municipality
6. Clean Production Technology Fund
7. Famous Brands Awards

E. Provision of Goods or Services for Less Than Adequate Remuneration (''LTAR'')

1. Papermaking Chemicals
2. Electricity
3. Land–Use Rights to State Owned Enterprises

F. Economic Development Zone Programs

1. Subsidies in the Nanchang EDZ
2. Subsidies in the Wuhan EDZ
3. Subsidies in the Yangpu EDZ
4. Subsidies in the Zhenjiang EDZ

For further information explaining why the Department is investigating these programs, see Initiation Checklist.

We are not including in our investigation the following programs alleged to benefit producers and exporters of the subject merchandise in the PRC:

1. State Science and Technology Support Scheme

Petitioners allege that the GOC provides grants to support research and development under the National Mid–term and Long–term Science and Technology Plan (2006 – 2020). While the Department has relied on policy directives such as the 2007 Paper Plan and Decision No. 40 to support specificity findings with respect to policy lending, Petitioners have not pointed to any language in these policy directives regarding grants to promote research and development. Instead, the grants are given pursuant to the Science and Technology Plan and Petitioners' specificity allegations in this respect are based on Section 771(5A)(D)(ii) and (D)(iii)(I) of the Act. Regarding the former, Petitioners appear to argue that because eligibility is not automatic ((D)(ii)(I)) and/or because the eligibility criteria are not clearly set out ((D)(ii)(III)), the program is specific as a matter of law. However, Petitioners have misconstrued the structure of (D)(ii) and a finding of *de jure* specificity set forth under section 771(5A)(D)(i) of the Act. Section 771(5A)(D)(ii) does not mean that if one or more of the criterion listed under this section of the Act is not meet then the program is specific as a matter of law. To be specific as a matter of law the program must meet the standard set forth under section 771(5A)(D)(i) of the Act: the legislation under which the program operates expressly limits access to the subsidy to an enterprise or industry. Petitioners have failed to sufficiently allege or support a claim that this program is *de jure* specific under Section 771(5A)(D)(i) of the Act. Finally, Petitioners have provided no support for their claim that the number of recipients is limited. Consequently, we do not plan on investigating this program.

2. Special Funds for Environmental Protection

Petitioners allege that central, provincial, and local government funds, in the form of grants or loan interest subsidies, are available to support certain qualified environmental protection projects. Although Petitioners point to specific language in the Papermaking Plan regarding policy support, that Plan was in place from 2001 – 2005, while the measures authorizing these grants were put in place after that timeframe. Further, Petitioners have not provided evidence showing that grants provided pursuant

to these authorizations are specific in law under Section 771(5A)(D)(i) or in fact under Section 771(5A)(D)(iii). We do not agree with Petitioners' claim of specificity under Section 771(5A)(D)(ii) for the reasons explained above under, ''State Science and Technology Support Scheme.'' Consequently, we do not plan on investigating this program.

3. Provision of Coal for LTAR

Petitioners allege that the GOC provides coal to Chinese producers of coated paper for LTAR. Petitioners have not supported their allegation that this program is specific to paper producers. The program as it relates to electricity generation targets the electricity industry, not the papermaking industry. Further, Petitioners have not supported their claim that the paper industry is an ''export industry.'' Consequently, we do not plan on investigating this program.

4. Provision of Water for LTAR

Petitioners allege that the GOC provides favored sectors with differential water rates and unlimited water use. Petitioners have not provided sufficient support of a national policy to provide water for LTAR to coated paper producers. Consequently, we do not plan on investigating this program.

5. Currency Undervaluation

Petitioners allege that the GOC–maintained exchange rate effectively prevents the appreciation of the Chinese currency (RMB) against the U.S. dollar. Therefore, when producers/exporters in the PRC sell their dollars at official foreign exchange banks, as required by law, the producers receive more RMB than they otherwise would if the value of the RMB were set by market mechanisms. In the alternative, Petitioners allege that GOC foreign exchange market interventions constitute a price support (of the U.S. dollar vis a vis the RMB), within the meaning of section 771(5)(B)(ii). In both cases, Petitioners describe the benefit conferred as the excess of RMB received, over what would have been received at a market rate (''excess RMB'') and alleges specificity within the meaning of Section 771(5A)(B) of the Act by virtue of the fact that '' there is a direct and positive correlation between the export activity/export earnings and the amount of subsidy received.'' Section 771(5A)(B) of the Act describes an export subsidy as '' a subsidy that is, in law or fact, contingent upon export performance, alone or as 1 of 2 or more conditions.'' Petitioners have failed to sufficiently allege that the receipt of the excess RMB is contingent on export or export performance because receipt of the excess RMB is independent of the type of transaction or commercial activity for which the dollars are converted or of the particular company or individuals converting the dollars. Consequently, we do not plan on investigating this program because Petitioners have failed to properly allege the specificity element.

Respondent Selection

For this investigation, the Department expects to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports during the period of investigation. We intend to release the CBP data under Administrative Protective Order (''APO'') to all parties with access to information protected by APO within five days of the announcement of the initiation of this investigation. Interested parties may submit comments regarding the CBP data and respondent selection within seven calendar days of publication of this notice. We intend to make our decision regarding respondent selection within 20 days of publication of this **Federal Register** notice.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on the Department's website at http://ia.ita.doc.gov/apo.

Distribution of Copies of the Petition

In accordance with section 702(b)(4)(A)(i) of the Act, a copy of the public version of the Petition has been provided to the Government of the PRC. As soon as and to the extent practicable, we will attempt to provide a copy of the public version of the Petition to each exporter named in the Petition, consistent with section 351.203(c)(2) of the Department's regulations

ITC Notification

We have notified the ITC of our initiation, as required by section 702(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, within 25 days after the date on which it receives notice of the initiation, whether there is a reasonable indication that imports of subsidized coated paper from the PRC are causing material injury, or threatening to cause material injury, to a U.S. industry. *See* section 703(a)(2) of the Act. A negative ITC determination will result in the investigation being terminated; otherwise, the investigation will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: October 13, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation includes certain coated paper and paperboard[2] in sheets suitable for high quality print graphics using sheet–fed presses; coated on one or both sides with kaolin (China or other clay), calcium carbonate, titanium dioxide, and/or other inorganic substances; with or without a binder; having a GE brightness level of 80 or higher[3]; weighing not more than 340 grams per square meter; whether gloss grade, satin grade, matte grade, dull grade, or any other grade of finish; whether or not surface–colored, surface–decorated, printed (except as described below), embossed, or perforated; and irrespective of dimensions (''Certain Coated Paper''). Certain Coated Paper includes (a) coated free sheet paper and paperboard that meets this scope definition; (b) coated groundwood paper and paperboard produced from bleached chemi–thermo-mechanical pulp (''BCTMP'') that meets this scope definition; and (c) any other coated paper that meets this scope definition.

Certain Coated Paper is typically (but not exclusively) used for printing multi–colored graphics for catalogues, books, magazines, envelopes, labels and wraps, greeting cards, and other commercial printing applications requiring high quality print graphics. Specifically excluded from the scope are imports of paper and paperboard printed with final content printed text or graphics.

As of 2009, imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States (''HTSUS''): 4810.14.11, 4810.14.1900, 4810.14.2010, 4810.14.2090, 4810.14.5000, 4810.14.6000, 4810.14.70, 4810.19.1100, 4810.19.1900, 4810.19.2010, 4810.19.2090, 4810.22.1000, 4810.22.50, 4810.22.6000,

[2] '' 'Paperboard' refers to Certain Coated Paper that is heavier, thicker and more rigid than coated paper which otherwise meets the product description. In the context of Certain Coated Paper, paperboard typically is referred to as 'cover,' to distinguish it from 'text.'''

[3] One of the key measurements of any grade of paper is brightness. Generally speaking, the brighter the paper the better the contrast between the paper and the ink. Brightness is measured using a GE Reflectance Scale, which measures the reflection of light off of a grade of paper. One is the lowest reflection, or what would be given to a totally black grade, and 100 is the brightest measured grade.

4810.22.70, 4810.29.1000, 4810.29.5000, 4810.29.6000, 4810.29.70. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

[FR Doc. E9–25210 Filed 10–19–09; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

(C–423–809)

Stainless Steel Plate in Coils from Belgium: Rescission of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: October 20, 2009.

FOR FURTHER INFORMATION CONTACT: Alexander Montoro or Mary Kolberg, at (202) 482–0238 or (202) 482–1785, respectively; AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On May 1, 2009, the Department of Commerce (''the Department'') published a notice announcing the opportunity to request an administrative review of the countervailing duty order on stainless steel plate in coils from Belgium. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 74 FR 20278 (May 1, 2009). On June 1, 2009, ArcelorMittal Stainless Belgium N.V. (''AMS Belgium'') timely requested an administrative review covering the period January 1, 2008, through December 31, 2008. In accordance with 19 CFR 351.221(c)(1)(i), the Department published a notice initiating an administrative review of the countervailing duty order on stainless steel plate in coils from Belgium. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 74 FR 30052 (June 24, 2009).

Rescission of Review

Pursuant to 19 CFR 351.213(d)(l), the Secretary will rescind an administrative review, in whole or in part, if the party that requested a review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. On September 22, 2009, AMS Belgium withdrew its request for review within the 90-day period. Therefore, in response to AMS Belgium's withdrawal of its request for an administrative review, and as no other party requested a review, the Department is rescinding this administrative review of the countervailing duty order on stainless steel plate in coils from Belgium for the period January 1, 2008, through December 31, 2008.

Assessment

The Department will instruct U.S. Customs and Border Protection (''CBP'') to assess countervailing duties at the cash deposit rate in effect on the date of entry, for entries during the period January 1, 2008, through December 31, 2008. The Department intends to issue appropriate assessment instructions to CBP 15 days after the date of publication of this notice of rescission of administrative review. In addition, pursuant to an injunction issued in *ArcelorMittal Stainless Belgium N.V. v. United States*, CIT No. 08–00434, on January 16, 2009, the Department must continue to suspend liquidation of entries made by AMS Belgium pending a conclusive court decision in that action.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protection orders (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 751(a)(l) and 777(i)(l) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: October 13, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–25200 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[C–560–824]

Certain Coated Paper From Indonesia: Initiation of Countervailing Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* October 20, 2009.

FOR FURTHER INFORMATION CONTACT: Gene Calvert or Dana Mermelstein, AD/CVD Operations, Office 6, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3586 or (202) 482–1391, respectively.

SUPPLEMENTARY INFORMATION:

The Petition

On September 23, 2009, the Department of Commerce (''the Department'') received a countervailing duty (''CVD'') petition concerning imports of certain coated paper suitable for high-quality print graphics using sheet-fed presses (''certain coated paper'') from Indonesia filed in proper form by Appleton Coated LLC, NewPage Corporation, Sappi Fine Paper North America, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, ''Petitioners''). *See* ''Petition for the Imposition of Countervailing Duties: Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia,'' dated September 23, 2009 (Indonesia CVD Petition). On September 29, October 5, and October 7, 2009, the Department issued additional requests for information and clarification of certain areas of the Indonesia CVD Petition. Based on the Department's requests, Petitioners timely filed additional information pertaining to the Indonesia CVD Petition on October 2, October 6, and October 9, 2009 (hereinafter, ''Supplement to the Indonesia CVD Petition,'' dated October 2, 2009, ''Second Supplement to the Indonesia CVD Petition,'' dated October 6, 2009, and ''Third Supplement to the Indonesia CVD Petition,'' dated October 9, 2009).

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended, (''the Act''), Petitioners allege that producers/exporters of certain coated paper in Indonesia received countervailable subsidies within the meaning of sections 701 and 771(5) of

the Act, and that imports from these producers/exporters materially injure, or threaten material injury to, an industry in the United States.

The Department finds that Petitioners have filed this CVD petition on behalf of the domestic industry because they are interested parties as defined in sections 771(9)(C) and 771(9)(D) of the Act, and Petitioners have demonstrated sufficient industry support with respect to the CVD investigation that they are requesting the Department to initiate (*see* ''Determination of Industry Support for the CVD Petition,'' below).

Period of Investigation

The anticipated period of investigation (''POI'') is calendar year 2008. *See* 19 CFR 351.204(b)(2).

Scope of Investigation

The products covered by this investigation are certain coated paper from Indonesia. For a full description of the scope of this investigation, please see the ''Scope of Investigation'' in the Appendix to this notice.

Comments on Scope of Investigation

During our review of the Indonesia CVD Petition, we discussed the scope with Petitioners to ensure that it is an accurate reflection of the products for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the regulations (*See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments by November 2, 2009. Comments should be addressed to Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determinations.

Consultations

Pursuant to section 702(b)(4)(A)(ii) of the Act, the Department held consultations with the Government of Indonesia (''GOI'') with respect to the Indonesia CVD Petition on October 7, 2009. *See* Memorandum to The File, ''Consultations with the Government of Indonesia Regarding the Countervailing Duty Petition on Certain Coated Paper from Indonesia,'' dated October 9, 2009, a public document on file in the Central Records Unit (''CRU''), Room 1117 of the main Department of Commerce building.

Determination of Industry Support for the Petition

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) At least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The United States International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (*see* section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. *See USEC, Inc.* v. *United States*, 132 F. Supp. 2d 1, 8 (Ct. Int'l Trade 2001), citing *Algoma Steel Corp., Ltd.* v. *United States*, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989), *cert. denied* 492 U.S. 919 (1989).

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, Petitioners offer a definition of domestic like product that includes sheeter rolls (rolls of certain coated paper intended to be slit and used in sheet-fed presses) and, therefore, is broader than the scope of the investigation, which does not include sheeter rolls. Based on our analysis of the information submitted on the record, we have determined that certain coated paper described in the scope of the investigations and sheeter rolls constitute a single domestic like product and we have analyzed industry support in terms of that domestic like product. For a discussion of the domestic like product analysis in this case, see Countervailing Duty Investigation Initiation Checklist: Certain Coated Paper from Indonesia (''Indonesia CVD Initiation Checklist'') at Attachment II, Analysis of Industry Support for the Petitions Covering Certain Coated Paper from the People's Republic of China and Indonesia, dated concurrently with this notice and on file in the CRU, Room 1117 of the main Department of Commerce building.

In determining whether Petitioners have standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Indonesia CVD Petition with reference to the domestic like product as defined in the Indonesia CVD Petition. To establish industry support, Petitioners provided their own 2008 shipments of the domestic like product, as well as one supporting company's (SMART Papers) 2008 shipments, and compared the total to the 2008 shipments of the entire domestic industry. *See* Volume I of the Indonesia CVD Petition, at 2–3, Exhibits I–3, I–4, and I–19, and Supplement to the Indonesia CVD Petition, dated October 2, 2009, at 19–22 and Exhibit 4. Petitioners estimated total 2008 shipments of the domestic like product based on the American Forest & Paper Association annual Coated Printing Papers Survey. *See* Volume I of the Indonesia CVD Petition, at 3 and Exhibits I–3 and I–4, and Supplement to the Indonesia CVD Petition, dated October 2, 2009, at 22 and Exhibit 4; *see also* Indonesia CVD Initiation Checklist at Attachment II.

Our review of the data provided in the Indonesia CVD Petition, supplemental submissions, and other information readily available to the Department indicates that Petitioners have established industry support. First, the Indonesia CVD Petition established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.*, polling). *See* section 702(c)(4)(D) of the Act; *see also* Indonesia CVD Initiation Checklist at Attachment II. Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Indonesia CVD Petition account for at least 25 percent of the total production of the domestic like product. *See* Indonesia CVD Initiation Checklist at Attachment II. Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Indonesia CVD Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Indonesia CVD Petition. Accordingly, the Department determines that the Indonesia CVD Petition was filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act. *See id.*

The Department finds that Petitioners filed the Indonesia CVD Petition on behalf of the domestic industry because they are interested parties as defined in sections 771(9)(C) and 771(9)(D) of the Act and they have demonstrated sufficient industry support with respect to the countervailing duty investigation that they are requesting the Department initiate. *See id.*

Injury Test

Because Indonesia is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to this investigation. Accordingly, the ITC must determine whether imports of the subject merchandise from Indonesia materially injure, or threaten material injury to, a U.S. industry.

Allegations and Evidence of Material Injury and Causation

Petitioners allege that imports of certain coated paper from Indonesia are benefitting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the domestic industry producing certain coated paper. In addition, Petitioners allege that subsidized imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.

Petitioners contend that the industry's injured condition is illustrated by reduced market share, underselling and price depressing and suppressing effects, increased import penetration, lost sales and revenue, reduced production, capacity, and capacity utilization, reduced shipments and inventories, reduced employment, and reduced financial performance. We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation. *See* Indonesia CVD Initiation Checklist at Attachment III, ''Analysis of Allegations and Evidence of Material Injury and Causation'' for the Petitions Covering Certain Coated Paper from the People's Republic of China and Indonesia.

Initiation of Countervailing Duty Investigation

Section 702(b)(1) of the Act requires the Department to initiate a CVD investigation whenever an interested party files a CVD petition on behalf of an industry that: (1) alleges the elements necessary for an imposition of a duty under section 701(a) of the Act; and (2) is accompanied by information reasonably available to the petitioners supporting the allegations.

The Department has examined the countervailing duty petition on certain coated paper from Indonesia and finds that it complies with the requirements of section 702(b)(1) of the Act. Therefore, in accordance with section 702(b)(1) of the Act, we are initiating a CVD investigation to determine whether producers/exporters of certain coated paper from Indonesia receive countervailable subsidies. For a discussion of evidence supporting our initiation determination, *see* Indonesia CVD Initiation Checklist.

We are including in our investigation the following programs alleged in the Indonesia CVD Petition to provide countervailable subsidies to producers/exporters of the subject merchandise:

1. Provision of Standing Timber for Less Than Adequate Remuneration.
2. Government Prohibition of Log Exports.
3. Government Provision of Interest-Free Reforestation Loans.
4. Debt Forgiveness through the Indonesian Government's Acceptance of Financial Instruments with No Market Value.
5. Debt Forgiveness through APP/SMG's Buyback of its Own Debt from the Indonesian Government.
6. Government Forgiveness of Stumpage Obligations.
7. Tax Incentives for Investment in Priority Business Lines and Designated Regions:
   a. Corporate Income Tax Deduction;
   b. Accelerated Depreciation and Amortization;
   c. Extension of Loss Carryforward;
   d. Reduced Withholding Tax on Dividends.

Respondent Selection

The petition identifies the Asia Pulp & Paper/Sinar Mas Group (APP/SMG), through the two Indonesian coated paper mills it operates, PT. Pabrik Kertas Tjiwi Kimia Tbk. (''Tjiwi Kimia'') and PT Pindo Deli Pulp and Paper (''Pindo Deli''), as the one major producer of coated paper in Indonesia. We have placed on the record import data from U.S. Customs and Border Protection (''CBP'') which supports Petitioners' contention. We note that in a recent countervailing duty investigation covering coated free sheet paper from Indonesia, the Department found that the APP/Sinar Mas Group produced almost all exports of coated paper from Indonesia and that Tjiwi Kimia and Pindo Deli are cross-owned companies within the APP/SMG family of companies, which operates together as a vertically integrated paper production company. *See Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 FR 60642 (October 25, 2007), and accompanying Issues and Decision Memorandum.

Because record information indicates that APP/SMG is the producer of nearly all of the coated paper produced in Indonesia, we are selecting APP/SMG as a mandatory respondent in this investigation, pursuant to section 777A(c)(2)(B) of the Act. We will release the CBP data under APO to the parties covered by APO on the day this initiation is announced. We will consider comments from interested parties on respondent selection. Parties wishing to comment must do so within five days of the publication of this notice in the **Federal Register**.

Distribution of Copies of the CVD Petition

In accordance with section 702(b)(4)(A)(i) of the Act, copies of the public versions of the Indonesia CVD

Petition and amendments thereto have been provided to the GOI. To the extent practicable, we will attempt to provide a copy of the public version of the Indonesia CVD Petition to each exporter named in the petition, as provided under 19 CFR 351.203(c)(2).

ITC Notification

We have notified the ITC of our initiation, as required by section 702(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the petition was filed, whether there is a reasonable indication that imports of subsidized certain coated paper from Indonesia materially injure, or threaten material injury to, a U.S. industry. *See* section 703(a)(2) of the Act. A negative ITC determination will result in the investigation being terminated; *see* section 703(a)(1) of the Act. Otherwise, the investigation will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: October 13, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I—Scope of the Investigation

The merchandise covered by this investigation includes certain coated paper and paperboard [1] in sheets suitable for high quality print graphics using sheet-fed presses; coated on one or both sides with kaolin (China or other clay), calcium carbonate, titanium dioxide, and/or other inorganic substances; with or without a binder; having a GE brightness level of 80 or higher [2]; weighing not more than 340 grams per square meter; whether gloss grade, satin grade, matte grade, dull grade, or any other grade of finish; whether or not surface-colored, surface-decorated, printed (except as described below), embossed, or perforated; and irrespective of dimensions (''Certain Coated Paper'').

Certain Coated Paper includes (a) coated free sheet paper and paperboard that meets this scope definition; (b) coated groundwood paper and paperboard produced from bleached chemi-thermo-mechanical pulp (''BCTMP'') that meets this scope definition; and (c) any other coated paper that meets this scope definition.

Certain Coated Paper is typically (but not exclusively) used for printing multi-colored graphics for catalogues, books, magazines, envelopes, labels and wraps, greeting cards, and other commercial printing applications requiring high quality print graphics.

Specifically excluded from the scope are imports of paper and paperboard printed with final content printed text or graphics.

As of 2009, imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States (''HTSUS''): 4810.14.11, 4810.14.1900, 4810.14.2010, 4810.14.2090, 4810.14.5000, 4810.14.6000, 4810.14.70, 4810.19.1100, 4810.19.1900, 4810.19.2010, 4810.19.2090, 4810.22.1000, 4810.22.50, 4810.22.6000, 4810.22.70, 4810.29.1000, 4810.29.5000, 4810.29.6000, 4810.29.70. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

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BILLING CODE 3510–DS–P

[1] '' 'Paperboard' refers to Certain Coated Paper that is heavier, thicker and more rigid than coated paper which otherwise meets the product description. In the context of Certain Coated Paper, paperboard typically is referred to as 'cover,' to distinguish it from 'text.' ''

[2] One of the key measurements of any grade of paper is brightness. Generally speaking, the brighter the paper the better the contrast between the paper and the ink. Brightness is measured using a GE Reflectance Scale, which measures the reflection of light off of a grade of paper. One is the lowest reflection, or what would be given to a totally black grade, and 100 is the brightest measured grade.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–560–823, A–570–958]

Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia and the People's Republic of China: Initiation of Antidumping Duty Investigations

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* October 20, 2009.

FOR FURTHER INFORMATION CONTACT: Gemal Brangman (Indonesia) or Frances Veith (People's Republic of China), AD/CVD Operations, Office 2 and Office 8, respectively, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3773 or (202) 482–4295, respectively.

SUPPLEMENTARY INFORMATION:

The Petitions

On September 23, 2009, the Department of Commerce (''the Department'') received Petitions concerning imports of certain coated paper, suitable for high-quality print graphics using sheet fed presses (''certain coated paper'') from Indonesia and the People's Republic of China (''PRC'') filed in proper form by Appleton Coated LLC, NewPage Corporation, S.D. Warren Company d/b/a Sappi Fine Paper North America, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, ''Petitioners''). *See* Petition for the Imposition of Antidumping Duties on Certain Coated Paper from Indonesia (''Indonesia petition'') dated September 23, 2009; and Petition for the Imposition of Antidumping Duties on Certain Coated Paper from the People's Republic of China dated September 23, 2009 (''PRC petition'') (collectively, ''the Petitions''). On September 29, and October 7, 2009, the Department issued requests for additional information and clarification of certain areas of the Petitions. Based on the Department's request, Petitioners filed supplements to the Petitions for both countries on October 2, 8, and 9, 2009.

In accordance with section 732(b) of the Tariff Act of 1930, as amended (''the Act''), Petitioners allege that imports of certain coated paper from Indonesia and the PRC are being, or are likely to be, sold in the United States at less than fair value, within the meaning of section 731 of the Act, and that such imports materially injure, or threaten material injury to, an industry in the United States.

The Department finds that Petitioners filed these Petitions on behalf of the domestic industry because Petitioners are interested parties as defined in sections 771(9)(C) and 771(9)(D) of the Act, and they have demonstrated sufficient industry support with respect to the investigations that they are requesting the Department to initiate (*see* ''Determination of Industry Support for the Petitions'' below).

Scope of Investigations

The products covered by these investigations are certain coated paper from Indonesia and the PRC. For a full description of the scope of the investigations, please *see* the ''Scope of Investigations,'' in Appendix I of this notice.

Comments on Scope of Investigations

During our review of the Petitions, we discussed the scope with Petitioners to

ensure that it is an accurate reflection of the products for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the regulations (*Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments by November 2, 2009, the next business day after 20 calendar days from the date of signature of this notice. Comments should be addressed to Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determinations.

Comments on Product Characteristics for Antidumping Duty Questionnaires

We are requesting comments from interested parties regarding the appropriate physical characteristics of certain coated paper to be reported in response to the Department's antidumping questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to more accurately report the relevant factors and costs of production, as well as to develop appropriate product comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate listing of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as (1) general product characteristics and (2) the product comparison criteria. We note that it is not always appropriate to use all product characteristics as product comparison criteria. We base product comparison criteria on meaningful commercial differences among products. In other words, while there may be some physical product characteristics utilized by manufacturers to describe certain coated paper, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in product matching. Generally, the Department attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the antidumping duty questionnaires, we must receive comments at the above-referenced address by November 2, 2009. Additionally, rebuttal comments must be received by November 9, 2009.

Determination of Industry Support for the Petitions

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) At least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) Poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (*see* section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (Ct. Int'l Trade 2001), citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989), *cert. denied* 492 U.S. 919 (1989).

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, Petitioners offer a definition of domestic like product that includes sheeter rolls (rolls of certain coated paper intended to be slit and used in sheet-fed presses) and, therefore, is broader than the scope of the investigations, which does not include sheeter rolls. Based on our analysis of the information submitted on the record, we have determined that certain coated paper described in the scope of the investigations and sheeter rolls constitute a single domestic like product and we have analyzed industry support in terms of that domestic like product. For a discussion of the domestic like product analysis in this case, *see* Antidumping Duty Investigation Initiation Checklist: PRC Initiation Checklist at Attachment II, Analysis of Industry Support for the Petitions Covering Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China and Indonesia, and Antidumping Duty Investigation Initiation Checklist: Indonesia Initiation Checklist at Attachment II, Analysis of Industry Support for the Petitions Covering Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China and Indonesia, dated concurrently with this notice and on file in the Central Records Unit (''CRU''), Room 1117 of the main Department of Commerce building.

In determining whether Petitioners have standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions with reference to the domestic like product as defined in the Petitions. To establish industry support, Petitioners provided their own 2008 shipments of the domestic like product, as well as the 2008 shipments of one supporting company (SMART Papers), and compared the total to the 2008 shipments of the entire domestic industry. *See* Volume I of the Petitions, at 2–3, Exhibits I–3, I–4, and I–19, and Supplement to the AD/CVD Petitions,

dated October 2, 2009, at 19–22 and Exhibit 4. Petitioners estimated total 2008 shipments of the domestic like product based on the American Forest & Paper Association Annual Coated Printing Papers Survey. *See* Volume I of the Petitions, at 3 and Exhibits I–3 and I–4, and Supplement to the AD/CVD Petitions, dated October 2, 2009, at 22 and Exhibit 4; *see also* PRC Initiation Checklist at Attachment II, and Indonesia Initiation Checklist at Attachment II.

Our review of the data provided in the Petitions, supplemental submissions, and other information readily available to the Department indicates that Petitioners have established industry support. First, the Petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.,* polling). *See* section 732(c)(4)(D) of the Act; *see also* PRC Initiation Checklist at Attachment II, and Indonesia Initiation Checklist at Attachment II. Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product. *See* PRC Initiation Checklist at Attachment II, and Indonesia Initiation Checklist at Attachment II. Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions. Accordingly, the Department determines that the Petitions were filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act. *See id.*

The Department finds that Petitioners filed the Petitions on behalf of the domestic industry because they are interested parties as defined in sections 771(9)(C) and 771(9)(D) of the Act and they have demonstrated sufficient industry support with respect to the antidumping duty investigations that they are requesting the Department initiate. *See id.*

Allegations and Evidence of Material Injury and Causation

Petitioners allege that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at less than normal value (''NV''). In addition, Petitioners allege that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.

Petitioners contend that the industry's injured condition is illustrated by reduced market share, underselling and price depressing and suppressing effects, increased import penetration, lost sales and revenue, reduced production, capacity, and capacity utilization, reduced shipments and inventories, reduced employment, and reduced financial performance. We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation. *See* PRC Initiation Checklist at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Petitions Covering Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China and Indonesia, and Indonesia Initiation Checklist at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Petitions Covering Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China and Indonesia.

Period of Investigations

In accordance with 19 CFR 351.204(b), because these Petitions were filed on September 23, 2009, the anticipated period of investigation (''POI'') is July 1, 2008, through June 30, 2009, for Indonesia, and January 1, 2009, through June 30, 2009, for the PRC.

Allegations of Sales at Less Than Fair Value

The following is a description of the allegations of sales at less than fair value upon which the Department has based its decision to initiate investigations with respect to Indonesia and the PRC. The sources of, and adjustments to, the data relating to export price (''EP'') and NV are discussed in greater detail in the Indonesia Initiation Checklist and the PRC Initiation Checklist.

Indonesia

Export Price

Petitioners calculated EPs using two sources: (1) The average unit customs values (''AUVs'') derived from import data collected by the U.S. Census Bureau; and (2) a price quote from Indonesian producers for the sale of subject merchandise to U.S. customers. They adjusted the price quote for international freight and insurance (''CIF'') charges, U.S. inland freight charges, and brokerage and handling expenses. Petitioners used import data for the POI to calculate an average CIF cost, and relied upon a price quote obtained from a freight company to calculate U.S. freight charges. Petitioners based U.S. brokerage and handling charges on data contained in the public questionnaire response of the Indonesian respondents in the 2005–2006 Investigation of Coated Free Sheet Paper from Indonesia. *See* Indonesia Initiation Checklist.

Normal Value

Petitioners claimed that Indonesia has a viable market for certain coated paper, based on information from the website of the parent company of two Indonesian producers/exporters of the subject merchandise. Petitioners obtained, through a market researcher, delivered price quotes for certain coated paper products to Indonesian customers, and adjusted these prices for VAT tax, distributor's markup, and freight costs. Petitioners obtained information on Indonesian VAT taxes and the distributor's markup from the market research report. They based estimated freight costs on data contained in the public questionnaire response of the Indonesian respondents in the 2005–2006 Investigation of Coated Free Sheet Paper from Indonesia. *See* Indonesia Initiation Checklist.

Sales-Below-Cost Allegation

Petitioners provided information demonstrating reasonable grounds to believe or suspect that sales of certain coated paper products in the Indonesian market were made at prices below the fully-absorbed cost of production (''COP''), within the meaning of section 773(b) of the Act, and requested that the Department conduct a country-wide sales-below-cost investigation. The Statement of Administrative Action (''SAA''), submitted to the Congress in connection with the interpretation and application of the Uruguay Round Agreements Act, states that an allegation of sales below COP need not be specific to individual exporters or producers. *See* SAA, H.R. Doc. No. 103–316 at 833

(1994). The SAA, at 833, states that ''Commerce will consider allegations of below-cost sales in the aggregate for a foreign country, just as Commerce currently considers allegations of sales at less than fair value on a country-wide basis for purposes of initiating an antidumping investigation.''

Further, the SAA provides that section 773(b)(2)(A) of the Act retains the requirement that the Department have ''reasonable grounds to believe or suspect'' that below-cost sales have occurred before initiating such an investigation. Reasonable grounds exist when an interested party provides specific factual information on costs and prices, observed or constructed, indicating that sales in the foreign market in question are at below-cost prices. *Id.*

Cost of Production

Pursuant to section 773(b)(3) of the Act, COP consists of the cost of manufacturing (''COM''); selling, general and administrative (''SG&A'') expenses; financial expenses; and packing expenses. Petitioners calculated the quantity of each of the inputs into COM (except factory overhead) and packing based on the production experience of a U.S. coated paper producer during the POI, multiplied by the value of inputs used to manufacture coated paper in Indonesia using publicly available data. Petitioners stated that to the best of their knowledge that the coated paper manufacturing processes in Indonesia are very similar to their own manufacturing processes, and therefore it is reasonable to estimate the Indonesian producers' usage rates based on the usage rates experienced by a U.S. coated paper producer. To value all raw materials, packing materials, and certain energy inputs (coal and woodwaste), Petitioners used Indonesian import statistics for the most recent twelve-month period available. To value labor, Petitioners relied on a monthly wage rate for the Indonesian paper industry as reported by the International Labor Organization. To value electricity, fuel oil, and natural gas, Petitioners used prices published by the International Energy Agency and the U.S. Embassy in Jakarta, Indonesia. To calculate the average factory overhead (exclusive of labor and energy), SG&A, and financial expense rates, Petitioners relied on the fiscal year 2008 financial statements of an Indonesian producer of packaging paper, products in the same general category of merchandise as certain coated paper. *See* Indonesia Initiation Checklist for further discussion.

Based upon a comparison of the prices of the foreign like product in the home market to the calculated COP of the product, we find reasonable grounds to believe or suspect that sales of the foreign like product were made below the COP, within the meaning of section 773(b)(2)(A)(i) of the Act. Accordingly, the Department is initiating a country-wide cost investigation.

Normal Value Based on Constructed Value

Because it alleged sales below cost, pursuant to sections 773(a)(4), 773(b) and 773(e) of the Act, Petitioners calculated NV based on constructed value (''CV''). Petitioners calculated CV using the same average COM, SG&A, financial and packing figures used to compute the COP. *See* Indonesian Initiation Checklist.

PRC

Export Price

Petitioners calculated EPs for certain coated paper based on actual sales and sales confirmations in 2009. Petitioners made adjustments to EPs for certain movement expenses. *See* PRC Initiation Checklist.

Normal Value

Petitioners state that in every previous administrative review and less-than-fair value investigation involving merchandise from the PRC, the Department has concluded that the PRC is a non-market economy country (''NME'') and, as the Department has not revoked this determination, its NME status remains in effect today. *See Id.* The Department has previously examined the PRC's market status and determined that NME status should continue for the PRC.[1] In addition, in recent investigations, the Department has continued to determine that the PRC is an NME country.[2]

In accordance with section 771(18)(C)(i) of the Act, the presumption of NME status remains in effect until revoked by the Department. The presumption of NME status for the PRC has not been revoked by the Department and, therefore, remains in effect for purposes of the initiation of this investigation. Accordingly, the NV of the product is appropriately based on factors of production valued in a surrogate market economy country, in accordance with section 773(c) of the Act. In the course of this investigation, all parties will have the opportunity to provide relevant information related to the issues of the PRC's NME status and the granting of separate rates to individual exporters.

Petitioners argue that India is the appropriate surrogate country for the PRC because it is at a comparable level of economic development and it is a significant producer of comparable merchandise. Petitioners state that the Department has determined in previous investigations and administrative reviews that India is at a level of development comparable to the PRC. Petitioners identified three producers of comparable merchandise in India, Seshasayee Paper and Boards, Ltd. (''Seshasayee''), JK Paper, Ltd. (''JK Paper''), and Rama Newsprint and Papers Ltd., (''Rama Paper''), and assert that the Department has used Seshasayee and JK Paper as surrogate producers in the investigation of coated free sheet from the PRC. *See id.* and *see Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China,* 72 FR 60632 (October 25, 2007) (''*CFS from the PRC*'').

Based on the information provided by Petitioners, the Department believes that the use of India as a surrogate country is appropriate for purposes of initiation. *See* PRC Initiation Checklist. However, after initiation of the investigation, interested parties will have the opportunity to submit comments regarding surrogate country selection and, pursuant to 19 CFR 351.301(c)(3)(i), will be provided an opportunity to submit publicly available information to value factors of production up to 40 days after the date of publication of the preliminary determination.

Petitioners provided dumping margin calculations using the Department's NME methodology as required by 19 CFR 351.202(b)(7)(i)(C) and 19 CFR 351.408. Petitioners calculated NVs for several certain coated paper products based on both integrated production operations and non-integrated production operations. *See id.*

Petitioners valued the factors of production using reasonably available, public surrogate country data, including India import data from the *Monthly Statistics of the Foreign Trade of India*

[1] *See* Memorandum from the Office of Policy to David M. Spooner, Assistant Secretary for Import Administration, regarding The People's Republic of China Status as a Non-Market Economy, dated May 15, 2006. This document is available online at *http://ia.ita.doc.gov/download/prc-nme-status/prc-nme-status-memo.pdf.*

[2] *See Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 74 FR 14514 (March 31, 2009); *Frontseating Service Valves from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances,* 74 FR 10886 (March 13, 2009); *1-Hydroxyethylidene-1, 1-Diphosphonic Acid From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 74 FR 10545 (March 11, 2009).

for the period September 2008 through February 2009. *See* PRC Initiation Checklist.

Petitioners stated that they valued certain chemicals using the general paper finishing agent classification because these chemicals could not be identified at a more specific level. *See id.* Further, Petitioners valued calcium carbonate using the HTS classification for marble based on the Department's similar determination in *CFS from the PRC. See* PRC Initiation Checklist.

Petitioners valued electricity based on the surrogate value used in *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Preliminary Results of the 2007–2008 Administrative Review of the Antidumping Duty Order,* 74 FR 32539 (July 8, 2009). *See* PRC Initiation Checklist. For natural gas, Petitioners used Indian import statistics for liquefied natural gas and converted the value from rupees per kilogram to rupees per million British thermal units (''MMBTU''). *See id.* For fuel oil, Petitioners used Indian import statistics and converted the value from rupees per ton to rupees per MMBTU. *See id.* For coal, Petitioners used Indian import data under the HTS number for steam coal. *See id.*

Petitioners valued labor using the wage rate data published on the Department's Web site, at *http://ia.ita.doc.gov/wages/05wages/05wages-051608.html. See id.*

Where Petitioners were unable to find input prices contemporaneous with the POI, they adjusted for inflation using the wholesale price index for India, as published in *International Financial Statistics* by the International Monetary Fund. Further, Petitioners used exchange rates, as provided on the Department's Web site, to convert Indian rupees to U.S. dollars. *See id.*

To calculate factory overhead, selling, general and administrative expenses, and profit for integrated producers, Petitioners relied on the financial statements of Seshasayee and JK Paper, Indian producers of comparable merchandise. For non-integrated producer financial ratios, Petitioners used the financial statements of Rama Paper, a producer of comparable merchandise. *See id.*

Fair-Value Comparisons

Based on the data provided by Petitioners, there is reason to believe that imports of certain coated paper from Indonesia and the PRC are being, or are likely to be, sold in the United States at less than fair value. Based on the comparisons of EP to CV, as discussed above, the estimated dumping margins for Indonesia range from 33 percent to 41 percent. Based on the comparisons of EP to NV, as discussed above, the estimated dumping margins for the PRC range from 25.7 percent to 135.8 percent. *See id.*

Initiation of Antidumping Investigations

Based upon the examination of the Petitions on certain coated paper from Indonesia and the PRC and other information reasonably available to the Department, the Department finds that these Petitions meet the requirements of section 732 of the Act. Therefore, we are initiating antidumping duty investigations to determine whether imports of certain coated paper from Indonesia and the PRC are being, or are likely to be, sold in the United States at less than fair value. In accordance with section 733(b)(1)(A) of the Act, unless postponed, we will make our preliminary determinations no later than 140 days after the date of this initiation.

Targeted-Dumping Allegations

On December 10, 2008, the Department issued an interim final rule for the purpose of withdrawing 19 CFR 351.414(f) and (g), the regulatory provisions governing the targeted-dumping analysis in antidumping duty investigations, and the corresponding regulation governing the deadline for targeted-dumping allegations, 19 CFR 351.301(d)(5). *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations,* 73 FR 74930 (December 10, 2008). The Department stated that ''{w}ithdrawal will allow the Department to exercise the discretion intended by the statute and, thereby, develop a practice that will allow interested parties to pursue all statutory avenues of relief in this area.'' *See id.* at 74931.

In order to accomplish this objective, if any interested party wishes to make a targeted-dumping allegation in any of these investigations pursuant to section 777A(d)(1)(B) of the Act, such allegations are due no later than 45 days before the scheduled date of the country-specific preliminary determination.

Respondent Selection

Indonesia

The petition identifies two subsidiaries of the Asia Pulp & Paper/Sinar Mas Group, PT. Pabrik Kertas Tjiwi Kimia Tbk. (''Tjiwi Kimia'') and PT Pindo Deli Pulp and Paper (''Pindo Deli''), as significant producers/exporters of certain coated paper in Indonesia. We have placed on the record import data from U.S. Customs and Border Protection (''CBP''), which supports Petitioners' contention. Therefore, we are selecting Tjiwi Kimia and Pindo Deli as mandatory respondents in this investigation, pursuant to section 777A(c)(2)(B) of the Act.

We will release the CBP data under APO to the parties covered by APO on the day this initiation is announced. We will consider comments from interested parties on respondent selection. Parties wishing to comment must do so within five days of the publication of this notice in the **Federal Register.**

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Instructions for filing such applications may be found on the Department's Web site at *http://ia.ita.doc.gov/apo.*

PRC

For the PRC, the Department will request quantity and value information from all known exporters and producers identified, with complete contact information, in the Petition. The quantity and value data received from NME exporters/producers will be used as the basis to select the mandatory respondents.

The Department requires that the respondents submit a response to both the quantity and value questionnaire and the separate-rate application by the respective deadlines in order to receive consideration for separate-rate status.[3] Appendix II of this notice contains the quantity and value questionnaire that must be submitted by all NME exporters/producers no later than November 3, 2009. In addition, the Department will post the quantity and value questionnaire along with the filing instructions on the Import Administration Web site, at *http://ia.ita.doc.gov/ia-highlights-and-news.html.* The Department will send the quantity and value questionnaire to those PRC companies identified in the General Issues and Injury Supplement to the Petitions, dated October 2, 2009, at Exhibit 8.

Separate Rates

In order to obtain separate-rate status in NME investigations, exporters and producers must submit a separate-rate status application. *See Certain Circular*

[3] *See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Initiation of Antidumping Duty Investigation,* 73 FR 10221, 10225 (February 26, 2008); and *Initiation of Antidumping Duty Investigation: Certain Artist Canvas From the People's Republic of China,* 70 FR 21996, 21999 (April 28, 2005).

Welded Carbon Quality Steel Line Pipe from the Republic of Korea and the People's Republic of China: Initiation of Antidumping Duty Investigations, 73 FR 23188, 23193 (April 29, 2008) (*Certain Circular Welded Carbon Quality Steel Line Pipe from the PRC*). The specific requirements for submitting the separate-rate application in this investigation are outlined in detail in the application itself, available on the Department's Web site at *http://ia.ita.doc.gov/ia-highlights-and-news.html* on the date of publication of this initiation notice in the **Federal Register.** The separate-rate application will be due sixty (60) days from the date of publication of this initiation notice in the **Federal Register.** For exporters and producers who submit a separate-rate status application and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for consideration for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Use of Combination Rates in an NME Investigation

The Department will calculate combination rates for certain respondents that are eligible for a separate rate in this investigation. The Separate Rates and Combination Rates Bulletin states:

{w}hile continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the weighted-average of the individually calculated rates. This practice is referred to as the application of combination rates because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation.

See Separate Rates and Combination Rates Bulletin at 6 (emphasis added).

Distribution of Copies of the Petitions

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public version of the Petitions and amendments thereto, have been provided to the representatives of the Governments of Indonesia and the PRC. To the extent practicable, we will attempt to provide a copy of the public version of the of the Petitions to each exporter named in the petition, as provided under 19 CFR 351.203(c)(2).

International Trade Commission (ITC) Notification

We have notified the ITC of our initiation, as required by section 732(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, no later than November 9, 2009, whether there is a reasonable indication that imports of certain coated paper from Indonesia and the PRC materially injure, or threaten material injury to, a U.S. industry. A negative ITC determination with respect to any country would result in the termination of the investigation with respect to that country. Otherwise, these investigations will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: October 13, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I—Scope of the Investigations

The merchandise covered by each of these investigations includes certain coated paper and paperboard [4] in sheets suitable for high quality print graphics using sheet-fed presses; coated on one or both sides with kaolin (China or other clay), calcium carbonate, titanium dioxide, and/or other inorganic substances; with or without a binder; having a GE brightness level of 80 or higher [5]; weighing not more than 340 grams per square meter; whether gloss grade, satin grade, matte grade, dull grade, or any other grade of finish; whether or not surface-colored, surface-decorated, printed (except as described below), embossed, or perforated; and irrespective of dimensions (''Certain Coated Paper'').

Certain Coated Paper includes (a) coated free sheet paper and paperboard that meets this scope definition; (b) coated groundwood paper and paperboard produced from bleached chemi-thermo-mechanical pulp (''BCTMP'') that meets this scope definition; and (c) any other coated paper that meets this scope definition.

Certain Coated Paper is typically (but not exclusively) used for printing multi-colored graphics for catalogues, books, magazines, envelopes, labels and wraps, greeting cards, and other commercial printing applications requiring high quality print graphics. Specifically excluded from the scope are imports of paper and paperboard printed with final content printed text or graphics.

As of 2009, imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States (''HTSUS''): 4810.14.11, 4810.14.1900, 4810.14.2010, 4810.14.2090, 4810.14.5000, 4810.14.6000, 4810.14.70, 4810.19.1100, 4810.19.1900, 4810.19.2010, 4810.19.2090, 4810.22.1000, 4810.22.50, 4810.22.6000, 4810.22.70, 4810.29.1000, 4810.29.5000, 4810.29.6000, 4810.29.70. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigations is dispositive.

Appendix II

Where it is not practicable to examine all known exporters/producers of subject merchandise, section 777A(c)(2) of the Tariff Act of 1930, as amended, permits us to investigate (1) a sample of exporters, producers, or types of products that is statistically valid based on the information available at the time of selection, or (2) exporters and producers accounting for the largest volume and value of the subject merchandise that can reasonably be examined.

In the chart below, please provide the total quantity and total value of all your sales of merchandise covered by the scope of this investigation (*see* ''Scope of Investigation'' section of this notice), produced in the PRC, and exported/shipped to the United States during the period January 1, 2009, through June 30, 2009.

Market	Total quantity in metric tons	Terms of sale	Total value
United States			
1. Export Price Sales			
2. a. Exporter Name			

[4] '' 'Paperboard' refers to Certain Coated Paper that is heavier, thicker and more rigid than coated paper which otherwise meets the product description. In the context of Certain Coated Paper, paperboard typically is referred to as 'cover,' to distinguish it from 'text.' ''

[5] One of the key measurements of any grade of paper is brightness. Generally speaking, the brighter the paper the better the contrast between the paper and the ink. Brightness is measured using a GE Reflectance Scale, which measures the reflection of light off of a grade of paper. One is the lowest reflection, or what would be given to a totally black grade, and 100 is the brightest measured grade.

Market	Total quantity in metric tons	Terms of sale	Total value
b. Address			
c. Contact			
d. Phone No.			
e. Fax No.			
3. Constructed Export Price Sales			
4. Further Manufactured			
Total Sales			

Total Quantity:

• Please report quantity on a metric ton basis. If any conversions were used, please provide the conversion formula and source.

Terms of Sales:

• Please report all sales on the same terms (*e.g.,* free on board at port of export).

Total Value:

• All sales values should be reported in U.S. dollars. Please indicate any exchange rates used and their respective dates and sources.

Export Price Sales:

• Generally, a U.S. sale is classified as an export price sale when the first sale to an unaffiliated customer occurs before importation into the United States.

• Please include any sales exported by your company directly to the United States.

• Please include any sales exported by your company to a third-country market economy reseller where you had knowledge that the merchandise was destined to be resold to the United States.

• If you are a producer of subject merchandise, please include any sales manufactured by your company that were subsequently exported by an affiliated exporter to the United States.

• Please do not include any sales of subject merchandise manufactured in Hong Kong in your figures.

Constructed Export Price Sales:

• Generally, a U.S. sale is classified as a constructed export price sale when the first sale to an unaffiliated customer occurs after importation. However, if the first sale to the unaffiliated customer is made by a person in the United States affiliated with the foreign exporter, constructed export price applies even if the sale occurs prior to importation.

• Please include any sales exported by your company directly to the United States;

• Please include any sales exported by your company to a third-country market economy reseller where you had knowledge that the merchandise was destined to be resold to the United States.

• If you are a producer of subject merchandise, please include any sales manufactured by your company that were subsequently exported by an affiliated exporter to the United States.

• Please do not include any sales of subject merchandise manufactured in Hong Kong in your figures.

Further Manufactured:

• Sales of further manufactured or assembled (including re-packaged) merchandise is merchandise that undergoes further manufacture or assembly in the United States before being sold to the first unaffiliated customer.

• Further manufacture or assembly costs include amounts incurred for direct materials, labor and overhead, plus amounts for general and administrative expense, interest expense, and additional packing expense incurred in the country of further manufacture, as well as all costs involved in moving the product from the U.S. port of entry to the further manufacturer.

[FR Doc. E9–25213 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Transportation and Related Equipment; Technical Advisory Committee; Notice of Open Meeting

The Transportation and Related Equipment Technical Advisory Committee (TRANSTAC) will meet on November 5, 2009, 9:30 a.m., in the Herbert C. Hoover Building, Room 6087B, 14th Street between Pennsylvania & Constitution Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to transportation and related equipment or technology.

Agenda:

1. Welcome and Introductions.
2. Review Status of Working Groups.
3. Proposals from the Public.
4. Closing Comments.

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov* no later than October 29, 2009.

The meeting will be open to the public and a limited number of seats will be available. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that presenters forward the public presentation materials to Yvette Springer.

For more information contact Ms. Springer on (202) 482–2813.

Dated: October 15, 2009.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. E9–25191 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XS47

Pacific 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 Pacific Fishery Management Council's (Council) Ad Hoc Salmon Amendment Committee (SAC) will hold a meeting to develop draft alternatives and plan analyses for an amendment to the Pacific Coast Salmon Fishery Management Plan (FMP) to address the Magnuson-Stevens Act (MSA) requirements for annual catch limits (ACL) and accountability measures (AM). This meeting of the SAC is open to the public.

DATES: The meeting will be held Thursday, November 5, 2009, from 8:30 a.m. to 4:30 p.m.

ADDRESSES: The meeting will be held at the Pacific Council Office, Large Conference Room, 7700 NE., Ambassador Place, Suite 101, Portland, OR 97220–1384; telephone: (503) 820–2280.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck Tracy, Salmon Management Staff Officer, Pacific Council; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The reauthorized MSA established new requirements to end and prevent

overfishing through the use of ACL and AM. Federal FMPs must establish mechanisms for ACL and AM by 2010 for stocks subject to overfishing and by 2011 for all others, with the exceptions of stocks managed under an international agreement or stocks with a life cycle of approximately one year.

On January 16, 2009, NMFS published amended guidelines for National Standard 1 (NS1) of the MSA to provide guidance on how to comply with new ACL and AM requirements. The NS1 guidelines include recommendations for establishing several related reference points to ensure scientific and management uncertainty are accounted for when management measures are established.

The purpose of this meeting is to develop alternatives to address those issues, and to plan analyses that will be used to evaluate those alternatives in a National Environmental Policy Act analysis.

Although non-emergency issues not contained in the meeting agenda may come before the SAC for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the 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 Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: October 15, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–25130 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XS49

New England Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The New England Fishery Management Council's (Council) Herring Advisory Panel and Oversight Committee along with the Atlantic States Marine Fisheries Commission (ASMFC) Section will hold two meetings to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: These meetings will be held in November 2009. For specific dates and times, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: These meetings will be held at the Sheraton Harborside Hotel, 250 Market Street, Portsmouth, NH 03801; telephone: (603) 431–2300; fax: (603) 431–7805.

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: The committee's schedule and agenda for the following meetings are as follows:

Advisory Panel Agenda:

Monday, November 9, 2009 beginning at 10 a.m.

1. Review Draft 2010–12 Atlantic herring fishery specifications, options for total allowable catches/annual catch limits, and all available related analysis; develop Advisory Panel (AP) recommendations regarding 2010–12 specifications for the Herring Committee/Section to consider on November 10;

2. Review Herring Committee work on catch monitoring alternatives to be included in Amendment 5 to the Herring Fishery Management Plan (FMP); discuss issues related to reporting, herring Letters of Authorization (LOA), and proposed measures to address LOAs, carrier vessels, and transfers at sea; develop AP recommendations as appropriate.

Oversight Committee Agenda:

Tuesday, November 10, 2009 beginning at 9:30 a.m.

1. Review Draft 2010–12 Atlantic herring fishery specifications; discuss options for total allowable catches/annual catch limits, and review all available related analysis and recommendations from the Herring Plan Development Team (PDT);

2. Review/discuss NEFMC Herring AP recommendations related to 2010–12 fishery specifications;

3. Develop final recommendations for domestic annual harvesting (DAH), domestic annual processing (DAP), joint venture processing (JVP), border transfer (BT), total allowable level of foreign fishing (TALFF), research set-asides (RSAs), optimum yield (OY), and other related specifications;

4. Discuss/address management uncertainty and develop related recommendations;

5. Develop final recommendations for 2010–12 annual catch limits (ACLs) for herring management areas, for Council consideration November 17–19, 2009;

6. Address other issues related to 2010–12 herring fishery specifications.

Although non-emergency issues not contained in this agenda may come before these groups for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**), at least 5 working days prior to the meeting date.

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

Dated: October 15, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–25132 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XS48

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's (Council) Groundfish Committee will meet to

consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on November 5, 2009, at 9 a.m.

ADDRESSES: The meeting will be held at the Sheraton Ferncroft Hotel, 50 Ferncroft Road, Danvers, MA 01923; telephone: (978) 777–2500; fax: (978) 750–7991.

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: The items of discussion in the committee's agenda are as follows:

The Committee will continue development of Framework 44 to the Northeast Multispecies Fishery Management Plan (FMP). Framework 44 will adopt fishery specifications and annual catch limits for groundfish stocks, and adjust measures as necessary to continue rebuilding of overfished groundfish stocks. At this meeting, the Committee will review Annual Catch Limits (ACLs) for FY 2010–12 and will consider changes in effort control measures for the common pool (non-sector) commercial fishery. Such changes may include modifications to trip limits or differential days-at-sea counting. Other business may also be discussed. The Committee's recommendations will be delivered to the full Council at its meeting in Newport, RI on November 17–19, 2009.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

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.

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

Dated: October 15, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–25131 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XS40

Fisheries of the South Atlantic and Gulf of Mexico; South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of joint workshop.

SUMMARY: The South Atlantic Fishery Management Council and NOAA Fisheries Service's Southeast Fisheries Science Center are convening a workshop to develop a fishery independent monitoring program for the fisheries resources of the South Atlantic. The workshop will be held in Beaufort, NC.

DATES: The workshop will be held November 17–20, 2009. The workshop will be held from 8:30 a.m. to 6 p.m. on November 17 through November 19; and from 8:30 a.m. to 4 p.m. on November 20, 2009.

ADDRESSES: The meeting will be held at the Center for Coastal Fisheries and Habitat Research, 101 Pivers Island Road, Beaufort, NC 28516.

Council address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer; telephone: (843) 571–4366; e-mail: *Kim.Iverson@safmc.net*.

SUPPLEMENTARY INFORMATION: The South Atlantic Fishery Management Council and the Southeast Fisheries Science Center are convening a workshop to develop a fishery independent monitoring program for the fisheries resources of the South Atlantic. Topics to be considered will include sampling design, temporal and spatial allocation, target species and habitats, gear selection and configuration, and needs that may be addressed through existing programs. The intent of the workshop is to build on the experience of existing programs such as the Marine Resources Monitoring, Assessment, and Prediction (MARMAP) Program and the Southeast Area Monitoring and Assessment Program (SEAMAP), and to incorporate knowledge of effective and practical sampling methods developed for similar habitats and species in other areas.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions will be restricted to those issues specifically identified 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 the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 3 business days prior to the meeting.

Dated: October 15, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–25129 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Information Systems Technical Advisory Committee: Notice of Partially Closed Meeting

The Information Systems Technical Advisory Committee (ISTAC) will meet on November 4, 2009, 9 a.m., in the Herbert C. Hoover Building, Room 3884, and November 5, 2009, 9 a.m., in the Herbert C. Hoover Building, Room 3407, 14th Street between Constitution and Pennsylvania Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to information systems equipment and technology.

Wednesday, November 4

Public Session

1. Welcome and Introduction.
2. Working Group Reports.
3. Microprocessors with Encryption.
4. Intel Technology Roadmap.

5. FIPS–140 (NIST)

Thursday, November 5

Closed Session

6. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 section 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov*, no later than October 28, 2009.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that public presentation materials or comments be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on May 19, 2009, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 section (10)(d)), that the portion of the meeting concerning trade secrets and commercial or financial information deemed privileged or confidential as described in 5 U.S.C. 552b(c)(4) and the portion of the meeting concerning matters the disclosure of which would be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 section 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: October 15, 2009.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. E9–25189 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Online Safety and Technology Working Group Meeting

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce

ACTION: Notice of Public Meeting.

SUMMARY: This notice announces a public meeting of the Online Safety and Technology Working Group (OSTWG).

DATES: The meeting will be held on November 3, 2009, from 8:45 a.m. to 5:00 p.m., Eastern Standard Time.

ADDRESSES: The meeting will be held at the United States Department of Commerce, 1401 Constitution Avenue, NW, Room 4830, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Joe Gattuso at (202) 482–0977 or jgattuso@ntia.doc.gov; and/or visit NTIA's web site at www.ntia.doc.gov.

SUPPLEMENTARY INFORMATION:

Background: NTIA established the OSTWG pursuant to Section 214 of the Protecting Children in the 21st Century Act (Act). The OSTWG is composed of representatives of relevant sectors of the business community, public interest groups, and other appropriate groups and Federal agencies. The members were selected for their expertise and experience in online safety issues, as well as their ability to represent the views of the various industry stakeholders.

According to the Act, the OSTWG is tasked with evaluating industry efforts to promote a safe online environment for children. The Act requires the OSTWG to report its findings and recommendations to the Assistant Secretary for Communications and Information and to Congress within one (1) year after its first meeting.

Matters to Be Considered: The OSTWG will hear presentations and have discussions on online safety and technology, with an emphasis on issues relevant to the work of the subcommittee on protection technology.

Time and Date: The meeting will be held on November 3, 2009, from 8:45 a.m. to 5:00 p.m. Eastern Standard Time. The times and the agenda topics are subject to change. The meeting may be webcast. Please refer to NTIA's web site, http://www.ntia.doc.gov, for the most up-to-date meeting agenda and webcast information.

Place: The meeting will be held at the United States Department of Commerce, 1401 Constitution Avenue, NW, Room 4830, Washington, DC 20230. The meeting will be open to the public and press on a first-come, first-served basis. Space is limited. Attendees should bring a photo ID and arrive early to clear security. The public meeting is physically accessible to people with disabilities. Individuals requiring special services, such as sign language interpretation or other ancillary aids, are asked to notify Mr. Gattuso at (202) 482–0977 or jgattuso@ntia.doc.gov, at least five (5) business days before the meeting.

Dated: October 15, 2009.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. E9–25163 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–60–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XS41

Marine Mammals; File No. 87–1851–02

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

ACTION: Notice; receipt of application for permit amendment.

SUMMARY: Notice is hereby given that Daniel P. Costa, Ph.D., University of California at Santa Cruz, Long Marine Laboratory, 100 Shaffer Road, Santa Cruz, CA, has applied for an amendment to Scientific Research Permit No. 87–1851–01.

DATES: Written, telefaxed, or e-mail comments must be received on or before November 19, 2009.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the Features box on the Applications and Permits for Protected Species home page, *https://apps.nmfs.noaa.gov*, and then selecting File No. 87–1851 from the list of available applications.

These documents are also available upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301)713–0376, or by email to *NMFS.Pr1Comments@noaa.gov*. Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Tammy Adams, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject amendment to Permit No. 87–1851–01 is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq*.) and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

Permit No. 87–1851–00, issued to Dr. Costa on January 29, 2007 (72 FR 5680), authorizes tagging studies and physiological research on seals in Antarctica, including crabeater seals (*Hydrurga leptonyx*), Weddell seals (*Leptonychotes weddellii*), and Ross seals (*Ommatophoca rossii*). The permit also authorizes research on California sea lions (*Zalophus californianus*) to investigate foraging, diving, energetics, food habits, and at-sea distribution along the California coast. Incidental harassment of California sea lions, harbor seals (*Phoca vitulina*), northern elephant seals (*Mirounga augustirostris*), and northern fur seals (*Callorhinus ursinus*) in California is authorized. The permit expires on January 31, 2012. Permit No. 87–1851–01, issued on January 13, 2009 (74 FR 4374), authorizes the permit holder to expand the geographic area where research is conducted in Antarctica to include the Weddell Sea, for the duration of the permit.

The permit holder is requesting the permit be amended to include authorization for expanding the geographic range where research is conducted in Antarctica to include the Ross Sea and to increase the number of Weddell seals captured, sedated, tagged, and sampled from 10 animals per year to 40 animals per year.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq*.), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: October 14, 2009.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–25212 Filed 10–19–09; 8:45 am]

BILLING CODE 3510–22–S

COMMODITY FUTURES TRADING COMMISSION

Notice of Intent, Pursuant to the Authority in Section 2(h)(7) of the Commodity Exchange Act and Commission Rule 36.3(c)(3), To Undertake a Determination Whether the Henry Financial Swing Contract; Henry Financial Basis Contract; and Henry Financial Index Contract, Offered for Trading on the IntercontinentalExchange, Inc., Perform Significant Price Discovery Functions

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of action and request for comment.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is undertaking a review to determine whether the Henry Financial Swing (''HHD'') contract; Henry Financial Basis (''HEN'') contract; and/or Henry Financial Index (''HIS'') contract, offered for trading on the IntercontinentalExchange, Inc. (''ICE''), an exempt commercial market (''ECM'') under Sections 2(h)(3)–(5) of the Commodity Exchange Act (''CEA'' or the ''Act''), perform significant price discovery functions. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder. In connection with this evaluation, the Commission invites comment from interested parties.

DATES: Comments must be received on or before November 4, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

- Follow the instructions for submitting comments. *Federal eRulemaking Portal: http://www.regulations.gov*.
- *E-mail: secretary@cftc.gov.* Include Henry Financial Swing (HHD) contract; Henry Financial Basis (HEN) contract; and/or Henry Financial Index (HIS) contract in the subject line of the message, depending on the subject contract(s) to which the comments apply.
- *Fax:* (202) 418–5521.
- *Mail:* Send to David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Courier:* Same as mail above.

All comments received will be posted without change to *http://www.CFTC.gov/*.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov*; or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 16, 2009, the CFTC promulgated final rules implementing provisions of the CFTC Reauthorization Act of 2008 (''Reauthorization Act'') [1] which subjects ECMs with significant price discovery contracts (''SPDCs'') to self-regulatory and reporting requirements, as well as certain Commission oversight authorities, with respect to those contracts. Among other things, these rules and rule amendments revise the information-submission requirements applicable to ECMs, establish procedures and standards by which the Commission will determine whether an ECM contract performs a significant price discovery function, and provide guidance with respect to compliance with nine statutory core principles applicable to ECMs with SPDCs. These rules became effective on April 22, 2009.

In determining whether an ECM's contract is or is not a SPDC, the Commission will consider the contract's material liquidity, price linkage to other contracts, potential for arbitrage with other contracts traded on designated contract markets or derivatives transaction execution facilities, use of the ECM contract's prices to execute or settle other transactions, and other factors.

In order to facilitate the Commission's identification of possible SPDCs,

[1] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

Commission rule 36.3(c)(2) requires that an ECM operating in reliance on section 2(h)(3) promptly notify the Commission and provide supporting information or data concerning any contract: (i) that averaged five trades per day or more over the most recent calendar quarter; and (ii) (A) for which the ECM sells price information regarding the contract to market participants or industry publications; or (B) whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement, or other daily price of another agreement.

II. Determination of a SPDC

A. The SPDC Determination Process

Commission rule 36.3(c)(3) establishes the procedures by which the Commission makes and announces its determination on whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish a notice in the **Federal Register** that it intends to undertake a determination as to whether the specified agreement, contract, or transaction performs a significant price discovery function and to receive written data, views, and arguments relevant to its determination from the ECM and other interested persons.[2] After prompt consideration of all relevant information [3], the Commission will, within a reasonable period of time after the close of the comment period, issue an order explaining its determination. Following the issuance of an order by the Commission that the ECM executes or trades an agreement, contract, or transaction that performs a significant price discovery function, the ECM must demonstrate, with respect to that agreement, contract, or transaction, compliance with the core principles under section 2(h)(7)(C) of the CEA [4] and the applicable provisions of Part 36. If the Commission's order represents the first time it has determined that one of the ECM's contracts performs a significant price discovery function, the ECM must submit a written demonstration of its compliance with the core principles within 90 calendar days of the date of the Commission's order. For each subsequent determination by the Commission that the ECM has an additional SPDC, the ECM must submit a written demonstration of its compliance with the core principles within 30 calendar days of the Commission's order.

B. Henry Financial Swing Contract

The HHD contract is a daily contract that is cash settled based on the spot index price for natural gas at the Henry Hub, as published by Platts in the ''Daily Price Survey'' table of *Gas Daily.* The Platts index price is based on fixed-price cash market transactions that are voluntarily reported by traders. The size of the HHD contract is 2,500 million British thermal units (''mmBtu''), and the unit of trading is any multiple of 2,500 mmBtu. The HHD contract is listed for 65 consecutive calendar days.

Based upon a required quarterly notification filed on July 27, 2009 (mandatory under Rule 36.3(c)(2)), the ICE reported that, with respect to its HHD contract, 5,246 separate trades occurred in the second quarter of 2009, resulting in a daily average of 82.0 trades. During the same period, the HHD contract had a total trading volume of 242,968 contracts (which was an average of 3,796.4 contracts per day). As of June 30, 2009, open interest in the HHD contract was 20,173 contracts.

It appears that the HHD contract may satisfy the material liquidity, arbitrage, and material price reference factors for SPDC determination. With respect to material liquidity, trading in the HHD contract averaged over 3,500 contracts on a daily basis with more than 80 separate transactions each day. Moreover, the open interest at the end of the second quarter in 2009 was significant. Because the HHD contract specifies the Henry Hub, the contract's prices series may be highly correlated with that of the New York Mercantile Exchange's physically-delivered Natural Gas contract and/or the ICE's Henry Financial LD1 Financial Fixed Price contract, thus increasing the opportunity for arbitrage. In regard to material price reference, while it did not specifically address the natural gas contracts under review, the ECM Study stated that, in general, market participants view the ICE as a price discovery market for certain natural gas contracts. Natural gas contracts based on actively-traded hubs are transacted on the ICE's electronic trading platform, with the remainder being completed over-the-counter and potentially submitted for clearing by voice brokers. In addition, the ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, the ICE offers ''Henry Hub End of Day'' and ''OTC Gas End of Day'' data packages with access to all price data or just 12, 24, 36, or 48 months of historical data.

C. Henry Financial Basis Contract

The HEN contract is a monthly contract that is cash settled based on the difference between the bidweek price index for a particular calendar month at the Henry Hub, as published by Platts in its *Inside FERC's Gas Market Report,* and the final settlement price of the New NYMEX's physically-delivered Henry Hub natural gas futures contract for the same calendar month. The Platts bidweek price is based on fixed-price cash market transactions that are conducted during the last five business days of the month and are voluntarily reported by traders; bidweek transactions specify the delivery of natural gas during the following calendar month. The size of the HEN contract is 2,500 mmBtu, and the unit of trading is any multiple of 2,500 mmBtu. The HEN contract is listed for up to 72 calendar months.

Based upon a required quarterly notification filed on July 27, 2009 (mandatory under Rule 36.3(c)(2)), the ICE reported that, with respect to its HEN contract, 538 separate trades occurred in the second quarter of 2009, resulting in a daily average of 8.4 trades. During the same period, the HEN contract had a total trading volume of 78,870 (which was an average of 1,232.3 contracts per day). As of June 30, 2009, open interest in the HEN contract was 128,504 contracts.

It appears that the HEN contract may satisfy the material liquidity, price linkage, and material price reference factors for SPDC determination. With respect to material liquidity, trading in the HEN contract averaged more than 1,000 contracts on a daily basis, with nearly 10 separate transactions each day. In addition, the open interest in the subject contract was substantial. In regard to price linkage, the final settlement of the HEN contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas contract, where the NYMEX is registered with the Commission as a designated contract market (''DCM''). In regard to material price reference, while it did not specifically address the

[2] The Commission may commence this process on its own initiative or on the basis of information provided to it by an ECM pursuant to the notification provisions of Commission rule 36.3(c)(2).

[3] Where appropriate, the Commission may choose to interview market participants regarding their impressions of a particular contract. Further, while they may not provide direct evidentiary support with respect to a particular contract, the Commission may rely for background and context on resources such as its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* (''ECM Study''). *http://www.cftc.gov/stellent/groups/public/@newsroom/documents/file/pr5403–07_ecmreport.pdf.*

[4] 7 U.S.C. 2(h)(7)(C).

natural gas contracts under review, the ECM Study stated that, in general, market participants view the ICE as a price discovery market for certain natural gas contracts. Natural gas contracts based on actively-traded hubs are transacted on the ICE's electronic trading platform, with the remainder being completed over-the-counter and potentially submitted for clearing by voice brokers. In addition, the ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, the ICE offers ''Henry Hub End of Day'' and ''OTC Gas End of Day'' data packages with access to all price data or just 12, 24, 36, or 48 months of historical data.

D. Henry Financial Index Contract

The HIS contract is a monthly contract that is cash settled based on the arithmetic average of the daily natural gas prices at the Henry Hub, as quoted in the ''Daily Price Survey'' table of Platts' *Gas Daily* during the specified month, less the Platts bidweek price that is reported in the first issue of *Inside FERC's Gas Market Report* in which the natural gas is produced. The Platts prices are based on fixed-price cash market transactions that are voluntarily reported by traders. The size of the HIS contract is 2,500 mmBtu, and the unit of trading is any multiple of 2,500 mmBtu. The HIS contract is listed for 36 calendar months.

Based upon a required quarterly notification filed on July 27, 2009 (mandatory under Rule 36.3(c)(2)), the ICE reported that, with respect to its HIS contract, 550 separate trades occurred in the second quarter of 2009, resulting in a daily average of 8.6 trades. During the same period, the HIS contract had a total trading volume of 79,330 contracts (which was an average of 1,239.5 contracts per day). As of June 30, 2009, open interest in the HIS contract was 127,346 contracts.

It appears that the HIS contract may satisfy the material liquidity, and material price reference factors for SPDC determination. With respect to material liquidity, trading in the HIS contract averaged over 1,200 contracts on a daily basis with more than 8 separate transactions each day. In addition, the open interest in the subject contract was substantial. In regard to material price reference, while it did not specifically address the natural gas contracts under review, the ECM Study stated that, in general, market participants view the ICE as a price discovery market for certain natural gas contracts. Natural gas contracts based on actively-traded hubs are transacted on the ICE's electronic trading platform, with the remainder being completed over-the-counter and potentially submitted for clearing by voice brokers. In addition, the ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, the ICE offers ''Henry Hub End of Day'' and ''OTC Gas End of Day'' data packages with access to all price data or just 12, 24, 36, or 48 months of historical data.

III. Request for Comment

In evaluating whether an ECM's agreement, contract, or transaction performs a significant price discovery function, section 2(h)(7) of the CEA directs the Commission to consider, as appropriate, four specific criteria: Price linkage, arbitrage, material price reference, and material liquidity. As it explained in Appendix A to the Part 36 rules,[5] the Commission, in making SPDC determinations, will apply and weigh each factor, as appropriate, to the specific contract and circumstances under consideration.

As part of its evaluation, the Commission will consider the written data, views, and arguments from any ECM that lists the potential SPDC and from any other interested parties. Accordingly, the Commission requests comment on whether the HHD, HEN, and/or HIS contracts perform significant price discovery functions. Commenters' attention is directed particularly to Appendix A of the Commission's Part 36 rules for a detailed discussion of the factors relevant to an SPDC determination. The Commission notes that comments which analyze the contracts in terms of these factors will be especially helpful to the determination process. In order to determine the relevance of comments received, the Commission requests that commenters explain in what capacity are they knowledgeable about the subject contracts. Moreover, because three contracts are included in this notice, it is important that commenters identify to which contract(s) their comments apply.

IV. Related Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA'')[6] imposes certain requirements on federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. Certain provisions of final Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA; OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

B. Cost-Benefit Analysis

Section 15(a) of the CEA[7] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission ''consider'' the costs and benefits of its action. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

The bulk of the costs imposed by the requirements of Commission Rule 36.3 relate to significant and increased information-submission and reporting requirements adopted in response to the Reauthorization Act's directive that the Commission take an active role in determining whether contracts listed by ECMs qualify as SPDCs. The enhanced requirements for ECMs will permit the Commission to acquire the information it needs to discharge its newly-mandated responsibilities and to ensure that ECMs with SPDCs are identified as entities with the elevated status of registered entity under the CEA and are in compliance with the statutory terms of the core principles of section 2(h)(7)(C) of the Act. The primary benefit to the public is to enable the Commission to discharge its statutory obligation to monitor for the presence of SPDCs and extend its oversight to the trading of SPDCs.

Issued in Washington, DC, on October 14, 2009 by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E9–25174 Filed 10–19–09; 8:45 am]

BILLING CODE 6351–01–P

[5] 17 CFR Part 36, Appendix A.

[6] 44 U.S.C. 3507(d).

[7] 7 U.S.C. 19(a).

COMMODITY FUTURES TRADING COMMISSION

Notice of Intent, Pursuant to the Authority in Section 2(h)(7) of the Commodity Exchange Act and Commission Rule 36.3(c)(3), To Undertake a Determination Whether the Socal Border Financial Basis Contract, Offered for Trading on the IntercontinentalExchange, Inc., Performs a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of action and request for comment.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is undertaking a review to determine whether the Socal Border Financial Basis (''SCL'') contract, offered for trading on the IntercontinentalExchange, Inc. (''ICE''), an exempt commercial market (''ECM'') under Sections 2(h)(3)–(5) of the Commodity Exchange Act (''CEA'' or the ''Act''), performs a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder. In connection with this evaluation, the Commission invites comment from interested parties.

DATES: Comments must be received on or before November 4, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Follow the instructions for submitting comments. Federal eRulemaking Portal: http://www.regulations.gov.*
- *E-mail: secretary@cftc.gov.* Include Socal Border Financial Basis (SCL) Contract in the subject line of the message.
- *Fax:* (202) 418–5521.
- *Mail:* Send to David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Courier:* Same as mail above.

All comments received will be posted without change to *http://www.CFTC.gov/.*

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 16, 2009, the CFTC promulgated final rules implementing provisions of the CFTC Reauthorization Act of 2008 (''Reauthorization Act'') [1] which subjects ECMs with significant price discovery contracts (''SPDCs'') to self-regulatory and reporting requirements, as well as certain Commission oversight authorities, with respect to those contracts. Among other things, these rules and rule amendments revise the information-submission requirements applicable to ECMs, establish procedures and standards by which the Commission will determine whether an ECM contract performs a significant price discovery function, and provide guidance with respect to compliance with nine statutory core principles applicable to ECMs with SPDCs. These rules became effective on April 22, 2009.

In determining whether an ECM's contract is or is not a SPDC, the Commission will evaluate the contract's material liquidity, price linkage to other contracts, potential for arbitrage with other contracts traded on designated contract markets or derivatives transaction execution facilities, use of the ECM contract's prices to execute or settle other transactions, and other factors.

In order to facilitate the Commission's identification of possible SPDCs, Commission rule 36.3(c)(2) requires that an ECM operating in reliance on section 2(h)(3) promptly notify the Commission and provide supporting information or data concerning any contract: (i) That averaged five trades per day or more over the most recent calendar quarter; and (ii) (A) for which the ECM sells price information regarding the contract to market participants or industry publications; or (B) whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement, or other daily price of another agreement.

II. Determination of a SPDC

A. The SPDC Determination Process

Commission rule 36.3(c)(3) establishes the procedures by which the Commission makes and announces its determination on whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish a notice in the **Federal Register** that it intends to undertake a determination as to whether the specified agreement, contract, or transaction performs a significant price discovery function and to receive written data, views, and arguments relevant to its determination from the ECM and other interested persons.[2] After prompt consideration of all relevant information,[3] the Commission will, within a reasonable period of time after the close of the comment period, issue an order explaining its determination. Following the issuance of an order by the Commission that the ECM executes or trades an agreement, contract, or transaction that performs a significant price discovery function, the ECM must demonstrate, with respect to that agreement, contract, or transaction, compliance with the core principles under section 2(h)(7)(C) of the CEA [4] and the applicable provisions of Part 36. If the Commission's order represents the first time it has determined that one of the ECM's contracts performs a significant price discovery function, the ECM must submit a written demonstration of its compliance with the core principles within 90 calendar days of the date of the Commission's order. For each subsequent determination by the Commission that the ECM has an additional SPDC, the ECM must submit a written demonstration of its compliance with the core principles within 30 calendar days of the Commission's order.

B. Socal Border Financial Basis Contract

The SCL contract is a monthly contract that is cash settled based on the difference between the price of natural gas at the Southern California Border hub for the month of delivery in the first publication of the month, as published in Intelligence Press Inc's (''IPI's'') *Natural Gas Bidweek Survey*, and the final settlement price for New York Mercantile Exchange's (''NYMEX's'')

[1] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[2] The Commission may commence this process on its own initiative or on the basis of information provided to it by an ECM pursuant to the notification provisions of Commission rule 36.3(c)(2).

[3] Where appropriate, the Commission may choose to interview market participants regarding their impressions of a particular contract. Further, while they may not provide direct evidentiary support with respect to a particular contract, the Commission may rely for background and context on resources such as its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* (''ECM Study''). *http://www.cftc.gov/stellent/groups/public/@newsroom/documents/file/pr5403–07_ecmreport.pdf.*

[4] 7 U.S.C. 2(h)(7)(C).

Henry Hub physically-delivered natural gas futures contract for the same specified calendar month. The size of the SCL contract is 2,500 million British thermal units (''mmBtu''), and the unit of trading is any multiple of 2,500 mmBtu. The SCL contract is listed for up to 120 calendar months commencing with the next calendar month.

Based upon a required quarterly notification filed on July 27, 2009 (mandatory under Rule 36.3(c)(2)), the ICE reported that, with respect to its SCL contract, the total number of trades was 8,102 in the second quarter of 2009, resulting in a daily average of 126.6 trades. During the same period, the SCL contract had a total trading volume of 612,452 contracts and an average daily trading volume of 9,569 contracts. Moreover, the open interest as of June 30, 2009, was 417,121 contracts.

It appears that the SCL contract may satisfy the material liquidity, price linkage, and material price reference factors for SPDC determination. With respect to material liquidity, trading in the SCL contract averaged more than 9,000 contracts on a daily basis, with more than 100 separate transactions each day. In addition, the open interest in the subject contract was substantial. In regard to price linkage, the final settlement of the SCL contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas contract, where the NYMEX is registered with the Commission as a designated contract market (''DCM''). In terms of material price reference, the ICE maintains exclusive rights over IPI's bidweek price indices. As a result, no other exchange can offer such a basis contract based on IPI's Socal bidweek index. While other third-party price providers produce natural gas price indices for a variety of trading centers, those indices may not be the same in value or quality as IPI's price indices; each company's bidweek indices are based on transactions that are consummated during the last five days of the month prior to delivery and are voluntarily submitted by traders. In addition, the ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, the ICE offers ''West Gas End of Day'' and ''OTC Gas End of Day'' with access to all price data or just 12, 24, 36, or 48 months of historical data.

III. Request for Comment

In evaluating whether an ECM's agreement, contract, or transaction performs a significant price discovery function, section 2(h)(7) of the CEA directs the Commission to consider, as appropriate, four specific criteria: Price linkage, arbitrage, material price reference, and material liquidity. As it explained in Appendix A to the Part 36 rules,[5] the Commission, in making SPDC determinations, will apply and weigh each factor, as appropriate, to the specific contract and circumstances under consideration.

As part of its evaluation, the Commission will consider the written data, views, and arguments from any ECM that lists the potential SPDC and from any other interested parties. Accordingly, the Commission requests comment on whether the ICE's SCL contract performs a significant price discovery function. Commenters' attention is directed particularly to Appendix A of the Commission's Part 36 rules for a detailed discussion of the factors relevant to a SPDC determination. The Commission notes that comments which analyze the contract in terms of these factors will be especially helpful to the determination process. In order to determine the relevance of comments received, the Commission requests that commenters explain in what capacity are they knowledgeable about one or several of the subject contracts.

IV. Related Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA'')[6] imposes certain requirements on federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. Certain provisions of final Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA; OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

B. Cost-Benefit Analysis

Section 15(a) of the CEA[7] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of such an order or to determine whether the benefits of such an order outweigh its costs; rather, it requires that the Commission ''consider'' the costs and benefits of its action. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

The bulk of the costs imposed by the requirements of Commission Rule 36.3 relate to significant and increased information-submission and reporting requirements adopted in response to the Reauthorization Act's directive that the Commission take an active role in determining whether contracts listed by ECMs qualify as SPDCs. The enhanced requirements for ECMs will permit the Commission to acquire the information it needs to discharge its newly-mandated responsibilities and to ensure that ECMs with SPDCs are identified as entities with the elevated status of registered entity under the CEA and are in compliance with the statutory terms of the core principles of section 2(h)(7)(C) of the Act. The primary benefit to the public is to enable the Commission to discharge its statutory obligation to monitor for the presence of SPDCs and extend its oversight to the trading of SPDCs.

Issued in Washington, DC, on October 14, 2009 by the Commission.

David A. Stawick,

Secretary of the Commission.

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[5] 17 CFR Part 36, Appendix A.

[6] 44 U.S.C. 3507(d).

[7] 7 U.S.C. 19(a).

COMMODITY FUTURES TRADING COMMISSION

Notice of Intent, Pursuant to the Authority in Section 2(h)(7) of the Commodity Exchange Act and Commission Rule 36.3(c)(3), To Undertake a Determination Whether the (1) Phys, BS, LD1 (US/MM), AB–NIT Contract, et al., Offered for Trading on the Natural Gas Exchange, Inc., Perform Significant Price Discovery Functions

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of action and request for comment.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is undertaking a review to determine whether the (1) Phys,[1] BS,[2]

[1] The acronym ''Phys'' indicates physical delivery of natural gas.

[2] The acronym ''BS'' indicates that the contract is a cash-settled basis swap.

LD1 [3] (US/MM), AB–NIT [4] (''Alberta Basis''); (2) Phys, BS, LD1 (US/MM), Union-Dawn [5] (''Union-Dawn Basis''); (3) Phys, FP,[6] (CA/GJ),[7] AB–NIT (''Alberta Fixed-Price''); (4) Phys, FP, (US/MM), Union-Dawn (''Union-Dawn Fixed-Price''); and (5) Phys, ID,[8] 7a [9] (CA/GJ), AB–NIT (''Alberta Index'') contracts, offered for trading on the Natural Gas Exchange, Inc. (''NGX''), an exempt commercial market (''ECM'') under Sections 2(h)(3)–(5) of the Commodity Exchange Act (''CEA'' or the ''Act''), perform significant price discovery functions. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder. In connection with this evaluation, the Commission invites comment from interested parties.

DATES: Comments must be received on or before November 4, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Follow the instructions for submitting comments. Federal eRulemaking Portal: http://www.regulations.gov.*
- *E-mail: secretary@cftc.gov.* Include Phys, BS, LD1 (US/MM), AB–NIT (''Alberta Basis'') Contract; Phys, BS, LD1 (US/MM), Union-Dawn (''Union-Dawn Basis'') Contract; Phys, FP, (CA/GJ), AB–NIT (''Alberta Fixed-Price'') Contract; Phys, FP, (US/MM), Union-Dawn (''Union-Dawn Fixed-Price'') Contract; and/or Phys, ID, 7a (CA/GJ), AB–NIT (''Alberta Index'') Contract in the subject line of the message, depending on the subject contract(s) to which the comments apply.
- *Fax:* (202) 418–5521
- *Mail:* Send to David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581
- *Courier:* Same as mail above.

All comments received will be posted without change to *http://www.CFTC.gov/*.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov*; or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 16, 2009, the CFTC promulgated final rules implementing provisions of the CFTC Reauthorization Act of 2008 (''Reauthorization Act'') [10] which subjects ECMs with significant price discovery contracts (''SPDCs'') to self-regulatory and reporting requirements, as well as certain Commission oversight authorities, with respect to those contracts. Among other things, these rules and rule amendments revise the information-submission requirements applicable to ECMs, establish procedures and standards by which the Commission will determine whether an ECM contract performs a significant price discovery function, and provide guidance with respect to compliance with nine statutory core principles applicable to ECMs with SPDCs. These rules became effective on April 22, 2009.

In determining whether an ECM's contract is or is not an SPDC, the Commission will evaluate the contract's material liquidity, price linkage to other contracts, potential for arbitrage with other contracts traded on designated contract markets or derivatives transaction execution facilities, use of the ECM contract's prices to execute or settle other transactions, and other factors.

In order to facilitate the Commission's identification of possible SPDCs, Commission rule 36.3(c)(2) requires that an ECM operating in reliance on section 2(h)(3) promptly notify the Commission and provide supporting information or data concerning any contract: (i) That averaged five trades per day or more over the most recent calendar quarter; and (ii) (A) for which the ECM sells price information regarding the contract to market participants or industry publications; or (B) whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement, or other daily price of another agreement.

II. Determination of an SPDC

A. The SPDC Determination Process

Commission rule 36.3(c)(3) establishes the procedures by which the Commission makes and announces its determination on whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish a notice in the **Federal Register** that it intends to undertake a determination as to whether the specified agreement, contract, or transaction performs a significant price discovery function and to receive written data, views, and arguments relevant to its determination from the ECM and other interested persons.[11] After prompt consideration of all relevant information,[12] the Commission will, within a reasonable period of time after the close of the comment period, issue an order explaining its determination. Following the issuance of an order by the Commission that the ECM executes or trades an agreement, contract, or transaction that performs a significant price discovery function, the ECM must demonstrate, with respect to that agreement, contract, or transaction, compliance with the core principles under section 2(h)(7)(C) of the CEA [13] and the applicable provisions of Part 36. If the Commission's order represents the first time it has determined that one of the ECM's contracts performs a significant price discovery function, the ECM must submit a written demonstration of its compliance with the core principles within 90 calendar days of the date of the Commission's order. For each subsequent determination by the Commission that the ECM has an additional SPDC, the

[3] The acronym ''LD1'' indicates the final settlement price of the New York Mercantile Exchange (NYMEX) physically-delivered Henry Hub Natural Gas futures contract for the corresponding contract month, which is expressed in US dollars and cents per million British thermal units (mmBtu).

[4] The acronym ''AB–NIT'' refers to the Alberta, Canada, and Nova Inventory Transfer hub.

[5] ''Union-Dawn'' refers to the Union Gas, Ltd.'s, Dawn hub, which is located in Canada across the U.S. border from Detroit, Michigan.

[6] The acronym ''FP'' refers to fixed-price contracts.

[7] The abbreviation CA/GJ refers the Canadian dollars per gigajoule, which is a unit of measure for energy. One GJ is equal to 0.9478 mmBtu.

[8] The acronym ''ID'' refers to index contracts.

[9] The term ''7a'' refers to a price index that is computed as a volume-weighted average of transactions that occur on the NGX trading platform during a particular calendar month. Such transactions specify the physical delivery of natural gas at the AB–NIT hub in the following calendar month.

[10] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[11] The Commission may commence this process on its own initiative or on the basis of information provided to it by an ECM pursuant to the notification provisions of Commission rule 36.3(c)(2).

[12] Where appropriate, the Commission may choose to interview market participants regarding their impressions of a particular contract. Further, while they may not provide direct evidentiary support with respect to a particular contract, the Commission may rely for background and context on resources such as its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* (''ECM Study''). *http://www.cftc.gov/stellent/groups/public/@newsroom/documents/file/pr5403–07_ecmreport.pdf.*

[13] 7 U.S.C. 2(h)(7)(C).

ECM must submit a written demonstration of its compliance with the core principles within 30 calendar days of the Commission's order.

B. Phys, BS, LD1 (US/MM), AB–NIT Contract

The Alberta Basis contract is a monthly contract that calls for physical delivery of natural gas based on the final settlement price for NYMEX's Henry Hub physically-delivered natural gas futures contract for the specified calendar month, plus or minus the price differential (basis) between the Alberta delivery point [14] and the Henry Hub. There is no standard size for the Alberta Basis contract, although a minimum volume of 100 mmBtu is required in increments of 100 units per day. The Alberta Basis contract is listed for 60 consecutive calendar months.

Based upon a required quarterly notification filed on August 25, 2009 (mandatory under Rule 36.3(c)(2)), the NGX reported that, with respect to its Alberta Basis contract, the average number of trades each day for the nearby contract month was 23.2 in the second quarter of 2009. During the same period, the Alberta Basis nearby contract had an average daily trading volume of 5,869,800 million British thermal units (mmBtu).[15] Moreover, the net open interest as of June 30, 2009, for the nearby contract month was 150,213,600 mmBtu. For delivery two months out, the open interest was 10,112,200 mmBtu.

It appears that the Alberta Basis contract may satisfy the material liquidity, price linkage, and material price reference factors for SPDC determination. With respect to material liquidity, trading in the Alberta Basis contract was nearly 6,000,000 mmBtu on a daily basis, with more than 20 separate transactions each day. In addition, the open interest in the subject contract was substantial. In regard to price linkage, the final settlement of the Alberta Basis contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas futures contract, where the NYMEX is registered with the Commission as a designated contract market (''DCM'').

With respect to material price reference, the NGX forged an alliance with the IntercontinentalExchange, Inc., (ICE) to use the ICE's matching engine to complete transactions in physical gas contracts traded on NGX. In return, the NGX agreed to provide the clearing services for such transactions. As part of the agreement, NGX provides the ICE with transaction data, which are then made available to market participants on a paid basis. The ICE offers the NGX data in several packages, which vary in terms of the amount of available historical data. For example, the ICE offers the ''OTC Gas End of Day'' data packages with access to all historical data, or the option of accessing 12, 24, 36, and 48 months of past data only.

C. Phys, BS, LD1 (US/MM), Union-Dawn Contract

The Union-Dawn Basis contract is a monthly contract that calls for physical delivery of natural gas based on the final settlement price for NYMEX's Henry Hub physically-delivered natural gas futures contract for the specified calendar month, plus or minus the price differential (basis) between the Dawn delivery point [16] and the Henry Hub. There is no standard size for the Union-Dawn Basis contract, although a minimum volume of 100 mmBtu is required in increments of 100 units per day. The Union-Dawn Basis contract is listed for 60 consecutive calendar months.

Based upon a required quarterly notification filed on August 25, 2009 (mandatory under Rule 36.3(c)(2)), the NGX reported that, with respect to its Union-Dawn Basis contract, the average number of trades each day for the nearby contract month was 8.3 in the second quarter of 2009. During the same period, the Union-Dawn Basis nearby contract had an average daily trading volume of 1,332,400 mmBtu. Moreover, the net open interest as of June 30, 2009, for the nearby contract month was 28,203,800 mmBtu. For delivery two months out, the open interest was 12,908,400 mmBtu.

It appears that the Union-Dawn Basis contract may satisfy the material liquidity, price linkage, and material price reference factors for SPDC determination. With respect to material liquidity, trading in the Union-Dawn Basis contract was more than 1,000,000 mmBtu on a daily basis, with more than eight separate transactions each day. In addition, the open interest in the subject contract was substantial. In regard to price linkage, the final settlement of the Union-Dawn Basis contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas futures contract, where the NYMEX is registered with the Commission as a designated contract market (''DCM'').

With respect to material price reference, the NGX forged an alliance with the IntercontinentalExchange, Inc., (ICE) to use the ICE's matching engine to complete transactions in physical gas contracts traded on NGX. In return, the NGX agreed to provide the clearing services for such transactions. As part of the agreement, NGX provides the ICE with transaction data, which are then made available to market participants on a paid basis. The ICE offers the NGX data in several packages, which vary in terms of the amount of available historical data. For example, the ICE offers the ''OTC Gas End of Day'' data packages with access to all historical data, or the option of accessing 12, 24, 36, and 48 months of past data only.

D. Phys, FP, (CA/GJ), AB–NIT Contract

The Alberta Fixed-Price contract calls for physical delivery of natural gas over a number of different time periods. This contract allows delivery of natural gas during the following day, Friday plus two or three days, Saturday plus three or four days, Sunday plus two days, the remainder of the month, throughout the nearby calendar month, and during a specific future calendar month. Each delivery period is considered to be a separate contract, and market participants value each delivery period separately. However, overlapping delivery days are considered fungible, and, thus, may be offset by traders. There is no standard size for the Alberta Fixed-Priced contract, although a minimum volume of 94.78 mmBtu is required in increments of 100 units per day. The NGX lists the Alberta Fixed-Price contract for 60 calendar months.

Based upon a required quarterly notification filed on August 25, 2009 (mandatory under Rule 36.3(c)(2)), the NGX reported that, with respect to its Alberta Fixed-Price contract, the average number of trades daily for each delivery period was greater than five in the second quarter of 2009. In this regard, the average number of trades each day was 122.1, 36.0, 7.0, 30.1, 7.4, 68.6, and 12.8 trades for the following delivery periods—following day, Friday plus two days, Friday plus three days, Saturday

[14] NOVA Gas Transmission, Ltd., owns the natural gas transmission infrastructure known as the Alberta System. The Alberta System is a network comprising 14,100 miles of pipeline that gathers natural gas for use both in Alberta and for delivery to provincial border points for export to North American markets. The Alberta System is one of the largest natural gas transmission systems in North America and gathers 66 percent of natural gas produced in Western Canada.

[15] For comparative purposes, the size of the NYMEX's physically-delivered Henry Hub natural gas futures contract is 10,000 mmBtu.

[16] Union Gas, Ltd., is a major Canadian natural gas storage, transmission, and distribution company based in Ontario, Canada. Union Gas offers premium storage and transportation services to customers at the Dawn hub, which the largest underground storage facility in Canada and one of the largest in North America. The Dawn hub offers customers an important link for natural gas moving from Western Canadian and U.S. supply basins to markets in central Canada and the northeast United States.

plus three days, Saturday plus four days, Sunday plus two days, remainder of the month, nearby calendar month, and any single future calendar month, respectively. During the same period, the Alberta Fixed-Price contract had an average daily trading volume of 1,209,505 mmBtu; 821,565 mmBtu; 223,874 mmBtu; 754,175 mmBtu; 672,568 mmBtu; 6,634,030 mmBtu; and 1,233,958 mmBtu for the following delivery periods—next day, Friday plus two days, Friday plus three days, Saturday plus three days, Saturday plus four days, Sunday plus two days, remainder of the month, nearby calendar month, and any single future calendar month, respectively. Moreover, the net open interest as of June 30, 2009, was 96,003,450 mmBtu for next-month delivery. For delivery two months out, the open interest was 54,456,997 mmBtu.[17]

It appears that the Alberta Fixed-Price contract may satisfy the material liquidity and material price reference factors for SPDC determination. With respect to material liquidity, trading in the nearby month of the Alberta Fixed-Price contract was close to 7,000,000 mmBtu on a daily basis, with nearly 70 separate transactions each day. In addition, the open interest in the subject contract was substantial.

With respect to material price reference, the NGX forged an alliance with the IntercontinentalExchange, Inc., (ICE) to use the ICE's matching engine to complete transactions in physical gas contracts traded on NGX. In return, the NGX agreed to provide the clearing services for such transactions. As part of the agreement, NGX provides the ICE with transaction data, which are then made available to market participants on a paid basis. The ICE offers the NGX data in several packages, which vary in terms of the amount of available historical data. For example, the ICE offers the ''OTC Gas End of Day'' data packages with access to all historical data, or the option of accessing 12, 24, 36, and 48 months of past data only.

E. Phys, FP, (US/MM), Union-Dawn Contract

The Union-Dawn Fixed-Price contract calls for physical delivery of natural gas over two different time periods: the following day and Saturday plus three days. Each delivery period is considered to be a separate contract, and the market participants value each delivery period separately. However, overlapping delivery days are considered fungible, and, thus, may be offset by traders. There is no standard size for the Union-Dawn Fixed-Priced contract, although a minimum volume of 100 mmBtu required in increments of 100 units per day. The NGX lists the Union-Dawn Fixed-Price contract for 60 calendar months.

Based upon a required quarterly notification filed on August 25, 2009 (mandatory under Rule 36.3(c)(2)), the NGX reported that, with respect to its Union-Dawn Fixed-Price contract, the average number of trades each day was 114.1 trades and 23.9 trades for next-day delivery and delivery Saturday plus the next three days, respectively. During the same period, the Union-Dawn Fixed-Price contract had an average daily trading volume of 812,800 mmBtu and 458,000 mmBtu for the delivery periods next day and Saturday plus three days, respectively. Moreover, the net open interest as of June 30, 2009, was 2,241,600 mmBtu for next-day delivery.

It appears that the Union-Dawn Fixed-Price contract may satisfy the material liquidity and material price reference factors for SPDC determination. With respect to material liquidity, trading activity in the next-day Union-Dawn Fixed-Price contract was over 800,000 mmBtu on a daily basis, with over 100 separate transactions each day. In addition, the open interest in the subject contract was substantial.

With respect to material price reference, the NGX forged an alliance with the IntercontinentalExchange, Inc., (ICE) to use the ICE's matching engine to complete transactions in physical gas contracts traded on NGX. In return, the NGX agreed to provide the clearing services for such transactions. As part of the agreement, NGX provides the ICE with transaction data, which are then made available to market participants on a paid basis. The ICE offers the NGX data in several packages, which vary in terms of the amount of available historical data. For example, the ICE offers the ''OTC Gas End of Day'' data packages with access to all historical data, or the option of accessing 12, 24, 36, and 48 months of past data only.

F. Phys, ID, 7a (CA/GJ), AB–NIT Contract

The Alberta Index contract calls for physical delivery of natural gas during the specified calendar month. When trading this contract, market participants price the difference between the anticipated value of natural gas at the time of delivery and the average of actual trades on the NGX system. The average of transactions on the NGX system is reported as a volume-weighted average price index in the first publication of the delivery month of Canadian Enerdata, Ltd.'s *Canadian Gas Price Reporter.* At the time of delivery, the negotiated price premium or discount is added or subtracted to the published index price. There is no standard size for the Alberta Index contract, although a minimum volume of 94.78 mmBtu is required in increments of 100 units per day. The NGX lists the Alberta Index contract for 60 calendar months.

Based upon a required quarterly notification filed on August 25, 2009 (mandatory under Rule 36.3(c)(2)), the NGX reported that, with respect to its Alberta Index contract, the average number of trades each day was 10.9. During the same period, the Alberta Index contract had an average daily trading volume of 2,438,627 mmBtu. Moreover, the net open interest as of June 30, 2009, was 6,287,794 mmBtu for delivery in the following month.

It appears that the Alberta Index contract may satisfy the material liquidity and material price reference factors for SPDC determination. With respect to material liquidity, trading in the nearby month of the Alberta Index contract was over 2,000,000 mmBtu on a daily basis, with over 10 separate transactions each day. In addition, the open interest in the subject contract was substantial.

With respect to material price reference, the NGX forged an alliance with the IntercontinentalExchange, Inc., (ICE) to use the ICE's matching engine to complete transactions in physical gas contracts traded on NGX. In return, the NGX agreed to provide the clearing services for such transactions. As part of the agreement, NGX provides the ICE with transaction data, which are then made available to market participants on a paid basis. The ICE offers the NGX data in several packages, which vary in terms of the amount of available historical data. For example, the ICE offers the ''OTC Gas End of Day'' data packages with access to all historical data, or the option of accessing 12, 24, 36, and 48 months of past data only.

III. Request for Comment

In evaluating whether an ECM's agreement, contract, or transaction performs a significant price discovery function, section 2(h)(7) of the CEA directs the Commission to consider, as appropriate, four specific criteria: price linkage, arbitrage, material price reference, and material liquidity. As it explained in Appendix A to the Part 36 rules,[18] the Commission, in making

[17] The open interest for other delivery periods was significantly smaller than for the nearby and second-nearby contracts.

[18] 17 CFR Part 36, Appendix A.

SPDC determinations, will apply and weigh each factor, as appropriate, to the specific contract and circumstances under consideration.

As part of its evaluation, the Commission will consider the written data, views, and arguments from any ECM that lists the potential SPDC and from any other interested parties. Accordingly, the Commission requests comment on whether the subject contracts perform significant price discovery functions. Commenters' attention is directed particularly to Appendix A of the Commission's Part 36 rules for a detailed discussion of the factors relevant to a SPDC determination. The Commission notes that comments which analyze the contracts in terms of these factors will be especially helpful to the determination process. In order to determine the relevance of comments received, the Commission requests that commenters explain in what capacity are they knowledgeable about one or several of the subject contracts. Moreover, because five contracts are included in this notice, it is important that commenters identify to which contract(s) their comments apply.

IV. Related Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA'') [19] imposes certain requirements on federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. Certain provisions of final Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA; OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

B. Cost-Benefit Analysis

Section 15(a) of the CEA [20] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of such an order or to determine whether the benefits of such an order outweigh its costs; rather, it requires that the Commission ''consider'' the costs and benefits of its action. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

The bulk of the costs imposed by the requirements of Commission Rule 36.3 relate to significant and increased information-submission and reporting requirements adopted in response to the Reauthorization Act's directive that the Commission take an active role in determining whether contracts listed by ECMs qualify as SPDCs. The enhanced requirements for ECMs will permit the Commission to acquire the information it needs to discharge its newly-mandated responsibilities and to ensure that ECMs with SPDCs are identified as entities with the elevated status of registered entity under the CEA and are in compliance with the statutory terms of the core principles of section 2(h)(7)(C) of the Act. The primary benefit to the public is to enable the Commission to discharge its statutory obligation to monitor for the presence of SPDCs and extend its oversight to the trading of SPDCs.

Issued in Washington, DC, on October 14, 2009 by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E9–25183 Filed 10–19–09; 8:45 am]

BILLING CODE 6351–01–P

[19] 44 U.S.C. 3507(d).

[20] 7 U.S.C.19(a).

COMMODITY FUTURES TRADING COMMISSION

Notice of Intent, Pursuant to the Authority in Section 2(h)(7) of the Commodity Exchange Act and Commission Rule 36.3(c)(3), To Undertake a Determination Whether the Fuel Oil-180 Singapore Swap Contract, Offered for Trading on the IntercontinentalExchange, Inc., Performs a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of action and request for comment.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is undertaking a review to determine whether the Fuel Oil—180 Singapore Swap (''SZS'') contract, offered for trading on the IntercontinentalExchange, Inc. (''ICE''), an exempt commercial market (''ECM'') under Sections 2(h)(3)–(5) of the Commodity Exchange Act (''CEA'' or the ''Act''), perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder. In connection with this evaluation, the Commission invites comment from interested parties.

DATES: Comments must be received on or before November 4, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Follow the instructions for submitting comments. Federal eRulemaking Portal: http://www.regulations.gov.*
- *E-mail: secretary@cftc.gov.* Include Fuel Oil—180 Singapore Swap (SZS) Contract in the subject line of the message.
- *Fax:* (202) 418–5521
- *Mail:* Send to David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581
- *Courier:* Same as mail above.

All comments received will be posted without change to *http://www.CFTC.gov/.*

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov*; or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 16, 2009, the CFTC promulgated final rules implementing provisions of the CFTC Reauthorization Act of 2008 (''Reauthorization Act'') [1] which subjects ECMs with significant price discovery contracts (''SPDCs'') to self-regulatory and reporting requirements, as well as certain Commission oversight authorities, with respect to those contracts. Among other things, these rules and rule amendments revise the information-submission requirements applicable to ECMs, establish procedures and standards by which the Commission will determine whether an ECM contract performs a significant price discovery function, and provide guidance with respect to compliance with nine statutory core principles applicable to ECMs with

[1] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

SPDCs. These rules became effective on April 22, 2009.

In determining whether an ECM's contract is or is not a SPDC, the Commission will evaluate the contract's material liquidity, price linkage to other contracts, potential for arbitrage with other contracts traded on designated contract markets or derivatives transaction execution facilities, use of the ECM contract's prices to execute or settle other transactions, and other factors.

In order to facilitate the Commission's identification of possible SPDCs, Commission rule 36.3(c)(2) requires that an ECM operating in reliance on section 2(h)(3) promptly notify the Commission and provide supporting information or data concerning any contract: (i) That averaged five trades per day or more over the most recent calendar quarter; and (ii)(A) for which the ECM sells price information regarding the contract to market participants or industry publications; or (B) whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement, or other daily price of another agreement.

II. Determination of a SPDC

A. The SPDC Determination Process

Commission rule 36.3(c)(3) establishes the procedures by which the Commission makes and announces its determination on whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish a notice in the **Federal Register** that it intends to undertake a determination as to whether the specified agreement, contract, or transaction performs a significant price discovery function and to receive written data, views, and arguments relevant to its determination from the ECM and other interested persons.[2] After prompt consideration of all relevant information,[3] the Commission will, within a reasonable period of time after the close of the comment period, issue an order explaining its determination. Following the issuance of an order by the Commission that the ECM executes or trades an agreement, contract, or transaction that performs a significant price discovery function, the ECM must demonstrate, with respect to that agreement, contract, or transaction, compliance with the core principles under section 2(h)(7)(C) of the CEA[4] and the applicable provisions of Part 36. If the Commission's order represents the first time it has determined that one of the ECM's contracts performs a significant price discovery function, the ECM must submit a written demonstration of its compliance with the core principles within 90 calendar days of the date of the Commission's order. For each subsequent determination by the Commission that the ECM has an additional SPDC, the ECM must submit a written demonstration of its compliance with the core principles within 30 calendar days of the Commission's order.

B. Fuel Oil-180 Singapore Swap Contract

The SZS contract specifies 1,000 metric tons of 180 CentiStokes (cst) Singapore high-sulfur fuel oil. The contract is cash-settled based on the arithmetic average of the means between the daily high and low price quotations for ''HSFO 180 CST'' delivered in the specified calendar month, published under the ''Singapore'' heading within Platts' *Asia-Pacific/Arab Gulf Marketscan.* The SZS contract is listed for up to 60 consecutive calendar months beginning with the next calendar month.

Based upon a required quarterly notification filed on July 27, 2009 (mandatory under Rule 36.3(c)(2)), the ICE reported that, with respect to the SZS contract, the total number of trades was 1,957 in the second quarter of 2009, resulting in a daily average of 30.6 trades. During the same period, the SZS contract had a total trading volume of 13,170 contracts and an average daily trading volume of 205.8 contracts. Additionally, as of June 30, 2009, open interest was 11,356 contracts.

It appears that the SZS contract may satisfy the material liquidity and material price reference factors for SPDC determination. With respect to material liquidity, as noted above, trading in the ICE SZS contract averaged over 200 contracts on a daily basis, with more than 30 separate transactions each day. In regard to material price reference, while it did not specify which contracts served a significant price discovery function or reference this particular contract, the Commission's ECM Study stated that, in general, market participants view the ICE as a price discovery market for certain energy contracts. Energy contracts based on actively-traded locations are transacted heavily on the ICE's electronic trading platform, with the remainder being completed over-the-counter and potentially submitted for clearing by voice brokers. In addition, ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, the ICE offers ''OTC Oil End of Day'' data packages with access to all price data or just 12, 24, 36, or 48 months of historical data.

III. Request for Comment

In evaluating whether an ECM's agreement, contract, or transaction performs a significant price discovery function, section 2(h)(7) of the CEA directs the Commission to consider, as appropriate, four specific criteria: Price linkage, arbitrage, material price reference, and material liquidity. As it explained in Appendix A to the Part 36 rules,[5] the Commission, in making SPDC determinations, will apply and weigh each factor, as appropriate, to the specific contract and circumstances under consideration.

As part of its evaluation, the Commission will consider the written data, views, and arguments from any ECM that lists the potential SPDC and from any other interested parties. Accordingly, the Commission requests comment on whether the ICE's SZS contract performs a significant price discovery function. Commenters' attention is directed particularly to Appendix A of the Commission's Part 36 rules for a detailed discussion of the factors relevant to a SPDC determination. The Commission notes that comments which analyze the contracts in terms of these factors will be especially helpful to the determination process. In order to determine the relevance of comments received, the Commission requests that commenters explain in what capacity are they knowledgeable about the subject contract.

[2] The Commission may commence this process on its own initiative or on the basis of information provided to it by an ECM pursuant to the notification provisions of Commission rule 36.3(c)(2).

[3] Where appropriate, the Commission may choose to interview market participants regarding their impressions of a particular contract. Further, while they may not provide direct evidentiary support with respect to a particular contract, the Commission may rely for background and context on resources such as its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* (''ECM Study''). *http://www.cftc.gov/stellent/groups/public/@newsroom/documents/file/pr5403–07_ecmreport.pdf.*

[4] 7 U.S.C. 2(h)(7)(C).

[5] 17 CFR Part 36, Appendix A.

IV. Related Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA'') [6] imposes certain requirements on federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. Certain provisions of final Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA; OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

B. Cost-Benefit Analysis

Section 15(a) of the CEA [7] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of such an order or to determine whether the benefits of such an order outweigh its costs; rather, it requires that the Commission ''consider'' the costs and benefits of its action. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

The bulk of the costs imposed by the requirements of Commission Rule 36.3 relate to significant and increased information-submission and reporting requirements adopted in response to the Reauthorization Act's directive that the Commission take an active role in determining whether contracts listed by ECMs qualify as SPDCs. The enhanced requirements for ECMs will permit the Commission to acquire the information it needs to discharge its newly-mandated responsibilities and to ensure that ECMs with SPDCs are identified as entities with the elevated status of registered entity under the CEA and are in compliance with the statutory terms of the core principles of section 2(h)(7)(C) of the Act. The primary benefit to the public is to enable the Commission to discharge its statutory obligation to monitor for the presence of SPDCs and extend its oversight to the trading of SPDCs.

[6] 44 U.S.C. 3507(d).

[7] 7 U.S.C. 19(a).

Issued in Washington, DC, on October 14, 2009 by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E9–25181 Filed 10–19–09; 8:45 am]

BILLING CODE 6351–01–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Sunshine Act Notice

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Notice of public meeting.

SUMMARY: Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given of the Defense Nuclear Facilities Safety Board's (Board) public hearing and meeting described below. The Board will conduct a public hearing and meeting pursuant to 42 U.S.C. 2286b and invites any interested persons or groups to present any comments, technical information, or data concerning safety issues related to the matters to be considered.

TIME AND DATE OF MEETING: 9 a.m., November 24, 2009.

PLACE: Defense Nuclear Facilities Safety Board, Public Hearing Room, 625 Indiana Avenue, NW., Suite 300, Washington, DC 20004–2001. Additionally, as a part of the Board's E–Government initiative, the meeting will be presented live through Internet video streaming. A link to the presentation will be available on the Board's Web site (*http://www.dnfsb.gov*).

STATUS: Open. While the Government in the Sunshine Act does not require that the scheduled discussion be conducted in a meeting, the Board has determined that an open meeting in this specific case furthers the public interests underlying both the Sunshine Act and the Board's enabling legislation.

MATTERS TO BE CONSIDERED: The Board will hold a series of public meetings to examine the Department of Energy's (DOE) implementation of Recommendation 2004–1, *Oversight of Complex, High-Hazard Nuclear Operations.* In 2003 and 2004, the Board conducted a series of eight public meetings that examined DOE's methods, and the proposed changes to those methods, for providing and ensuring adequate protection for the public health and safety and that of the workers at DOE's defense nuclear facilities. Based on the findings from these public meetings, the Board issued Recommendation 2004–1 on May 21, 2004. While the Board notes that progress has been made on many of the 22 commitments contained in DOE's *Implementation Plan to Improve Oversight of Nuclear Operations (Revision 2, October 2006),* major commitments remain incomplete, and areas continue to require greater attention from senior management if planned activities are to be completed. In addition, commitments previously declared complete must be reviewed and reinforced by cognizant managers to reaffirm the continued achievement of their purposes and functions. This series of public meetings will examine the overall implementation of Recommendation 2004–1 in light of the Recommendation's basic precepts: strengthen federal health and safety assurance; learn from internal and external operating experience; and revitalize the implementation of Integrated Safety Management. Of particular importance to the successful implementation of Recommendation 2004–1 is the direct and unbroken line of roles and responsibilities for the safety of nuclear operations, extending from the Secretary of Energy, Program Secretarial Officers, and the National Nuclear Security Administration (NNSA) to field offices and sites.

This hearing and meeting is intended to further assist the Board and DOE in their collective efforts to evaluate any needed improvements in the timeliness of issue resolution. The Board expects to hear presentations from the top leadership team of DOE and NNSA to outline the safety goals and safety management approach that DOE/NNSA is pursuing in the context of activities conducted under Recommendation 2004–1 and other DOE safety initiatives. The Board may also collect any other information relevant to health or safety of the workers and the public, with respect to Recommendation 2004–1. The public hearing portion of this proceeding is authorized by 42 U.S.C. 2286b.

CONTACT PERSON FOR MORE INFORMATION: Brian Grosner, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901, (800) 788–4016. This is a toll-free number.

SUPPLEMENTARY INFORMATION: Requests to speak at the hearing may be submitted in writing or by telephone. The Board asks that commentators describe the nature and scope of their oral presentation. Those who contact the Board prior to close of business on November 23, 2009, will be scheduled for time slots, beginning at approximately 12 p.m. The Board will post a schedule for those speakers who

have contacted the Board before the hearing. The posting will be made at the entrance to the Public Hearing Room at the start of the 9 a.m. hearing and meeting. Anyone who wishes to comment or provide technical information or data may do so in writing, either in lieu of, or in addition to, making an oral presentation. The Board Members may question presenters to the extent deemed appropriate. Documents will be accepted at the meeting or may be sent to the Board's Washington, DC office. The Board will hold the record open until December 24, 2009, for the receipt of additional materials. A transcript of the meeting will be made available by the Board for inspection by the public at the Board's Washington office and at DOE's public reading room at the DOE Federal Building, 1000 Independence Avenue, SW., Washington, DC 20585. The Board specifically reserves its right to further schedule and otherwise regulate the course of the meeting and hearing, to recess, reconvene, postpone, or adjourn the meeting and hearing, conduct further reviews, and otherwise exercise its power under the Atomic Energy Act of 1954, as amended.

Dated: October 14, 2009.

John E. Mansfield,

Vice Chairman.

[FR Doc. E9–25326 Filed 10–16–09; 4:15 pm]

BILLING CODE 3670–01–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Air University Board of Visitors Meeting

ACTION: Notice of meeting of the Air University Board of Visitors.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the Air University Board of Visitors' meeting will take place on Monday, November 16th, 2009, from 8 a.m.–5 p.m., and Tuesday, November 17th, 2009, from 8 a.m.–8 p.m. The meeting will be held in the Air University Commander's Conference Room located in building 836. Please contact Dr. Dorothy Reed, 334–953–5159 for further details of the meeting location.

The purpose of this meeting is to provide independent advice and recommendations on matters pertaining to the educational, doctrinal, and research policies and activities of Air University. The agenda will include topics relating to the policies, programs, and initiatives of Air University educational programs.

Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155 all sessions of the Air University Board of Visitors' meeting will be open to the public. Any member of the public wishing to provide input to the Air University Board of Visitors should submit a written statement in accordance with 41 CFR 102–3.140(c) and section 10(a)(3) of the Federal Advisory Committee Act and the procedures described in this paragraph. Written statements can be submitted to the Designated Federal Officer at the address detailed below at any time. Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed below at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after this date may not be provided to or considered by the Air University Board of Visitors until its next meeting. The Designated Federal Officer will review all timely submissions with the Air University Board of Visitors' Board Chairperson and ensure they are provided to members of the Board before the meeting that is the subject of this notice. Additionally, any member of the public wishing to attend this meeting should contact either person listed below at least five calendar days prior to the meeting for information on base entry passes.

FOR FURTHER INFORMATION CONTACT: Dr. Dorothy Reed, Federal Designated Officer, Air University Headquarters, 55 LeMay Plaza South, Maxwell Air Force Base, Alabama 36112–6335, telephone (334) 953–5159 or Mrs. Diana Bunch, Alternate Federal Designated Officer, same address, telephone (334) 953–4547.

Bao-Anh Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. E9–25142 Filed 10–19–09; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF ENERGY

Basic Energy Sciences Advisory Committee

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Basic Energy Sciences Advisory Committee (BESAC). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, November 5, 2009, 8:30 a.m.–5:30 p.m., and Friday, November 6, 2009, 8:30 a.m. to 12 noon.

ADDRESSES: Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

FOR FURTHER INFORMATION CONTACT: Katie Perine, Office of Basic Energy Sciences, U.S. Department of Energy, Germantown Building, Independence Avenue, Washington, DC 20585; Telephone: (301) 903–6529.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The purpose of this meeting is to provide advice and guidance on the basic energy sciences research program.

Tentative Agenda: Agenda will include discussions of the following:

- News from Office of Science/DOE.
- News from the Office of Basic Energy Sciences.
- Energy Frontier Research Center Update.
- Briefing on the Accelerator Physics of Future Light Sources Workshop.
- New BESAC Charge Discussion.
- Public Comments (10-minute rule).

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Katie Perine at 301–903–6594 (fax) or *katie.perine@science.doe.gov* (e-mail). Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room; 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585; between 9 a.m. and 4 p.m., Monday through Friday, except holidays.

Issued in Washington, DC, on October 15, 2009.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E9–25172 Filed 10–19–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2413–112]

Georgia Power Company; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

October 13, 2009.

a. *Type of Application:* Non-project use of project lands and waters.

b. *Project Number:* 2413–112.

c. *Date Filed:* June 23, 2009.

d. *Applicant:* Georgia Power Company.

e. *Name of Project:* Wallace Dam Hydroelectric Project.

f. *Location:* The project is located on the Oconee River in Putnam, Morgan, Oconee, Oglethorpe, Greene, and Hancock Counties, Georgia, and occupies Federal lands administered by the U.S. Forest Service. The proposed action would occur in Greene County.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a) 825(r) and 799 and 801.

h. *Applicant Contact:* Mr. Herbie N. Johnson, Lake Resources Manager, 125 Wallace Dam Road, NE., Eatonton, GA 21024, telephone: (706) 485–8704 ext. 5.

i. *FERC Contact:* Any questions on this notice should be addressed to Christopher Yeakel at (202) 502–8132, or e-mail address: *christopher.yeakel@ferc.gov*.

j. *Deadline for filing comments and or motions:* November 13, 2009.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* Georgia Power Company (licensee) proposes to permit the Linger Longer Development Company (permittee) to construct six community boat docks with 5 double slips each, access walkways, and a pedestrian bridge for use by residents of Hall's Crossing development. The proposed facilities would impact a total of 2.02 acres of project lands and would be constructed along 2,180 linear feet of shoreline. In addition, rip-rap would be installed along the shoreline at each dock location, and fish attractors would be placed beneath each dock to enhance fish habitat. In developing the application, the licensee consulted with the U.S. Fish and Wildlife Service, Georgia State Historic Preservation Officer, and Georgia Department of Natural Resources—Wildlife Resources Division.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field (p-2413) to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3372 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers (p–2413–112).

p. *Agency Comments*—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–25098 Filed 10–19–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

October 8, 2009.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP09–1080–000.

Applicants: Gulfstream Natural Gas System, L.L.C.

Description: Gulfstream Natural Gas System, L.L.C. submits Exhibit B to a Rate Schedule FTS Service Agreement with Florida Power & Light Company.

Filed Date: 09/30/2009.

Accession Number: 20090930–0078.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–31–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Gulf South Pipeline Company submits a negotiated rate agreement associated with a capacity release agreement with Sequent Energy Management, LP.

Filed Date: 10/02/2009.

Accession Number: 20091006–0013.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 14, 2009.

Docket Numbers: RP10–32–000.

Applicants: CenterPoint Energy Gas Transmission Company.

Description: CenterPoint Energy Gas Transmission Company submits negotiated rate agreement with DB Energy Trading L.L.C., to be effective 10/6/09.

Filed Date: 10/06/2009.

Accession Number: 20091006–0028.

Comment Date: 5 p.m. Eastern Time on Monday, October 19, 2009.

Docket Numbers: RP10–33–000.

Applicants: Tres Palacios Gas Storage L.L.C.

Description: Tres Palacios Gas Storage L.L.C. submits First Revised Sheet No. 13 *et al.* to its FERC Gas Tariff, Original Volume No. 1.

Filed Date: 10/06/2009.

Accession Number: 20091006–0027.

Comment Date: 5 p.m. Eastern Time on Monday, October 19, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–25091 Filed 10–19–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 13, 2009.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC10–3–000.

Applicants: Majestic Wind Power LLC, Butler Ridge, LLC, Wessington Wind I LLC, High Majestic Wind Energy Center, LLC, Butler Ridge Wind Energy Center, LLC, Wessington Wind Energy Center, LLC.

Description: Majestic Wind Power LLC, *et al.* Application for Authorization for Disposition of Jurisdictional Facilities, Request for Confidential Treatment, and Request for Expedited Consideration.

Filed Date: 10/09/2009.

Accesssion Number: 20091009–5140.

Comment Date: 5 p.m. Eastern Time on Friday, October 30, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER07–407–006.

Applicants: High Prairie Wind Farm II, LLC.

Description: High Prairie Wind Farm II, LLC submits Sub. Original Sheet 3 to correct the inadvertent error.

Filed Date: 10/09/2009.

Accesssion Number: 20091013–0052.

Comment Date: 5 p.m. Eastern Time on Friday, October 30, 2009.

Docket Numbers: ER09–1636–001.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc submits errata filing to correct a proposed revision to Attachment O of the Midwest ISO Open Access Transmission, Energy and Operating Reserve Markets Tariff.

Filed Date: 10/09/2009.

Accesssion Number: 20091013–0029.

Comment Date: 5 p.m. Eastern Time on Monday, October 19, 2009.

Docket Numbers: ER09–1637–001.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator, Inc submits errata filing to correct a proposed revision to Attachment O of the Midwest ISO Open Access Transmission, Energy and Operating Reserve Markets Tariff.

Filed Date: 10/13/2009.

Accesssion Number: 20091013–0030.

Comment Date: 5 p.m. Eastern Time on Monday, October 19, 2009.

Docket Numbers: ER09–1699–002.

Applicants: Eurus Combine Hills II LLC.

Description: Eurus Combine Hills II LLC submits second amended application for market based rate authority.

Filed Date: 10/08/2009.

Accesssion Number: 20091013–0031.

Comment Date: 5 p.m. Eastern Time on Thursday, October 29, 2009.

Docket Numbers: ER10–42–000.

Applicants: American Electric Power Service Corporation.

Description: American Electric Power Service Corporation submits first revision to the Interconnection and Local Delivery Service Agreement between AEP and the City of Danville.

Filed Date: 10/09/2009.

Accesssion Number: 20091013–0027.

Comment Date: 5 p.m. Eastern Time on Friday, October 30, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–25175 Filed 10–19–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

October 9, 2009.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–34–000.

Applicants: Arlington Storage Company, LLC.

Description: Arlington Storage Company, LLC submits the non-conforming terms of its firm service agreements under Rate Schedule FSS with six initial firm storage customers at the Thomas Corners Natural Gas Storage Project in Steuben County, New York.

Filed Date: 10/07/2009.

Accession Number: 20091008–0239.

Comment Date: 5 p.m. Eastern Time on Monday, October 19, 2009.

Docket Numbers: RP10–35–000.

Applicants: Cheyenne Plains Gas Pipeline Company LLC.

Description: Cheyenne Plains Gas Pipeline Company, LLC submits First Revised Sheet 266 *et al.* to FERC Gas Tariff, Original Volume 1, to be effective 11/9/09.

Filed Date: 10/08/2009.

Accession Number: 20091008–0199.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 20, 2009.

Docket Numbers: RP10–36–000.

Applicants: Colorado Interstate Gas Company.

Description: Colorado Interstate Gas Company submits First Revised Sheet 381 *et al.* to FERC Gas Tariff, First Revised Volume 1 to be effective 12/9/09.

Filed Date: 10/08/2009.

Accession Number: 20091008–0200.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 20, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.

Deputy Secretary.

[FR Doc. E9–25089 Filed 10–19–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 9, 2009.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC10–2–000.

Applicants: Allegheny Energy Supply Company, LLC.

Description: Application for Authorization under Section 203 of the Federal Power Act and Request for Waivers and Expedited Action of Allegheny Energy Supply Company, LLC.

Filed Date: 10/07/2009.

Accession Number: 20091007–5089.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 28, 2009.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG10–1–000.

Applicants: Gilberton Power Company.

Description: Self Certification Notice of Gilberton Power Company.

Filed Date: 10/08/2009.

Accession Number: 20091008–5049.

Comment Date: 5 p.m. Eastern Time on Thursday, October 29, 2009.

Docket Numbers: EG10–2–000.

Applicants: CPV Keenan II Renewable Energy Company,

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of CPV Keenan II Renewable Energy Company, LLC.

Filed Date: 10/08/2009.

Accession Number: 20091008–5043.

Comment Date: 5 p.m. Eastern Time on Thursday, October 29, 2009.

Docket Numbers: EG10–3–000.

Applicants: Vantage Wind Energy LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Vantage Wind Energy LLC.

Filed Date: 10/09/2009.

Accession Number: 20091009–5035.

Comment Date: 5 p.m. Eastern Time on Friday, October 30, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER97–3359–011; ER98–3566–016; ER01–2074–008.

Applicants: Florida Power & Light Company; FPL Energy Power Marketing, Inc.; Calhoun Power Company 1, LLC.

Description: FPL Companies Supplement to the September 2, 2008 Southeast Region Market Power Update.

Filed Date: 10/07/2009.
Accession Number: 20091007–5098.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 28, 2009.

Docket Numbers: ER08–1178–005; EL08–88–006.
Applicants: California Independent System Operator Corporation.
Description: The California Independent System Operator submits Substitute Original Sheet 643A *et al.* to FERC Electric Tariff, Fourth Replacement Volume 1.
Filed Date: 10/02/2009.
Accession Number: 20091005–0083.
Comment Date: 5 p.m. Eastern Time on Friday, October 23, 2009.

Docket Numbers: ER08–1297–003; ER01–1071–014; ER08–1294–003; ER03–1103–005; ER03–1104–010; ER03–1105–010; ER03–34–013; ER06–1261–008; ER06–1392–006; ER06–9–009; ER07–174–008; ER08–1293–003; ER08–1296–003; ER08–1300–003; ER08–197–007; ER08–250–004; ER09–832–001; ER09–988–002; ER09–989–002; ER98–2076–016; ER98–4222–015.
Applicants: Ashtabula Wind, LLC; Badger Windpower LLC; Crystal Lake Wind II, LLC; FPL Energy South Dakota Wind, LLC; FPL Energy North Dakota Wind, LLC; FPL Energy North Dakota Wind, LLC; FPL Energy Hancock County Wind, LLC; FPL Energy Mower County, LLC; FPL Energy Oliver Wind, LLC; FPL Energy Burleigh County Wind, LLC; Osceola Windpower, LLC; Crystal Lake Wind, LLC; Osceola Windpower II, LLC; Story Wind, LLC; FPL Energy Oliver Wind II, LLC; Langdon Wind, LLC; NextEra Energy Power Marketing, LLC; NextEra Energy Duane Arnold, LLC; NextEra Energy Point Beach, LLC; Hawkeye Power Partners, LLC; Lake Benton Power Partners II LLC.
Description: NextEra Energy Resources, LLC Amendment to Asset Appendix B.
Filed Date: 10/07/2009.
Accession Number: 20091007–5054.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 28, 2009.

Docket Numbers: ER09–938–003.
Applicants: Central Maine Power Company.
Description: Northeast Utilities Service Company *et al.* submits transmittal letter and proposed revision to Attachment F, Annual Transmission Revenue Requirements, of the OATT in compliance with the Commission's 8/7/09.
Filed Date: 10/06/2009.
Accession Number: 20091007–0082.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 27, 2009.

Docket Numbers: ER09–1102–002.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits an amendment to its 6/26/09 filing and the corrected Amended and Restated Interconnection and Operating Agreement *etc.*
Filed Date: 10/08/2009.
Accession Number: 20091008–0201.
Comment Date: 5 p.m. Eastern Time on Thursday, October 29, 2009.

Docket Numbers: ER09–1146–003.
Applicants: Lafarge Midwest, Inc.
Description: Lafarge Midwest, Inc. submits a Refund Report.
Filed Date: 10/07/2009.
Accession Number: 20091007–5095.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 28, 2009.

Docket Numbers: ER09–1317–001.
Applicants: New York Independent System Operator, Inc.
Description: New York Independent System Operator, Inc. submits Substitute Ninth Revised Sheet No. 8 *et al.* to FERC Electric Tariff, Original Volume No. 1, effective 9/17/09.
Filed Date: 10/07/2009.
Accession Number: 20091008–0241.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 28, 2009.

Docket Numbers: ER09–1421–000; ER09–1428–000.
Applicants: Midwest Independent Transmission System Operator, Inc.; Xcel Energy Operating Companies.
Description: The Midwest Independent Transmission System Operator, Inc. submits responses to information requested in the FERC 9/3/09 letter.
Filed Date: 10/05/2009.
Accession Number: 20091007–0052.
Comment Date: 5 p.m. Eastern Time on Monday, October 26, 2009.

Docket Numbers: ER09–1421–000; ER09–1428–000.
Applicants: Midwest Independent Transmission System Operator, Inc.; Xcel Energy Operating Companies.
Description: Northern States Power Company submits supplemental information requested in the Commission's 9/3/09 letter order.
Filed Date: 10/05/2009.
Accession Number: 20091008–0272.
Comment Date: 5 p.m. Eastern Time on Monday, October 26, 2009.

Docket Numbers: ER09–1435–001.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits First Revised Sheet 2280V *et al.* to FERC Electric Tariff, Fourth Revised Volume 1.
Filed Date: 10/08/2009.
Accession Number: 20091009–0039.
Comment Date: 5 p.m. Eastern Time on Thursday, October 29, 2009.

Docket Numbers: ER10–33–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits Meter Agent Services Agreement between Kansas Power Pool and Westar Energy, Inc.
Filed Date: 10/05/2009.
Accession Number: 20091006–0017.
Comment Date: 5 p.m. Eastern Time on Monday, October 26, 2009.

Docket Numbers: ER10–36–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits transmission revenue balancing account adjustment rate reliability services rates and end-use customer refund adjustment rates.
Filed Date: 10/06/2009.
Accession Number: 20091007–0154.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 27, 2009.

Docket Numbers: ER10–37–000.
Applicants: Idaho Power Company.
Description: Idaho Power Company submits the Exchange Agreement with Clatskanie People's Utility District.
Filed Date: 10/08/2009.
Accession Number: 20091008–0281.
Comment Date: 5 p.m. Eastern Time on Thursday, October 29, 2009.

Docket Numbers: ER10–38–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits amendments to Schedule 12 of the Amended and Restated Operating Agreement to update the PJM Member List to include new member, delete withdrawing members *etc.*
Filed Date: 10/08/2009.
Accession Number: 20091008–0280.
Comment Date: 5 p.m. Eastern Time on Thursday, October 29, 2009.

Docket Numbers: ER10–39–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits notice of cancellation of an interim interconnection service agreement between PJM, Streator-Cayuga Ridge Wind Power LLC and Commonwealth Edison Company.
Filed Date: 10/08/2009.
Accession Number: 20091008–0279.
Comment Date: 5 p.m. Eastern Time on Thursday, October 29, 2009.

Docket Numbers: ER10–40–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits Second Revised Sheet 47 *et al.* to Second Revised Rate Schedule FERC 280.
Filed Date: 10/08/2009.
Accession Number: 20091009–0041.
Comment Date: 5 p.m. Eastern Time on Thursday, October 29, 2009.

Docket Numbers: ER10–41–000.

Applicants: North Western Corporation.

Description: North Western Corporation submits Rate Schedule 37 *et al.* with East River Electric Power Cooperative, Inc.

Filed Date: 10/08/2009.

Accession Number: 20091009–0040.

Comment Date: 5 p.m. Eastern Time on Thursday, October 29, 2009.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES10–2–000.

Applicants: Trans-Allegheny Interstate Line Company.

Description: Section 204 Application of Trans-Allegheny Interstate Line Company.

Filed Date: 10/08/2009.

Accession Number: 20091008–5057.

Comment Date: 5 p.m. Eastern Time on Thursday, October 29, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–25087 Filed 10–19–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–2–000]

Butler Ridge Wind Energy Center, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

October 9, 2009.

This is a supplemental notice in the above-referenced proceeding of Butler Ridge Wind Energy Center, LLC application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is October 29, 2009.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–25085 Filed 10–19–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–3–000]

Wessington Wind Energy Center, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

October 9, 2009.

This is a supplemental notice in the above-referenced proceeding of Wessington Wind Energy Center, LLC application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard

to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is October 29, 2009.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list.

They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–25086 Filed 10–19–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–1–000]

High Majestic Wind Energy Center, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

October 9, 2009.

This is a supplemental notice in the above-referenced proceeding of High Majestic Wind Energy Center, LLC application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is October 29, 2009.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–25088 Filed 10–19–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of FERC Staff Attendance at Southwest Power Pool Regional State Committee Annual Meeting and Southwest Power Pool Board of Directors Meeting and Annual Meeting of Members

October 8, 2009.

The Federal Energy Regulatory Commission hereby gives notice that members of its staff may attend the meetings of the Southwest Power Pool (SPP) Regional State Committee, and SPP Board of Directors, as noted below. Their attendance is part of the Commission's ongoing outreach efforts.

SPP Regional State Committee Annual Meeting

October 26, 2009 (1 p.m.–5 p.m.), Doubletree Hotel Warren Place, 6110 South Yale Avenue, Tulsa, OK 74136, 918–495–1000.

SPP Board of Directors Meeting and Annual Meeting of Members

October 27, 2009 (8 a.m.–3 p.m.), Doubletree Hotel Warren Place, 6110 South Yale Avenue, Tulsa, OK 74136, 918–495–1000.

The discussions may address matters at issue in the following proceedings:

Docket No. ER06–451, Southwest Power Pool, Inc.

Docket No. ER07–371, Southwest Power Pool, Inc.

Docket No. ER08–923, Southwest Power Pool, Inc.

Docket No. ER08–1307, Southwest Power Pool, Inc.

Docket No. ER08–1308, Southwest Power Pool, Inc.

Docket No. ER08–1357, Southwest Power Pool, Inc.

Docket No. ER08–1358, Southwest Power Pool, Inc.

Docket No. ER08–1419, Southwest Power Pool, Inc.

Docket No. ER09–35, Tallgrass Transmission LLC

Docket No. ER09–36, Prairie Wind Transmission LLC

Docket No. ER09–262, Southwest Power Pool, Inc.

Docket No. ER09–342, Southwest Power Pool, Inc.

Docket No. ER09–659, Southwest Power Pool, Inc.

Docket No. ER09–1050, Southwest Power Pool, Inc.

Docket No. ER09–1254, Southwest Power Pool, Inc.

Docket No. ER09–1255, Southwest Power Pool, Inc.

Docket No. ER09–1386–001, Southwest Power Pool, Inc.

Docket No. ER09–1397, Southwest Power Pool, Inc.

Docket No. ER09–1665–000, Southwest Power Pool, Inc.

Docket No. ER09–1714–000, Southwest Power Pool, Inc.

Docket No. ER09–1716–000, Southwest Power Pool, Inc.,

Docket No. ER09–1732–000, Southwest Power Pool, Inc.

Docket No. ER09–1733–000, Southwest Power Pool, Inc.

Docket No. ER09–1736–000, Southwest Power Pool, Inc.

Docket No. ER09–1740–000, Southwest Power Pool, Inc.

Docket No. ER10–13–000, Southwest Power Pool, Inc.

Docket No. ER10–21–000, Southwest Power Pool, Inc.

Docket No. ER10–33–000, Southwest Power Pool, Inc.

Docket No. ER08–1419, Southwest Power Pool, Inc.

Docket No. OA08–5 and EL09–40, Southwest Power Pool, Inc.

Docket No. OA08–60, Southwest Power Pool, Inc.

Docket No. OA08–61, Southwest Power Pool, Inc.

Docket No. OA08–104, Southwest Power Pool, Inc.

These meetings are open to the public.

For more information, contact Patrick Clarey, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (317) 249–5937 or *patrick.clarey@ferc.gov*.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–25176 Filed 10–19–09; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8970–2]

Request for Nominations to the Environmental Financial Advisory Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA) invites nominations of qualified candidates to be considered for appointments to fill vacancies on the Environmental Financial Advisory Board. Nominees should demonstrate experience in any of the following areas: Environmental economics, public utility finance and management, state revolving loan funds, environmental infrastructure financing, state/local government, Tribal representatives and non-profit environmental group, corporate finance and investment banking, public-private partnerships, bond rating and financing, commercial banking, environmental engineering, accounting and/or auditing, and financial assurance mechanisms. In addition to this notice, other sources may be utilized in the solicitation of nominees. The deadline for receiving nominations is November 10, 2009. Appointments will be made by the Deputy Administrator of the Environmental Protection Agency and will be announced during February 2010. EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups. Nominations for membership must include a resume describing the professional and educational qualifications of the nominee as well as experience. Contact details should include full name and title, business mailing address, telephone, fax, and e-mail address. A supporting letter of endorsement is encouraged but not required.

ADDRESS/FURTHER INFORMATION CONTACT: Submit nomination materials by postal mail, electronic mail or fax to: Pamela Scott, Membership Coordinator, Environmental Financial Advisory Board, EPA, Office of the Chief Financial Officer, 1200 Pennsylvania Avenue, NW., (2731R), Washington, DC 20460; or e-mail *scott.pamela@epa.gov;* phone 202–564–6368; or fax 202–565–2587.

SUPPLEMENTARY INFORMATION: The Environmental Financial Advisory Board was chartered in 1989 under the Federal Advisory Committee Act to provide advice and recommendations to EPA on the following issues:

- Reducing the cost of financing environmental facilities and discouraging polluting behavior;
- Creating incentives to increase private investment in the provision of environmental services and removing or reducing constraints on private involvement imposed by current regulations;
- Developing new and innovative environmental financing approaches and supporting and encouraging the use of cost-effective existing approaches;
- Identifying approaches specifically targeted to small community financing; and
- Increasing the capacity issue of state and local governments to carry out their respective Environmental programs under current Federal tax laws.
- Increasing the capacity of state and local governments to carry out their respective environmental programs under current Federal tax laws;
- Increasing the total investment in environmental protection of public and private environmental resources to help ease the environmental financing challenge facing our nations.

The Board meets two times each calendar year (two days per meeting) at different locations within the continental United States. Board members typically contribute approximately 1–3 hours per month to the Board's work. The Board membership services are voluntary as we are unable to provide honoraria or compensation. However, you may receive Travel and per diem allowances where appropriate and in accordance with Federal Travel Regulations for invitational travelers.

The following criteria will be used to evaluate nominees:

- Residence in the continental United States;
- Representing the points of view of a group, and has professional knowledge of and experience with, environmental financing activities;
- Senior level-experience that fills a gap in Board representation, or brings a new and relevant dimension to its deliberations;
- Demonstrated ability to work in a consensus-building process with a wide range of representatives from diverse constituencies; and
- Willingness to serve a two-year term as an active-contributing member, with possible re-appointment to a second term.

Dated: October 14, 2009.

Joshua Baylson,

Associate Chief Financial Officer, Office of the Chief Financial Officer.

[FR Doc. E9–25168 Filed 10–19–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8970–5]

Notice of a Project Waiver of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 (ARRA) to the Village of Ruidoso/City of Ruidoso Downs, NM

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Acting Regional Administrator of EPA Region 6 is hereby granting a project waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(2) (manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality) to the Village of Ruidoso/City of Ruidoso Downs—Joint Use Board (''Ruidoso'') for the purchase of a membrane bioreactor system (MBR), supplied by Enviroquip, Inc., that contains two primary components not manufactured in America, at the proposed Wastewater Treatment Plant (WWTP). Ruidoso indicates that the MBR system is necessary to achieve the wastewater treatment levels required by the National Pollutant Discharge Elimination System (NPDES) permit issued for this WWTP. This is a project specific waiver and only applies to the use of the specified product for the ARRA funded project being proposed. Any other ARRA project that opts to use the same product must apply for a separate waiver based on the specific project circumstances. The Acting Regional Administrator is making this determination based on the review and recommendations of the EPA Region 6 Water Quality Protection Division. Ruidoso has provided sufficient documentation to support its request. The Assistant Administrator of the EPA's Office of Administration and Resources Management has concurred on this decision to make an exception to Section 1605 of ARRA. This action permits the purchase of the MBR containing goods not manufactured in American from Enviroquip, Inc., for the proposed project being implemented by Ruidoso. It should be noted that for purposes of this action, the MBR, while treated as a single system, is not itself a manufactured good, but is an assembly of manufactured goods.

DATES: *Effective Date:* August 24, 2009.

FOR FURTHER INFORMATION CONTACT: Rajen Patel, Buy American Coordinator, (214) 665–2788, SRF & Projects Section, Water Quality Protection Division, U.S. EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.

SUPPLEMENTARY INFORMATION: In accordance with ARRA Section 1605(c), EPA hereby provides notice that it is granting a project waiver of the requirements of Section 1605(b)(2) of Public Law 111–5, Buy American requirements to the Village of Ruidoso/City of Ruidoso Down—Joint Use Board, New Mexico, for the acquisition of an ''Enviroquip MBR system.'' Ruidoso has been unable to find an MBR system that contains American-made MBR cassettes and aeration blowers (as specified in Ruidoso's specifications for Enviroquip MBR system) to meet its specific wastewater requirements.

Section 1605 of the ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States unless a waiver is provided to the recipient by EPA. A waiver may be granted if EPA determines that (1) Applying these requirements would be inconsistent with public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

The Enviroquip MBR system is comprised of MBR filtration cassettes, aeration blowers, and several other auxiliary components integral to the efficient operation of the system. The MBR system is a packaged product that has undergone complex biological design, hydraulic modeling, control automation, fabrication and integration of specialized product components. The Enviroquip MBR system—as a whole, is designed to remove nutrients (Phosphorus and Nitrogen) to a level specified in Ruidoso's NPDES permit.

The purpose of Ruidoso's waiver request is to allow the purchase of the Enviroquip MBR system with forty-eight MBR cassettes, manufactured by Kubota Inc., of Japan, and eight Aerzen Generation 5 aeration blowers, manufactured by Aerzen, Germany.

The new WWTP would incorporate the entire MBR system to meet the effluent requirements of the National Pollutant Discharge Elimination System (NPDES) permit. The MBR cassettes are designed to provide increased nutrient removal capabilities, which will allow the City to meet their nutrient waste-load allocation for the Rio Ruidoso. Aerzen Generation 5 blowers are integral components of the MBR system because they maintain the critically important oxygen levels and membrane scouring capabilities through out the MBR system.

Ruidoso chose the MBR treatment process after an engineering analysis of various treatment alternatives. Ruidoso determined this to be the most environmentally sound and cost effective solution because it meets the high quality effluent required by its waste load allocation under its Total Maximum Daily Limit, when compared to other considered solutions. In addition, in anticipation of procuring the MBR system, Ruidoso has already incorporated specific technical design requirements for installation of MBR system at their proposed WWTP, including specifics on MBR system footprint and configuration.

Ruidoso has provided information to the EPA demonstrating that there are no MBR cassettes manufactured in the United States in sufficient and reasonable quantity and of a satisfactory quality to meet the required technical specification. Two companies were considered for the purchase of filtration cassettes, none based in the United States. Ruidoso has performed rigorous market research, but was unsuccessful in its effort to locate any domestic manufacturers of MBR cassettes for the MBR system.

Based on additional research conducted by EPA Region 6, there does not appear to be any domestic MBR cassette manufacturers that would meet Ruidoso's technical specifications. EPA's national contractor prepared a technical assessment report dated August 3, 2009 based on the waiver request submittal. The report determined that the waiver request submittal was complete, that adequate technical information was provided, and that there were no significant weaknesses in the justification provided. The report confirmed the waiver applicant's claim that there are no American-made MBR cassettes available for use in the proposed MBR system.

Ruidoso could only identify three aeration blowers (Aerzen Generation 5, Aerzen Delta IV, and Dresser Roots) that could provide the oxygen levels and membrane scouring capabilities required by Enviroquip's process guarantee. Ruidoso disqualifies the use of Aerzen Delta IV blower on the grounds that its noise level, at 81 dB, is substantially higher than that of Aerzen Generation 5 models (72 dB for pre-air supply and 76 dB for MBR air supply) and that such a noise level would interfere with the system operators and with occupants of nearby offices. Noise levels of 72 dB and 76dB are included in the original specifications for the respective air supplies. Ruidoso disqualifies the Dresser Roots blowers on the grounds that they run at substantially higher revolutions per minute (RPM) rates (4,000 RPM for pre-air and 3,300 for MBR air) than called for in the specifications (3,244 RPM for pre-air and 2,740 RPM for MBR air).

Ruidoso included a performance guarantee in the request for proposal (RFP) as well as the original specification. Enviroquip's performance guarantee applies to the entire MBR system, including all components supplied by Enviroquip, which would be voided by substitution of other components. The potential voiding of the performance raises a valid issue regarding availability of alternative aeration blowers. The existence of such a performance guarantee supports treating the entire MBR system as a unitary whole, rather than a collection of individual components. Therefore, EPA Region 6 concludes that only the ''Enviroquip MBR System—as a whole'' meets the ''specifications in project plans and design.''

The April 28, 2009 EPA HQ Memorandum, Implementation of Buy American provisions of Public Law 111–5, the ''American Recovery and Reinvestment Act of 2009'', defines reasonably available quantity as ''the quantity of iron, steel, or relevant manufactured good is available or will be available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design.'' Ruidoso has incorporated specific technical design requirements for the installation of the MBR system at its WWTP.

The purpose of the ARRA is to stimulate economic recovery, in part, by funding current infrastructure construction, not to delay projects that are ''shovel ready'' by requiring utilities, such as Ruidoso, to revise their standards and specifications, institute a new bidding process, and potentially choose a more costly, less efficient project. The imposition of ARRA Buy American requirements on such projects otherwise eligible for State Revolving Fund assistance would result in unreasonable delay and thus displace the ''shovel ready'' status for this project. To further delay construction is in direct conflict with the fundamental economic purpose of the ARRA, which is to create or retain jobs.

The Region 6 Water Quality Protection Division has reviewed this waiver request, and to the best of my knowledge at the time of review, has determined that the supporting documentation provided by Ruidoso is sufficient to meet the criteria listed under ARRA, Section 1605(b), Office of Management and Budget (OMB) regulations at 2 CFR 176.60–176.170., and in the April 28, 2009, ''Implementation of Buy American provisions of Public Law 111–5, the ''American Recovery and Reinvestment Act of 2009'' Memorandum: Iron, steel, and the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality. The basis for this project waiver is the authorization provided in ARRA, Section 1605(b)(2). Due to the lack of production of this product in the United States in sufficient and reasonably available quantities and of a satisfactory quality in order to meet Ruidoso's technical specifications, a waiver from the Buy American requirement is justified.

EPA headquarters' March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to Section 1605 of ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients. Having established both a proper basis to specify the particular good required for this project, and that this manufactured good was not available from a producer in the United States, Ruidoso is hereby granted a waiver from the Buy American requirements of ARRA, Section 1605(a) of Public Law 111–5 for the purchase of ''Enviroquip MBR system'' using ARRA funds, as specified in Ruidoso's request of July 6, 2009. This supplementary information constitutes the detailed written justification required by ARRA, Section 1605(c), for waivers ''based on a finding under subsection (b).''

Authority: Public Law 111–5, section 1605.

Dated: August 24, 2009.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

[FR Doc. E9–25171 Filed 10–19–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8970–3]

EPA Science Advisory Board Staff Office; Request for Nominations of Experts for the SAB Methanol Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice request for nominations.

SUMMARY: The Science Advisory Board (SAB) Staff Office is requesting public nominations of experts to form an SAB *Ad Hoc* Panel to review EPA's health effects assessment for Methanol.

DATES: Nominations should be submitted by November 10, 2009 per instructions below.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information regarding this Request for Nominations may contact Mr. Edward Hanlon, Designated Federal Officer (DFO), SAB Staff Office, by telephone/voice mail at (202) 343–9946; by fax at (202) 233–0643; or via e-mail at *hanlon.edward@epa.gov.* General information concerning the EPA Science Advisory Board can be found on the EPA SAB Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION:

Background: EPA's Integrated Risk Information System (IRIS) is an electronic database containing descriptive and quantitative toxicological information on human health effects that may result from chronic exposure to various substances in the environment. This information supports human health risk assessments, and includes hazard identification and dose-response data and derivations of oral reference doses (RfDs) and inhalation reference concentrations (RfCs) for noncancer effects and oral slope factors and oral and inhalation unit risks for cancer effects. IRIS is prepared and maintained by EPA's National Center for Environmental Assessment (NCEA) within the Office of Research and Development (ORD). NCEA is updating the health effects information that supported the1988 IRIS Toxicological Assessment for Methanol, and has requested that SAB conduct a review of its updated Assessment.

The SAB was established by 42 U.S.C. 4365 to provide independent scientific and technical advice, consultation and recommendations to the EPA Administrator on the technical basis for Agency positions and regulations. The SAB Staff Office will form an expert Panel to review ORD's draft IRIS Toxicological Assessment for Methanol. The SAB Panel will comply with the provisions of the Federal Advisory Committee Act (FACA) and all appropriate SAB procedural policies. Upon completion, the Panel's report will be submitted to the chartered SAB for final approval for transmittal to the EPA Administrator. The Methanol Review Panel is being asked to comment on the scientific soundness of the Agency's draft IRIS review.

Availability of the Review Materials: The EPA draft IRIS Toxicological Review document to be reviewed by the Methanol Review Panel will be made available by ORD at the following URL: *http://epa.gov/ncea* (under ''Recent Additions''). For questions concerning the review materials, please contact Dr.

Jeffrey Gift, ORD, at (919) 541–4828, or *gift.jeff@epa.gov.*

Request for Nominations: The SAB Staff Office is requesting nominations of nationally recognized experts with expertise in the assessment of health effects for Methanol in one or more of the following areas: Metabolism, toxicokinetics, toxicology, mechanisms of toxicity and carcinogenicity, epidemiology, statistics, and risk assessment. In addition, the SAB is requesting nominations of experts in the areas of lymphoma pathology and rodent infectious diseases, including *Mycoplasma pulmonis.*

Process and Deadline for Submitting Nominations: Any interested person or organization may nominate qualified individuals for possible service on the Methanol Panel in the areas of expertise described above. Nominations should be submitted in electronic format (which is preferred over hard copy) following the instructions for ''Nominating Experts to Advisory Panels and Ad Hoc Committees Being Formed'' provided on the SAB Web site. The instructions can be accessed through the ''Nomination of Experts'' link on the blue navigational bar on the SAB Web site at *http://www.epa.gov/sab.* To receive full consideration, nominations should include all of the information requested.

EPA's SAB Staff Office requests: contact information about the person making the nomination; contact information about the nominee; the disciplinary and specific areas of expertise of the nominee; the nominee's curriculum vita; sources of recent grant and/or contract support; and a biographical sketch of the nominee indicating current position, educational background, research activities, and recent service on other national advisory committees or national professional organizations.

Persons having questions about the nomination procedures, or who are unable to submit nominations through the SAB Web site, should contact Mr. Edward Hanlon, DFO, as indicated above in this notice. Nominations should be submitted in time to arrive no later than November 10, 2009. EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups.

The EPA SAB Staff Office will acknowledge receipt of nominations. The names and biosketches of qualified nominees identified by respondents to the **Federal Register** notice and additional experts identified by the SAB Staff will be posted on the SAB Web site at *http://www.epa.gov/sab.* Public comments on this ''Short List'' of candidates will be accepted for 21 calendar days. The public will be requested to provide relevant information or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates.

For the EPA SAB Staff Office, a balanced subcommittee or review panel includes candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the charge. In establishing the Methanol Panel, the SAB Staff Office will consider public comments on the ''Short List'' of candidates, information provided by the candidates themselves, and background information independently gathered by the SAB Staff Office. Selection criteria to be used for Panel membership include: (a) Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) availability and willingness to serve; (c) absence of financial conflicts of interest; (d) absence of an appearance of a lack of impartiality; and (e) skills working in committees, subcommittees and advisory panels; and, for the Panel as a whole, (f) diversity of, and balance among scientific expertise and viewpoints.

The SAB Staff Office's evaluation of an absence of financial conflicts of interest will include a review of the ''Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency'' (EPA Form 3110–48). This confidential form allows Government officials to determine whether there is a statutory conflict between that person's public responsibilities (which includes membership on an EPA Federal advisory committee) and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded from the following URL address: *http://www.epa.gov/sab/pdf/epaform3110–48.pdf.*

The approved policy under which the EPA SAB Office selects subcommittees and review panels is described in the following document: *Overview of the Panel Formation Process at the Environmental Protection Agency Science Advisory Board* (EPA–SAB–EC–02–010), which is posted on the SAB Web site at *http://www.epa.gov/sab/pdf/ec02010.pdf.*

Dated: October 13, 2009

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. E9–25169 Filed 10–19–09; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Notice of Open Special Meeting of the Sub-Saharan Africa Advisory Committee (SAAC) of the Export-Import Bank of the United States (Export-Import Bank)

SUMMARY: The Sub-Saharan Africa Advisory Committee was established by Public Law 105–121, November 26, 1997, to advise the Board of Directors on the development and implementation of policies and programs designed to support the expansion of the Bank's financial commitments in Sub-Saharan Africa under the loan, guarantee, and insurance programs of the Bank. Further, the committee shall make recommendations on how the Bank can facilitate greater support by U.S. commercial banks for trade with Sub-Saharan Africa.

Time and Place: November 4, 2009, at 9:30 a.m. to 12:30 p.m. The meeting will be held at the Export-Import Bank in Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

Agenda: Presentation on recent developments in Sub-Saharan Africa markets by Export-Import Bank staff; discussion and update on the 2008 committee recommendations to U.S. Congress followed by an update on a new Sub-Saharan Africa special initiative; and an update on the Bank's on-going business development initiatives.

Public Participation: The meeting will be open to public participation, and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to November 4, 2009, Barbara Ransom, Room 1209, 811 Vermont Avenue, NW., Washington, DC 20571, Voice: (202) 565–3525 or TDD (202) 565–3377.

FOR FURTHER INFORMATION CONTACT: For further information, contact Barbara Ransom, Room 1209, 811 Vermont

Avenue, NW., Washington, DC 20571, (202) 565–3525.

Jonathan Cordone,

General Counsel.

[FR Doc. E9–25047 Filed 10–19–09; 8:45 am]

BILLING CODE 6690–01–M

FEDERAL COMMUNICATIONS COMMISSION

Sunshine Act FCC to Hold Open Commission Meeting Thursday, October 22, 2009

Date: October 15, 2009.

The Federal Communications Commission will hold an Open Meeting on the subject listed below on Thursday, October 22, 2009, which is scheduled to commence at 10 a.m. in Room TW–C305, at 445 12th Street, S.W., Washington, D.C.

ITEM NO.	BUREAU	SUBJECT
	WIRELINE COMPETITION & WIRELESS TELE–COMMUNICATIONS.	TITLE: Preserving the Open Internet; Broadband Industry Practices (WC Docket No. 07–52) SUMMARY: The Commission will consider a Notice of Proposed Rule-making on policies to preserve the open Internet.

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. Other reasonable accommodations for people with disabilities are available upon request. In your request, include a description of the accommodation you will need and a way we can contact you if we need more information. Last minute requests will be accepted, but may be impossible to fill. Send an e–mail to: fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Additional information concerning this meeting may be obtained from Audrey Spivack or David Fiske, Office of Media Relations, (202) 418–0500; TTY 1–888–835–5322. Audio/Video coverage of the meeting will be broadcast live with open captioning over the Internet from the FCC's Audio/Video Events web page at www.fcc.gov/realaudio.

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. To purchase these services call (703) 993–3100 or go to www.capitolconnection.gmu.edu.

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, Best Copy and Printing, Inc. (202) 488–5300; Fax (202) 488–5563; TTY (202) 488–5562. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio and video tape. Best Copy and Printing, Inc. may be reached by e–mail at FCC@BCPIWEB.com.

Federal Communications Commission

Marlene H. Dortch,

Secretary.

[FR Doc. E9–25335 Filed 10–16–09; 4:15 pm]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2900]

Petition for Reconsideration of Action in Rulemaking Proceeding

Oct 15, 2009.

SUMMARY: A Petition for Reconsideration has been filed in the Commission's Rulemaking proceeding listed in this Public Notice and published pursuant to 47 CFR Section 1.429(e). The full text of this document is available for viewing and copying in Room CY–B402, 445 12th Street, SW, Washington, DC or may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI) (1–800–378–3160). Oppositions to this petition must be filed by November 4, 2009. See Section 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: In the Matter of Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations (MB Docket No. 08–253)

NUMBER OF PETITIONS FILED: 1

Federal Communications Commission

Marlene H. Dortch,

Secretary.

[FR Doc. E9–25164 Filed 10–19–09; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than November 4, 2009.

A. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. Alma Medina Vivar, Daly City, California, as part of a group acting in concert including Rommel and Ruell Medina, to individually and collectively acquire voting shares of MNB Holdings, Corporation, and thereby indirectly acquire voting shares of Mission National Bank, both of San Francisco, California.

Board of Governors of the Federal Reserve System, October 15, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–25162 Filed 10–19–09; 8:45 am]

BILLING CODE 6210–01–S

GOVERNMENT PRINTING OFFICE

Depository Library Council to the Public Printer; Meeting

The Depository Library Council to the Public Printer (DLC) will meet on Monday, October 19, 2009, through Wednesday, October 21, 2009, at Doubletree Hotel Crystal City, located at Arlington, Virginia. The sessions will take place from 8 a.m. to 5:30 p.m. on Monday through Tuesday, and Wednesday, 8 a.m. to 12 p.m. The meeting will be held at the Doubletree Hotel Crystal City, 300 Army Navy Drive, Arlington, Virginia. The purpose of this meeting is to discuss the Federal Depository Library Program. All sessions are open to the public. The sleeping rooms available at the Doubletree Hotel Crystal City will be at the Government rate of $229.00 (plus applicable state and local taxes, currently 10.25%) a night for a single or double for $249.00. The Doubletree Hotel Crystal City is in compliance with the requirements of Title III of the Americans With Disabilities Act and meets all Fire Safety Act regulations.

Robert C. Tapella,

Public Printer of the United States.

[FR Doc. E9–25296 Filed 10–19–09; 8:45 am]

BILLING CODE 1520–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0296]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Food Labeling Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by November 19, 2009.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0381. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794. *JonnaLynn.Capezzuto@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Food Labeling Regulations—(OMB Control Number 0910–0381)—Extension

FDA regulations require food producers to disclose to consumers and others specific information about themselves or their products on the label or labeling of their products. Related regulations require that food producers retain records establishing the basis for the information contained in the label or labeling of their products and provide those records to regulatory officials. Finally, certain regulations provide for the submission of food labeling petitions to FDA. FDA's food labeling regulations under parts 101, 102, 104, and 105 (21 CFR parts 101, 102, 104, and 105) were issued under the authority of sections 4, 5, and 6 of the Fair Packaging and Labeling Act (the FPLA) (15 U.S.C. 1453, 1454, and 1455) and under sections 201, 301, 402, 403, 409, 411, 701, and 721 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321, 331, 342, 343, 348, 350, 371, and 379e). Most of these regulations derive from section 403 of the act, which provides that a food product shall be deemed to be misbranded if, among other things, its label or labeling fails to bear certain required information concerning the food product, is false or misleading in any particular, or bears certain types of unauthorized claims. The disclosure requirements and other collections of information in the regulations in parts 101, 102, 104, and 105 are necessary to ensure that food products produced or sold in the United States are in compliance with the labeling provisions of the act and the FPLA.

Section 101.3 of FDA's food labeling regulations requires that the label of a food product in packaged form bear a statement of identity (i.e., the name of the product), including, as appropriate, the form of the food or the name of the food imitated. Section 101.4 prescribes requirements for the declaration of ingredients on the label or labeling of food products in packaged form. Section 101.5 requires that the label of a food product in packaged form specify the name and place of business of the manufacturer, packer, or distributor and, if the food producer is not the manufacturer of the food product, its connection with the food product. Section 101.9 requires that nutrition information be provided for all food products intended for human consumption and offered for sale, unless an exemption in § 101.9(j) applies to the product. Section 101.9(g)(9) also provides for the submission to FDA of requests for alternative approaches to nutrition labeling. Finally, § 101.9(j)(18) provides for the submission to FDA of notices from firms claiming the small business exemption from nutrition labeling. FDA has developed Form FDA 3570 to assist small businesses in claiming the small business exemption from nutrition labeling. The form contains all the elements required by § 101.9(j)(18).

Section 101.10 requires that restaurants provide nutrition information, upon request, for any food or meal for which a nutrient content claim or health claim is made. Section 101.12(b) provides the reference amount that is used for determining the serving sizes for specific products, including baking powder, baking soda, and pectin. Section 101.12(e) provides that a manufacturer that adjusts the reference amount customarily consumed (RACC) of an aerated food for the difference in density of the aerated food relative to the density of the appropriate nonaerated reference food must be prepared to show FDA detailed protocols and records of all data that were used to determine the density-adjusted RACC. Section 101.12(g) requires that the label or labeling of a food product disclose the serving size that is the basis for a claim made for the product if the serving size on which the claim is based differs from the RACC. Section 101.12(h) provides for the submission of petitions to FDA to request changes in the reference amounts defined by regulation.

Section 101.13 requires that nutrition information be provided in accordance with § 101.9 for any food product for which a nutrient content claim is made. Under some circumstances, § 101.13 also requires the disclosure of other types of information as a condition for the use of a nutrient content claim. For example, under § 101.13(j), if the claim compares the level of a nutrient in the food with the level of the same nutrient in another ''reference'' food, the claim

must also disclose the identity of the reference food, the amount of the nutrient in each food, and the percentage or fractional amount by which the amount of the nutrient in the labeled food differs from the amount of the nutrient in the reference food. It also requires that when this comparison is based on an average of food products, this information must be provided to consumers or regulatory officials upon request. Section 101.13(q)(5) requires that restaurants document and provide to appropriate regulatory officials, upon request, the basis for any nutrient content claims they have made for the foods they sell.

Section 101.14(d)(2) and (d)(3) provides for the disclosure of nutrition information in accordance with § 101.9 and, under some circumstances, certain other information as a condition for making a health claim for a food product. Section 101.15 provides that, if the label of a food product contains any representation in a foreign language, all words, statements, and other information required by or under authority of the act to appear on the label shall appear thereon in both the foreign language and in English. Section 101.22 contains labeling requirements for the disclosure of spices, flavorings, colorings, and chemical preservatives in food products. Section 101.22(i)(4) sets forth reporting and recordkeeping requirements pertaining to certifications for flavors designated as containing no artificial flavor. Section 101.30 specifies the conditions under which a beverage that purports to contain any fruit or vegetable juice must declare the percentage of juice present in the beverage and the manner in which the declaration is to be made. Section 102.33 specifies the common or usual name for beverages that contain fruit or vegetable juice.

Section 101.36 requires that nutrition information be provided for dietary supplements offered for sale, unless an exemption in § 101.36(h) applies. Section 101.36(f)(2) cross-references the provisions in § 101.9(g)(9) for the submission to FDA of requests for alternative approaches to nutrition labeling. Also, § 101.36(h)(2) cross-references the provisions in § 101.9(j)(18) for the submission of small business exemption notices. As noted previously, FDA has developed Form FDA 3570 to assist small businesses in claiming the small business exemption from nutrition labeling. The form contains all the elements required by § 101.36(h)(2).

Section 101.36(e) permits the voluntary declaration of the quantitative amount and the percent of Daily Value of a dietary ingredient on a ''per day'' basis in addition to the required ''per serving'' basis, if a dietary supplement label recommends that the dietary supplement be consumed more than once per day.

Section 101.42 requests that food retailers voluntarily provide nutrition information for raw fruits, vegetables, and fish at the point of purchase, and § 101.45 contains guidelines for providing such information. Also, § 101.45(c) provides for the submission of nutrient databases and proposed nutrition labeling values for raw fruit, vegetables, and fish to FDA for review and approval.

Sections 101.54, 101.56, 101.60, 101.61, and 101.62 specify information that must be disclosed as a condition for making particular nutrient content claims. Section 101.67 provides for the use of nutrient content claims for butter, and cross-references requirements in other regulations for ingredient declaration (§ 101.4) and disclosure of information concerning performance characteristics (§ 101.13(d)). Section 101.69 provides for the submission of a petition requesting that FDA authorize a particular nutrient content claim by regulation. Section 101.70 provides for the submission of a petition requesting that FDA authorize a particular health claim by regulation. Section 101.77(c)(2)(ii)(D) requires the disclosure of the amount of soluble fiber per serving in the nutrition labeling of a food bearing a health claim about the relationship between soluble fiber and a reduced risk of coronary heart disease. Section 101.79(c)(2)(iv) requires the disclosure of the amount of folate per serving in the nutrition labeling of a food bearing a health claim about the relationship between folate and a reduced risk of neural tube defects.

Section 101.100(d) provides that any agreement that forms the basis for an exemption from the labeling requirements of section 403(c), (e), (g), (h), (i), (k), and (q) of the act be in writing and that a copy of the agreement be made available to FDA upon request. Section 101.100 also contains reporting and disclosure requirements as conditions for claiming certain labeling exemptions (e.g., § 101.100(h)).

Section 101.105 specifies requirements for the declaration of the net quantity of contents on the label of a food in packaged form and prescribes conditions under which a food whose label does not accurately reflect the actual quantity of contents may be sold, with appropriate disclosures, to an institution operated by Federal, State, or local government. Section 101.108 provides for the submission to FDA of a written proposal requesting a temporary exemption from certain requirements of §§ 101.9 and 105.66 for the purpose of conducting food labeling experiments with FDA's authorization.

Regulations in part 102 define the information that must be included as part of the statement of identity for particular foods and prescribe related labeling requirements for some of these foods. For example, § 102.22 requires that the name of a protein hydrolysate shall include the identity of the food source from which the protein was derived.

Part 104, which pertains to nutritional quality guidelines for foods, cross-references several labeling provisions in part 101 but contains no separate information collection requirements.

Part 105 contains special labeling requirements for hypoallergenic foods, infant foods, and certain foods represented as useful in reducing or maintaining body weight.

The disclosure and other information collection requirements in the previously mentioned regulations are placed primarily upon manufacturers, packers, and distributors of food products. Because of the existence of exemptions and exceptions, not all of the requirements apply to all food producers or to all of their products. Some of the regulations affect food retailers, such as supermarkets and restaurants.

The purpose of the food labeling requirements is to allow consumers to be knowledgeable about the foods they purchase. Nutrition labeling provides information for use by consumers in selecting a nutritious diet. Other information enables a consumer to comparison shop. Ingredient information also enables consumers to avoid substances to which they may be sensitive. Petitions or other requests submitted to FDA provide the basis for the agency to permit new labeling statements or to grant exemptions from certain labeling requirements. Recordkeeping requirements enable FDA to monitor the basis upon which certain label statements are made for food products and whether those statements are in compliance with the requirements of the act or the FPLA.

In the **Federal Register** of July 15, 2009 (74 FR 34353), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL THIRD PARTY DISCLOSURE BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency of Disclosure	Total Annual Disclosures	Hours per Disclosures	Total Hours
101.3, 101.22, 102 and 104	25,000	1.03	25,750	.5	12,875
101.4, 101.22, 101.100, 102, 104 and 105	25,000	1.03	25,750	1	25,750
101.5	25,000	1.03	25,750	0.25	6,438
101.9, 101.13(n), 101.14(d)(3), 101.62, and 104	25,000	1.03	25,750	4	103,000
101.9(g)(9 and 101.36(f)(2)	12	1	12	4	48
101.10	300,000	1.5	450,000	0.25	112,500
101.12(b)	29	2.3	67	1	67
101.12(e)	25	1	25	1	25
101.12(g)	5,000	1	5,000	1	5,000
101.12(h)	5	1	5	80	400
101.13(d)(1) and 101.67	200	1	200	1	200
101.13(j)(2), 101.13(k), 101.54, 101.56, 101.60, 101.61, and 101.62	5,000	1	5,000	1	5,000
101.13(q)(5)	300,000	1.5	450,000	0.75	337,500
101.14(d)(2)	300,000	1.5	450,000	0.75	337,500
101.15	160	10	1,600	8	12,800
101.22(i)(4)	25	1	25	1	25
101.30 and 102.33	1,500	5	7,500	1	7,500
101.36	300	40	12,000	4	48,000
101.36(e)	125	13	1,625	0.25	406
101.42 and 101.45	1,000	1	1,000	0.5	500
101.45(c)	5	4	20	4	80
101.69	3	1	3	25	75
101.70	5	1	5	80	400
101.79(c)(2)(i)(D)	1,000	1	1,000	0.25	250
101.79(c)(2)(iv)	100	1	100	0.25	25
101.100(d)	1,000	1	1,000	1	1,000
101.105 and 101.100(h)	25,000	1.03	25,750	0.5	12,875
101.108	1	1	1	40	40
Total					1,110,279

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
101.12(e)	25	1	25	1	25
101.13(q)(5)	300,000	1.5	450,000	0.75	337,500

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]—Continued

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
101.14(d)(2)	300,000	1.5	450,000	0.75	337,500
101.22(i)(4)	25	1	25	1	25
101.100(d)(2)	1,000	1	1,000	1	1,000
101.105(t)	100	1	100	1	100
Total					676,150

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 3—ESTIMATED REPORTING BURDEN[1]

21 CFR Section/ Form No.	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
101.9(j)(18) and 101.36(h)(2)/ Form FDA 3570	10,000	1	10,000	8	80,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The estimated annual reporting and recordkeeping burdens are based on agency communications with industry and FDA's knowledge of and experience with food labeling and the submission of petitions and requests to the agency. Where an agency regulation implements an information collection requirement in the act or the FPLA, only any additional burden attributable to the regulation has been included in FDA's burden estimate.

No burden has been estimated for those requirements where the information to be disclosed is information that has been supplied by FDA. Also, no burden has been estimated for information that is disclosed to third parties as a usual and customary part of a food producer's normal business activities. Under 5 CFR 1320.3(c)(2), the public disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public is not a collection of information. Under 5 CFR 1320.3(b)(2), the time, effort, and financial resources necessary to comply with a collection of information are excluded from the burden estimate if the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary because they would occur in the normal course of activities.

In this request for extension of OMB approval under the PRA, FDA is combining the burden hours associated with OMB control numbers 0910–0395 (collection entitled ''Food Labeling: Nutrition Labeling of Dietary Supplements on a 'Per Day' Basis'') and 0910–0515 (collection entitled ''Food Labeling: Trans Fatty Acids in Nutrition Labeling'') with the burden hours approved under OMB control number 0910–0381 (collection entitled ''Food Labeling Regulations'').

Dated: October 9, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–25102 Filed 10–19–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0501]

Agency Information Collection Activities; Proposed Collection; Comment Request; Third Party Disclosure and Recordkeeping Requirements for Reportable Food

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions of FDA's third party disclosure and recordkeeping requirements for reportable food.

DATES: Submit written or electronic comments on the collection of information by December 21, 2009.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794, *Jonnalynn.Capezzuto@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB

for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Third Party Disclosure and Recordkeeping Requirements for Reportable Food—21 U.S.C. 350f (OMB Control Number 0910–0643)—Extension

On September 27, 2007, the President signed into law the Food and Drug Administration Amendments Act of 2007 (FDAAA) (Public Law 110–85). Section 1005 of FDAAA amends the Federal Food, Drug, and Cosmetic Act (the act) by creating a new section 417 (21 U.S.C. 350f), among other things. Section 417 of the act requires the Secretary of Health and Human Services (the Secretary) to establish within the FDA a Reportable Food Registry (the Registry). The Secretary has delegated to the Commissioner of FDA the responsibility for administering the act, including section 417.

Section 417 of the act defines ''reportable food'' as an ''article of food (other than infant formula) for which there is a reasonable probability that the use of, or exposure to, such article of food will cause serious adverse health consequences or death to humans or animals.'' (see section 417(a)(2) of the act). Section 417 of the act requires FDA to establish an electronic portal (the Reportable Food electronic portal) by which instances of reportable food must be submitted to FDA by responsible parties and may be submitted by public health officials. FDA made the decision that the most efficient and cost effective means to implement the requirements of section 417 of the act relating to the Registry was to utilize the business enterprise system currently under development within the agency: the MedWatchPlus Portal. The electronic portal became operational on September 8, 2009. The collection of information associated with the submission of reportable food reports to FDA using the MedWatchPlus electronic portal has been approved under OMB Control No. 0910–0645.

In addition, section 1005(f) of FDAAA required FDA to issue guidance to industry about submitting reports through the electronic portal of instances of reportable food and providing notifications to other persons in the supply chain of such article of food. FDA issued guidance containing questions and answers relating to the requirements under section 417 of the act, including: (1) How, when, and where to submit reports to FDA; (2) who is required to submit reports to FDA; (3) what is required to be submitted to FDA; and (4) what may be required when providing notifications to other persons in the supply chain of an article of food. The agency announced the availability of the guidance document entitled ''Questions and Answers Regarding the Reportable Food Registry as Established by the Food and Drug Administration Amendments Act of 2007,'' on September 9, 2009 (74 FR 46434). The guidance also refers to previously approved collections of information found in FDA regulations. The collections of information in question 28 of the guidance have been approved under OMB Control No. 0910–0249.

Section 417 of the act established third party disclosure and recordkeeping burdens associated with the Reportable Food Registry. Specifically, FDA may require the responsible party to notify the immediate previous source(s) and/or immediate subsequent recipient(s) of the reportable food (see section 417(d)(6)(B)(i) and (d)(6)(B)(ii) of the act). Similarly, FDA may also require the responsible party that is notified (i.e., the immediate previous source and/or immediate subsequent recipient) to notify their own immediate previous source(s) and/or immediate subsequent recipient(s) of the reportable food (section 417(d)(7)(C)(i) and (d)(7)(C)(ii) of the act).

Notification to the immediate previous source(s) and immediate subsequent recipient(s) of the article of food may be accomplished by electronic communication methods such as e-mail, fax or text messaging or by telegrams, mailgrams, or first class letters. Notification may also be accomplished by telephone call or other personal contacts but FDA recommends that such notifications also be confirmed by one of the previous methods and/or documented in an appropriate manner. FDA may require that the notification include any or all of the following data elements: (1) The date on which the article of food was determined to be a reportable food; (2) a description of the article of food including the quantity or amount; (3) the extent and nature of the adulteration; (4) the results of any investigation of the cause of the adulteration if it may have originated with the responsible party, if known; (5) the disposition of the article of food, when known; (6) product information typically found on packaging including product codes, use-by dates, and the names of manufacturers, packers, or distributors sufficient to identify the article of food; (7) contact information for the responsible party; (8) contact information for parties directly linked in the supply chain and notified under sections 417(d)(6)(B) or 417(d)(7)(C) of the act, as applicable; (9) the information required by FDA to be included in the notification provided by the responsible party involved under sections 417(d)(6)(B) or 417(d)(7)(C) of the act or required to report under section 417(d)(7)(A) of the act; and (10) the unique number described in section 417(d)(4) of the act (section 417(d)(6)(B)(iii)(I), (d)(7)(C)(iii)(I), and (e) of the act). FDA may also require that the notification provide information about the actions that the recipient of the notification shall perform and/or any other information FDA may require (section 417(d)(6)(B)(iii)(II), (d)(6)(B)(iii)(III), (d)(7)(C)(iii)(II), and (d)(7)(C)(iii)(III) of the act).

Section 417(g) of the act requires that responsible persons maintain records related to reportable foods reports and notifications under section 417 of the act for a period of 2 years.

The congressionally-identified purpose of the Registry is to provide ''a reliable mechanism to track patterns of adulteration in food [which] would support efforts by the Food and Drug Administration to target limited inspection resources to protect the public health'' (Public Law 110–085, section 1005(a)(4)). The third party disclosure and recordkeeping requirements described previously are designed to enable FDA to quickly identify and track an article of food (other than infant formula) for which there is a reasonable probability that the use of, or exposure to, such article of food will cause serious adverse health consequences or death to humans or animals. FDA uses the information collected to help ensure that such products are quickly and efficiently removed from the market.

Description of Respondents: Mandatory respondents to this collection of information are the

owners, operators, or agents in charge of a domestic or foreign facility engaged in manufacturing, processing, packing, or holding food for consumption in the United States (''responsible parties'') who have information on a reportable food. Voluntary respondents to this collection of information are Federal, State, and local public health officials who have information on a reportable food.

FDA estimates the burden of this collection of information as follows:

Third Party Disclosure

FDA estimates that approximately 1,200 reportable food events with mandatory reporters will occur annually. FDA received 625 voluntary food complaints leading to adverse events from January 1, 2008, to June 30, 2008, and there were 206 and 182 class 1 recalls for human food in fiscal years 2006 and 2007, respectively. Based on these experiences, FDA estimates that FDA could receive 200 to 1,200 ''reportable'' food reports annually from 200 to 1,200 mandatory and voluntary users of the electronic reporting system. FDA will utilize the upper-bound estimate of 1,200 for these calculations (73 FR 63153 at 63157, October 23, 2008; 74 FR 23721 at 23727, May 20, 2009).

FDA estimates that notifying the immediate previous source(s) will take 0.6 hours per reportable food and notifying the immediate subsequent recipient(s) will take 0.6 hours per reportable food. FDA also estimates that it will take 0.6 hours for the immediate previous source and/or the immediate subsequent recipient to also notify their immediate previous source(s) and/or immediate subsequent recipient(s). The agency bases its estimate on its experience with mandatory and voluntary reports recently submitted to FDA that would be considered reportable food reports in the future (73 FR 63153 at 63157).

Although it is not mandatory under FDAAA section 1005 that responsible persons notify the sources and recipients of instances of reportable food, for purposes of the burden estimate we are assuming FDA would exercise its authority and require such notifications in all such instances for mandatory reporters. This notification burden will not affect voluntary reporters of reportable food events. Therefore, FDA estimates that the total burden of notifying the immediate previous source(s) and immediate subsequent recipient(s) under section 417(d)(6)(B)(i), (d)(6)(B)(ii), (d)(7)(C)(i), and (d)(7)(C)(ii) of the act for 1,200 reportable foods will be 2,880 hours annually (1,200 x 0.6 hours) + (1,200 x 0.6 hours) + (1,200 x 0.6 hours) + (1,200 x 0.6 hours).

TABLE 1—ESTIMATED ANNUAL THIRD PARTY DISCLOSURE BURDEN[1]

Activity	No. of Respondents	Annual Frequency of Disclosure	Total Annual Disclosures	Hours per Disclosure	Total Hours
Notifying immediate previous source of the article of food under section 417(d)(6)(B)(i) of the act	1,200	1	1,200	0.6	720
Notifying immediate subsequent recipient of the article of food under section 417(d)(6)(B)(ii) of the act	1,200	1	1,200	0.6	720
Notifying immediate previous source of the article of food under section 417(d)(7)(C)(i) of the act	1,200	1	1,200	0.6	720
Notifying immediate subsequent recipient of the article of food under section 417(d)(7)(C)(ii) of the act	1,200	1	1,200	0.6	720
Total					2,880

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Recordkeeping

As noted previously, section 417(g) of the act requires that responsible persons maintain records related to reportable foods reports and notifications under section 417 of the act for a period of 2 years. We estimate that each mandatory report and its associated notifications will require 30 minutes of recordkeeping for the 2-year period, or 15 minutes per record per year. FDA bases its estimate on its experience with recordkeeping for food and cosmetics derived from cattle materials (71 FR 59653 at 59667, October 11, 2006). The annual recordkeeping burden for mandatory reportable food reports and their associated notifications is thus estimated to be 300 hours (1,200 x 0.25 hours).

We do not expect that records will always be kept in relation to voluntary reportable food reports. Therefore, FDA estimates that records will be kept for 600 of the 1,200 voluntary reports we expect to receive annually. The recordkeeping burden associated with voluntary reports is thus estimated to be 150 hours annually (600 x 0.25 hours). The estimated total annual recordkeeping burden is shown in Table 2.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

Activity	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records[2]	Hours per Records	Total Hours
Maintenance of reportable food records under section 417(g) of the act—Mandatory reports	1,200	1	1,200	0.25	300
Maintenance of reportable food records under section 417(g) of the act—Voluntary reports	600	1	600	0.25	150

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]—Continued

Activity	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records[2]	Hours per Records	Total Hours
Total					450

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] For purposes of estimating number of records and hours per record, a ''record'' means all records kept for an individual reportable food by the responsible party or a voluntary reporter.

Dated: October 13, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–25100 Filed 10–19–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0487]

Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance on Informed Consent For In Vitro Diagnostic Device Studies Using Leftover Human Specimens That Are Not Individually Identifiable

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on guidance on informed consent for in vitro diagnostic device studies using leftover human specimens that are not individually identifiable.

DATES: Submit written or electronic comments on the collection of information by December 21, 2009.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Guidance on Informed Consent For In Vitro Diagnostic Device Studies Using Leftover Human Specimens That Are Not Individually Identifiable—OMB Control Number 0910–0582—Extension

FDA's investigational device regulations are intended to encourage the development of new, useful devices in a manner that is consistent with public health, safety, and with ethical standards. Investigators should have freedom to pursue the least burdensome means of accomplishing this goal. However, to ensure that the balance is maintained between product development and the protection of public health, safety, and ethical standards, FDA has established human subject protection regulations addressing requirements for informed consent and institutional review board (IRB) review that apply to all FDA-regulated clinical investigations involving human subjects. In particular, informed consent requirements further both safety and ethical considerations by allowing potential subjects to consider both the physical and privacy risks they face if they agree to participate in a trial.

Under FDA regulations, clinical investigations using human specimens conducted in support of premarket submissions to FDA are considered human subject investigations (see 21 CFR 812.3(p)). Many investigational device studies are exempt from most provisions of part 812 (21 CFR part 812), Investigational Device Exemptions, under § 812.2(c)(3), but FDA's regulations for the protection of human subjects (21 CFR parts 50 and 56) apply to all clinical investigations that are regulated by FDA (see 21 CFR 50.1; 21 CFR 56.101, 21 U.S.C. 360j(g)(3)(A), and 21 U.S.C. 360j(g)(3)(D)).

FDA regulations do not contain exceptions from the requirements of informed consent on the grounds that the specimens are not identifiable or that they are remnants of human specimens collected for routine clinical care or analysis that would otherwise have been discarded. Nor do FDA regulations allow IRBs to decide whether or not to waive informed

consent for research involving leftover or unidentifiable specimens.

In a level one guidance document issued under the Good Guidances Practices regulation, 21 CFR 10.115, FDA outlines the circumstances in which it intends to exercise enforcement discretion as to the informed consent regulations for clinical investigators, sponsors, and IRBs.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN

FD&C Act Section:	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours	Total Capital Costs	Total Operating and Maintenance Costs
520(g)	700	1	700	4	2,800	$210,000	$420,000

The recommendations of this guidance impose a minimal burden on industry. FDA estimates that 700 studies will be affected annually. Each study will result in one recordkeeping per year, estimated to take 4 hours to complete. This results in a total recordkeeping burden of 2,400 hours (700 x 4 = 2,800). FDA estimates that the cost of developing standard operating procedures for each record keeper is $300 (6 hours of work at $50/hour (h)). This results in a total cost to industry of $210,000 ($300 x 700 recordkeepers). FDA estimates that operating costs for collecting this information is $300 per record keeper (6 hours of work at $50/h). This results in a total operational and maintenance cost to industry of $210,000 ($300 x 700 recordkeepers). The total cost of this recordkeeping, capital plus operational and maintenance cost is estimated to be $420,000.

Dated: October 13, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–25178 Filed 10–19–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0489]

Agency Information Collection Activities; Proposed Collection; Comment Request; Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension, of an existing collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on collections of information associated with the guidance issued January 30, 2008, and titled ''Recommendations: Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices''.

DATES: Submit written or electronic comments on the collection of information by December 21, 2009.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications—21 CFR Section 493 (OMB Control Number 0910–0598)—Extension

Congress passed the Clinical Laboratory Improvements Amendment (CLIA) (Public Law 100–578) in 1988 to establish quality standards for all laboratory testing. The purpose was to ensure the accuracy, reliability, and timeliness of patient test results regardless of where the test took place. CLIA requires that clinical laboratories obtain a certificate from the Secretary of Health and Human Services (the Secretary), before accepting materials derived from the human body for laboratory tests (42 U.S.C. 263a(b)). Laboratories that perform only tests that are ''simple'' and that have an ''insignificant risk of an erroneous result'' may obtain a certificate of waiver (42 U.S.C. 263a(c)(2)). The Secretary has delegated to FDA the authority to determine whether particular tests (waived tests) are ''simple'' and have ''an insignificant risk of an erroneous result'' under CLIA (69 FR 22849, April 27, 2004). This

guidance document describes recommendations for device manufacturers submitting to FDA an application for determination that a cleared or approved device meets this CLIA standard (CLIA waiver application).

The guidance recommends that CLIA waiver applications include a description of the features of the device that make it ''simple''; a report describing a hazard analysis that identifies potential sources of error, including a summary of the design and results of flex studies and conclusions drawn from the flex studies; a description of fail-safe and failure alert mechanisms and a description of the studies validating these mechanisms; a description of clinical tests that demonstrate the accuracy of the test in the hands of intended operators; and statistical analyses of clinical study results. Only new information collections not already approved are included in the estimate in the following table. Quick reference instructions are a short version of the instructions that are written in simple language and that can be posted.

FDA estimates the burden of this collection as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency of Response	Total Annual Responses	Hours per Response	Total Hours	Operating and Maintenance Costs
493.15(a) and (b)	40	1	40	780	31,200	$50,200

[1] There are no capital costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours	Operating and Maintenance Costs
493.15(a) and (b)	40	1	40	2,800	112,000	$16,000

[1] There are no capital costs associated with this collection of information.

The total number of reporting and recordkeeping hours is 143,200 hours. FDA bases the burden on an agency analysis of premarket submissions with clinical trials similar to the waived laboratory tests. Based on previous years' experience with CLIA waiver applications, FDA expects 40 manufacturers to submit one CLIA waiver application per year. The time required to prepare and submit a waiver application, including the time needed to assemble supporting data, averages 780 hours per waiver application for a total of 31,200 hours for reporting. Based on previous years experience with CLIA waiver applications, FDA expects that each manufacturer will spend 2,800 hours creating and maintaining the record for a total of 112,000 hours.

The total operating and maintenance cost associated with the waiver application is estimated at $66,200. The cost consists of specimen collection for the clinical study (estimated $23,500); laboratory supplies, reference testing and study oversight (estimated $26,700); shipping and office supplies (estimated $6,000); and educational materials, including quick reference instructions (estimated $10,000).

This guidance also refers to previously approved collections of information found in FDA regulations. The collections of information in 21 CFR part 801 and § 809.10 have been approved under OMB control number 0910–0485 and the collections of information in 21 CFR part 803 have been approved under OMB control number 0910–0437.

Dated: October 9, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–25177 Filed 10–19–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0490]

Draft Guidance for Industry and Food and Drug Administration Staff: Investigational New Drug Applications for Minimally Manipulated, Unrelated Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution for Specified Indications; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft document entitled ''Guidance for Industry and FDA Staff: Investigational New Drug Applications (INDs) for Minimally Manipulated, Unrelated Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution for Specified Indications,'' dated October 2009. In this draft guidance, we refer to these products for hematopoietic reconstitution for specified indications as hematopoietic progenitor cells, cord (HPC–C). This draft guidance provides advice to potential sponsors (e.g., generally cord blood banks, or registries, and individual physicians serving as sponsor-investigators) to assist in the submission of an IND for certain HPC–Cs, when such HPC–Cs are not licensed in accordance with certain FDA regulations, and when a suitable human leukocyte antigen (HLA) matched cord blood transplant is needed for treatment of a patient with a serious or life-threatening disease or condition and there is no satisfactory alternative treatment. This draft guidance document is applicable only to HPC–Cs intended for hematopoietic reconstitution in patients with the clinical indications listed in the guidance entitled ''Guidance for Industry: Minimally Manipulated, Unrelated Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution for Specified Indications'' (HPC–C licensure guidance), published elsewhere in this issue of the **Federal Register**. FDA is also announcing that it no longer intends to exercise enforcement discretion with respect to the IND and biologics license application (BLA) requirements for minimally manipulated, unrelated allogeneic hematopoietic stem/progenitor cell products and the phase-in implementation period for IND and license application requirements will end as of October 20, 2011.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit electronic or written comments on the draft guidance by January 19, 2010.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Tami Belouin, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled ''Guidance for Industry and FDA Staff: Investigational New Drug Applications (INDs) for Minimally Manipulated, Unrelated Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution for Specified Indications,'' dated October 2009. This draft guidance provides advice to potential sponsors (e.g., generally cord blood banks, or registries, and individual physicians serving as sponsor-investigators), to assist in the submission of an IND for certain HPC–Cs, when such HPC–Cs are not licensed in accordance with 21 CFR part 601, and when a suitable HLA matched cord blood transplant is needed for treatment of a patient with a serious or life-threatening disease or condition and there is no satisfactory alternative treatment. This draft guidance document is applicable only to HPC–Cs intended for hematopoietic reconstitution in patients with the clinical indications as listed in the guidance entitled ''Guidance for Industry: Minimally Manipulated, Unrelated Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution in Patients with Specified Indications'' (HPC–C licensure guidance), published elsewhere in this issue of the **Federal Register**.

FDA is also announcing that it no longer intends to exercise enforcement discretion with respect to IND and BLA requirements for minimally manipulated unrelated allogeneic hematopoietic stem/progenitor cell products and the phase-in implementation period for IND and license application requirements for these products will end (see the **SUMMARY** for the ending date). We encourage sponsors to send in applications as soon as possible to allow sufficient time for review, comment, and resubmission as needed to complete all actions by the end of this 2-year period.

In the **Federal Register** notice of January 20, 1998 (63 FR 2985), FDA requested submission of comments proposing establishment controls, process controls, and product standards designed to ensure the safety and effectiveness of minimally manipulated unrelated allogeneic hematopoietic stem/progenitor cell products derived from peripheral and cord blood for hematopoietic reconstitution. Also, in the January 20, 1998, notice, FDA announced its intention to phase in implementation of IND and license application requirements for minimally manipulated unrelated allogeneic hematopoietic stem/progenitor cell products to permit the development of licensing standards for those products where possible.

In the **Federal Register** notice of January 17, 2007 (72 FR 1999), FDA announced the availability of the draft guidance entitled ''Guidance for Industry: Minimally Manipulated, Unrelated, Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution in Patients with Hematological Malignancies,'' dated December 2006. FDA received comments on the December 2006 draft guidance and those comments were considered as the guidance was finalized. The HPC–C licensure guidance finalizes the December 2006 draft guidance. Some of the comments received by FDA expressed the importance of access and availability of HPC–C products that do not meet the standards for licensure and therefore, cannot be licensed. FDA recognizes the importance of providing guidance for such products and is publishing this IND draft guidance for comment. The HPC–C licensure guidance document is effective on its date of publication.

This draft guidance is consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance when finalized will represent FDA's current thinking on these topics. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. Alternative approaches may be used if such approaches satisfy the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 312 have been approved under OMB Control No. 0910–0014; 21 CFR part 1271 have been approved under OMB Control Nos. 0910–0559, 0910–0469, and 0910–0543; and FDA Form 1571 has been approved under OMB Control No. 0910–0014.

III. Comments

The draft guidance is being distributed for comment purposes only and is not intended for implementation at this time. Interested persons may still, at any time, submit to the Division of Dockets Management (see **ADDRESSES**) electronic or written comments regarding the draft guidance. Submit a single copy of electronic comments or two paper 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. A copy of the draft guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm*.

Dated: October 14, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–25136 Filed 10–19–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2006–D–0157] (Formerly Docket No. 2006D–0514)

Guidance for Industry: Minimally Manipulated, Unrelated Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution for Specified Indications; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance document entitled ''Guidance for Industry: Minimally Manipulated, Unrelated Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution for Specified Indications,'' dated October 2009. In this guidance, we refer to these products for hematopoietic reconstitution for specified indications as hematopoietic progenitor cells, cord (HPC–C). This guidance (HPC–C licensure guidance) provides recommendations to manufacturers applying for licensure of minimally manipulated, unrelated allogeneic placental/umbilical cord blood, for specified indications. Elsewhere in this issue of the **Federal Register**, FDA is publishing a draft guidance entitled ''Guidance for Industry and FDA Staff: Investigational New Drug Applications (INDs) for Minimally Manipulated, Unrelated Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution for Specified Indications.'' FDA is also announcing the end of the phased-in implementation period for IND and biologics license application (BLA) requirements for minimally manipulated unrelated allogeneic hematopoietic stem/progenitor cell products. The HPC–C licensure guidance announced in this notice finalizes the draft guidance entitled ''Guidance for Industry: Minimally Manipulated, Unrelated, Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution in Patients with Hematological Malignancies,'' dated December 2006.

DATES: Submit electronic or written comments on agency guidances at any time. FDA no longer intends to exercise enforcement discretion with respect to IND and BLA requirements for minimally manipulated, unrelated allogeneic hematopoietic stem/progenitor cell products and the phase in implementation period for IND and BLA requirements will end after October 20, 2011.

ADDRESSES: Submit written requests for single copies of the guidance to the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Tami Belouin, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance document entitled ''Guidance for Industry: Minimally Manipulated, Unrelated Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution for Specified Indications,'' dated October 2009. This guidance provides recommendations to manufacturers applying for licensure of minimally manipulated, unrelated allogeneic placental/umbilical cord blood, for specified indications. Elsewhere in this issue of the **Federal Register**, FDA is publishing an IND draft guidance entitled ''Guidance for Industry and FDA Staff: Investigational New Drug Applications (INDs) for Minimally Manipulated, Unrelated Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution for Specified Indications.'' FDA is also announcing that it no longer intends to exercise enforcement discretion with respect to IND and BLA requirements for minimally manipulated unrelated allogeneic hematopoietic stem/progenitor cell products and the phase-in implementation period for IND and license application requirements for these products will end (see **DATES** for ending date). We encourage sponsors to send in applications as soon as possible to allow sufficient time for review, comment, and re-submission as needed to complete all actions by the end of this 2-year period.

In the **Federal Register** notice of January 20, 1998 (63 FR 2985), FDA requested submission of comments proposing establishment controls, process controls, and product standards designed to ensure the safety and effectiveness of minimally manipulated unrelated allogeneic hematopoietic stem/progenitor cell products derived from peripheral and cord blood for hematopoietic reconstitution. Also, in the January 20, 1998, notice, FDA announced its intention to phase in implementation of IND and license application requirements for minimally manipulated unrelated allogeneic hematopoietic stem/progenitor cell products to permit the development of licensing standards for those products where possible.

In the **Federal Register** notice of January 17, 2007 (72 FR 1999), FDA announced the availability of the draft guidance entitled ''Guidance for Industry: Minimally Manipulated, Unrelated, Allogeneic Placental/Umbilical Cord Blood Intended for Hematopoietic Reconstitution in Patients with Hematological Malignancies,'' dated December 2006. FDA received comments on the December 2006 draft guidance and those comments were considered as the guidance was finalized. The HPC–C licensure guidance announced in this notice finalizes the December 2006 draft guidance. Some of the comments received by FDA expressed the importance of access and availability of HPC–C products that not do meet standards for licensure and therefore cannot be licensed. FDA recognizes the importance of these products and is publishing a draft IND guidance addressing IND submissions for such products.

This guidance is consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents FDA's current thinking on these topics. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. Alternative approaches may be used if such approaches satisfy the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These

collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 201 have been approved under OMB Control No. 0910–0572; 21 CFR part 211 have been approved under OMB Control No. 0910–0139; 21 CFR part 600 have been approved under OMB Control No. 0910–0308; 21 CFR parts 601, 610, and FDA Form 356(h) have been approved under OMB Control No. 0910–0338; 21 CFR part 1271 have been approved under OMB Control Nos. 0910–0559, 0910–0469, and 0910–0543; and FDA Form 3500A has been approved under OMB Control No. 0910–0291.

III. Comments

Interested persons may, at any time, submit to the Division of Dockets Management (see **ADDRESSES**) electronic or written comments regarding the guidance. Submit a single copy of electronic comments or two paper 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. A copy of the guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov*.

Dated: October 14, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–25135 Filed 10–19–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2007–N–0270]

Medical Device User Fee and Modernization Act; Notice to Public of Web Location of 2010 Proposed Guidance Development

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the Web location where it will post a list of guidance documents the Center for Devices and Radiological Health (CDRH) is considering for development. In addition, FDA has established a docket where stakeholders may provide comments and/or draft language for those topics as well as suggestions for new or different guidances.

DATES: Submit written or electronic comments at any time.

ADDRESSES: Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Myrna Hanna, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. WO66, rm. 4436, Silver Spring, MD 20993, 301–796–5739.

SUPPLEMENTARY INFORMATION:

I. Background

During negotiations over the reauthorization of the Medical Device User Fee and Modernization Act (MDUFMA), FDA agreed, in return for additional funding from industry, to meet a variety of quantitative and qualitative goals intended to help get safe and effective medical devices to market more quickly. These commitments include annually posting a list of guidance documents that CDRH is considering for development and providing stakeholders an opportunity to provide comments and/or draft language for those topics, or suggestions for new or different guidances. This notice announces the Web location of the list of guidances on which CDRH is intending to work over the next fiscal year. We note that the agency is not required to issue every guidance on the list, nor is it precluded from issuing guidance documents that are not on the list. The list includes topics that currently have no guidance associated with them, topics where updated guidance may be helpful, and topics for which CDRH has already issued level 1 drafts that may be finalized following review of public comments. We will consider stakeholder comments as we prioritize our guidance efforts.

FDA and CDRH priorities are subject to change at any time. Topics on this and past guidance priority lists may be removed or modified based on current priorities. We also note that CDRH's experience over the years has shown that there are many reasons CDRH staff does not complete the entire annual agenda of guidances it undertakes. Staff are frequently diverted from guidance development to other activities, including review of premarket submissions or postmarket problems. In addition, the Center is required each year to issue a number of guidances that it cannot anticipate at the time the annual list is generated. These may involve newly identified public health issues as well as special control guidance documents for de novo classifications of devices. It will be helpful, therefore, to receive comments that indicate the relative priority of different guidance topics to interested stakeholders.

Through feedback from stakeholders, including draft language for guidance documents, CDRH expects to be able to better prioritize and more efficiently draft guidances that will be useful to industry and other stakeholders. This will be the third annual list CDRH has posted. FDA intends to update the list each year.

FDA invites interested persons to submit comments on any or all of the guidance documents on the list. FDA has established a specific docket where comments about the fiscal year 2010 list, draft language for guidance documents on those topics, and suggestions for new or different guidances may be submitted (see **ADDRESSES**). FDA believes this docket is an important tool for receiving information from interested parties and for sharing this information with the public. Similar information about planned guidance development is included in the annual agency-wide notice issued by FDA under its good guidance practices (21 CFR 10.115(f)(5)). This CDRH list, however, will be focused exclusively on device-related guidances and will be made available on FDA's Web site prior to the beginning of each fiscal year from 2008 to 2012.

To access the list of the guidance documents CDRH is considering for development in 2010, visit the FDA Web site *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/MedicalDeviceUserFeeandModernizationActMDUFMA/ucm109196.htm.*

II. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper 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. Comments submitted to this docket may include draft guidance documents that stakeholders have prepared for FDA's consideration.

Dated: October 2, 2009.

Jeffrey Shuren,

Acting Director, Center for Devices and Radiological Health.

[FR Doc. E9–25179 Filed 10–19–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5283–N–02]

Notice of Proposed Information Collection: Comment Request; Affirmative Fair Housing Marketing (AFHM) Plan

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995. The Department of Housing and Urban Development (the Department) is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* December 21, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed information collection requirement. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian L. Deitzer, Reports Management Officer, QDAM, Office of Investments Strategies, Department of Housing and Urban Development, 451 7th Street, SW., Room 4178, Washington, DC 20410–2000; e-mail *Lillian.L.Deitzer@hud.gov* or telephone (202) 402–8048.

FOR FURTHER INFORMATION CONTACT: Pamela D. Walsh, Director, Office of Policy, Legislative Initiatives, and Outreach, Department of Housing and Urban Development, 451 7th Street, SW., Room 5224, Washington, DC 20410–2000; telephone: (202) 708–1145 (this is not a toll-free number) for copies of the proposed forms and other available information. Hearing or speech-impaired individuals may access this number TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Department is submitting this proposed information collection requirement to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice solicits comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed information collection is necessary for the proper performance of the functions of the agency; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses, information collection on responders, including the use of appropriate automated collection techniques or other forms of information technology (*e.g.*, electronic submission of responses).

This Notice also lists the following information:

Title of Proposal: Affirmative Fair Housing Marketing (AFHM) Plan.

Title of Regulation: Affirmative Fair Housing Marketing Regulations (24 CFR Part 200.600 and Affirmative Fair Housing Marketing Compliance Regulations (24 CFR Part 108).

OMB Control Number, if applicable: 2529–0013.

Description of the need for the information and proposed use: HUD uses this information to assess the adequacy of the applicant's proposed actions to carry out the Affirmative Fair Housing Marketing requirements of 24 CFR 200.600 and review compliance with these requirements under 24 CFR Part 108, the AFHM Compliance Regulations.

Agency form numbers, if applicable: HUD–935.2A Affirmative Fair Housing Marketing (AFHM) Plan (Multifamily), HUD–935.2B Affirmative Fair Housing Marketing (AFHM) Plan (Single-Family), and HUD–935.2C Affirmative Fair Housing Market (AFHM) Plan (Condominiums or Cooperatives).

Members of affected public: Applicants for mortgage insurance under the Department's insured single-family and multi-family subsidized and unsubsidized programs.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 25,540, which includes time for initial submission, review of existing plans, and any necessary revision. On an annual basis, there are approximately 4,360 respondents who submit initial plans or updated plans. On an annual basis, an additional 3,720 respondents simply review their existing plans. The frequency of annual response is once, and the average burden hour per response is 6 hours for initial submitted plans, and 4 hours for review and updating of existing plans.

Status of the proposed information collection: Extension of currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: October 9, 2009.

John Malgeri,

Director, Office of Program Standards and Compliance Division.

[FR Doc. E9–25211 Filed 10–19–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2009–N118; 1265–0000–10137–S3]

Keālia Pond National Wildlife Refuge and Kakahai'a National Wildlife Refuge, Maui County, HI

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent to prepare a comprehensive conservation plan and National Environmental Policy Act document and announcement of public open house meetings.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), intend to prepare a comprehensive conservation plan (CCP) for the Keālia Pond and Kakahai'a National Wildlife Refuges (NWRs). We will also prepare an evaluation under the National Environmental Policy Act (NEPA) to analyze the potential environmental effects of various CCP alternatives. We provide this notice in compliance with our CCP policy to advise the public, other Federal and State agencies, and Native Hawaiian organizations of our intentions and to obtain suggestions and information on the scope of issues to be considered in the planning process. We are also announcing two public open

house meetings; see **SUPPLEMENTARY INFORMATION** for details.

DATES: Please provide written comments on the scope of the CCP by November 19, 2009.

ADDRESSES: Send your comments or requests for more information by any of the following methods:

E-mail: FW1PlanningComments@fws.gov. Include ''Maui NWRC Scoping Comments'' in the subject line of the message.

Fax: Attn: Glynnis Nakai, (808) 875–2945.

U.S. Mail: Glynnis Nakai, Project Leader, Maui National Wildlife Refuge Complex, P.O. Box 1042, Kīhei, HI 96753.

Additional information about the CCP planning process is available on the Internet at *http://www.fws.gov/kealiapond* and *http://www.fws.gov/kakahaia*.

FOR FURTHER INFORMATION CONTACT: Glynnis Nakai, Project Leader, (808) 875–1582, or *Glynnis_Nakai@fws.gov.*

SUPPLEMENTARY INFORMATION:

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1977, requires us to develop a CCP for each national wildlife refuge. The purpose of developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

The Service will prepare a CCP/NEPA document in compliance with NEPA of 1969, as amended (42 U.S.C. 4321 *et seq.*); NEPA regulations (40 CFR parts 1500–1508); other applicable Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

Each unit of the NWRS is established for specific purposes. These purposes guide development and prioritization of management goals and objectives within the NWRS mission and determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives for the best possible conservation of important wildlife habitat, while providing for wildlife-dependent recreational opportunities that are compatible with the refuges' establishing purposes and the mission of the NWRS.

We will conduct a planning process that provides opportunities for the public, Federal and local government agencies, Native Hawaiian organizations, and others to participate in issue scoping and public comment. We request input for issues, concerns, ideas, and suggestions for the future management of Keālia Pond and Kakahai'a NWRs.

We will also give the public an opportunity to provide input at open houses to identify issues and concerns. All information provided voluntarily by mail, phone, or at public meetings becomes part of our official public record. We will handle requests for comments received in accordance with the Freedom of Information Act, NEPA, and Service and Departmental policies and procedures.

The Refuges

Keālia Pond and Kakahai'a NWRs are part of the Maui National Wildlife Refuge Complex. Located along the southern shore of Maui, Keālia Pond NWR was established in 1992 for the purpose of providing habitat for endangered Hawaiian waterbirds, specifically the ae'o or Hawaiian stilt, and 'alae ke'oke'o or Hawaiian coot.

Keālia Pond is one of the largest natural wetlands remaining in the Hawaiian Islands. The 691-acre Refuge is administered under a perpetual conservation easement from Alexander and Baldwin, Inc. Habitats found on the Refuge include open water, fresh to brackish water marsh, mudflat, grassland, upland shrub, and coastal beach strand.

Keālia Pond NWR contains one of the largest concentrations of wetland birds in Hawai'i and is an important breeding, feeding, and resting area for the Hawaiian stilt and Hawaiian coot. In addition, Keālia Pond NWR provides a strategic landfall for migratory birds coming from Alaska, Siberia, and Asia, including koloa mapu or Northern pintail, koloa moha or Northern shoveler, lesser scaup, kolea or Pacific golden-plover, and 'akekeke or ruddy turnstone. A total of 110 bird species have been documented on the Refuge. The majority of the Refuge is closed to general public access; however, trails, overlooks, and educational programs provide the public with opportunities to view and appreciate some of Hawai'i's endangered and migratory wildlife.

Kakahai'a NWR is located on the southeastern coast of Moloka'i. It was established to protect and provide habitat for endangered species. Habitats found on this Refuge include open water, freshwater marsh, mudflat, grassland, and shrubland. An inland Hawaiian fishpond is also located on the Refuge. The Refuge provides important breeding, feeding, and resting areas for endangered waterbirds, a variety of migratory waterfowl, shorebirds, and other wetland birds. Some of the more common migrants are koloa mapu or Northern pintail, and kolea or Pacific golden-plover. Kakahai'a NWR is closed to the general public; however, volunteers occasionally conduct wetland education programs.

Scoping: Preliminary Issues, Concerns, and Opportunities

We have identified preliminary issues, concerns, and opportunities to be addressed in the CCP. Additional issues may be identified through public scoping.

During the CCP planning process, the Service will analyze methods for enhancing the wildlife and habitat resources, visitor services, protection of cultural and historic resources, and facilities maintenance of the Keālia Pond and Kakahai'a NWRs while providing quality opportunities for wildlife-dependent recreation.

Public Meetings

Public open house meetings will be held at the following locations to provide information on the CCP and receive public comments. Opportunities for additional public input will be announced throughout the planning process.

Date	Time	Location
Wednesday, November 4, 2009	6:30–8:30 p.m.	Mitchel Pauole Center, Conference Room, 90 Ainoa Street, Kaunakakai, Moloka'i, HI 96748.
Thursday, November 5, 2009	6:30–8:30 p.m.	Kihei Community Center, Main Hall, 303 East Lipoa Street, Kihei, Maui, HI 96753.

Public Availability of Comments

All comments—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: October 13, 2009.

David J. Wesley,

Acting Regional Director, Region 1, Portland, Oregon.

[FR Doc. E9–25139 Filed 10–19–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLES003420.L14300000.EU0000; WIES–055403]

Notice of Realty Action: Modified Competitive Sale of Public Land in Bayfield County, WI

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: A parcel of public land totaling 92.26 acres in Bayfield County, Wisconsin, is being considered for sale under the provisions of the Federal Land Policy and Management Act of 1976 (FLPMA) at no less than the appraised fair market value. The Bureau of Land Management (BLM) proposes to sell the land using modified competitive sale procedures pursuant to 43 CFR 2711.3–2.

DATES: Interested parties may submit written comments regarding the proposed sale to the BLM at the address listed below on or before December 4, 2009. The BLM will accept sealed bids for the offered land from qualified bidders no later than 4:30 p.m. CDT on December 21, 2009.

ADDRESSES: Comments concerning the proposed sale should be addressed to Mark Storzer, Field Manager, Bureau of Land Management, Milwaukee Field Office, 626 East Wisconsin Avenue, Suite 200, Milwaukee, Wisconsin 53202–4617.

FOR FURTHER INFORMATION CONTACT: Carol Grundman, Realty Specialist, (414) 297–4447, or via e-mail at *carol_grundman@blm.gov.* More detailed information concerning the sale including maps and the current appraisal will be available at: *http://www.blm.gov/es/st/en/fo/milwaukeefo_html.html.*

SUPPLEMENTARY INFORMATION: The following described public land has been examined and found suitable for sale under the provisions of Section 203 of the FLPMA (43 U.S.C. 1713) and implementing regulations at 43 CFR part 2711:

Fourth Principal Meridian

T. 45 N., R. 6 W.,

Sec. 33, lots 8 to 12, inclusive.

The area described contains 92.26 acres in Bayfield County.

The BLM Wisconsin Resource Management Plan Amendment dated 2001 identified this parcel of land as suitable for disposal. The purpose of the sale is to dispose of land which is difficult and uneconomic to manage as part of the National System of Public Lands. Because the parcel has no legal access via a public road, the sale will be offered first by modified competitive sale procedures in accordance with 43 CFR 2711.3–2 to allow adjacent landowners an equal opportunity to successfully bid on the property. Bidding under the modified competitive sale procedures is only open to adjacent landowners who must submit sealed bids to the BLM, Milwaukee Field Office (address stated above), no later than 4:30 p.m. CDT, on December 21, 2009.

If the adjacent landowners fail to exercise the preference consideration offered by the modified competitive sale, the parcel will remain available for sale on a continuing basis in accordance with competitive sale procedures found at 43 CFR 2711.3–1 without further legal notice. If the modified competitive sale held on December 21, 2009 is not successful, then bids will continue to be accepted by the BLM under competitive sale procedures. Bids submitted to the BLM under competitive sale procedures will be opened on a monthly basis on the first Friday of each month at 10 a.m. CDT, at the BLM, Milwaukee Field Office, until a successful bid is received or the offer is cancelled.

Sealed bid envelopes must be clearly marked on the front lower left-hand corner with ''SEALED BID BLM LAND SALE WI, WIES–055403''. The bid envelope must contain a signed statement showing the total amount of the bid and the name, mailing address, and phone number of the entity making the bid. Bids must be for not less than the federally appraised fair market value determination of the land. The appraised fair market value will be made available 30 days prior to the sealed bid closing date at the BLM, Milwaukee Field Office, and on the Web site (address and Web site stated above). Each sealed bid must be accompanied by a certified check, money order, bank draft, or cashier's check made payable to the Bureau of Land Management for an amount not less than 20 percent of the total amount of the bid. Personal checks will not be accepted.

Sealed bids will be opened to determine the high bid at 10 a.m. CDT, December 21, 2009, at the BLM, Milwaukee Field Office (address stated above). The highest qualifying bid will be declared the high bid and the high bidder will receive written notice. Bidders submitting matching high bid amounts for the parcel will be provided an opportunity to submit a supplemental sealed bid. Bid deposits submitted by unsuccessful bidders will be returned by U.S. mail.

The successful bidder will be allowed 180 days from the date of sale to submit the remainder of the full bid price in the form of a certified check, money order, bank draft, or cashier's check made payable to the Bureau of Land Management. Personal checks will not be accepted. Failure to submit the remainder of the full bid price prior to but not including the 180th day following the day of the sale, will result in the forfeiture of the bid deposit to the BLM, and the parcel will be offered to the second highest qualifying bidder at their original bid.

Federal law requires that bidders must be (1) United States citizens 18 years of age or older, (2) a corporation subject to the laws of any State or of the United States, (3) an entity including, but not limited to associations or partnerships capable of acquiring and owning real property, or interests therein, under the laws of the State of Wisconsin, or (4) a State, State instrumentality, or political subdivision authorized to hold real property.

Certifications and evidence to this effect will be required of the purchaser prior to issuance of a patent.

The Federal mineral interests underlying this parcel have no known mineral value and will be conveyed with the sale of the parcel. A sealed bid for the above described parcel constitutes an application for conveyance of those mineral interests. In addition to the full purchase price, a successful bidder must pay a separate nonrefundable filing fee of $50 for the mineral interests to be conveyed simultaneously with the sale of the land.

Publication of this Notice in the **Federal Register** segregates the subject land from appropriation under the pubic land laws, except sale under the provisions of the FLPMA. The segregation will terminate upon issuance of patent, upon publication in the **Federal Register** of a termination of the segregation, or on *October 20, 2011,* unless extended by the BLM State Director in accordance with 43 CFR 2711.1–2(d) prior to the termination date.

The terms and conditions applicable to this sale are as follows:

1. The parcel is subject to valid existing rights.

2. To the extent required by law, this parcel is subject to the requirements of Section 120(h) of the Comprehensive Environmental Response Compensation and Liability Act, as amended (CERCLA) (42 U.S.C. 9620(h)).

3. An appropriate indemnification clause protecting the United States from claims arising out of the lessee's/patentee's use, occupancy, or occupations on the leased/patented lands.

4. No warranty of any kind, expressed or implied, is given by the United States as to the title, physical condition or potential uses of the land proposed for sale, and the conveyance will not be on a contingency basis. It is the buyer's responsibility to be aware of all applicable local government policies and regulations that may affect the subject land or its future uses. It is also the buyer's responsibility to be aware of existing or prospective uses of nearby properties. Any land lacking access from a public road or highway will be conveyed as such, and future access acquisition will be the responsibility of the buyer.

Public Comments: Interested parties and the general public may submit written comments concerning the land being considered for sale, including notification of any encumbrances or other claims relating to the identified land, to the Field Manager, BLM Milwaukee Field Office, at the above address on or before December 4, 2009. Comments transmitted via e-mail or facsimile will not be considered. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. The BLM will make available for public review, in their entirety, all comments submitted by businesses or organizations, including comments by an individual in their capacity as an official or representative of a business or organization. Comments will be available for public review at the BLM Milwaukee Field Office during regular business hours, except holidays.

Any adverse comments will be reviewed by the State Director, who may sustain, vacate, or modify this realty action. In the absence of timely filed objections, this realty action will become the final determination of the Department of the Interior.

Authority: 43 CFR part 2711.

Steven Wells,

Deputy State Director, Division of Natural Resources.

[FR Doc. E9–24567 Filed 10–19–09; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2009–N204; 40120–1112–0000–F2]

Receipt of Application for Incidental Take Permit for One Parking Facility in Escambia County, FL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice: receipt of application for incidental take permit (ITP) for a Habitat Conservation Plan (HCP); availability of proposed HCP and environmental assessment (EA); request for comment.

SUMMARY: We, the Fish and Wildlife Service, announce the availability of a proposed HCP, an accompanying ITP application, and an EA related to a proposed development that would take the Perdido Key beach mouse (*Peromyscus polionotus trissyllepsis*) on Perdido Key in Escambia County, Florida. The HCP analyzes the take of the Federally endangered Perdido Key beach mouse incidental to construction and maintenance of a parking facility (Project). Spanish Key Condominium (Applicant) requests an ITP under the Endangered Species Act of 1973 (Act), as amended. The Applicant's HCP describes the mitigation and minimization measures proposed to address the effects on the species.

DATES: We must receive any written comments on the ITP application, EA, and HCP at our Regional Office (*see* **ADDRESSES**) on or before November 19, 2009.

ADDRESSES: Documents will be available for public inspection by appointment during normal business hours at the Fish and Wildlife Service's Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, GA 30345 (Attn: David Dell); or Field Supervisor, Fish and Wildlife Service, 1601 Balboa Avenue, Panama City, FL 32405.

FOR FURTHER INFORMATION CONTACT: Mr. David Dell, Regional HCP Coordinator, (*see* **ADDRESSES**), telephone: (404) 679–7313; or Mr. Ben Frater, Field Office Project Manager, at the Panama City Field Office (*see* **ADDRESSES**), telephone: (850) 769–0552, ext. 248.

SUPPLEMENTARY INFORMATION: We announce the availability of a proposed HCP, accompanying ITP application, and an EA, which analyzes the take of the Perdido Key beach mouse incidental to the Project. The applicant requests a 30-year ITP under section 10(a)(1)(B) of the Endangered Species Act of 1973 (Act; 16 U.S.C. 1531 *et seq.*), as amended.

We specifically request information, views, and opinions from the public via this notice on our proposed Federal action, including identification of any other aspects of the human environment not already identified in the EA pursuant to NEPA regulations (40 CFR 1506.6). Further, we specifically solicit information regarding the adequacy of the HCP per 50 CFR parts 13 and 17.

An assessment of the likely environmental impacts associated with the implementation of the Spanish Key HCP, the EA considers the environmental consequences of the no-action alternative and the proposed action. The proposed action alternative is issuance of the ITP and implementation of the HCP as submitted by the Applicant. The HCP covers activities associated with the construction and maintenance of a parking facility. Avoidance, minimization and mitigation measures include a reduced design footprint, on-site land management to maintain use of the site by Perdido Key beach mice, and

funding off-site habitat acquisition and management.

Public Comments

If you wish to comment, you may submit comments by any one of several methods. Please reference TE227165–0 in such comments. You may mail comments to the Fish and Wildlife Service's Regional Office (*see* **ADDRESSES**). You may also comment via the Internet to *david_dell@fws.gov.* Please include your name and return address in your Internet message. If you do not receive a confirmation from us that we have received your Internet message, contact us directly at either telephone number listed under **FOR FURTHER INFORMATION CONTACT**.

Finally, you may hand-deliver comments to either of our offices listed under **ADDRESSES**. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Covered Area

The area encompassed under the HCP and ITP application is a 0.49-acre parcel located on the bayside of the western portion of Perdido Key, a 16.9-mile barrier island. Perdido Key constitutes the entire historic range of the Perdido Key beach mouse.

Next Steps

We will evaluate these ITP applications, including the HCP and any comments we receive, to determine whether these applications meet the requirements of section 10(a)(1)(B) of the Act. We will also evaluate whether issuance of the section 10(a)(1)(B) ITP complies with section 7 of the Endangered Species Act by conducting an intra-Service section 7 consultation. We will use the results of this consultation, in combination with the above findings, in our final analysis to determine whether or not to issue the ITP. If we determine that the requirements are met, we will issue the ITP for the incidental take of the Perdido Key beach mouse.

Authority: We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*) and NEPA regulations (40 CFR 1506.6).

Dated: September 17, 2009.

David Viker,

Acting Regional Director.

[FR Doc. E9–25140 Filed 10–19–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF JUSTICE

[OMB Number 1105–0071]

National Drug Intelligence Center; Agency Information Collection Activities: Extension With Change of a Previously Approved Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Extension with change of a previously approved collection National Drug Threat Survey.

The United States Department of Justice (DOJ), National Drug Intelligence Center (NDIC), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until December 21, 2009. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Kevin M. Walker, General Counsel, National Drug Intelligence Center, Fifth Floor, 319 Washington Street, Johnstown, PA 15901.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension reinstatement with change of a previously approved collection.

(2) *Title of the Form/Collection:* National Drug Threat Survey.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: NDIC Form # A–34j.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Federal, State, Tribal, and Local law enforcement agencies. This survey is a critical component of the National Drug Threat Assessment and other reports and assessments produced by the National Drug Intelligence Center. It provides direct access to detailed drug threat data from state and local law enforcement agencies.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that approximately 3,500 respondents will complete a survey response within approximately 20 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 1,167 total annual burden hours associated with this collection.

If additional information is required contact: Ms. Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: October 14, 2009.

Lynn Bryant,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. E9–25127 Filed 10–19–09; 8:45 am]

BILLING CODE 4410–DC–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0038]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Reporting and Recordkeeping for Digital Certificates

ACTION: 60-Day Notice of Information Collection under review.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until December 21, 2009. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Mark W. Caverly, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection 1117–0038

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Reporting and recordkeeping for digital certificates.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:*

Form Number:

DEA Form 251: CSOS DEA Registrant Certificate Application.

DEA Form 252: CSOS Principal Coordinator/Alternate Coordinator Certificate Application.

DEA Form 253: CSOS Power of Attorney Certificate Application.

DEA Form 254: CSOS Certificate Application Registrant List Addendum. CSOS Certificate Revocation.

Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: Non-profit, State and local government.

Abstract: Persons use these forms to apply for DEA-issued digital certificates to order Schedule I and II controlled substances. Certificates must be renewed upon renewal of the DEA registration to which the certificate is linked. Certificates may be revoked and/or replaced when information on which the certificate is based changes.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

Total number of respondents: 38,000 per year and 113,000 for the three-year period.

Average time to respond: 0.58 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* It is estimated that there are 21,129 annual burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: October 14, 2009.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E9–25128 Filed 10–19–09; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Parole Commission

Record of Vote of Meeting Closure; (Pub. L. 94–409) (5 U.S.C. 552b)

I, Isaac Fulwood, of the United States Parole Commission, was present at a meeting of said Commission, which started at approximately 12 p.m., on Tuesday, October 6, 2009, at the U.S. Parole Commission, 5550 Friendship Boulevard, 4th Floor, Chevy Chase, Maryland 20815. The purpose of the meeting was to decide one petition for reconsideration pursuant to 28 CFR 2.27. Four Commissioners were present, constituting a quorum when the vote to close the meeting was submitted.

Public announcement further describing the subject matter of the meeting and certifications of General Counsel that this meeting may be closed by vote of the Commissioners present were submitted to the Commissioners prior to the conduct of any other business. Upon motion duly made, seconded, and carried, the following Commissioners voted that the meeting be closed: Isaac Fulwood, Cranston J. Mitchell, Edward F. Reilly, Jr. and Patricia K. Cushwa.

In witness whereof, I make this official record of the vote taken to close this meeting and authorize this record to be made available to the public.

Dated: October 8, 2009.

Isaac Fulwood,

Chairman, U.S. Parole Commission.

[FR Doc. E9–25053 Filed 10–19–09; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,460]

Delphi Steering Including On-Site Leased Workers From Bartech and Securitas, Acro Service Corporation, Et al.; Saginaw, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor

issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 14, 2009, applicable to workers of Delphi Steering, including on-site leased workers from Bartech and Securitas, Saginaw, Michigan. The notice was published in the **Federal Register** on September 2, 2009 (74 FR 45477).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of steering systems and components such as steering columns, gears, pumps and electronic power steering systems.

The company reports that on-site leased workers from Acro Service Corp., Aerotek, Inc., Continental, Inc., Dynamic Corp., G–Tech Professional Staffing, Inc., GlobalEdge Technologies, Inc. (formerly CAE Tech), Gonzalez Contract Services, Integrated Partners Group LLC, Kelly Services, Manpower, Inc., Rapid Global Business Solutions, Inc., TAC Worldwide, Trialon Corp., Trison Business Solutions and Wright K. Technologies were employed on-site at the Saginaw, Michigan location of Delphi Steering. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from the above mentioned firms working on-site at the Saginaw, Michigan location of Delphi Steering.

The amended notice applicable to TA–W–70,460 is hereby issued as follows:

All workers of Delphi Steering, including on-site leased workers from Bartech, Securitas, Acro Service Corp., Aerotek, Inc., Continental, Inc., Dynamic Corp., G–Tech Professional Staffing, Inc., GlobalEdge Technologies, Inc., (formerly CAE Tech), Gonzalez Contract Services, Integrated Partners Group LLC, Kelly Services, Manpower, Inc., Rapid Global Business Solutions, Inc., TAC Worldwide, Trialon Corp., Trison Business Solutions, and Wright K. Technologies, Saginaw, Michigan, who became totally or partially separated from employment on or after May 20, 2008, through July 14, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 7th day of October 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25149 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–60,808]

Invista, S.A.R.L., Nylon Apparel Filament Fibers Group, a Subsidiary of Koch Industries, Inc.; Chattanooga, TN; Notice of Revised Determination on Remand

On June 18, 2009, the U.S. Court of International Trade (USCIT) remanded to the Department of Labor's motion for further investigation the matter *Former Employees of Invista, S.A.R.L.* v. *U.S. Secretary of Labor*, Court No. 07–00160.

On December 15, 2006, an official of Invista, S.A.R.L, Nylon Apparel Filament Fibers Group, A Subsidiary of Koch Industries, Inc., Chattanooga, Tennessee (Invista) filed a petition for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) on behalf of workers and former workers at Invista engaged in activity related to the production of nylon fiber. AR 1. The petition stated that the separations were due to a shift in production to Mexico that was the basis for a certification that expired on August 20, 2006 (TA–W–55,055). AR 2. The company official stated that, as of February 1, 2007, all workers of Invista would be terminated from employment. AR 7.

On February 7, 2007, the Department of Labor (Department) issued a negative determination regarding workers' eligibility to apply for TAA/ATAA. AR 30–32. On February 21, 2007, the Department's Notice of determination was published in the **Federal Register** (72 FR 7909). AR 43.

In support of a request for administrative reconsideration (dated February 18, 2007), a worker stated that the workers' separations are ''a direct result of the textile industry going to developing countries.'' AR 38.

In a letter dated March 15, 2007, the Department stated that the request for reconsideration was being dismissed because insufficient evidence was furnished to warrant reconsideration pursuant to 29 CFR 90.18(c) and that the shift in production that was the basis for the certification of TA–W–55,055 occurred outside the relevant period. AR 45. The Dismissal of Application for Reconsideration was issued on March 21, 2007. AR 47. The Department's Notice of dismissal was published in the **Federal Register** on March 30, 2007 (72 FR 15169). AR 48.

On May 11, 2007, Plaintiffs sought review by the USCIT. The Plaintiffs assert that the worker separations are due to Invista's shift in production to Mexico.

On March 27, 2008, the USCIT granted the Department's motion for voluntary remand and directed the Department to conduct further investigation to determine whether workers of Invista are eligible to apply for TAA and ATAA.

On June 2, 2008, the Department issued a Notice of Negative Determination on Remand based on the finding that there was no causal nexus between the worker separations and an earlier shift in production to Mexico of articles like or directly competitive with nylon fiber produced at Invista. SAR 35. The Department's Notice of determination was published in the **Federal Register** on June 10, 2008 (73 FR 32739). SAR 42.

On June 18, 2009, the USCIT ordered the Department to conduct further investigation to determine whether workers of Invista are eligible to apply for TAA and ATAA.

The group eligibility requirements for directly-impacted (primary) workers under Section 222(a) of the Trade Act of 1974, as amended, can be satisfied in either of two ways:

I. Section (a)(2)(A)—all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B)—both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

During the second remand investigation, the Department obtained additional information regarding Invista's shift in production of nylon fiber to Mexico, Invista's business decisions related to the post-shift reorganization, and the subsequent worker separations at Invista. SAR 67–71.

Following a careful review of the information obtained during its investigations, the Department determined that a significant portion or number of workers at Invista was separated and that there was a shift in production to Mexico of articles like or directly competitive with nylon fiber produced at Invista. Therefore, the Department determines that the group eligibility requirements under Section 222(a)(2)(B) the Trade Act of 1974, as amended, have been met.

In accordance with Section 246 the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department herein presents the results of its investigation regarding certification of eligibility to apply for ATAA.

The Department has determined in this case that the group eligibility requirements of Section 246 have been met.

A significant number of workers at the firm are age 50 or over and possess skills that are not easily transferable. Competitive conditions within the industry are adverse.

Conclusion

After careful review of the facts generated through the first and second remand investigations, I determine that a shift in production by Invista to Mexico of articles like or directly competitive to nylon fiber produced at Invista contributed to the total or partial separation of a significant number or proportion of workers at Invista.

In accordance with the provisions of the Act, I make the following certification:

All workers of Invista, S.A.R.L. Nylon Apparel Filament Fibers Group, A Subsidiary of Koch Industries, Inc., Chattanooga, Tennessee, who became totally or partially separated from employment on or after August 21, 2006, through two years from the issuance of this revised determination are eligible to apply for Trade Adjustment Assistance under Section 223 of the Trade Act of 1974, and are eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 8th day of September 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25146 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

TA–W–64,643, Chrysler LLC, Headquarters, Including On-Site Leased Workers From Aerotek, Ajilon, et al., Auburn Hills, MI; TA–W–64,643A, Chrysler LLC, Technology Center, Including On-Site Leased Workers From Aerotek, Ajilon, et al., Auburn Hills, MI; TA–W–64,643B, Chrysler LLC, Featherstone, Including On-Site Leased Workers From Aerotek, Bartech Group, et al., Auburn Hills, MI; TA–W–64,643C, Chrysler LLC, Chrysler Office Building, Including On-Site Leased Workers From Aerotek, Ajilon, et al., Auburn Hills, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on December 19, 2008, applicable to workers of Chrysler LLC, Headquarters, Auburn Hills, Michigan, Chrysler LLC, Technology Center, Auburn Hills, Michigan and Chrysler LLC, Featherstone, Auburn Hills, Michigan. The notice was published in the **Federal Register** on January 14, 2009 (74 FR 2136). The notice was amended on April 24, 2009 to include on-site leased workers. The Notice was published in the **Federal Register** on May 18, 2009 (74 FR 23216). The notice was amended again on August 27, 2009 to include workers at the Chrysler Office Building, an annex of the Headquarters at the Auburn Hills Complex. The notice was published in the **Federal Register** on September 22, 2009 (74 FR 48297)

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to the production automotive vehicles and automotive vehicle parts.

New information shows that workers leased from the INCAT, Ta Ta Technologies, TechOps and Tech Team Global were employed on-site at the Auburn Hills, Michigan locations of the above mentioned plants of Chrysler LLC.

The Department has determined that these workers were sufficiently under the control of Chrysler LLC, Headquarters, Technology Center, Featherstone and Chrysler Office Building to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from INCAT, Ta Ta Technologies, TechOps and Tech Team Global working on-site at the Auburn Hills, Michigan locations of the subject firm.

The amended notice applicable to TA–W–64,494 is hereby issued as follows:

All workers of Chrysler LLC, Headquarters, including on-site leased workers from Aerotek, Ajilon, Argos, ASG Renaissance, Bartech, Group, CDI Information Services, Computer Consultants of America, Computer Engrg Services, Epitec Group, Gtech Professional Staffing, JDM Systems Consultants, Kelly Services, Preferred Solutions, Resource Technologies, Spherion, Synova, and TAC Transportation, INCAT, Ta Ta Technologies, TechOps and Tech Team Global, Auburn Hills, Michigan (TA–W–64,643), Chrysler LLC, Technology Center, including on-site leased workers from Aerotek, Ajilon, Altair Engineering, Applied Technologies, Argos, ASG Renaissance, Automated Analysis Corp/Belcan, Bartech Group, CAE Tech, CDI Information Services, CER–CAD Engineering Resources, Computer Consultants of America, Computer Engrg Services, Compuware, Controller Technologies, Data Communications Corp., Emerging Technologies Corp., Engineering Technology Assoc., Gonzalez Design Engineering, Gtech Professional Staffing, Incat, Jefferson Wells International, Kelly Services, Magnasteyr, Meda Technical Services, Modern Professional Services, MSX International, Optical Q Quest Corp., Quantum Consultants, Rapid Global Business, Resource Technologies, Ricardo, RSB Systems, Spherion, Synova, Syntel Int'l, Systems Technology, TAC Transportation, TEC, Technical Training, UGS PLM Solutions, Unique Systems Design, Valley Forge, Wel-Tek International, INCAT, Ta Ta Technologies TechOps and Tech Team Global, Auburn Hills, Michigan (TA–W–64,643A), Chrysler LLC, Featherstone, including on-site leased workers from

Aerotek, Bartech Group, CDE Information Services, Computer Consultants of America, Computer Engreg Services, Crassociates, Gtech Professional Staffing, Incat, JDM Systems Consultants, Kelly Services, Meda Technical Services, Modern Professional Services, MSX International, O/E Learning, Resource Technologies, Ricardo, Spherion, Synova, Systems Technology, TAC, Technical Training, INCAT, Ta Ta Technologies and Tech Team Global, Auburn Hills, Michigan (TA–W–64,643B), and all workers of Chrysler LLC, Chrysler Office Building, including on-site leased workers from Aerotek, Ajilon, Argos, Bartech Group, CDI Information Services, Computer Consultants of America, Inc., Computer Engrg Services, Epitec Group, Inc., Gtech Professional Staffing, Inc., JDM Systems Consultants, Inc., Kelly Services, Inc., Preferred Solutions, Resource Technologies Corp., Spherion, Synova, TA Transportation, INCAT, Ta Ta Technologies, TechOps and Tech Team Global, Auburn Hills, Michigan, who became totally or partially separated from employment on or after December 2, 2007 through December 19, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 29th day of September 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25156 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,813]

Sparton Electronics; Including On-Site Leased Workers From Kelly Services, et al.; Jackson, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 29, 2009, applicable to workers of Sparton Electronics, including on-site leased workers from Kelly Services, Manpower of Jackson, HRU, Inc., Technical Resources and Patriot Technical, Jackson, Michigan. The notice will be published soon in the **Federal Register**.

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of electronic circuit boards.

The company reports that on-site leased workers from CSS USA were employed on-site at the Jackson, Michigan location of Sparton Electronics. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from CSS USA working on-site at the Jackson, Michigan location of Sparton Electronics.

The amended notice applicable to TA–W–70,813 is hereby issued as follows:

All workers of Sparton Electronics, including on-site leased workers from Kelly Services, Manpower of Jackson, HRU, Inc., Technical Resources, Patriot Technical and CSS USA, Jackson, Michigan, who became totally or partially separated from employment on or after May 19, 2008, through July 29, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 29th day of September 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25158 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,784]

Oval International; Hoquiam, WA; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated August 26, 2009, a petitioner requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of the subject firm. The determination was issued on August 6, 2009. The Notice of Determination was published in the **Federal Register** on September 2, 2009 (74 FR 45474).

The initial investigation resulted in a negative determination based on the finding that imports of pulp bale strapping machines and spare parts did not contribute importantly to worker separations at the subject firm. The investigation revealed that the subject firm did not shift production of pulp bale strapping machines and spare parts to foreign countries during the period under investigation.

In the request for reconsideration, the petitioner alleged that employment at the subject firm was negatively impacted by a shift in production of spare parts abroad. To support the allegation, the petition supplied additional documentation.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 29th day of September 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25160 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–61,554]

Semitool, Incorporated Including On-Leased Employees From LC Staffing, Express Personnel and Workplace, Inc. Kalispell, MT; Including Employees in Support of Semitool, Incorporated, Kalispell, MT Working at Various Locations in the Following States: TA–W–61,554C Arizona et al.; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

TA–W–61,554C Arizona ..... TA–W–63,996D California.
TA–W–61,554E Florida ..... TA–W–61,554F Maine.
TA–W–61,554G North Carolina ..... TA–W–61,554H New Jersey.
TA–W–61,554I New York ..... TA–W–61,554J Oregon.
TA–W–61,554K Pennsylvania ..... TA–W–61,554L Texas.
TA–W–61,554M Utah ..... TA–W–61,554N Virginia.
TA–W–61,554O Washington ..... TA–W–61,554P Wisconsin.
And TA–W–61,554Q Minnesota.

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on July 16, 2007, applicable to workers of Semitool, Incorporated, including on-site leased workers from LC Staffing, Express Personnel, and Workplace, Incorporated, Kalispell, Montana. The notice was published in the **Federal Register** on August 2, 2007 (72 FR 42435). The notice was amended on March 26, 2009 to include employees of the subject firm working at various locations at the above mentioned states. The notice was published in the **Federal Register** on April 7, 2009 (74 FR 15753).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of semiconductor processing equipment.

New information shows that a worker separation has occurred involving an employee, (John Polinski) who provided various services supporting the Kalispell, Montana location of Semitool, Incorporated working out of the state of Minnesota.

Based on these findings, the Department is amending this certification to include an employee of the Kalispell, Montana facility of Semitool, Incorporated working out of the state of Minnesota.

The intent of the Department's certification is to include all workers of Semitool, Incorporated, Kalispell, Montana who were adversely affected by increased imports of semiconductor processing equipment.

The amended notice applicable to TA–W–61,554 is hereby issued as follows:

All workers of Semitool, Incorporated, including on-site leased workers from LC Staffing, Express Personnel and Workplace, Incorporated, Kalispell, Montana, including employees in support of Semitool, Incorporated, Kalispell, Montana working at various locations in the following states: Arizona (TA–W–61,554C), California (TA–W–61,554D), Florida (TA–W–61,554E), Maine (TA–W–61,554F), North Carolina (TA–W–61,554G), New Jersey (TA–W–61,554H), New York (TA–W–61,554I), Oregon (TA–W–61,554J), Pennsylvania (TA–W–61,554K), Texas (TA–W–61,554L), Utah (TA–W–61,554M, Virginia (TA–W–61,554N), Washington (TA–W–61,554O), Wisconsin (TA–W–61,554P) and Minnesota (TA–W–61,554Q), who became totally or partially separated from employment on or after May 18, 2006, through July 16, 2009, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 6th day of October 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25154 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,783]

Coherent-Deos, LLC, Including Workers Whose UI Wages Are Reported to Albany Services, Inc., Including On-Site Leased Workers From ATR International, Inc., et al.; Connecticut; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on January 23, 2009, applicable to workers of Coherent-DEOS, LLC, Bloomfield, Connecticut. The notice was published in the **Federal Register** on February 10, 2009 (74 FR 6653). The notice was amended on August 31, 2009 include on-site leased workers ATR International, Inc., Coworx PPS, LLC, Stewart Staffing Solutions, 888 Consulting Group and Roth Staffing Co and to include workers whose UI wages were reported Albany Services, Inc. The notice was published in the **Federal Register** on September 22, 2009 (74 FR 48296).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of air-cooled carbon dioxide lasers.

Information shows that workers leased from Ultimate Staffing Services and TAC Worldwide were employed on-site at the Bloomfield, Connecticut location of Coherent-DEOS, LLC. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers eased from Ultimate Staffing Services and TAC Worldwide working on-site at the Bloomfield, Connecticut location of Coherent-DEOS, LLC.

The amended notice applicable to TA–W–64,783 is hereby issued as follows:

All workers of Coherent-DEOS, LLC, including workers whose UI wages are reported to Albany Services, Inc., and including on-site leased workers from ATR International, Inc., Coworx PPS, LLC, Stewart Staffing Solutions, 888 Consulting Group, Roth Staffing Company, Ultimate Staffing Services and TAC Worldwide, Bloomfield, Connecticut, who became totally or partially separated from employment on or after December 26, 2007, through January 23, 2011, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 6th day of October 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25151 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,156]

Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance, etc.: Temic Automotive of North America, Inc., Elma, NY, et al.; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on April 15, 2008, applicable to workers of Temic Automotive of North America, Inc., a wholly-owned subsidiary of Continental Automotive Group, including on-site leased workers from Manpower Inc., Adecco, and USA Inc., Elma, New York. The notice was published in the **Federal Register** on May 2, 2008 (73 FR 24318).

At the request of a firm official, the Department reviewed the certification for workers of the subject firm. The subject firm workers produce automotive electronics, including pressure sensors, transmission controls, and power steering controllers and are not separately identifiable by product.

New information shows that workers leased from Linc Facility Services, Clean Sweep Janitorial Services Inc., Securitas Security Services USA Inc., Next Generation Vending and Food Services, and MECU were working on-site at the Elma, New York location of the subject firm. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to leased workers of Linc Facility Services, Clean Sweep Janitorial Services Inc., Securitas Security Services USA Inc., Next Generation Vending and Food Services, and MECU working on-site at the Elma, New York location of the subject firm.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by a shift of production to a foreign country which is party to a free trade agreement with the United States.

The amended notice applicable to TA–W–63,156 is hereby issued as follows:

All workers of Temic Automotive of North America, Inc., a wholly-owned subsidiary of Continental Automotive Group, including on-site leased workers from Manpower Inc., Adecco, USA Inc., Linc Facility Services, Clean Sweep Janitorial Services Inc., Securitas Security Services USA Inc., Next Generation Vending and Food Services, and MECU, Elma, New York, who became totally or partially separated from employment on or after April 7, 2007, through April 15, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 30th day of September 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25155 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–61,994]

Child Craft Industries, Inc., Currently Known as Child Craft LLC; New Salisbury, IN; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on September 7, 2007, applicable to workers of Child Craft Industries, Inc., New Salisbury, Indiana. The notice was published in the **Federal Register** on September 21, 2007 (72 FR 54076).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of juvenile furniture.

New information shows that during July 2008, Child Craft Industries, Inc. became known as Child Craft LLC and those workers' wages are being reported under the State of Indiana Unemployment Insurance (UI) tax accounts for Child Craft LLC.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of Child Craft Industries, Inc., currently known as Child Craft LLC, New Salisbury, Indiana, who were adversely affected by a shift in production of juvenile furniture to Honduras, China and Indonesia.

The amended notice applicable to TA–W–61,994 is hereby issued as follows:

All workers of Child Craft Industries, Inc., currently known as Child Craft LLC, New Salisbury, Indiana, who became totally or partially separated from employment on or after October 15, 2007, through September 7, 2009, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 6th day of October 2009.

Elliott S. Kushner

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25153 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,066]

Emerson Network Power, Embedded Computing, Including On-Site Leased Workers From Manpower, et al.; Tempe, AZ; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on August 5, 2009, applicable to workers of Emerson Network Power, Embedded Computing, including on-site leased workers from Manpower, QTI and ACAE, Temple, Arizona. The notice was published in the **Federal Register** September 22, 2009 (74 FR 48303).

At the request of a petitioner and the company, the Department reviewed the certification for workers of the subject firm. The workers are engaged in manufacturing of embedded computer products.

The company reports that on-site leased workers from Victory Personnel Services, Coretek, SDI and Collins were employed on-site at the Tempe, Arizona

location of Emerson Network Power, Embedded Computing. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Victory Personnel Services, Coretek, SDI, and Collins working on-site at the Tempe, Arizona location of the subject firm.

The amended notice applicable to TA–W–70,066 is hereby issued as follows:

All workers of Emerson Network Power, Embedded Computing, including on-site leased workers from Manpower, QTI, ACAE, Victory Personnel Services, Coretek, SDI and Collins, Tempe, Arizona, who became totally or partially separated from employment on or after May 18, 2008, through August 5, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 8th day of October 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25161 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,326]

Ford Motor Company, Dearborn Truck Plant; Dearborn, MI; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated September 18, 2009, a petitioner requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of the subject firm. The determination was issued on August 14, 2009. The Notice of Determination was published in the **Federal Register** on September 22, 2009 (74 FR 48302).

The initial investigation resulted in a negative determination based on the finding that imports of Ford F Series pickups and Lincoln Mark LT sports-utility pickups did not contribute importantly to worker separations at the subject firm. The investigation revealed that the subject firm did not shift production of Ford F Series pickups and Lincoln Mark LT sports-utility pickups to foreign countries during the period under investigation.

In the request for reconsideration, the petitioner alleged that employment at the subject firm was negatively impacted by a shift in production of pickups from the subject firm to South Africa, Thailand, Mexico and Canada. The petitioner also alleged that imports of directly competitive products with Ford F Series pickups contributed importantly to the decline in sales at the subject facility.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 29th day of September 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25159 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,633]

Consuelo E. Kelly, DBA Kelly International U.S.; Overland Park, KS; Notice of Negative Determination Regarding Application for Reconsideration

By application dated September 9, 2009, a company official requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The denial notice was signed on August 12, 2009 and published in the **Federal Register** on September 22, 2009 (74 FR 48301).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The negative TAA determination issued by the Department for workers of Consuelo E. Kelly, dba Kelly International U.S., Overland Park, Kansas was based on the finding that the worker group number threshold was not met in accordance with the group eligibility requirements of Section 222 of the Trade Act of 1974. Section 222 of the Trade Act defines an eligible worker ''group'' as ''three or more workers in a firm or an appropriate subdivision.'' As the total worker number at Consuelo E. Kelly, Overland Park, Kansas was two in the relevant period, the worker group did not meet the group eligibility requirements for trade adjustment assistance.

In the request for reconsideration the petitioner alleged that even though the worker group accounted for two employees during the relevant period, the number of workers in the worker group should not be a determining factor for determining of the Kelly International's eligibility for TAA.

The number of workers in the worker group and number of separated workers during the relevant period are elements that are relevant in determining workers' eligibility for TAA as established by the Trade Act of 1974. This criteria is outlined in the legislation and regulations as stated in the determination dated August 12, 2009.

When assessing eligibility for TAA, the Department exclusively considers employment numbers at the subject firm during the relevant period (one year prior to the date of the petition). Since the subject firm employed only two workers during the relevant period the workers do not meet the eligibility requirement of the trade act in the current investigation.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 29th day of September 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25157 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,028]

Three Rivers Timber, Inc.; Kamiah, ID; Notice of Revised Determination on Reconsideration

By application dated September 15, 2009, a company official requested administrative reconsideration of the Department's negative determination regarding eligibility for workers and former workers of the subject firm to apply for Trade Adjustment Assistance (TAA).

The initial investigation resulted in a negative determination signed on September 4, 2009, was based on the finding that imports of softwood lumber did not contribute importantly to worker separations at the subject firm and there was no shift in production of softwood lumber from the subject firm abroad. The denial notice will soon be published in the **Federal Register**.

In the request for reconsideration, the petitioner requested the Department of Labor conduct further analysis of the data reported by the customers of the subject firm and imports that are like or directly competitive with softwood lumber.

The Department further reviewed responses of a sample customer survey conducted during the initial investigation. On further analysis, it has been determined that the survey revealed that customers increased their reliance on imported softwood lumber, while decreasing their purchases from the subject firm from 2007 to 2008.

The investigation also revealed that employment, sales and production at Three Rivers Timber, Inc., Kamiah, Idaho declined absolutely during the relevant period.

Furthermore, it was determined that increased reliance on imports of softwood lumber by the customers of the subject firm contributed importantly to the worker group separation and sales/production declines at Three Rivers Timber, Inc. in Kamiah, Idaho.

Conclusion

After careful review of the additional facts obtained on reconsideration, I determine that workers of Three Rivers Timber, Inc., Kamiah, Idaho, who are engaged in activities related to the production of softwood lumber meet the worker group certification criteria under Section 222(a) of the Act, 19 U.S.C. 2272(a). In accordance with Section 223 of the Act, 19. U.S.C. 2273, I make the following certification:

All workers of Three Rivers Timber, Inc., Kamiah, Idaho, who became totally or partially separated from employment on or after May 18, 2008, through two years from the date of this certification, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 7th day of October 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25150 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,216]

H&H Trailer Company, Including On-Site Workers From Brandon Hall; Clarinda, IA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on February 25, 2009, applicable to workers of H&H Trailer Company, Clarinda, Iowa. The notice was published in the **Federal Register** on March 19, 2009 (74 FR 11757).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of trailers.

New information shows that workers from Brandon Hall were employed on-site to provide hauling services for the Clarinda, Iowa location of H&H Trailer Company. The Department has determined that these workers were sufficiently under the control and in support of H&H Trailer Company, Clarinda, Iowa to be included in the certification determination established for the subject firm.

Based on these findings, the Department is amending this certification to include workers from Brandon Hall working on-site at the Clarinda, Iowa location of H&H Trailer Company.

The amended notice applicable to TA–W–65,216 is hereby issued as follows:

All workers of H&H Trailer Company, including on-site workers from Brandon Hall, Clarinda, Iowa, who became totally or partially separated from employment on or after February 10, 2008 through February 25, 2011, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 8th day of October 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25147 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,812]

Performance Fibers Operations, Inc., Salisbury Plant, Including On-Site Leased Workers From Mundy Maintenance Services and Operations and UTi Integrated Logistics, Formerly Known as Standard Corporation; Salisbury, NC; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 7, 2009, applicable to workers of Performance Fibers Operations, Inc., Salisbury Plant, Salisbury, North Carolina. The notice was published in the **Federal Register** on August 19, 2009 (74 FR 41933). The notice as amended on July 23, 2009 to include on-site leased workers from Mundy Maintenance, Services and Operations, LLC and UTi Integrated logistics. The notice was published in the **Federal Register** on August 5, 2009 (74 FR 39106).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production

of polyester tire cord and high denier industrial yarn.

The company reports that UTi Integrated Logistics, an on-site leasing firm at the subject firm, was formerly known as Standard Corporation.

Information also shows that workers separated from employment from UTi Integrated Logistics had their wages reported under a separate unemployment insurance (UI) tax account for Standard Corporation.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected as an upstream supplier to a trade certified primary firm.

The amended notice applicable to TA–W–70,812 is hereby issued as follows:

All workers of Performance Fibers Operations, Inc., Salisbury Plant, including on-site leased workers from Mundy Maintenance Services and Operations and UTi Integrated Logistics, formerly known as Standard Corporation, Salisbury, North Carolina, who became totally or partially separated from employment on or after May 29, 2008 through July 7, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 7th day of October 2009

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25148 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,477]

Dell USA LP, Americas Business Operations Organization; Round Rock, TX; Notice of Negative Determination Regarding Application for Reconsideration

By application sent via facsimile on September 17, 2009, a petitioner requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The denial notice was signed on August 7, 2009 and published in the **Federal Register** on September 22, 2009 (74 FR 48304).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous; (2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or (3) If in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The negative TAA determination issued by the Department for workers of Dell USA LP, Americas Business Operations Organization, Round Rock, Texas was based on the finding that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by Section 222 of the Trade Act of 1974.

The petitioner stated that prior to May 2008 the workers of the subject firm were part of Global Financial Services Group at Dell USA. The petitioner further stated that in May 2008 the petitioning worker group was transferred to a different division at Dell USA and became a part of Americas Business Operations Group. After the transition, the workers continued performing similar functions and were engaged in activities related to financial and accounting services.

When assessing eligibility for TAA, the Department determines whether each required criterion is met prior to issuing the determination. In order for the criteria (a)(2)(A)(i) and 222(c)(1) to be met, the Department exclusively considers the relevant employment data (for one year prior to the date of the petition and any imminent layoffs) for the facility where the petitioning worker group was employed.

In case at hand, the investigation revealed that employment levels at Dell USA LP, Americas Business Operations Organization, Round Rock, Texas did not decline during the relevant period and there was no threat of separations. A significant number or proportion of the workers in a firm or appropriate subdivision means at least three workers in a workforce of fewer than 50 workers, five percent of the workers in a workforce of over 50 workers, or at least 50 workers. Therefore, criterion I of Section 222(a) and criterion (1) of Section 222(c) of the Act were not met.

The petitioner also alleged that there was a shift in services provided by the workers of the subject firm to India and not to Beijing, China as indicated in the negative determination document issued by the Department of Labor.

The allegation of the shift in services to India would have been relevant if it was determined that all other criteria have been met. However, it was revealed that there was no employment decline at the subject facility during the relevant period.

Should conditions change in the future, the petitioner is encouraged to file a new petition on behalf of the worker group which will encompass an investigative period that will include these changing conditions.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) A mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 6th day of October, 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–25152 Filed 10–19–09; 8:45 am]

BILLING CODE 4510–FN–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0192; Docket No. 50–244; Renewed License No. DPR–18]

In the Matter of EDF Development, Inc., Constellation Energy Nuclear Group, LLC; R.E. Ginna Nuclear Power Plant, LLC (R.E. Ginna Nuclear Power Plant); Order Approving Application Regarding Proposed Corporate Restructuring

I

R.E. Ginna Nuclear Power Plant, LLC (Ginna, LLC or the licensee) is the holder of Renewed Facility Operating License No. DPR–18 which authorizes the possession, use, and operation of the R.E. Ginna Nuclear Power Plant (Ginna). The facility is located at the licensee's

site in Ontario, New York. The operating license authorizes the licensee to possess, use, and operate Ginna.

II

By letter dated January 22, 2009, as supplemented on February 26, April 8, June 25, and July 27, 2009 (together, the application), Constellation Energy Nuclear Group, LLC (CENG), on behalf of the licensee and EDF Development, Inc. (EDF Development) (together, the applicants), requested that the Nuclear Regulatory Commission (NRC, the Commission), pursuant to Title 10 of the Code of Federal Regulations (10 CFR) 50.80, consent to the indirect license transfers that would be effected by the indirect transfer of control of CENG's ownership and operating interests in Ginna. The action is being sought as a result of certain proposed corporate restructuring actions in connection with a planned investment by EDF Development whereby it would acquire a 49.99% ownership interest in CENG from Constellation Energy Group, Inc. (CEG), the current 100% owner of CENG. EDF Development is a U.S. corporation organized under the laws of the State of Delaware and a wholly-owned subsidiary of E.D.F. International S.A., a public limited company organized under the laws of France, which is in turn a wholly-owned subsidiary of Électricité de France S.A., a French limited company.

Following the proposed transaction, EDF Development will hold a 49.99% ownership interest in CENG; CEG will hold a 50.01% ownership interest in CENG through two new intermediate parent companies, Constellation Nuclear, LLC and CE Nuclear, LLC, formed for non-operational purposes. In addition, Constellation Nuclear Power Plants, Inc., which is currently an intermediate holding company between CENG and Ginna, LLC and Nine Mile Point Nuclear Station, LLC, will convert to a Delaware limited liability company and become Constellation Nuclear Power Plants, LLC, and will exist as an intermediate holding company between CENG and Ginna, LLC, Nine Mile Point Nuclear Station, LLC, and Calvert Cliffs Nuclear Power Plant, LLC. No physical changes to the facilities or operational changes are being proposed in the application.

Approval of the transfer of the license is requested by the applicants pursuant to 10 CFR 50.80. Notice of the request for approval and opportunity for a hearing was published in the **Federal Register** on May 6, 2009 (74 FR 21013). No hearing requests or petitions to intervene were received. The NRC received comments from a member of the public in Seattle, Washington, in an e-mail dated May 22, 2009. The comments did not provide any information additional to that in the application, nor did they provide any information contradictory to that provided in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. Upon review of the information in the application and other information before the Commission, and relying upon the representations and agreements contained in the application, the NRC staff has determined that the proposed indirect license transfer of control of the subject license held by the licensee to the extent such will result from the proposed corporate restructuring actions in connection with the planned investment by EDF Development whereby it will acquire a 49.99% ownership interest in CENG, to the extent affected by the proposed transaction as described in the application, is otherwise consistent with applicable provisions of law, regulations, and Orders issued by the NRC, pursuant thereto, subject to the conditions set forth below. The NRC staff has further found that the application for the proposed license amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations set forth in 10 CFR Chapter I; the facility will operate in conformity with the application, the provisions of the Act, and the rules and regulations of the Commission; there is reasonable assurance that the activities authorized by the proposed license amendment can be conducted without endangering the health and safety of the public and that such activities will be conducted in compliance with the Commission's regulations; the issuance of the proposed license amendment will not be inimical to the common defense and security or to the health and safety of the public; and the issuance of the proposed amendments will be in accordance with 10 CFR Part 51 of the Commission's regulations and all applicable requirements have been satisfied.

The findings set forth above are supported by the NRC staff's safety evaluation (SE) dated the same day as this Order.

III

Accordingly, pursuant to Sections 161b, 161i, 161o, and 184 of the Act, 42 U.S.C. Sections 2201(b), 2201(i), 2201(o), and 2234; and 10 CFR 50.80, *it is hereby ordered* that the application regarding the indirect license transfers related to the proposed corporate restructuring actions in connection with the planned investment by EDF Development, as described herein, is approved, subject to the following conditions:

(1) The ownership and governance arrangements as a result of the proposed transaction, are subject to the following:

(a) The Operating Agreement included with the application dated January 22, 2009, may not be modified in any material respect concerning decision-making authority over ''safety issues'' as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.

(b) At least half the members of CENG's Board of Directors must be U.S. citizens.

(c) The Chief Executive Officer (CEO), Chief Nuclear Officer (CNO) and Chairman of the Board of Directors of CENG must be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure and shall ensure that the business and activities of CENG with respect to the Calvert Cliffs, Unit Nos. 1 and 2, Calvert Cliffs ISFSI, Nine Mile Point, Unit Nos. 1 and 2, and R.E. Ginna licenses are at all times conducted in a manner consistent with the public health and safety and common defense and security of the United States.

(d) CENG will establish a Nuclear Advisory Committee (NAC) composed of U.S. citizens who are not officers, directors, or employees of CENG, CEG or EDF Development. The NAC will report to and provide transparency to the NRC and other U.S. governmental agencies regarding foreign ownership and control of nuclear operations.

(e) CENG shall cause to be transmitted to the Director, Office of Nuclear Reactor Regulation, within 30 days of knowledge of a filing with the U.S. Securities and Exchange Commission, any Schedules 13D or 13G filed pursuant to the Securities and Exchange Act of 1934 that disclose beneficial ownership of any registered classes of CEG stock.

(2) The financial arrangements resulting from the proposed transaction, are subject to the following:

(a) The working capital and cash pooling arrangements described in Article IV of the Operating Agreement included with the application dated January 22, 2009, and supplement dated July 27, 2009, shall be effective as of the date of the transfer and shall be consistent with the representations

contained in the application. CENG and Ginna, LLC shall take no action to cause CEG and/or EDF Development, or their successors and assigns, to void, cancel or materially modify the working capital and cash pooling arrangements in the Operating Agreement without the prior written consent of the NRC staff.

(b) The Support Agreements described in the supplement to the application dated February 26, 2009 (up to $290 million), shall be effective as of the date of the transfer and shall be consistent with the representations contained in the application. CENG and Ginna, LLC shall take no action to cause CEG and/or EDF Development, or their successors and assigns, to void, cancel or materially modify the Support Agreements as submitted without the prior written consent of the NRC staff. CENG shall inform the Director of the Office of Nuclear Reactor Regulation, in writing, no later than ten days after any funds are provided to CENG or any of the licensees by CEG or EDF Development under any Support Agreement.

(c) The Master Demand Notes described in the supplement to the application dated July 27, 2009, shall be effective as of the date of the transfer and shall be consistent with the representations contained in the application. CENG and Ginna, LLC shall take no action to cause CEG and/or EDF Development, or their successors and assigns, to void, cancel or materially modify the Master Demand Notes without the prior written consent of the NRC staff.

It is further ordered that CENG shall inform the Director of the Office of Nuclear Reactor Regulation, in writing, of the date of closing of the transfer of EDF Development's ownership and operating interests in CENG at least 1 business day before the closing. Should the transfer of the license not be completed within 1 year of this Order's date of issuance, this Order shall become null and void, provided, however, that upon written application and for good cause shown, such date may be extended by order.

This Order is effective upon issuance.

For further details with respect to this Order, see the initial application dated January 22, 2009 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML090290101), as supplemented by letters dated February 26 (ML090630426), April 8 (ML091000665), June 25 (ML091811094), and July 27, 2009 (ML092150712), and the SE with the same date as this Order, which are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Room O–1 F21 (First Floor), Rockville, Maryland, and accessible electronically from the 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 or 301–415–4737, or by e-mail at *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 9th day of October 2009.

For the Nuclear Regulatory Commission.

Bruce S. Mallett,

Deputy Executive Director for Reactor and Preparedness Programs.

[FR Doc. E9–25167 Filed 10–19–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0194; Docket Nos. 50–317, 50–318, 72–8; Renewed License No. DPR–53; Renewed License No. DPR–69; License No. SNM–2505]

In the Matter of Constellation Energy Nuclear Group, LLC; EDF Development, Inc.; Calvert Cliffs Nuclear Power Plant, Inc.; Calvert Cliffs Nuclear Power Plant, LLC (Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, and Calvert Cliffs Independent Spent Fuel Storage Installation); Order Approving Application Regarding Proposed Corporate Restructuring and Approving Conforming Amendments

I

Calvert Cliffs Nuclear Power Plant, Inc. (CCNPP, Inc. or the licensee) is the holder of Renewed Facility Operating License Nos. DPR–53 and DPR–69, which authorize the possession, use, and operation of Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2 (CCNPP 1 and 2), and of Material License No. SNM–2505, which authorizes the possession, use, and operation of the Calvert Cliffs Independent Spent Fuel Storage Installation (Calvert Cliffs ISFSI), and authorizes CCNPP, Inc. to receive, possess, transfer, and store power reactor spent fuel at the Calvert Cliffs ISFSI. The facilities are located at the licensee's site in Calvert County, Maryland.

II

By letter dated January 22, 2009, as supplemented on February 26, April 8, June 25, and July 27, 2009 (together, the application), Constellation Energy Nuclear Group, LLC (CENG), on behalf of the licensee and EDF Development, Inc. (EDF Development) (together, the applicants), requested that the Nuclear Regulatory Commission (NRC, the Commission), pursuant to Title 10 of the Code of Federal Regulations (10 CFR) 50.80 and 10 CFR 72.50, consent to the indirect license transfers that would be affected by the indirect transfer of control of CENG's ownership and operating interests in CCNPP 1 and 2. The actions being sought as a result of certain proposed corporate restructuring actions in connection with a planned investment by EDF Development whereby it would acquire a 49.99% ownership interest in CENG from Constellation Energy Group, Inc. (CEG), the current 100% owner of CENG. EDF Development is a U.S. corporation organized under the laws of the State of Delaware and a wholly-owned subsidiary of E.D.F. International S.A., a public limited company organized under the laws of France, which is in turn a wholly-owned subsidiary of Électricité de France S.A., a French limited company. The applicants also requested approval of the proposed direct transfer of licenses held under CCNPP, Inc. to a new legal entity, CCNPP, LLC and approval of conforming license amendments that would replace references to CCNPP, Inc. in the license with references to CCNPP, LLC to reflect the transfer of ownership and operating authority, specifically, to possess, use and operate CCNPP 1 and 2 and to receive, possess, or use related licensed materials under the applicable conditions and authorizations in the CCNPP 1 and 2 license and for the ISFSI license.

Following the proposed transaction, EDF Development will hold a 49.99% ownership interest in CENG; CEG will hold a 50.01% ownership interest in CENG through two new intermediate parent companies, Constellation Nuclear, LLC and CE Nuclear, LLC, formed for non-operational purposes. In addition, Constellation Nuclear Power Plants, Inc., which is currently an intermediate holding company between CENG and Nine Mile Point Nuclear Station, LLC and R.E. Ginna Nuclear Power Plant, LLC, will convert to a Delaware limited liability company and become Constellation Nuclear Power Plants, LLC, and will exist as an intermediate holding company between CENG and CCNPP, LLC, Nine Mile Point Nuclear Station, LLC, and R.E. Ginna Nuclear Power Plant, LLC.

CCNPP, Inc. will convert to CCNPP, LLC.

No physical changes to the facilities or operational changes are being proposed in the application. The proposed conforming license amendment would replace references to CCNPP, Inc. in the license with references to CCNPP, LLC to reflect the proposed direct transfer of the licenses.

Approval of the transfer of the license and the conforming license amendment is requested by the applicants pursuant to 10 CFR 50.80, 10 CFR 50.90, and 10 CFR 72.50. Notice of the request for approval and opportunity for a hearing was published in the **Federal Register** on May 7, 2009 (74 FR 21413). No hearing requests or petitions to intervene were received. The NRC received comments from a member of the public in Seattle, Washington, in an e-mail dated May 22, 2009. The comments did not provide any information additional to that in the application, nor did they provide any information contradictory to that provided in the application.

Pursuant to 10 CFR 50.80 and 10 CFR 72.50, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. Upon review of the information in the application and other information before the Commission, and relying upon the representations and agreements contained in the application, the NRC staff has determined that the proposed indirect license transfer of control of the subject license held by the licensee to the extent such will result from the proposed corporate restructuring actions in connection with the planned investment by EDF Development whereby it will acquire a 49.99% ownership interest in CENG, and that the direct transfer of CCNPP, Inc. to CCNPP, LLC, to the extent affected by the proposed transaction as described in the application, is otherwise consistent with applicable provisions of law, regulations, and Orders issued by the NRC, pursuant thereto, subject to the conditions set forth below. The NRC staff has further found that the application for the proposed license amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations set forth in 10 CFR Chapter I; the facility will operate in conformity with the application, the provisions of the Act, and the rules and regulations of the Commission; there is reasonable assurance that the activities authorized by the proposed license amendment can be conducted without endangering the health and safety of the public and that such activities will be conducted in compliance with the Commission's regulations; the issuance of the proposed license amendments will not be inimical to the common defense and security or to the health and safety of the public; and the issuance of the proposed amendments will be in accordance with 10 CFR part 51 of the Commission's regulations and all applicable requirements have been satisfied.

The findings set forth above are supported by the NRC staff's safety evaluation (SE) dated the same day as this Order.

III

Accordingly, pursuant to Sections 161b, 161i, 161o, and 184 of the Act, 42 U.S.C. Sections 2201(b), 2201(i), 2201(o), and 2234; and 10 CFR 50.80 and 10 CFR 72.50, *it is hereby ordered* that the application regarding the indirect license transfers and direct license transfers related to the proposed corporate restructuring actions in connection with the planned investment by EDF Development, as described herein, is approved, subject to the following conditions:

(1) Before completion of the proposed transaction, CENG shall provide the Director of the Office of Nuclear Reactor Regulation satisfactory documentary evidence that CCNPP, LLC has obtained the appropriate amount of insurance required of licensees under 10 CFR part 140 of the Commission's regulations.

(2) CCNPP, LLC may no longer rely exclusively on an external sinking fund as its decommissioning funding assurance mechanism and will be required to implement an alternate decommissioning funding assurance mechanism, acceptable per NRC requirements outlined in 10 CFR 50.75(e)(1), which will be used to provide decommissioning funding assurance.

(3) The ownership and governance arrangements as a result of the proposed transaction, are subject to the following:

(a) The Operating Agreement included with the application dated January 22, 2009, may not be modified in any material respect concerning decision-making authority over ''safety issues'' as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.

(b) At least half the members of CENG's Board of Directors must be U.S. citizens.

(c) The Chief Executive Officer (CEO), Chief Nuclear Officer (CNO) and Chairman of the Board of Directors of CENG must be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure and shall ensure that the business and activities of CENG with respect to the Calvert Cliffs, Unit Nos. 1 and 2, Calvert Cliffs ISFSI, Nine Mile Point, Unit Nos. 1 and 2, and R.E. Ginna licenses are at all times conducted in a manner consistent with the public health and safety and common defense and security of the United States.

(d) CENG will establish a Nuclear Advisory Committee (NAC) composed of U.S. citizens who are not officers, directors, or employees of CENG, CEG or EDF Development. The NAC will report to and provide transparency to the NRC and other U.S. governmental agencies regarding foreign ownership and control of nuclear operations.

(e) CENG shall cause to be transmitted to the Director, Office of Nuclear Reactor Regulation, within 30 days of knowledge of a filing with the U.S. Securities and Exchange Commission, any Schedules 13D or 13G filed pursuant to the Securities and Exchange Act of 1934 that disclose beneficial ownership of any registered classes of CEG stock.

(4) The financial arrangements resulting from the proposed transaction, are subject to the following:

(a) The working capital and cash pooling arrangements described in Article IV of the Operating Agreement included with the application dated January 22, 2009, and supplement dated July 27, 2009, shall be effective as of the date of the transfer and shall be consistent with the representations contained in the application. CENG and CCNPP, LLC shall take no action to cause CEG and/or EDF Development, or their successors and assigns, to void, cancel or materially modify the working capital and cash pooling arrangements in the Operating Agreement without the prior written consent of the NRC staff.

(b) The Support Agreements described in the supplement to the application dated February 26, 2009 (up to $290 million) shall be effective as of the date of the transfer and shall be consistent with the representations contained in the application. CENG and CCNPP, LLC shall take no action to cause CEG and/or EDF Development, or their successors and assigns, to void, cancel or materially modify the Support Agreements as submitted without the prior written consent of the NRC staff. CENG shall inform the Director of the Office of Nuclear Reactor Regulation, in writing, no later than ten days after any funds are provided to CENG or any of the licensees by CEG or EDF

Development under any Support Agreement.

(c) The Master Demand Notes described in the supplement to the application dated July 27, 2009, shall be effective as of the date of the transfer and shall be consistent with the representations contained in the application. CENG and CCNPP, LLC, shall take no action to cause CEG and/or EDF Development, or their successors and assigns, to void, cancel or materially modify the Master Demand Notes without the prior written consent of the NRC staff.

It is further ordered that, consistent with 10 CFR 2.1315(b), the license amendment that makes changes, as indicated in Enclosure 2 to the cover letter forwarding this Order, to conform the license to reflect the subject direct license transfer is approved. The amendment shall be issued and made effective at the time the proposed direct license transfer is completed.

It is further ordered that CENG shall inform the Director of the Office of Nuclear Reactor Regulation, in writing, of the date of closing of the transfer of EDF Development's ownership and operating interests in CENG at least 1 business day before the closing. Should the transfer of the license not be completed within 1 year of this Order's date of issuance, this Order shall become null and void, provided, however, that upon written application and for good cause shown, such date may be extended by Order.

This Order is effective upon issuance.

For further details with respect to this Order, see the initial application dated January 22, 2009 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML090290101), as supplemented by letters dated February 26 (ML090630426), April 8 (ML091000665), June 25 (ML091811094), and July 27, 2009 (ML092150712), and the SE with the same date as this Order, which are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Room O–1 F21 (First Floor), Rockville, Maryland, and accessible electronically from the 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 or 301–415–4737, or by e-mail at *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 9th day of October 2009.

For the Nuclear Regulatory Commission.

Bruce S. Mallett,

Deputy Executive Director for Reactor and Preparedness Programs.

Michael F. Weber,

Director, Office of Nuclear Material Safety.

[FR Doc. E9–25166 Filed 10–19–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0193; Docket Nos. 50–220 and 50–410]

EDF Development, Inc., Renewed License No. DPR–63; Constellation Energy Nuclear Group, LLC, Renewed License No. NPF–69; Nine Mile Point Nuclear Station, LLC (Nine Mile Point Nuclear Station Unit Nos. 1 and 2); Order Approving Application Regarding Proposed Corporate Restructuring

I

Nine Mile Point Nuclear Station, LLC (NMPNS, LLC or the licensee) is the holder of Renewed Facility Operating License Nos. DPR–63 and NPF–69, which authorize the possession, use, and operation of the Nine Mile Point Nuclear Station, Unit Nos. 1 and 2 (NMP 1 and 2). The facility is located at the licensee's site in Oswego, New York.

II

By letter dated January 22, 2009, as supplemented on February 26, April 8, June 25, and July 27, 2009 (together, the application), Constellation Energy Nuclear Group, LLC (CENG), on behalf of the licensee and EDF Development, Inc. (EDF Development) (together, the applicants), requested that the Nuclear Regulatory Commission (NRC, the Commission), pursuant to Title 10 of the Code of Federal Regulations (10 CFR) 50.80, consent to the indirect license transfers that would be effected by the indirect transfer of control of CENG's ownership and operating interests in NMP 1 and 2. The actions being sought as a result of certain proposed corporate restructuring actions in connection with a planned investment by EDF Development whereby it would acquire a 49.99% ownership interest in CENG from Constellation Energy Group, Inc. (CEG), the current 100% owner of CENG. EDF Development is a U.S. corporation organized under the laws of the State of Delaware and a wholly-owned subsidiary of E.D.F. International S.A., a public limited company organized under the laws of France, which is in turn a wholly-owned subsidiary of Électricité de France S.A., a French limited company.

Following the proposed transaction, EDF Development will hold a 49.99% ownership interest in CENG; CEG will hold a 50.01% ownership interest in CENG through two new intermediate parent companies, Constellation Nuclear, LLC and CE Nuclear, LLC, formed for non-operational purposes. In addition, Constellation Nuclear Power Plants, Inc., which is currently an intermediate holding company between CENG and NMPNS, LLC and R.E. Ginna Nuclear Power Plant, LLC, will convert to a Delaware limited liability company and become Constellation Nuclear Power Plants, LLC, and will exist as an intermediate holding company between CENG and NMPNS, LLC, R.E. Ginna Nuclear Power Plant, LLC, and Calvert Cliffs Nuclear Power Plant, LLC. No physical changes to the facilities or operational changes are being proposed in the application.

Approval of the transfer of the license is requested by the applicants pursuant to 10 CFR 50.80. Notice of the request for approval and opportunity for a hearing was published in the **Federal Register** on May 6, 2009 (74 FR 21015). No hearing requests or petitions to intervene were received. The NRC received comments from a member of the public in Seattle, Washington, in an e-mail dated May 22, 2009. The comments did not provide any information additional to that in the application, nor did they provide any information contradictory to that provided in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. Upon review of the information in the application and other information before the Commission, and relying upon the representations and agreements contained in the application, the NRC staff has determined that the proposed indirect license transfer of control of the subject license held by the licensee to the extent such will result from the proposed corporate restructuring actions in connection with the planned investment by EDF Development whereby it will acquire a 49.99% ownership interest in CENG, to the extent affected by the proposed transaction as described in the application, is otherwise consistent with applicable provisions of law, regulations, and Orders issued by the NRC, pursuant thereto, subject to the conditions set forth below. The NRC

staff has further found that the application for the proposed license amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations set forth in 10 CFR Chapter I; the facility will operate in conformity with the application, the provisions of the Act, and the rules and regulations of the Commission; there is reasonable assurance that the activities authorized by the proposed license amendment can be conducted without endangering the health and safety of the public and that such activities will be conducted in compliance with the Commission's regulations; the issuance of the proposed license amendment will not be inimical to the common defense and security or to the health and safety of the public; and the issuance of the proposed amendments will be in accordance with 10 CFR Part 51 of the Commission's regulations and all applicable requirements have been satisfied.

The findings set forth above are supported by the NRC staff's safety evaluation (SE) dated the same day as this Order.

III

Accordingly, pursuant to Sections 161b, 161i, 161o, and 184 of the Act, 42 U.S.C. Sections 2201(b), 2201(i), 2201(o), and 2234; and 10 CFR 50.80, *it is hereby ordered* that the application regarding the indirect license transfers related to the proposed corporate restructuring actions in connection with the planned investment by EDF Development, as described herein, is approved, subject to the following conditions:

(1) The ownership and governance arrangements as a result of the proposed transaction, is subject to the following:

(a) The Operating Agreement included with the application dated January 22, 2009, may not be modified in any material respect concerning decision-making authority over ''safety issues'' as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.

(b) At least half the members of CENG's Board of Directors must be U.S. citizens.

(c) The Chief Executive Officer (CEO), Chief Nuclear Officer (CNO) and Chairman of the Board of Directors of CENG must be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure and shall ensure that the business and activities of CENG with respect to the Calvert Cliffs, Unit Nos. 1 and 2, Calvert Cliffs ISFSI, Nine Mile Point, Unit Nos. 1 and 2, and R.E. Ginna licenses are at all times conducted in a manner consistent with the public health and safety and common defense and security of the United States.

(d) CENG will establish a Nuclear Advisory Committee (NAC) composed of U.S. citizens who are not officers, directors, or employees of CENG, CEG or EDF Development. The NAC will report to and provide transparency to the NRC and other U.S. governmental agencies regarding foreign ownership and control of nuclear operations.

(e) CENG shall cause to be transmitted to the Director, Office of Nuclear Reactor Regulation, within 30 days of knowledge of a filing with the U.S. Securities and Exchange Commission, any Schedules 13D or 13G filed pursuant to the Securities and Exchange Act of 1934 that disclose beneficial ownership of any registered classes of CEG stock.

(2) The financial arrangements resulting from the proposed transaction, are subject to the following:

(a) The working capital and cash pooling arrangements described in Article IV of the Operating Agreement included with the application dated January 22, 2009, and supplement dated July 27, 2009, shall be effective as of the date of the transfer and shall be consistent with the representations contained in the application. CENG and NMPNS, LLC shall take no action to cause CEG and/or EDF Development, or their successors and assigns, to void, cancel or materially modify the working capital and cash pooling arrangements in the Operating Agreement without the prior written consent of the NRC staff.

(b) The Support Agreements described in the supplement to the application dated February 26, 2009 (up to $290 million), shall be effective as of the date of the transfer and shall be consistent with the representations contained in the application. CENG and NMPNS, LLC shall take no action to cause CEG and/or EDF Development, or their successors and assigns, to void, cancel or materially modify the Support Agreements as submitted without the prior written consent of the NRC staff, except, however, the intercompany credit agreement referenced in the current licenses for NMP 1 and 2 [condition 2.D(12) for Unit 1 and 2.C(15) for Unit 2] may be revoked or rescinded if and when the $290 million support agreements described in the February 26, 2009, supplement to the application become effective. CENG shall inform the Director of the Office of Nuclear Reactor Regulation, in writing, no later than ten days after any funds are provided to CENG or any of the licensees by CEG or EDF Development under any Support Agreement.

(c) The Master Demand Notes described in the supplement to the application dated July 27, 2009, shall be effective as of the date of the transfer and shall be consistent with the representations contained in the application. CENG and NMPNS, LLC shall take no action to cause CEG and/or EDF Development, or their successors and assigns, to void, cancel or materially modify the Master Demand Notes without the prior written consent of the NRC staff.

It is further ordered that CENG shall inform the Director of the Office of Nuclear Reactor Regulation, in writing, of the date of closing of the transfer of EDF Development's ownership and operating interests in CENG at least 1 business day before the closing. Should the transfer of the license not be completed within 1 year of this Order's date of issuance, this Order shall become null and void, provided, however, that upon written application and for good cause shown, such date may be extended by order.

This Order is effective upon issuance.

For further details with respect to this Order, see the initial application dated January 22, 2009 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML090290101), as supplemented by letters dated February 26 (ML090630426), April 8 (ML091000665), June 25 (ML091811094), and July 27, 2009 (ML092150712), and the SE with the same date as this Order, which are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Room O–1 F21 (First Floor), Rockville, Maryland, and accessible electronically from the 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 or 301–415–4737, or by e-mail at *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 9th day of October 2009.

For The Nuclear Regulatory Commission.

Bruce S. Mallett,

Deputy Executive Director for Reactor and Preparedness Programs.

[FR Doc. E9–25165 Filed 10–19–09; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[NRC–2009–0456]

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) 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 September 24, 2009, to October 7, 2009. The last biweekly notice was published on October 6, 2009 (74 FR 51327).

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 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. 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.

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, Rulemaking and Directives Branch (RDB), TWB–05–B01M, 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 faxed to the RDB at 301–492–3446. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. 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 person(s) 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 O1F21, 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/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, 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.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.*

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory e-filing system may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC Meta-System Help Desk, which is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays. The Meta-System Help Desk can be contacted by telephone at 1–866–672–7640 or by e-mail at *MSHD.Resource@nrc.gov*.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted 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; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the request and/or petition should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submissions.

For further details with respect to this license amendment application, 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 O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the 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 at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

Entergy Gulf States Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station (RBS), Unit 1, West Feliciana Parish, Louisiana

Date of amendment request: August 10, 2009.

Description of amendment request: The proposed amendment would revise the RBS Technical Specifications (TSs) to support operation with 24-month fuel cycles. Specifically, the change addresses certain TS Surveillance Requirement (SR) frequencies that are specified as ''18 months'' by revising them to ''24 months'' in accordance with the guidance of U.S. Nuclear Regulatory Commission (NRC) Generic Letter 91–04, ''Changes in Technical Specification Surveillance Intervals to Accommodate a 24-Month Fuel Cycle,'' dated April 2, 1991.

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?

Response: No.

The proposed TS changes involve a change in the surveillance testing intervals and allowable values to facilitate a change in the operating cycle length. The proposed TS changes do not physically impact the plant. The proposed TS changes do not degrade the performance of, or increase the challenges to, any safety systems assumed to function in the accident analysis. The proposed TS changes do not impact the usefulness of the SRs in evaluating the operability of required systems and components, or the way in which the surveillances are performed. In addition, the frequency of surveillance testing is not considered an initiator of any analyzed accident, nor does a revision to the frequency introduce any accident initiators. The specific value of the allowable value is not considered an initiator of any analyzed accident. Therefore, the proposed change does not involve a significant increase in the probability of an accident previously evaluated.

The consequences of a previously evaluated accident are not significantly increased. The proposed change does not affect the performance of any equipment credited to mitigate the radiological consequences of an accident. Evaluation of the proposed TS changes demonstrated that the availability of credited equipment is 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 equipment. Historical review of surveillance test results and associated maintenance records did not find evidence of failures that would invalidate the above conclusions.

The allowable values have been developed in accordance with [NRC Regulatory Guide] 1.105, ''Instrument Setpoints,'' to ensure that the design and safety analysis limits are satisfied. The methodology used for the development of the allowable values ensures the affected instrumentation remains capable of mitigating design basis events as described in the safety analyses and that the results and radiological consequences described in the safety analyses remain bounding. Therefore, the proposed change does not alter the ability to detect and mitigate events and, as such, does not involve a significant increase in the consequences of an accident previously evaluated.

Standby Liquid Control System

The proposed change in required weight of Boron-10 in [standby liquid control (SLC)] does not physically impact the plant, nor does it degrade the performance of, or increase the challenges to, any safety systems assumed to function in the accident analysis. The consequences of a previously evaluated accident are not increased. The proposed change does not affect the performance of any equipment credited to mitigate the radiological consequences of an accident. Evaluation of the proposed TS changes demonstrated that the availability of credited equipment is not affected. Therefore, the proposed change does not alter the ability to detect and mitigate events and, as such, does not involve a significant increase in the consequences of an accident previously evaluated.

Loss of Power Instrumentation

A change to the Allowable Values (AVs) is proposed for Table 3.3.8.1–1, Item 1.c and Item 2.c. The proposed change is the result of application of the RBS Instrument Setpoint Methodology using plant-specific drift values and incorporating margins available based on a revised off-site reliability study. Application of this methodology results in AVs that more accurately reflect total device accuracy, as well as that of test equipment and calculated drift between surveillances. The proposed change will not result in any hardware changes. The instrumentation is not assumed to be an initiator of any analyzed event. Existing operating margin between plant conditions and actual plant setpoints is not significantly reduced due to the proposed changes. The role of the instrumentation is in mitigating and thereby, limiting the consequences of accidents.

The AVs were developed to ensure the design and safety analysis limits are satisfied. The methodology used for the development of the AVs ensures that: (1) The affected instrumentation remains capable of mitigating design basis events as described in the safety analysis, and (2) the results and radiological consequences described in the safety analysis remain bounding. Additionally, the proposed change does not alter the plant's ability to detect and mitigate events. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The change in the degraded voltage protection voltage AVs allows the protection scheme to function as originally designed. The proposed allowable values ensure that the Class 1E distribution system remains connected to the offsite power system when adequate offsite voltage is available and motor starting transients are considered.

Therefore, the proposed change does not involve a significant 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?

Response: No.

The proposed TS changes involve a change in the surveillance testing intervals and allowable values to facilitate a change in the operating cycle length. The proposed TS changes do not introduce any failure mechanisms of a different type than those previously evaluated, since there are no physical changes being made to the facility. No new or different equipment is being installed. No installed equipment is being operated in a different manner. As a result, no new failure modes are being introduced. The way surveillance tests are performed remains unchanged. A historical review of surveillance test results and associated maintenance records indicated there was no evidence of any failures that would invalidate the above conclusions.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

Standby Liquid Control System

The proposed change to the required weight of Boron-10 in SLC does not introduce any failure mechanisms of a different type than those previously evaluated, since there are no physical changes being made to the facility. No new or different equipment is being installed. No installed equipment is being operated in a different manner. As a result, no new failure modes are being introduced. The way surveillance tests are performed remains unchanged. A historical review of surveillance test results and associated maintenance records indicated there was no evidence of any failures that would invalidate the above conclusions.

Loss of Power Instrumentation

The proposed change in AVs is the result of application of the Instrument Setpoint Methodology using plant-specific drift values and does not create the possibility of a new or different kind of accident from any accident previously evaluated. This is based upon the fact that the method and manner of plant operation are unchanged.

The use of the proposed AVs does not impact safe operation of the plant in that the safety analysis limits are maintained. The proposed change in AVs involves no system additions. The AVs are revised to ensure the affected instrumentation remains capable of mitigating accidents and transients. Plant equipment will not be operated in a manner different from previous operation, except that setpoints may be changed. No additional failure mechanisms are introduced as a result of the changes to the allowable values. Since operational methods remain unchanged and

the operating parameters were evaluated to maintain the plant within existing design basis criteria, no different type of failure or accident is created.

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 amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed TS changes involve a change in the surveillance testing intervals and allowable values to facilitate a change in the operating cycle length. The impact of these changes on system availability is not significant, based on other more frequent testing that is performed, the existence of redundant systems and equipment, and overall system reliability. Evaluations have shown there is no evidence of time dependent failures that would impact the availability of the systems. The proposed changes do not significantly impact the condition or performance of structures, systems, and components relied upon for accident mitigation. The proposed changes in TS instrumentation allowable values are the result of application of the RBS setpoint methodology using plant specific drift values. The revised allowable values more accurately reflect total instrumentation loop accuracy including drift while continuing to protect any assumed analytical limit. The proposed changes do not result in any hardware changes or in any changes to the analytical limits assumed in accident analyses. Existing operating margin between plant conditions and actual plant setpoints is not significantly reduced due to these changes. The proposed changes do not significantly impact any safety analysis assumptions or results.

Standby Liquid Control System

The proposed change in required weight of Boron-10 in SLC is to facilitate a change in the operating cycle length. The proposed change does not result in any hardware changes or in any changes to the analytical limits assumed in accident analyses. Existing operating margin between plant conditions and actual plant setpoints is not reduced due to this change. The proposed change does not impact any safety analysis assumptions or results. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

Loss of Power Instrumentation

The proposed protection voltage AVs are low enough to prevent inadvertent power supply transfer, but high enough to ensure that sufficient voltage is available to the required equipment. The proposed change does not involve a reduction in a margin of safety. The proposed change was developed using a methodology to ensure safety analysis limits are not exceeded. As such, this proposed change does not involve a significant reduction in a margin of safety.

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: Terence A. Burke, Associate General Counsel—Nuclear Entergy Services, Inc., 1340 Echelon Parkway, Jackson, Mississippi 39213.

NRC Branch Chief: Michael T. Markley.

Entergy Nuclear Operations, Inc., Docket No. 50–255, Palisades Nuclear Plant, Van Buren County, Michigan

Date of amendment request: August 25, 2009.

Description of amendment request: The proposed amendment would allow for a one-time extension to the ten-year frequency for the next Palisades Nuclear Plant (PNP) containment Type A integrated leak rate test (ILRT) that is required by Technical Specification (TS) 5.5.14. The proposed change would permit the existing ILRT frequency to be extended from ten years to approximately 11.25 years.

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 exemption involves a one-time extension to the current interval for Type A containment testing. The current test interval of 120 months (10 years) would be extended on a one-time basis to no longer than approximately 135 months from the last Type A test. The proposed extension does not involve either a physical change to the plant or a change in the manner in which the plant is operated or controlled. The containment is designed to provide an essentially leak tight barrier against the uncontrolled release of radioactivity to the environment for postulated accidents. As such, the containment and the testing requirements invoked to periodically demonstrate the integrity of the containment exist to ensure the plant's ability to mitigate the consequences of an accident, and do not involve the prevention or identification of any precursors of an accident. Therefore, this proposed extension does not involve a significant increase in the probability of an accident previously evaluated.

This proposed extension is for the Type A containment leak rate tests only. The Type B and C containment leak rate tests would continue to be performed at the frequency currently required by the PNP TS. As documented in NUREG 1493, Type B and C tests have identified a very large percentage of containment leakage paths and that the percentage of containment leakage paths that are detected only by Type A testing is very small. The PNP Type A test history supports this conclusion.

The integrity of the containment is subject to two types of failure mechanisms that can be categorized as (1) activity based and (2) time based. Activity based failure mechanisms are defined as degradation due to system and/or component modifications or maintenance. Local leak rate test requirements and administrative controls such as configuration management and procedural requirements for system restoration ensure that containment integrity is not degraded by plant modifications or maintenance activities. The design and construction requirements of the containment combined with the containment inspections performed in accordance with ASME Section XI, the Maintenance Rule, and TS requirements serve to provide a high degree of assurance that the containment would not degrade in a manner that is detectable only by a Type A test. Based on the above, the proposed extension does not involve a significant increase in the 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 revision to the TS involves a one-time extension to the current interval for Type A containment testing. The containment and the testing requirements invoked to periodically demonstrate the integrity of the containment exist to ensure the plant's ability to mitigate the consequences of an accident and do not involve the prevention or identification of any precursors of an accident. The proposed TS change does not involve a physical change to the plant or the manner in which the plant is operated or controlled. Therefore, the proposed TS 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.

The proposed change to the TS involves a one-time extension to the current interval for Type A containment testing. The proposed TS change does not involve a physical change to the plant or a change in the manner in which the plant is operated or controlled. The specific requirements and conditions of the TS Containment Leak Rate Testing Program exist to ensure that the degree of containment structural integrity and leak-tightness that is considered in the plant safety analysis is maintained. The overall containment leak rate limit specified by TS is maintained. The proposed change involves only the extension of the interval between Type A containment leak rate tests. The proposed surveillance interval extension is bounded by the 15-month extension currently authorized within NEI 94–01, Revision 0. Type B and C containment leak

rate tests would continue to be performed at the frequency currently required by TS. Industry experience supports the conclusion that Type B and C testing detects a large percentage of containment leakage paths and that the percentage of containment leakage paths that are detected only by Type A testing is small. The containment inspections performed in accordance with ASME Section XI and the Maintenance Rule serve to provide a high degree of assurance that the containment would not degrade in a manner that is detectable only by Type A testing. The combination of these factors ensures that the margin of safety in the plant safety analysis is maintained. The design, operation, testing methods and acceptance criteria for Type A, B, and C containment leakage tests specified in applicable codes and standards would continue to be met, with the acceptance of this proposed change, since these are not affected by changes to the Type A test interval. Therefore, the proposed TS 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. William Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Ave., White Plains, NY 10601.

NRC Acting Branch Chief: Peter Tam.

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont

Date of amendment request: August 26, 2009.

Description of amendment request: The proposed amendment would revise the Technical Specification (TS) Section 6.5 that governs administrative controls of High Radiation Areas (HRA) to incorporate the HRA administrative controls contained within the Standard Technical Specifications, 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 which is presented below:

1. The operation of Vermont Yankee Nuclear Power Station (VY) in accordance with the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed amendment does not impact the operability of any structure, system or component that affects the probability of an accident or that supports mitigation of an accident previously evaluated. The proposed amendment does not affect reactor operations or accident analysis and has no radiological consequences. The operability requirements for accident mitigation systems remain consistent with the licensing and design basis. Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The operation of VY in accordance with the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed amendment does not change the design or function of any component or system. No new modes of failure or initiating events are being introduced. Therefore, operation of VY in accordance with the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The operation of VY in accordance with the proposed amendment will not involve a significant reduction in a margin of safety.

The proposed amendment does not change the design or function of any component or system. The proposed amendment does not involve any safety limits, safety settings or safety margins. The TS administrative access controls for high radiation areas are being replaced with those contained in section 5.7 of NUREG–1433 to provide additional requirements and options for the control of these areas.

Therefore, operation of VY in accordance with the proposed amendment will not involve a significant reduction in the margin to 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. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 400 Hamilton Avenue, White Plains, NY 10601.

NRC Branch Chief: Nancy Salgado.

Nine Mile Point Nuclear Station, LLC (NMPNS) Docket No. 50–410, Nine Mile Point Nuclear Station Unit No. 2 (NMP 2), Oswego County, New York

Date of amendment request: May 27, 2009, as supplemented on August 28, 2009.

Description of amendment request: The proposed amendment requests an increase in the maximum steady-state power level at NMP2 from 3467 megawatts thermal (MWt) to 3988 MWt. This represents a 15-percent increase over the current licensed thermal power.

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?

No, the increase in power level discussed herein will not significantly increase the probability or consequences of an accident previously evaluated.

The proposed change will increase NMP2's authorized maximum power level from the current licensed thermal power (CLTP) level of 3467 megawatts thermal (MWt) to 3988 MWt. In support of this Constant Pressure Extended Power Uprate (CPPU), a comprehensive evaluation was performed for nuclear steam supply system (NSSS) and balance of plant (BOP) systems, structures, components, and analyses that could be affected by this change. The effect of increasing the maximum power level from the CLTP of 3467 MWt to 3988 MWt on the NMP2 licensing and design bases was evaluated. The result of this evaluation is that all plant components, as modified, will continue to be capable of performing their design function at an uprated core power of 3988 MWt. In addition, an evaluation of the accident analyses concludes that applicable analysis acceptance criteria continue to be met. Power level is an input assumption to the equipment design and accident analyses, but it is not an initiator for any transient or accident. Therefore, no accident initiators are affected by this uprate and no challenges to any plant safety barriers are created by this change.

Therefore, operation of the facility in accordance with the proposed change does not involve a significant increase in the probability of an accident previously evaluated.

This change does not affect the release paths, the frequency of release, or the source term for release for any accidents previously evaluated in the Updated Safety Analysis Report (USAR). Structures, systems, and components (SSC) required to mitigate transients remain capable of performing their design functions, and thus were found acceptable. The source terms used to assess radiological consequences have been reviewed and determined to bound operation at the uprated condition. The results of EPU [extended power uprate] accident evaluations do not exceed the U. S. Nuclear Regulatory Commission (NRC) approved acceptance limits.

The spectrum of postulated accidents and transients has been investigated and are shown to meet the regulatory criteria to which NMP2 is currently licensed. In the area of fuel and core design, the Safety Limit Minimum Critical Power ratio (SLMCPR) and other applicable Specified Acceptable Fuel Design Limits (SAFDLS) are still met. Continued compliance with the SLMCPR and other SAFDLs is confirmed on a cycle specific basis consistent with criteria accepted by the NRC.

Challenges to the reactor coolant pressure boundary were evaluated at EPU conditions

(pressure, temperature, flow, and radiation) and found to meet the acceptance criteria for allowable stresses. Adequate overpressure margin is maintained.

Challenges to the containment have been evaluated and the containment and its associated cooling system continue to meet applicable regulatory requirements. The increase in the calculated post Loss of Coolant Accident (LOCA) suppression pool temperature above the current peak temperature was evaluated and determined to be acceptable.

Radiological release events (accidents) have been evaluated and shown to meet the requirements of 10 CFR 50.67.

Therefore, the proposed change does not involve a significant 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?

No, the increase in power level discussed herein will not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change will increase NMP2's authorized maximum power level from the CLTP level of 3467 MWt to 3988 MWt. Equipment that could be affected by EPU has been evaluated. No new operating mode, safety-related equipment lineup, accident scenario, or equipment failure mode was identified. The full spectrum of accident considerations has been evaluated and no new or different kind of accident has been identified. This Constant Pressure Extended Power Uprate utilizes a standard evaluation methodology applied to known technology employed within the range of current or modified plant capabilities. As such, the plant safety-related equipment continues to operate in accordance with regulatory criteria. Evaluations were performed using NRC approved codes, standards and methods. No new accidents or event precursors have been identified.

All structures, systems and components previously required for the mitigation of a transient remain capable of fulfilling their intended design functions. The proposed changes do not adversely affect safety-related systems or components and do not challenge the performance or integrity of any safety-related system. This change does not adversely affect any current system interfaces or create any new interfaces that could result in an accident or malfunction of a different kind than was previously evaluated. Operating at a core power level of 3988 MWt does not create any new accident initiators or precursors.

Therefore, the proposed changes do 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?

No, the increase in power level discussed herein will not involve a significant reduction in a margin of safety.

Comprehensive analyses of the proposed changes have concluded that relevant design and safety acceptance criteria will be met without a significant reduction in margins of safety. The analyses supporting EPU have demonstrated that the NMP2 SSCs are capable of safely performing at EPU conditions. The analyses identified and defined the major input parameters to the NSSS, analyzed NSSS design transients, and evaluated the capabilities of the NSSS fluid systems, NSSS/BOP interfaces, NSSS control systems, and NSSS and BOP components, as appropriate. Radiological consequences of design basis events remain within regulatory limits and are not increased significantly. The analyses confirmed that NSSS and BOP SSCs are capable, some with modifications, of achieving EPU conditions without significant reduction in margins of safety.

Analyses have shown that the integrity of primary fission product barriers will not be significantly affected as a result of the power increase. Calculated loads on SSCs important to safety have been shown to remain within design allowables under EPU conditions for all design basis event categories. Plant response to transients and accidents do not result in exceeding acceptance criteria. As appropriate, the evaluations that demonstrate acceptability of EPU have been performed using methods that have either been reviewed and approved by the NRC staff, or that are in compliance with regulatory review guidance and standards established for maintaining adequate margins of safety. These evaluations demonstrate that there are no significant reductions in the margins of safety.

Maximum power level is one of the inherent inputs that determine the safe operating range defined by the accident analyses. The Technical Specifications ensure that NMP2 is operated within the bounds of the inputs and assumptions used in the accident analyses. The acceptance criteria for the accident analyses are conservative with respect to the operating conditions defined by the Technical Specifications. The engineering reviews performed for the constant pressure extended power uprate confirm that the accident analyses criteria are met at the revised maximum allowable thermal power level of 3988 MWt, as well as at the rated thermal power (RTP) levels specified in the Facility Operating License and Technical Specifications. Therefore, the adequacy of the revised Facility Operating Licenses and Technical Specifications to maintain the plant in a safe operating range is also confirmed, and the increase in maximum allowable power level does not involve a significant decrease in a margin of safety.

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: Mark J. Wetterhahn, Esquire, Winston & Strawn, 1700 K Street, NW., Washington, DC 20006.

NRC Branch Chief: Nancy L. Salgado.

Nine Mile Point Nuclear Station, LLC (NMPNS) Docket No. 50–410, Nine Mile Point Nuclear Station Unit No. 2 (NMP2), Oswego County, New York

Date of amendment request: June 29, 2009, as supplemented on August 13, 2009.

Description of amendment request: The proposed amendment would revise the NMP2 Technical Specification (TS) 5.5.12 by replacing the reference to Regulatory Guide (RG) 1.163 with a reference to Nuclear Energy Institute (NEI) Topical Report NEI 94–01, Revision 2–A, as the implementation document used by NMPNS to develop the NMP2 performance-based leakage testing program in accordance with Option B of Title 10 of the Code of Federal Regulations (10 CFR) Part 50. The proposed amendment would allow the next primary containment integrated leak rate test (ILRT) to be performed within 15 years from the last ILRT as opposed to the current 10-year interval, and would allow successive ILRTs to be performed at 15-year intervals.

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?

Response: No.

The proposed amendment involves changes to the NMP2 10 CFR 50 Appendix J Testing Program Plan. The proposed amendment does not involve a physical change to the plant or a change in the manner in which the plant is operated or controlled. The primary containment function is to provide an essentially leak tight barrier against the uncontrolled release of radioactivity to the environment for postulated accidents. As such, the containment itself and the testing requirements to periodically demonstrate the integrity of the containment exist to ensure the plant's ability to mitigate the consequences of an accident, and do not involve any accident precursors or initiators. Therefore, the probability of occurrence of an accident previously evaluated is not significantly increased by the proposed amendment.

The proposed amendment adopts the NRC-accepted guidelines of NEI 94–01, Revision 2, for development of the NMP2 performance-based leakage testing program. Implementation of these guidelines continues to provide adequate assurance that during design basis accidents, the primary containment and its components will limit

leakage rates to less [then] the values assumed in the plant safety analyses. The potential consequences of extending the ILRT interval from 10 years to 15 years have been evaluated by analyzing the resulting changes in risk. The increase in risk in terms of person-rem per year within 50 miles resulting from design basis accidents was estimated to be acceptably small, and the increase in the large early release frequency resulting from the proposed change was determined to be within the guidelines published in NRC RG 1.174. Additionally, the proposed change maintains defense-in-depth by preserving a reasonable balance among prevention of core damage, prevention of containment failure, and consequence mitigation. NMPNS has determined that the increase in conditional containment failure probability due to the proposed change would be very small. Therefore, it is concluded that the proposed amendment does not significantly increase the 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?

Response: No.

The proposed amendment adopts the NRC-accepted guidelines of NEI–94–01, Revision 2, for development of the NMP2 performance-based leakage testing program, and establishes a 15 year interval for the performance of the primary containment ILRT. The containment and the testing requirements to periodically demonstrate the integrity of the containment exist to ensure the plant's ability to mitigate the consequences of an accident, and do not involve any accident precursors and initiators. The proposed change does not involve a physical change to the plant (i.e., no new or different type of equipment will be installed) or a change to the manner in which the plant is operated or controlled.

Therefore, the proposed amendment 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?

Response: No.

The proposed amendment adopts the NRC-accepted guidelines of NEI–94–01, Revision 2, for development of the NMP2 performance-based leakage testing program, and establishes a 15 year interval for the performance of the primary containment ILRT. The amendment does not alter the manner in which safety limits, limiting safety system setpoints, or limiting conditions for operation are determined. The specific requirements and conditions of the 10 CFR 50 Appendix J Testing Program Plan, as defined in the TS, ensure that the degree of primary containment structural integrity and leak-tightness that is considered in the plant safety analyses is maintained. The overall containment leakage rate limit specified by the TS is maintained, and the Type A, B, and C containment leakage tests will continue to be performed at the frequencies established in accordance with the NRC-accepted guidelines of NEI 94–01, Revision 2.

Containment inspections performed in accordance with other plant programs serve to provide a high degree of assurance that the containment will not degrade in a manner that is detectable only by an ILRT. In addition, the on-line containment monitoring capability that is inherent to inerted boiling water reactor containments allows for the detection of gross containment leakage that may develop during power operation. This combination of factors ensures that evidence of containment structural degradation is identified in a timely manner. Furthermore, a risk assessment using the current NMP2 Probabilistic Risk Assessment model concluded that extending the ILRT test interval from 10 years to 15 years results in a very small change to the NMP2 risk profile.

Therefore, the proposed amendment 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: Mark J. Wetterhahn, Esquire, Winston & Strawn, 1700 K Street, NW., Washington, DC 20006.

NRC Branch Chief: Nancy L. Salgado.

Southern Nuclear Operating Company, Inc., Docket Nos. 50–348 and 50–364, Joseph M. Farley Nuclear Plant, Units 1 and 2, Houston County, Alabama

Date of amendment request: September 15, 2009.

Description of amendment request: The proposed amendment revises Technical Specification (TS) 3.3.2, in Appendix A to Facility Operating License Nos. NPF–2 and NPF–8 for the Joseph M. Farley Nuclear Plant Units 1 and 2, respectively. P–11 is an engineered safety feature actuation system (ESFAS) permissive/interlock which permits normal unit cooldown and depressurization without actuation of safety injection (SI) from low pressurizer pressure. P–12 is an ESFAS permissive/interlock which permits normal unit cooldown and depressurization without actuation of SI and main steam line isolation on the condition of low steam line pressure. Both P–11 and P–12 circuits use input from three protection channels. The current wording of Condition K in TS 3.3.2 states, ''Two channels inoperable.'' As a result, Condition K does not explicitly address the possible conditions of one channel or three channels inoperable, possibly creating a literal compliance issue. The proposed Condition K change from ''Two channels inoperable'' to ''One or more channels inoperable'' will resolve the current literal compliance issue. The change does not alter the current Condition K required action, it simply clarifies that the required action must be performed for one, two, or three P–11 or P–12 channels inoperable. In addition, an editorial change is proposed for TS 5.6.8 to correct the citation of a condition requiring a report for the post-accident monitoring instrumentation. The current TS 5.6.8 text states, ''When a report is required by Condition B or G of LCO [limiting conditions for operation] 3.3.3. * * *'' The citation of Condition B is correct while Condition G does not currently exist for LCO 3.3.3; instead TS 5.6.8 should cite Condition F.

Basis for proposed no significant hazards consideration determination: As required by Title 10 of the Code of Federal Regulations (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?

Response: No.

The proposed change to TS 3.3.2 does not significantly increase the probability or consequences of an accident previously evaluated in the FSAR. These interlocks do not directly initiate an accident. The consequences of accidents previously evaluated in the FSAR are not adversely affected by these changes because the changes are made to reflect the Improved Standard Technical Specifications and the interlocks are verified to be in the required state for the unit condition.

The proposed change to TS 5.6.8 corrects an editorial error and therefore does not significantly increase the probability or consequences of a previously evaluated accident.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change to TS 3.3.2 does not create the possibility of a new or different kind of accident than any accident already evaluated in the FSAR. No new accident scenario, failure mechanisms, or limiting single failures are introduced as a result of the proposed change. The proposed TS 3.3.2 change does not challenge the performance or integrity of any safety-related systems. Therefore, this change does not create the possibility of a new or different kind of accident from any accident previously analyzed.

The proposed change to TS 5.6.8 corrects an editorial error and therefore does not create the possibility of a new or different kind of accident from any accident previously analyzed.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change to TS 3.3.2 does not involve a significant reduction in a margin of safety. The proposed change is made to accurately reflect the format of the Improved Standard Technical Specifications. The actuation setpoints specified by the Technical Specifications and safety analysis limits assumed in the accident analysis are unchanged. The margin of safety associated with these trip setpoints and the safety analysis acceptance criteria is unchanged. Therefore, the proposed change to TS 3.3.2 will not significantly reduce the margin of safety as defined in the Technical Specifications.

The proposed change to TS 5.6.8 corrects an editorial error and therefore involves no significant reduction in a margin of safety.

Based on the above, SNC concludes that the proposed amendment does not involve a significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and, accordingly, a finding of ''no significant hazards consideration'' is justified.

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. Stanford Blanton, Esq., Balch and Bingham, Post Office Box 306, 1710 Sixth Avenue North, Birmingham, Alabama 35201.

NRC Branch Chief: Jon H. Thompson, Acting.

Tennessee Valley Authority (TVA), Docket Nos. 50–259, 50–260 and 50–296, Browns Ferry Nuclear Plant, Units 1, 2 and 3, Limestone County, Alabama

Date of amendment request: July 27, 2009 (TS–465).

Description of amendment request: The proposed change is to eliminate Technical Specification (TS) surveillance requirement (SR) 3.6.1.3.11 and the requirement to perform water leak rate testing on the listed containment isolation valves. More specifically, the proposed change eliminates water local leak rate testing of valves in the Containment Leak Rate Program that are being tested to verify the combined leakage rate is within the limit that ensures the suppression pool level is sufficient to keep lines that terminate below the water level for at least 30 days without additional make-up.

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.

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

This proposal does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change to the scope of water leak rate testing for the subject valves does not affect the probability of the design basis accidents. The valves will continue to be maintained in an operable state, and in their current design configuration. There is no correlation between the scope of the water leak rate testing and accident probability.

TVA reviewed the postulated consequences of design basis events on primary containment isolation under the proposed change. The primary containment structure, including access openings, penetrations and the containment heat removal system, is designed so that the containment structure and its internal compartments can withstand, without exceeding the design leakage rate (2.0% per day), the peak accident pressure and temperature that could occur during any postulated LOCA [loss-of-coolant accident].

For the purposes of considering the consequences of LOCAs under the proposed change, a single active failure of a CIV [containment isolation valve] or a passive failure of the closed system were reviewed, within the limits of the existing licensing basis. Under the existing licensing basis, a pipe rupture of seismically qualified ECCS [emergency core cooling system] piping does not have to be assumed concurrent with the LOCA, except if it is a consequence of the LOCA. Consequential failures can be eliminated, since a LOCA inside containment is separated from the ECCS piping by the containment structure. Consequential failures of the ECCS piping from LOCA's outside containment are outside the Appendix J design considerations, although they are adequately addressed through the redundancy and separation of the ECCS design. A single active failure of the CIV, under the LOCA condition, can be accommodated since the closed and filled system piping and the suppression pool water inventory remain as the leakage barriers. The ECCS passive failure criterion does require consideration of system leaks, but not pipe breaks, beyond the initiating LOCA. Pipe leakage, equivalent to the leakage from a valve or pump seal failure, should be considered at 24 hours or greater post-LOCA. The capability to make-up inventory to the suppression pool is adequate to ensure that postulated seat leakage and pipe leakage does not result in a condition that jeopardizes pool level. Make-up capability exists to the suppression pool. Actions to make-up to the suppression pool are delineated in Emergency Operating Instructions.

Therefore, the proposal to eliminate the subject water leak rate tests does not involve a significant 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?

This proposal does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The acceptability of the proposed change to the scope of water leak rate testing for the subject valves is based on maintaining the existing barriers to primary containment leakage, and ensuring that the suppression pool level is assured for 30 days during all design basis, post-accident modes of operation. By meeting these dual objectives, the plant response to the design basis events will be unchanged, and no new accident scenarios will be encountered. These two objectives are related, in that, the suppression pool inventory creates a passive barrier to primary containment atmospheric leakage for valves associated with penetrations which are located below the minimum water level of the pool.

The proposed Technical Specification change does not alter the configuration of the subject containment isolation valves or their associated systems. The valves will continue to be tested and maintained to ensure their operability. The subject valves are all isolation valves associated with lines that penetrate the primary containment. For closed system valves, the redundant isolation boundary for each of the affected valves is the closed system associated with the valve. The closed system piping is verified via a 10 CFR 50 Appendix J Type A test. The integrity of the closed systems is also monitored and controlled via Technical Specification 5.5.2, ''Primary Coolant Sources Outside Containment.''

The subject valves may be open, or change state, post-accident to support the design function of their associated ECCS systems (HPCI [high-pressure coolant injection], Core Spray, RHR [residual heat removal]), RCIC [reactor core isolation coolant] or RHR Sampling using the Post Accident Sampling System. The subject valves function as system valves during the periods when they are open or in an intermediate state, not as containment isolation valves. Reliance is placed on the suppression pool seal and the closed system piping to maintain the barrier between primary and secondary containment atmospheres.

Therefore, with the valve configuration and closed systems configuration unaffected by the proposed change, the existing barriers to primary containment atmospheric leakage are maintained, so long as the suppression pool level is ensured.

The suppression pool is designed and operated so that it is filled with water in accordance with Technical Specifications 3.6.2.2, ''Suppression Pool Water Level,'' and the associated Bases. As such, the supply of water in the suppression pool is assured for 30 days during all design basis, post-accident modes of operation. Water leak rate testing has historically been performed on valves associated with lines that connect to the suppression pool. The acceptance criteria for combined leakage from these penetrations is 72.79 cfh [cubic feet per hour]. This leakage rate is at a level which ensures the 30-day post-accident suppression pool level.

As mentioned above, the integrity of the closed system piping is verified via a 10 CFR 50 Appendix J Type A test and is monitored and controlled via Technical Specification 5.5.2. TS 5.5.2 establishes a program to monitor and control leakage from systems located outside containment that could contain highly radioactive fluids during a serious transient or accident. This program applies to the ECCS and RCIC systems affected by the proposed change and ensures that leakage into secondary containment via packing, flanges, seals, etc., is controlled. Leakage from these systems has been found to be very low, and well below the 20 gpm [gallons per minute] limit established for these systems. The proposed change is not expected to contribute to higher levels of system leakage. Normal operational monitoring of suppression pool level, operator rounds, housekeeping inspections, and system pressure testing further ensure external leakage is identified and minimized while suppression pool level is being maintained.

A review of water leak rate test data for the subject CIVs showed that the valves have had leakage rates within the acceptance criteria. Testing of the valves in accordance with ASME [American Society of Mechanical Engineers] Code requirements ensure valve operability.

Therefore, leakage past the CIVs is expected to be low and in keeping with the design basis for the suppression pool. However, the capability does exist to make-up water to the suppression pool if necessary. Existing Emergency Operating Instructions require actions if suppression pool level is less than the required level. Thus, the level of the suppression pool is ensured, independent of the current CIV water leak rate testing requirement.

The proposed change to the scope of water leak rate testing for the subject valves maintains the existing barriers to primary containment leakage, and ensures that the suppression pool level is assured for 30 days during all design basis, post-accident modes of operation. Therefore, the plant response to the design basis events is unchanged, and the proposal 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?

This change does not involve a significant reduction in a margin of safety.

As discussed in the responses to questions 1 and 2, the proposed change does not alter the plant response to existing accident scenarios, and does not introduce new or different scenarios. So the margin of safety from a design basis accident standpoint is maintained.

Historically, the leakage rate through the subject valves has been determined in accordance with TS SR 3.6.1.3.11. This leakage rate has always been within the acceptance criteria. Quantifying leakage past the CIVs has been used to ensure that the suppression pool level is assured for 30 days post-accident. Under the proposed change, this leakage rate will not be quantified. In addition, closed system leakage is monitored and controlled by an existing Technical Specification program. Closed system leakage has been found to be very low on each of the units, and is currently well below the 20 gpm allowable. Therefore, leakage past the CIVs is expected to be low and in keeping with the design basis for the suppression pool. However, the capability does exist, and is proceduralized, to make-up water to the suppression pool if necessary. Thus the current capability to maintain adequate suppression pool level for 30 days post-accident is assured under the proposed change.

Therefore the proposed change to the scope of water leak rate testing for the subject valves 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: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET 11A, Knoxville, Tennessee 37902.

NRC Branch Chief: Thomas H. Boyce.

Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

Florida Power and Light Company, Docket Nos. 50–250 and 251, Turkey Point Plant Units 3, and 4, Miami-Dade County, Florida

Date of application for amendment: September 1, 2009.

Description of amendment request: Delay the date specified in License Amendments 234 and 229 for the implementation of the Boraflex Remedy in the spent fuel pools.

Date of publication of individual notice in the ***Federal Register:*** September 15, 2009 (74 FR 47278).

Expiration date of individual notice: October 15, 2009 (Public comments) and November 16, 2009 (Hearing requests).

Florida Power and Light Company, Docket Nos. 50–250 and 50–251, Turkey Point Plant, Units 3 and 4, Miami-Dade County, Florida

Date of application for amendments: July 23, 2009.

Description of amendments request: Revise the scope of the inservice inspections required in the tubesheet regions of the steam generators.

Date of publication of individual notice in the1 ***Federal Register:*** August 28, 2009 (74 FR 44405).

Expiration date of individual notice: September 28, 2009 (Public comments) and October 27, 2009 (Hearing requests).

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 51.22(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 (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 (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 PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr.resource@nrc.gov.*

Arizona Public Service Company, et al., Docket Nos. STN 50–528, STN 50–529, and STN 50–530, Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3, Maricopa County, Arizona

Date of application for amendment: May 28, 2009, as supplemented by letter dated August 3, 2009.

Brief description of amendment: The amendments eliminated working hour restrictions from Technical Specification (TS) 5.2.2 for Palo Verde Nuclear Generating Station, Units 1, 2, and 3, to support compliance with the revisions to Title 10 of the Code of Federal Regulations (10 CFR), Part 26, ''Fitness for Duty Programs,'' that became effective on March 31, 2008. The changes are consistent with the NRC-approved Technical Specification Task Force (TSTF) Standard Technical Specification change traveler, TSTF–511, Revision 0, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR part 26.''

Date of issuance: September 30, 2009.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment No.: Unit 1–175; Unit 2–175; Unit 3–175.

Facility Operating License Nos. NPF–41, NPF–51, and NPF–74: The amendments revised the Operating Licenses and Technical Specifications.

Date of initial notice in ***Federal Register:*** July 28, 2009 (74 FR 37247). The supplemental letter dated August 3, 2009, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated September 30, 2009.

No significant hazards consideration comments received: No.

Calvert Cliffs Nuclear Power Plant, Inc., Docket Nos. 50–317 and 50–318, Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, Calvert County, Maryland

Date of application for amendments: May 13, 2009.

Brief description of amendments: The amendments revise Technical Specification (TS) 5.5.8, ''Inservice Testing Program,'' by incorporating TS Task Force Traveler (TSTF) 479, ''Changes to Reflect Revision of 10 CFR [Title 10 of the Code of Federal Regulations] 50.55a,'' and TSTF–497, ''Limit Inservice Testing Program SR [Surveillance Requirement] 3.0.2 Application to Frequencies of 2 Years or Less.'' Specifically, the amendments (1) replace references to the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code, Section XI with the ASME Code for Operation and Maintenance of Nuclear Power Plants for inservice testing activities, and (2) applies the extension allowance of SR 3.0.2 to other normal and accelerated inservice testing frequencies of 2 years or less that were not included in the frequencies of the table listed in TS 5.5.8.a.

Date of issuance: September 28, 2009.

Effective date: As of the date of issuance to be implemented within 60 days.

Amendment Nos.: 294 and 270.

Renewed Facility Operating License Nos. DPR–53 and DPR–69: Amendments revised the License and Technical Specifications.

Date of initial notice in ***Federal Register:*** July 14, 2009 (74 FR 34046). The Commission's related evaluation of these amendments is contained in a Safety Evaluation dated September 28, 2009.

No significant hazards consideration comments received: No.

Entergy Gulf States Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana

Date of amendment request: November 20, 2008, as supplemented by letter dated August 12, 2009.

Brief description of amendment: The amendment revised Technical Specification 5.6.5, ''Core Operating Limits Report (COLR),'' to add a reference to an analytical method that will be used to determine the core operating limits. The change is needed to support the use of GE14 fuel during refueling outage 15 scheduled for the fall of 2009.

Date of issuance: September 29, 2009.

Effective date: As of the date of issuance and shall be implemented prior to Cycle 16 operation.

Amendment No.: 166.

Facility Operating License No. NPF–47: The amendment revised the Facility Operating License and Technical Specifications.

Date of initial notice in ***Federal Register:*** January 23, 2009 (74 FR 4249). The supplemental letter dated August 12, 2009, 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 as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 29, 2009.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: September 17, 2008, as supplemented by letters dated February 26, June 30, and September 24, 2009.

Brief description of amendment: The amendment revised the Waterford 3 Technical Specifications (TSs) to take credit for soluble boron in Region 1 (cask storage pit) and Region 2 (spent fuel pool and refueling canal) fuel storage racks for the storage of both Standard and Next Generation Fuel assemblies. Two new TSs were added which included a surveillance that ensures the required boron concentration is maintained in the spent fuel storage racks and to reflect the results of the new criticality analysis.

Date of issuance: September 30, 2009.

Effective date: As of the date of issuance and shall be implemented within 60 days from the date of issuance.

Amendment No.: 223.

Facility Operating License No. NPF–38: The amendment revised the Facility Operating License and Technical Specifications.

Date of initial notice in ***Federal Register:*** April 14, 2009 (74 FR 17228). The application dated September 17, 2008, contained an evaluation of the TS change in accordance with 10 CFR 50.91(a)(1) using criteria in 10 CFR 50.92(c), and the licensee determined that the change involved no significant hazards consideration (NSHC). However, based on the discussions between the staff and the licensee, the licensee provided a revised NSHC in its supplemental letter dated February 26, 2009. Based on the February 26, 2009, revised NSHC, the staff's proposed

NSHC determination was published in the **Federal Register** on April 14, 2009. The supplemental letters dated June 30 and September 24, 2009, provided additional information that clarified the application, did not expand the scope of the application as noticed, and did not change the staff's proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 30, 2009.

No significant hazards consideration comments received: No.

FirstEnergy Nuclear Operating Company, et al., Docket No. 50–412, Beaver Valley Power Station, Unit No. 2, Beaver County, Pennsylvania

Date of application for amendment: October 10, 2008, as supplemented by letters dated. June 16 and July 14, 2009.

Brief description of amendment: The amendment revises Technical Specification (TS) 5.5.5 to allow an additional method of repair for steam generator (SG) tubes by installation of leak limiting Alloy 800 sleeves developed by Westinghouse and clarifies an existing reporting requirement in TS 5.6.6.2.4 concerning SG tube inspections.

Date of issuance: September 30, 2009.

Effective date: As of the date of issuance and shall be implemented prior to achieving Mode 4 during startup from the fall 2009 refueling outage.

Amendment No: 170

Facility Operating License No. NPF–73. Amendment revised the License and TSs.

Date of initial notice in ***Federal Register:*** February 17, 2009 (74 FR 7482). The June 16 and July 14, 2009, supplemental letters provided clarifying information that was within the scope of the initial notice and did not change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 30, 2009.

No significant hazards consideration comments received: No.

Northern States Power Company—Minnesota, LLC, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of application for amendment: May 29, 2009.

Brief description of amendment: The amendment changes the Technical Specifications, revising the applicability for isolation of the Reactor Water Cleanup System on a Standby Liquid Control system initiation to align with the modes stated in Specification 3.1.7.

Date of issuance: September 28, 2009.

Effective date: As of the date of issuance and shall be implemented within 90 days of issuance.

Amendment No.: 164.

Facility Operating License No. DPR–22. Amendment revised the Facility Operating License and the Technical Specifications.

Date of initial notice in ***Federal Register:*** July 28, 2009 (74 FR 37248). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 28, 2009.

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. 50–424 and 50–425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of application for amendments: May 19, 2009, as supplemented August 28, 2009 (three submittals) and September 11, 2009.

Brief description of amendments: The amendments revised TS 5.5.9, ''Steam Generator (SG) Program,'' to exclude portions of the tubes within the tubesheet from periodic SG inspections (establish alternate repair criteria). The amendments also revised TS 5.6.10, ''Steam Generator Tube Inspection Report,'' to remove reference to previous interim alternate repair criteria and provide specific reporting requirements for Unit 1 during refueling outage (RFO) 15 and the subsequent operating cycle, and for Unit 2 during RFO 14 and the subsequent operating cycle.

Date of issuance: September 24, 2009.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: 157 and 138.

Renewed Facility Operating License Nos. NPF–68 and NPF–81: Amendments revised the licenses and the technical specifications.

Date of initial notice in ***Federal Register:*** June 18, 2009 (74 FR 28962). The supplements dated August 28, 2009, and September 11, 2009, 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 amendments is contained in a Safety Evaluation dated September 24, 2009.

No significant hazards consideration comments received: No.

Union Electric Company, Docket No. 50–483, Callaway Plant, Unit 1, Callaway County, Missouri

Date of application for amendment: May 4, 2009.

Brief description of amendment: The amendment revised the Callaway Plant Technical Specification (TS) 5.2.2, ''Unit Staff,'' to eliminate working hour restrictions in paragraph d of TS 5.2.2 to support compliance with Title 10 of the Code of Federal Regulations (10 CFR) Part 26. The change is consistent with U.S. Nuclear Regulatory Commission (NRC)-approved Revision 0 to TS Task Force (TSTF) Improved Technical Specification change traveler, TSTF–511, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR Part 26.'' The availability of this TS improvement was announced in the **Federal Register** on December 30, 2008 (73 FR 79923), as part of the consolidated line item improvement process.

Date of issuance: September 29, 2009.

Effective date: As of its date of issuance and shall be implemented by October 1, 2009.

Amendment No.: 193.

Facility Operating License No. NPF–30: The amendment revised the Operating License and Technical Specifications.

Date of initial notice in ***Federal Register:*** July 28, 2009 (74 FR 37250).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 29, 2009.

Date of initial notice in ***Federal Register:*** July 28, 2009 (74 FR 37250).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 29, 2009.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 8th day of October 2009.

For the Nuclear Regulatory Commission.

Joseph G. Giitter,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E9–24915 Filed 10–19–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0107]

Notice of Issuance of Regulatory Guide

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Issuance and Availability of Regulatory Guide 1.215.

FOR FURTHER INFORMATION CONTACT: R.A. Jervey, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 251–7404 or e-mail to *RAJ@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The Nuclear Regulatory Commission (NRC) is issuing a new guide in the agency's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Regulatory Guide 1.215, Revision 0, ''Guidance for ITAAC Closure Under 10 CFR Part 52,'' was issued with a temporary identification as Draft Regulatory Guide, DG–1204. This guide describes a method that the staff of the NRC considers acceptable for use in satisfying the requirements for documenting the completion of inspections, tests, analyses, and acceptance criteria (ITAAC). In particular, this guide endorses the methodologies described in the industry guidance document Nuclear Energy Institute (NEI) 08–01, ''Industry Guideline for the ITAAC Closure Process Under 10 CFR Part 52,'' Revision 3, issued January 2009, for the implementation of Title 10, Section 52.99, ''Inspection during construction,'' of the Code of Federal Regulations (10 CFR 52.99).

II. Further Information

In March 2009, DG–1204 was published with a public comment period of 60 days from the issuance of the guide. The public comment period closed on May 13, 2009. The staff's responses to the comments received are located in the NRC's Agencywide Documents Access and Management System under accession number ML091480083. Electronic copies of Regulatory Guide 1.215, Revision 0 are available through the NRC's public Web site under ''Regulatory Guides'' at *http://www.nrc.gov/reading-rm/doc-collections/*.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR) located at Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852–2738. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4209, by fax at (301) 415–3548, and by e-mail to *pdr.resource@nrc.gov*.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 5th day of October 2009.

For the Nuclear Regulatory Commission.

Andrea D. Valentin,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E9–25144 Filed 10–19–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act; Meetings

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of October 19, 26, November 2, 9, 16, 23, 2009.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

Week of October 19, 2009

There are no meetings scheduled for the week of October 19, 2009.

Week of October 26, 2009—Tentative

There are no meetings scheduled for the week of October 26, 2009.

Week of November 2, 2009—Tentative

Tuesday, November 3, 2009

9:30 a.m. Briefing on Fire Protection Lessons Learned from Shearon Harris (Public Meeting) (*Contact:* Alex Klein, 301–415–2822.)

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

Week of November 9, 2009—Tentative

Tuesday, November 10, 2009

9:30 a.m. Briefing on NRC International Activities (Public Meeting). (*Contact:* Karen Henderson, 301–415–0202.)

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

Week of November 16, 2009—Tentative

Tuesday, November 17, 2009

9:30 a.m. Briefing on Equal Employment Opportunity (EEO) and Small Business Programs (Public Meeting). (*Contact:* Elva Bowden Berry, 301–415–1536.)

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

Week of November 23, 2009—Tentative

There are no meetings scheduled for the week of November 23, 2009.

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The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292.

CONTACT PERSON FOR MORE INFORMATION: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-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, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *rohn.brown@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov.*

October 15, 2009.

Rochelle C. Bavol,

Office of the Secretary.

[FR Doc. E9–25342 Filed 10–16–09; 4:15 pm]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Proposed Collection; Request for Comments on a Revised Information Collection: (OMB Control No. 3206–0170; Standard Forms SF 3106 and SF 3106A)

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) intends to submit to the Office of Management and Budget (OMB) a request for review of a revised information collection. This information collection, ''Application for Refund of Retirement Deductions Federal Employees Retirement System (FERS),'' (OMB Control No. 3206–0170; Standard Form 3106), is used by former Federal employees under FERS, to apply for a refund of retirement deductions withheld during Federal employment, plus any interest provided by law. ''Current/Former Spouse(s) Notification of Application for Refund of Retirement Deductions Under FERS'' (OMB Control No. 3206–0170; Standard Form 3106A), is used by refund applicants to notify their current/former spouse(s) that they are applying for a refund of retirement deductions, which is required by law.

Comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the Office of Personnel Management, 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; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Approximately 17,000 SF 3106 forms will be processed annually. The SF 3106 takes approximately 30 minutes to complete for a total of 8,500 hours annually. Approximately 13,600 SF 3106A forms will be processed annually. The SF 3106A takes approximately 5 minutes to complete for a total of 1,133 hours. The total annual estimated burden is 9,633 hours.

For copies of this proposal, contact Cyrus S. Benson on (202) 606–0623, FAX (202) 606- 0910 or via e-mail to *Cyrus.Benson@opm.gov.* Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 60 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—James K. Freiert, Deputy Assistant Director, Retirement Services Program, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3305, Washington, DC 20415–3500.

FOR FURTHER INFORMATION CONTACT: *For information regarding administrative coordination contact:* Cyrus S. Benson, Team Leader, Publications Team, RIS Support Services/Support Group, U.S. Office of Personnel Management, 1900 E Street, NW., Room 4H28, Washington, DC 20415, (202) 606–0623.

U.S. Office of Personnel Management

John Berry,

Director.

[FR Doc. E9–25126 Filed 10–19–09; 8:45 am]

BILLING CODE 6325–38–P

POSTAL SERVICE

United States Postal Service Board of Governors; Sunshine Act Meeting

Board Votes To Close October 12–14, 2009, Meeting

At its closed session meeting on September 22, 2009, the Board of Governors of the United States Postal Service voted unanimously to close to public observation its meeting to be held October 12–14, 2009, at the Bolger Center for Leadership Development in Potomac, Maryland. The Board determined that no earlier public notice was possible.

GENERAL COUNSEL CERTIFICATION: The General Counsel of the United States Postal Service has certified that the meeting is properly closed under the Government in the Sunshine Act.

TIMES AND DATES:

5 p.m., Monday, October 12, 2009;
8 a.m., Tuesday, October 13, 2009; and
8 a.m., Wednesday, October 14, 2009.

MATTERS TO BE CONSIDERED:

Monday, October 12 at 5 p.m. (Closed)

1. Strategic Issues.
2. Financial Matters.
3. Pricing.
4. Personnel Matters and Compensation Issues.
5. Governors' Executive Session—Discussion of prior agenda items and Board Governance.

Tuesday, October 13 at 8 a.m. (Closed)

Continuation of Monday's agenda.

Wednesday, October 14 at 8 a.m. (Closed)—(if needed)

Continuation of Monday's agenda.

CONTACT PERSON FOR MORE INFORMATION: Julie S. Moore, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260–1000. Telephone (202) 268–4800.

Julie S. Moore,

Secretary.

[FR Doc. E9–25364 Filed 10–16–09; 4:15 pm]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28945; File No. 812–13086–05]

Neuberger Berman Management LLC, et al.; Notice of Application

October 14, 2009.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 19(b) of the Act and rule 19b–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain registered closed-end management investment companies to make periodic distributions of long-term capital gains with respect to their outstanding common stock as frequently as monthly in any taxable year, and as frequently as distributions are specified by or in accordance with the terms of any outstanding preferred stock that such investment companies may issue.

APPLICANTS: Neuberger Berman Management LLC (''NB Management''), and Neuberger Berman Dividend Advantage Fund Inc., Neuberger Berman Income Opportunity Fund Inc., and Neuberger Berman Real Estate Securities Income Fund Inc. (collectively, the ''Current Funds'').

FILING DATES: The application was filed on May 18, 2004 and amended on June 5, 2007, October 28, 2008, January 22, 2009, January 26, 2009, May 15, 2009 and October 13, 2009.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 9, 2009, and

should be accompanied by proof of service on the applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, c/o Andrew B. Allard, Neuberger Berman, LLC, 605 Third Avenue, 21st Floor, New York, New York 10158–3698.

FOR FURTHER INFORMATION CONTACT: Barbara T. Heussler, Senior Counsel, at (202) 551–6990, or Jennifer L. Sawin, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. Each Current Fund is a registered closed-end management investment company organized as a Maryland corporation.[1] The common stock (''common shares'') of the Current Funds are listed and traded on the American Stock Exchange. The Current Funds have also issued either private preferred shares or auction market preferred shares (collectively, ''preferred shares''). Applicants believe that the shareholders of each Current Fund are generally dividend-sensitive investors who desire current income periodically and may favor a fixed distribution policy.

2. NB Management serves as each Current Fund's investment manager and administrator. Neuberger Berman LLC (''Neuberger Berman'') serves as a sub-adviser to each Current Fund. Neuberger Berman Fixed Income LLC (''NBFI'') also serves as a sub-adviser to NBIO. NB Management, Neuberger Berman and NBFI are registered as investment advisers under the Investment Advisers Act of 1940, as amended (''Advisers Act''). Each future Investment Adviser will be registered under the Advisers Act.

3. Applicants represent that the board of directors (each, a ''Board'' and collectively, ''Boards'') of each Current Fund, including a majority of the directors who are not ''interested persons,'' as defined in section 2(a)(19) of the Act (''Independent Directors''), of the respective Current Fund requested and evaluated, and NB Management furnished, such information as was reasonably necessary to make an informed determination on whether the Board should adopt and implement a proposed distribution policy (''Distribution Policy'') for that Current Fund. The Board considered, among other things: (i) The purpose and terms of the Distribution Policy; (ii) any potential or actual conflicts of interest that NB Management, any affiliated person of NB Management, or any other affiliated person of the respective Current Fund may have relating to the adoption or implementation of the Distribution Policy; (iii) whether the rate of distribution under the Distribution Policy will exceed the Current Fund's expected total return based on net asset value per common share (''NAV''); and (iv) any reasonably foreseeable material effects of the Distribution Policy on the Fund's long-term total return based on market price and NAV. Applicants state that, after considering such information, the Board, including the Independent Directors, determined that adoption and implementation of the Distribution Policy would be consistent with the Current Fund's investment objective(s) and policies and in the best interests of the Current Fund and its shareholders.

4. Applicants state that the purpose of a Fund's Distribution Policy is to permit that Fund to provide shareholders with periodic fixed cash dividends that approximate the character of income that the Fund receives throughout the year. Each Fund's Distribution Policy provides for periodic level distributions with respect to outstanding common shares based upon a fixed amount per share, a fixed percentage of market price or a fixed percentage of NAV. The Distribution Policy will allow distributions to be made without significant restrictions due to the timing of realization of capital gains. Applicants state that the Distribution Policy will allow the Fund to pay realized long-term capital gains as part of its periodic distributions rather than forcing the distributions to be funded with returns of capital (when net investment income and realized net short-term capital gains are insufficient to cover the fixed distribution amount). The Distribution Policy will provide investors with the potential for a more tax-efficient return on their investment in the Fund. Applicants state that if a Fund's net investment income and net realized capital gains for any year exceed the amount required to be distributed under the Distribution Policy, the Fund will at a minimum make distributions necessary to comply with the distribution requirements of Subchapter M of the Internal Revenue Code of 1986 (''Code'').

5. Prior to relying on the order and implementing the Distribution Policy in the future, the Board of each Fund will approve and adopt policies and procedures under rule 38a–1 under the Act that: (i) Are reasonably designed to ensure that all notices required to be sent to the Fund's shareholders pursuant to section 19(a) of the Act, rule 19a–1 thereunder and condition 4 below (each a ''19(a) Notice'') include the disclosure required by rule 19a–1 under the Act and by condition 2(a) below, and that all other written communications by the Fund or its agents, described in condition 3(a) below, about the distributions under the Distribution Policy include the disclosure required by condition 3(a) below; and (ii) require the Fund to keep records that demonstrate its compliance with all of the conditions of the order and that are necessary for such Fund to form the basis for, or demonstrate the calculation of, the amounts disclosed in its 19(a) Notices.

Applicants' Legal Analysis

1. Section 19(b) of the Act generally makes it unlawful for any registered investment company to make long-term capital gains distributions more than once every twelve months. Rule 19b–1 under the Act limits the number of capital gains dividends, as defined in section 852(b)(3)C) of the Code (''distributions''), that a fund may make with respect to any one taxable year to one, plus a supplemental ''clean up'' distribution made pursuant to section 855 of the Code not exceeding 10% of the total amount distributed for the year,

[1] Applicants request that any order issued granting the relief requested in the application also apply to any registered closed-end investment company currently advised or to be advised in the future by NB Management (including any successor in interest) or by an entity controlling, controlled by or under common control (within the meaning of section 2(a)(9) of the Act) with NB Management (such entities, together with NB Management, the ''Investment Advisers'') that decides in the future to rely on the requested relief. Any fund that relies on the requested order will comply with the terms and conditions of the application (such investment companies together with the Current Funds, the ''Funds,'' and with the Investment Advisers, the ''Applicants''). A successor in interest is limited to entities that result from a reorganization into another jurisdiction or a change in the type of business organization. All existing Funds currently intending to rely on the requested order have been named as Applicants.

plus one additional capital gain dividend made in whole or in part to avoid the excise tax under section 4982 of the Code.

2. Section 6(c) of the Act provides that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of the Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. Applicants state that one of the concerns leading to the enactment of section 19(b) and adoption of rule 19b–1 was that shareholders might be unable to distinguish between frequent distributions of capital gains and dividends from investment income. Applicants state, however, that rule 19a–1 effectively addresses this concern by requiring that distributions (or the confirmation of the reinvestment thereof) estimated to be sourced in part from capital gains or capital be accompanied by a separate statement showing the sources of the distribution (*e.g.*, estimated net income, net short-term capital gains, net long-term capital gains and/or return of capital). Applicants state that the same information is included in the annual reports of each Current Fund sent to its shareholders and on the IRS Form 1099–DIV, which is sent to each common and preferred shareholder who received distributions during a particular year.

4. Applicants further state that each of the Funds will make the additional disclosures required by the conditions set forth below, and each of them will adopt compliance policies and procedures in accordance with rule 38a–1 under the Act to ensure that all required notices and disclosures are sent to shareholders. Applicants argue that rule 19a–1, the Distribution Policy and the compliance policies ensure that each Fund's shareholders would be provided sufficient information to understand that their periodic distributions are not tied to the Fund's net investment income and realized capital gains to date, and may not represent yield or investment return. Accordingly, Applicants assert that continuing to subject the Funds to section 19(b) and rule 19b–1 would afford shareholders no extra protection.

5. Applicants assert that section 19(b) and rule 19b–1 also were intended to prevent certain improper sales practices, including, in particular, the practice of urging an investor to purchase shares of a fund on the basis of an upcoming capital gains dividend (''selling the dividend''), where the dividend would result in an immediate corresponding reduction in NAV and would be in effect a taxable return of the investor's capital. Applicants assert that the ''selling the dividend'' concern should not apply to closed-end investment companies, such as the Funds, which do not continuously distribute shares. According to the Applicants, if the underlying concern extends to secondary market purchases of shares of closed-end funds that are subject to a large upcoming capital gains dividend, adoption of a periodic distribution plan actually helps minimize the concern by avoiding, through periodic distributions, any buildup of large end-of-the-year distributions.

6. Applicants note that common shares of closed-end funds that invest primarily in equity securities often trade in the marketplace at a discount to their NAVs. Applicants believe that this discount may be reduced if the Funds are permitted to pay relatively frequent dividends on their common shares at a consistent rate, whether or not those dividends contain an element of long-term capital gain.

7. Applicants assert that the application of rule 19b–1 to a Distribution Policy actually could have an undesirable influence on portfolio management decisions. Applicants state that, in the absence of an exemption from rule 19b–1, the adoption of a periodic distribution plan imposes pressure on management (i) not to realize any net long-term capital gains until the point in the year that the fund can pay all of its remaining distributions in accordance with rule 19b–1, and (ii) not to realize any long-term capital gains during any particular year in excess of the amount of the aggregate pay-out for the year (since as a practical matter excess gains must be distributed and accordingly would not be available to satisfy pay-out requirements in following years), notwithstanding that purely investment considerations might favor realization of long-term gains at different times or in different amounts. Applicants assert that by limiting the number of capital gain distributions that a fund may make with respect to any one year, rule 19b–1 may prevent the normal and efficient operation of a periodic distribution plan whenever that fund's realized net long-term capital gains in any year exceed the total of the periodic distributions that may include such capital gains under the rule.

8. In addition, Applicants assert that rule 19b–1 may cause fixed regular periodic distributions to be funded with returns of capital[2] (to the extent net investment income and realized short term capital gains are insufficient to fund the distribution), even though undistributed realized net long-term capital gains otherwise would be available. To distribute all of a fund's long-term capital gains within the limits in rule 19b–1, a fund may be required to make total distributions in excess of the annual amount called for by its periodic distribution plan or to retain and pay taxes on the excess amount. Applicants thus assert that the requested order would minimize these effects of rule 19b–1 by enabling the Funds to realize long-term capital gains as often as investment considerations dictate without fear of violating rule 19b–1.

9. Applicants state that Revenue Ruling 89–81 under the Code requires that a fund that has both common shares and preferred shares outstanding designate the types of income, *e.g.*, investment income and capital gains, in the same proportion as the total distributions distributed to each class for that tax year. To satisfy the proportionate designation requirements of Revenue Ruling 89–81, whenever a fund has realized a long-term capital gain with respect to a given tax year, the fund must designate the required proportionate share of such capital gain to be included in common and preferred share dividends. Applicants state that although rule 19b–1 allows a fund some flexibility with respect to the frequency of capital gains distributions, a fund might use all of the exceptions available under the rule for a tax year and still need to distribute additional capital gains allocated to the preferred shares to comply with Revenue Ruling 89–81.

10. Applicants assert the potential abuses addressed by section 19(b) and rule 19b–1do not arise with respect to preferred shares issued by a closed-end fund. Applicants assert that such distributions are either fixed, determined in periodic auctions, or determined by reference to short-term interest rates rather than by reference to performance of the issuer, and Revenue Ruling 89–81 determines the proportion of such distributions that are comprised of long-term capital gains.

11. Applicants also submit that the ''selling the dividend'' concern is not applicable to preferred shares, which entitles a holder to no more than a

[2] Returns of capital as used in the application means return of capital for financial accounting purposes and not for tax accounting purposes.

periodic dividend at a fixed rate or a rate determined by the market, and, like a debt security, is priced based upon its liquidation preference, dividend rate, credit quality, and frequency of payment. Applicants assert that investors buy preferred shares for the express purpose of receiving payments at the frequency bargained for and do not expect the liquidation value of their shares to change.

12. Applicants request an order pursuant to section 6(c) of the Act granting an exemption from the provisions of section 19(b) of the Act and rule 19b–1 thereunder to permit each Fund to make periodic capital gain dividends (as defined in section 852(b)(3)(C) of the Code) that include long-term capital gains as often as monthly in any one taxable year in respect of its common shares and as often as specified by or determined in accordance with the terms thereof in respect of the Fund's preferred shares.

Applicants' Conditions

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions.

1. *Compliance Review and Reporting:* The Fund's chief compliance officer will (a) report to the Fund's Board, no less frequently than once every three months or at the next regularly scheduled quarterly Board meeting, whether (i) the Fund and its Investment Adviser have complied with the conditions of the order, and (ii) a material compliance matter (as defined in rule 38a–1(e)(2) under the Act) has occurred with respect to such conditions; and (b) review the adequacy of the policies and procedures adopted by the Board no less frequently than annually.

2. *Disclosures to Fund Shareholders:*

(a) Each 19(a) Notice disseminated to the holders of the Fund's common shares, in addition to the information required by section 19(a) and rule 19a–1:

(i) Will provide, in a tabular or graphical format:

(1) The amount of the distribution, on a per common share basis, together with the amounts of such distribution amount, on a per common share basis and as a percentage of such distribution amount, from estimated: (A) Net investment income; (B) net realized short-term capital gains; (C) net realized long-term capital gains; and (D) return of capital or other capital source;

(2) The fiscal year-to-date cumulative amount of distributions, on a per common share basis, together with the amounts of such cumulative amount, on a per common share basis and as a percentage of such cumulative amount of distributions, from estimated: (A) Net investment income; (B) net realized short-term capital gains; (C) net realized long-term capital gains; and (D) return of capital or other capital source;

(3) The average annual total return in relation to the change in NAV for the 5-year period (or, if the Fund's history of operations is less than five years, the time period commencing immediately following the Fund's first public offering) ending on the last day of the month prior to the most recent distribution record date compared to the current fiscal period's annualized distribution rate expressed as a percentage of NAV as of the last day of the month prior to the most recent distribution record date; and

(4) The cumulative total return in relation to the change in NAV from the last completed fiscal year to the last day of the month prior to the most recent distribution record date compared to the fiscal year-to-date cumulative distribution rate expressed as a percentage of NAV as of the last day of the month prior to the most recent distribution record date. Such disclosure shall be made in a type size at least as large and as prominent as the estimate of the sources of the current distribution; and

(ii) will include the following disclosure:

(1) ''You should not draw any conclusions about the Fund's investment performance from the amount of this distribution or from the terms of the Fund's Distribution Policy'';

(2) ''The Fund estimates that it has distributed more than its income and net realized capital gains; therefore, a portion of your distribution may be a return of capital. A return of capital may occur, for example, when some or all of the money that you invested in the Fund is paid back to you. A return of capital distribution does not necessarily reflect the Fund's investment performance and should not be confused with 'yield' or 'income' '';[3] and

(3) ''The amounts and sources of distributions reported in this 19(a) Notice are only estimates and are not being provided for tax reporting purposes. The actual amounts and sources of the amounts for tax reporting purposes will depend upon the Fund's investment experience during the remainder of its fiscal year and may be subject to changes based on tax regulations. The Fund will send you a Form 1099–DIV for the calendar year that will tell you how to report these distributions for federal income tax purposes.''

Such disclosure shall be made in a type size at least as large as and as prominent as any other information in the 19(a) Notice and placed on the same page in close proximity to the amount and the sources of the distribution.

(b) On the inside front cover of each report to shareholders under rule 30e–1 under the Act, the Fund will:

(i) Describe the terms of the Distribution Policy (including the fixed amount or fixed percentage of the distributions and the frequency of the distributions);

(ii) Include the disclosure required by condition 2(a)(ii)(1) above;

(iii) State, if applicable, that the Distribution Policy provides that the Board may amend or terminate the Distribution Policy at any time without prior notice to Fund shareholders; and

(iv) Describe any reasonably foreseeable circumstances that might cause the Fund to terminate the Distribution Policy and any reasonably foreseeable consequences of such termination; and

(c) Each report provided to shareholders under rule 30e–1 under the Act and each prospectus filed with the Commission on Form N–2 under the Act, will provide the Fund's total return in relation to changes in NAV in the financial highlights table and in any discussion about the Fund's total return.

3. *Disclosure to Shareholders, Prospective Shareholders and Third Parties:*

(a) The Fund will include the information contained in the relevant 19(a) Notice, including the disclosure required by condition 2(a)(ii) above, in any written communication (other than a communication on Form 1099) about the Distribution Policy or distributions under the Distribution Policy by the Fund, or agents that the Fund has authorized to make such communication on the Fund's behalf, to any Fund common shareholder, prospective common shareholder or third-party information provider;

(b) The Fund will issue, contemporaneously with the issuance of any 19(a) Notice, a press release containing the information in the 19(a) Notice and will file with the Commission the information contained in such 19(a) Notice, including the disclosure required by condition 2(a)(ii) above, as an exhibit to its next filed Form N–CSR; and

[3] The disclosure in this condition 2(a)(ii)(2) will be included only if the current distribution or the fiscal year-to-date cumulative distributions are estimated to include a return of capital.

(c) The Fund will post prominently a statement on its (or its Investment Adviser's) Web site containing the information in each 19(a) Notice, including the disclosure required by condition 2(a)(ii) above, and maintain such information on such Web site for at least 24 months.

4. *Delivery of 19(a) Notices to Beneficial Owners:*

If a broker, dealer, bank or other person (''financial intermediary'') holds common shares issued by the Fund in nominee name, or otherwise, on behalf of a beneficial owner, the Fund: (a) will request that the financial intermediary, or its agent, forward the 19(a) Notice to all beneficial owners of the Fund's shares held through such financial intermediary; (b) will provide, in a timely manner, to the financial intermediary, or its agent, enough copies of the 19(a) Notice assembled in the form and at the place that the financial intermediary, or its agent, reasonably requests to facilitate the financial intermediary's sending of the 19(a) Notice to each beneficial owner of the Fund's shares; and (c) upon the request of any financial intermediary, or its agent, that receives copies of the 19(a) Notice, will pay the financial intermediary, or its agent, the reasonable expenses of sending the 19(a) Notice to such beneficial owners.

5. *Special Board Review for Funds Whose Common Stock Trades at a Premium.* If:

(a) The Fund's common shares have traded on the stock exchange that they primarily trade on at the time in question at an average premium to NAV equal to or greater than 10%, as determined on the basis of the average of the discount or premium to NAV as of the close of each trading day over a 12-week rolling period (each such 12-week rolling period ending on the last trading day of each week); and

(b) The Fund's annualized distribution rate for such 12-week rolling period, expressed as a percentage of NAV as of the ending date of such 12-week rolling period, is greater than the Fund's average annual total return in relation to the change in NAV over the 2-year period ending on the last day of such 12-week rolling period; then:

(i) At the earlier of the next regularly scheduled meeting or within four months of the last day of such 12-week rolling period, the Board, including a majority of the Independent Directors:

(1) Will request and evaluate, and the Investment Adviser will furnish, such information as may be reasonably necessary to make an informed determination of whether the Distribution Policy should be continued or continued after amendment;

(2) Will determine whether continuation, or continuation after amendment, of the Distribution Policy is consistent with the Fund's investment objective(s) and policies and in the best interests of the Fund and its shareholders, after considering the information in condition 5(b)(i)(1) above, including, without limitation:

(A) Whether the Distribution Policy is accomplishing its purpose(s);

(B) The reasonably foreseeable material effects of the Distribution Policy on the Fund's long-term total return in relation to the market price and NAV; and

(C) The Fund's current distribution rate, as described in condition 5(b) above, compared with the Fund's average annual taxable income or total return over the 2-year period, as described in condition 5(b), or such longer period as the Board deems appropriate; and

(3) Based upon that determination, will approve or disapprove the continuation, or continuation after amendment, of the Distribution Policy; and

(ii) The Board will record the information considered by it, including its consideration of the factors listed in condition 5(b)(i)(2) above, and the basis for its approval or disapproval of the continuation, or continuation after amendment, of the Distribution Policy in its meeting minutes, which must be made and preserved for a period of not less than six years from the date of such meeting, the first two years in an easily accessible place.

6. *Public Offerings:* The Fund will not make a public offering of the Fund's common shares other than:

(a) A rights offering below NAV to holders of the Fund's common shares;

(b) An offering in connection with a dividend reinvestment plan, merger, consolidation, acquisition, spin-off or reorganization of the Fund; or

(c) An offering other than an offering described in conditions 6(a) and 6(b) above, provided that, with respect to such other offering:

(i) the Fund's annualized distribution rate for the six months ending on the last day of the month ended immediately prior to the most recent distribution record date,[4] expressed as a percentage of NAV as of such date, is no more than 1 percentage point greater than the Fund's average annual total return for the 5-year period ending on such date; [5] and

(ii) the transmittal letter accompanying any registration statement filed with the Commission in connection with such offering discloses that the Fund has received an order under section 19(b) to permit it to make periodic distributions of long-term capital gains with respect to its common shares as frequently as twelve times each year, and as frequently as distributions are specified by or determined in accordance with the terms of any outstanding preferred shares as such Fund may issue.

7. *Amendments to Rule 19b–1:* The requested order will expire on the effective date of any amendment to rule 19b–1 that provides relief permitting certain closed-end investment companies to make periodic distributions of long-term capital gains with respect to their outstanding common shares as frequently as twelve times each year.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–25137 Filed 10–19–09; 8:45 am]

BILLING CODE 8011–01–P

[4] If the Fund has been in operation fewer than six months, the measured period will begin immediately following the Fund's first public offering.

[5] If the Fund has been in operation fewer than five years, the measured period will begin immediately following the Fund's first public offering.

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Altiva Financial Corp., Atlantic Gulf Communities Corp., CFI Mortgage, Inc., Commodore Holdings Ltd., Conversion Technologies International, Inc., Cyntech Technologies, Inc., Diversified Senior Services, Inc., Dyersburg Corp., Flour City International, Inc., Gerald Stevens, Inc., Leisure Time Casinos & Resorts, Inc., and Platinum Entertainment, Inc. (n/k/a Vidalia Gichner Holdings, Inc.),; Order of Suspension of Trading

October 16, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Altiva Financial Corp. because it has not filed any periodic reports since the period ended February 29, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Atlantic Gulf Communities Corp. because it has

not filed any periodic reports since the period ended September 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of CFI Mortgage, Inc. because it has not filed any periodic reports since the period ended September 30, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Commodore Holdings Ltd. because it has not filed any periodic reports since the period ended June 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Conversion Technologies International, Inc. because it has not filed any periodic reports since the period ended June 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Cyntech Technologies, Inc. because it has not filed any periodic reports since the period ended July 31, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Diversified Senior Services, Inc. because it has not filed any periodic reports since the period ended September 30, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Dyersburg Corp. because it has not filed any periodic reports since the period ended March 31, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Flour City International, Inc. because it has not filed any periodic reports since the period ended July 31, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Gerald Stevens, Inc. because it has not filed any periodic reports since the period ended November 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Leisure Time Casinos & Resorts, Inc. because it has not filed any periodic reports since the period ended June 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Platinum Entertainment, Inc. (n/k/a Vidalia Gichner Holdings, Inc.) because it has not filed any periodic reports since the period ended March 31, 2000.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on October 16, 2009, through 11:59 p.m. EDT on October 29, 2009.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–25286 Filed 10–16–09; 11:15 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice 6742]

Industry Advisory Panel: Notice of Charter Renewal

Summary: The Under Secretary for Management has approved the renewal of the charter for the Bureau of Overseas Buildings Operations' Industry Advisory Panel for an additional two-year period. The panel meets quarterly in the Harry S Truman Building, U.S. Department of State, located at 2201 C Street, NW., 23rd Street entrance in Washington, DC. The majority of each meeting is devoted to an exchange of ideas between the Department's Bureau of Overseas Buildings Operations' senior management and the panel members on design, operations, security, and building maintenance. The meetings are open to the public and are subject to advance registration and provision of required security information. Procedures for registration are included with each meeting announcement.

If you have any questions, please contact Jonathan Blyth at *BlythJJ@state.gov* or on (703) 875–4131.

Adam E. Namm,

Acting Director, Bureau of Overseas Buildings Operations, U.S. Department of State.

[FR Doc. E9–25225 Filed 10–19–09; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF STATE

[Public Notice 6711]

Shipping Coordinating Committee; Notice of Committee Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 9:30 a.m. Wednesday November 4, 2009, Tuesday December 15, 2009, and Tuesday February 23, 2010 in suite 1060 of the Radio Technical Commission for Maritime Services (RTCM), 1800 North Kent Street, Arlington, VA 22209. The primary purpose of the meetings is to prepare for the 14th Session of the International Maritime Organization (IMO) Subcommittee on Radiocommunications and Search and Rescue scheduled for the week of March 8–12, 2010, in London, England.

The primary matters to be considered include:

—Adoption of the agenda.
—Decisions of other IMO bodies.
—Global Maritime Distress and Safety System (GMDSS).
—ITU Radiocommunication matters.
—Satellite services (Inmarsat and COSPAS–SARSAT).
—Matters concerning search and rescue, including those related to the 1979 SAR Conference and the implementation of the GMDSS.
—Developments in maritime radiocommunication systems and technology.
—Revision of the IAMSAR Manual.
—Development of procedures for updating shipborne navigation and communication equipment.
—Measures to protect the safety of persons rescued at sea.
—Safety provisions applicable to tenders operating from passenger ships.
—Development of an e-navigation strategy implementation plan.
—Revision of Performance Standards for Float-Free Satellite EPIRBs operating on 406 MHz (resolution A.810(19)).
—Any other business such as papers submitted by other delegations to the Subcommittee.

Members of the public may attend this meeting up to the seating capacity of the room. To facilitate attendance, those who plan to attend should contact the meeting coordinator, Mr. Russell S. Levin, by writing: U.S. Coast Guard Headquarters, Commandant (CG–622), 2100 Second Street, SW., Stop 7101, Washington DC, 20593–7101 or by sending Internet electronic mail to *Russell.S.Levin@USCG.mil* not later than 72 hours before the meeting. A member of the public needing

reasonable accommodation should make his or her request at least 7 days prior to a meeting. Requests submitted after that date will be considered, but might not be able to be fulfilled. Additional information regarding this and other IMO SHC public meetings may be found at: *http://www.uscg.mil/hq/cg5/imo*.

Dated: October 14, 2009.

J. Trent Warner,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. E9–25180 Filed 10–19–09; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 6780]

Notice of Proposal To Extend the Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological Material From the Pre-Hispanic Cultures of the Republic of El Salvador

The Government of the Republic of El Salvador has informed the Government of the United States of its interest in an extension of the Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Imposition of Import Restrictions on Certain Archaeological Material from the Pre-Hispanic Cultures of the Republic of El Salvador, which entered into force on March 8, 1995 and was extended in 2000 and 2005.

Pursuant to the authority vested in the Assistant Secretary for Educational and Cultural Affairs, and pursuant to the requirement under 19 U.S.C. 2602(f)(1), an extension of this Memorandum of Understanding is hereby proposed.

Pursuant to 19 U.S.C. 2602(f)(2), the views and recommendations of the Cultural Property Advisory Committee regarding this proposal will be requested.

A copy of this Memorandum of Understanding, the designated list of restricted categories of material, and related information can be found at the following Web site: *http://exchanges.state.gov/culprop.*

Dated: October 8, 2009.

Maura M. Pally,

Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. E9–25182 Filed 10–19–09; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2009–0001–N–25]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Requirement (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 burden. The **Federal Register** notice with a 60-day comment period soliciting comments on the following collection of information was published on August 10, 2009 (74 FR 39993).

DATES: Comments must be submitted on or before November 19, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 17, Washington, DC 20590 (telephone: (202) 493–6292), or Ms. Nakia Jackson, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6470). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On August 10, 2009, FRA published a 60-day notice in the **Federal Register** soliciting comment on the ICR that the agency was seeking OMB approval. 74 FR 39993. FRA received no comments in response to this notice.

Before OMB decides whether to re-approve this proposed collection of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507 (b)-(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summary below describes the nature of the information collection requirement (ICR) and the expected burden. The ICR is being submitted for clearance by OMB as required by the PRA.

Title: Use of Locomotive Horns at Highway-Rail Grade Crossings.

OMB Control Number: 2130–0560.

Type of Request: Extension of a currently approved collection.

Affected Public: Public authorities/railroads.

Form(s): N/A.

Abstract: The collection of information is used by FRA to increase safety at highway-rail grade crossings nationwide by requiring that locomotive horns be sounded when trains approach and pass through these crossings, or by ensuring that a safety level at least equivalent to that provided by blowing horns exists for rail corridors in which horns are silenced. Communities that qualify for this exception may create ''quiet zones'' within which locomotive horns would not be routinely sounded. FRA reviews applications by public authorities intending to establish new or, in some cases, continue pre-rule quiet zones to ensure that the necessary level of safety is achieved.

Annual Estimated Burden Hours: 5,575.

ADDRESSES: Send comments regarding these information collections to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW., Washington, DC 20503; Attention: FRA Desk Officer. Comments may also be sent via e-mail to OMB at the following address: *oira_submissions@omb.eop.gov.*

Comments are invited on the following: Whether the proposed collections of information are necessary for the proper performance of the functions of FRA, including whether the information will have practical utility; the accuracy of FRA's estimates of the burden of the proposed information

collections; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collections of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC, on October 14, 2009.

Donna Alwine,

Acting Director, Office of Financial Management, Federal Railroad Administration.

[FR Doc. E9–25078 Filed 10–19–09; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[NHTSA–2009–0165]

Reports, Forms, and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (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 collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on March 12, 2009 (74 FR 10804).

DATES: Comments must be received on or before November 19, 2009.

FOR FURTHER INFORMATION CONTACT: David Bonelli, Office of Chief Counsel, NCC–113, telephone (202) 366–1834, fax (202) 366–3820; NHTSA, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Title: Designation of Agent for Service of Process.

OMB Control Number: 2127–0040.

Requested Expiration Date of Approval: Three years from the approval date.

Type of Request: Extension of a previously approved collection.

Affected Public: Business or other for-profit.

Form Number: N/A.

Abstract: This collection of information applies to motor vehicle and motor vehicle equipment manufacturers located outside of the United States (''foreign manufacturers''). Section 110(e) of the National Traffic and Motor Vehicle Safety Act of 1966 (49 U.S.C. 30164) requires a foreign manufacturer offering a motor vehicle or motor vehicle equipment for importation into the United States to designate a permanent resident of the United States as its agent upon whom service of notices and processes may be made in administrative and judicial proceedings. These designations are required to be filed with NHTSA. NHTSA requires this information in case it needs to advise a foreign manufacturer of a safety related defect in its products so that the manufacturer can, in turn, notify purchasers and correct the defect. This information also enables NHTSA to serve a foreign manufacturer with all administrative and judicial processes, notices, orders, decisions and requirements.

When NHTSA amended the regulation implementing that statutory requirement, codified at 49 CFR Part 551, subpart D, NHTSA included an appendix containing a suggested designation form for use by foreign manufacturers and their agents. The purpose of the suggested designation format was to simplify the information collection and submission process, and thereby reduce the burden imposed on each covered manufacturer by 49 CFR Part 551, subpart D. To further streamline the information collection process, NHTSA has set up a customer Web site that may be accessed at *http://www.nhtsa.dot.gov/cars/rules/manufacture/agent/customer.html.*

Estimated Annual Burden: 120 hours.

Estimated Number of Respondents: 240 respondents.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer.

The Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued on: October 15, 2009.

John Donaldson,

Assistant Chief Counsel, Legislation and General Law.

[FR Doc. E9–25218 Filed 10–19–09; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[NHTSA Docket No. NHTSA–2009–0167]

National Emergency Medical Services Advisory Council to the Secretary of Transportation

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: National Advisory Council; Notice of Request for Applicants for Appointment/Reappointment to the National Emergency Medical Services Advisory Council (NEMSAC).

SUMMARY: NHTSA is soliciting applications for appointment or reappointment DOT's NEMSAC. The purpose of NEMSAC is to serve as a nationally recognized council of emergency medical services (EMS) representatives and consumers to provide advice and recommendations regarding EMS to DOT and its modal administration, NHTSA, and through NHTSA to the Federal Interagency Committee on EMS (FICEMS).

DATES: Applications for membership (including resume or curriculum vitae (CV), letters of recommendation, and a statement identifying the EMS sector or discipline that the applicant seeks to represent) should reach NHTSA at the address below on or before 5 p.m. EST, on Friday, November 16, 2009.

ADDRESSES: If you wish to apply for membership, your application should be submitted by:

- *E-mail: NEMSAC@ems.gov.*
- *Fax:* (202) 366–7149.
- *Mail: Use only overnight mail such as UPS or FedEx to*—National Highway Traffic Safety Administration, Office of Emergency Medical Services, Attn: NEMSAC, 1200 New Jersey Avenue, SE., NTI–140, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer, Drew Dawson, Director, Office of Emergency Medical Services, telephone 202–366–9966; e-mail *drew.dawson@dot.gov*, or

Dana Sade, Office of the Chief Counsel, 202–366–5251 or via e-mail at *dana.sade@dot.gov*, or *NEMSAC@ems.gov*.

SUPPLEMENTARY INFORMATION: NEMSAC is an advisory council established by DOT in accordance with the provisions of the Federal Advisory Committee Act (FACA), Public Law 92–463, as amended (5 U.S.C. App.) and DOT Order 1120.3B. NEMSAC provides information, advice, and recommendations to the Secretary via the Administrator of NHTSA, and through NHTSA to FICEMS on matters relating to all aspects of development and implementation of EMS.

In accordance with the NEMSAC Charter, a copy of which is available at *https://www.fido.gov/facadatabase/docs_charters/29152_Charter%20(April%2009)-(2009-04-27-17-34-53).pdf*, members should represent a cross-section of the diverse agencies, organizations, and individuals involved in EMS activities and programs in the U.S. NEMSAC consists of not more than 26 members, each of whom shall be appointed by the Secretary. Members serve in a ''representatives'' capacity on NEMSAC and not as Special Government Employees. Pursuant to the charter, twenty four of these members must represent the perspectives of particular sectors of the EMS community. Members will be selected for their individual expertise and to reflect a balanced representation of interests from across the EMS community, but no member will represent a specific organization.

To the extent practical, the final council membership shall assure representation from the following sectors of the EMS community:

- ➢ Volunteer EMS
- ➢ Fire-based (career) EMS
- ➢ Private (career non-fire) EMS
- ➢ Hospital-based EMS
- ➢ Tribal EMS
- ➢ Air Medical EMS
- ➢ Local EMS service director/administrators
- ➢ EMS Medical Directors
- ➢ Emergency Physicians
- ➢ Trauma Surgeons
- ➢ Pediatric Emergency Physicians
- ➢ State EMS Directors
- ➢ State Highway Safety Directors
- ➢ EMS Educators
- ➢ Public Safety Call-taker/Dispatcher (911)
- ➢ EMS Data Managers
- ➢ EMS Researchers
- ➢ Emergency Nurses
- ➢ Hospital Administration
- ➢ Public Health
- ➢ Emergency Management
- ➢ State Homeland Security Director
- ➢ Consumers (not directly affiliated with an EMS or healthcare organization)
- ➢ State or local legislative bodies (*e.g.* city/county councils; State legislatures)

Qualified individuals interested in serving on the NEMSAC are invited to apply for appointment or reappointment by submitting a resume or CV along with letters of recommendation to the NEMSAC Designated Federal Officer. Each applicant must identify the EMS sector or discipline that he or she seeks to represent. Current NEMSAC members whose terms are ending should notify the Designated Federal Officer of their interest in reappointment in lieu of submitting a new application, and should provide an updated resume or CV and a restatement of the current sector they represent.

The NEMSAC meets in plenary session approximately once per quarter. At least one such quarterly meeting may be held via teleconference, during which NEMSAC sets up public call-in lines to facilitate public participation. Members serve without compensation from the Federal Government; however, pursuant to the terms of the Charter, they receive travel reimbursement and per diem in accordance with applicable Federal Travel Regulations.

Issued on: October 15, 2009.

Jeffrey P. Michael,

Associate Administrator for Research and Program Development.

[FR Doc. E9–25221 Filed 10–19–09; 8:45 am]

BILLING CODE 4910–59–P

Federal Register

Tuesday,

October 20, 2009

Part II

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 218

Taking and Importing Marine Mammals; Military Training Activities and Research, Development, Testing and Evaluation Conducted Within the Mariana Islands Range Complex (MIRC); Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 218

[Docket No. 0907281180–91190–01]

RIN 0648–AX90

Taking and Importing Marine Mammals; Military Training Activities and Research, Development, Testing and Evaluation Conducted Within the Mariana Islands Range Complex (MIRC)

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization for the Department of Defense (including the Navy, the U.S. Air Force (USAF), and the U.S. Marine Corps (USMC)) to take marine mammals incidental to training activities conducted in the Mariana Islands Range Complex (MIRC) study area for the period of March 2010 through February 2015 (amended from the initial request for January 2010 through December 2014). Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that take and requesting information, suggestions, and comments on these proposed regulations.

DATES: Comments and information must be received no later than November 19, 2009.

ADDRESSES: You may submit comments, identified by 0648–AX90, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.
- Hand delivery or mailing of paper, disk, or CD–ROM comments should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

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

FOR FURTHER INFORMATION CONTACT: Jolie Harrison, Office of Protected Resources, NMFS, (301) 713–2289, ext. 166.

SUPPLEMENTARY INFORMATION:

Availability

A copy of the Navy's application, as well as the draft Monitoring Plan and the draft Stranding Response Plan for MIRC, may be obtained by writing to the address specified above (see **ADDRESSES**), telephoning the contact listed above (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*. The Navy's Draft Environmental Impact Statement (DEIS) for MIRC was published on January 30, 2009, and may be viewed at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*. NMFS is participating in the development of the Navy's EIS as a cooperating agency under NEPA.

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) during periods of not more than five consecutive years each if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as:

> an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The National Defense Authorization Act of 2004 (NDAA) (Pub. L. 108–136) modified the MMPA by removing the ''small numbers'' and ''specified geographical region'' limitations and amended the definition of ''harassment'' as it applies to a ''military readiness activity'' to read as follows (Section 3(18)(B) of the MMPA):

> (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or
>
> (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Summary of Request

In August 2008, NMFS received an application from the Navy (which was updated in February, March, and June 2009) requesting authorization for the take of individuals of 28 species of marine mammals incidental to upcoming Department of Defense (including Navy, USMC, and USAF) training activities to be conducted from March 2010 through February 2015 within the MIRC study area, which encompasses a 501,873-square-nautical mile (nm^2) area around the islands of Guam, Tinian, Saipan, Rota, Fallaron de Medenillia, and others and includes ocean areas in both the Pacific Ocean and the Philippine Sea. These training activities are classified as military readiness activities under the provisions of the NDAA. The Navy states, and NMFS concurs, that these military readiness activities may incidentally take marine mammals present within the MIRC Study Area by exposing them to sound from mid-frequency or high frequency active sonar (MFAS/HFAS) or underwater detonations. The Navy requests authorization to take individuals of 27 species of marine mammals by Level B Harassment and 2 individuals of 2 species by Level A Harassment, although injury will likely be avoided through the implementation of the Navy's proposed mitigation measures. Further, although it does not anticipate that it will occur, the Navy requests authorization to take, by injury or mortality, up to 10 beaked whales over the course of the 5-yr regulations.

Description of Specified Activities

Purpose and Background

The Navy's mission is to maintain, train, and equip combat-ready naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas. Section 5062 of

Title 10 of the United States Code directs the Chief of Naval Operations to train all military forces for combat. The Chief of Naval Operations meets that direction, in part, by conducting at-sea training exercises and ensuring naval forces have access to ranges, operating areas (OPAREAs) and airspace where they can develop and maintain skills for wartime missions and conduct research, development, testing, and evaluation (RDT&E) of weapons systems.

The specified training and RDT&E activities addressed in this proposed rule are a subset of the Proposed Action described in the MIRC DEIS, which would support and maintain Department of Defense training and assessments of current capabilities, RDT&E activities, and associated range capabilities (including hardware and infrastructure improvements in the MIRC). Training and RDT&E do not include combat operations, operations in direct support of combat, or other activities conducted primarily for purposes other than training. The Department of Defense proposes to implement actions within the MIRC to:

- Maintain baseline training and RDT&E activities at mandated levels;
- Provide the potential to increase training activities and exercises from current levels;
- Accommodate increased readiness activities associated with the force structure changes (human resources, new platforms, additional weapons systems, including underwater tracking capabilities and training activities to support Intelligence, Surveillance, Reconnaissance, Strike [ISR/Strike]); and
- Implement range complex investment strategies that sustain, upgrade, modernize, and transform the MIRC to accommodate increased use and more realistic training scenarios.

The proposed action would result in the following increases (above those conducted in previous years, i.e., the No Action Alternative in the Navy's DEIS) in activities associated with the annual take of marine mammals:

- Multistrike Exercises and Joint Expeditionary Exercises (most extensive at sea exercises utilizing MFAS)—increase from one exercise in alternate years to one exercise every year.
- Other Major Exercises utilizing MFAS (shorter and less MFAS use)—increase from 1 to 7 exercises.
- Unit Level Anti-submarine Warfare (ASW) Exercises (TRACKEX and TORPEX)—an increase from 34 to 83 exercises.
- Mine Warfare Exercises—an increase from 32 to 53 exercises.
- Bombing Exercises (non-inert)—an increase from 1 to 4 exercises.
- Sinking Exercises—an increase from 1 to 2 exercises.
- Gunnery Exercises—an increase from 32 to 54 exercises.
- Missile Exercises (Air to Surface, live HELLFIRE missile)—an increase from 0 to 2 exercises.

Overview of the MIRC

The U.S. military has been training and operating in the area now defined as the MIRC for over 100 years. The MIRC Study Area (see figure 1–1 in the Navy's application) is located in the Western Pacific (WestPac) and consists of three primary components: ocean surface and undersea areas, special use airspace (SUA), and training land areas. The ocean surface and undersea areas extend from the international waters south of Guam to north of Pagan (CNMI), and from the Pacific Ocean east of the Mariana Islands to the middle of the Philippine Sea to the west, encompassing 501,873 square nautical miles (nm^2) (1,299,851 square kilometers [km^2]) of open ocean and littorals (coastal areas). The MIRC Study Area includes ocean areas in the Philippine Sea, Pacific Ocean, and exclusive economic zones (EEZs) of the United States and Federal States of Micronesia (FSM). The MIRC Study Area includes land ranges and training area/facilities on Guam, Rota, Tinian, Saipan, and Farallon de Medinilla (FDM), encompassing 64 nm^2 (220 km^2) of land. Special Use Airspace (SUA) consists of Warning Area 517 (W–517), restricted airspace over FDM (R–7201), and Air Traffic Control Assigned Airspace (ATCAA) encompassing 63,000 nm^2 (216,000 km^2) of airspace. For range management and scheduling purposes, the MIRC is divided into training areas under different controlling authorities.

Guam is located roughly three quarters of the distance from Hawaii to the Philippines, about 1,600 miles east of Manila and 1,550 miles southeast of Tokyo. The southern extent of the Commonwealth of the Northern Mariana Islands (CNMI) is located 40 miles north of Guam (Rota Island) and extends 330 miles to the northwest. Saipan, the CNMI capital, is 3,300 miles west of Honolulu and 1,470 miles south-southeast of Tokyo. The MIRC is of particular significance for the training of U.S. military forces in the Western Pacific because of its location. As the westernmost complex in U.S. territory, it provides the only opportunity for forward-deployed U.S. forces to train on U.S.-owned lands without having to return to Hawaii or the continental United States.

The seafloor of the MIRC is characterized by the Mariana Trench, the Mariana Basin, the Mariana Ridge, ridges, numerous seamounts, hydrothermal vents, and volcanic activity. These areas are comprised of very deep water with a very rapid transition from the shelf to deep water. The Mariana Trench is located east to south-east of Guam and the Mariana Islands and is characterized by deep depths of 16,404 to 32,808 feet [ft] (5,000 to 10,000 m) (Fryer *et al.*, 2003). The Mariana Basin is located west of Guam and the Mariana Islands, and is characterized by an average depth of 11,483 ft (Taylor and Martinez 2003; Yamazaki *et al.*, 1993). The Mariana Ridge consists of Guam and the Mariana Islands and the waters out to the Mariana Trench, and is characterized by shallow water transitioning to deep water of 11,483 ft (3,500 m) (Taylor and Martinez 2003; Yamazaki *et al.*, 1993). The bottom substrate covering the seafloor in the MIRC is primarily volcanic or marine in nature (Eldredge, 1983).

The waters of the MIRC Study Area undergo an annual cycle of temperature change, however this temperature flux is only a few degrees each year, as would be expected from a tropical climate. The temperature throughout the year ranges from about 25° to 31 °C with an annual mean temperature of 27° to 28 °C for the years ranging from 1984 to 2003 (National Oceanic and Atmospheric Administration [NOAA] 2004). Temperatures increase during the summer and autumn months with peak temperatures occurring in September/October.

The water column in the MIRC Study Area contains a well-mixed surface layer ranging from 295 ft to 410 ft (90 to 125 m). Immediately below the mixed layer is a rapid decline in temperature to the cold deeper waters. Unlike more temperate climates, the thermocline is relatively stable, rarely turning over and mixing the more nutrient-rich waters of the deeper ocean in to the surface layer. This constitutes what has been defined as a ''significant'' surface duct (a mixed layer of constant water temperature extending from the sea surface to 100 feet or more), which influences the transmission of sound in the water. This factor has been included in the modeling analysis of marine mammal impacts.

Marianas Trench Marine National Monument

The Marianas Trench Marine National Monument (the 'Monument') was

established in January 2009 by Presidential Proclamation under the authority of the Antiquities Act (16 U.S.C. 431). The Monument consists of approximately 71,897 square nautical miles (246,600 square kilometers) of submerged lands and waters of the Mariana Archipelago and was designated with the purpose of protecting the submerged volcanic areas of the Mariana Ridge, the coral reef ecosystems of the waters surrounding the islands of Farallon de Pajaros, Maug, and Asuncion in the Commonwealth of the Northern Mariana Islands, and the Mariana Trench. The Monument includes the waters and submerged lands of the three northernmost Mariana Islands (the 'Islands Unit') and only the submerged lands of designated volcanic sites (the 'Volcanic Unit') and the Mariana Trench (the 'Trench Unit') to the extent described as follows: The seaward boundaries of the Islands Unit of the monument extend to the lines of latitude and longitude which lie approximately 50 nautical miles (93 kilometers) from the mean low water line of Farallon de Pajaros (Uracas), Maug, and Asuncion. The inland boundary of the Islands Unit of the monument is the mean low water line. The boundary of the Trench Unit of the Monument extends from the northern limit of the EEZ of the United States in the Commonwealth of the Northern Mariana Islands to the southern limit of the Exclusive Economic Zone of the United States in Guam approximately following the points of latitude and longitude identified in Figure 3.6–1 of the MIRC DEIS. The boundaries of the Volcanic Unit of the Monument include a 1 nautical mile radius centered on each of the islands' volcanic features.

The Monument contains objects of scientific interest, including the largest active mud volcanoes on Earth. The Champagne vent, located at the Eifuku submarine volcano, produces almost pure liquid carbon dioxide. This phenomenon has only been observed at one other site in the world. The Sulfur Cauldron, a pool of liquid sulfur, is found at the Daikoku submarine volcano. The only other known location of molten sulfur is on Io, a moon of Jupiter. Unlike other reefs across the Pacific, the northernmost Mariana reefs provide unique volcanic habitats that support marine biological communities requiring basalt. Maug Crater represents one of only a handful of places on Earth where photosynthetic and chemosynthetic communities of life are known to come together.

The waters of the Monument's northern islands are among the most biologically diverse in the Western Pacific and include the greatest diversity of seamount and hydrothermal vent life yet discovered. These volcanic islands are ringed by coral ecosystems with very high numbers of apex predators, including large numbers of sharks. They also contain one of the most diverse collections of stony corals in the Western Pacific. The northern islands and shoals in the Monument have substantially higher large fish biomass, including apex predators, than the southern islands and Guam. The waters of Farallon de Pajaros (also known as Uracas), Maug, and Asuncion support some of the largest biomass of reef fishes in the Mariana Archipelago.

A portion of the Monument lies within the MIRC, including a small area on the northern border of the MIRC as well as the Volcanic Unit and the Trench Unit (See Figure 3.6–1). Any of the activities identified under the Proposed Action could take place within areas included in the Monument, where they overlap. The Presidential Proclamation establishing the Monument indicates that the prohibitions required by the Proclamation shall not apply to activities and exercises of the Armed Forces, but also that the Armed Forces shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities, that its vessels and aircraft act in a manner consistent, so far as is reasonable and practicable, with the Proclamation.

Specified Activities

As mentioned above, the Navy has requested MMPA authorization to take marine mammals incidental to training or RDT&E activities in the MIRC that would result in the generation of sound or pressure waves in the water at or above levels that NMFS has determined will likely result in take (see Acoustic Take Criteria Section), either through the use of MFAS/HFAS or the detonation of explosives in the water. These activities are discussed in the subsections below. In addition to use of active sonar sources and explosives, these activities include the operation and movement of vessels that are necessary to conduct the training, and the effects of this part of the activities are also analyzed in this document.

The Navy's application also briefly summarizes Maritime and Air Interdiction of Maritime Targets and Air Combat Maneuvers; however, these activities are primarily air based and do not utilize sound sources or explosives in the water. No take of marine mammals is anticipated to result from these activities and, therefore, they are not discussed further.

Activities Utilizing Active Sonar Sources

For the MIRC, the training activities that utilize active tactical sonar sources fall primarily into the category of Anti-submarine Warfare (ASW). This section includes a description of ASW, the active acoustic devices used in ASW exercises, and the exercise types in which these acoustic sources are used.

ASW Training and Active Sonar

ASW involves helicopter and sea control aircraft, ships, and submarines, operating alone or in combination, to locate, track, and neutralize submarines. Various types of active and passive sonars are used by the Navy to determine water depth, locate mines, and identify, track, and target submarines. Passive sonar ''listens'' for sound waves by using underwater microphones, called hydrophones, which receive, amplify and process underwater sounds. No sound is introduced into the water when using passive sonar. Passive sonar can indicate the presence, character and movement of submarines. However, passive sonar provides information about only the bearing (direction) to a sound-emitting source; it does not provide an accurate range (distance) to the source. Also, passive sonar relies on the underwater target itself to provide sufficient sound to be detected by hydrophones. Active sonar is needed to locate objects that emit little or no noise (such as mines or diesel-electric submarines operating in electric mode) and to establish both bearing and range to the detected contact.

Active sonar transmits pulses of sound that travel through the water, reflect off objects and return to a receiver. By knowing the speed of sound in water and the time taken for the sound wave to travel to the object and back, active sonar systems can quickly calculate direction and distance from the sonar platform to the underwater object. There are three types of active sonar: Low frequency, mid-frequency, and high-frequency.

MFAS, as defined in the Navy's MIRC LOA application, operates between 1 and 10 kHz, with detection ranges up to 10 nm (19 km). Because of this detection ranging capability, MFAS is the Navy's primary tool for conducting ASW. Many ASW experiments and exercises have demonstrated that the improved capability (of MFAS over other sources) for long range detection of adversary submarines before they are able to conduct an attack is essential to U.S.

ship survivability. Today, ASW is the Navy's number one war-fighting priority. Navies across the world utilize modern, quiet, diesel-electric submarines that pose the primary threat to the U.S. Navy's ability to perform a number of critical missions. Extensive training is necessary if Sailors on ships and in strike groups are to gain proficiency in using MFAS. If a strike group does not demonstrate MFAS proficiency, it cannot be certified as combat ready.

HFAS, as defined in the Navy's MIRC LOA application, operates at frequencies greater than 10 kilohertz (kHz). At higher acoustic frequencies, sound rapidly dissipates in the ocean environment, resulting in short detection ranges, typically less than five nm (9 km). High-frequency sonar is used primarily for determining water depth, hunting mines and guiding torpedoes.

Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) sonar operates below 1 kHz and is designed to detect extremely quiet diesel-electric submarines at ranges far beyond the capabilities of MFA sonars. There are currently only two ships in use by the Navy that are equipped with LFA sonar; both are ocean surveillance vessels operated by Military Sealift Command (MSC).

Acoustic Sources Used for ASW Exercises in the MIRC

Modern sonar technology has developed a multitude of sonar sensor and processing systems. In concept, the simplest active sonars emit omni-directional pulses (''pings'') and time the arrival of the reflected echoes from the target object to determine range. More sophisticated active sonar emits an omni-directional ping and then rapidly scans a steered receiving beam to provide directional, as well as range, information. More advanced active sonars transmit multiple preformed beams, listening to echoes from several directions simultaneously and providing efficient detection of both direction and range. The types of active sonar sources employed during ASW active sonar training exercises in the MIRC are identified in Table 1.

The SURTASS LFA system may also be used during some of the Navy's training and testing scenarios within the MIRC Study Area (see SURTASS LFA subsection below), however, that system's use was analyzed in other environmental documentation (DON 1999, 2002b, 2007a; NOAA 2002a, 2007).

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Sonar Sources	Frequency (kHz)	Source Level (dB) re 1 µPa @ 1 m	Emission Spacing (m)*	Vertical Directivity	Horizontal Directivity	Associated Platform	System Description	Annual Amount	Unit
AN/SQS-53C	3.5	235	154	Omni	240° forward-looking	Cruiser (CG) and Destroyer (DDG) hull mounted sonar	ASW search, detection, & localization (approximately 120 pings per hour)	1989-summer / 184-winter	Hours
AN/SQS-56C	7.5	225	129	13°	30°	Frigate (FFG) hullmounted sonar	ASW search, detection, & localization (approximately 120 pings per hour)	109-summer / 32-winter	Hours
AN/AQS-22	Classifed (HF)	Classified				Helicopter Dipping sonar	ASW search, detection, & localization (10 pings/dip, 30 seconds between pings), also used to represent AN/AQS-13	440-summer / 152-winter	Hours
AN/BQQ-10	Classifed (HF)	Classified				Submarine hull-mounted sonar	ASW search and attack (approximately one ping per two hours when in use)	6-summer / 6 winter	Hours
AN/SSQ-62 DICASS (sonobuoy, tonal)	8	201	450	Omni	Omni	Helicopter and maritime patrol aircraft (P3 and P8 MPA) dropped sonobuoy	Remotely commanded expendable sonar-equipped buoy (approximately 12 pings per use, 30 secs between pings, 8 buoys per hour)	1568-summer / 86-winter	Buoys
MK-48 torpedo sonar	Classified (>10)	Classified	144	Omni	Omni	Submarine (SSN) launched torpedo (used during TORPEX)	Recoverable and non-explosive exercise torpedo; sonar is active approximately 15 min per torpedo run	20-summer / 20-winter	Torpedoes
AN/SSQ-110A (IEER)	Classified (impulsive, broadband)	Classified	n/a	Omni	Omni	MPA deployed	ASW system consists of explosive acoustic source buoy (contains two 4.1 lb charges) and expendable passive receiver sonobuoy	102-summer / 4-winter	Buoys
AN/SSQ-125 (AEER)	1	Classified	15	Omni	Omni	MPA deployed	ASW system consists of active sonobuoy and expendable passive receiver sonobuoy	102-summer / 4-winter	Buoys
MK-84 Range Pingers	12.9 or 37 (rare)	194	Ping dur. 15 msec / ping every 2 sec	90°		Ships, submarines, weapons, targets, and UUV (8-10 knot platform)	4 pingers max used during a PUTR TORPEX or TRACKEX exercise. Surface ship pingers are at 7 m depth / target or sub pingers at 100 m depth. 8 hours total event duration each during PUTR operational days.	280	Hours
PUTR Transponder	8.8 or 40	186 or 190	n/a		180 upward-looking	Portable Undersea Tracking Range, deployed on ocean floor	2 pingers used 8 hrs per event. One ping every 2 seconds.	280	Hours

Table 1. Active sonar sources in the MIRC and parameters used for modeling them. Many of the actual parameters and capabilities of these sonars are classified. Parameters used for modeling were derived to be as representative as possible. When, however, there were a wide range of potential modeling values, a nominal parameter likely to result in the most impact was used so that the model would err towards overestimation.

*Spacing means distance between pings at the nominal speed

CG – Guided Missile Cruiser; DDG – Guided Missile Destroyer; DICASS – Directional Command-Activated Sonobuoy System; FFG – Fast Frigate; HF – High-Frequency; MF – Mid-Frequency.

ASW sonar systems are deployed from certain classes of surface ships, submarines, helicopters, and fixed-wing maritime patrol aircraft (MPA). Maritime patrol aircraft is a category of fixed-wing aircraft that includes the current P–3C Orion, and the future P–8 Poseidon multimission maritime aircraft. The surface ships used are typically equipped with hull-mounted sonars (passive and active) for the detection of submarines. Fixed-wing MPA are used to deploy both active and passive sonobuoys to assist in locating and tracking submarines or ASW targets during the exercise. Helicopters are used to deploy both active and passive sonobuoys to assist in locating and tracking submarines or ASW targets during the exercise, and to deploy dipping sonar. Submarines are equipped with passive sonar sensors used to locate and prosecute other submarines and/or surface ships during the exercise. The platforms used in ASW exercises are identified below.

Surface Ship Sonars—A variety of surface ships participate in training events, including the Fast Frigate (FFG) and the Guided Missile Destroyer (DDG), and the guided missile cruiser (CG). These three classes of ship are equipped with active as well as passive tactical sonars for mine avoidance and submarine detection and tracking. DDG and CG class ships are equipped with the AN/SQS–53 sonar system (the most powerful system), with a nominal source level of 235 decibels (dB) re 1 μPa @ 1 m. The FFG class ship uses the SQS–56 sonar system, with a nominal source level of 225 decibels (dB) re 1 μPa @ 1 m. Sonar ping transmission durations were modeled as lasting 1 second per ping and omni-directional, which is a conservative assumption that will overestimate potential effects. Actual ping durations will be less than 1 second. The AN/SQS–53 hull-mounted sonar transmits at a center frequency of 3.5 kHz. The SQS–56 transmits at a center frequency of 7.5 kHz. Details concerning the tactical use of specific frequencies and the repetition rate for the sonar pings is classified but was modeled based on the required tactical training setting.

Submarine Sonars—Submarine sonars (e.g., AN/BQQ–10) are used to detect and target enemy submarines and surface ships. Because submarine active sonar use is very rare and in those rare instances, very brief, it is extremely unlikely that use of active sonar by submarines would have any measurable effect on marine mammals. In addition, submarines have a high frequency AN/BQS–15 sonar used for navigation safety and mine avoidance that is not unlike a fathometer in source level or output. There is, at present, no mine training range in the MIRC area. Therefore, given its limited use and rapid attenuation as a high frequency source, the AN/BQS–15 is not expected to result in the take of marine mammals.

Aircraft Sonar Systems—Aircraft sonar systems that would operate in the MIRC include sonobuoys and dipping sonar. Sonobuoys may be deployed by maritime patrol aircraft or helicopters; dipping sonars are used by carrier-based helicopters. A sonobuoy is an expendable device used by aircraft for the detection of underwater acoustic energy and for conducting vertical water column temperature measurements. Most sonobuoys are passive, but some can generate active acoustic signals, as well. Dipping sonar is an active or passive sonar device lowered on cable by helicopters to detect or maintain contact with underwater targets. During ASW training, these systems' active modes are only used briefly for localization of contacts and are not used in primary search capacity.

Extended Echo Ranging and Improved Extended Echo Ranging (EER/IEER) Systems—EER/IEER are airborne ASW systems used to conduct ''large area'' searches for submarines. These systems are made up of airborne avionics ASW acoustic processing and sonobuoy types that are deployed in pairs. The EER/IEER System's active sonobuoy component, the AN/SSQ–110A Sonobuoy, generates an explosive sound impulse and a passive sonobuoy (ADAR, AN/SSQ–101A) that would ''listen'' for the return echo that has been bounced off the surface of a submarine. These sonobuoys are designed to provide underwater acoustic data necessary for naval aircrews to quickly and accurately detect submerged submarines. The sonobuoy pairs are dropped from a maritime patrol aircraft into the ocean in a predetermined pattern with a few buoys covering a very large area. The AN/SSQ–110A Sonobuoy Series is an expendable and commandable sonobuoy. Upon command from the aircraft, the explosive charge would detonate, creating the sound impulse. Within the sonobuoy pattern, only one detonation is commanded at a time. Twelve to twenty SSQ–110A source sonobuoys are used in a typical exercise. Both charges of each sonobuoy would be detonated independently during the course of the training, either tactically to locate the submarine, or when the sonobuoys are commanded to scuttle at the conclusion of the exercise. The AN/SSQ–110A is listed in Table 1 because it functions like a sonar ping, however, the source creates an explosive detonation and its effects are considered in the underwater explosive section.

Advanced Extended Echo Ranging (AEER) System—The proposed AEER system is operationally similar to the existing EER/IEER system. The AEER system will use the same ADAR sonobuoy (SSQ–101A) as the acoustic receiver and will be used for a large area ASW search capability in both shallow and deep water. However, instead of using an explosive AN/SQS–110A as an impulsive source for the active acoustic wave, the AEER system will use a battery powered (electronic) source for the AN/SSQ 125 sonobuoy. The output and operational parameters for the AN/SSQ–125 sonobuoy (source levels, frequency, wave forms, etc.) are classified. However, this sonobuoy is intended to replace the EER/IEER's use of explosives and is scheduled to enter the fleet in 2011. For purposes of analysis, replacement of the EER/IEER system by the AEER system will be assumed to occur at 25% per year as follows: 2011—25% replacement; 2012—50% replacement; 2013—75% replacement; 2014—100% replacement with no further use of the EER/IEER system beginning in 2015 and beyond.

Torpedoes—Torpedoes are the primary ASW weapon used by surface ships, aircraft, and submarines. The guidance systems of these weapons can be autonomous or electronically controlled from the launching platform through an attached wire. The autonomous guidance systems are acoustically based. They operate either passively, exploiting the emitted sound energy by the target, or actively, ensonifying the target and using the received echoes for guidance. The MK–48 submarine-launched torpedo was modeled for active sonar transmissions as a high frequency source during specified training activities within the MIRC. The use of the less powerful MK–46 and MK–54 torpedoes will also occur in the MIRC, however, their use was accounted for by modeling all torpedo use in MIRC as if they were MK–48 torpedoes.

Portable Undersea Tracking Range—The Portable Undersea Tracking Range (PUTR) would be developed to support ASW training in areas where the ocean depth is between 400 m and 3500 m. In MIRC it would likely be deployed in a TORPEX area or in W–517. This system would temporarily instrument up to a 100 square-nautical mile or smaller areas on the seafloor, and would provide high fidelity crew feedback and scoring of crew performance during ASW training activities. No on-shore

construction would take place. Seven electronics packages, each approximately 3 ft long by 2 ft in diameter, would be temporarily installed on the seafloor by a range boat. The anchors used to keep the electronics packages on the seafloor are made of steel, approximately 1.5 ft-by-1.5 ft and 300 pounds. PUTR use is planned for Navy training areas other than MIRC including the Northwest Training Range Complex and Gulf of Alaska. PUTR equipment can be recovered for maintenance or when training is completed. The Navy proposes to deploy this system year round, and to conduct TRACKEX and TORPEX activities for up to 35 days per year at any time of year. During each of the 35 days of annual operation, the PUTR would be in use for up to 8 hours each day. Two separate sound sources are associated with the operation of the PUTR:

• Range tracking pingers—Range tracking pingers would be used on ships, submarines, and ASW targets when training is conducted on the PUTR. A typical MK 84 range tracking pinger generates a 12.9 kHz pulse with a duty cycle of 15 milliseconds and has a design power of 194 dB re 1 micro-Pascal at 1 meter. Ping rate is selectable and typically one pulse every two seconds. Under the proposed action, up to four range pingers would operate simultaneously for 8 hours each of the 35 PUTR operating days per year. Total time operated would be 280 hours annually.

• Transponders—Each transponder package consists of a hydrophone that receives pinger signals, and a transducer that sends an acoustic ''uplink'' of locating data to the range boat. The uplink signal is transmitted at 8.8 kilohertz (kHz) or 40 kHz, at a source level of 190 decibels (dB) at 40 kHz, and 186 dB at 8.8 kHz. The uplink frequency is selectable and typically uses the 40 kHz signal, however the lower frequency may be used when PUTR is deployed in deep waters where conditions may not permit the 40 kHz signal to establish and maintain the uplink. The PUTR system also incorporates an emergency underwater voice capability that transmits at 8–11 kHz and a source level of 190 dB. Under the proposed action, the uplink transmitters would operate 35 days per year, for 8 hours each day of use. Total time operated would be 280 hours annually.

Acoustic Device Countermeasures (ADCs)—ADCs (e.g., AN/SLQ–25 (''NIXIE''), MK–2 and MK–3 are, in effect, decoys to avert localization and/or torpedo attacks. These do not represent a significant source of sound given their intermittent use and operational characteristics (source output level and/or frequency). Given the sporadic use of these devices, the potential to affect marine mammals is unlikely, therefore these sources were not modeled or considered further in this analysis.

Training Targets—ASW training targets are used to simulate opposition submarines. They are equipped with one or a combination of the following devices: (1) Acoustic projectors emanating sounds to simulate submarine acoustic signatures, (2) echo repeaters to simulate the characteristics of the echo of a particular sonar signal reflected from a specific type of submarine, and (3) magnetic sources to trigger magnetic detectors. Based on the operational characteristics (source output level and/or frequency) of these acoustic sources, the potential to affect marine mammals is unlikely, and therefore they were not modeled for this analysis.

SURTASS LFA—SURTASS LFA is a long-range, all-weather, sonar system that operates in the low frequency band (100–500 Hz). The system has both passive and active components. The active system component, LFA, is an augmentation to the passive detection system, and is planned for use when passive system performance proves inadequate. LFA is a set of acoustic transmitting source elements suspended by cable from underneath a ship. These elements, called projectors, are devices that produce the active sound pulse, or ping. The projectors transform electrical energy to mechanical energy that set up vibrations or pressure disturbances within the water to produce a ping. The passive, or listening, part of the system is SURTASS, which detects returning echoes from submerged objects, such as submarines, through the use of hydrophones. The SURTASS hydrophones are mounted on a receive array that is towed behind the vessel. The return signals or echoes, which are usually below background or ambient sound level, are then processed and evaluated to identify and classify potential underwater targets.

In the MIRC Study Area, the military intends to conduct three exercises (multi-strike group exercises) that will include an LFA component during a five-year period that may include both SURTASS LFA and MFA active sonar sources. The expected duration of these combined exercises is approximately 14 days. Based on an exercise of this length, an LFA system would be active (i.e., actually transmitting) for no more than approximately 25 hours. In the combined exercise, LFA sonar is used as a long-range search tool (to find a potential target at long range) while MFA sonar is generally used as a closer-range search tool (to find a target at closer range). The LFA sonar and the MFA sonar would not normally be operated in close proximity to each other. Tactical and technical considerations dictate that the LFA ship would typically be tens of miles from the MFA ship when using active sonar.

Analysis of the environmental impacts of the SURTASS LFA system, including the potential for synergistic and cumulative effects with MFAS operation, was previously presented in a series of Navy EISs and the August, 2009 biological opinion for SURTASS LFA 2009 LOA, and the take of marine mammals incidental to the operation of LFA in the MIRC and elsewhere has been previously authorized by NOAA/NMFS (2002a, 2007). Although the authorization of take of marine mammals incidental to the operation of LFA sonar will not be considered here, NMFS describes and considers the limited manner in which the two separately analyzed systems (LFAS and MFAS) may interact in a multi-strike group exercise in the MIRC.

Exercises Utilizing MFAS in the MIRC

As described above, ASW Exercises are the primary type of exercises that utilize MFAS and HFAS sources in the MIRC. Unit level tracking and torpedo ASW exercises occur regularly in the MIRC. Additionally, in a single year the MIRC will either have several major exercises, or one multi-strike group exercise, that integrate ASW training with other types of training such as air, surface, or strike warfare. ASW exercise descriptions are included below and summarized (along with the exercises utilizing explosives) in Table 2.

ASW Tracking Exercise (TRACKEX)—Generally, TRACKEXs train aircraft, ship, and submarine crews in tactics, techniques, and procedures for search, detection, localization, and tracking of submarines with the goal of determining a firing solution that could be used to launch a torpedo and destroy the submarine. ASW Tracking Exercises occur during both day and night. A typical unit-level exercise involves one (1) ASW unit (aircraft, ship, or submarine) versus one (1) target—either a MK–39 Expendable Mobile ASW Training Target (EMATT), or a live submarine. The target may be non-evading while operating on a specified track or fully evasive. Participating units use active and passive sensors, including hull-mounted sonar, towed arrays, and sonobuoys for tracking. If

the exercise continues into the firing of a practice torpedo it is termed a Torpedo Exercise (TORPEX). The ASW TORPEX usually starts as a TRACKEX to achieve the firing solution. The different types of TORPEXs are further described below.

Torpedo Exercise (TORPEX)—Anti-submarine Warfare (ASW) TORPEX activities train crews in tracking and attack of submerged targets, firing one or two exercise torpedoes (EXTORPs) or recoverable exercise torpedoes (REXTORPs). TORPEX targets and systems used in the Offshore Areas may include live submarines, MK–46, MK–54, and MK–48 torpedoes, MK–30 ASW training targets, and MK–39 Expendable Mobile ASW Training Targets (EMATTs). The target may be non-evading while operating on a specified track, or it may be fully evasive, depending on the training requirements of the training exercise. Submarines periodically conduct torpedo firing training exercises within the MIRC. Typical duration of a submarine TORPEX exercise is 10 hours, while air and surface ASW platform TORPEX exercises using the MK–46 and MK–54 torpedoes are considerably shorter.

Joint Expeditionary Exercise—The Joint Expeditionary Exercise brings different branches of the U.S. military together in a joint environment that includes planning and execution efforts as well as military operations at sea, in the air, and ashore. The purpose of the exercise is to train a U.S. Joint Task Force staff in crisis action planning for execution of contingency operations. It provides U.S. forces an opportunity to practice training together in a joint environment as well as a combined environment with partner nation forces, where more than 8,000 personnel may participate.

The participants and assets could include: Carrier Strike Group with its aircraft carrier, guided missile cruisers and Guided missile destroyers; Amphibious command and assault ships, submarines, logistic ships. It may also include Fleet and Battle Group Staffs, Naval and Air Force aircraft, Marine Expeditionary Units (MEU), and Army Infantry Units. This type of exercise would include activities conducted at sea and in the air and near-shore and ashore activities on Tinian, FDM, Guam, and Saipan.

ASW active sonar activity may include: Single and multi-unit TRACKEX and TORPEX in coordinated ASW events; active ASW sources may include SQS–53; SQS–56; DICASS; IEER/AEER; AQS–22; BQQ–10; MK–48 EXTORP; and, Portable Underwater Tracking Range operation including transponders and MK–84 range tracking pingers.

Marine Air Ground Task Force (Amphibious) (MAGTF) Exercise—This major exercise includes over the horizon, ship to objective maneuver and activities of the ESG and Amphibious MAGTF for up to 10 days. The exercise utilizes all elements of the MAGTF to secure the battlespace (air, land, and sea), maneuver to and seize the objective, and conduct self-sustaining operations ashore with continual logistic support of the ESG. Tinian is the primary MIRC training area for this exercise; however elements of the exercise may be rehearsed nearshore and on Guam.

ASW active sonar activity may include: single and multi-unit TRACKEX and TORPEX in coordinated ASW event; active ASW sources may include SQS–53C/D; SQS–56; DICASS; IEER/AEER; AQS–22; BQQ–10; MK–48 EXTORP and Portable Underwater Tracking Range operation including transponders and MK–84 range tracking pingers.

Joint Multi-Strike Group Exercise—The Joint Multi-Strike Group conducts training involving Navy assets engaging in a schedule of events (SOE) battle scenario, with U.S. forces pitted against a notional opposition force (OPFOR). Participants use and build upon previously gained training skill sets to maintain and improve the proficiency needed for a mission-capable, deployment-ready unit.

The exercise includes several at-sea activities. In Command and Control (C2), a command organization exercises operational control of the assets involved in the exercise. This control includes monitoring for safety and compliance with protective measures. Air Warfare (AW) includes missile exercises which involve firing live missiles at air targets. Ships and aircraft fire missiles against air targets. AW also includes non-firing events such as Defensive Counter Air (DCA). DCA exercises ship and aircrew capabilities at detecting and reacting to incoming airborne threats. In Anti-Surface Warfare (ASUW), Naval forces control sea lanes by countering hostile surface combatant ships.

ASW active sonar activity in this exercise may include: Single and multi-unit TRACKEX and TORPEX in coordinated ASW events; active ASW sources may include SQS–53C/D; SQS–56; DICASS; IEER/AEER; AQS–22; BQQ–10; MK–48 EXTORP; Portable Underwater Tracking Range operation including transponders and MK–84 range tracking pingers.

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EXERCISE TYPE	SINKEX	EER/IEER	DEMO	BOMBEX [A-S]	GUNEX [S–S]	MISSILEX [A-S]	ASW TRACKEX / TORPEX/ OTHER	(Major Ex.) Joint Expedit.	(Major Ex.) MAGTF	MULTI-STRIKE GROUP**
Sources/Weapons/ Rounds	See SINKEX Ordnance Table	SSQ-110A (4.1 pound [lb] NEW)	10 lb NEW (Agat and Apra Harbor)	MK 82/83/84 Series General Purpose Bombs - GBU-38/32/31 JDAM	5 in gun 76 mm gun	HELLFIRE*	AN/SQS-53 MFA Sonar AN/SQS-56 MFA Sonar BQQ-10 Submarine Sonar AN/SSQ-62 DICASS Sonobuoy AN/SSQ-125 AEER Sonobuoy AN/ASQ-22Track Mode (Dipping Sonar) MK-48 Torpedo HFA Sonar PUTR: transponders and MK-84 tracking pinger	AN/SQS-53 MFA Sonar AN/SQS-56 MFA Sonar BQQ-10 Submarine Sonar AN/SSQ-62 DICASS Sonobuoy AN/SSQ-125 AEER Sonobuoy AN/ASQ-22Track Mode (Dipping Sonar) MK-48 Torpedo HFA Sonar		AN/SQS-53 MFA Sonar AN/SQS-56 MFA Sonar BQQ-10 Submarine Sonar AN/SSQ-62 DICASS Sonobuoy AN/SSQ-125 AEER Sonobuoy AN/ASQ-22 Track Mode (Dipping Sonar) MK-48 Torpedo HFA Sonar
Explosion in or on water	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No
Length of Exercise	4-8 hrs over 1-2 days	6 hours	Variable	Variable	1 to 2 hours	2 – 4 hours	8 hours reset for modeling	10 days	10 days	10 days (12 hours reset for modeling)
Detonations/hours/ rounds/sonobuoy or torpedo deployments, or helicopter sonar dips per exercise or year	See SINKEX Ordnance Table	106 deploy/yr (non SINKEX)	50/yr (10 lb)	Delivery of up to (1) bomb / quarter; up to 4 bombs / year	5" - 320 Rounds 76mm – 120 Rounds	2 HELLFIRE Missiles	SQS-53 (Search) = 368 hrs/yr SQS-53 (Kingfisher) = 0 hrs/yr SQS-56 = 64 hrs/yr BQQ-10 = 12 hrs/yr SSQ-62 DICASS = 172 Sonobuoys/yr AN/SSQ-125 AEER = 8 ASQ-22 Track Mode = 304 Dips/yr MK-48 Torpedo = 40 torpedoes/yr PUTR: 8 hours/exercise	Joint Expeditionary and MAGTF combined are same as Multi-strike Group Exercise		SQS-53 (Search) = 1,705 hrs/exercise SQS-53 Kingfisher = 0 hrs/exercise SQS -56 = 77 hrs/exercise BQQ-10 = 0 hrs/exercise SSQ-62 DICASS* = 1,282 Sonobuoys/exercise AN/SSQ-125 AEER = 98 ASQ-22Track Mode = 288 Dips/exercise MK-48 Torpedo* 0 /exercise
Number Exercises per Year	2	N/A	N/A	4	5" – 8/yr 76mm– 4/yr	2	ASW TRACKEX: 66 ASW TORPEX: 17 PUTR: 35	1 (in non-multi-strike year)	4 (in non-multi-strike year)	1
Area Used	W-517; maritime areas > 50 nm from land, ATCAAs	General	Piti Floating Mine Neutral - ization Site, Outer Apra Harbor Deep Agat Bay Mine Neutralization	W-517, maritime areas > 12 nm from land	W-517, maritime areas > 12nm from land, > 3 nm for small arms	W-517 > 12 nm from land,	Maritime areas > 3 nm from land, W-517	General MIRC	General MIRC	General MIRC
Months of Yr	Year Round	Year	Year Round	Year Round	Year	Year Round	Year round	Summer	Summer	Summer

Table 2. Summary of exercises in MIRC Study Area

Activities Utilizing Underwater Detonations

Underwater detonation activities can occur at various depths depending on the activity, but may also include activities with detonations at or just below the surface (such as SINKEX or gunnery exercise [GUNEX]). When the weapons hit the target, except for live torpedo shots, there is no explosion in the water, and so a ''hit'' is not modeled (i.e., the energy (either acoustic or pressure) from the hit is not expected to reach levels that would result in take of marine mammals). When a live weapon misses, it is modeled as exploding below the water surface at 1 ft (5-inch naval gunfire, 76-mm rounds), 2 meters (Maverick, Harpoon, MK–82, MK–83, MK–84), or 50 ft (MK–48 torpedo) as shown in Appendix A of the Navy's application (the depth is chosen to represent the worst case of the possible scenarios as related to potential marine mammals impacts). Exercises may utilize either live or inert ordnance of the types listed in Table 3. Additionally, successful hit rates are known to the Navy and are utilized in the effects modeling. Training events that involve explosives and underwater detonations occur throughout the year and are described below and summarized in Table 2.

Ordnance	Net Explosive Weight	TTS		Injury		Mortality	
		182 SEL	23 psi	205 SEL	13 psi-ms	31 psi-ms	Exclusion Zone Used (m)
5" Naval gunfire	9.54 lbs	235	275	18	44	24	548
76 mm Rounds	1.6 lbs	100	152	8	25	13	548
HELLFIRE	16.5 lbs	424	327	84	112	59	1852 (SINKEX), 1645 (MISSILEX)
HARM**	41.6	689	448	133	156	66	1852 (SINKEX), 1645 (MISSILEX)
Maverick	78.5 lbs	959	554	182	191	107	1852 (SINKEX), 1645 (MISSILEX)
SLAM**	164.3	1406	726	262	237	137	1852 (SINKEX), 1645 (MISSILEX)
Harpoon	448 lbs	1666	847	121	276	160	1852 (SINKEX), 1645 (MISSILEX)
GBU-12**	238	1712	832	315	262	153	1852 (SINKEX), 914 (BOMBEX)
GBU-10**	945	3626	1326	613	373	223	1852 (SINKEX), 914 (BOMBEX)
MK-84/83/82	945 lbs	2260	2260	426	426	213	1851 (SINKEX)
MK-48	851 lbs	2588	1198	228	762	442	1852 (SINKEX)
Demolition Charges	10 lbs	511	353	26	162	82	548
EER/IEER	5 lbs	331	280	17	155	75	914

Table 3. Representative ordnance used in MIRC Explosive Exercises for which take of marine mammals is anticipated.
Table also indicates range to indicated threshold and size of Navy exclusion zone used in mitigation. **Units are meters.**

Sinking Exercise—In a SINKEX, a specially prepared, deactivated vessel is deliberately sunk using multiple weapons systems. The exercise provides training to ship and aircraft crews in delivering both live and inert ordnance on a real target. These target vessels are empty, cleaned, and environmentally-remediated ship hulk. A SINKEX target is towed to sea and set adrift at the SINKEX location. The duration of a SINKEX is unpredictable since it ends when the target sinks, sometimes immediately after the first weapon impact and sometimes only after multiple impacts by a variety of weapons. Typically, the exercise lasts for 4 to 8 hours over 1 to 2 days. SINKEXs occur only occasionally during MIRC exercises. Potential harassment would be from underwater detonation. SINKEX events have been conducted in the open ocean of the western Pacific and within the MIRC, in compliance with 40 CFR 229.2.

The Environmental Protection Agency (EPA) grants the Navy a general permit through the Marine Protection, Research, and Sanctuaries Act to transport vessels ''for the purpose of sinking such vessels in ocean waters…'' (40 CFR 229.2). Subparagraph (a)(3) of this regulation states ''All such vessel sinkings shall be conducted in water at least 1,000 fathoms (6,000 feet) deep and at least 50 nautical miles from land.''

SINKEX events typically include at least one surface combatant (frigate, destroyer, or cruiser); one submarine; and numerous fixed-wing and rotary-wing aircraft. One surface ship will serve as a surveillance platform to ensure the hulk does not pose a hazard to navigation prior to and during the SINKEX. The weapons actually expended during a SINKEX can vary greatly. Table 1–2 in the Navy's application indicates the typical ordnance used in a SINKEX, which include HARPOON, HELLFIRE, and MAVERICK missiles, 5′ gunfire, MK–48 torpedoes, and underwater demolitions. This table reflects the planning for weapons, which may be expended during one SINKEX in the MIRC Study Area. This level of ordnance is expected for each of the SINKEX events in the Joint Multi-strike Group exercise. With the exception of the torpedo, which is designed to explode below the target hulk in the water column, the weapons deployed during a SINKEX are intended to strike the target hulk, and thus not explode within the water column.

Surface-to-Surface Gunnery Exercise—S–S GUNEX take place in the open ocean to provide gunnery practice for Navy and Coast Guard ship crews. GUNEX training activities conducted in the offshore study area involve stationary targets such as a MK–42 floating at-sea target (FAST) or a MK–58 marker (smoke) buoy. The gun systems employed against surface targets include the 5-inch, 76 millimeter (mm), 25-mm chain gun, 20-mm Close-in Weapon System (CIWS), and 50-caliber machine gun. Typical ordnance expenditure for a single GUNEX is a minimum of 21 rounds of 5-inch or 76-mm ammunition, and approximately 150 rounds of 25-mm or .50-caliber ammunition. Both live and inert training rounds are used. After impacting the water, the rounds and fragments sink to the bottom of the ocean. A GUNEX lasts approximately 1 to 2 hours, depending on target services and weather conditions. The live 5-inch and 76-mm rounds are considered in the underwater detonation modeling.

Air-to-Surface Gunnery Exercise (A–S GUNEX)—A–S GUNEX training activities are conducted by rotary-wing aircraft against stationary targets (Floating at-sea Target [FAST] and smoke buoy). Rotary-wing aircraft involved in this activity would include a single helicopter using either 7.62-mm or .50-caliber door-mounted machine guns. A typical GUNEX will last approximately one hour and involve the

expenditure of approximately 400 rounds of 0.50-caliber or 7.62-mm ammunition. Due to their being inert and the small size of the rounds, they are not considered to have an underwater detonation impact.

Air-to-Surface Missile Exercise (A–S MISSILEX)—The A–S MISSILEX consists of the attacking platform releasing a forward-fired, guided weapon at the designated towed target. The exercise involves locating the target, then designating the target, usually with a laser. A–S MISSILEX training that does not involve the release of a live weapon can take place if the attacking platform is carrying a captive air training missile (CATM) simulating the weapon involved in the training. The CATM MISSILEX is identical to a live-fire exercise in every aspect except that a weapon is not released. The training requires a laser-safe range as the target is designated just as in a live-fire exercise. From 1 to 16 aircraft, carrying live, inert, or CATMs, or flying without ordnance (dry runs) are used during the exercise. At sea, seaborne powered targets (SEPTARs), Improved Surface Towed Targets (ISTTs), and decommissioned hulks are used as targets. A–S MISSILEX assets include helicopters and/or 1 to 16 fixed-wing aircraft with air-to-surface missiles and anti-radiation missiles (electromagnetic radiation source seeking missiles). Targets include SEPTARs, ISTTs, and excess ship hulks. When HELLFIRE Missiles are used the exercise is called a HELLFIRE MISSILEX. HELLFIRE MISSILEXs would occur 2 times per year in an area approximately 30–35 nm south of Apra Harbor in W–517. Potential harassment would be from underwater detonation.

Surface-to-Surface Missile Exercise (S–S MISSILEX)—S–S MISSILEX involves the attack of surface targets at sea by use of cruise missiles or other missile systems, usually by a single ship conducting training in the detection, classification, tracking and engagement of a surface target. S–S MISSILEXs always occur during a SINKEX. Engagement is usually with HARPOON missiles or Standard missiles in the surface-to-surface mode. Targets could include virtual targets or the SEPTAR or ship deployed surface target. S–S MISSILEX training is routinely conducted on individual ships with embedded training devices. A S–S MISSILEX could include 4 to 20 surface-to-surface missiles, SEPTARs, a weapons recovery boat, and a helicopter for environmental and photo evaluation. All missiles are equipped with instrumentation packages or a warhead. Surface-to-air missiles can also be used in a surface-to-surface mode. Each exercise typically lasts five hours. Future S–S MISSILEX could range from 4 to 35 hours. Potential harassment would be from underwater detonation.

Air-to-Surface Bombing Exercise—During an Air-to-Surface Bombing Exercise (BOMBEX A–S), fixed-wing aircraft deliver bombs against simulated surface maritime targets, typically a smoke float, with the goal of destroying or disabling enemy ships or boats. Typically, a flight of two aircraft will approach the target from an altitude of between 15,000 ft to less than 3,000 ft, and will adhere to designated ingress and egress routes. Typical bomb release altitude is below 3,000 ft and within a range of 1000 yards for unguided munitions, and above 15,000 ft and in excess of 10 nm for precision-guided munitions. In most training exercises, the aircrew drops inert training ordnance, such as the Bomb Dummy Unit (BDU–45) on a MK–58 smoke float used as the target. Some BOMBEXs include the use of the MK–84/GBU–31 JDAM, the largest bomb proposed for use. JDAM training would occur 4 times per year in W–517 and generally in the southern portion avoiding known fishing areas. The surface danger zone requires a 25 nm buffer around the aim point, so that all operations occur within W–517. Each BOMBEX A–S can take up to 4 hours to complete.

Mine Neutralization—Mine Neutralization involves the detection, identification, evaluation, rendering safe, and disposal of mines and unexploded ordnance (UXO) that constitutes a threat to ships or personnel. Mine neutralization training can be conducted by a variety of air, surface and undersea assets. Potential harassment would be from underwater detonation.

Tactics for neutralization of ground or bottom mines involve the diver placing a specific amount of explosives, which when detonated underwater at a specific distance from a mine results in neutralization of the mine. Floating, or moored, mines involve the diver placing a specific amount of explosives directly on the mine. Floating mines encountered by Fleet ships in open-ocean areas are detonated at the surface. In support of an expeditionary assault, divers and Navy marine mammal assets deploy in very shallow water depths (10 to 40 feet) to locate mines and obstructions. Divers are transported to the mines by boat or helicopter. Inert dummy mines are used in the exercises. The total net explosive weight used against each mine ranges from less than 1 pound to 20 pounds.

All demolition activities are conducted in accordance with Commander, Naval Surface Forces Pacific (COMNAVSURFPAC) Instruction 3120.8F, Procedures for Disposal of Explosives at Sea/Firing of Depth Charges and Other Underwater Ordnance (DoN 2003). Before any explosive is detonated, divers are transported a safe distance away from the explosive. Standard practices for tethered mines require ground mine explosive charges to be suspended 10 feet below the surface of the water.

EER–IEER AN/SSQ–110A—The Extended Echo Ranging and Improved Extended Echo Ranging (EER/IEER) Systems are airborne ASW systems used in conducting ''large area'' searches for submarines. These systems are made up of airborne avionics ASW acoustic processing and sonobuoy types that are deployed in pairs. The IEER System's active sonobuoy component, the AN/SSQ–110A Sonobuoy, generates a sound similar to a ''sonar ping'' using a small explosive and the passive AN/SSQ–101A ADAR Sonobuoy ''listens'' for the return echo of the ''sonar ping'' that has been bounced off the surface of a submarine. These sonobuoys are designed to provide underwater acoustic data necessary for naval aircrews to quickly and accurately detect submerged submarines. The sonobuoy pairs are dropped from a fixed-wing aircraft into the ocean in a predetermined pattern with a few buoys covering a very large area. The AN/SSQ–110A Sonobuoy Series is an expendable and commandable sonobuoy. Upon command from the aircraft, the bottom payload is released to sink to a designated operating depth. A second command is required from the aircraft to cause the second payload to release and detonate the explosive to generate a ''ping''. There is only one detonation in the pattern of buoys at a time. Potential harassment would be from underwater detonations.

The AEER system (described in the sonar source section) will eventually replace use of the EER/IEER system and was analyzed for this proposed rule.

Vessel Movement

The operation and movement of vessels that is necessary to conduct the training described above is also analyzed here. Training exercises involving vessel movements occur intermittently and are variable in duration, ranging from a few hours up to 10 days. During training, speeds vary and depend on the specific type of activity, although 10–14 knots is considered the typical speed. The Navy logs about 1,000 total vessel days within

the MIRC Study Area during a typical year. Training activities are widely dispersed throughout the large OPAREA, which encompasses 501,873 nm^2 (1,299,851 km^2). Consequently, the density of Navy ships within the Study Area at any given time is low.

Research, Development, Testing, and Evaluation

The Services may conduct RDT&E, engineering, and fleet support for command, control, and communications systems and ocean surveillance in the MIRC. These activities may include ocean engineering, missile firings, torpedo testing, manned and unmanned submersibles testing, unmanned aerial vehicle (UAV) tests, electronic combat (EC), and other DoD weapons testing.

RDT&E activities, if they have a potential for takes of marine mammals, will be reviewed to assure they are included within the parameters of existing sonar and explosive activities as modeled for this rule and the LOAs. As an example, if a new model of SQS 53 sonar were tested, as long as it's operating parameters are within the parameters modeled, an equal number of hours of SQS 53C use in training would be deducted to ensure that the total SQS 53C hours for the year (training plus RDT&E) remain within those described in the rule. The same would apply for explosives, overall NET explosive weights for similar munitions would be reviewed to assure compliance with existing rules.

Additional information on the Navy's proposed activities may be found in the LOA Application and the Navy's MIRC DEIS.

Description of Marine Mammals in the Area of the Specified Activities

Thirty-two marine mammal species or populations/stocks have confirmed or possible occurrence within the MIRC, including seven species of baleen whales (mysticetes), 22 species of toothed whales (odontocetes), two species of seal (pinnipeds), and the dugong (sirenian). Table 4 summarizes their abundance, Endangered Species Act (ESA) status, occurrence, and density in the area. Seven of the species are ESA-listed and considered depleted under the MMPA: Blue whale; fin whale; humpback whale; sei whale; sperm whale; North Pacific right whale; Hawaiian monk seal; and dugong. The dugong is managed by the U.S. Fish and Wildlife Service and will not be addressed further here.

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Common Name	Species Name	IUCN/ ESA/ MMPA Status	Occurrence		Density
			Summer July-Nov	Winter Dec-June	
Mysticetes					
Blue whale	*Balaenoptera musculus*	E, D, S	Rare	Rare	0.0001***
Fin whale	*Balaenoptera physalus*	E, D, S	Rare	Regular	0.0003***
Sei whale	*Balaenoptera borealis*	E, D, S	Rare	Regular	.00029*
Bryde's whale	*Balaenoptera edeni*		Regular	Regular	.00041*
Minke whale	*Balaenoptera acutorostrata*		Rare	Regular	.0003***
Humpback whale	*Megaptera novaeangliae*	E, D, S	Rare	Regular	.0069***
North Pacific right whale	*Eubalaena japonica*	E, D, S	Rare	Rare	n/a
Odontocetes					
Sperm whale	*Physeter macrocephalus*	E, D, S	Regular	Regular	.00123*
Blainville's beaked whale	*Mesoplodon densirostris*		Regular	Regular	.00117**
Bottlenose dolphin	*Tursiops truncatus*		Regular	Regular	.00021*
Cuvier's beaked whale	*Ziphius cavirostris*		Regular	Regular	.00621**
Dwarf sperm whale	*Kogia sima*		Regular	Regular	.00714**
False killer whale	*Pseudorca crassidens*		Regular	Regular	.00111*
Fraser's dolphin	*Lagenodelphis hosei*		Regular	Regular	.00417**
Ginkgo-tooth beaked whale	*Mesoplodon ginkgodens*		Rare	Rare	.0005***
Hubbs beaked whale	*Mesoplodon carlhubbsi*		Extra-limital	Extra-limital	n/a
Indo-Pacific bottlenose dolphin	*Tursiops aduncus*		Extra-limital	Extra-limital	n/a
Killer whale offshore	*Orcinus orca*		Regular	Regular	.00014**
Longman's beaked whale	*Indopacetus pacificus*		Regular	Rare	.00041**
Melon-headed whale	*Peponocephala electra*		Regular	Regular	.00428*
Pantropical spotted dolphin	*Stenella attenuata*		Regular	Regular	.0226*
Pygmy killer whale	*Feresa attenuata*		Regular	Regular	.00014*
Pygmy sperm whale	*Kogia breviceps*		Regular	Regular	.00291**
Risso's dolphin	*Grampus griseus*		Regular	Regular	.00097**
Rough-toothed dolphin	*Steno bredanensis*		Regular	Regular	.00029*
Short-beaked common dolphin	*Delphinus delphis*		Rare	Rare	.0021***
Short-finned pilot whale	*Globicephala macrorhynchus*		Regular	Regular	.00159*
Spinner dolphin	*Stenella longirostris*		Regular	Regular	.00314*
Striped dolphin	*Stenella coeruleoalba*		Regular	Regular	.00616*
Pinniped					
Northern elephant seal	*Mirounga angustirostris*		Extra-limital	Extra-limital	n/a
Hawaiian Monk Seal	*Monachus schauinslandi*	T, D, S	Extra-limital	Extra-limital	n/a
Sirenia					
Dugong	*Dugong dugon*	E, V	Extra-limital	Extra-limital	n/a

Table 4. Marine Mammals of known or possible occurrence in MIRC. Table includes status, ocurrence, and density.

* Density derived from 2007 Mariana Islands Survey (MISTCS Report - DoN 2007)

**Density derived from Hawaii Offshore Report (Barlow 2006)

*** Density derived from Eastern Tropical Pacific (Ferguson and Barlow 2001, 2003)

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Species Not Considered Further

North Pacific right whale—The likelihood of a North Pacific right whale (Eubalaena japonica) occurring in the action area is extremely low. The North Pacific right whale population is the most endangered of the large whale species (Perry *et al.,* 1999) and, currently, there is no reliable population estimate for this species, although the population in the western North Pacific Ocean is considered to be very small, perhaps in the tens to low hundreds of animals. Despite many years of systematic aerial and ship-based surveys for marine mammals off the western coast of the U.S., only seven documented sightings of right whales were made from 1990 through 2005 near Alaska (Waite *et al.,* 2003; Wade *et al.,* 2006). Based on this information, it is highly unlikely for a right whale to be present in the action area. Consequently, this species will not be considered in the remainder of this analysis.

Hawaiian monk seal—The likelihood of a Hawaiian monk seal (Monachus schauinslandi) being present in the action area is extremely low. There are no confirmed records of Hawaiian monk seals in the Micronesia region; however, Reeves *et al.* (1999) and Eldredge (1991, 2003) have noted occurrence records for

seals (unidentified species) in the Marshall and Gilbert islands. It is possible that Hawaiian monk seals wander from the Hawaiian Islands to appear at the Marshall or Gilbert Islands in the Micronesia region (Eldredge 1991). However, given the extremely low likelihood of this species occurrence in the action area, the Hawaiian monk seal will not be considered in the remainder of this analysis.

Hubbs Beaked Whale—The likelihood of a Hubbs beaked whale (Mesoplodon carlhubbsi) occurring in the action area is extremely low. There are no occurrence records for the Mariana Islands and the nearest records are from strandings in Japan (DoN 2005). Recent data suggests that the distribution is likely north of 30° N (MacCleod *et al.,* 2006). Given the extremely low likelihood of this species occurrence in the action area, the Hubbs beaked whale will not be considered in the remainder of this analysis.

Indo-Pacific Bottlenose Dolphin—The likelihood of an Indo-Pacific bottlenose dolphin (Tursiops aduncas) occurring in the action area is extremely low. The Indo-Pacific bottlenose dolphin is generally associated with continental margins and does not appear to occur around offshore islands that are great distances from a continent, such as the Marianas (Jefferson as cited in DoN 2005). Given the extremely low likelihood of this species occurrence in the action area, the Indo-Pacific bottlenose dolphin will not be considered in the remainder of this analysis.

Northern Elephant Seal—Northern elephant seals (Mirounga angustirostris) are common on islands and mainland haul-out sites in Baja California, Mexico north through central California. Elephant seals spend several months at sea feeding and travel as far as the Gulf of Alaska. Occasionally juveniles wander great distances with several individuals being observed in Hawaii and Japan. Although elephant seals may wander great distances it is very unlikely that they would travel to Japan or Hawaii and then continue traveling to the MIRC. Given the extremely low likelihood of this species occurrence in the action area, the northern elephant seal will not be considered in the remainder of this analysis.

The Navy has compiled information on the abundance, behavior, status and distribution, and vocalizations of marine mammal species in the MIRC waters from the Navy Marine Resource Assessment and has supplemented this information with additional citations derived from new survey efforts and scientific publications. NMFS has not designated stocks of marine mammals in the waters surrounding the MIRC and, therefore, does not compile stock assessment reports for this area. This information may be viewed in the Navy's LOA application and/or the Navy's DEIS for MIRC (see Availability), and is incorporated by reference herein.

There are no designated marine mammal critical habitats or known breeding areas within the MIRC. Much is unknown about the reproductive habits of the dolphin species in MIRC, but they are thought to mate throughout their range (like better studied species and stocks are known to do) and possibly throughout the year. Even less is known about the mating habits of beaked whales. Baleen whales and sperm whales are thought to breed seasonally in areas within and around the MIRC and some calves have been seen with sperm, Bryde's and sei whales (DoN 2007b), although it is not known where exactly breeding and calving occurs.

Spinner dolphins, which rest primarily during the day in relatively large groups, are known to consistently use certain areas (usually bays) for this function. Because of this, they are regularly visited by whalewatching boats or other members of the public interested in viewing or interacting with them, which could potentially put them at increased energetic risk if their resting cycles are repeatedly interrupted in a significant manner. There are several recognized resting areas for spinner dolphins in the MIRC Study Area: Agat Bay, Bile/Tougan Bay, and Double Reef. These areas are in clear, calm, shallow waters sheltered from prevailing tradewinds.

Marine Mammal Hearing and Vocalizations

Cetaceans have an auditory anatomy that follows the basic mammalian pattern, with some changes to adapt to the demands of hearing in the sea. The typical mammalian ear is divided into an outer ear, middle ear, and inner ear. The outer ear is separated from the inner ear by a tympanic membrane, or eardrum. In terrestrial mammals, the outer ear, eardrum, and middle ear transmit airborne sound to the inner ear, where the sound waves are propagated through the cochlear fluid. Since the impedance of water is close to that of the tissues of a cetacean, the outer ear is not required to transduce sound energy as it does when sound waves travel from air to fluid (inner ear). Sound waves traveling through the inner ear cause the basilar membrane to vibrate. Specialized cells, called hair cells, respond to the vibration and produce nerve pulses that are transmitted to the central nervous system. Acoustic energy causes the basilar membrane in the cochlea to vibrate. Sensory cells at different positions along the basilar membrane are excited by different frequencies of sound (Pickles, 1998). Baleen whales have inner ears that appear to be specialized for low-frequency hearing. Conversely, dolphins and porpoises have ears that are specialized to hear high frequencies.

Marine mammal vocalizations often extend both above and below the range of human hearing; vocalizations with frequencies lower than 18 Hertz (Hz) are labeled as infrasonic and those higher than 20 kHz as ultrasonic (National Research Council [NRC], 2003; Figure 4–1). Measured data on the hearing abilities of cetaceans are sparse, particularly for the larger cetaceans such as the baleen whales. The auditory thresholds of some of the smaller odontocetes have been determined in captivity. It is generally believed that cetaceans should at least be sensitive to the frequencies of their own vocalizations. Comparisons of the anatomy of cetacean inner ears and models of the structural properties and the response to vibrations of the ear's components in different species provide an indication of likely sensitivity to various sound frequencies. The ears of small toothed whales are optimized for receiving high-frequency sound, while baleen whale inner ears are best in low to infrasonic frequencies (Ketten, 1992; 1997; 1998).

Baleen whale vocalizations are composed primarily of frequencies below 1 kHz, and some contain fundamental frequencies as low as 16 Hz (Watkins *et al.,* 1987; Richardson *et al.,* 1995; Rivers, 1997; Moore *et al.,* 1998; Stafford *et al.,* 1999; Wartzok and Ketten, 1999) but can be as high as 24 kHz (humpback whale; Au *et al.,* 2006). Clark and Ellison (2004) suggested that baleen whales use low frequency sounds not only for long-range communication, but also as a simple form of echo ranging, using echoes to navigate and orient relative to physical features of the ocean. Information on auditory function in mysticetes is extremely lacking. Sensitivity to low-frequency sound by baleen whales has been inferred from observed vocalization frequencies, observed reactions to playback of sounds, and anatomical analyses of the auditory system. Although there is apparently much variation, the source levels of most baleen whale vocalizations lie in the range of 150–190 dB re 1 μPa at 1

m. Low-frequency vocalizations made by baleen whales and their corresponding auditory anatomy suggest that they have good low-frequency hearing (Ketten, 2000), although specific data on sensitivity, frequency or intensity discrimination, or localization abilities are lacking. Marine mammals, like all mammals, have typical U-shaped audiograms that begin with relatively low sensitivity (high threshold) at some specified low frequency with increased sensitivity (low threshold) to a species specific optimum followed by a generally steep rise at higher frequencies (high threshold) (Fay, 1988).

The toothed whales produce a wide variety of sounds, which include species-specific broadband ''clicks'' with peak energy between 10 and 200 kHz, individually variable ''burst pulse'' click trains, and constant frequency or frequency-modulated (FM) whistles ranging from 4 to 16 kHz (Wartzok and Ketten, 1999). The general consensus is that the tonal vocalizations (whistles) produced by toothed whales play an important role in maintaining contact between dispersed individuals, while broadband clicks are used during echolocation (Wartzok and Ketten, 1999). Burst pulses have also been strongly implicated in communication, with some scientists suggesting that they play an important role in agonistic encounters (McCowan and Reiss, 1995), while others have proposed that they represent ''emotive'' signals in a broader sense, possibly representing graded communication signals (Herzing, 1996). Sperm whales, however, are known to produce only clicks, which are used for both communication and echolocation (Whitehead, 2003). Most of the energy of toothed whales social vocalizations is concentrated near 10 kHz, with source levels for whistles as high as 100–180 dB re 1 µPa at 1 m (Richardson *et al.,* 1995). No odontocete has been shown audiometrically to have acute hearing (<80 dB re 1 µPa) below 500 Hz (DoN, 2001). Sperm whales produce clicks, which may be used to echolocate (Mullins *et al.,* 1988), with a frequency range from less than 100 Hz to 30 kHz and source levels up to 230 dB re 1 µPa 1 m or greater (Mohl *et al.,* 2000).

Table 5 includes a summary of the vocalizations of the species found in the MIRC. The ''Brief Background on Sound'' section below contains a description of the functional hearing groups designated by Southall *et al.* (2007), which includes the functional hearing range of various marine mammal groups (i.e., what frequencies that can actually hear).

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Species	Signal Type	Frequency Range (kHz)	Frequency Near Max Energy (kHz)	Source Level (dB re 1	Duration / Other
Blue whale	moans, long duration songs	0.012 - .4	.012 - .025	188	up to 36 s, repeated every 1 - 2 min
	FM sweeps	0.858 ± 0.148			< 5 s
	vocalizations	0.012 - .4	.012 - .025		
Fin whale	vocalizations	- / .015 - .028	- / -	159-184 / 185-192	
	moans	0.016 - 0.75	0.02	160-190	
	pulses	0.04 - 0.075 / 0.018 - 0.025	- / 0.02		
	ragged pulse	< 0.03			
	rumbles	- / 0.01 - 0.03	< 0.03 / -		
	moans, downsweeps	0.014 - 0.118	0.02	160-186	
	constant call	0.02 - 0.04			
	moans, tones, upsweeps	0.03 - 0.75		155-165	
	whistles, chirps	1.5 - 5	1.5 - 2.5		
	clicks	16 - 28			
	vocal sequence, ? only	0.015 - 0.03			
	FM sweeps	0.018 - .23		184 - 186	1 s
Humpback whale	social	.020 - 10 / 0.05 -10	<3 / 0.1 - 4		
	songs	0.03 - 8 / -	0.12 - 4 / -	144 - 186 / 151-173	
	shrieks		0.75 - 1.8	179-181	
	horn blasts		0.41 - 0.42	181-185	
	moans	0.02 - 1.8	0.035 - 0.36	175	
	grunts	0.025 - 1.9		190	
	pulse trains	0.025 - 1.25	0.025 - 0.080	179-181	
	slap	0.03 - 1.2		183-192	
	feeding calls	0.02 - 2	0.5	162 -192	< 1 s
Calf	simple vocalization	0.14 - 4	0.22 (mean)		
Sei whale	FM sweeps	1.5 - 3.5			7 to 20 sweeps lasting 4 ms
	growls, whooshes, tonal calls	0.433		156	.45 s
	growls and whooshes	0.241 - 0.625		152.4 - 159.6	
Bryde's whale	moans	0.07 - 0.245	0.124 - 0.132	152-174	0.25 to several s
	pulsed moans	0.1 - 0.93	0.165 - 0.9		
	discrete pulses	0.7 - 0.95	0.7 - 0.9		
	call	< 0.06			0.25 to several s
Minke whale	sweeps, moans	0.06 - 0.14		151-175	
	down sweeps	0.06 - 0.13		165	
	moans, grunts	0.06 - 0.14	0.06 - 0.14	151-175	
	ratchet	0.85 - 6	0.85		
	thump trains	0.1 - 2	0.1 - 0.2		
	speed up pulse train	0.2 - 0.4			40 to 60 ms
	slow down pulse train	0.25 - 0.35			70 to 140 ms
	Star Wars vocalization	0.05 - 9.4		150-165	
	Breeding Boings (pulse then amp-mod. call)	1.3 - 1.4			2.5 s with slight frequency modulation
	vocalizations	0.06 - 12			

Table 5a. Summary of mysticete vocalization information compiled from The Biology of Marine Mammals (Reynolds and Rommel (eds), 1999) and the Navy's SOCAL, AFAST, HRC, and MIRC EISs - see those documents for specific information.

Species	Signal Type	Frequency Range (kHz)	Frequency Near Max energy (kHz)	Source Level (dB re	Duration / Other
Sperm whale	clicks	0.1 - 30	2 - 4, 10 - 16	160 - 180	< 30 ms
	short clicks			236	< 1 µs, highly directional
	trumpets			172	
Neonate	clicks		0.5	140 - 162	directionality
Blainville's beaked whale	whistles, chirps	< 1 - 6			
	whistles	2.6 - 10.7			
	echolocation clicks	20 - 40		200 - 220	m
Cuvier's beaked whale	echolocation clicks	20 - 40, 20 - 70		214	> 200 m
	whistles	8 - 12			upsweep lasts 1 s
	pulses	13 - 17			15 to 44 s
Ginkgo-toothed beaked whale					
Longman's beaked whale					
Bottlenose dolphin	whistles	0.8 - 24	3.5 - 14.5	125-173	
	whistle	4 - 20			
	click	0.2 - 150	30 - 60		
	click		110 - 130	218 - 228	
	clicks and burst-pulses	110 - 130		218 - 228	
	bark	0.2 - 16			
Fraser's dolphin	whistles	7.6 - 13.4			< 0.5 s
Pantropical spotted dolpin	whistles	3.1 - 21.4	6.7 - 17.8		
	pulse	up to 150			
	clicks	40 -140		up to 220	
Rough-toothed dolphin	whistles	0.3 - 24			< 1 s
	whistles		4 - 7		
	clicks	0.1 - 200	25		< 250 µsec
	clicks		5 - 32		
	echolocation clicks		50 -65	up to 222	< 40 - 70 µs
Risso's dolphin	whistles		3.5 - 4.5		
	rasp / pulse burst	0.1 - > 8	2 - 5		
	click		65	~120	
	whistle / burst	4 - 22			< 1 sec to several s
	broadband clicks	6 - > 22			
	narrowband grunts	0.4 - 0.8			
	echolocation clicks	30 - 50, 80 - 100		up to 216	
Common dolphin	whistles, chirps		0.5 - 18		
	whistles	4 - 16			
	click	0.2 - 150	30 - 60	170	
	clicks		23 - 67		
	chips and barks	0.5 - 14			
	whistles	2 - 18		180	
Spinner dolphin	pulse	1 - 160	5 - 60		
	whistles	1 - 20 / 1 - 22.5	8 - 12 / 6.8 - 17.9		
	echolocation clicks	up to 65			
	click	1 - 160	60	195 - 222	
Striped dolphin	whistles	1 - 22.5	6.8 - 16.9	109-125	
	whistles	6 - 24	8 - 12.5		
	pulse bursts	wideband	5 - 60	108-115	
Dwarf sperm whale	clicks	13-33			0.3 - 0.5 s
Pygmy sperm whale	clicks	60 - 200	120		
	narrowband pulses		129	175	40-70 ms
	echolocation clicks	60 - 200	120 - 130		
False killer whale	whistles		4 - 9.5		
	clicks		25 -30, 95 - 130	220-228	
	echolocation clicks	20 - 130	40	201 - 225	
Killer whale	whistles	1.5 - 18	6 - 12		
	clicks	0.1 - 35 / 0.25 - 0.5	12 - 25	180	
	scream	2			
	pulsed calls	0.5 - 25	1 - 6	160	
Canadian killer whale	echolocation clicks		45 - 80	195 - 224	< 80 - 120 µs
Norwegian killer whale	echolocation clicks		22 - 49	173 - 202	< 31 - 203 µs
Melon-headed whale	whistles	8 to 12		155	
	clicks	20 - 40		165	
Pygmy killer whale	clicks	45 - 117	70 - 85	197-223	
Short-finned pilot whale	whistles	0.5 - > 20	2 to 14	180	
	click		30 - 60	180	

Table 5b. Summary of odontocete and pinniped vocalization information compiled from The Biology of Marine Mammals (Reynolds and Rommel (eds), 1999) and the Navy's SOCAL, AFAST, HRC, and MIRC EISs - see those documents for specific information.

Marine Mammal Density Estimates

Understanding the distribution and abundance of a particular marine mammal species or stock is necessary to analyze the potential impacts of an action on that species or stock. Further, it is necessary to know the density of the animals in the affected area in order to quantitatively assess the likely acoustic impacts of a potential action on individuals and estimate take (discussed further in the Estimated Take section).

Prior to 2007 there was little information available on the abundance and density of marine mammals in the MIRC Study Area. Most information on the occurrence of marine mammals came from short surveys (several days) and opportunistic sightings (NMFS Platform of Opportunity, oceanographic cruises or strandings). The first comprehensive survey of the area, Mariana Islands Sea Turtle and Cetacean Survey (MISTCS), was funded by the Navy to gather data in support of this analysis and was conducted in early 2007 covering mid January to mid April (DoN 2007b). Densities were calculated for 13 species observed during this survey and are the only published densities derived for this area that are based upon actual sightings. For the purposes of the MIRC analysis, the Navy compiled published densities from other geographical areas with existing survey data and similar oceanography (e.g. sea surface temperature) such as the Hawaiian Islands (Barlow 2003, 2006), warm water areas of the eastern tropical Pacific (Ferguson and Barlow 2001, 2003) and Miyashita (1993). As shown in Table 3–2 of the MIRC application, for the species that MISTCS provided an estimate for, the estimated densities are either mid-range or higher than the other published densities. This, combined with the fact that the MISTCS survey was conducted in the actual MIRC Study Area, supports the Navy's decision to use MISTCS data as the primary source for modeling. Considering the similar habitat and species diversity with the MIRC Study Area, offshore survey data from the Hawaiian Islands (Barlow 2003, 2006) was used as a secondary source. Densities from the Eastern Tropical Pacific survey (Ferguson and Barlow 2001, 2003) were used for six remaining species. Miyashita 1993 was also reviewed; however, no densities from that report were ultimately utilized because the surveys were not conducted in the systematic line transect manner typically used by NMFS, but rather occurred while searching for cetaceans.

The draft MISTCS density report was reviewed by local biologists at NMFS–Pacific Fisheries Science Center (PIFSC) and Pacific Islands Regional Office (PIRO), whose recommendations were incorporated into the final document. The methods used in the final MISTCS report was approved by NMFS PIFSC and PIRO for use in preparation of environmental planning documents for the Mariana Islands.

Brief Background on Sound

An understanding of the basic properties of underwater sound is necessary to comprehend many of the concepts and analyses presented in this document. A summary is included below.

Sound is a wave of pressure variations propagating through a medium (for the MFAS/HFAS considered in this proposed rule, the medium is marine water). Pressure variations are created by compressing and relaxing the medium. Sound measurements can be expressed in two forms: intensity and pressure. Acoustic intensity is the average rate of energy transmitted through a unit area in a specified direction and is expressed in watts per square meter (W/m^2). Acoustic intensity is rarely measured directly, it is derived from ratios of pressures; the standard reference pressure for underwater sound is 1 microPascal (μPa); for airborne sound, the standard reference pressure is 20 μPa (Richardson *et al.,* 1995).

Acousticians have adopted a logarithmic scale for sound intensities, which is denoted in decibels (dB). Decibel measurements represent the ratio between a measured pressure value and a reference pressure value (in this case 1 μPa or, for airborne sound, 20 μPa). The logarithmic nature of the scale means that each 10 dB increase is a ten-fold increase in power (e.g., 20 dB is a 100-fold increase over 10 dB, 30 dB is a 1,000-fold increase over 10dB). Humans perceive a 10-dB increase in noise as a doubling of loudness, or a 10 dB decrease in noise as a halving of loudness. The term ''sound pressure level'' implies a decibel measure and a reference pressure that is used as the denominator of the ratio. Throughout this document, NMFS uses 1 microPascal (denoted re: 1μPa) as a standard reference pressure unless noted otherwise.

It is important to note that decibels underwater and decibels in air are not the same and cannot be directly compared. To estimate a comparison between sound in air and underwater, because of the different densities of air and water and the different decibel standards (i.e., reference pressures) in water and air, a sound with the same intensity (i.e., power) in air and in water would be approximately 63 dB quieter in air. Thus a sound that is 160 dB loud underwater would have the same approximate effective intensity as a sound that is 97 dB loud in air.

Sound frequency is measured in cycles per second, or Hertz (abbreviated Hz), and is analogous to musical pitch; high-pitched sounds contain high frequencies and low-pitched sounds contain low frequencies. Natural sounds in the ocean span a huge range of frequencies: from earthquake noise at 5 Hz to harbor porpoise clicks at 150,000 Hz (150 kHz). These sounds are so low or so high in pitch that humans cannot even hear them; acousticians call these infrasonic (typically below 20 Hz) and ultrasonic (typically above 20,000 Hz) sounds, respectively. A single sound may be made up of many different frequencies together. Sounds made up of only a small range of frequencies are called ''narrowband'', and sounds with a broad range of frequencies are called ''broadband''; explosives are an example of a broadband sound source and active tactical sonars are an example of a narrowband sound source.

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms derived using auditory evoked potential (AEP) techniques, anatomical modeling, and other data, Southall *et al.* (2007) designate ''functional hearing groups'' for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. Further, the frequency range in which each group's hearing is estimated as being most sensitive is represented in the flat part of the M-weighting functions (which are derived from the audiograms described above, see figure 1 in Southall *et al.* (2007) developed for each group. The functional groups and the associated frequencies are indicated below (though, again, animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): functional hearing is estimated to occur between approximately 7 Hz and 22 kHz;
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): functional hearing is estimated to occur

between approximately 150 Hz and 160 kHz;

• High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): functional hearing is estimated to occur between approximately 200 Hz and 180 kHz;

• Pinnipeds in Water: functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz.

Because ears adapted to function underwater are physiologically different from human ears, comparisons using decibel measurements in air would still not be adequate to describe the effects of a sound on a whale. When sound travels (propagates) away from its source, its loudness decreases as the distance traveled by the sound increases. Thus, the loudness of a sound at its source is higher than the loudness of that same sound a kilometer distant. Acousticians often refer to the loudness of a sound at its source (typically measured one meter from the source) as the source level and the loudness of sound elsewhere as the received level. For example, a humpback whale three kilometers from an airgun that has a source level of 230 dB may only be exposed to sound that is 160 dB loud, depending on how the sound propagates (in this example, it is spherical spreading). As a result, it is important not to confuse source levels and received levels when discussing the loudness of sound in the ocean or its impacts on the marine environment.

As sound travels from a source, its propagation in water is influenced by various physical characteristics, including water temperature, depth, salinity, and surface and bottom properties that cause refraction, reflection, absorption, and scattering of sound waves. Oceans are not homogeneous and the contribution of each of these individual factors is extremely complex and interrelated. The physical characteristics that determine the sound's speed through the water will change with depth, season, geographic location, and with time of day (as a result, in actual MFAS/HFAS operations, crews will measure oceanic conditions, such as sea water temperature and depth, to calibrate models that determine the path the sonar signal will take as it travels through the ocean and how strong the sound signal will be at a given range along a particular transmission path). As sound travels through the ocean, the intensity associated with the wavefront diminishes, or attenuates. This decrease in intensity is referred to as propagation loss, also commonly called transmission loss.

Metrics Used in This Document

This section includes a brief explanation of the two sound measurements (sound pressure level (SPL) and sound exposure level (SEL)) frequently used in the discussions of acoustic effects in this document.

SPL

Sound pressure is the sound force per unit area, and is usually measured in micropascals (μPa), where 1 Pa is the pressure resulting from a force of one newton exerted over an area of one square meter. SPL is expressed as the ratio of a measured sound pressure and a reference level. The commonly used reference pressure level in underwater acoustics is 1 μPa, and the units for SPLs are dB re: 1 μPa.

SPL (in dB) = 20 log (pressure/reference pressure)

SPL is an instantaneous measurement and can be expressed as the peak, the peak-peak, or the root mean square (rms). Root mean square, which is the square root of the arithmetic average of the squared instantaneous pressure values, is typically used in discussions of the effects of sounds on vertebrates and all references to SPL in this document refer to the root mean square. SPL does not take the duration of a sound into account. SPL is the applicable metric used in the risk continuum, which is used to estimate behavioral harassment takes (see Level B Harassment Risk Function (Behavioral Harassment) Section).

SEL

SEL is an energy metric that integrates the squared instantaneous sound pressure over a stated time interval. The units for SEL are dB re: 1 $\mu Pa^2 - s$.

SEL = SPL + 10log(duration in seconds)

As applied to MFAS/HFAS, the SEL includes both the SPL of a sonar ping and the total duration. Longer duration pings and/or pings with higher SPLs will have a higher SEL. If an animal is exposed to multiple pings, the SEL in each individual ping is summed to calculate the total SEL. The total SEL depends on the SPL, duration, and number of pings received. The thresholds that NMFS uses to indicate at what received level the onset of temporary threshold shift (TTS) and permanent threshold shift (PTS) in hearing are likely to occur are expressed in SEL.

Potential Effects of Specified Activities on Marine Mammals

The Navy has requested authorization for the take of marine mammals that may occur incidental to training and RDT&E activities in the MIRC utilizing MFAS/HFAS or underwater detonations. In addition to MFAS/HFAS and underwater detonations, the Navy has analyzed other potential impacts to marine mammals from training activities in the MIRC DEIS, including ship strike, aerial overflights, ship noise and movement, and others, and, in consultation with NMFS as a cooperating agency for the MIRC DEIS, has determined that take of marine mammals incidental to these non-acoustic components of the MIRC is unlikely and, therefore, has not requested authorization for take of marine mammals that might occur incidental to these non-acoustic components. In this document, NMFS analyzes the potential effects on marine mammals from exposure to MFAS/HFAS and underwater detonations, but also includes some additional analysis of the potential impacts from vessel operations in the MIRC.

For the purpose of MMPA authorizations, NMFS' effects assessments serve four primary purposes: (1) To help identify the permissible methods of taking, meaning: the nature of the take (e.g., resulting from anthropogenic noise vs. from ship strike, etc.); the regulatory level of take (i.e., mortality vs. Level A or Level B harassment); and, the amount of take; (2) to inform the prescription of means of effecting the least practicable adverse impact on such species or stock and its habitat (i.e., mitigation); (3) to support the determination of whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival); and (4) to determine whether the specified activity will have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (however, there are no subsistence communities that would be affected in the MIRC).

More specifically, for activities involving sonar or underwater detonations, NMFS' analysis will identify the probability of lethal responses, physical trauma, sensory impairment (permanent and temporary threshold shifts and acoustic masking), physiological responses (particular stress responses), behavioral disturbance (that rises to the level of

harassment), and social responses that would be classified as behavioral harassment or injury and/or would be likely to adversely affect the species or stock through effects on annual rates of recruitment or survival. In this section, we will focus qualitatively on the different ways that MFAS/HFAS and underwater explosive detonations may affect marine mammals (some of which NMFS would not classify as harassment). Then, in the Estimated Take of Marine Mammals Section, NMFS will relate the potential effects to marine mammals from MFAS/HFAS and underwater detonation of explosives to the MMPA regulatory definitions of Level A and Level B Harassment and attempt to quantify those effects.

Exposure to MFAS/HFAS

In the subsections below, the following types of impacts are discussed in more detail: direct physiological impacts, stress responses, acoustic masking and impaired communication, behavioral disturbance, and strandings. An additional useful graphic tool for better understanding the layered nature of potential marine mammal responses to anthropogenic sound is presented in Figure 1 of NMFS' August 13, 2009 biological opinion for SURTASS LFA (available at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*). That document presents a conceptual model of the potential responses of endangered and threatened species upon being exposed to active sonar and the pathways by which those responses might affect the fitness of individual animals that have been exposed, and the resulting impact on the individual animal's ability to reproduce or survive. Literature supporting the framework, with examples drawn from many taxa (both aquatic and terrestrial) was included in the ''Application of this Approach'' and ''Response Analyses'' sections of that document.

Direct Physiological Effects

Based on the literature, there are two basic ways that MFAS/HFAS might directly result in physical trauma or damage: noise-induced loss of hearing sensitivity (more commonly called ''threshold shift'') and acoustically mediated bubble growth. Separately, an animal's behavioral reaction to an acoustic exposure might lead to physiological effects that might ultimately lead to injury or death, which is discussed later in the Stranding section.

Threshold Shift (Noise-Induced Loss of Hearing)

When animals exhibit reduced hearing sensitivity (i.e., sounds must be louder for an animal to recognize them) following exposure to a sufficiently intense sound, it is referred to as a noise-induced threshold shift (TS). An animal can experience temporary threshold shift (TTS) or permanent threshold shift (PTS). TTS can last from minutes or hours to days (i.e., there is recovery), occurs in specific frequency ranges (i.e., an animal might only have a temporary loss of hearing sensitivity between the frequencies of 1 and 10 kHz)), and can be of varying amounts (for example, an animal's hearing sensitivity might be reduced by only 6 dB or reduced by 30 dB). PTS is permanent (i.e., there is no recovery), but also occurs in a specific frequency range and amount as mentioned above for TTS.

The following physiological mechanisms are thought to play a role in inducing auditory TSs: effects to sensory hair cells in the inner ear that reduce their sensitivity, modification of the chemical environment within the sensory cells, residual muscular activity in the middle ear, displacement of certain inner ear membranes, increased blood flow, and post-stimulatory reduction in both efferent and sensory neural output (Southall *et al.,* 2007). The amplitude, duration, frequency, temporal pattern, and energy distribution of sound exposure all affect the amount of associated TS and the frequency range in which it occurs. As amplitude and duration of sound exposure increase, so, generally, does the amount of TS, along with the recovery time. Human non-impulsive noise exposure guidelines are based on exposures of equal energy (the same SEL) producing equal amounts of hearing impairment regardless of how the sound energy is distributed in time (NIOSH 1998). Until recently, previous marine mammal TTS studies have also generally supported this equal energy relationship (Southall *et al.,* 2007). Three newer studies, two by Mooney *et al.* (2009a, 2009b) on a single bottlenose dolphin either exposed to playbacks of Navy MFAS or octave-band noise (4–8 kHz) and one by Kastak *et al.* (2007) on a single California sea lion exposed to airborne octave-band noise (centered at 2.5 kHz), concluded that for all noise exposure situations the equal energy relationship may not be the best indicator to predict TTS onset levels. All three of these studies highlight the inherent complexity of predicting TTS onset in marine mammals, as well as the importance of considering exposure duration when assessing potential impacts. Generally, with sound exposures of equal energy, those that were quieter (lower sound pressure level [SPL]) with longer duration were found to induce TTS onset more than those of louder (higher SPL) and shorter duration (more similar to MFAS). For intermittent sounds, less TS will occur than from a continuous exposure with the same energy (some recovery will occur between intermittent exposures) (Kryter *et al.,* 1966; Ward, 1997). For example, one short but loud (higher SPL) sound exposure may induce the same impairment as one longer but softer sound, which in turn may cause more impairment than a series of several intermittent softer sounds with the same total energy (Ward, 1997). Additionally, though TTS is temporary, very prolonged exposure to sound strong enough to elicit TTS, or shorter-term exposure to sound levels well above the TTS threshold, can cause PTS, at least in terrestrial mammals (Kryter, 1985) (although in the case of MFAS/HFAS, animals are not expected to be exposed to levels high enough or durations long enough to result in PTS).

PTS is considered auditory injury (Southall *et al.,* 2007). Irreparable damage to the inner or outer cochlear hair cells may cause PTS, however, other mechanisms are also involved, such as exceeding the elastic limits of certain tissues and membranes in the middle and inner ears and resultant changes in the chemical composition of the inner ear fluids (Southall *et al.,* 2007).

Although the published body of scientific literature contains numerous theoretical studies and discussion papers on hearing impairments that can occur with exposure to a loud sound, only a few studies provide empirical information on the levels at which noise-induced loss in hearing sensitivity occurs in nonhuman animals. For cetaceans, published data on the onset of TTS are limited to the captive bottlenose dolphin and beluga (Finneran *et al.,* 2000, 2002b, 2005a; Schlundt *et al.,* 2000; Nachtigall *et al.,* 2003, 2004). For pinnipeds in water, data are limited to Kastak *et al.'s* measurement of TTS in one harbor seal, one elephant seal, and one California sea lion.

Marine mammal hearing plays a critical role in communication with conspecifics and in interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (i.e., recovery time), and frequency range of TTS, and

the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during a time when communication is critical for successful mother/calf interactions could have more serious impacts if it were in the same frequency band as the necessary vocalizations and of a severity that it impeded communication. The fact that animals exposed to levels and durations of sound that would be expected to result in this physiological response would also be expected to have behavioral responses of a comparatively more severe or sustained nature is also notable and potentially of more importance than the simple existence of a TTS.

Also, depending on the degree and frequency range, the effects of PTS on an animal could range in severity, although it is considered generally more serious than TTS because it is a permanent condition. Of note, reduced hearing sensitivity as a simple function of development and aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.,* 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost. There is no empirical evidence that exposure to MFAS/HFAS can cause PTS in any marine mammals; instead the probability of PTS has been inferred from studies of TTS (see Richardson *et al.,* 1995).

Acoustically Mediated Bubble Growth

One theoretical cause of injury to marine mammals is rectified diffusion (Crum and Mao, 1996), the process of increasing the size of a bubble by exposing it to a sound field. This process could be facilitated if the environment in which the ensonified bubbles exist is supersaturated with gas. Repetitive diving by marine mammals can cause the blood and some tissues to accumulate gas to a greater degree than is supported by the surrounding environmental pressure (Ridgway and Howard, 1979). The deeper and longer dives of some marine mammals (for example, beaked whales) are theoretically predicted to induce greater supersaturation (Houser *et al.,* 2001b) although recent preliminary empirical data suggests that there is no increase in blood nitrogen levels or formation of bubbles in diving bottlenose dolphins (Houser 2008). If rectified diffusion were possible in marine mammals exposed to high-level sound, conditions of tissue supersaturation could theoretically speed the rate and increase the size of bubble growth. Subsequent effects due to tissue trauma and emboli would presumably mirror those observed in humans suffering from decompression sickness.

It is unlikely that the short duration of MFAS pings would be long enough to drive bubble growth to any substantial size, if such a phenomenon occurs. However, an alternative but related hypothesis has also been suggested: stable bubbles could be destabilized by high-level sound exposures such that bubble growth then occurs through static diffusion of gas out of the tissues. In such a scenario the marine mammal would need to be in a gas-supersaturated state for a long enough period of time for bubbles to become of a problematic size.

Yet another hypothesis (decompression sickness) speculated that rapid ascent to the surface following exposure to a startling sound might produce tissue gas saturation sufficient for the evolution of nitrogen bubbles (Jepson *et al.,* 2003; Fernandez *et al.,* 2005). In this scenario, the rate of ascent would need to be sufficiently rapid to compromise behavioral or physiological protections against nitrogen bubble formation. Alternatively, Tyack *et al.* (2006) studied the deep diving behavior of beaked whales and concluded that ''Using current models of breath-hold diving, we infer that their natural diving behavior is inconsistent with known problems of acute nitrogen supersaturation and embolism.'' Collectively, these hypotheses can be referred to as ''hypotheses of acoustically mediated bubble growth.''

Although theoretical predictions suggest the possibility for acoustically mediated bubble growth, there is considerable disagreement among scientists as to its likelihood (Piantadosi and Thalmann, 2004; Evans and Miller, 2003; Cox *et al.,* 2006; Rommel *et al.,* 2006). Crum and Mao (1996) hypothesized that received levels would have to exceed 190 dB in order for there to be the possibility of significant bubble growth due to supersaturation of gases in the blood (i.e., rectified diffusion). More recent work conducted by Crum *et al.* (2005) demonstrated the possibility of rectified diffusion for short duration signals, but at SELs and tissue saturation levels that are highly improbable to occur in diving marine mammals. To date, Energy Levels (ELs) predicted to cause in vivo bubble formation within diving cetaceans have not been evaluated (NOAA, 2002b). Although it has been argued that traumas from some recent beaked whale strandings are consistent with gas emboli and bubble-induced tissue separations (Jepson *et al.,* 2003), there is no conclusive evidence of this (Rommel *et al.,* 2006). However, Jepson *et al.* (2003, 2005) and Fernandez *et al.* (2004, 2005) concluded that in vivo bubble formation, which may be exacerbated by deep, long-duration, repetitive dives, may explain why beaked whales appear to be particularly vulnerable to MFAS/HFAS exposures. Further investigation is needed to further assess the potential validity of these hypotheses. More information regarding hypotheses that attempt to explain how behavioral responses to MFAS/HFAS can lead to strandings is included in the Behaviorally Mediated Bubble Growth Section, after the summary of strandings.

Acoustic Masking

Marine mammals use acoustic signals for a variety of purposes, which differ among species, but include communication between individuals, navigation, foraging, reproduction, and learning about their environment (Erbe and Farmer, 2000; Tyack, 2000). Masking, or auditory interference, generally occurs when sounds in the environment are louder than, and of a similar frequency as, auditory signals an animal is trying to receive. Masking is a phenomenon that affects animals that are trying to receive acoustic information about their environment, including sounds from other members of their species, predators, prey, and sounds that allow them to orient in their environment. Masking these acoustic signals can disturb the behavior of individual animals, groups of animals, or entire populations.

The extent of the masking interference depends on the spectral, temporal, and spatial relationships between the signals an animal is trying to receive and the masking noise, in addition to other factors. In humans, significant masking of tonal signals occurs as a result of exposure to noise in a narrow band of similar frequencies. As the sound level increases, though, the detection of frequencies above those of the masking stimulus decreases also. This principle is expected to apply to marine mammals as well because of common biomechanical cochlear properties across taxa.

Richardson *et al.* (1995b) argued that the maximum radius of influence of an industrial noise (including broadband low frequency sound transmission) on a marine mammal is the distance from the source to the point at which the noise can barely be heard. This range is determined by either the hearing sensitivity of the animal or the background noise level present. Industrial masking is most likely to affect some species' ability to detect communication calls and natural sounds (i.e., surf noise, prey noise, etc.; Richardson *et al.,* 1995).

The echolocation calls of toothed whales are subject to masking by high frequency sound. Human data indicate low-frequency sound can mask high-frequency sounds (i.e., upward masking). Studies on captive odontocetes by Au *et al.* (1974, 1985, 1993) indicate that some species may use various processes to reduce masking effects (e.g., adjustments in echolocation call intensity or frequency as a function of background noise conditions). There is also evidence that the directional hearing abilities of odontocetes are useful in reducing masking at the high-frequencies these cetaceans use to echolocate, but not at the low-to-moderate frequencies they use to communicate (Zaitseva *et al.,* 1980). A recent study by Nachtigall and Supin (2008) showed that false killer whales adjust their hearing to compensate for ambient sounds and the intensity of returning echolocation signals.

As mentioned previously, the functional hearing ranges of odontocetes, pinnipeds underwater, and mysticetes all overlap the frequencies of the MFAS/HFAS sources used in the Navy's MFAS/HFAS training exercises (although some mysticete's best hearing capacities are likely at frequencies somewhat lower than MFAS). Additionally, in almost all species, vocal repertoires span across the frequencies of these MFAS/HFAS sources used by the Navy. The closer the characteristics of the masking signal to the signal of interest, the more likely masking is to occur. For hull-mounted MFAS/HFAS, which accounts for the largest part of the takes of marine mammals (because of the source strength and number of hours it's conducted), the pulse length and duty cycle of the MFAS/HFAS signal (~ 1 second pulse twice a minute) makes it less likely that masking will occur as a result.

Impaired Communication

In addition to making it more difficult for animals to perceive acoustic cues in their environment, anthropogenic sound presents separate challenges for animals that are vocalizing. When they vocalize, animals are aware of environmental conditions that affect the ''active space'' of their vocalizations, which is the maximum area within which their vocalizations can be detected before they drop to the level of ambient noise (Brenowitz, 2004; Brumm *et al.,* 2004; Lohr *et al.,* 2003). Animals are also aware of environmental conditions that affect whether listeners can discriminate and recognize their vocalizations from other sounds, which is more important than simply detecting that a vocalization is occurring (Brenowitz, 1982; Brumm *et al.,* 2004; Dooling, 2004, Marten and Marler, 1977; Patricelli *et al.,* 2006). Most animals that vocalize have evolved with an ability to make adjustments to their vocalizations to increase the signal-to-noise ratio, active space, and recognizability/distinguishability of their vocalizations in the face of temporary changes in background noise (Brumm *et al.,* 2004; Patricelli *et al.,* 2006). Vocalizing animals can make one or more of the following adjustments to their vocalizations: Adjust the frequency structure; adjust the amplitude; adjust temporal structure; or adjust temporal delivery.

Many animals will combine several of these strategies to compensate for high levels of background noise. Anthropogenic sounds that reduce the signal-to-noise ratio of animal vocalizations, increase the masked auditory thresholds of animals listening for such vocalizations, or reduce the active space of an animal's vocalizations impair communication between animals. Most animals that vocalize have evolved strategies to compensate for the effects of short-term or temporary increases in background or ambient noise on their songs or calls. Although the fitness consequences of these vocal adjustments remain unknown, like most other trade-offs animals must make, some of these strategies probably come at a cost (Patricelli *et al.,* 2006). For example, vocalizing more loudly in noisy environments may have energetic costs that decrease the net benefits of vocal adjustment and alter a bird's energy budget (Brumm, 2004; Wood and Yezerinac, 2006). Shifting songs and calls to higher frequencies may also impose energetic costs (Lambrechts, 1996).

Stress Responses

Classic stress responses begin when an animal's central nervous system perceives a potential threat to its homeostasis. That perception triggers stress responses regardless of whether a stimulus actually threatens the animal; the mere perception of a threat is sufficient to trigger a stress response (Moberg, 2000; Sapolsky *et al.,* 2005; Seyle, 1950). Once an animal's central nervous system perceives a threat, it mounts a biological response or defense that consists of a combination of the four general biological defense responses: behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune response.

In the case of many stressors, an animal's first and most economical (in terms of biotic costs) response is behavioral avoidance of the potential stressor or avoidance of continued exposure to a stressor. An animal's second line of defense to stressors involves the sympathetic part of the autonomic nervous system and the classical ''fight or flight'' response which includes the cardiovascular system, the gastrointestinal system, the exocrine glands, and the adrenal medulla to produce changes in heart rate, blood pressure, and gastrointestinal activity that humans commonly associate with ''stress.'' These responses have a relatively short duration and may or may not have significant long-term effect on an animal's welfare.

An animal's third line of defense to stressors involves its neuroendocrine or sympathetic nervous systems; the system that has received the most study has been the hypothalmus-pituitary-adrenal system (also known as the HPA axis in mammals or the hypothalamus-pituitary-interrenal axis in fish and some reptiles). Unlike stress responses associated with the autonomic nervous system, virtually all neuro-endocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction (Moberg, 1987; Rivier, 1995) and altered metabolism (Elasser *et al.,* 2000), reduced immune competence (Blecha, 2000) and behavioral disturbance. Increases in the circulation of glucocorticosteroids (cortisol, corticosterone, and aldosterone in marine mammals; see Romano *et al.,* 2004) have been equated with stress for many years.

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and distress is the biotic cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the

cost of the stress response would not pose a risk to the animal's welfare. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other biotic functions, which impairs those functions that experience the diversion. For example, when mounting a stress response diverts energy away from growth in young animals, those animals may experience stunted growth. When mounting a stress response diverts energy from a fetus, an animal's reproductive success and its fitness will suffer. In these cases, the animals will have entered a pre-pathological or pathological state which is called ''distress'' (sensu Seyle, 1950) or ''allostatic loading'' (sensu McEwen and Wingfield, 2003). This pathological state will last until the animal replenishes its biotic reserves sufficient to restore normal function. Note that these examples involved a long term (days or weeks) stress response exposure to a stimuli.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses have also been documented fairly well through controlled experiment; because this physiology exists in every vertebrate that has been studied, it is not surprising that stress responses and their costs have been documented in both laboratory and free-living animals (for examples see, Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005; Reneerkens *et al.,* 2002; Thompson and Hamer, 2000). Although no information has been collected on the physiological responses of marine mammals to exposure to anthropogenic sounds, studies of other marine animals and terrestrial animals would lead us to expect some marine mammals to experience physiological stress responses and, perhaps, physiological responses that would be classified as ''distress'' upon exposure to high frequency, mid-frequency and low-frequency sounds.

For example, Jansen (1998) reported on the relationship between acoustic exposures and physiological responses that are indicative of stress responses in humans (for example, elevated respiration and increased heart rates). Jones (1998) reported on reductions in human performance when faced with acute, repetitive exposures to acoustic disturbance. Trimper *et al.* (1998) reported on the physiological stress responses of osprey to low-level aircraft noise while Krausman *et al.* (2004) reported on the auditory and physiology stress responses of endangered Sonoran pronghorn to military overflights. Smith *et al.* (2004a, 2004b) identified noise-induced physiological transient stress responses in hearing-specialist fish (i.e., goldfish) that accompanied short- and long-term hearing losses. Welch and Welch (1970) reported physiological and behavioral stress responses that accompanied damage to the inner ears of fish and several mammals.

Hearing is one of the primary senses marine mammals use to gather information about their environment and to communicate with conspecifics. Although empirical information on the relationship between sensory impairment (TTS, PTS, and acoustic masking) on marine mammals remains limited, it seems reasonable to assume that reducing an animal's ability to gather information about its environment and to communicate with other members of its species would be stressful for animals that use hearing as their primary sensory mechanism. Therefore, we assume that acoustic exposures sufficient to trigger onset PTS or TTS would be accompanied by physiological stress responses because terrestrial animals exhibit those responses under similar conditions (NRC, 2003). More importantly, marine mammals might experience stress responses at received levels lower than those necessary to trigger onset TTS. Based on empirical studies of the time required to recover from stress responses (Moberg, 2000), NMFS also assumes that stress responses could persist beyond the time interval required for animals to recover from TTS and might result in pathological and pre-pathological states that would be as significant as behavioral responses to TTS.

Behavioral Disturbance

Behavioral responses to sound are highly variable and context-specific. Many different variables can influence an animal's perception of and response to (in both nature and magnitude) an acoustic event. An animal's prior experience with a sound or sound source affects whether it is less likely (habituation) or more likely (sensitization) to respond to certain sounds in the future (animals can also be innately pre-disposed to respond to certain sounds in certain ways) (Southall *et al.,* 2007). Related to the sound itself, the perceived nearness of the sound, bearing of the sound (approaching vs. retreating), similarity of a sound to biologically relevant sounds in the animal's environment (i.e., calls of predators, prey, or conspecifics), and familiarity of the sound may affect the way an animal responds to the sound (Southall *et al.,* 2007). Individuals (of different age, gender, reproductive status, etc.) among most populations will have variable hearing capabilities, and differing behavioral sensitivities to sounds that will be affected by prior conditioning, experience, and current activities of those individuals. Often, specific acoustic features of the sound and contextual variables (i.e., proximity, duration, or recurrence of the sound or the current behavior that the marine mammal is engaged in or its prior experience), as well as entirely separate factors such as the physical presence of a nearby vessel, may be more relevant to the animal's response than the received level alone.

Exposure of marine mammals to sound sources can result in (but is not limited to) no response or any of the following observable responses: increased alertness; orientation or attraction to a sound source; vocal modifications; cessation of feeding; cessation of social interaction; alteration of movement or diving behavior; avoidance; habitat abandonment (temporary or permanent); and, in severe cases, panic, flight, stampede, or stranding, potentially resulting in death (Southall *et al.,* 2007). A review of marine mammal responses to anthropogenic sound was first conducted by Richardson (1995). A more recent review (Nowacek *et al.,* 2007) addresses studies conducted since 1995 and focuses on observations where the received sound level of the exposed marine mammal(s) was known or could be estimated. The following sub-sections provide examples of behavioral responses that provide an idea of the variability in behavioral responses that would be expected given the differential sensitivities of marine mammal species to sound and the wide range of potential acoustic sources to which a marine mammal may be exposed. Estimates of the types of behavioral responses that could occur for a given sound exposure should be determined from the literature that is available for each species, or extrapolated from closely related species when no information exists.

Alteration of Diving or Movement—Changes in dive behavior can vary widely. They may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive. Variations in dive behavior may reflect interruptions in biologically significant activities (e.g., foraging) or they may be of little biological significance. Variations in dive behavior may also

expose an animal to potentially harmful conditions (e.g., increasing the chance of ship-strike) or may serve as an avoidance response that enhances survivorship. The impact of a variation in diving resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Nowacek *et al.* (2004) reported disruptions of dive behaviors in foraging North Atlantic right whales when exposed to an alerting stimulus, a reaction, they noted, that could lead to an increased likelihood of ship strike. However, the whales did not respond to playbacks of either right whale social sounds or vessel noise, highlighting the importance of the sound characteristics in producing a behavioral reaction. Conversely, Indo-Pacific humpback dolphins have been observed to dive for longer periods of time in areas where vessels were present and/or approaching (Ng and Leung, 2003). In both of these studies, the influence of the sound exposure cannot be decoupled from the physical presence of a surface vessel, thus complicating interpretations of the relative contribution of each stimulus to the response. Indeed, the presence of surface vessels, their approach and speed of approach, seemed to be significant factors in the response of the Indo-Pacific humpback dolphins (Ng and Leung, 2003). Low frequency signals of the Acoustic Thermometry of Ocean Climate (ATOC) sound source were not found to affect dive times of humpback whales in Hawaiian waters (Frankel and Clark, 2000) or to overtly affect elephant seal dives (Costa *et al.,* 2003). They did, however, produce subtle effects that varied in direction and degree among the individual seals, illustrating the varied nature of behavioral effects and consequent difficulty in defining and predicting them.

Foraging—Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (e.g., bubble nets or sediment plumes), or changes in dive behavior. Noise from seismic surveys was not found to impact the feeding behavior in western grey whales off the coast of Russia (Yazvenko *et al.,* 2007) and sperm whales engaged in foraging dives did not abandon dives when exposed to distant signatures of seismic airguns (Madsen *et al.,* 2006). Balaenopterid whales exposed to moderate SURTASS LFA demonstrated no variation in foraging activity (Croll *et al.,* 2001), whereas five out of six North Atlantic right whales exposed to an acoustic alarm interrupted their foraging dives (Nowacek *et al.,* 2004). Although the received sound pressure level at the animals was similar in the latter two studies, the frequency, duration, and temporal pattern of signal presentation were different. These factors, as well as differences in species sensitivity, are likely contributing factors to the differential response. A determination of whether foraging disruptions incur fitness consequences will require information on or estimates of the energetic requirements of the individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Brownell (2004) reported the behavioral responses of western gray whales off the northeast coast of Sakhalin Island to sounds produced by seismic activities in that region. In 1997, the gray whales responded to seismic activities by changing their swimming speed and orientation, respiration rates, and distribution in waters around the seismic surveys. In 2001, seismic activities were conducted in a known feeding area of these whales and the whales left the feeding area and moved to areas farther south in the Sea of Okhotsk. They only returned to the feeding area several days after the seismic activities stopped. The potential fitness consequences of displacing these whales, especially mother-calf pairs and ''skinny whales,'' outside of their normal feeding area is not known; however, because gray whales, like other large whales, must gain enough energy during the summer foraging season to last them the entire year, sounds or other stimuli that cause them to abandon a foraging area for several days could disrupt their energetics and force them to make trade-offs like delaying their migration south, delaying reproduction, reducing growth, or migrating with reduced energy reserves.

Social relationships—Social interactions between mammals can be affected by noise via the disruption of communication signals or by the displacement of individuals. Sperm whales responded to military sonar, apparently from a submarine, by dispersing from social aggregations, moving away from the sound source, remaining relatively silent and becoming difficult to approach (Watkins *et al.,* 1985). In contrast, sperm whales in the Mediterranean that were exposed to submarine sonar continued calling (J. Gordon pers. Comm. cited in Richardson *et al.,* 1995). Social disruptions must be considered, however, in context of the relationships that are affected. While some disruptions may not have deleterious effects, long-term or repeated disruptions of mother/calf pairs or interruption of mating behaviors have the potential to affect the growth and survival or reproductive effort/success of individuals, respectively.

Vocalizations (also see Masking Section)—Vocal changes in response to anthropogenic noise can occur across the repertoire of sound production modes used by marine mammals, such as whistling, echolocation click production, calling, and singing. Changes may result in response to a need to compete with an increase in background noise or may reflect an increased vigilance or startle response. For example, in the presence of low-frequency active sonar, humpback whales have been observed to increase the length of their ''songs'' (Miller *et al.,* 2000; Fristrup *et al.,* 2003), possibly due to the overlap in frequencies between the whale song and the low-frequency active sonar. A similar compensatory effect for the presence of low frequency vessel noise has been suggested for right whales; right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007). Killer whales off the northwestern coast of the United States have been observed to increase the duration of primary calls once a threshold in observing vessel density (e.g., whale watching) was reached, which has been suggested as a response to increased masking noise produced by the vessels (Foote *et al.,* 2004). In contrast, both sperm and pilot whales potentially ceased sound production during the Heard Island feasibility test (Bowles *et al.,* 1994), although it cannot be absolutely determined whether the inability to acoustically detect the animals was due to the cessation of sound production or the displacement of animals from the area.

Avoidance—Avoidance is the displacement of an individual from an area as a result of the presence of a sound. Richardson *et al.* (1995) noted that avoidance reactions are the most obvious manifestations of disturbance in marine mammals. It is qualitatively different from the flight response, but also differs in the magnitude of the response (i.e., directed movement, rate of travel, etc.). Oftentimes avoidance is temporary, and animals return to the area once the noise has ceased. Longer term displacement is possible, however, which can lead to changes in abundance or distribution patterns of the species in

the affected region if they do not become acclimated to the presence of the chronic sound (Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006). Acute avoidance responses have been observed in captive porpoises and pinnipeds exposed to a number of different sound sources (Kastelein *et al.,* 2001; Finneran *et al.,* 2003; Kastelein *et al.,* 2006a; Kastelein *et al.,* 2006b). Short term avoidance of seismic surveys, low frequency emissions, and acoustic deterrents have also been noted in wild populations of odontocetes (Bowles *et al.,* 1994; Goold, 1996; 1998; Stone *et al.,* 2000; Morton and Symonds, 2002) and to some extent in mysticetes (Gailey *et al.,* 2007), while longer term or repetitive/chronic displacement for some dolphin groups and for manatees has been suggested to be due to the presence of chronic vessel noise (Haviland-Howell *et al.,* 2007; Miksis-Olds *et al.,* 2007).

Maybaum (1993) conducted sound playback experiments to assess the effects of mid-frequency active sonar on humpback whales in Hawaiian waters. Specifically, she exposed focal pods to sounds of a 3.3-kHz sonar pulse, a sonar frequency sweep from 3.1 to 3.6 kHz, and a control (blank) tape while monitoring the behavior, movement, and underwater vocalizations. The two types of sonar signals (which both contained both mid- and low frequency components) differed in their effects on the humpback whales, but both resulted in avoidance behavior. The whales responded to the pulse by increasing their distance from the sound source and responded to the frequency sweep by increasing their swimming speeds and track linearity. In the Caribbean, sperm whales avoided exposure to mid-frequency submarine sonar pulses, in the range of 1000 Hz to 10,000 Hz (IWC 2005).

Kvadsheim *et al.,* (2007) conducted a controlled exposure experiment in which killer whales (*Orcinus orca*) that had been fitted with D-tags were exposed to mid-frequency active sonar (Source A: a 1.0 s upsweep 209 dB @ 1–2 kHz every 10 seconds for 10 minutes; Source B: with a 1.0 s upsweep 197 dB @ 6–7 kHz every 10 s for 10 min). When exposed to Source A, a tagged whale and the group it was traveling with did not appear to avoid the source. When exposed to Source B, the tagged whales along with other whales that had been carousel feeding, ceased feeding during the approach of the sonar and moved rapidly away from the source. When exposed to Source B, Kvadsheim and his co-workers reported that a tagged killer whale seemed to try to avoid further exposure to the sound field by immediately swimming away (horizontally) from the source of the sound; by engaging in a series of erratic and frequently deep dives that seem to take it below the sound field; or by swimming away while engaged in a series of erratic and frequently deep dives. Although the sample sizes in this study are too small to support statistical analysis, the behavioral responses of the orcas were consistent with the results of other studies.

In 2007, the first in the series of behavioral response studies conducted by NMFS and other scientists showed one beaked whale (*Mesoplodon densirostris*) responding to an MFAS playback. The BRS–07 Cruise report indicates that the playback began when the tagged beaked whale was vocalizing at depth (at the deepest part of a typical feeding dive), following a previous control with no sound exposure. The whale appeared to stop clicking significantly earlier than usual, when exposed to mid-frequency signals in the 130–140 dB (rms) received level range. After a few more minutes of the playback, when the received level reached a maximum of 140–150 dB, the whale ascended on the slow side of normal ascent rates with a longer than normal ascent, at which point the exposure was terminated. The BRS–07 Cruise report notes that the results are from a single experiment and that a greater sample size is needed before robust and definitive conclusions can be drawn (NMFS, 2008). The BRS–08 Cruise report has not been published yet.

Flight Response—A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presences of predators have occurred (Connor and Heithaus, 1996). Flight responses have been speculated as being a component of marine mammal strandings associated with MFAS activities (Evans and England, 2001). If marine mammals respond to Navy vessels that are transmitting active sonar in the same way that they might respond to a predator, their probability of flight responses should increase when they perceive that Navy vessels are approaching them directly, because a direct approach may convey detection and intent to capture (Burger and Gochfeld, 1981, 1990, Cooper, 1997, 1998). The probability of avoidance and flight responses should also increase as received levels of active sonar increase (and the ship is, therefore, closer) and as ship speeds increase (that is, as approach speeds increase). For example, the probability of flight responses in Dall's sheep *Ovis dalli dalli* (Frid 2001a, 2001b), ringed seals *Phoca hispida* (Born *et al.,* 1999), Pacific brant (*Branta bernicl nigricans*) and Canada geese (*B. Canadensis*) increased as a helicopter or fixed-wing aircraft approached groups of these animals more directly (Ward *et al.,* 1999). Bald eagles (*Haliaeetus leucocephalus*) perched on trees alongside a river were also more likely to flee from a paddle raft when their perches were closer to the river or were closer to the ground (Steidl and Anthony, 1996).

Breathing—Variations in respiration naturally vary with different behaviors and variations in respiration rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Mean exhalation rates of gray whales at rest and while diving were found to be unaffected by seismic surveys conducted adjacent to the whale feeding grounds (Gailey *et al.,* 2007). Studies with captive harbor porpoises showed increased respiration rates upon introduction of acoustic alarms (Kastelein *et al.,* 2001; Kastelein *et al.,* 2006a) and emissions for underwater data transmission (Kastelein *et al.,* 2005). However, exposure of the same acoustic alarm to a striped dolphin under the same conditions did not elicit a response (Kastelein *et al.,* 2006a), again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure.

Continued Pre-disturbance Behavior and Habituation—Under some circumstances, some of the individual marine mammals that are exposed to active sonar transmissions will continue their normal behavioral activities; in other circumstances, individual animals will become aware of the sonar transmissions at lower received levels and move to avoid additional exposure or exposures at higher received levels (Richardson *et al.,* 1995).

It is difficult to distinguish between animals that continue their pre-disturbance behavior without stress responses, animals that continue their behavior but experience stress responses (that is, animals that cope with disturbance), and animals that habituate to disturbance (that is, they may have experienced low-level stress responses

initially, but those responses abated over time). Watkins (1986) reviewed data on the behavioral reactions of fin, humpback, right and minke whales that were exposed to continuous, broadband low-frequency shipping and industrial noise in Cape Cod Bay. He concluded that underwater sound was the primary cause of behavioral reactions in these species of whales and that the whales responded behaviorally to acoustic stimuli within their respective hearing ranges. Watkins also noted that whales showed the strongest behavioral reactions to sounds in the 15 Hz to 28 kHz range, although negative reactions (avoidance, interruptions in vocalizations, etc.) were generally associated with sounds that were either unexpected, too loud, suddenly louder or different, or perceived as being associated with a potential threat (such as an approaching ship on a collision course). In particular, whales seemed to react negatively when they were within 100 m of the source or when received levels increased suddenly in excess of 12 dB relative to ambient sounds. At other times, the whales ignored the source of the signal and all four species habituated to these sounds.

Nevertheless, Watkins concluded that whales ignored most sounds in the background of ambient noise, including the sounds from distant human activities even though these sounds may have had considerable energies at frequencies well within the whales' range of hearing. Further, he noted that of the whales observed, fin whales were the most sensitive of the four species, followed by humpback whales; right whales were the least likely to be disturbed and generally did not react to low-amplitude engine noise. By the end of his period of study, Watkins (1986) concluded that fin and humpback whales have generally habituated to the continuous and broadband noise of Cape Cod Bay while right whales did not appear to change their response. As mentioned above, animals that habituate to a particular disturbance may have experienced low-level stress responses initially, but those responses abated over time. In most cases, this likely means a lessened immediate potential effect from a disturbance; however, concern exists where the habituation occurs in a potentially more harmful situation, for example: animals may become more vulnerable to vessel strikes once they habituate to vessel traffic (Swingle *et al.,* 1993; Wiley *et al.,* 1995).

Aicken *et al.,* (2005) monitored the behavioral responses of marine mammals to a new low-frequency active sonar system that was being developed for use by the British Navy. During those trials, fin whales, sperm whales, Sowerby's beaked whales, long-finned pilot whales (*Globicephala melas*), Atlantic white-sided dolphins, and common bottlenose dolphins were observed and their vocalizations were recorded. These monitoring studies detected no evidence of behavioral responses that the investigators could attribute to exposure to the low-frequency active sonar during these trials.

Behavioral Responses (Southall et al. (2007))

Southall *et al.* (2007) reports the results of the efforts of a panel of experts in acoustic research from behavioral, physiological, and physical disciplines that convened and reviewed the available literature on marine mammal hearing and physiological and behavioral responses to human-made sound with the goal of proposing exposure criteria for certain effects. This peer-reviewed compilation of literature is very valuable, though Southall *et al.* (2007) note that not all data are equal, some have poor statistical power, insufficient controls, and/or limited information on received levels, background noise, and other potentially important contextual variables—such data were reviewed and sometimes used for qualitative illustration but were not included in the quantitative analysis for the criteria recommendations. All of the studies considered, however, contain an estimate of the received sound level when the animal exhibited the indicated response.

In the Southall *et al.* (2007) publication, for the purposes of analyzing responses of marine mammals to anthropogenic sound and developing criteria, the authors differentiate between single pulse sounds, multiple pulse sounds, and non-pulse sounds. MFAS/HFAS is considered a non-pulse sound. Southall *et al.* (2007) summarize the studies associated with low-frequency, mid-frequency, and high-frequency cetacean and pinniped responses to non-pulse sounds, based strictly on received level, in Appendix C of their article (incorporated by reference and summarized in the three paragraphs below).

The studies that address responses of low frequency cetaceans to non-pulse sounds include data gathered in the field and related to several types of sound sources (of varying similarity to MFAS/HFAS) including: vessel noise, drilling and machinery playback, low-frequency M-sequences (sine wave with multiple phase reversals) playback, tactical low-frequency active sonar playback, drill ships, Acoustic Thermometry of Ocean Climate (ATOC) source, and non-pulse playbacks. These studies generally indicate no (or very limited) responses to received levels in the 90 to 120 dB re: 1 μPa range and an increasing likelihood of avoidance and other behavioral effects in the 120 to 160 dB range. As mentioned earlier, though, contextual variables play a very important role in the reported responses and the severity of effects are not linear when compared to received level. Also, few of the laboratory or field datasets had common conditions, behavioral contexts or sound sources, so it is not surprising that responses differ.

The studies that address responses of mid-frequency cetaceans to non-pulse sounds include data gathered both in the field and the laboratory and related to several different sound sources (of varying similarity to MFAS/HFAS) including: pingers, drilling playbacks, ship and ice-breaking noise, vessel noise, Acoustic Harassment Devices (AHDs), Acoustic Deterrent Devices (ADDs), MFAS, and non-pulse bands and tones. Southall *et al.* (2007) were unable to come to a clear conclusion regarding the results of these studies. In some cases, animals in the field showed significant responses to received levels between 90 and 120 dB, while in other cases these responses were not seen in the 120 to 150 dB range. The disparity in results was likely due to contextual variation and the differences between the results in the field and laboratory data (animals typically responded at lower levels in the field).

The studies that address responses of high frequency cetaceans to non-pulse sounds include data gathered both in the field and the laboratory and related to several different sound sources (of varying similarity to MFAS/HFAS) including: pingers, AHDs, and various laboratory non-pulse sounds. All of these data were collected from harbor porpoises. Southall *et al.* (2007) concluded that the existing data indicate that harbor porpoises are likely sensitive to a wide range of anthropogenic sounds at low received levels (~90–120 dB), at least for initial exposures. All recorded exposures above 140 dB induced profound and sustained avoidance behavior in wild harbor porpoises (Southall *et al.*, 2007). Rapid habituation was noted in some but not all studies. There is no data to indicate whether other high frequency cetaceans are as sensitive to anthropogenic sound as harbor porpoises are.

The studies that address the responses of pinnipeds in water to non-pulse sounds include data gathered both in

the field and the laboratory and related to several different sound sources (of varying similarity to MFAS/HFAS) including: AHDs, ATOC, various non-pulse sounds used in underwater data communication; underwater drilling, and construction noise. Few studies exist with enough information to include them in the analysis. The limited data suggested that exposures to non-pulse sounds between 90 and 140 dB generally do not result in strong behavioral responses in pinnipeds in water, but no data exist at higher received levels.

In addition to summarizing the available data, the authors of Southall *et al.* (2007) developed a severity scaling system with the intent of ultimately being able to assign some level of biological significance to a response. Following is a summary of their scoring system; a comprehensive list of the behaviors associated with each score may be found in the report:

- 0–3 (Minor and/or brief behaviors) includes, but is not limited to: no response; minor changes in speed or locomotion (but with no avoidance); individual alert behavior; minor cessation in vocal behavior; minor changes in response to trained behaviors (in laboratory)
- 4–6 (Behaviors with higher potential to affect foraging, reproduction, or survival) includes, but is not limited to: moderate changes in speed, direction, or dive profile; brief shift in group distribution; prolonged cessation or modification of vocal behavior (duration > duration of sound), minor or moderate individual and/or group avoidance of sound; brief cessation of reproductive behavior; or refusal to initiate trained tasks (in laboratory)
- 7–9 (Behaviors considered likely to affect the aforementioned vital rates) includes, but is not limited to: extensive or prolonged aggressive behavior; moderate, prolonged or significant separation of females and dependent offspring with disruption of acoustic reunion mechanisms; long-term avoidance of an area; outright panic, stampede, stranding; threatening or attacking sound source (in laboratory)

In Table 6 we have summarized the scores that Southall *et al.* (2007) assigned to the papers that reported behavioral responses of low-frequency cetaceans, mid-frequency cetaceans, and pinnipeds in water to non-pulse sounds. This table is included simply to summarize the findings of the studies and opportunistic observations (all of which were capable of estimating received level) that Southall *et al.* (2007) compiled in the effort to develop acoustic criteria.

	Received RMS Sound Pressure Level (dB re: 1 μPa)											
Response Score	80 to < 90	90 to < 100	100 to < 110	110 to < 120	120 to < 130	130 to < 140	140 to < 150	150 to < 160	160 to < 170	170 to < 180	180 to < 190	190 to <200
9												
8		M	M		M		M				M	M
7						L	L					
6	H	L/H	L/P/H	L/M/H	L/M/H	L	L/H	H	M/H	M		
5			H	H	M							
4				L/M	L/M/P	P	L					
3		M	L/M	L/M	M/P	P						
2			L	L/M	L	L	L					
1			M	M	M							
0	L/H/P	L/H/P	L/M/H	L/M/H/P	L/M/H/P	L	M				M	M

Table 6. Data compiled from three tables from Southall et al. (2007) indicating when marine mammals (low-frequency cetaceans = L, mid-frequency cetaceans = M, high frequency cetaceans = H, and pinnipeds = P) were reported as having a behavioral response of the indicated severity to a non-pulse sound of the indicated received level. As discussed in the text, responses are highly variable and context specific.

Potential Effects of Behavioral Disturbance

The different ways that marine mammals respond to sound are sometimes indicators of the ultimate effect that exposure to a given stimulus will have on the well-being (survival, reproduction, etc.) of an animal. There are little quantitative marine mammal data relating the exposure of marine mammals to sound to effects on reproduction or survival, though data exist for terrestrial species to which we can draw comparisons for marine mammals. Several authors have reported that disturbance stimuli cause animals to abandon nesting and foraging sites (Sutherland and Crockford, 1993), cause animals to increase their activity levels and suffer premature deaths or reduced reproductive success when their energy expenditures exceed their energy budgets (Daan *et al.*, 1996, Feare 1976, Giese 1996, Mullner *et al.*, 2004, Waunters *et al.*, 1997), or cause animals to experience higher predation rates when they adopt risk-prone foraging or migratory strategies (Frid and Dill, 2002). Each of these studies addressed the consequences that result when animals shift from one behavioral state (for example, resting or foraging) to another behavioral state (avoidance or escape behavior) because of human disturbance or disturbance stimuli.

One consequence of behavioral avoidance results from changing the energetics of marine mammals because of the energy required to avoid surface vessels or the sound field associated with active sonar (Frid and Dill, 2002). Most animals can avoid that energetic cost by swimming away at slow speeds or those speeds that are at or near the minimum cost of transport (Miksis-Olds, 2006), as has been demonstrated in Florida manatees (Hartman, 1979, Miksis-Olds, 2006).

Those costs increase, however, when animals shift from a resting state, which is designed to conserve an animal's energy, to an active state that consumes energy the animal would have conserved had it not been disturbed. Marine mammals that have been disturbed by anthropogenic noise and vessel approaches are commonly reported to shift from resting behavioral states to active behavioral states, which would imply that they incur an energy cost. Morete *et al.*, (2007) reported that undisturbed humpback whale cows that were accompanied by their calves were frequently observed resting while their calves circled them (milling) and rolling interspersed with dives. When vessels approached, the amount of time cows and calves spent resting and milling, respectively declined significantly. These results are similar to those reported by Scheidat *et al.* (2004) for the

humpback whales they observed off the coast of Ecuador.

Constantine and Brunton (2001) reported that bottlenose dolphins in the Bay of Islands, New Zealand only engaged in resting behavior 5% of the time when vessels were within 300 meters compared with 83% of the time when vessels were not present. Miksis-Olds (2006) and Miksis-Olds *et al.* (2005) reported that Florida manatees in Sarasota Bay, Florida, reduced the amount of time they spent milling and increased the amount of time they spent feeding when background noise levels increased. Although the acute costs of these changes in behavior are not likely to exceed an animal's ability to compensate, the chronic costs of these behavioral shifts are uncertain.

Attention is the cognitive process of selectively concentrating on one aspect of an animal's environment while ignoring other things (Posner, 1994). Because animals (including humans) have limited cognitive resources, there is a limit to how much sensory information they can process at any time. The phenomenon called ''attentional capture'' occurs when a stimulus (usually a stimulus that an animal is not concentrating on or attending to) ''captures'' an animal's attention. This shift in attention can occur consciously or unconsciously (for example, when an animal hears sounds that it associates with the approach of a predator) and the shift in attention can be sudden (Dukas, 2002; van Rij, 2007). Once a stimulus has captured an animal's attention, the animal can respond by ignoring the stimulus, assuming a ''watch and wait'' posture, or treat the stimulus as a disturbance and respond accordingly, which includes scanning for the source of the stimulus or ''vigilance'' (Cowlishaw *et al.*, 2004).

Vigilance is normally an adaptive behavior that helps animals determine the presence or absence of predators, assess their distance from conspecifics, or to attend cues from prey (Bednekoff and Lima, 1998; Treves, 2000). Despite those benefits, however, vigilance has a cost of time: when animals focus their attention on specific environmental cues, they are not attending to other activities such a foraging. These costs have been documented best in foraging animals, where vigilance has been shown to substantially reduce feeding rates (Saino, 1994; Beauchamp and Livoreil, 1997; Fritz *et al.*, 2002). Animals will spend more time being vigilant, which may translate to less time foraging or resting, when disturbance stimuli approach them more directly, remain at closer distances, have a greater group size (for example, multiple surface vessels), or when they co-occur with times that an animal perceives increased risk (for example, when they are giving birth or accompanied by a calf). Most of the published literature, however, suggests that direct approaches will increase the amount of time animals will dedicate to being vigilant. For example, bighorn sheep and Dall's sheep dedicated more time to being vigilant, and less time resting or foraging, when aircraft made direct approaches over them (Frid, 2001; Stockwell *et al.*, 1991).

Several authors have established that long-term and intense disturbance stimuli can cause population declines by reducing the body condition of individuals that have been disturbed, followed by reduced reproductive success, reduced survival, or both (Daan *et al.*, 1996; Madsen, 1994; White, 1983). For example, Madsen (1994) reported that pink-footed geese (*Anser brachyrhynchus*) in undisturbed habitat gained body mass and had about a 46% reproductive success rate compared with geese in disturbed habitat (being consistently scared off the fields on which they were foraging) which did not gain mass and had a 17% reproductive success rate. Similar reductions in reproductive success have been reported for mule deer (*Odocoileus hemionus*) disturbed by all-terrain vehicles (Yarmoloy *et al.*, 1988), caribou disturbed by seismic exploration blasts (Bradshaw *et al.*, 1998), caribou disturbed by low-elevation military jet-fights (Luick *et al.*, 1996), and caribou disturbed by low-elevation jet flights (Harrington and Veitch, 1992). Similarly, a study of elk (*Cervus elaphus*) that were disturbed experimentally by pedestrians concluded that the ratio of young to mothers was inversely related to disturbance rate (Phillips and Alldredge, 2000).

The primary mechanism by which increased vigilance and disturbance appear to affect the fitness of individual animals is by disrupting an animal's time budget and, as a result, reducing the time they might spend foraging and resting (which increases an animal's activity rate and energy demand). For example, a study of grizzly bears (*Ursus horribilis*) reported that bears disturbed by hikers reduced their energy intake by an average of 12 kcal/min (50.2×10^3 kJ/min), and spent energy fleeing or acting aggressively toward hikers (White *et al.*, 1999). Alternately, Ridgway *et al.*, (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a five day period did not cause any sleep deprivation or stress effects such as changes in cortisol or epinephrine levels.

On a related note, many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.*, 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.*, 2007).

Stranding and Mortality

When a live or dead marine mammal swims or floats onto shore and becomes ''beached'' or incapable of returning to sea, the event is termed a ''stranding'' (Geraci *et al.*, 1999; Perrin and Geraci, 2002; Geraci and Lounsbury, 2005; National Marine Fisheries Service, 2007p). The legal definition for a stranding within the United States is that (A) ''a marine mammal is dead and is (i) on a beach or shore of the United States; or (ii) in waters under the jurisdiction of the United States (including any navigable waters); or (B) a marine mammal is alive and is (i) on a beach or shore of the United States and is unable to return to the water; (ii) on a beach or shore of the United States and, although able to return to the water, is in need of apparent medical attention; or (iii) in the waters under the jurisdiction of the United States (including any navigable waters), but is unable to return to its natural habitat under its own power or without assistance.'' (16 U.S.C. 1421h).

Marine mammals are known to strand for a variety of reasons, such as infectious agents, biotoxicosis, starvation, fishery interaction, ship strike, unusual oceanographic or weather events, sound exposure, or combinations of these stressors sustained concurrently or in series. However, the cause or causes of most strandings are unknown (Geraci *et al.*, 1976; Eaton, 1979, Odell *et al.*, 1980; Best, 1982). Numerous studies suggest that the physiology, behavior, habitat relationships, age, or condition of cetaceans may cause them to strand or might pre-dispose them to strand when exposed to another phenomenon. These suggestions are consistent with the conclusions of numerous other studies that have demonstrated that combinations of dissimilar stressors commonly combine to kill an animal or dramatically reduce its fitness, even

though one exposure without the other does not produce the same result (Chroussos, 2000; Creel, 2005; DeVries *et al.*, 2003; Fair and Becker, 2000; Foley *et al.*, 2001; Moberg, 2000; Relyea, 2005a, 2005b; Romero, 2004; Sih *et al.*, 2004).

Several sources have published lists of mass stranding events of cetaceans in an attempt to identify relationships between those stranding events and military active sonar (Hildebrand, 2004; IWC, 2005; Taylor *et al.*, 2004). For example, based on a review of stranding records between 1960 and 1995, the International Whaling Commission (2005) identified ten mass stranding events of Cuvier's beaked whales that had been reported and one mass stranding of four Baird's beaked whales (*Berardius bairdii*). The IWC concluded that, out of eight stranding events reported from the mid-1980s to the summer of 2003, seven had been coincident with the use of MFAS, one of those seven had been associated with the use of tactical low-frequency sonar, and the remaining stranding event had been associated with the use of seismic airguns.

Most of the stranding events reviewed by the IWC involved beaked whales. A mass stranding of Cuvier's beaked whales in the eastern Mediterranean Sea occurred in 1996 (Franzis, 1998) and mass stranding events involving Gervais' beaked whales, Blainville's beaked whales, and Cuvier's beaked whales occurred off the coast of the Canary Islands in the late 1980s (Simmonds and Lopez-Jurado, 1991). The stranding events that occurred in the Canary Islands and Kyparissiakos Gulf in the late 1990s and the Bahamas in 2000 have been the most intensively-studied mass stranding events and have been associated with naval exercises involving the use of MFAS.

Strandings Associated With MFAS

Over the past 12 years, there have been five stranding events coincident with military mid-frequency active sonar use in which exposure to sonar is believed by NMFS and the Navy to have been a contributing factor: Greece (1996); the Bahamas (2000); Madeira (2000); Canary Islands (2002); and Spain (2006). Additionally, in 2004, during the RIMPAC exercises, between 150–200 usually pelagic melon-headed whales occupied the shallow waters of the Hanalei Bay, Kaua'i, Hawaii for over 28 hours. NMFS determined that the mid-frequency sonar was a plausible, if not likely, contributing factor in what may have been a confluence of events that led to the Hanalei Bay stranding. A number of other stranding events coincident with the operation of MFAS including the death of beaked whales or other species (Minke whales, dwarf sperm whales, pilot whales) have been reported; however, the majority have not been investigated to the degree necessary to determine the cause of the stranding and only one of these exercises was conducted by the U.S. Navy.

Greece (1996)

Twelve Cuvier's beaked whales stranded atypically (in both time and space) along a 38.2-kilometer strand of the coast of the Kyparissiakos Gulf on May 12 and 13, 1996 (Frantzis, 1998). From May 11 through May 15, the NATO research vessel Alliance was conducting active sonar tests with signals of 600 Hz and 3 kHz and source levels of 228 and 226 dB re: 1μPa, respectively (D'Amico and Verboom, 1998; D'Spain *et al.*, 2006). The timing and the location of the testing encompassed the time and location of the whale strandings (Frantzis, 1998).

Necropsies of eight of the animals were performed but were limited to basic external examination and sampling of stomach contents, blood, and skin. No ears or organs were collected, and no histological samples were preserved. No apparent abnormalities or wounds were found (Frantzis, 2004). Examination of photos of the animals, taken soon after their death, revealed that the eyes of at least four of the individuals were bleeding. Photos were taken soon after their death (Frantzis, 2004). Stomach contents contained the flesh of cephalopods, indicating that feeding had recently taken place (Frantzis, 1998).

All available information regarding the conditions associated with this stranding event were compiled, and many potential causes were examined including major pollution events, prominent tectonic activity, unusual physical or meteorological events, magnetic anomalies, epizootics, and conventional military activities (International Council for the Exploration of the Sea, 2005a). However, none of these potential causes coincided in time or space with the mass stranding, or could explain its characteristics (International Council for the Exploration of the Sea, 2005a). The robust condition of the animals, plus the recent stomach contents, is inconsistent with pathogenic causes (Frantzis, 2004). In addition, environmental causes can be ruled out as there were no unusual environmental circumstances or events before or during this time period and within the general proximity (Frantzis, 2004).

Because of the rarity of this mass stranding of Cuvier's beaked whales in the Kyparissiakos Gulf (first one in history), the probability for the two events (the military exercises and the strandings) to coincide in time and location, while being independent of each other, was thought to be extremely low (Frantzis, 1998). However, because full necropsies had not been conducted, and no abnormalities were noted, the cause of the strandings could not be precisely determined (Cox *et al.*, 2006). A Bioacoustics Panel convened by NATO concluded that the evidence available did not allow them to accept or reject sonar exposures as a causal agent in these stranding events. Their official finding was ''An acoustic link can neither be clearly established, nor eliminated as a direct or indirect cause for the May 1996 strandings.'' The analysis of this stranding event provided support for, but no clear evidence for, the cause-and-effect relationship of active sonar training activities and beaked whale strandings (Cox *et al.*, 2006).

Bahamas (2000)

NMFS and the Navy prepared a joint report addressing the multi-species stranding in the Bahamas in 2000, which took place within 24 hours of U.S. Navy ships using MFAS as they passed through the Northeast and Northwest Providence Channels on March 15–16, 2000. The ships, which operated both AN/SQS–53C and AN/SQS–56, moved through the channel while emitting MFAS pings approximately every 24 seconds. Of the 17 cetaceans that stranded over a 36-hr period (Cuvier's beaked whales, Blainville's beaked whales, Minke whales, and a spotted dolphin), seven animals died on the beach (5 Cuvier's beaked whales, 1 Blainville's beaked whale, and the spotted dolphin), while the other 10 were returned to the water alive (though their ultimate fate is unknown). As discussed in the Bahamas report (DOC/DON, 2001), there is no likely association between the Minke whale and spotted dolphin strandings and the operation of MFAS.

Necropsies were performed on five of the stranded beaked whales. All five necropsied beaked whales were in good body condition, showing no signs of infection, disease, ship strike, blunt trauma, or fishery related injuries, and three still had food remains in their stomachs. Auditory structural damage was discovered in four of the whales, specifically bloody effusions or hemorrhaging around the ears. Bilateral intracochlear and unilateral temporal region subarachnoid hemorrhage, with

blood clots in the lateral ventricles, were found in two of the whales. Three of the whales had small hemorrhages in their acoustic fats (located along the jaw and in the melon).

A comprehensive investigation was conducted and all possible causes of the stranding event were considered, whether they seemed likely at the outset or not. Based on the way in which the strandings coincided with ongoing naval activity involving tactical MFAS use, in terms of both time and geography, the nature of the physiological effects experienced by the dead animals, and the absence of any other acoustic sources, the investigation team concluded that MFAS aboard U.S. Navy ships that were in use during the active sonar exercise in question were the most plausible source of this acoustic or impulse trauma to beaked whales. This sound source was active in a complex environment that included the presence of a surface duct, unusual and steep bathymetry, a constricted channel with limited egress, intensive use of multiple, active sonar units over an extended period of time, and the presence of beaked whales that appear to be sensitive to the frequencies produced by these active sonars. The investigation team concluded that the cause of this stranding event was the confluence of the Navy MFAS and these contributory factors working together, and further recommended that the Navy avoid operating MFAS in situations where these five factors would be likely to occur. This report does not conclude that all five of these factors must be present for a stranding to occur, nor that beaked whales are the only species that could potentially be affected by the confluence of the other factors. Based on this, NMFS believes that the operation of MFAS in situations where surface ducts exist, or in marine environments defined by steep bathymetry and/or constricted channels may increase the likelihood of producing a sound field with the potential to cause cetaceans (especially beaked whales) to strand, and therefore, suggests the need for increased vigilance while operating MFAS in these areas, especially when beaked whales (or potentially other deep divers) are likely present.

Madeira, Spain (2000)

From May 10–14, 2000, three Cuvier's beaked whales were found atypically stranded on two islands in the Madeira archipelago, Portugal (Cox *et al.*, 2006). A fourth animal was reported floating in the Madeiran waters by fishermen but did not come ashore (Woods Hole Oceanographic Institution, 2005). Joint NATO amphibious training peacekeeping exercises involving participants from 17 countries aboard 80 warships, took place in Portugal during May 2–15, 2000.

The bodies of the three stranded whales were examined post mortem (Woods Hole Oceanographic Institution, 2005), though only one of the stranded whales was fresh enough (24 hours after stranding) to be necropsied (Cox *et al.*, 2006). Results from the necropsy revealed evidence of hemorrhage and congestion in the right lung and both kidneys (Cox *et al.*, 2006). There was also evidence of intercochlear and intracranial hemorrhage similar to that which was observed in the whales that stranded in the Bahamas event (Cox *et al.*, 2006). There were no signs of blunt trauma, and no major fractures (Woods Hole Oceanographic Institution, 2005). The cranial sinuses and airways were found to be clear with little or no fluid deposition, which may indicate good preservation of tissues (Woods Hole Oceanographic Institution, 2005).

Several observations on the Madeira stranded beaked whales, such as the pattern of injury to the auditory system, are the same as those observed in the Bahamas strandings. Blood in and around the eyes, kidney lesions, pleural hemorrhages, and congestion in the lungs are particularly consistent with the pathologies from the whales stranded in the Bahamas, and are consistent with stress and pressure related trauma. The similarities in pathology and stranding patterns between these two events suggest that a similar pressure event may have precipitated or contributed to the strandings at both sites (Woods Hole Oceanographic Institution, 2005).

Even though no definitive causal link can be made between the stranding event and naval exercises, certain conditions may have existed in the exercise area that, in their aggregate, may have contributed to the marine mammal strandings (Freitas, 2004): Exercises were conducted in areas of at least 547 fathoms (1000 m) depth near a shoreline where there is a rapid change in bathymetry on the order of 547 to 3,281 (1000–6000 m) fathoms occurring across a relatively short horizontal distance (Freitas, 2004); multiple ships were operating around Madeira, though it is not known if MFAS was used, and the specifics of the sound sources used are unknown (Cox *et al.*, 2006, Freitas, 2004); exercises took place in an area surrounded by land masses separated by less than 35 nm (65 km) and at least 10 nm (19 km) in length, or in an embayment. Exercises involving multiple ships employing MFAS near land may produce sound directed towards a channel or embayment that may cut off the lines of egress for marine mammals (Freitas, 2004).

Canary Islands, Spain (2002)

The southeastern area within the Canary Islands is well known for aggregations of beaked whales due to its ocean depths of greater than 547 fathoms (1000 m) within a few hundred meters of the coastline (Fernandez *et al.*, 2005). On September 24, 2002, 14 beaked whales were found stranded on Fuerteventura and Lanzarote Islands in the Canary Islands (International Council for Exploration of the Sea, 2005a). Seven whales died, while the remaining seven live whales were returned to deeper waters (Fernandez *et al.*, 2005). Four beaked whales were found stranded dead over the next 3 days either on the coast or floating offshore. These strandings occurred within near proximity of an international naval exercise that utilized MFAS and involved numerous surface warships and several submarines. Strandings began about 4 hours after the onset of MFAS activity (International Council for Exploration of the Sea, 2005a; Fernandez *et al.*, 2005).

Eight Cuvier's beaked whales, one Blainville's beaked whale, and one Gervais' beaked whale were necropsied, six of them within 12 hours of stranding (Fernandez *et al.*, 2005). No pathogenic bacteria were isolated from the carcasses (Jepson *et al.*, 2003). The animals displayed severe vascular congestion and hemorrhage especially around the tissues in the jaw, ears, brain, and kidneys, displaying marked disseminated microvascular hemorrhages associated with widespread fat emboli (Jepson *et al.*, 2003; International Council for Exploration of the Sea, 2005a). Several organs contained intravascular bubbles, although definitive evidence of gas embolism in vivo is difficult to determine after death (Jepson *et al.*, 2003). The livers of the necropsied animals were the most consistently affected organ, which contained macroscopic gas-filled cavities and had variable degrees of fibrotic encapsulation. In some animals, cavitary lesions had extensively replaced the normal tissue (Jepson *et al.*, 2003). Stomachs contained a large amount of fresh and undigested contents, suggesting a rapid onset of disease and death (Fernandez *et al.*, 2005). Head and neck lymph nodes were enlarged and congested, and parasites were found in the kidneys of all animals (Fernandez *et al.*, 2005).

The association of NATO MFAS use close in space and time to the beaked whale strandings, and the similarity between this stranding event and previous beaked whale mass strandings coincident with active sonar use, suggests that a similar scenario and causative mechanism of stranding may be shared between the events. Beaked whales stranded in this event demonstrated brain and auditory system injuries, hemorrhages, and congestion in multiple organs, similar to the pathological findings of the Bahamas and Madeira stranding events. In addition, the necropsy results of Canary Islands stranding event lead to the hypothesis that the presence of disseminated and widespread gas bubbles and fat emboli were indicative of nitrogen bubble formation, similar to what might be expected in decompression sickness (Jepson *et al.*, 2003; Fernández *et al.*, 2005).

Spain (2006)

The Spanish Cetacean Society reported an atypical mass stranding of four beaked whales that occurred January 26, 2006, on the southeast coast of Spain, near Mojacar (Gulf of Vera) in the Western Mediterranean Sea. According to the report, two of the whales were discovered the evening of January 26 and were found to be still alive. Two other whales were discovered during the day on January 27, but had already died. The fourth animal was found dead on the afternoon of January 27, a few kilometers north of the first three animals. From January 25–26, 2006, Standing North Atlantic Treaty Organization (NATO) Response Force Maritime Group Two (five of seven ships including one U.S. ship under NATO Operational Control) had conducted active sonar training against a Spanish submarine within 50 nm (93 km) of the stranding site.

Veterinary pathologists necropsied the two male and two female Cuvier's beaked whales. According to the pathologists, the most likely primary cause of this type of beaked whale mass stranding event was anthropogenic acoustic activities, most probably anti-submarine MFAS used during the military naval exercises. However, no positive acoustic link was established as a direct cause of the stranding. Even though no causal link can be made between the stranding event and naval exercises, certain conditions may have existed in the exercise area that, in their aggregate, may have contributed to the marine mammal strandings (Freitas, 2004); exercises were conducted in areas of at least 547 fathoms (1000 m) depth near a shoreline where there is a rapid change in bathymetry on the order of 547 to 3,281 fathoms (1000–6000 m) occurring across a relatively short horizontal distance (Freitas, 2004); multiple ships (in this instance, five) were operating MFAS in the same area over extended periods of time (in this case, 20 hours) in close proximity; exercises took place in an area surrounded by landmasses, or in an embayment. Exercises involving multiple ships employing MFAS near land may have produced sound directed towards a channel or embayment that may have cut off the lines of egress for the affected marine mammals (Freitas, 2004).

Hanalei Bay (2004)

On July 3–4, 2004, approximately 150–200 melon-headed whales occupied the shallow waters of the Hanalei Bay, Kaua'i, Hawaii for over 28 hours. Attendees of a canoe blessing observed the animals entering the Bay in a single wave formation at 7 a.m. on July 3, 2004. The animals were observed moving back into the shore from the mouth of the Bay at 9 a.m. The usually pelagic animals milled in the shallow bay and were returned to deeper water with human assistance beginning at 9:30 a.m. on July 4, 2004, and were out of sight by 10:30 a.m.

Only one animal, a calf, was known to have died following this event. The animal was noted alive and alone in the Bay on the afternoon of July 4, 2004 and was found dead in the Bay the morning of July 5, 2004. A full necropsy, magnetic resonance imaging, and computerized tomography examination were performed on the calf to determine the manner and cause of death. The combination of imaging, necropsy and histological analyses found no evidence of infectious, internal traumatic, congenital, or toxic factors. Although cause of death could not be definitively determined, it is likely that maternal separation, poor nutritional condition, and dehydration contributed to the final demise of the animal. Although we do not know when the calf was separated from its mother, the movement into the Bay, the milling and re-grouping may have contributed to the separation or lack of nursing especially if the maternal bond was weak or this was a primiparous calf.

Environmental factors, abiotic and biotic, were analyzed for any anomalous occurrences that would have contributed to the animals entering and remaining in Hanalei Bay. The Bay's bathymetry is similar to many other sites within the Hawaiian Island chain and dissimilar to sites that have been associated with mass strandings in other parts of the United States. The weather conditions appeared to be normal for that time of year with no fronts or other significant features noted. There was no evidence of unusual distribution or occurrence of predator or prey species, or unusual harmful algal blooms, although Mobley *et al.*, 2007 suggested that the full moon cycle that occurred at that time may have influenced a run of squid into the Bay Weather patterns and bathymetry that have been associated with mass strandings elsewhere were not found to occur in this instance.

The Hanalei event was spatially and temporally correlated with RIMPAC. Official sonar training and tracking exercises in the Pacific Missile Range Facility (PMRF) warning area did not commence until approximately 8 a.m. on July 3 and were thus ruled out as a possible trigger for the initial movement into the Bay.

However, six naval surface vessels transiting to the operational area on July 2 intermittently transmitted active sonar (for approximately 9 hours total from 1:15 p.m. to 12:30 a.m.) as they approached from the south. The potential for these transmissions to have triggered the whales' movement into Hanalei Bay was investigated. Analyses with the information available indicated that animals to the south and east of Kaua'i could have detected active sonar transmissions on July 2, and reached Hanalei Bay on or before 7 a.m. on July 3, 2004. However, data limitations regarding the position of the whales prior to their arrival in the Bay, the magnitude of sonar exposure, behavioral responses of melon-headed whales to acoustic stimuli, and other possible relevant factors preclude a conclusive finding regarding the role of sonar in triggering this event. Propagation modeling suggest that transmissions from sonar use during the July 3 exercise in the PMRF warning area may have been detectable at the mouth of the Bay. If the animals responded negatively to these signals, it may have contributed to their continued presence in the Bay. The U.S. Navy ceased all active sonar transmissions during exercises in this range on the afternoon of July 3, 2004. Subsequent to the cessation of sonar use, the animals were herded out of the Bay.

While causation of this stranding event may never be unequivocally determined, we consider the active sonar transmissions of July 2–3, 2004, a plausible, if not likely, contributing factor in what may have been a confluence of events. This conclusion is based on: (1) The evidently anomalous nature of the stranding; (2) its close spatiotemporal correlation with wide-

scale, sustained use of sonar systems previously associated with stranding of deep-diving marine mammals; (3) the directed movement of two groups of transmitting vessels toward the southeast and southwest coast of Kauai; (4) the results of acoustic propagation modeling and an analysis of possible animal transit times to the Bay; and (5) the absence of any other compelling causative explanation. The initiation and persistence of this event may have resulted from an interaction of biological and physical factors. The biological factors may have included the presence of an apparently uncommon, deep-diving cetacean species (and possibly an offshore, non-resident group), social interactions among the animals before or after they entered the Bay, and/or unknown predator or prey conditions. The physical factors may have included the presence of nearby deep water, multiple vessels transiting in a directed manner while transmitting active sonar over a sustained period, the presence of surface sound ducting conditions, and/or intermittent and random human interactions while the animals were in the Bay.

A separate event involving melon-headed whales and rough-toothed dolphins took place over the same period of time in the Northern Mariana Islands (Jefferson *et al.*, 2006), which is several thousand miles from Hawaii. Some 500–700 melon-headed whales came into Sasanhaya Bay on 4 July 2004 on the island of Rota and then left of their own accord after 5.5 hours; no known active sonar transmissions occurred in the vicinity of that event. The Rota incident led to scientific debate regarding what, if any, relationship the event had to the simultaneous events in Hawaii and whether they might be related by some common factor (e.g., there was a full moon on July 2, 2004 as well as during other melon-headed whale strandings and nearshore aggregations (Brownell *et al.* 2009; Lignon, *et al.* 2007; Mobley *et al.* 2007). Brownell *et al.*, (2009) compared the two incidents, along with one other stranding incident at Nuka Hiva in French Polynesia and normal resting behaviors observed at Palmyra Island, in regard to physical features in the areas, melon-headed whale behavior, and lunar cycles. Brownell *et al.*, (2009) concluded that the rapid entry of the whales into Hanalei Bay, their movement into very shallow water far from the 100-m contour, their milling behavior (typical pre-stranding behavior), and their reluctance to leave the bay constituted an unusual event that was not similar to the events that occurred at Rota (but was similar to the events at Palmyra), which appear to be similar to observations of melon-headed whales resting normally at Palmyra Island. Additionally, there was not a correlation between lunar cycle and the types of behaviors observed in the Brownell *et al.*, (2009) examples.

Association Between Mass Stranding Events and Exposure to MFAS

Several authors have noted similarities between some of these stranding incidents: they occurred in islands or archipelagoes with deep water nearby, several appeared to have been associated with acoustic waveguides like surface ducting, and the sound fields created by ships transmitting MFAS (Cox *et al.*, 2006, D'Spain *et al.*, 2006). Although Cuvier's beaked whales have been the most common species involved in these stranding events (81% of the total number of stranded animals), other beaked whales (including *Mesoplodon europeaus*, *M. densirostris*, and *Hyperoodon ampullatus*) comprise 14% of the total. Other species, such as *Kogia breviceps*, have stranded in association with the operation of MFAS, but in much lower numbers and less consistently than beaked whales.

Based on the evidence available, however, we cannot determine whether (a) Cuvier's beaked whale is more prone to injury from high-intensity sound than other species, (b) their behavioral responses to sound makes them more likely to strand, or (c) they are more likely to be exposed to MFAS than other cetaceans (for reasons that remain unknown). Because the association between active sonar exposures and marine mammals mass stranding events is not consistent—some marine mammals strand without being exposed to active sonar and some sonar transmissions are not associated with marine mammal stranding events despite their co-occurrence—other risk factors or a grouping of risk factors probably contribute to these stranding events.

Behaviorally Mediated Responses to MFAS That May Lead to Stranding

Although the confluence of Navy MFAS with the other contributory factors noted in the report was identified as the cause of the 2000 Bahamas stranding event, the specific mechanisms that led to that stranding (or the others) are not understood, and there is uncertainty regarding the ordering of effects that led to the stranding. It is unclear whether beaked whales were directly injured by sound (acoustically mediated bubble growth, addressed above) prior to stranding or whether a behavioral response to sound occurred that ultimately caused the beaked whales to be injured and to strand.

Although causal relationships between beaked whale stranding events and active sonar remain unknown, several authors have hypothesized that stranding events involving these species in the Bahamas and Canary Islands may have been triggered when the whales changed their dive behavior in a startled response to exposure to active sonar or to further avoid exposure (Cox *et al.*, 2006; Rommel *et al.*, 2006). These authors proposed three mechanisms by which the behavioral responses of beaked whales upon being exposed to active sonar might result in a stranding event. These include: gas bubble formation caused by excessively fast surfacing; remaining at the surface too long when tissues are supersaturated with nitrogen; or diving prematurely when extended time at the surface is necessary to eliminate excess nitrogen. More specifically, beaked whales that occur in deep waters that are in close proximity to shallow waters (for example, the ''canyon areas'' that are cited in the Bahamas stranding event; see D'Spain and D'Amico, 2006), may respond to active sonar by swimming into shallow waters to avoid further exposures and strand if they were not able to swim back to deeper waters. Second, beaked whales exposed to active sonar might alter their dive behavior. Changes in their dive behavior might cause them to remain at the surface or at depth for extended periods of time which could lead to hypoxia directly by increasing their oxygen demands or indirectly by increasing their energy expenditures (to remain at depth), which would increase their oxygen. If beaked whales are at depth when they detect a ping from an active sonar transmission and change their dive profile, this could lead to the formation of significant gas bubbles, which could damage multiple organs or interfere with normal physiological function (Cox *et al.*, 2006; Rommel *et al.*, 2006; Zimmer and Tyack, 2007). Baird *et al.* (2005) found that slow ascent rates from deep dives and long periods of time spent within 50 m of the surface were typical for both Cuvier's and Blainville's beaked whales, the two species involved in mass strandings related to naval MFAS. These two behavioral mechanisms may be necessary to purge excessive dissolved nitrogen concentrated in their tissues during their frequent long dives (Baird *et al.*, 2005). Baird *et al.* (2005) further

suggests that abnormally rapid ascents or premature dives in response to high-intensity active sonar could indirectly result in physical harm to the beaked whales, through the mechanisms described above (gas bubble formation or non-elimination of excess nitrogen).

Because many species of marine mammals make repetitive and prolonged dives to great depths, it has long been assumed that marine mammals have evolved physiological mechanisms to protect against the effects of rapid and repeated decompressions. Although several investigators have identified physiological adaptations that may protect marine mammals against nitrogen gas supersaturation (alveolar collapse and elective circulation; Kooyman *et al.*, 1972; Ridgway and Howard, 1979), Ridgway and Howard (1979) reported that bottlenose dolphins (*Tursiops truncatus*) that were trained to dive repeatedly had muscle tissues that were substantially supersaturated with nitrogen gas. Houser *et al.* (2001) used these data to model the accumulation of nitrogen gas within the muscle tissue of other marine mammal species and concluded that cetaceans that dive deep and have slow ascent or descent speeds would have tissues that are more supersaturated with nitrogen gas than other marine mammals. Based on these data, Cox *et al.* (2006) hypothesized that a critical dive sequence might make beaked whales more prone to stranding in response to acoustic exposures. The sequence began with (1) very deep (to depths of up to 2 kilometers) and long (as long as 90 minutes) foraging dives with (2) relatively slow, controlled ascents, followed by (3) a series of ''bounce'' dives between 100 and 400 meters in depth (also see Zimmer and Tyack, 2007). They concluded that acoustic exposures that disrupted any part of this dive sequence (for example, causing beaked whales to spend more time at surface without the bounce dives that are necessary to recover from the deep dive) could produce excessive levels of nitrogen supersaturation in their tissues, leading to gas bubble and emboli formation that produces pathologies similar to decompression sickness.

Recently, Zimmer and Tyack (2007) modeled nitrogen tension and bubble growth in several tissue compartments for several hypothetical dive profiles and concluded that repetitive shallow dives (defined as a dive where depth does not exceed the depth of alveolar collapse, approximately 72 m for *Ziphius*), perhaps as a consequence of an extended avoidance reaction to active sonar sound, could pose a risk for decompression sickness and that this risk should increase with the duration of the response. Their models also suggested that unrealistically rapid rates of ascent from normal dive behaviors are unlikely to result in supersaturation to the extent that bubble formation would be expected. Tyack *et al.* (2006) suggested that emboli observed in animals exposed to MFAS (Jepson *et al.*, 2003; Fernandez *et al.*, 2005) could stem from a behavioral response that involves repeated dives shallower than the depth of lung collapse. Given that nitrogen gas accumulation is a passive process (i.e. nitrogen is metabolically inert), a bottlenose dolphin was trained to repetitively dive a profile predicted to elevate nitrogen saturation to the point that nitrogen bubble formation was predicted to occur. However, inspection of the vascular system of the dolphin via ultrasound did not demonstrate the formation of asymptomatic nitrogen gas bubbles (Houser *et al.*, 2007). Baird *et al.* (2008), in a beaked whale tagging study off Hawaii, showed that deep dives are equally common during day or night, but ''bounce dives'' are typically a daytime behavior, possibly associated with visual predator avoidance (Baird *et al.*, 2008). This may indicate that ''bounce dives'' are associated with something other than behavioral regulation of dissolved nitrogen levels, which would be necessary day and night.

Despite the many theories involving bubble formation (both as a direct cause of injury (see Acoustically Mediated Bubble Growth Section) and an indirect cause of stranding (See Behaviorally Mediated Bubble Growth Section), Southall *et al.* (2007) summarizes that there is either scientific disagreement or a lack of information regarding each of the following important points: (1) Received acoustical exposure conditions for animals involved in stranding events; (2) pathological interpretation of observed lesions in stranded marine mammals; (3) acoustic exposure conditions required to induce such physical trauma directly; (4) whether noise exposure may cause behavioral reactions (such as atypical diving behavior) that secondarily cause bubble formation and tissue damage; and (5) the extent the post mortem artifacts introduced by decomposition before sampling, handling, freezing, or necropsy procedures affect interpretation of observed lesions.

Although not all of the five environmental factors believed to have contributed to the Bahamas stranding (at least 3 surface vessel MFAS sources operating simultaneously or in conjunction with one another, beaked whale presence, surface ducts, steep bathymetry, and constricted channels with limited egress) will be present during exercises in the MIRC Study area (the MIRC study area does not contain similar bathymetric features), NMFS recommends caution when either steep bathymetry, surface ducting conditions (which are present in the MIRC study area), or a constricted channel is present when mid-frequency active sonar is employed by multiple surface vessels simultaneously and cetaceans (especially beaked whales) are present.

LFA Sonar

Analysis of the environmental impacts of the SURTASS LFA sonar system, including the potential for synergistic and cumulative effects with MFAS operation, has been addressed to some degree in the Navy's SURTASS LFA Sonar EISs and more recently in NMFS' August, 2009 biological opinion for SURTASS LFA Sonar. The take of marine mammals incidental to the operation of LFA sonar in the MIRC and elsewhere has been previously authorized by NOAA/NMFS (2002a, 2007).

Although the authorization of take of marine mammals incidental to the operation of LFA sonar will not be considered here because it has already been separately authorized, NMFS has considered more specifically the manner in which LFA sonar and MFAS may interact in a multi-strike group exercise with respect to the potential to impact marine mammals in a manner not previously considered.

As mentioned previously, the military intends to conduct three exercises (multi-strike group exercises) during the five-year duration of the rule that may include both SURTASS LFA and MFA sonar sources. The expected duration of these combined exercises is approximately 14 days. Based on an exercise of this length, an LFA sonar system would be active (i.e., actually transmitting) for no more than approximately 25 hours. Tactical and technical considerations dictate that the LFA sonar ship would typically be tens of miles from the MFA sonar ship when using active sonar.

It is unlikely, but possible, that both LFA and MFA sonar would be active at exactly the same time during a major exercise. In the unlikely event that both systems were operating simultaneously, the likelihood of more than a relatively small number of individual marine mammals being physically present at a time, location, and depth to be able to receive both LFA and MFA sonar signals at levels of concern at the same time is even smaller as the sound from

both signals would have attenuated when they reached the marine mammal in question, so even a simultaneous exposure would not be at the full signal of either system. Additionally, few species have maximum sensitivity to both the low and middle frequencies.

In terms of estimating hours of such exposure, assuming an LFA and MFA sonar source transmitting at the same time over a 25-hour period (which is a subset of a nominal 14-day exercise) and based on the fact that the two sources transmit at very different duty cycles, the overlap of the actual signals would be approximately 3.2%, or 0.8 hours (assuming that there is only one MFA sonar ship transmitting). But the possibility of even that overlap must consider the other factors discussed above.

Based on the fact that an LFA sonar ship would be tens of miles away from an MFA ship when using active sonar and that the overlap of the signals would only be about 50 minutes, the potential impacts on marine mammals that might be exposed simultaneously to both MFA and LFA sonars would be limited and not significant.

Exposure to Underwater Detonation of Explosives

Some of the Navy's training exercises include the underwater detonation of explosives. For many of the exercises discussed, inert ordnance is used for a subset of the exercises. For exercises that involve ''shooting'' at a target that is above the surface of the water, underwater explosions only occur when the target is missed, which is the minority of the time (the Navy has historical hit/miss ratios and uses them in their exposure estimates). The underwater explosion from a weapon would send a shock wave and blast noise through the water, release gaseous by-products, create an oscillating bubble, and cause a plume of water to shoot up from the water surface. The effects of an underwater explosion on a marine mammal depends on many factors, including the size, type, and depth of both the animal and the explosive charge; the depth of the water column; and the standoff distance between the charge and the animals, as well as the sound propagation properties of the environment. Potential impacts can range from brief effects (such as behavioral disturbance), tactile perception, physical discomfort, slight injury of the internal organs and the auditory system, to death of the animal (Yelverton *et al.*, 1973; O'Keeffe and Young, 1984; DoN, 2001). Non-lethal injury includes slight injury to internal organs and the auditory system; however, delayed lethality can be a result of individual or cumulative sublethal injuries (DoN, 2001). Immediate lethal injury would be a result of massive combined trauma to internal organs as a direct result of proximity to the point of detonation (DoN, 2001).'' Generally, exposures to higher levels of impulse and pressure levels would result in worse impacts to an individual animal.

Injuries resulting from a shock wave take place at boundaries between tissues of different density. Different velocities are imparted to tissues of different densities, and this can lead to their physical disruption. Blast effects are greatest at the gas-liquid interface (Landsberg, 2000). Gas-containing organs, particularly the lungs and gastrointestinal tract, are especially susceptible (Goertner, 1982; Hill, 1978; Yelverton *et al.*, 1973). In addition, gas-containing organs including the nasal sacs, larynx, pharynx, trachea, and lungs may be damaged by compression/expansion caused by the oscillations of the blast gas bubble (Reidenberg and Laitman, 2003). Intestinal walls can bruise or rupture, with subsequent hemorrhage and escape of gut contents into the body cavity. Less severe gastrointestinal tract injuries include contusions, petechiae (small red or purple spots caused by bleeding in the skin), and slight hemorrhaging (Yelverton *et al.*, 1973).

Because the ears are the most sensitive to pressure, they are the organs most sensitive to injury (Ketten, 2000). Sound-related trauma associated with blast noise can be theoretically distinct from injury from the shock wave, particularly farther from the explosion. If an animal is able to hear a noise, at some level it can fatigue or damage its hearing by causing decreased sensitivity (Ketten, 1995) (See Noise-induced Threshold Shift Section above). Sound-related trauma can be lethal or sublethal. Lethal impacts are those that result in immediate death or serious debilitation in or near an intense source and are not, technically, pure acoustic trauma (Ketten, 1995). Sublethal impacts include hearing loss, which is caused by exposures to perceptible sounds. Severe damage (from the shock wave) to the ears includes tympanic membrane rupture, fracture of the ossicles, damage to the cochlea, hemorrhage, and cerebrospinal fluid leakage into the middle ear. Moderate injury implies partial hearing loss due to tympanic membrane rupture and blood in the middle ear. Permanent hearing loss also can occur when the hair cells are damaged by one very loud event, as well as by prolonged exposure to a loud noise or chronic exposure to noise. The level of impact from blasts depends on both an animal's location and, at outer zones, on its sensitivity to the residual noise (Ketten, 1995).

There have been fewer studies addressing the behavioral effects of explosives on marine mammals than MFAS/HFAS. However, though the nature of the sound waves emitted from an explosion is different (in shape and rise time) from MFAS/HFAS, we still anticipate the same sorts of behavioral responses (see Exposure to MFAS/HFAS: Behavioral Disturbance Section) to result from repeated explosive detonations (a smaller range of likely less severe responses would be expected to occur as a result of exposure to a single explosive detonation).

Potential Effects of Vessel Movement and Collisions

Vessel movement in the vicinity of marine mammals has the potential to result in either a behavioral response or a direct physical interaction. Both scenarios are discussed below.

Vessel Movement

There are limited data concerning marine mammal behavioral responses to vessel traffic and vessel noise, and a lack of consensus among scientists with respect to what these responses mean or whether they result in short-term or long-term adverse effects. In those cases where there is a busy shipping lane or where there is large amount of vessel traffic, marine mammals may experience acoustic masking (Hildebrand, 2005) if they are present in the area (e.g., killer whales in Puget Sound; Foote *et al.*, 2004; Holt *et al.*, 2008). In cases where vessels actively approach marine mammals (e.g., whale watching or dolphin watching boats), scientists have documented that animals exhibit altered behavior such as increased swimming speed, erratic movement, and active avoidance behavior (Bursk, 1983; Acevedo, 1991; Baker and MacGibbon, 1991; Trites and Bain, 2000; Williams *et al.*, 2002; Constantine *et al.*, 2003), reduced blow interval (Ritcher *et al.*, 2003), disruption of normal social behaviors (Lusseau, 2003; 2006), and the shift of behavioral activities which may increase energetic costs (Constantine *et al.*, 2003; 2004). A detailed review of marine mammal reactions to ships and boats is available in Richardson *et al.* (1995). For each of the marine mammals taxonomy groups, Richardson *et al.* (1995) provided the following assessment regarding cetacean reactions to vessel traffic:

Toothed whales: ''In summary, toothed whales sometimes show no

avoidance reaction to vessels, or even approach them. However, avoidance can occur, especially in response to vessels of types used to chase or hunt the animals. This may cause temporary displacement, but we know of no clear evidence that toothed whales have abandoned significant parts of their range because of vessel traffic.''

Baleen whales: ''When baleen whales receive low-level sounds from distant or stationary vessels, the sounds often seem to be ignored. Some whales approach the sources of these sounds. When vessels approach whales slowly and non-aggressively, whales often exhibit slow and inconspicuous avoidance maneuvers. In response to strong or rapidly changing vessel noise, baleen whales often interrupt their normal behavior and swim rapidly away. Avoidance is especially strong when a boat heads directly toward the whale.''

It is important to recognize that behavioral responses to stimuli are complex and influenced to varying degrees by a number of factors such as species, behavioral contexts, geographical regions, source characteristics (moving or stationary, speed, direction, etc.), prior experience of the animal, and physical status of the animal. For example, studies have shown that beluga whales reacted differently when exposed to vessel noise and traffic. In some cases, naïve beluga whales exhibited rapid swimming from ice-breaking vessels up to 80 km away, and showed changes in surfacing, breathing, diving, and group composition in the Canadian high Arctic where vessel traffic is rare (Finley *et al.*, 1990). In other cases, beluga whales were more tolerant of vessels, but responded differentially to certain vessels and operating characteristics by reducing their calling rates (especially older animals) in the St. Lawrence River where vessel traffic is common (Blane and Jaakson, 1994). In Bristol Bay, Alaska, beluga whales continued to feed when surrounded by fishing vessels and resisted dispersal even when purposefully harassed (Fish and Vania, 1971).

In reviewing more than 25 years of whale observation data, Watkins (1986) concluded that whale reactions to vessel traffic were ''modified by their previous experience and current activity: Habituation often occurred rapidly, attention to other stimuli or preoccupation with other activities sometimes overcame their interest or wariness of stimuli.'' Watkins noticed that over the years of exposure to ships in the Cape Cod area, minke whales (*Balaenoptera acutorostrata*) changed from frequent positive (such as approaching vessels) interest to generally uninterested reactions; finback whales (*B. physalus*) changed from mostly negative (such as avoidance) to uninterested reactions; right whales (*Eubalaena glacialis*) apparently continued the same variety of responses (negative, uninterested, and positive responses) with little change; and humpbacks (*Megaptera novaeangliae*) dramatically changed from mixed responses that were often negative to often strongly positive reactions. Watkins (1986) summarized that ''whales near shore, even in regions with low vessel traffic, generally have become less wary of boats and their noises, and they have appeared to be less easily disturbed than previously. In particular locations with intense shipping and repeated approaches by boats (such as the whale-watching areas of Stellwagen Bank), more and more whales had P [positive] reactions to familiar vessels, and they also occasionally approached other boats and yachts in the same ways.''

Although the radiated sound from Navy vessels will be audible to marine mammals over a large distance, it is unlikely that animals will respond behaviorally (in a manner that NMFS would consider MMPA harassment) to low-level distant shipping noise as the animals in the area are likely to be habituated to such noises (Nowacek *et al.*, 2004). In light of these facts, NMFS does not expect the Navy's vessel movements to result in Level B harassment.

Vessel Strike

Commercial and Navy ship strikes of cetaceans can cause major wounds, which may lead to the death of the animal. An animal at the surface could be struck directly by a vessel, a surfacing animal could hit the bottom of a vessel, or an animal just below the surface could be cut by a vessel's propeller. The severity of injuries typically depends on the size and speed of the vessel (Knowlton and Kraus, 2001; Laist *et al.*, 2001; Vanderlaan and Taggart, 2007).

The most vulnerable marine mammals are those that spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (for example, the sperm whale). In addition, some baleen whales, such as the North Atlantic right whale, seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.*, 2004). These species are primarily large, slow moving whales. Smaller marine mammals (for example, bottlenose dolphin) move quickly through the water column and are often seen riding the bow wave of large ships. Marine mammal responses to vessels may include avoidance and changes in dive pattern (NRC, 2003).

An examination of all known ship strikes from all shipping sources (civilian and military) indicates vessel speed is a principal factor in whether a vessel strike results in death (Knowlton and Kraus, 2001; Laist *et al.,* 2001, Jensen and Silber, 2003; Vanderlaan and Taggart, 2007). In assessing records in which vessel speed was known, Laist *et al.* (2001) found a direct relationship between the occurrence of a whale strike and the speed of the vessel involved in the collision. The authors concluded that most deaths occurred when a vessel was traveling in excess of 13 knots.

Jensen and Silber (2003) detailed 292 records of known or probable ship strikes of all large whale species from 1975 to 2002. Of these, vessel speed at the time of collision was reported for 58 cases. Of these cases, 39 (or 67%) resulted in serious injury or death (19 or 33% resulted in serious injury as determined by blood in the water, propeller gashes or severed tailstock, and fractured skull, jaw, vertebrae, hemorrhaging, massive bruising or other injuries noted during necropsy and 20 or 35% resulted in death). Operating speeds of vessels that struck various species of large whales ranged from 2 to 51 knots. The majority (79%) of these strikes occurred at speeds of 13 knots or greater. The average speed that resulted in serious injury or death was 18.6 knots. Pace and Silber (2005) found that the probability of death or serious injury increased rapidly with increasing vessel speed. Specifically, the predicted probability of serious injury or death increased from 45% to 75% as vessel speed increased from 10 to 14 knots, and exceeded 90% at 17 knots. Higher speeds during collisions result in greater force of impact, but higher speeds also appear to increase the chance of severe injuries or death by pulling whales toward the vessel. Computer simulation modeling showed that hydrodynamic forces pulling whales toward the vessel hull increase with increasing speed (Clyne, 1999, Knowlton *et al.,* 1995).

The Jensen and Silber (2003) report notes that the database represents a minimum number of collisions, because the vast majority probably go undetected or unreported. In contrast, Navy vessels are likely to detect any strike that does occur, and they are required to report all ship strikes involving marine mammals. Overall, the percentages of Navy traffic relative to

overall large shipping traffic are very small (on the order of 2%).

The probability of vessel and marine mammal interactions occurring in the MIRC Study Area is dependent upon several factors including numbers, types, and speeds of vessels; the regularity, duration, and spatial extent of training events; the presence/absence and density of marine mammals; and mitigation measures implemented by the Navy. Currently, the number of Navy vessels operating in the MIRC Study Area varies based on training schedules and can typically range from zero to about ten vessels at any given time. Ship sizes range from 362 ft (110 m) for a nuclear submarine (SSN) to 1,092 ft (331 m) for a nuclear aircraft carrier (CVN). Smaller boats such as RHIBS, LCAC, etc. are also utilized in the MIRC study area. The smaller boats do not contain acoustic sound sources. Speeds are typically within 10 to 14 knots; however, slower or faster speeds are possible depending upon the specific training scenario. Training involving vessel movements occurs intermittently and is variable in duration, ranging from a few hours up to two weeks. These training events are widely dispersed. Consequently, the density of ships within the MIRC Study Area at any given time is extremely low (i.e., less than 0.0002 ships/nm^2). The Navy logs about 1,000 total vessel days within the MIRC Study Area during a typical year. Vessel days was computed as the number of steaming days per year by summing the number of steaming hours proposed in the range complex, dividing by 24 hours per day, and rounding to the nearest 10 days.

Moreover, naval vessels transiting the study area or engaging in the training exercises will not actively or intentionally approach a marine mammal. While in transit, naval vessels will be alert at all times, use extreme caution, and proceed at a ''safe speed'' so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions. When whales have been sighted in the area, Navy vessels will increase vigilance and take reasonable and practicable actions to avoid collisions and activities that might result in close interaction of naval assets and marine mammals. Actions may include changing speed and/or direction and would be dictated by environmental and other conditions (e.g., safety, weather). For a thorough discussion of mitigation measures, please see the Mitigation section.

Additionally, the majority of ships participating in MIRC training activities have a number of advantages for avoiding ship strikes as compared to most commercial merchant vessels, including the following:

- Navy ships have their bridges positioned forward, offering good visibility ahead of the bow.
- Crew size is much larger than that of merchant ships allowing for more potential observers on the bridge.
- Dedicated lookouts are posted during a training activity scanning the ocean for anything detectable in the water; anything detected is reported to the Officer of the Deck.
- Navy lookouts receive extensive training including Marine Species Awareness Training designed to provide marine species detection cues and information necessary to detect marine mammals.
- Navy ships are generally much more maneuverable than commercial merchant vessels.

Based on the implementation of Navy mitigation measures and the low density of Navy ships in the Study Area, NMFS has concluded preliminarily that the probability of a ship strike is very low, especially for dolphins and porpoises, killer whales, social pelagic odontocetes and pinnipeds that are highly visible, and/or comparatively small and maneuverable. Though more probable, NMFS also believes that the likelihood of a Navy vessel striking a mysticete or sperm whale is low. The Navy did not request take from a ship strike and based on our preliminary determination, NMFS is not recommending that they modify their request at this time. However, both NMFS and the Navy are currently engaged in a Section 7 consultation under the ESA, and that consultation will further inform our final decision.

Mitigation

In order to issue an incidental take authorization (ITA) under Section 101(a)(5)(A) of the MMPA, NMFS must set forth the ''permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.'' The NDAA of 2004 amended the MMPA as it relates to military-readiness activities and the ITA process such that ''least practicable adverse impact'' shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the ''military readiness activity''. The training activities described in the MIRC application are considered military readiness activities.

NMFS reviewed the proposed MIRC activities and the proposed MIRC mitigation measures as described in the Navy's LOA application to determine if they would result in the least practicable adverse effect on marine mammals, which includes a careful balancing of the likely benefit of any particular measure to the marine mammals with the likely effect of that measure on personnel safety, practicality of implementation, and impact on the effectiveness of the ''military-readiness activity.'' NMFS identified the need to further flesh out the Navy's plan for how to respond in the event of a stranding in the MIRC, and the Navy and NMFS subsequently coordinated and produced the draft Stranding Response Plan for MIRC, which is summarized below and available at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* Included below are the mitigation measures the Navy initially proposed (see ''Mitigation Measures Proposed in the Navy's LOA Application'') and the Stranding Response Plan that NMFS and the Navy developed (see ''Additional Measure Developed by NMFS and the Navy'' below).

Mitigation Measures Proposed in the Navy's LOA Application

Personnel Training

The use of shipboard lookouts is a critical component of all Navy protective measures. Lookout duties require that they report all objects sighted in the water to the officer of the deck (OOD) (e.g., trash, a periscope, marine mammals, sea turtles) and all disturbances (e.g., surface disturbance, discoloration) that may be indicative of a threat to the vessel and its crew. There are personnel serving as lookouts on station at all times (day and night) when a ship or surfaced submarine is moving through the water.

- All commanding officers (COs), executive officers (XOs), lookouts, officers of the deck (OODs), junior OODs (JOODs), maritime patrol aircraft aircrews, and Anti-submarine Warfare (ASW) helicopter crews will complete the NMFS-approved Marine Species Awareness Training (MSAT) by viewing the U.S. Navy MSAT digital versatile disk (DVD). All bridge lookouts will complete both parts one and two of the MSAT; part two is optional for other personnel. This training addresses the lookout's role in environmental protection, laws governing the protection of marine species, Navy

stewardship commitments and general observation information to aid in avoiding interactions with marine species.

• Navy lookouts will undertake extensive training in order to qualify as a watchstander in accordance with the Lookout Training Handbook (Naval Education and Training Command [NAVEDTRA] 12968–D).

• Lookout training will include on-the-job instruction under the supervision of a qualified, experienced lookout. Following successful completion of this supervised training period, lookouts will complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects). Personnel being trained as lookouts can be counted among the number of lookeouts required by a particular mitigation measure as long as supervisors monitor their progress and performance.

• Lookouts will be trained in the most effective means to ensure quick and effective communication within the command structure in order to facilitate implementation of protective measures if marine species are spotted.

• All lookouts onboard platforms involved in ASW training events will review the NMFS-approved Marine Species Awareness Training material prior to use of mid-frequency active sonar.

• All COs, XOs, and officers standing watch on the bridge will have reviewed the Marine Species Awareness Training material prior to a training event employing the use of MFAS/HFAS.

General Operating Procedures (for All Training Types)

Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order will be issued to further disseminate the personnel training requirement and general marine species protective measures.

• COs will make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

• While underway, surface vessels will have at least two lookouts with binoculars; surfaced submarines will have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts will watch for and report to the OOD the presence of marine mammals.

• On surface vessels equipped with a multi-function active sensor, pedestal mounted ''Big Eye'' (20x110) binoculars will be properly installed and in good working order to assist in the detection of marine mammals in the vicinity of the vessel.

• Personnel on lookout will employ visual search procedures employing a scanning methodology in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

• After sunset and prior to sunrise, lookouts will employ Night Lookouts Techniques in accordance with the Lookout Training Handbook. (NAVEDTRA 12968–D).

• While in transit, naval vessels will be alert at all times, use extreme caution, and proceed at a ''safe speed'', which means the speed at which CO can maintain crew safety and effectiveness of current operational directives, so that the vessel can take action to avoid a collision with any marine mammal.

• When whales have been sighted in the area, Navy vessels will increase vigilance and take all reasonable actions to avoid collisions and close interaction of naval assets and marine mammals. Actions may include changing speed and/or direction and would be dictated by environmental and other conditions (e.g., safety, weather).

• Navy aircraft participating in exercises at sea will conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties.

• Marine mammal detections will be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

Operating Procedures (for Anti-Submarine Warfare Operations)

• On the bridge of surface ships, there will always be at least three people on watch whose duties include observing the water surface around the vessel.

• All surface ships participating in ASW training events will, in addition to the three personnel on watch noted previously, have at all times during the exercise at least two additional personnel on watch as lookouts.

• Personnel on lookout and officers on watch on the bridge will have at least one set of binoculars available for each person to aid in the detection of marine mammals.

• Personnel on lookout will be responsible for reporting all objects or anomalies sighted in the water (regardless of the distance from the vessel) to the Officer of the Deck, since any object or disturbance (e.g., trash, periscope, surface disturbance, discoloration) in the water may be indicative of a threat to the vessel and its crew or indicative of a marine species that may need to be avoided as warranted.

• All personnel engaged in passive acoustic sonar operation (including aircraft, surface ships, or submarines) will monitor for marine mammal vocalizations and report the detection of any marine mammal to the appropriate watch station for dissemination and appropriate action.

• During MFAS operations, personnel will utilize all available sensor and optical systems (such as night vision goggles) to aid in the detection of marine mammals.

• Aircraft with deployed sonobuoys will use only the passive capability of sonobuoys when marine mammals are detected within 200 yds (183 m) of the sonobuoy.

• Helicopters shall observe/survey the vicinity of an ASW exercise for 10 minutes before the first deployment of active (dipping) sonar in the water.

• Helicopters shall not dip their sonar within 200 yards of a marine mammal and shall cease pinging if a marine mammal closes within 200 yards after pinging has begun.

• Safety Zones—When marine mammals are detected by any means (aircraft, shipboard lookout, or acoustically) within or closing to inside 1,000 yds (914 m) of the sonar dome (the bow), the ship or submarine will limit active transmission levels to at least 6 decibels (dB) below normal operating levels (i.e., limit to at most 229 dB for AN/SQS–53C and 219 for AN/SQS–56C, etc)

• Ships and submarines will continue to limit maximum transmission levels by this 6-dB factor until the animal has been seen to leave the 1000-yd exclusion zone, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

• Should a marine mammal be detected within or closing to inside 500 yds (457 m) of the sonar dome, active sonar transmissions will be limited to at least 10 dB below the equipment's normal operating level (i.e., limit to at most 225 dB for AN/SQS–53C and 215 for AN/SQS–56C, etc.). Ships and submarines will continue to limit maximum ping levels by this 10-dB

factor until the animal has been seen to leave the 500-yd area (at which point the Navy could return to the 6-dB down powerdown, but not full power) or the 1000-yd area, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

• Should the marine mammal be detected within or closing to inside 200 yds (183 m) of the sonar dome, active sonar transmissions will cease. Active sonar will not resume until the animal has been seen to leave the 200-yd exclusion zone (at which point the 500 or 1000-yd powerdowns apply until the animal is beyond the 1000-yd exclusion zone), has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

• Special conditions applicable for dolphin and porpoise only: If, after conducting an initial maneuver to avoid close quarters with dolphin or porpoise, the OOD concludes that dolphins are deliberately closing to ride the vessel's bow wave, no further mitigation actions would be necessary while the dolphin or porpoise continue to exhibit bow wave riding behavior.

• If the need for power-down should arise (as detailed in ''Safety Zones'' above) when the Navy was operating a hull-mounted or sub-mounted source above 235 dB (infrequent) the Navy shall follow the requirements as though they were operating at 235 dB (i.e., the first power-down will be to 229 dB).

• Prior to start up or restart of active sonar, operators will check that the Safety Zone radius around the sound source is clear of marine mammals.

• Active sonar levels (generally)—Navy will operate sonar at the lowest practicable level, not to exceed 235 dB, except as required to meet tactical training objectives.

• Submarine sonar operators will review detection indicators of close-aboard marine mammals prior to the commencement of ASW training events involving MFAS.

Underwater Detonations (Up to 10-lb Charges)

Exclusion Zones—All training activities involving the use of explosive charges must include exclusion zones for marine mammals to prevent physical and/or acoustic effects to those species. These exclusion zones for demolitions and ship mine countermeasres shall extend in a 700-yard arc (640 m) radius around the detonation site. Should a marine mammal be present within the the surveillance area, the explosive event shall not be started until the animal leaves the area.

Pre-Exercise Surveys—For Demolition and Ship Mine Countermeasures Operations, pre-exercise surveys shall be conducted within 30 minutes prior to the commencement of the scheduled explosive event. The survey may be conducted from the surface, by divers, and/or from the air, and personnel shall be alert to the presence of any marine mammal. Should such an animal be present within the exclusion area, the explosive event shall be paused until the animal voluntarily leaves the area. The Navy will ensure the exclusion area is clear of marine mammals for a full 30 minutes prior to initiating the explosive event.

Post-Exercise Surveys—Surveys within the same radius shall also be conducted within 30 minutes after the completion of the explosive event.

Reporting—If there is any evidence that a marine mammal may have been injured or killed by the action, Navy training activities shall be immediately suspended and the action reported immediately to Commander, Navy Marianas who will contact the Commander, Pacific Fleet. The situation shall also be reported to NMFS (see Stranding Plan for details).

Sinking Exercises

The selection of sites suitable for SINKEXs involves a balance of operational suitability, requirements established under the Marine Protection, Research and Sanctuaries Act (MPRSA) permit granted to the Navy (40 CFR 229.2), and the identification of areas with a low likelihood of encountering ESA-listed species. To meet operational suitability criteria, the locations of SINKEXs must be within a reasonable distance of the target vessels' originating location. The locations should also be close to active military bases to allow participating assets access to shore facilities. For safety purposes, these locations should also be in areas that are not generally used by non-military air or watercraft. The MPRSA permit requires vessels to be sunk in waters which are at least 1000 fathoms (1828 m) deep and at least 50 nm from land. In general, most listed species prefer areas with strong bathymetric gradients and oceanographic fronts for significant biological activity such as feeding and reproduction. Typical locations include the continental shelf and shelf-edge.

• All weapons firing would be conducted during the period 1 hour after official sunrise to 30 minutes before official sunset.

• Extensive range clearance activities would be conducted in the hours prior to commencement of the exercise, ensuring that no shipping is located within the hazard range of the longest-range weapon being fired for that event.

• An exclusion zone with a radius of 1.0 nm (1.9 km) would be established around each target. This exclusion zone is based on calculations using a 990-lb (450-kg) H6 net explosive weight high explosive source detonated 5 ft (1.5 m) below the surface of the water, which yields a distance of 0.85 nm (1.57 km) (cold season) and 0.89 nm (1.65 km) (warm season) beyond which the received level is below the 182 decibels (dB) re: 1 micropascal squared-seconds (μPa2-s) threshold established for the WINSTON S. CHURCHILL (DDG 81) shock trials (U.S. Navy, 2001). An additional buffer of 0.5 nm (0.9 km) would be added to account for errors, target drift, and animal movements. Additionally, a safety zone, which would extend beyond the buffer zone by an additional 0.5 nm (0.9 km), would be surveyed. Together, the zones extend out 2 nm (3.7 km) from the target.

• A series of surveillance overflights shall be conducted prior to the event to determine whether marine mammals are present in the exclusion zone. Survey protocol will be as follows:

• Overflights within the exclusion zone would be conducted in a manner that optimizes the surface area of the water observed. This may be accomplished through the use of the Navy's Search and Rescue Tactical Aid, which provides the best search altitude, ground speed, and track spacing for the discovery of small, possibly dark objects in the water based on the environmental conditions of the day. These environmental conditions include the angle of sun inclination, amount of daylight, cloud cover, visibility, and sea state.

• All visual surveillance activities would be conducted by Navy personnel trained in visual surveillance. At least one member of the mitigation team would have completed the Navy's marine mammal training program for lookouts.

• In addition to the overflights, the exclusion zone would be monitored by passive acoustic means, when assets are available. This passive acoustic monitoring would be maintained throughout the exercise. Potential assets include sonobuoys, which can be utilized to detect any vocalizing marine mammals (particularly sperm whales) in the vicinity of the exercise. The sonobuoys would be re-seeded as necessary throughout the exercise. Additionally, passive sonar onboard submarines may be utilized to detect any vocalizing marine mammals in the area. The OCE would be informed of

any aural detection of marine mammals and would include this information in the determination of when it is safe to commence the exercise.

• On each day of the exercise, aerial surveillance of the exclusion and safety zones would commence 2 hours prior to the first firing.

• The results of all visual, aerial, and acoustic searches would be reported immediately to the OCE. No weapons launches or firing would commence until the OCE declares the safety and exclusion zones free of marine mammals and threatened and endangered species.

• If a marine mammal observed within the exclusion zone is diving, firing would be delayed until the animal is re-sighted outside the exclusion zone, or 30 minutes have elapsed, whichever occurs first. After 30 minutes, if the animal has not been re-sighted it would be assumed to have left the exclusion zone. The OCE would determine if the marine mammal is in danger of being adversely affected by commencement of the exercise.

• During breaks in the exercise of 30 minutes or more, the exclusion zone would again be surveyed for any marine mammal. If a marine mammal is sighted within the exclusion zone or the buffer zone, the OCE would be notified, and the procedure described above would be followed.

• Upon sinking of the vessel, a final surveillance of the exclusion zone would be monitored for 2 hours, or until sunset, to verify that no marine mammals were harmed.

• Aerial surveillance would be conducted using helicopters or other aircraft based on necessity and availability. The Navy has several types of aircraft capable of performing this task; however, not all types are available for every exercise. For each exercise, the available asset best suited for identifying objects on and near the surface of the ocean would be used. These aircraft would be capable of flying at the slow safe speeds necessary to enable viewing of marine vertebrates with unobstructed, or minimally obstructed, downward and outward visibility. The exclusion and safety zone surveys may be cancelled in the event that a mechanical problem, emergency search and rescue, or other similar and unexpected event preempts the use of one of the aircraft onsite for the exercise.

• Every attempt would be made to conduct the exercise in sea states that are ideal for marine mammal sighting—Beaufort Sea State 3 or less. In the event of a sea state of 4 or above, survey efforts would be increased within the zones. This would be accomplished through the use of an additional aircraft, if available, and conducting tight search patterns.

• The exercise would not be conducted unless the exclusion zone or buffer zone could be adequately monitored visually. Should low cloud cover or surface visibility prevent adequate visual monitoring as described previously, the exercise would be delayed until conditions improved, and all of the above monitoring criteria could be met.

• In the unlikely event that any marine mammal is observed to be harmed in the area, a detailed description of the animal would be taken, the location noted, and if possible, photos taken. This information would be provided to NMFS via the Navy's regional environmental coordinator for purposes of identification (see the draft Stranding Plan for detail).

• An after action report detailing the exercise's time line, the time the surveys commenced and terminated, amount, and types of all ordnance expended, and the results of survey efforts for each event would be submitted to NMFS.

Surface-to-Surface Gunnery (Up to 5-Inch Explosive Rounds)

• For exercises using targets towed by a vessel, target-towing vessels shall maintain a trained lookout for marine mammals when feasible. If a marine mammal is sighted in the vicinity, the tow vessel will immediately notify the firing vessel, which will suspend the exercise until the area is clear.

• A 600 yard (585 m) radius buffer zone will be established around the intended target.

• From the intended firing position, trained lookouts will survey the buffer zone for marine mammals and sea turtles prior to commencement and during the exercise as long as practicable. Due to the distance between the firing position and the buffer zone, lookouts are only expected to visually detect breaching whales, whale blows, and large pods of dolphins and porpoises.

• The exercise will be conducted only when the buffer zone is visible and marine mammals are not detected within it.

Surface-to-Surface Gunnery (Non-Explosive Rounds)

• A 200 yard (183 m) radius buffer zone will be established around the intended target.

• From the intended firing position, trained lookouts will survey the buffer zone for marine mammals and sea turtles prior to commencement and during the exercise as long as practicable. Due to the distance between the firing position and the buffer zone, lookouts are only expected to visually detect breaching whales, whale blows, and large pods of dolphins and porpoises.

• If applicable, target towing vessels will maintain a lookout. If a marine mammal or sea turtle is sighted in the vicinity of the exercise, the tow vessel will immediately notify the firing vessel in order to secure gunnery firing until the area is clear.

• The exercise will be conducted only when the buffer zone is visible and marine mammals and sea turtles are not detected within the target area and the buffer zone.

Surface-to-Air Gunnery (Explosive and Non-Explosive Rounds)

• Vessels will orient the geometry of gunnery exercises in order to prevent debris from falling in the area of sighted marine mammals and sea turtles.

• Vessels will expedite the attempt to recover any parachute deploying aerial targets to reduce the potential for entanglement of marine mammals and sea turtles.

• Target towing aircraft shall maintain a lookout if feasible. If a marine mammal or sea turtle is sighted in the vicinity of the exercise, the tow aircraft will immediately notify the firing vessel in order to secure gunnery firing until the area is clear.

Air-to-Surface Gunnery (Explosive and Non-Explosive Rounds)

• A 200 yard (183 m) radius buffer zone will be established around the intended target.

• If surface vessels are involved, lookout(s) will visually survey the buffer zone for marine mammals and sea turtles prior to and during the exercise.

• Aerial surveillance of the buffer zone for marine mammals and sea turtles will be conducted prior to commencement of the exercise. Aerial surveillance altitude of 500 feet to 1,500 feet (152–456 m) is optimum. Aircraft crew/pilot will maintain visual watch during exercises. Release of ordnance through cloud cover is prohibited; aircraft must be able to actually see ordnance impact areas.

• The exercise will be conducted only if marine mammals and sea turtles are not visible within the buffer zone.

Small Arms Training (Grenades, Explosive and Non-Explosive Rounds)

Lookouts will visually survey for marine mammals and sea turtles. Weapons will not be fired in the

direction of known or observed marine mammals or sea turtles.

Air-to-Surface At-Sea Bombing Exercises (Explosive Bombs and Rockets)

- Ordnance shall not be targeted to impact within 1,000 yards (914 m) of known or observed sea turtles or marine mammals.
- A buffer zone of 1,000 yards (914 m) radius will be established around the intended target.
- Aircraft will visually survey the target and buffer zone for marine mammals and sea turtles prior to and during the exercise. The survey of the impact area will be made by flying at 1,500 feet or lower, if safe to do so, and at the slowest safe speed. When safety or other considerations require the release of weapons without the releasing pilot having visual sight of the target area, a second aircraft, the ''wingman,'' will clear the target area and perform the clearance and observation functions required before the dropping plane may release its weapons. Both planes must have direct communication to assure immediate notification to the dropping plane that the target area may have been fouled by encroaching animals or people. The clearing aircraft will assure it has visual site of the target area at a maximum height of 1500 ft. The clearing plane will remain within visual sight of the target until required to clear the area for safety reasons.
- Survey aircraft should employ most effective search tactics and capabilities.
- The exercises will be conducted only if marine mammals and sea turtles are not visible within the buffer zone.

Air-to-Surface At-Sea Bombing Exercises (Non-Explosive Bombs and Rockets)

- If surface vessels are involved, trained lookouts will survey for sea turtles and marine mammals. Ordnance shall not be targeted to impact within 1,000 yards (914 m) of known or observed sea turtles or marine mammals.
- A 1,000 yard (914 m) radius buffer zone will be established around the intended target.
- Aircraft will visually survey the target and buffer zone for marine mammals and sea turtles prior to and during the exercise. The survey of the impact area will be made by flying at 1,500 feet (152 m) or lower, if safe to do so, and at the slowest safe speed. When safety or other considerations require the release of weapons without the releasing pilot having visual sight of the target area, a second aircraft, the ''wingman,'' will clear the target area and perform the clearance and observation functions required before the dropping plane may release its weapons. Both planes must have direct communication to assure immediate notification to the dropping plane that the target area may have been fouled by encroaching animals or people. The clearing aircraft will assure it has visual site of the target area at a maximum height of 1500 ft. The clearing plane will remain within visual sight of the target until required to clear the area for safety reasons. Survey aircraft shall employ most effective search tactics and capabilities.
- The exercise will be conducted only if marine mammals and sea turtles are not visible within the buffer zone.

Air-to-Surface Missile Exercises (explosive and non-explosive)—Aircraft will visually survey the target area for marine mammals. Visual inspection of the target area will be made by flying at 1,500 (457 m) feet or lower, if safe to do so, and at slowest safe speed. Firing or range clearance aircraft must be able to actually see ordnance impact areas. Explosive ordnance shall not be targeted to impact within 1,800 yds (1646 m) of sighted marine mammals.

Aircraft Training Activities Involving Non-Explosive Devices

Non-explosive devices such as some sonobuoys, inert bombs, and Mining Training Activities involve aerial drops of devices that have the potential to hit marine mammals and sea turtles if they are in the immediate vicinity of a floating target. The exclusion zone, as established above for each non-explosive exercise type and if not-defined above, the minimum exclusion zone is 200 yards, shall be clear of marine mammals and sea turtles around the target location. Pre- and post-surveillance and reporting requirements outlined for underwater detonations shall be implemented during Mining Training Activities.

Explosive Source Sonobuoys Used in EER/IEER (AN/SSQ–110A)

- Crews will conduct visual reconnaissance of the drop area prior to laying their intended sonobuoy pattern. This search should be conducted below 457 m (500 yd) at a slow speed, if operationally feasible and weather conditions permit. In dual aircraft operations, crews are allowed to conduct coordinated area clearances.
- Crews shall conduct a minimum of 30 minutes of visual and aural monitoring of the search area prior to commanding the first post detonation. This 30-minute observation period may include pattern deployment time.
- For any part of the briefed pattern where a post (source/receiver sonobuoy pair) will be deployed within 914 m (1,000 yd) of observed marine mammal activity, deploy the receiver only and monitor while conducting a visual search. When marine mammals are no longer detected within 914 m (1,000 yd) of the intended post position, co-locate the explosive source sonobuoy (AN/SSQ–110A) (source) with the receiver.
- When operationally feasible, crews will conduct continuous visual and aural monitoring of marine mammal activity. This is to include monitoring of own-aircraft sensors from first sensor placement to checking off station and out of RF range of these sensors.
- Aural Detection—If the presence of marine mammals is detected aurally, then that should cue the aircrew to increase the diligence of their visual surveillance. Subsequently, if no marine mammals are visually detected, then the crew may continue multi-static active search.
- Visual Detection—If marine mammals are visually detected within 914 m (1,000 yd) of the explosive source sonobuoy (AN/SSQ–110A) intended for use, then that payload shall not be detonated. Aircrews may utilize this post once the marine mammals have not been re-sighted for 30 minutes, or are observed to have moved outside the 914 m (1,000 yd) safety buffer, whichever occurs first. Aircrews may shift their multi-static active search to another post, where marine mammals are outside the 914 m (1,000 yd) safety buffer.
- Aircrews shall make every attempt to manually detonate the unexploded charges at each post in the pattern prior to departing the operations area by using the ''Payload 1 Release'' command followed by the ''Payload 2 Release'' command. Aircrews shall refrain from using the ''Scuttle'' command when two payloads remain at a given post. Aircrews will ensure that a 914 m (1,000 yd) safety buffer, visually clear of marine mammals, is maintained around each post as is done during active search training activities.
- Aircrews shall only leave posts with unexploded charges in the event of a sonobuoy malfunction, an aircraft system malfunction, or when an aircraft must immediately depart the area due to issues such as fuel constraints, inclement weather, and in-flight emergencies. In these cases, the sonobuoy will self-scuttle using the secondary (detonation occurs by timer approximately 6 hours after water entry) or tertiary (detonation occurs by salt water soluble plug approximately 12 hours after water entry) method.

• Aircrews shall ensure all payloads are accounted for. Explosive source sonobuoys (AN/SSQ–110A) that cannot be scuttled shall be reported as unexploded ordnance via voice communications while airborne, then upon landing via naval message.

• Mammal monitoring shall continue until out of own-aircraft sensor range.

Stranding Response Plan for MIRC

NMFS and the Navy have developed a draft Stranding Response Plan for Major Exercises in the MIRC Study Area (available at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*). Pursuant to 50 CFR 216.105, the plan will be included as part of (attached to) the Navy's MMPA Letter of Authorization (LOA), which contains the conditions under which the Navy is authorized to take marine mammals pursuant to training activities in the MIRC Study Area. The Stranding Response plan is specifically intended to outline the applicable requirements the authorization is conditioned upon in the event that a marine mammal stranding is reported in the MIRC Study Area during a major training exercise (MTE) (see glossary below). NMFS considers all plausible causes within the course of a stranding investigation and this plan in no way presumes that any strandings in the MIRC Study Area are related to, or caused by, Navy training activities, absent a determination made in a Phase 2 Investigation, as outlined in Paragraph 7 of this plan, indicating that MFAS or explosive detonation in the MIRC Study Area were a cause of the stranding. This plan is designed to address the following three issues:

• Mitigation—When marine mammals are in a situation that can be defined as a stranding (see glossary of plan), they are experiencing physiological stress. When animals are stranded, and alive, NMFS believes that exposing these compromised animals to additional known stressors would likely exacerbate the animal's distress and could potentially cause its death. Regardless of the factor(s) that may have initially contributed to the stranding, it is NMFS' goal to avoid exposing these animals to further stressors. Therefore, when live stranded cetaceans are in the water and engaged in what is classified as an Uncommon Stranding Event (USE) (see glossary of plan), the shutdown component of this plan is intended to minimize the exposure of those animals to MFAS and explosive detonations, regardless of whether or not these activities may have initially played a role in the event.

• Monitoring—This plan will enhance the understanding of how MFAS/HFAS or IEER (as well as other environmental conditions) may, or may not, be associated with marine mammal injury or strandings. Additionally, information gained from the investigations associated with this plan may be used in the adaptive management of mitigation or monitoring measures in subsequent LOAs, if appropriate.

• Compliance—The information gathered pursuant to this protocol will inform NMFS' decisions regarding compliance with Sections 101(a)(5)(B) and (C) of the MMPA.

The Stranding Response Plan has several components:

Shutdown Procedures—When an uncommon stranding event (USE—defined in the plan) occurs during a major exercise in the MIRC Study Area, and a live cetacean(s) is in the water exhibiting indicators of distress (defined in the plan), NMFS will advise the Navy that they should cease MFAS/HFAS operation and explosive detonations within 14 nm of the live animal involved in the USE (NMFS and Navy will maintain a dialogue, as needed, regarding the identification of the USE and the potential need to implement shutdown procedures). This distance is the approximate distance at which sounds from the sonar sources are anticipated to attenuate to 145 dB (SPL). The risk function predicts that less than 1 percent of the animals exposed to sonar at this level (mysticete or odontocete) would respond in a manner that NMFS considers Level B Harassment.

Memorandum of Agreement (MOA)—The Navy and NMFS will develop an MOA, or other mechanism consistent with federal fiscal law requirements (and all other applicable laws), that allows the Navy to assist NMFS with the Phase 1 and 2 Investigations of USEs through the provision of in-kind services, such as (but not limited to) the use of plane/boat/truck for transport of stranding responders or animals, use of Navy property for necropsies or burial, or assistance with aerial surveys to discern the extent of a USE. The Navy may assist NMFS with the investigations by providing one or more of the in-kind services outlined in the MOA, when available and logistically feasible and when the provision does not negatively affect Fleet operational commitments.

Communication Protocol—Effective communication is critical to the successful implementation of this Stranding Response Plan. Very specific protocols for communication, including identification of the Navy personnel authorized to implement a shutdown and the NMFS personnel authorized to advise the Navy of the need to implement shutdown procedures and the associated phone trees, etc. are currently in development and will be refined and finalized for the Stranding Response Plan prior to the issuance of a final rule (and updated yearly).

Stranding Investigation—The Stranding Response Plan also outlines the way that NMFS plans to investigate any strandings (providing staff and resources are available) that occur during major training exercises in the MIRC.

Mitigation Conclusions

NMFS has carefully evaluated the Navy's proposed mitigation measures and considered a broad range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

• The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals,

• The proven or likely efficacy of the specific measure to minimize adverse impacts as planned,

• The practicability of the measure for applicant implementation, including consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

In some cases, additional mitigation measures are required beyond those that the applicant proposes. Any mitigation measure(s) prescribed by NMFS should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

(a) Avoidance or minimization of injury or death of marine mammals wherever possible (goals b, c, and d may contribute to this goal).

(b) A reduction in the numbers of marine mammals (total number or number at biologically important time or location) exposed to received levels of MFAS/HFAS, underwater detonations, or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing harassment takes only).

(c) A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to received levels of MFAS/HFAS, underwater detonations,

or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing harassment takes only).

(d) A reduction in the intensity of exposures (either total number or number at biologically important time or location) to received levels of MFAS/HFAS, underwater detonations, or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing the severity of harassment takes only).

(e) Avoidance or minimization of adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time.

(f) For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation (shut-down zone, etc.).

Based on our evaluation of the Navy's proposed measures, as well as other measures considered by NMFS or recommended by the public, NMFS has determined preliminarily that the Navy's proposed mitigation measures (especially when the Adaptive Management component is taken into consideration (see Adaptive Management below)) are adequate means of effecting the least practicable adverse impacts on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, while also considering personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Further detail is included below.

The proposed rule comment period will afford the public an opportunity to submit recommendations, views and/or concerns regarding this action and the proposed mitigation measures. While NMFS has determined preliminarily that the Navy's proposed mitigation measures will effect the least practicable adverse impact on the affected species or stocks and their habitat, NMFS will consider all public comments to help inform our final decision. Consequently, the proposed mitigation measures may be refined, modified, removed, or added to prior to the issuance of the final rule based on public comments received, and where appropriate, further analysis of any additional mitigation measures.

NMFS believes that the range clearance procedures and shutdown/safety zone/exclusion zone measures the Navy has proposed will enable the Navy to avoid injuring marine mammals and will enable them to minimize the numbers of marine mammals exposed to levels associated with TTS for the following reasons:

MFAS/HFAS

The Navy's standard protective measures indicate that they will ensure powerdown of MFAS/HFAS by 6-dB when a marine mammal is detected within 1000 yd (914 m), powerdown of 4 more dB (or 10-dB total) when a marine mammal is detected within 500 yd (457 m), and will cease MFAS/HFAS transmissions when a marine mammal is detected within 200 yd (183 m).

PTS/Injury—NMFS believes that the proposed mitigation measures will allow the Navy to avoid exposing marine mammals to received levels of MFAS/HFAS sound that would result in injury for the following reasons:

- The estimated distance from the most powerful source at which cetaceans would receive levels at or above the threshold for PTS/injury/Level A Harassment is approximately 10 m (10.9 yd).
- NMFS believes that the probability that a marine mammal would approach within the above distances of the sonar dome (to the sides or below) without being seen by the watchstanders (who would then activate a shutdown if the animal was within 200 yd (183 m)) is very low, especially considering that animals would likely avoid approaching a source transmitting at that level at that distance.
- The model predicted that one pantropical dolphin and one sperm whale would be exposed to levels associated with injury, however, the model does not consider the mitigation or likely avoidance behaviors and NMFS believes that injury is unlikely when those factors are considered.

TTS—NMFS believes that the proposed mitigation measures will allow the Navy to minimize exposure of marine mammals to received levels of MFAS/HFAS sound associated with TTS for the following reasons:

- The estimated maximum distance from the most powerful source at which cetaceans would receive levels at or above the threshold for TTS is approximately 140 m from the source in most operating environments.
- Based on the size of the animals, average group size, behavior, and average dive time, NMFS believes that the probability that Navy watchstanders will visually detect mysticetes or sperm whales, dolphins, and social pelagic species (pilot whales, melon-headed whales, etc.) at some point within the 1000 yd (914 km) safety zone before they are exposed to the TTS threshold levels is high, which means that the Navy would often be able to shutdown or powerdown to avoid exposing these species to sound levels associated with TTS.
- However, more cryptic animals that are difficult to detect and observe, such as deep-diving cetaceans (beaked whales and *Kogia* spp.), are less likely to be visually detected and could potentially be exposed to levels of MFAS/HFAS expected to cause TTS. However, animals at depth in one location would not be expected to be continuously exposed to repeated sonar signals given the typical 10–14 knot speed of Navy surface ships during ASW events. During a typical one-hour subsurface dive by a beaked whale, the ship will have moved over 5 to 10 nm from the original location.
- Additionally, the Navy's bow-riding mitigation exception for dolphins may sometimes result in dolphins being exposed to levels of MFAS/HFAS likely to result in TTS. However, there are combinations of factors that reduce the acoustic energy received by dolphins approaching ships to ride in bow waves. Dolphins riding a ship's bow wave are outside of the main beam of the MFAS vertical beam pattern. Source levels drop quickly outside of the main beam. Sidelobes of the radiate beam pattern that point to the surface are significantly lower in power. Together with spherical spreading losses, received levels in the ship's bow wave can be more than 42 dB less than typical source level (i.e., 235 dB − 42 dB = 193 dB SPL). Finally, bow wave riding dolphins are frequently in and out of a bubble layer generated by the breaking bow waves. This bubble layer is an excellent scatterer of acoustic energy and can further reduce received energy.

The Stranding Response Plan will minimize the probability of distressed live-stranded animals responding to the proximity of sonar in a manner that further stresses them or increases the potential likelihood of mortality.

Underwater Explosives

The Navy utilizes exclusion zones (wherein explosive detonation will not begin/continue if animals are within the zone) for explosive exercises. Table 3 identifies the various explosives, the estimated distance at which animals will receive levels associated with take (see Acoustic Take Criteria Section), and the exclusion zone associated with the explosive types.

Mortality and Injury—NMFS believes that the mitigation measures will allow

the Navy to avoid exposing marine mammals to underwater detonations that would result in injury or mortality for the following reasons:

• Surveillance for large charges (which includes aerial and passive acoustic detection methods, when available, to ensure clearance) begins two hours before the exercise and extends to 2 nm (3704 m) from the source. Surveillance for all charges extends out 3–50 times the farthest distance from the source at which injury would be anticipated to occur (see Table 3).

• Animals would need to be less than 426 m (465 yd) (large explosives) or 8–160 m (9–175 yd) (smaller charges) from the source to be injured.

• Unlike for active sonar, an animal would need to be present at the exact moment of the explosion(s) (except for the short series of gunfire example in GUNEX) to be taken.

• The model predicted that 0 animals would be exposed to explosive levels associated with injury or death.

• When the implementation of the exclusion zones (i.e., the fact that the Navy will not start a detonation or will not continue to detonate explosives if an animal is detected within the exclusion zone) is considered in combination with the factors described in the above bullets, NMFS believes that the Navy's mitigation will prevent injury and mortality to marine mammals from explosives.

TTS—NMFS believes that the proposed mitigation measures will allow the Navy to minimize the exposure of marine mammals to underwater detonations that would result in TTS for the following reasons:

• 43 animals annually were predicted to be exposed to explosive levels that would result in TTS. For the reasons explained above, NMFS believes that most modeled TTS takes can be avoided, especially dolphins, mysticetes and sperm whales, and social pelagic species.

• However, more cryptic, deep-diving species (beaked whales and *Kogia* spp.) are less likely to be visually detected and could potentially be exposed to explosive levels expected to cause TTS. The model estimated that 4 beaked whales and zero Kogia would be exposed to TTS levels.

• Additionally, for SINKEXs, the distance at which an animal would be expected to receive sound or pressure levels associated with TTS (182 dB SEL or 23 psi) is sometimes (when the largest explosive type, the MK–84, is used) larger than the exclusion zone, which means that for those two exercise types, some individuals will likely be exposed to levels associated with TTS outside of the exclusion zone.

Research

The Navy provides a significant amount of funding and support to marine research. In the past five years the agency funded over $100 million ($26 million in FY08 alone) to universities, research institutions, federal laboratories, private companies, and independent researchers around the world to study marine mammals. The U.S. Navy sponsors 70% of all U.S. research concerning the effects of human-generated sound on marine mammals and 50% of such research conducted worldwide. Major topics of Navy-supported research include the following:

• Better understanding of marine species distribution and important habitat areas,

• Developing methods to detect and monitor marine species before and during training,

• Understanding the effects of sound on marine mammals, sea turtles, fish, and birds, and

• Developing tools to model and estimate potential effects of sound.

This research is directly applicable to Fleet training activities, particularly with respect to the investigations of the potential effects of underwater noise sources on marine mammals and other protected species. Proposed training activities employ active sonar and underwater explosives, which introduce sound into the marine environment.

The Marine Life Sciences Division of the Office of Naval Research currently coordinates six programs that examine the marine environment and are devoted solely to studying the effects of noise and/or the implementation of technology tools that will assist the Navy in studying and tracking marine mammals. The six programs are as follows:

• Environmental Consequences of Underwater Sound,

• Non-Auditory Biological Effects of Sound on Marine Mammals,

• Effects of Sound on the Marine Environment,

• Sensors and Models for Marine Environmental Monitoring,

• Effects of Sound on Hearing of Marine Animals, and

• Passive Acoustic Detection, Classification, and Tracking of Marine Mammals.

The Navy has also developed the technical reports referenced within this document, which include the Marine Resource Assessments and the Marine Mammal and sea turtle density estimates for Guam and the CNMI (DoN 2007). Furthermore, research cruises by the National Marine Fisheries Service (NMFS) and by academic institutions have received funding from the U.S. Navy.

The Navy has sponsored several workshops to evaluate the current state of knowledge and potential for future acoustic monitoring of marine mammals. The workshops brought together acoustic experts and marine biologists from the Navy and other research organizations to present data and information on current acoustic monitoring research efforts and to evaluate the potential for incorporating similar technology and methods on instrumented ranges. However, acoustic detection, identification, localization, and tracking of individual animals still requires a significant amount of research effort to be considered a reliable method for marine mammal monitoring. The Navy supports research efforts on acoustic monitoring and will continue to investigate the feasibility of passive acoustics as a potential mitigation and monitoring tool.

Overall, the Navy will continue to fund ongoing marine mammal research, and is planning to coordinate long-term monitoring/studies of marine mammals on various established ranges and operating areas. The Navy will continue to research and contribute to university/external research to improve the state of the science regarding marine species biology and acoustic effects. These efforts include mitigation and monitoring programs; data sharing with NMFS and via the literature for research and development efforts; and future research as described previously.

Long-Term Prospective Study

Apart from this proposed rule, NMFS, with input and assistance from the Navy and several other agencies and entities, will perform a longitudinal observational study of marine mammal strandings to systematically observe and record the types of pathologies and diseases and investigate the relationship with potential causal factors (e.g., active sonar, seismic, weather). The study will not be a true ''cohort'' study, because we will be unable to quantify or estimate specific active sonar or other sound exposures for individual animals that strand. However, a cross-sectional or correlational analyses, a method of descriptive rather than analytical epidemiology, can be conducted to compare population characteristics, e.g., frequency of strandings and types of specific pathologies between general periods of various anthropogenic activities and non-activities within a prescribed geographic space. In the

long-term study, we will more fully and consistently collect and analyze data on the demographics of strandings in specific locations and consider anthropogenic activities and physical, chemical, and biological environmental parameters. This approach in conjunction with true cohort studies (tagging animals, measuring received sounds, and evaluating behavior or injuries) in the presence of activities and non-activities will provide critical information needed to further define the impacts of MTEs and other anthropogenic and non-anthropogenic stressors. In coordination with the Navy and other Federal and non-federal partners, the comparative study will be designed and conducted for specific sites during intervals of the presence of anthropogenic activities such as active sonar transmission or other sound exposures and absence to evaluate demographics of morbidity and mortality, lesions found, and cause of death or stranding. Additional data that will be collected and analyzed in an effort to control potential confounding factors include variables such as average sea temperature (or just season), meteorological or other environmental variables (e.g., seismic activity), fishing activities, etc. All efforts will be made to include appropriate controls (i.e., no active sonar or no seismic); environmental variables may complicate the interpretation of ''control'' measurements. The Navy and NMFS along with other partners are evaluating mechanisms for funding this study.

Monitoring

In order to issue an ITA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for LOAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals:

(a) An increase in our understanding of how many marine mammals are likely to be exposed to levels of MFAS/HFAS (or explosives or other stimuli) that we associate with specific adverse effects, such as behavioral harassment, TTS, or PTS.

(b) An increase in our understanding of how individual marine mammals respond (behaviorally or physiologically) to MFAS/HFAS (at specific received levels), explosives, or other stimuli expected to result in take.

(c) An increase in our understanding of how anticipated takes of individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival).

(d) An increased knowledge of the affected species,

(e) An increase in our understanding of the effectiveness of certain mitigation and monitoring measures,

(f) A better understanding and record of the manner in which the authorized entity complies with the incidental take authorization,

(g) An increase in the probability of detecting marine mammals, both within the safety zone (thus allowing for more effective implementation of the mitigation) and in general to better achieve the above goals.

Proposed Monitoring Plan for the MIRC

The Navy has submitted a draft Monitoring Plan for the MIRC which may be viewed at NMFS' Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*. The plan may be modified or supplemented based on comments or new information received from the public during the public comment period. A summary of the primary components of the plan follows.

The draft Monitoring Plan for MIRC has been designed as a collection of focused ''studies'' (described fully in the MIRC draft Monitoring Plan) to gather data that will allow the Navy to address the following questions:

(a) Are marine mammals exposed to MFAS/HFAS, especially at levels associated with adverse effects (i.e., based on NMFS' criteria for behavioral harassment, TTS, or PTS)? If so, at what levels are they exposed?

(b) If marine mammals are exposed to MFAS/HFAS in the MIRC Range Complex, do they redistribute geographically as a result of continued exposure? If so, how long does the redistribution last?

(c) If marine mammals are exposed to MFAS/HFAS, what are their behavioral responses to various levels?

(d) What are the behavioral responses of marine mammals that are exposed to explosives at specific levels?

(e) Is the Navy's suite of mitigation measures for MFAS/HFAS (e.g., measures agreed to by the Navy through permitting) effective at preventing TTS, injury, and mortality of marine mammals?

Data gathered in these studies will be collected by qualified, professional marine mammal biologists that are experts in their field. They will use a combination of the following methods to collect data:

- Contracted third party vessel surveys.
- Passive acoustic monitoring.
- Marine mammal observers on Navy ships.
- Shore-based monitoring.

In the four proposed study designs (all of which cover multiple years), the above methods will be used separately or in combination to monitor marine mammals in different combinations before, during, and after training activities utilizing MFAS/HFAS.

This monitoring plan has been designed to gather data on all species of marine mammals that are observed in the MIRC, however, where appropriate priority will be given to ESA-listed species, beaked whales and other deep-diving species (Kogia, melon-headed whales, and false-killer whales). The Plan recognizes that deep-diving and cryptic species of marine mammals such as beaked whales have a low probability of detection (Barlow and Gisiner, 2006). Therefore, methods will be utilized to attempt to address this issue (e.g., passive acoustic monitoring).

In addition to the Monitoring Plan for MIRC, by the end of 2009, the Navy will have completed an Integrated Comprehensive Monitoring Program (ICMP) Plan. The ICMP will provide the overarching structure and coordination that will, over time, compile data from both range specific monitoring plans (such as AFAST, the Hawaii Range Complex, the Southern California Range Complex, and the Northwest Training Range Complex) as well as Navy funded research and development (R&D) studies. The primary objectives of the ICMP are to:

- Coordinate monitoring and assessment of the effects of Navy activities on protected species;
- Ensure data collected at multiple locations is collected in a manner that allows comparison between and among different geographic locations;
- Assess the efficacy and practicability of monitoring and mitigation techniques; and
- Add to the overall knowledge base on potential behavioral and physiological effects to marine species from Navy activities.

More information about the ICMP may be found in the draft Monitoring Plan for MIRC.

Monitoring Workshop

The Navy, with guidance and support from NMFS, will convene a Monitoring Workshop, including marine mammal and acoustic experts as well as other interested parties, in 2011. The Monitoring Workshop participants will review the monitoring results from the first two years of monitoring pursuant to this MIRC rule as well as monitoring results from other Navy rules and LOAs (e.g., the Southern California Range Complex (SOCAL), Hawaii Range Complex (HRC), etc.). The Monitoring Workshop participants would provide their individual recommendations to the Navy and NMFS on the monitoring plan(s) after also considering the current science (including Navy research and development) and working within the framework of available resources and feasibility of implementation. NMFS and the Navy would then analyze the input from the Monitoring Workshop participants and determine the best way forward from a national perspective. Subsequent to the Monitoring Workshop, modifications would be applied to monitoring plans as appropriate.

Past Monitoring in the MIRC Study Area

NMFS has received one monitoring report addressing MFAS use in the MIRC. The data contained in the After Action Report (AAR) have been considered in developing mitigation and monitoring measures for the proposed activities contained in this rule. The Navy's AAR may be viewed at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. NMFS has reviewed this report and has summarized the results, as related to marine mammal observations, below.

Valiant Shield 07

Valiant Shield 07 (VS 07) was conducted from August 6, 2007 through August 13, 2007. The ASW training conducted during the VS 07 involved ships, submarines, aircraft, non-explosive exercise weapons, and other training related devices and occurred in the Western Pacific ocean waters south of the Mariana Islands portion of the MIRC (see Figure A–1, Appendix A). MFAS-equipped platforms participating in VS07 include Ticonderoga-class guided missile cruisers (CG), and Arleigh Burke-class guided missile destroyers (DDG) surface combatants with AN/SQS–53C sonar, and associated aviation assets (SH–60B/F/R with AN/AQS–13F or AQS–22 dipping sonar, and AN/SSQ–62B/C/D/E Directional Command Activated Sonobuoy System—DICASS), and P–3 Maritime Patrol Aircraft (MPA) (DICASS sonobuoy).

During VS07, 1,208 hours of MFAS time was reported from all sources including hull-mounted 53C, helicopter dipping sonar, and DICASS sonobuoys.

Table A–2 contains a complete list of VS07 marine mammal visual sightings made by U.S. Navy lookouts and watch teams based on standardized reporting protocols. There were a total of 25 marine mammal sightings for an estimated 235 animals during VS07. As in other U.S. Navy exercise after action reports, the majority of animals sighted were dolphins and porpoises since these species often occur in large schools. For VS07, this was again true with six dolphin sightings accounting for 196 animals or 83% of the total estimated number of animals (196 of 235).

None of the watchstanders reported any sort of ''observed effect'' on the marine mammals that were observed in the ten instances when the sonar was on.

Post-Exercise Aerial Marine Mammal Survey

Immediately following the exercise, an aerial marine mammal survey was conducted from 13–17 August 2007. This effort represents one of the first summer time marine mammal surveys for the waters south of the Marianas, and was conducted by experienced, independent civilian scientists and crew using NMFS-approved survey protocols.

The first survey day involved circumnavigating the islands of Guam and Rota to detect any stranded or near stranded marine mammals. None were detected on or near coastlines.

Subsequent line-transect surveys encompassed approximately 2,352 km (1270 nautical miles) of linear effort, with transect grids distributed randomly throughout a 163,300 km^2 (63,050 $miles^2$) area. A total of 8 sightings were recorded during the five-day period including seven cetacean and one unidentified turtle species. Cetacean species sighted included a Bryde's whale (*Balaenoptera edeni*), a Cuvier's beaked whale (*Ziphius cavirostris*), spotted dolphins (*Stenella attenuata*), pygmy or dwarf sperm whale (*Kogia* spp.), rough-toothed dolphins (*Steno bredanensis*) and two sightings of unidentified dolphin species. No unusual behavior was detected. More information regarding the findings of these aerial surveys may be found in Appendix B of the VS 07 Monitoring report, which is posted on the NMFS Web site, at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*.

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Date-Time local	Description of Actions Taken	MFAS time lost (min)	Type of Detection	Night time ?	#	Animal Type	MFAS in use?	MFAS secured ?
08/xx - 1050	Surface ship sights 4 "large whales" traveling at 4000 yards. MFAS not in use. No action taken.		visual		4	lg whale		
08/xx - 1120	Surface ship sights 2 "large whales" traveling at 3000 yards. MFAS not in use. No action taken.		visual		2	lg whale		
08/xx - 1300	Surface ship sights 2 "large whales" traveling at 3000 yards. MFAS not ins use. No action taken.		visual		2	lg whale		
08/06 - 1412	Surface ship sights 20 dolphins at 50 yards closing to ride bow. MFAS not in use. No action taken.		visual		20	dolphin		
08/06 - 0930	Surface ship sights 1 "medium sized whale" traveling at **2000 yards. MFAS in use. MFAS secured.**	Not listed	visual		1	whale	yes	yes
08/07 - 1048	Surface ship sights 5 "small whales" crossing bow from starboard to port. MFAS in not in use. No action taken. *Ship alters course to avoid.*		visual		5	sm whale		
08/07 - 1104	Surface ship sights 5 "dolphins" at 200 yards moving aft along the ship's starboard beam. MFAS not in use. No action taken.		visual		5	dolphin		
08/07 - 1315	Helicopter sights 1 "whale" milling at 400 yards. MFAS not in use. No action taken. *Helicopter changes to new course for 15 minutes.*		visual		1	whale	yes	yes
08/07 - 1414	Helicopter sights 1 "dolphin" traveling at 300 yards. **MFAS in use. Turns MFAS to low power first, then secures. Helicopter relocates away from marine mammals.**	Not listed	visual		1	dolphin	yes	yes
08/08 - 1028	Helicopter sights 5 "whales" traveling. Range not reported. **MFAS in use. MFAS secured for 30 minutes and helicopter relocates away from marine mammals.**	30	visual		5	whale	yes	yes
08/08 - 0407	Surface ship sights 1 "whale" traveling at **3000 yards. MFAS in use. MFAS secured at first sighting** and for 15 minutes until animals depart	15	visual	night	1	whale	yes	yes
08/08 - 1630	Helicopter sights 4 "small whales" traveling at 3000 yards. MFAS not in use. No action taken.		visual		4	sm whale		
08/08 - 0604	Surface ship sights 3 "small whales" traveling at 6000 yards. MFAS not in use. *Ship altered course to avoid.*		visual		3	sm whale		
08/09 - 1320	Surface ships sights 1 "small whale" at traveling at 4000 yards. MFAS not in use. No action taken		visual		1	sm whale		
08/09 - 1920	Surface ship sights 1 "whale" traveling east to west at **6500 yards. MFAS in use. MFAS secured.**	Not listed	visual		1	whale	yes	yes
08/09 - 2212	Surface ship reports unknown number of porpoises estimated at 100 yards based on passive detection		passive	night		porpoise		
08/10 - 1224	Surface ships sights 150 "porpoises" at 200 yards traveling and jumping. MFAS not in use. No action taken.		visual		150	porpoise		
08/10 - 1707	Helicopter sights 2 "whales" spouting at 2000 yards. **MFAS in use. MFAS secured and helicopter relocates away from marine**	Not listed	visual		2	whale	yes	yes

Date-Time local	Description of Actions Taken	MFAS time lost (min)	Type of Detection	Night time ?	#	Animal Type	MFAS in use?	MFAS secured ?
	mammals.							
08/10 - 0249	Surface ship reports 4 "small whales" traveling at 33000 yards detected by sonar		active	night	4	sm whale		
08/10 - 0600	Surface ship sights 20 "dolphins" closing to ride bow. First sighted at 200 yards. **MFAS in use. MFAS secured at first sighting and** for 20 minutes until animals depart.	20	visual		20	dolphin	yes	yes
08/11 - 0833	Surface ship sights unknown number of "whales" traveling at 6000 yards. MFAS not in use. No action taken.		visual			whale		
08/12 - 0847	Surface ship sights 1 "whale" traveling at **4500 yards. MFAS in use. MFAS secured at first sighting** and for 48 minutes until animals depart	48	visual		1	whale	yes	yes
08/13 - 1113	Surface ship sights 1 "large whale" traveling at **2000 yards. MFAS in use. MFAS secured at first sighting** and for 23 minutes until animals depart	23	visual		1	lg whale	yes	yes
08/13 - 0400	Surface ship sights 1 "whale" traveling at **3000 yards. MFAS in use. MFAS secured at first sighting** and for 23 minutes until animals depart	23	visual	night	1	whale	yes	yes
08/13 - 0513	Surface ship sights unknown marine mammal at 100 yards. MFAS not in use. No action taken.		visual			unknown		
25	**= total number of sightings**	**159 min or 2.65 hrs**	**= known lost MFAS training time in minutes**		**235**	**= # of marine mammals**		

Table 6A. Marine mammal sightings and actions by exercise participants during VS07. Text in Bold indicate events when MFAS was in use and secured due to marine mammal mitigation.

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General Conclusions Drawn From Review of Monitoring Reports

Because NMFS has received only one monitoring report from sonar training in the MIRC Study Area, it is difficult to draw biological conclusions. However, NMFS can draw some general conclusions from the content of the monitoring reports:

(a) Data from watchstanders is generally useful to indicate the presence or absence of marine mammals within the safety zones (and sometimes without) and to document the implementation of mitigation measures, but does not provide useful species-specific information or behavioral data. Data gathered by independent observers can provide very valuable information at a level of detail not possible with watchstanders (such as data gathered by independent, biologist monitors in Hawaii and submitted to NMFS in a monitoring report, which indicated the presence of sub-adult sei whales in the Hawaiian Islands in fall, potentially indicating the use of the area for breeding).

(b) Though it is by no means conclusory, it is worth noting that no instances of obvious behavioral disturbance were observed by the Navy watchstanders. Of course, these observations only cover the animals that were at the surface (or slightly below in the case of aerial surveys) and within the distance that the observers can see with the big-eye binoculars or from the aircraft.

(c) NMFS and the Navy need to more carefully designate what information should be gathered during monitoring, as some reports contain different information, making cross-report comparisons difficult. This issue is currently being considered in the development of the ICMP.

Adaptive Management

The final regulations governing the take of marine mammals incidental to Navy training exercises in the MIRC will contain an adaptive management component. Our understanding of the effects of MFAS/HFAS and explosives on marine mammals is still in its relative infancy, and yet the science in this field is evolving fairly quickly. These circumstances make the inclusion of an adaptive management component both valuable and necessary within the context of 5-year regulations for activities that have been associated with marine mammal mortality in certain circumstances and locations (though not the MIRC in the Navy's over 60 years of use of the area for sonar testing and training). The use of adaptive management will allow NMFS to consider new information from different sources to determine (with input from the Navy regarding practicability) on an annual basis if mitigation or monitoring measures should be modified (including additions or deletions) if new data suggest that such modifications are appropriate for subsequent annual LOAs.

Following are some of the possible sources of applicable data:

- Results from the Navy's monitoring from the previous year (either from MIRC or other locations).
- Findings of the Workshop that the Navy will convene in 2011 to analyze monitoring results to date, review

current science, and recommend modifications, as appropriate to the monitoring protocols to increase monitoring effectiveness.

• Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP, which is discussed elsewhere in this document).

• Results from specific stranding investigations (either from MIRC or other locations, and involving coincident MFAS/HFAS or explosives training or not involving coincident use).

• Results from the Long Term Prospective Study described above.

• Results from general marine mammal and sound research.

• Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

Mitigation measures could be modified, added, or deleted if new information suggests that such modifications would have a reasonable likelihood of accomplishing the goals of mitigation laid out in this proposed rule and if the measures are practicable. NMFS would also coordinate with the Navy to modify, add, or delete the existing monitoring requirements if the new data suggest that the addition of (or deletion of) a particular measure would more effectively accomplish the goals of monitoring laid out in this proposed rule. The reporting requirements associated with this proposed rule are designed to provide NMFS with monitoring data from the previous year to allow NMFS to consider the data and issue annual LOAs. NMFS and the Navy will meet annually, prior to LOA issuance, to discuss the monitoring reports, Navy R&D developments, and current science and whether mitigation or monitoring modifications are appropriate.

Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking''. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring. Proposed reporting requirements may be modified, removed, or added based on information or comments received during the public comment period. Currently, there are several different reporting requirements pursuant to these proposed regulations:

General Notification of Injured or Dead Marine Mammals

Navy personnel will ensure that NMFS is notified immediately (see Communication Plan) or as soon as clearance procedures allow if an injured, stranded, or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing MFAS, HFAS, or underwater explosive detonations. The Navy will provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available). The MIRC Stranding Response Plan contains more specific reporting requirements for specific circumstances.

In the event that an injured, stranded, or dead marine mammal is found by the Navy that is not in the vicinity of, or found during or shortly after MFAS, HFAS, or underwater explosive detonations, the Navy will report the same information as listed above as soon as operationally feasible and clearance procedures allow.

General Notification of a Ship Strike

In the event of a ship strike by any Navy vessel, at any time or place, the Navy shall do the following:

• Immediately report to NMFS the species identification (if known), location (lat/long) of the animal (or the strike if the animal has disappeared), and whether the animal is alive or dead (or unknown).

• Report to NMFS as soon as operationally feasible the size and length of animal, an estimate of the injury status (e.g., dead, injured but alive, injured and moving, unknown, etc.), vessel class/type and operational status.

• Report to NMFS the vessel length, speed, and heading as soon as feasible.

• Provide NMFS a photo or video, if equipment is available.

Annual MIRC Monitoring Plan Report

The Navy shall submit a report annually on November 15 describing the implementation and results (through September 15 of the same year) of the MIRC Monitoring Plan, described above. Data collection methods will be standardized across range complexes to allow for comparison in different geographic locations. Although additional information will also be gathered, the marine mammal observers (MMOs) collecting marine mammal data pursuant to the MIRC Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in the MFAS/HFAS major Training Exercises section of the Annual MIRC Exercise Report referenced below.

The MIRC Monitoring Plan Report may be provided to NMFS within a larger report that includes the required Monitoring Plan Reports from multiple Range Complexes.

Annual MIRC Exercise Report

The Navy will submit an Annual MIRC Report on November 15 of every year (covering data gathered through September 15). This report shall contain the subsections and information indicated below.

MFAS/HFAS Major Training Exercises

This section shall contain the following information for the following Coordinated and Strike Group exercises, which for simplicity will be referred to as major training exercises for reporting (MTERs): Joint Multi-strike Group Exercises; Joint Expeditionary Exercises; and Marine Air Ground Task Force MIRC:

(a) Exercise Information (for each MTER):

(i) Exercise designator.

(ii) Date that exercise began and ended.

(iii) Location.

(iv) Number and types of active sources used in the exercise.

(v) Number and types of passive acoustic sources used in exercise.

(vi) Number and types of vessels, aircraft, etc., participating in exercise.

(vii) Total hours of observation by watchstanders.

(viii) Total hours of all active sonar source operation.

(ix) Total hours of each active sonar source (along with explanation of how hours are calculated for sources typically quantified in alternate way (buoys, torpedoes, etc.)).

(x) Wave height (high, low, and average during exercise).

(b) *Individual marine mammal sighting info (for each sighting in each MTER):*

(i) Location of sighting.

(ii) Species (if not possible—indication of whale/dolphin/pinniped).

(iii) Number of individuals.

(iv) Calves observed (y/n).

(v) Initial Detection Sensor.

(vi) Indication of specific type of platform observation made from (including, for example, what type of surface vessel, i.e., FFG, DDG, or CG).

(vii) Length of time observers maintained visual contact with marine mammal(s).

(viii) Wave height (in feet).

(ix) Visibility.

(x) Sonar source in use (y/n).

(xi) Indication of whether animal is <200yd, 200–500yd, 500–1000yd, 1000–2000yd, or >2000yd from sonar source in (x) above.

(xiii) Mitigation Implementation—Whether operation of sonar sensor was delayed, or sonar was powered or shut down, and how long the delay was.

(xiv) If source in use (x) is hullmounted, true bearing of animal from ship, true direction of ship's travel, and estimation of animal's motion relative to ship (opening, closing, parallel).

(xv) Observed behavior—Watchstanders shall report, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming, etc.).

(c) An evaluation (based on data gathered during all of the MTERs) of the effectiveness of mitigation measures designed to avoid exposing marine mammals to MFAS. This evaluation shall identify the specific observations that support any conclusions the Navy reaches about the effectiveness of the mitigation.

ASW Summary

This section shall include the following information as summarized from non-major training exercises (unit-level exercises, such as TRACKEXs):

(a) *Total Hours*—Total annual hours of each type of sonar source (along with explanation of how hours are calculated for sources typically quantified in alternate way (buoys, torpedoes, etc.)).

(b) *Cumulative Impacts*—To the extent practicable, the Navy, in coordination with NMFS, shall develop and implement a method of annually reporting non-major training (i.e., ULT) utilizing hull-mounted sonar. The report shall present an annual (and seasonal, where practicable) depiction of non-major training exercises geographically across MIRC. The Navy shall include (in the MIRC annual report) a brief annual progress update on the status of the development of an effective and unclassified method to report this information until an agreed-upon (with NMFS) method has been developed and implemented.

Sonar Exercise Notification

The Navy shall submit to the NMFS Office of Protected Resources (specific contact information to be provided in LOA) either an electronic (preferably) or verbal report within fifteen calendar days after the completion of any MTER indicating:

(1) Location of the exercise.

(2) Beginning and end dates of the exercise.

(3) Type of exercise.

Improved Extended Echo-Ranging System (IEER)/Advanced Extended Echo-Ranging System (AEER) Summary

This section shall include an annual summary of the following IEER and AEER information:

(i) Total number of IEER and AEER events conducted in MIRC Study Area.

(ii) Total expended/detonated rounds (buoys).

(iii) Total number of self-scuttled IEER rounds.

Sinking Exercises (SINKEXs)

This section shall include the following information for each SINKEX completed that year:

(a) *Exercise information:*

(i) Location

(ii) Date and time exercise began and ended

(iii) Total hours of observation by watchstanders before, during, and after exercise

(iv) Total number and types of rounds expended/explosives detonated

(v) Number and types of passive acoustic sources used in exercise

(vi) Total hours of passive acoustic search time

(vii) Number and types of vessels, aircraft, etc., participating in exercise

(viii) Wave height in feet (high, low and average during exercise)

(ix) Narrative description of sensors and platforms utilized for marine mammal detection and timeline illustrating how marine mammal detection was conducted

(b) Individual marine mammal observation during SINKEX (by Navy lookouts) information:

(i) Location of sighting

(ii) Species (if not possible—indication of whale/dolphin/pinniped)

(iii) Number of individuals

(iv) Calves observed (y/n)

(v) Initial detection sensor

(vi) Length of time observers maintained visual contact with marine mammal

(vii) Wave height

(viii) Visibility

(ix) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after

(x) Distance of marine mammal from actual detonations (or target spot if not yet detonated)—use four categories to define distance: (1) The modeled injury threshold radius for the largest explosive used in that exercise type in that OPAREA (426 m for SINKEX in MIRC); (2) the required exclusion zone (1 nm for SINKEX in MIRC); (3) the required observation distance (if different than the exclusion zone (2 nm for SINKEX in MIRC); and (4) greater than the required observed distance. For example, in this case, the observer would indicate if < 426 m, from 426 m–1 nm, from 1 nm–2 nm, and > 2 nm.

(xi) Observed behavior—Watchstanders will report, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction.

(xii) Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long.

(xiii) If observation occurs while explosives are detonating in the water, indicate munitions type in use at time of marine mammal detection.

Explosives Summary

The Navy is in the process of improving the methods used to track explosive use to provide increased granularity. To the extent practicable, the Navy will provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they will provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.

(a) Total annual number of each type of explosive exercise (of those identified as part of the ''specified activity'' in this final rule) conducted in MIRC

(b) Total annual expended/detonated rounds (missiles, bombs, etc.) for each explosive type

MIRC 5-Yr Comprehensive Report

The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during ASW and explosive exercises for which annual reports are required (Annual MIRC Exercise Reports and MIRC Monitoring Plan Reports). This report will be submitted at the end of the fourth year of the rule (November 2013), covering activities that have occurred through July15, 2014.

Comprehensive National ASW Report

By June, 2014, the Navy shall submit a draft National Report that analyzes, compares, and summarizes the active sonar data gathered (through January 1, 2014) from the watchstanders and

pursuant to the implementation of the Monitoring Plans for the Northwest Training Range Complex, the Southern California Range Complex, the Atlantic Fleet Active Sonar Training, the Hawaii Range Complex, the Mariana Islands Range Complex, and the Gulf of Alaska.

The Navy shall respond to NMFS comments and requests for additional information or clarification on the MIRC Range Complex Comprehensive Report, the Comprehensive National ASW report, the Annual MIRC Range Complex Exercise Report, or the Annual MIRC Range Complex Monitoring Plan Report (or the multi-Range Complex Annual Monitoring Plan Report, if that is how the Navy chooses to submit the information) if submitted within 3 months of receipt. These reports will be considered final after the Navy has adequately addressed NMFS' comments or provided the requested information, or three months after the submittal of the draft if NMFS does not comment by then.

Estimated Take of Marine Mammals

As mentioned previously, one of the main purposes of NMFS' effects assessments is to identify the permissible methods of taking, meaning: The nature of the take (e.g., resulting from anthropogenic noise vs. from ship strike, etc.); the regulatory level of take (i.e., mortality vs. Level A or Level B harassment) and the amount of take. In the Potential Effects of Exposure of Marine Mammal to MFAS/HFAS and Underwater Detonations section, NMFS identified the lethal responses, physical trauma, sensory impairment (permanent and temporary threshold shifts and acoustic masking), physiological responses (particular stress responses), and behavioral responses that could potentially result from exposure to MFAS/HFAS or underwater explosive detonations. In this section, we will relate the potential effects to marine mammals from MFAS/HFAS and underwater detonation of explosives to the MMPA statutory definitions of Level A and Level B Harassment and attempt to quantify the effects that might occur from the specific training activities that the Navy is proposing in the MIRC.

As mentioned previously, behavioral responses are context-dependent, complex, and influenced to varying degrees by a number of factors other than just received level. For example, an animal may respond differently to a sound emanating from a ship that is moving towards the animal than it would to an identical received level coming from a vessel that is moving away, or to a ship traveling at a different speed or at a different distance from the animal. At greater distances, though, the nature of vessel movements could also potentially not have any effect on the animal's response to the sound. In any case, a full description of the suite of factors that elicited a behavioral response would require a mention of the vicinity, speed and movement of the vessel, or other factors. So, while sound sources and the received levels are the primary focus of the analysis and those that are laid out quantitatively in the regulatory text, it is with the understanding that other factors related to the training are sometimes contributing to the behavioral responses of marine mammals, although they cannot be quantified.

Definition of Harassment

As mentioned previously, with respect to military readiness activities, Section 3(18)(B) of the MMPA defines ''harassment'' as: (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Level B Harassment

Of the potential effects that were described in the Potential Effects of Exposure of Marine Mammal to MFAS/HFAS and Underwater Detonations Section, the following are the types of effects that fall into the Level B Harassment category:

Behavioral Harassment—Behavioral disturbance that rises to the level described in the definition above, when resulting from exposures to MFAS/HFAS or underwater detonations (or another stressor), is considered Level B Harassment. Louder sounds (when other factors are not considered) are generally expected to elicit a stronger response. Some of the lower level physiological stress responses discussed in the Potential Effects of Exposure of Marine Mammal to MFAS/HFAS and Underwater Detonations Section: Stress Section will also likely co-occur with the predicted harassments, although these responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. When Level B Harassment is predicted based on estimated behavioral responses, those takes may have a stress-related physiological component as well.

In the effects section above, we described the Southall *et al.* (2007) severity scaling system and listed some examples of the three broad categories of behaviors: (0–3: Minor and/or brief behaviors); 4–6 (Behaviors with higher potential to affect foraging, reproduction, or survival); 7–9 (Behaviors considered likely to affect the aforementioned vital rates). Generally speaking, MMPA Level B Harassment, as defined in this document, would include the behaviors described in the 7–9 category, and a subset, dependent on context and other considerations, of the behaviors described in the 4–6 categories. Behavioral harassment would not typically include behaviors ranked 0–3 in Southall *et al.* (2007).

Acoustic Masking and Communication Impairment—The severity or importance of an acoustic masking event can vary based on the length of time that the masking occurs, the frequency of the masking signal (which determines which sounds are masked, which may be of varying importance to the animal), and other factors. Some acoustic masking would be considered Level B Harassment, if it can disrupt natural behavioral patterns by interrupting or limiting the marine mammal's receipt or transmittal of important information or environmental cues.

TTS—As discussed previously, TTS can disrupt behavioral patterns by inhibiting an animal's ability to communicate with conspecifics and interpret other environmental cues important for predator avoidance and prey capture. However, depending on the degree (elevation of threshold in dB), duration (i.e., recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during a time when communication is critical for successful mother/calf interactions could have more serious impacts if it were in the same frequency band as the necessary vocalizations and of a severity that it impeded communication.

The following physiological mechanisms are thought to play a role in inducing auditory fatigue: Effects to sensory hair cells in the inner ear that reduce their sensitivity, modification of the chemical environment within the sensory cells, residual muscular activity in the middle ear, displacement of certain inner ear membranes, increased blood flow, and post-stimulatory reduction in both efferent and sensory neural output. Ward (1997) suggested that when these effects result in TTS rather than PTS, they are within the normal bounds of physiological variability and tolerance and do not represent a physical injury. Additionally, Southall *et al.* (2007) indicate that although PTS is a tissue injury, TTS is not, because the reduced hearing sensitivity following exposure to intense sound results primarily from fatigue, not loss, of cochlear hair cells and supporting structures and is reversible. Accordingly, NMFS classifies TTS (when resulting from exposure to either MFAS/HFAS or underwater detonations) as Level B Harassment, not Level A Harassment (injury).

Level A Harassment

Of the potential effects that were described in the Potential Effects of Exposure of Marine Mammals to MFAS/HFAS and Underwater Detonations Section, following are the types of effects that fall into the Level A Harassment category:

PTS—PTS (resulting from either exposure to MFAS/HFAS or explosive detonations) is irreversible and considered an injury. PTS results from exposure to intense sounds that cause a permanent loss of inner or outer cochlear hair cells or exceed the elastic limits of certain tissues and membranes in the middle and inner ears and result in changes in the chemical composition of the inner ear fluids. Although PTS is considered an injury, the effects of PTS on the fitness of an individual can vary based on the degree of TTS and the frequency band that it is in.

Tissue Damage Due to Acoustically Mediated Bubble Growth—A few theories suggest ways in which gas bubbles become enlarged through exposure to intense sounds (MFAS/HFAS) to the point where tissue damage results. In rectified diffusion, exposure to a sound field would cause bubbles to increase in size. A short duration of active sonar pings (such as that which an animal exposed to MFAS would be most likely to encounter) would not likely be long enough to drive bubble growth to any substantial size. Alternately, bubbles could be destabilized by high-level sound exposures such that bubble growth then occurs through static diffusion of gas out of the tissues. The degree of supersaturation and exposure levels observed to cause microbubble destabilization are unlikely to occur, either alone or in concert because of how close an animal would need to be to the sound source to be exposed to high enough levels, especially considering the likely avoidance of the sound source and the required mitigation. Still, possible tissue damage from either of these processes would be considered an injury or, potentially, mortality.

Tissue Damage Due to Behaviorally Mediated Bubble Growth—Several authors suggest mechanisms in which marine mammals could behaviorally respond to exposure to MFAS/HFAS by altering their dive patterns in a manner (unusually rapid ascent, unusually long series of surface dives, etc.) that might result in unusual bubble formation or growth ultimately resulting in tissue damage (emboli, etc.). In this scenario, the rate of ascent would need to be sufficiently rapid to compromise behavioral or physiological protections against nitrogen bubble formation. There is considerable disagreement among scientists as to the likelihood of this phenomenon (Piantadosi and Thalmann, 2004; Evans and Miller, 2003). Although it has been argued that the tissue effects observed from recent beaked whale strandings are consistent with gas emboli and bubble-induced tissue separations (Jepson *et al.,* 2003; Fernandez *et al.,* 2005, Tyack *et al.,* 2006), nitrogen bubble formation as the cause of the traumas has not been verified. If tissue damage does occur by this phenomenon, it would be considered an injury or, potentially, mortality.

Physical Disruption of Tissues Resulting From Explosive Shock Wave—Physical damage of tissues resulting from a shock wave (from an explosive detonation) is classified as an injury. Blast effects are greatest at the gas-liquid interface (Landsberg, 2000) and gas-containing organs, particularly the lungs and gastrointestinal tract, are especially susceptible (Goertner, 1982; Hill 1978; Yelverton *et al.,* 1973). Nasal sacs, larynx, pharynx, trachea, and lungs may be damaged by compression/expansion caused by the oscillations of the blast gas bubble (Reidenberg and Laitman, 2003). Severe damage (from the shock wave) to the ears can include tympanic membrane rupture, fracture of the ossicles, damage to the cochlea, hemorrhage, and cerebrospinal fluid leakage into the middle ear.

Vessel Strike, Ordnance Strike, Entanglement—Although not anticipated (or authorized) to occur, vessel strike, ordnance strike, or entanglement in materials associated with the specified action are considered Level A Harassment or mortality.

Acoustic Take Criteria

For the purposes of an MMPA incidental take authorization, three types of take are identified: Level B Harassment; Level A Harassment; and mortality (or serious injury leading to mortality). The categories of marine mammal responses (physiological and behavioral) that fall into the two harassment categories were described in the previous section.

Because the physiological and behavioral responses of the majority of the marine mammals exposed to MFAS/HFAS and underwater detonations cannot be detected or measured (because, e.g., not all responses are visible external to animal, a portion of exposed animals are underwater, many animals are located many miles from observers and covering very large area, etc.) and because NMFS must authorize take prior to the impacts to marine mammals, a method is needed to estimate the number of individuals that will be taken, pursuant to the MMPA, based on the proposed action. To this end, NMFS developed acoustic criteria that estimate at what received level (when exposed to MFAS/HFAS or explosive detonations) Level B Harassment, Level A Harassment, and mortality (for explosives) of marine mammals would occur. The acoustic criteria for MFAS/HFAS and Underwater Detonations (IEER) are discussed below.

MFAS/HFAS Acoustic Criteria

Because relatively few applicable data exist to support acoustic criteria specifically for HFAS and because such a small percentage of the active sonar pings that marine mammals will likely be exposed to incidental to this activity come from a HFAS source (the vast majority come from MFAS sources), NMFS will apply the criteria developed for the MFAS to the HFAS as well.

NMFS utilizes three acoustic criteria to assess impacts from MFAS/HFAS: PTS (injury—Level A Harassment), TTS (Level B Harassment), and behavioral harassment (Level B Harassment). Because there is related quantitative data, the TTS criterion is a valuable tool for more specifically identifying the likely impacts to marine mammals from MFAS/HFAS, plus the PTS criteria are extrapolated from it. However, TTS is simply a subset of level B Harassment—

the likely ultimate effects of which are not anticipated to necessarily be any more severe than the behavioral impacts that would be expected to occur at the same received levels. Because the TTS and PTS criteria are derived similarly and the PTS criteria are extrapolated from the TTS data, the TTS and PTS acoustic criteria will be presented first, before the behavioral criteria.

For more information regarding these criteria, please see the Navy's DEIS for MIRC.

Level B Harassment Threshold (TTS)

As mentioned above, behavioral disturbance, acoustic masking, and TTS are all considered Level B Harassment. Marine mammals would usually be behaviorally disturbed at lower received levels than those at which they would likely sustain TTS, so the levels at which behavioral disturbances are likely to occur are considered the onset of Level B Harassment. The behavioral responses of marine mammals to sound are variable, context specific, and, therefore, difficult to quantify (see Risk Function section, below). Conversely, TTS is a physiological effect that has been studied and quantified in laboratory conditions. Because data exist to support an estimate of the received levels at which marine mammals will incur TTS, NMFS uses an acoustic criterion to estimate the number of marine mammals that might sustain TTS. TTS is a subset of Level B Harassment.

A number of investigators have measured TTS in marine mammals. These studies measured hearing thresholds in trained marine mammals before and after exposure to intense sounds. The existing cetacean TTS data are summarized in the following bullets.

• Schlundt *et al.* (2000) reported the results of TTS experiments conducted with 5 bottlenose dolphins and 2 belugas exposed to 1-second tones. This paper also includes a reanalysis of preliminary TTS data released in a technical report by Ridgway *et al.* (1997). At frequencies of 3, 10, and 20 kHz, sound pressure levels (SPLs) necessary to induce measurable amounts (6 dB or more) of TTS were between 192 and 201 dB re 1 μPa (EL = 192 to 201 dB re 1 μPa^2-s). The mean exposure SPL and EL for onset-TTS were 195 dB re 1 μPa and 195 dB re 1 μPa^2-s, respectively.

• Finneran *et al.* (2001, 2003, 2005) described TTS experiments conducted with bottlenose dolphins exposed to 3-kHz tones with durations of 1, 2, 4, and 8 seconds. Small amounts of TTS (3 to 6 dB) were observed in one dolphin after exposure to ELs between 190 and 204 dB re 1 μPa^2-s. These results were consistent with the data of Schlundt *et al.* (2000) and showed that the Schlundt *et al.* (2000) data were not significantly affected by the masking sound used. These results also confirmed that, for tones with different durations, the amount of TTS is best correlated with the exposure EL rather than the exposure SPL.

• Nachtigall *et al.* (2003) measured TTS in a bottlenose dolphin exposed to octave-band sound centered at 7.5 kHz. Nachtigall *et al.* (2003a) reported TTSs of about 11 dB measured 10 to 15 minutes after exposure to 30 to 50 minutes of sound with SPL 179 dB re 1 μPa (EL about 213 dB re μPa^2-s). No TTS was observed after exposure to the same sound at 165 and 171 dB re 1 μPa. Nachtigall *et al.* (2004) reported TTSs of around 4 to 8 dB 5 minutes after exposure to 30 to 50 minutes of sound with SPL 160 dB re 1 μPa (EL about 193 to 195 dB re 1 μPa^2-s). The difference in results was attributed to faster post-exposure threshold measurement—TTS may have recovered before being detected by Nachtigall *et al.* (2003). These studies showed that, for long-duration exposures, lower sound pressures are required to induce TTS than are required for short-duration tones.

• Finneran *et al.* (2000, 2002) conducted TTS experiments with dolphins and belugas exposed to impulsive sounds similar to those produced by distant underwater explosions and seismic waterguns. These studies showed that, for very short-duration impulsive sounds, higher sound pressures were required to induce TTS than for longer-duration tones.

• Finneran *et al.* (2007) conducted TTS experiments with bottlenose dolphins exposed to intense 20 kHz fatiguing tone. Behavioral and auditory evoked potentials (using sinusoidal amplitude modulated tones creating auditory steady state response [AASR]) were used to measure TTS. The fatiguing tone was either 16 (mean = 193 re 1μPa, SD = 0.8) or 64 seconds (185–186 re 1μPa) in duration. TTS ranged from 19–33dB from behavioral measurements and 40–45dB from ASSR measurements.

• Kastak *et al.* (1999a, 2005) conducted TTS experiments with three species of pinnipeds, California sea lion, northern elephant seal and a Pacific harbor seal, exposed to continuous underwater sounds at levels of 80 and 95 dB sensation level at 2.5 and 3.5 kHz for up to 50 minutes. Mean TTS shifts of up to 12.2 dB occurred with the harbor seals showing the largest shift of 28.1 dB. Increasing the sound duration had a greater effect on TTS than increasing the sound level from 80 to 95 dB.

Some of the more important data obtained from these studies are onset-TTS levels (exposure levels sufficient to cause a just-measurable amount of TTS) often defined as 6 dB of TTS (for example, Schlundt *et al.,* 2000) and the fact that energy metrics (sound exposure levels (SEL), which include a duration component) better predict when an animal will sustain TTS than pressure (SPL) alone. NMFS' TTS criterion (which indicates the received level at which onset TTS (>6dB) is induced) for MFAS/HFAS and cetaceans is 195 dB re 1 μPa^2-s (based on mid-frequency cetaceans—no published data exist on auditory effects of noise in low- or high-frequency cetaceans (Southall *et al.* (2007)).

A detailed description of how this TTS criterion was derived from the results of the above studies may be found in Chapter 3 of Southall *et al.* (2007), as well as the Navy's MIRC LOA application.

Level A Harassment Threshold (PTS)

For acoustic effects, because the tissues of the ear appear to be the most susceptible to the physiological effects of sound, and because threshold shifts tend to occur at lower exposures than other more serious auditory effects, NMFS has determined that PTS is the best indicator for the smallest degree of injury that can be measured. Therefore, the acoustic exposure associated with onset-PTS is used to define the lower limit of the Level A harassment.

PTS data do not currently exist for marine mammals and are unlikely to be obtained due to ethical concerns. However, PTS levels for these animals may be estimated using TTS data from marine mammals and relationships between TTS and PTS that have been discovered through study of terrestrial mammals. NMFS uses the following acoustic criterion for injury of cetaceans: 215 dB re 1 μPa^2-s (based on mid-frequency cetaceans—no published data exist on auditory effects of noise in low- or high-frequency cetaceans (Southall *et al.* (2007)).

This criterion is based on a 20 dB increase in SEL over that required for onset-TTS. Extrapolations from terrestrial mammal data indicate that PTS occurs at 40 dB or more of TS, and that TS growth occurs at a rate of approximately 1.6 dB TS per dB increase in EL. There is a 34-dB TS difference between onset-TTS (6 dB)

and onset-PTS (40 dB). Therefore, an animal would require approximately 20dB of additional exposure (34 dB divided by 1.6 dB) above onset-TTS to reach PTS. A detailed description of how TTS criteria were derived from the results of the above studies may be found in Chapter 3 of Southall *et al.* (2007), as well as the Navy's MIRC LOA application. Southall *et al.* (2007) recommend a precautionary dual criteria for TTS (230 dB re 1 µPa (SPL peak pressure) in addition to 215 dB re 1 µPa^2-s (SEL)) to account for the potentially damaging transients embedded within non-pulse exposures. However, in the case of MFAS/HFAS, the distance at which an animal would receive 215 dB (SEL) is farther from the source (i.e., more conservative) than the distance at which they would receive 230 dB (SPL peak pressure) and therefore, it is not necessary to consider 230 dB peak.

We note here that behaviorally mediated injuries (such as those that have been hypothesized as the cause of some beaked whale strandings) could potentially occur in response to received levels lower than those believed to directly result in tissue damage. As mentioned previously, data to support a quantitative estimate of these potential effects (for which the exact mechanism is not known and in which factors other than received level may play a significant role) do not exist. However, based on the number of years (more than 60) and number of hours of MFAS per year that the U.S. (and other countries) has operated compared to the reported (and verified) cases of associated marine mammal strandings, NMFS believes that the probability of these types of injuries is very low.

Level B Harassment Risk Function (Behavioral Harassment)

In 2006, NMFS issued the first MMPA authorization to allow the take of marine mammals incidental to MFAS (to the Navy for the Rim of the Pacific Exercises (RIMPAC)). For that authorization, NMFS used 173 dB SEL as the criterion for the onset of behavioral harassment (Level B Harassment). This type of single number criterion is referred to as a step function, in which (in this example) all animals estimated to be exposed to received levels above 173 db SEL would be predicted to be taken by Level B Harassment and all animals exposed to less than 173dB SEL would not be taken by Level B Harassment. As mentioned previously, marine mammal behavioral responses to sound are highly variable and context specific (affected by differences in acoustic conditions; differences between species and populations; differences in gender, age, reproductive status, or social behavior; or the prior experience of the individuals), which does not support the use of a step function to estimate behavioral harassment.

Unlike step functions, acoustic risk continuum functions (which are also called ''exposure-response functions,'' ''dose-response functions,'' or ''stress-response functions'' in other risk assessment contexts) allow for probability of a response that NMFS would classify as harassment to occur over a range of possible received levels (instead of one number) and assume that the probability of a response depends first on the ''dose'' (in this case, the received level of sound) and that the probability of a response increases as the ''dose'' increases (see Figure 1a). In January, 2009, NMFS issued 3 final rules governing the incidental take of marine mammals (Navy's Hawaii Range Complex, Southern California Range Complex, and Atlantic Fleet Active Sonar Training) that used a risk continuum to estimate the percent of marine mammals exposed to various levels of MFAS that would respond in a manner NMFS considers harassment. The Navy and NMFS have previously used acoustic risk functions to estimate the probable responses of marine mammals to acoustic exposures for other training and research programs. Examples of previous application include the Navy FEISs on the SURTASS LFA sonar (U.S. Department of the Navy, 2001c); the North Pacific Acoustic Laboratory experiments conducted off the Island of Kauai (Office of Naval Research, 2001), and the Supplemental EIS for SURTASS LFA sonar (U.S. Department of the Navy, 2007d). As discussed in the Effects section, factors other than received level (such as distance from or bearing to the sound source) can affect the way that marine mammals respond; however, data to support a quantitative analysis of those (and other factors) do not currently exist. NMFS will continue to modify these criteria as new data that meet NMFS standards of quality become available and can be appropriately and effectively incorporated.

The particular acoustic risk functions developed by NMFS and the Navy (see Figures 1a and 1b) estimate the probability of behavioral responses to MFAS/HFAS (interpreted as the percentage of the exposed population) that NMFS would classify as harassment for the purposes of the MMPA given exposure to specific received levels of MFAS/HFAS. The mathematical function (below) underlying this curve is a cumulative probability distribution adapted from a solution in Feller (1968) and was also used in predicting risk for the Navy's SURTASS LFA MMPA authorization as well.

$$R = \frac{1-\left(\frac{L-B}{K}\right)^{-A}}{1-\left(\frac{L-B}{K}\right)^{-2A}}$$

Where:

R = Risk (0–1.0)
L = Received level (dB re: 1 µPa)
B = Basement received level = 120 dB re: 1 µPa
K = Received level increment above B where 50% risk = 45 dB re: 1 µPa
A = Risk transition sharpness parameter = 10 (odontocetes and pinnipeds) or 8 (mysticetes)

In order to use this function to estimate the percentage of an exposed population that would respond in a manner that NMFS classifies as Level B Harassment, based on a given received level, the values for B, K and A need to be identified.

B Parameter (Basement)—The B parameter is the estimated received level below which the probability of disruption of natural behavioral patterns, such as migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered approaches zero for the MFAS/HFAS risk assessment. At this received level, the curve would predict that the percentage of the exposed population that would be taken by Level B Harassment approaches zero. For MFAS/HFAS, NMFS has determined that B = 120 dB. This level is based on a broad overview of the levels at which many species have been reported responding to a variety of sound sources.

K Parameter (representing the 50 percent Risk Point)—The K parameter is based on the received level that corresponds to 50% risk, or the received level at which we believe 50% of the animals exposed to the designated received level will respond in a manner that NMFS classifies as Level B Harassment. The K parameter (K = 45 dB) is based on three data sets in which marine mammals exposed to mid-frequency sound sources were reported to respond in a manner that NMFS would classify as Level B Harassment. There is widespread consensus that marine mammal responses to MFA sound signals need to be better defined using controlled exposure experiments

(Cox *et al.,* 2006; Southall *et al.,* 2007). The Navy is contributing to an ongoing 3-Phase behavioral response study in the Bahamas that is expected to provide some initial information on beaked whales, the species identified as the most sensitive to MFAS. NMFS is leading this international effort with scientists from various academic institutions and research organizations to conduct studies on how marine mammals respond to underwater sound exposures. The results from Phase 1 of this study are discussed in the Potential Effects of Specified Activities on Marine Mammals section and the results from Phase 2 are expected to be available in late 2009. Phase 3 was conducted in the Mediterranean Sea in the summer of 2009. Additionally, the Navy recently tagged whales in conjunction with the 2008 RIMPAC exercises; however, analyses of these data are not yet complete. Until additional appropriate data are available, however, NMFS and the Navy have determined that the following three data sets are most applicable for the direct use in establishing the K parameter for the MFAS/HFAS risk function. These data sets, summarized below, represent the only known data that specifically relate altered behavioral responses (that NMFS would consider Level B Harassment) to exposure—at specific received levels—to MFAS and sources within or having components within the range of MFAS (1–10 kHz).

Even though these data are considered the most representative of the proposed specified activities, and therefore the most appropriate on which to base the K parameter (which basically determines the midpoint) of the risk function, these data have limitations, which are discussed in Appendix D of the Navy's DEIS for MIRC.

1. Controlled Laboratory Experiments With Odontocetes (SSC Dataset)—Most of the observations of the behavioral responses of toothed whales resulted from a series of controlled experiments on bottlenose dolphins and beluga whales conducted by researchers at SSC's facility in San Diego, California (Finneran *et al.,* 2001, 2003, 2005; Finneran and Schlundt, 2004; Schlundt *et al.,* 2000). In experimental trials (designed to measure TTS) with marine mammals trained to perform tasks when prompted, scientists evaluated whether the marine mammals still performed these tasks when exposed to mid-frequency tones. Altered behavior during experimental trials usually involved refusal of animals to return to the site of the sound stimulus but also included attempts to avoid an exposure in progress, aggressive behavior, or refusal to further participate in tests.

Finneran and Schlundt (2004) examined behavioral observations recorded by the trainers or test coordinators during the Schlundt *et al.* (2000) and Finneran *et al.* (2001, 2003, 2005) experiments. These included observations from 193 exposure sessions (fatiguing stimulus level > 141 dB re 1μPa) conducted by Schlundt *et al.* (2000) and 21 exposure sessions conducted by Finneran *et al.* (2001, 2003, 2005). The TTS experiments that supported Finneran and Schlundt (2004) are further explained below:

- Schlundt *et al.* (2000) provided a detailed summary of the behavioral responses of trained marine mammals during TTS tests conducted at SSC San Diego with 1-sec tones and exposure frequencies of 0.4 kHz, 3 kHz, 10 kHz, 20 kHz and 75 kHz. Schlundt *et al.* (2000) reported eight individual TTS experiments. The experiments were conducted in San Diego Bay. Because of the variable ambient noise in the bay, low-level broadband masking noise was used to keep hearing thresholds consistent despite fluctuations in the ambient noise. Schlundt *et al.* (2000) reported that ''behavioral alterations,'' or deviations from the behaviors the animals being tested had been trained to exhibit, occurred as the animals were exposed to increasing fatiguing stimulus levels.
- Finneran *et al.* (2001, 2003, 2005) conducted 2 separate TTS experiments using 1-sec tones at 3 kHz. The test methods were similar to that of Schlundt *et al.* (2000) except the tests were conducted in a pool with very low ambient noise level (below 50 dB re 1 μPa^2/hertz [Hz]), and no masking noise was used. In the first, fatiguing sound levels were increased from 160 to 201 dB SPL. In the second experiment, fatiguing sound levels between 180 and 200 dB SPL were randomly presented.

Bottlenose dolphins exposed to 1-second (sec) intense tones exhibited short-term changes in behavior above received sound levels of 178 to 193 dB re 1 μPa (rms), and beluga whales did so at received levels of 180 to 196 dB and above.

2. Mysticete Field Study (Nowacek *et al.,* 2004)—The only available and applicable data relating mysticete responses to exposure to mid-frequency sound sources is from Nowacek *et al.* (2004). Nowacek *et al.* (2004) documented observations of the behavioral response of North Atlantic right whales exposed to alert stimuli containing mid-frequency components in the Bay of Fundy. Investigators used archival digital acoustic recording tags (DTAG) to record the behavior (by measuring pitch, roll, heading, and depth) of right whales in the presence of an alert signal, and to calibrate received sound levels. The alert signal was 18 minutes of exposure consisting of three 2-minute signals played sequentially three times over. The three signals had a 60% duty cycle and consisted of: (1) Alternating 1-sec pure tones at 500 Hz and 850 Hz; (2) a 2-sec logarithmic down-sweep from 4,500 Hz to 500 Hz; and (3) a pair of low (1,500 Hz)-high (2,000 Hz) sine wave tones amplitude modulated at 120 Hz and each 1-sec long. The purposes of the alert signal were (a) to pique the mammalian auditory system with disharmonic signals that cover the whales' estimated hearing range; (b) to maximize the signal to noise ratio (obtain the largest difference between background noise) and (c) to provide localization cues for the whale. The maximum source level used was 173 dB SPL.

Nowacek *et al.* (2004) reported that five out of six whales exposed to the alert signal with maximum received levels ranging from 133 to 148 dB re 1 μPa significantly altered their regular behavior and did so in identical fashion. Each of these five whales: (i) Abandoned their current foraging dive prematurely as evidenced by curtailing their 'bottom time'; (ii) executed a shallow-angled, high power (i.e. significantly increased fluke stroke rate) ascent; (iii) remained at or near the surface for the duration of the exposure, an abnormally long surface interval; and (iv) spent significantly more time at subsurface depths (1–10 m) compared with normal surfacing periods when whales normally stay within 1 m (1.1 yd) of the surface.

3. Odontocete Field Data (Haro Strait—USS SHOUP)—In May 2003, killer whales (Orcinus orca) were observed exhibiting behavioral responses generally described as avoidance behavior while the U.S. Ship (USS) SHOUP was engaged in MFAS in the Haro Strait in the vicinity of Puget Sound, Washington. Those observations have been documented in three reports developed by Navy and NMFS (NMFS, 2005; Fromm, 2004a, 2004b; DON, 2003). Although these observations were made in an uncontrolled environment, the sound field that may have been associated with the active sonar operations was estimated using standard acoustic propagation models that were verified (for some but not all signals) based on calibrated in situ measurements from an independent researcher who recorded the sounds during the event. Behavioral

observations were reported for the group of whales during the event by an experienced marine mammal biologist who happened to be on the water studying them at the time. The observations associated with the USS SHOUP provide the only data set available of the behavioral responses of wild, non-captive animal upon actual exposure to AN/SQS–53 sonar.

U.S. Department of Commerce (National Marine Fisheries, 2005a); U.S. Department of the Navy (2004b); Fromm (2004a, 2004b) documented reconstruction of sound fields produced by USS SHOUP associated with the behavioral response of killer whales observed in Haro Strait. Observations from this reconstruction included an approximate closest approach time which was correlated to a reconstructed estimate of received level. Observations from this reconstruction included an estimate of 169.3 dB SPL which represents the mean level at a point of closest approach within a 500 m wide area in which the animals were exposed. Within that area, the estimated received levels varied from approximately 150 to 180 dB SPL.

Calculation of K Parameter—NMFS and the Navy used the mean of the following values to define the midpoint of the function: (1) The mean of the lowest received levels (185.3 dB) at which individuals responded with altered behavior to 3 kHz tones in the SSC data set; (2) the estimated mean received level value of 169.3 dB produced by the reconstruction of the USS SHOUP incident in which killer whales exposed to MFAS (range modeled possible received levels: 150 to 180 dB); and (3) the mean of the 5 maximum received levels at which Nowacek *et al.* (2004) observed significantly altered responses of right whales to the alert stimuli than to the control (no input signal) is 139.2 dB SPL. The arithmetic mean of these three mean values is 165 dB SPL. The value of K is the difference between the value of B (120 dB SPL) and the 50% value of 165 dB SPL; therefore, K=45.

A Parameter (Steepness)—NMFS determined that a steepness parameter (A) = 10 is appropriate for odontocetes (except harbor porpoises) and pinnipeds and A = 8 is appropriate for mysticetes.

The use of a steepness parameter of A = 10 for odontocetes for the MFAS/HFAS risk function was based on the use of the same value for the SURTASS LFA risk continuum, which was supported by a sensitivity analysis of the parameter presented in Appendix D of the SURTASS/LFA FEIS (U.S. Department of the Navy, 2001c). As concluded in the SURTASS FEIS/EIS, the value of A=10 produces a curve that has a more gradual transition than the curves developed by the analyses of migratory gray whale studies (Malme *et al.,* 1984; Buck and Tyack, 2000; and SURTASS LFA Sonar EIS, Subchapters 1.43, 4.2.4.3 and Appendix D, and National Marine Fisheries Service, 2008).

NMFS determined that a lower steepness parameter (A = 8), resulting in a shallower curve, was appropriate for use with mysticetes and MFAS/HFAS. The Nowacek *et al.* (2004) dataset contains the only data illustrating mysticete behavioral responses to a sound source that encompasses frequencies in the mid-frequency sound spectrum. A shallower curve (achieved by using A = 8) better reflects the risk of behavioral response at the relatively low received levels at which behavioral responses of right whales were reported in the Nowacek *et al.* (2004) data. Compared to the odontocete curve, this adjustment results in an increase in the proportion of the exposed population of mysticetes being classified as behaviorally harassed at lower RLs, such as those reported in the Novacek report, and is supported by the only representative dataset currently available.

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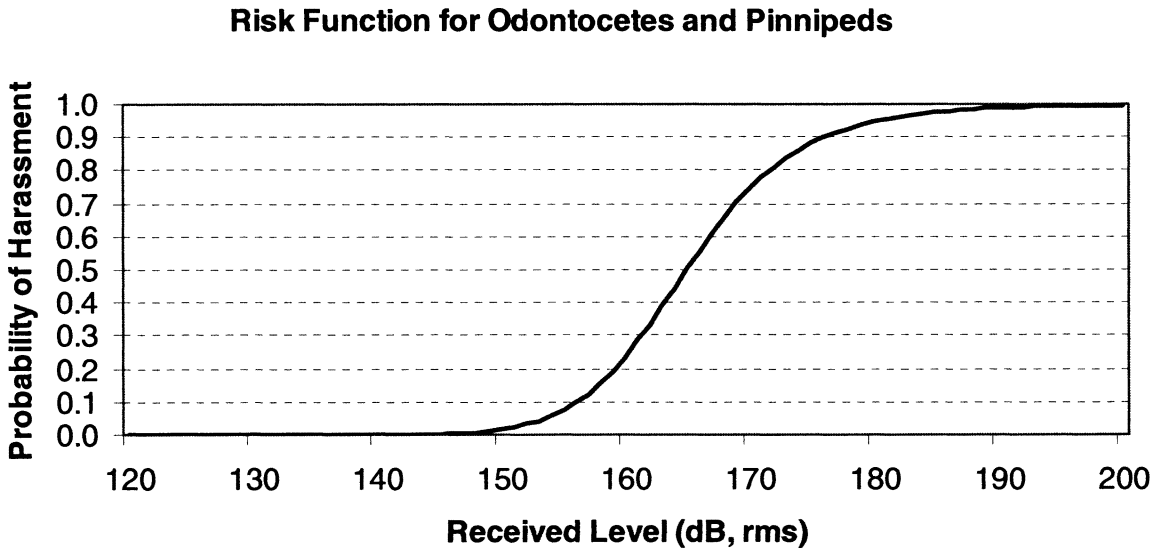

Figure 1a. Risk function for odontocetes and pinnipeds. B=120 dB, K=45 dB, A=10

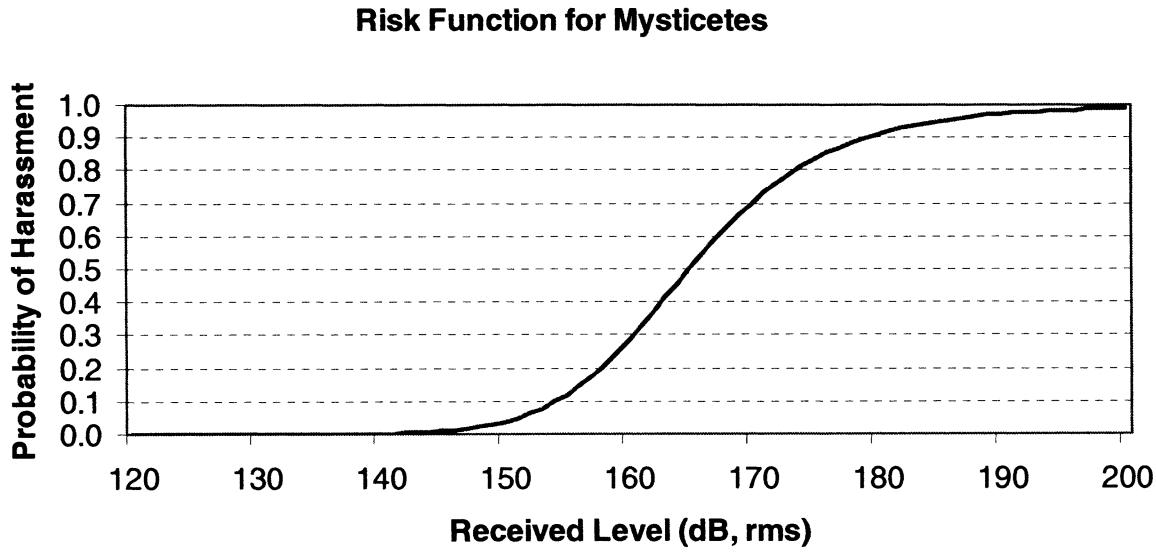

Figure 1b. Risk function for mysticetes. B=120 dB, K=45 dB, A=8.

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Basic Application of the Risk Function—The risk function is used to estimate the percentage of an exposed population that is likely to exhibit behaviors that would qualify as harassment (as that term is defined by the MMPA applicable to military readiness activities, such as the Navy's testing and training with MFAS) at a given received level of sound. For example, at 165 dB SPL (dB re: 1µPa rms), the risk (or probability) of harassment is defined according to this function as 50%, and Navy/NMFS applies that by estimating that 50% of the individuals exposed at that received level are likely to respond by exhibiting behavior that NMFS would classify as behavioral harassment. The risk function is not applied to individual animals, only to exposed populations.

The data primarily used to produce the risk function (the K parameter) were compiled from four species that had been exposed to sound sources in a variety of different circumstances. As a result, the risk function represents a general relationship between acoustic exposures and behavioral responses that

is then applied to specific circumstances. That is, the risk function represents a relationship that is deemed to be generally true, based on the limited, best-available science, but may not be true in specific circumstances. In particular, the risk function, as currently derived, treats the received level as the only variable that is relevant to a marine mammal's behavioral response. However, we know that many other variables—the marine mammal's gender, age, and prior experience; the activity it is engaged in during an exposure event, its distance from a sound source, the number of sound sources, and whether the sound sources are approaching or moving away from the animal—can be critically important in determining whether and how a marine mammal will respond to a sound source (Southall *et al.,* 2007). The data that are currently available do not allow for incorporation of these other variables in the current risk functions; however, the risk function represents the best use of the data that are available. Additionally, although these other factors cannot be taken into consideration quantitatively in the risk function, NMFS considers these other variables qualitatively in our analysis, when applicable data are available.

As more specific and applicable data become available for MFAS/HFAS sources, NMFS can use these data to modify the outputs generated by the risk function to make them more realistic. Ultimately, data may exist to justify the use of additional, alternate, or multi-variate functions. For example, as mentioned previously, the distance from the sound source and whether it is perceived as approaching or moving away can affect the way an animal responds to a sound (Wartzok *et al.,* 2003). In the MIRC example, animals exposed to received levels between 120 and 140 dB will likely be more that 125 km away from a sound source depending on seasonal variations; those distances could influence whether those animals perceive the sound source as a potential threat, and their behavioral responses to that threat. Though there are data showing response of certain marine mammal species to mid-frequency sound sources at that received level, NMFS does not currently have any data that describe the response of marine mammals to mid-frequency sounds at that distance, much less data that compare responses to similar sound levels at varying distances (much less for MFAS/HFAS). However, if applicable data meeting NMFS standards were to become available, NMFS would re-evaluate the risk function and to incorporate any additional variables into the ''take'' estimates.

Explosive Detonation Criteria

The criteria for mortality, Level A Harassment, and Level B Harassment resulting from explosive detonations were initially developed for the Navy's Seawolf and Churchill ship-shock trials and have not changed. The criteria, which are applied to cetaceans and pinnipeds, are summarized in Table 7. Additional information regarding the derivation of these criteria is available in the Navy's DEIS for the MIRC, the LOA application, and in the Navy's CHURCHILL FEIS (U.S. Department of the Navy, 2001c).

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Type of Effect	Criteria	Metric	Threshold	MMPA
Mortality	Onset of Extensive Lung Injury	Goertner modified positive impulse	indexed to 30.5 psi-msec (assumes 100 percent small animal at 26.9 lbs)	Mortality
Injurious Physiological	50% Tympanic Membrane Rupture	Energy flux density	1.17 in-lb/in^2 (about 205 dB re 1 microPa^2-sec)	Level A Harassment
Injurious Physiological	Onset Slight Lung Injury	Goertner modified positive impulse	indexed to 13 psi-msec (assumes 100 percent small animal at 26.9 lbs)	Level A Harassment
Non-injurious Physiological	TTS	Greatest energy flux density level in any 1/3-octave band (> 100 Hz for toothed whales and > 10 Hz for baleen whales) - for total energy over all exposures	182 dB re 1 microPa^2-sec	Level B Harassment
Non-injurious Physiological	TTS	Peak pressure over all exposures	23 psi	Level B Harassment
Non-injurious Behavioral	Multiple Explosions Without TTS	Greatest energy flux density level in any 1/3-octave (> 100 Hz for toothed whales and > 10 Hz for baleen whales) - for total energy over all exposures (multiple explosions only)	177 dB re 1 microPa^2-sec	Level B Harassment

Table 7. Summary of Explosive Criteria

Estimates of Potential Marine Mammal Exposure

Estimating the take that will result from the proposed activities entails the following three general steps: (1) Propagation model estimates animals exposed to sources at different levels; (2) further modeling determines number of exposures to levels indicated in criteria above (i.e., number of takes); and (3) post-modeling corrections refine estimates to make them more accurate. More information regarding the models used, the assumptions used in the models, and the process of estimating take is available in Appendix A of the Navy's Application.

(1) In order to quantify the types of take described in previous sections that are predicted to result from the Navy's specified activities, the Navy first uses a sound propagation model that predicts the number of animals that will be exposed to a range of levels of pressure and energy (of the metrics used in the criteria) from MFAS/HFAS and explosive detonations based on several important pieces of information, including:

- Characteristics of the sound sources.
- Active sonar source characteristics include: source level (with horizontal and vertical directivity corrections), source depth, center frequency, source directivity (horizontal/vertical beam width and horizontal/vertical steer direction), and ping spacing.
- Explosive source characteristics include: the weight of an explosive, the type of explosive, the detonation depth, and number of successive explosions.
- Transmission loss (in 9 representative environmental provinces in two seasons) based on: water depth; sound speed variability throughout the water column (warm season exhibits a weak surface duct, cold season exhibits a relatively strong surface duct); bottom geo-acoustic properties (bathymetry); and wind speed.
- The estimated density of each marine mammal species in the MIRC (see Table 4), horizontally distributed uniformly and vertically distributed according to dive profiles based on field data.

(2) Next, the criteria discussed in the previous section are applied to the estimated exposures to predict the number of exposures that exceed the criteria, i.e., the number of takes by Level B Harassment, Level A Harassment, and mortality.

(3) During the development of the EIS for MIRC, NMFS and the Navy determined that the output of the model could be made more realistic by applying post-modeling corrections to account for the following:

- Acoustic footprints for active sonar sources must account for land masses (by subtracting them out).
- Acoustic footprints for active sonar sources should not be added independently, rather, the degree to which the footprints from multiple ships participating in the same exercise would typically overlap needs to be taken into consideration.
- Acoustic modeling should account for the maximum number of individuals of a species that could potentially be exposed to active sonar within the course of 1 day or a discrete continuous sonar event if less than 24 hours.

Last, the Navy's specified activities have been described based on best estimates of the number of MFAS/HFAS hours that the Navy will conduct. The exact number of hours may vary from year to year, but will not exceed the 5-year total indicated in Table 8 (by multiplying the yearly estimate by 5) by more than 10%. NMFS estimates that a 10% increase in active sonar hours would result in approximately a 10% increase in the number of takes, and we have considered this possibility in our analysis.

The Navy's model provides a systematic and repeatable way of estimating the number of animals that will be taken by Level A and Level B Harassment. The model is based on the sound propagation characteristics of the sound sources, physical characteristics of the surrounding environment, and a uniform density of marine mammals. As mentioned in the previous sections, many other factors will likely affect how and the degree to which marine mammals are impacted both at the individual and species level by the Navy's activity (such as social ecology of the animals, long term exposures in one area, etc.); however, in the absence quantitative data, NMFS has, and will continue, to evaluate that sort of information qualitatively.

Species	Modeled Sonar Exposures to Indicated Thresholds			Modeled Explosive Exposures to Indicated Thresholds				NMFS Proposed Annual Take Authorization		
	Level B Exposures		Level A Exposures (PTS)	Level B Exposures		Level A Exposures	Mortality			
	Risk Function (Behavioral)	TTS		Sub-TTS	TTS			Level B Harassment	Level A Harassment	Mortality
ESA Species										
Blue whale	128	2	0	0	0	0	0	130	0	
Fin whale	180	2	0	0	0	0	0	182	0	
Humpback whale	794	10	0	0	1	0	0	805	0	
Sei whale	319	6	0	0	0	0	0	325	0	
Sperm whale	807	10	1	6	3	0	0	826	1	
Sei/Bryde's whale	61	1	0	0	0	0	0	62	0	
Unidentified Balaenopterid whale	71	1	0	0	0	0	0	72	0	
Mysticetes										
Bryde's whale	449	8	0	0	0	0	0	457	0	
Minke whale	438	7	0	0	0	0	0	445	0	
Odontocetes										
Blainville's beaked whale	758	12	0	0	0	0	0	770	0	10 over the course of 5-yr rule
Cuvier's beaked whale	3,567	44	0	12	4	0	0	3627	0	
Ginkgo-toothed beaked whale	423	7	0	0	0	0	0	430	0	
Longman's beaked whale	204	2	0	0	0	0	0	206	0	
Bottlenose dolphin	168	3	0	0	0	0	0	171	0	
Bottlenose/Rough-toothed dolphin	72	1	0					73	0	
Fraser's dolphin	4,523	74	0	12	4	0	0	4613	0	
Pantropical spotted dolphin	31,963	510	1	12	8	0	0	32493	1	
Rough-toothed dolphin	236	5	0	0	0	0	0	241	0	
Risso's dolphin	6,627	108	0	26	10	0	0	6771	0	
Short-beaked common dolphin	918	17	0	6	2	0	0	943	0	
Spinner dolphin	2,099	36	0	6	2	0	0	2143	0	
Striped dolphin	8,713	139	0	3	1	0	0	8856	0	
Unidentified delphinid	1,514	24	0	0	0	0	0	1538	0	
Dwarf/Pygmy sperm whale	6,574	103	0	20	6	0	0	6703	0	
False killer whale	1,266	23	0	0	0	0	0	1289	0	
Killer whale	226	4	0	0	0	0	0	230	0	
Melon-headed whale	2,808	46	0	6	2	0	0	2862	0	
Pygmy killer whale	158	2	0	0	0	0	0	160	0	
Short-finned pilot whale	2,238	36	0	0	0	0	0	2274	0	
Total	**78,302**	**1,243**	**2**	**109**	**43**	**0**	**0**	79697	2	

Table 8. Navy's estimated marine mammal exposures to the thresholds and NMFS proposed take authorization.

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Mortality

Evidence from five beaked whale strandings, all of which have taken place outside the MIRC Range Complex, and have occurred over approximately a decade, suggests that the exposure of beaked whales to MFAS in the presence of certain conditions (e.g., multiple units using active sonar, steep bathymetry, constricted channels, strong surface ducts, etc.) may result in strandings, potentially leading to mortality. Although not all 5 of these physical factors believed to have contributed to the likelihood of beaked whale strandings are present, in their aggregate, in the MIRC, scientific uncertainty exists regarding what other factors, or combination of factors, may contribute to beaked whale strandings. Accordingly, to allow for scientific uncertainty regarding contributing causes of beaked whale strandings and the exact behavioral or physiological mechanisms that can lead to the ultimate physical effects (stranding and/or death), the Navy has requested authorization for (and NMFS is proposing authorizing) take, by injury or mortality. Although the Navy has requested take by injury or mortality of 10 beaked whales over the course of the 5-yr regulations, the Navy's model did not predict injurious takes of beaked whales and neither NMFS, nor the Navy anticipates that marine mammal strandings or mortality will result from the operation of MFAS during Navy exercises within the MIRC.

Effects on Marine Mammal Habitat

The Navy's proposed training exercises could potentially affect marine mammal habitat through the introduction of pressure, sound, and expendable materials into the water column, which in turn could impact prey species of marine mammals, or cause bottom disturbance or changes in water quality. Each of these components was considered in the MIRC DEIS and was determined by the Navy to have no significant or long term effect on marine mammal habitat. Based on the information below and the supporting information included in the Navy's DEIS, NMFS has preliminarily determined that the MIRC training activities will not have significant or long term impacts on marine mammal habitat. Unless the sound source or explosive detonation is stationary and/or continuous over a long duration in one area, the effects of the introduction of sound into the environment are generally considered to have a less severe impact on marine mammal habitat than the physical alteration of the habitat. Marine mammals may be temporarily displaced from areas where Navy training is occurring, but the area will likely be utilized again after the activities have ceased. A summary of the conclusions are included in subsequent sections.

Effects on Food Resources

Fish

The Navy's DEIS includes a detailed discussion of the effects of active sonar on marine fish. In summary, studies have indicated that acoustic communication and orientation of fish may be restricted by anthropogenic sound in their environment. However, the vast majority of fish species studied to date are hearing generalists and cannot hear sounds above 500 to 1,500 Hz (0.5 to 1.5 kHz) (depending upon the species). Therefore, these fish species are not likely to be affected behaviorally from higher frequency sounds such as MFAS/HFAS. Moreover, even those marine species that may hear above 1.5 kHz, such as a few sciaenids and the clupeids (and relatives), have relatively poor hearing above 1.5 kHz as compared to their hearing sensitivity at lower frequencies, so it is likely that the fish will only actually hear the sounds if the fish and source were fairly close to one another. Finally, since the vast majority of sounds that are of biological relevance to fish are below 1 kHz (e.g., Zelick *et al.,* 1999; Ladich and Popper, 2004), even if a fish detects a mid- or high-frequency sound, these sounds will not likely mask detection of lower frequency biologically relevant sounds. Thus, based on the available information, a reasonable conclusion is that there will be few, and more likely no, impacts on the behavior of fish from active sonar.

Though mortality has been shown to occur in one species, a hearing specialist, as a result of exposure to non-impulsive sources, the available evidence does not suggest that exposures such as those anticipated from MFAS/HFAS would result in significant fish mortality on a population level. The mortality that was observed was considered insignificant in light of natural daily mortality rates. Experiments have shown that exposure to loud sound can result in significant threshold shifts in certain fish that are classified as hearing specialists (but not those classified as hearing generalists). Threshold shifts are temporary, and considering the best available data, no data exist that demonstrate any long-term negative effects on marine fish from underwater sound associated with active sonar activities. Further, while fish may respond behaviorally to mid-frequency sources, this behavioral modification is only expected to be brief and not biologically significant.

There are currently no well-established thresholds for estimating effects to fish from explosives other than mortality models. Fish that are located in the water column, in proximity to the source of detonation could be injured, killed, or disturbed by the impulsive sound and possibly temporarily leave the area. Continental Shelf Inc. (2004) summarized a few studies conducted to determine effects associated with removal of offshore structures (e.g., oil rigs) in the Gulf of Mexico. Their findings revealed that at very close range, underwater explosions are lethal to most fish species regardless of size, shape, or internal anatomy. For most situations, cause of death in fishes has been massive organ and tissue damage and internal bleeding. At longer range, species with gas-filled swimbladders (e.g., snapper, cod, and striped bass) are more susceptible than those without swimbladders (e.g., flounders, eels). Studies also suggest that larger fishes are generally less susceptible to death or injury than small fishes. Moreover, elongated forms that are round in cross section are less at risk than deep-bodied forms; and orientation of fish relative to the shock wave may affect the extent of injury. Open water pelagic fish (e.g., mackerel) also seem to be less affected than reef fishes. The results of most studies are dependent upon specific biological, environmental, explosive, and data recording factors.

The huge variations in the fish population, including numbers, species, sizes, and orientation and range from the detonation point, make it very difficult to accurately predict mortalities at any specific site of detonation. Most fish species experience a large number of natural mortalities, especially during early life-stages, and any small level of mortality caused by the MIRC training exercises involving explosives will likely be insignificant to the population as a whole.

Invertebrates

Very little is known about sound detection and use of sound by invertebrates (see Budelmann 1992a, b, Popper *et al.,* 2001 for reviews). The limited data show that some crabs are able to detect sound, and there has been the suggestion that some other groups of invertebrates are also able to detect sounds. In addition, cephalopods (octopus and squid) and decapods (lobster, shrimp, and crab) are thought to sense low-frequency sound (Budelmann, 1992b). Packard *et al.*

(1990) reported sensitivity to sound vibrations between 1–100 Hz for three species of cephalopods. McCauley *et al.* (2000) found evidence that squid exposed to seismic airguns show a behavioral response including inking. However, these were caged animals, and it is not clear how unconfined animals may have responded to the same signal and at the same distances used. In another study, Wilson *et al.* (2007) played back echolocation clicks of killer whales to two groups of squid (*Loligo pealeii*) in a tank. The investigators observed no apparent behavioral effects or any acoustic debilitation from playback of signals up to 199 to 226 dB re 1 µPa. It should be noted, however, that the lack of behavioral response by the squid may have been because the animals were in a tank rather than being in the wild. In another report on squid, Guerra *et al.* (2004) claimed that dead giant squid turned up around the time of seismic airgun operations off of Spain. The authors suggested, based on analysis of carcasses, that the damage to the squid was unusual when compared to other dead squid found at other times. However, the report presents conclusions based on a correlation to the time of finding of the carcasses and seismic testing, but the evidence in support of an effect of airgun activity was totally circumstantial. Moreover, the data presented showing damage to tissue is highly questionable since there was no way to differentiate between damage due to some external cause (e.g., the seismic airgun) and normal tissue degradation that takes place after death, or due to poor fixation and preparation of tissue. To date, this work has not been published in peer reviewed literature, and detailed images of the reportedly damaged tissue are also not available.

In summary, baleen whales feed on the aggregations of krill and small schooling fish, while toothed whales feed on epipelagic, mesopelagic, and bathypelagic fish and squid. As summarized above and in the MIRC EIS/OEIS in more detail, potential impacts to marine mammal food resources within the MIRC is negligible given both lack of hearing sensitivity to mid-frequency sonar, the very geographic and spatially limited scope of most Navy at sea activities including underwater detonations, and the high biological productivity of these resources. No short or long term effects to marine mammal food resources from Navy activities are anticipated within the MIRC.

Military Expendable Material

Marine mammals are subject to entanglement in expended materials, particularly anything incorporating loops or rings, hooks and lines, or sharp objects. Most documented cases of entanglements occur when whales encounter the vertical lines of fixed fishing gear. This section summarizes the potential effects of expended materials on marine mammals. Detailed discussion of military expendable material is contained within the MIRC EIS.

The Navy endeavors to recover expended training materials. Notwithstanding, it is not possible to recover all training materials, and some may be encountered by marine mammals in the waters of the MIRC. Debris related to military activities that is not recovered generally sinks; the amount that might remain on or near the sea surface is low, and the density of such expendable materials in the MIRC would be very low. Types of training materials that might be encountered include: Parachutes of various types (e.g., those employed by personnel or on targets, flares, or sonobuoys); torpedo guidance wires, torpedo ''flex hoses;'' cable assemblies used to facilitate target recovery; sonobuoys; and EMATT.

Entanglement in military expendable material was not cited as a source of injury or mortality for any marine mammals recorded in a large marine mammal and sea turtle stranding database for California waters, an area with much higher density of marine mammals. Therefore as discussed in the MIRC EIS, expendable material is highly unlikely to directly affect marine mammal species or potential habitat within the MIRC.

NMFS Office of Habitat Conservation is working with the Navy to better identify the potential risks of expended materials from the Navy activities as they relate to Essential Fish Habitat. These effects are indirectly related to marine mammal habitat, but based on the extent of the likely effects described in the Navy's DEIS, NMFS' Office of Protected Resources has preliminarily determined that they will not result in significant impacts to marine mammal habitat. The EFH discussions between Navy and NMFS' Office of Habitat Conservation will further inform the marine mammal habitat analysis in the final rule.

Water Quality

The MIRC EIS/OEIS analyzed the potential effects to water quality from sonobuoy, ADCs, and Expendable Mobile Acoustic Training Target (EMATT) batteries; explosive packages associated with the explosive source sonobuoy (AN/SSQ–110A), and Otto Fuel (OF) II combustion byproducts associated with torpedoes. Expendable bathythermographs do not have batteries and were not included in the analysis. In addition, sonobuoys were not analyzed since, once scuttled, their electrodes are largely exhausted during use and residual constituent dissolution occurs more slowly than the releases from activated seawater batteries. As such, only the potential effects of batteries and explosions on marine water quality in and surrounding the sonobuoy training area were completed. The Navy determined that there would be no significant effect to water quality from seawater batteries, lithium batteries, and thermal batteries associated with scuttled sonobuoys.

ADCs and EMATTs use lithium sulfur dioxide batteries. The constituents in the battery react to form soluble hydrogen gas and lithium dithionite. The hydrogen gas eventually enters the atmosphere and the lithium hydroxide dissociates, forming lithium ions and hydroxide ions. The hydroxide is neutralized by the hydronium formed from hydrolysis of the acidic sulfur dioxide, ultimately forming water. Sulfur dioxide, a gas that is highly soluble in water, is the major reactive component in the battery. The sulfur ioxide ionizes in the water, forming bisulfite (HSO3) that is easily oxidized to sulfate in the slightly alkaline environment of the ocean. Sulfur is present as sulfate in large quantities (i.e., 885 milligrams per liter [mg/L]) in the ocean. Thus, it was determined that there would be no significant effect to water quality from lithium sulfur batteries associated with scuttled ADCs and EMATTs.

Only a very small percentage of the available hydrogen fluoride explosive product in the explosive source sonobuoy (AN/SSQ–110A) is expected to become solubilized prior to reaching the surface and the rapid dilution would occur upon mixing with the ambient water. As such, it was determined that there would be no significant effect to water quality from the explosive product associated with the explosive source sonobuoy (AN/SSQ–110A).

OF II is combusted in the torpedo engine and the combustion byproducts are exhausted into the torpedo wake, which is extremely turbulent and causes rapid mixing and diffusion. Combustion byproducts include carbon dioxide, carbon monoxide, water, hydrogen gas, nitrogen gas, ammonia, hydrogen cyanide, and nitrogen oxides. All of the byproducts, with the exception of

hydrogen cyanide, are below the EPA water quality criteria. Hydrogen cyanide is highly soluble in seawater and dilutes below the EPA criterion within 6.3 m (20.7 ft) of the torpedo. Therefore, it was determined there would be no significant effect to water quality as a result of OF II.

Analysis and Negligible Impact Determination

Pursuant to NMFS' regulations implementing the MMPA, an applicant is required to estimate the number of animals that will be ''taken'' by the specified activities (i.e., takes by harassment only, or takes by harassment, injury, and/or death). This estimate informs the analysis that NMFS must perform to determine whether the activity will have a ''negligible impact'' on the affected species or stock. Level B (behavioral) harassment occurs at the level of the individual(s) and does not assume any resulting population-level consequences, though there are known avenues through which behavioral disturbance of individuals can result in population-level effects (for example: pink-footed geese (*Anser brachyrhynchus*) in undisturbed habitat gained body mass and had about a 46-percent reproductive success compared with geese in disturbed habitat (being consistently scared off the fields on which they were foraging) which did not gain mass and has a 17-percent reproductive success). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (i.e., population-level effects). An estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), as well as the number and nature of estimated Level A Harassment takes, the number of estimated mortalities, and effects on habitat. Generally speaking, and especially with other factors being equal, the Navy and NMFS anticipate more severe effects from takes resulting from exposure to higher received levels (though this is in no way a strictly linear relationship throughout species, individuals, or circumstances) and less severe effects from takes resulting from exposure to lower received levels.

The Navy's specified activities have been described based on best estimates of the number of MFAS/HFAS hours that the Navy will conduct. The exact number of hours (or torpedoes, or pings, whatever unit the source is estimated in) may vary from year to year, but will not exceed the 5-year total indicated in Table 8 (by multiplying the yearly estimate by 5) by more than 10%. NMFS estimates that a 10-percent increase in active sonar hours (torpedoes, pings, etc.) would result in approximately a 10-percent increase in the number of takes, and we have considered this possibility and the effect of the additional active sonar use in our analysis.

Taking the above into account, considering the sections discussed below, and dependent upon the implementation of the proposed mitigation measures, NMFS has preliminarily determined that Navy training exercises utilizing MFAS/HFAS and underwater detonations will have a negligible impact on the marine mammal species and stocks present in the MIRC Range Complex.

Behavioral Harassment

As discussed in the Potential Effects of Exposure of Marine Mammals to MFAS/HFAS and illustrated in the conceptual framework, marine mammals can respond to MFAS/HFAS in many different ways, a subset of which qualify as harassment (see Behavioral Harassment Section). One thing that the take estimates do not take into account is the fact that most marine mammals will likely avoid strong sound sources to one extent or another. Although an animal that avoids the sound source will likely still be taken in some instances (such as if the avoidance results in a missed opportunity to feed, interruption of reproductive behaviors, etc.) in other cases avoidance may result in fewer instances of take than were estimated or in the takes resulting from exposure to a lower received level than was estimated, which could result in a less severe response. For MFAS/HFAS, the Navy provided information (Table 9) estimating the percentage of the total takes that will occur within the 10-dB bins (without considering mitigation or avoidance) that are within the received levels considered in the risk continuum and for TTS and PTS. This table applies specifically to AN/SQS–53C hull-mounted active sonar (the most powerful source), with less powerful sources the percentages would increase slightly in the lower received levels and correspondingly decrease in the higher received levels. As mentioned above, an animal's exposure to a higher received level is more likely to result in a behavioral response that is more likely to adversely affect the health of the animal.

Received Level (SPL)	Distance At Which Levels Occur in NWTRC	Percent of Total Harassment Takes Estimated to Occur at Indicated Level
Below 140 dB	36 km - 125 km	< 1%
140 < Level < 150 dB	15 km - 36 km	2%
150 < Level < 160 dB	5 km - 15 km	20%
160 < Level < 170 dB	2 km - 5 km	40%
170 < Level < 180 dB	0.6 m - 2 km	24%
180 < Level < 190 dB	180 m - 600 m	9%
above 190 dB	0 - 180 m	2%
TTS (195 SEL)	0 - 140	2%
PTS (215 SEL)	0 - 10 m	1%

Table 9. Approximate percent of estimated takes that occur in the indicated 10-dB bins for AN/SQS-53 (the most powerful source). For smaller sources, a higher % of the takes occur at lower levels, and a lower % at higher levels.

Because the Navy has only been monitoring specifically to discern the effects of MFAS/HFAS on marine mammals since approximately 2006, and because of the overall data gap regarding the effects of MFAS/HFAS on marine mammals, not a lot is known regarding how marine mammals in the MIRC will respond to MFAS/HFAS. For the one major exercise (Valiant Shield, 2007) for which NMFS has received a monitoring report, no instances of obvious behavioral disturbance were observed by the Navy watchstanders in the 25 marine mammal sightings of 235 animals. The Navy has also submitted reports from more than 60 major exercises conducted in the Southern California Range Complex, the Hawaii Range Complex, and off the Atlantic Coast, that similarly indicate no observed behavioral disturbance observed. One cannot conclude from these results that marine mammals were not harassed from MFAS/HFAS, as a portion of animals within the area of concern were not seen (especially those more cryptic, deep-diving species, such as beaked whales or Kogia spp.) and some of the non-biologist watchstanders might not be well-qualified to characterize behaviors. However, one can say that the animals that were observed did not respond in any of the obviously more severe ways, such as panic, aggression, or anti-predator response.

In addition to the monitoring that will be required pursuant to these regulations and any corresponding LOAs, which is specifically designed to help us better understand how marine mammals respond to sound, the Navy and NMFS have developed, funded, and begun conducting a controlled exposure experiment with beaked whales in the Bahamas (results of first year discussed in previous sections, 2008 results not yet available). Separately, the Navy and NMFS conducted an opportunistic tagging experiment with several species of marine mammals in the area of the 2008 Rim of the Pacific training exercises in the HRC, for which the results are still being analyzed.

Diel Cycle

As noted previously, many animals perform vital functions, such as feeding, resting, traveling, and socializing on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (when taking place in a biologically important context, such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007).

In the previous section, we discussed the fact that potential behavioral responses to MFAS/HFAS that fall into the category of harassment could range in severity. By definition, takes by behavioral harassment involve the disturbance of a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns (such as migration, surfacing, nursing, breeding, feeding, or sheltering) to a point where such behavioral patterns are abandoned or significantly altered. These reactions would, however, be more of a concern if they were expected to last over 24 hours or be repeated in subsequent days. As indicated in table 2, with the exception of the major exercises (either 1 multi-strike group exercise annually, or 1 Joint Expeditionary exercise and 1–4 MAGTFs annually), which last approximately 10 days, the rest of the sonar exercises conducted in the MIRC are 8 hours in duration or shorter. Additionally, vessels with hull-mounted active sonar are typically moving at speeds of 10–14 knots, which would make it unlikely that the same animal could remain in the immediate vicinity of the ship for the entire duration of the exercise. Animals are not expected to be exposed to MFAS/HFAS at levels or for a duration likely to result in a significant response that would then last for more than one day or on successive days. With the exception of SINKEXs, the planned explosive exercises are also of a short duration (1–6 hours). Although explosive exercises may sometimes be conducted in the same general areas repeatedly, because of their short duration and the fact that they are in the open ocean and animals can easily move away, it is similarly unlikely that animals would be exposed for long, continuous amounts of time. Although SINKEXs may last for up to 48 hours, only 2 are planned annually, they are stationary and conducted in deep, open water (where fewer marine mammals would typically be expected to be randomly encountered), and they have a rigorous monitoring and shutdown protocol, all of which make it unlikely that individuals would be

exposed to the exercise for extended periods or in consecutive days.

TTS

NMFS and the Navy have estimated that approximately 1300 individual marine mammals (totaled from all affected species), may sustain some level of TTS from MFAS/HFAS annually. As mentioned previously, TTS can last from a few minutes to days, be of varying degree, and occur across various frequency bandwidths, all of which determine the severity of the impacts on the affected individual, which can range from minor to more severe. Table 8 indicates the estimated number of animals that might sustain TTS from exposure to MFAS/HFAS. The TTS sustained by an animal is primarily classified by three characteristics:

• Frequency—Available data (of mid-frequency hearing specialists exposed to mid to high frequency sounds—Southall *et al.,* 2007) suggest that most TTS occurs in the frequency range of the source up to one octave higher than the source (with the maximum TTS at ½ octave above). The more MF powerful sources used (the two hull-mounted MFAS sources and the DICASS sonobuoys) have center frequencies between 3.5 and 8 kHz and the other unidentified MF sources are, by definition, less than 10 kHz, which suggests that TTS induced by any of these MF sources would be in a frequency band somewhere between approximately 2 and 20 kHz. There are fewer hours of HF source use and the sounds would attenuate more quickly, plus they have lower source levels, but if an animal were to incur TTS from these sources, it would cover a higher frequency range (sources are between 20 and 100 kHz, which means that TTS could range up to 200 kHz; however, HF systems are typically used less frequently and for shorter time periods than surface ship and aircraft MF systems, so TTS from these sources is even less likely). TTS from explosives would be broadband. Tables 5a and 5b summarize the vocalization data for each species.

• Degree of the shift (i.e., how many dB is the sensitivity of the hearing reduced by)—generally, both the degree of TTS and the duration of TTS will be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). The threshold for the onset of TTS (≤ 6 dB) is 195 dB (SEL), which might be received at distances of up to 140 m from the most powerful MFAS source, the AN/SQS–53 (the maximum ranges to TTS from other sources would be less, as modeled for MIRC). An animal would have to approach closer to the source or remain in the vicinity of the sound source appreciably longer to increase the received SEL, which would be difficult considering the watchstanders and the nominal speed of an active sonar vessel (10–12 knots). In the TTS studies, some using exposures of almost an hour in duration or up to 217 SEL, most of the TTS induced was 15 dB or less, though Finneran *et al.* (2007) induced 43 dB of TTS with a 64-sec exposure to a 20 kHz source (MFAS emits a 1-s ping 2 times/minute).

• Duration of TTS (Recovery time)—In the TTS laboratory studies, some using exposures of almost an hour in duration or up to 217 SEL, almost all individuals recovered within 1 day (or less, often in minutes), though in one study (Finneran *et al.* (2007)), recovery took 4 days.

Based on the range of degree and duration of TTS reportedly induced by exposures to non-pulse sounds of energy higher than that to which free-swimming marine mammals in the field are likely to be exposed during MFAS/HFAS training exercises in MIRC, it is unlikely that marine mammals would ever sustain a TTS from MFAS that alters their sensitivity by more than 20 dB for more than a few days (and the majority would be far less severe because of short duration of the majority of the exercises and the speed of a typical vessel), if that. Also, for the same reasons discussed in the Diel Cycle section, and because of the short distance within which animals would need to approach the sound source, it is unlikely that animals would be exposed to the levels necessary to induce TTS in subsequent time periods such that their recovery is impeded. Additionally, though the frequency range of TTS that marine mammals might sustain would overlap with some of the frequency ranges of their vocalization types, the frequency range of TTS from MFAS (the source from which TTS would most likely be sustained because the higher source level and slower attenuation make it more likely that an animal would be exposed to a higher level) would not usually span the entire frequency range of one vocalization type, much less span all types of vocalizations (see Tables 5a and 5b). If impaired, marine mammals would typically be aware of their impairment and implement behaviors to compensate for it (see Communication Impairment Section), though these compensations may incur energetic costs.

Acoustic Masking or Communication Impairment

Table 5 is also informative regarding the nature of the masking or communication impairment that could potentially occur from MFAS (again, center frequencies are 3.5 and 7.5 kHz for the two types of hull-mounted active sonar). However, masking only occurs during the time of the signal (and potential secondary arrivals of indirect rays), versus TTS, which continues beyond the duration of the signal. Standard MFAS pings last on average one second and occur about once every 24–30 seconds for hull-mounted sources. For the sources for which we know the pulse length, most are significantly shorter than hull-mounted active sonar, on the order of several microseconds to 10s of micro seconds. For hull-mounted active sonar, though some of the vocalizations that marine mammals make are less than one second long, there is only a 1 in 24 chance that they would occur exactly when the ping was received, and when vocalizations are longer than one second, only parts of them are masked. Alternately, when the pulses are only several microseconds long, the majority of most animals' vocalizations would not be masked. Masking effects from MFAS/HFAS are expected to be minimal. If masking or communication impairment were to occur briefly, it would be in the frequency range of MFAS, which overlaps with some marine mammal vocalizations, however, it would likely not mask the entirety of any particular vocalization or communication series because the signal length, frequency, and duty cycle of the MFAS/HFAS signal does not perfectly mimic the characteristics of any marine mammal's vocalizations.

PTS, Injury, or Mortality

The Navy's model estimated that one pantropical dolphin and one sperm whale would be exposed to levels of MFAS/HFAS that would result in PTS. This estimate does not take into consideration either the mitigation measures, the likely avoidance behaviors of some of the animals exposed, the distance from the sonar dome of a surface vessel within which an animal would have to be exposed to incur PTS (10 m), and the nominal speed of a surface vessel engaged in ASW exercises. NMFS believes that many marine mammals would deliberately avoid exposing themselves to the received levels of active sonar necessary to induce injury by moving away from or at least modifying their path to avoid a close approach.

Additionally, in the unlikely event that an animal approaches the sonar vessel at a close distance, NMFS believes that the mitigation measures (i.e., shutdown/powerdown zones for MFAS/HFAS) would typically ensure that animals would be not be exposed to injurious levels of sound. As discussed previously, the Navy utilizes both aerial (when available) and passive acoustic monitoring (during all ASW exercises) in addition to watchstanders on vessels to detect marine mammals for mitigation implementation and indicated that they are capable of effectively monitoring a 1000-meter (1093-yd) safety zone at night using night vision goggles, infrared cameras, and passive acoustic monitoring.

If a marine mammal is able to approach a surface vessel within the distance necessary to incur PTS, the likely speed of the vessel (nominal 10–12 knots) would make it very difficult for the animal to remain in range long enough to accumulate enough energy to result in more than a mild case of PTS. As mentioned previously and in relation to TTS, the likely consequences to the health of an individual that incurs PTS can range from mild to more serious dependent upon the degree of PTS and the frequency band it is in, and many animals are able to compensate for the shift, although it may include energetic costs. While NMFS believes it is very unlikely that a pantropical dolphin or sperm whale will incur PTS from exposure to MFAS/HFAS, the Navy has requested authorization to take one each by Level A Harasssment and therefore, NMFS has considered this possibility in our analysis.

As discussed previously, marine mammals (especially beaked whales) could potentially respond to MFAS at a received level lower than the injury threshold in a manner that indirectly results in the animals stranding. The exact mechanisms of this potential response, behavioral or physiological, are not known. When naval exercises have been associated with strandings in the past, it has typically been when three or more vessels are operating simultaneously, in the presence of a strong surface duct, and in areas of constricted channels, semi-enclosed areas, and/or steep bathymetry. While these features certainly do not define the only factors that can contribute to a stranding, and while they need not all be present in their aggregate to increase the likelihood of a stranding, it is worth noting that they are not all present in the MIRC, which does have a strong surface duct present much of the time, but does not have bathymetry or constricted channels of the type that have been present in the sonar-associated strandings. Additionally, based on the number of occurrences where strandings have been definitively associated with military active sonar versus the number of hours of active sonar training that have been conducted, we suggest that the probability is small that this will occur. Additionally, an active sonar shutdown protocol for strandings involving live animals milling in the water minimizes the chances that these types of events turn into mortalities. Though NMFS does not expect it to occur, because of the uncertainty surrounding the mechanisms that link exposure to MFAS to stranding (especially in beaked whales), NMFS is proposing to authorize the injury or mortality of 10 beaked whales over the course of the 5-yr regulations.

60 Years of Navy Training Exercises Using MFAS/HFAS in the MIRC Range Complex

The Navy has been conducting MFAS/HFAS training exercises in the MIRC Range Complex for over 60 years. Although limited monitoring specifically in conjunction with training exercises to determine the effects of active sonar and explosives on marine mammals has not been conducted by the Navy in the past in the MIRC and the symptoms indicative of potential acoustic trauma were not as well recognized prior to the mid-nineties, people have been collecting stranding data in the MIRC Range Complex for approximately 4 years. Though not all dead or injured animals are expected to end up on the shore (some may be eaten or float out to sea), one might expect that if marine mammals were being harmed by the Navy training exercises with any regularity, more evidence would have been detected.

Species-Specific Analysis

In the discussions below, the ''acoustic analysis'' refers to the Navy's analysis, which includes the use of several models and other applicable calculations as described in the Estimates of Potential Marine Mammal Exposure section. The numbers predicted by the ''acoustic analysis'' are based on a uniform and stationary distribution of marine mammals and do not take into consideration the implementation of mitigation measures or potential avoidance behaviors of marine mammals, and therefore, are likely overestimates of potential exposures to the indicated thresholds (PTS, TTS, behavioral harassments).

Blue Whale (MMPA Depleted/ESA-Listed)

Acoustic analysis predicts that 130 exposures of blue whales to MFAS/HFAS at levels likely to result in Level B harassment will occur, and that 0 exposures to explosives will occur. This estimate represents the total number of takes and not necessarily the number of individuals taken, as a single individual may be taken multiple times over the course of a year. These Level B takes are anticipated to be primarily in the form of behavioral disturbance as described in the Definition of Harassment: Level B Harassment section, although two TTS takes are also estimated. However, it is unlikely that any blue whales will incur TTS because of: the distance within which they would have to approach the MFAS source (approximately 140 m for the most powerful source for TTS), the fact that many animals will likely avoid active sonar sources to some degree, and the likelihood that Navy monitors would detect these animals prior to an approach within this distance (given their large size, average group size (2–3), and pronounced vertical blow) and implement active sonar powerdown or shutdown. Of note, blue whale vocalizations are in the 12 to 400 Hz range with dominant energy in the 12 to 25 Hz range, which suggests that blue whale hearing may be more sensitive in this frequency range. Thus, frequencies in the MFAS range (1–10 kHz) are predicted to lie closer to the periphery of their hearing, which suggests that adverse impacts resulting from exposure to MFAS may be fewer than modeled.

Blue whales have not actually been seen in the MIRC and the most appropriate population estimate is the one for the North Pacific, which estimates a minimum of 3,300 whales. Like most baleen whales, blue whales would most likely feed in the north in the summer and head southward (potentially MIRC) in the cooler months. Relative to the population size, this activity is anticipated to result only in a limited number of level B harassment takes. The MIRC activities are not expected to occur in an area/time of specific importance for reproduction, feeding, or other known critical behaviors. The blue whales' large size and detectability makes it unlikely that these animals would be exposed to the higher levels of sound expected to result in more severe effects. Consequently, the activities are not expected to adversely impact rates of recruitment or survival of blue whales. Based on the general information contained in the Negligible Impact Analysis section and this species-specific summary of the

effects of the takes, NMFS has preliminarily determined that the Navy's specified activities will have a negligible impact on this species.

Fin Whale (MMPA Depleted/ESA-Listed)

Acoustic analysis predicts that 182 exposures of fin whales to MFAS/HFAS at sound levels likely to result in Level B harassment will occur, and that 0 exposures to explosives will occur. This estimate represents the total number of takes and not necessarily the number of individuals taken, as a single individual may be taken multiple times over the course of a year. These Level B takes are anticipated to be primarily in the form of behavioral disturbance as described in the Definition of Harassment: Level B Harassment section, although two TTS takes are also estimated. However, it is unlikely that any fin whales will incur TTS because of: The distance within which they would have to approach the MFAS source (approximately 140 m for the most powerful source for TTS), the fact that many animals will likely avoid active sonar sources to some degree, and the likelihood that Navy monitors would detect these animals prior to an approach within this distance (given their large size, average group size (3), and pronounced vertical blow) and implement active sonar powerdown or shutdown. Of note, fin whale vocalizations are in the 15–750 Hz range with the majority below 70 Hz, which suggests that fin whale hearing may be more sensitive in this frequency range. Thus, frequencies in the MFAS range (1–10 kHz) are predicted to lie closer to the periphery of their hearing, which suggests that adverse impacts resulting from exposure to MFAS may be fewer than modeled.

Fin whales have not actually been seen in the MIRC and the most appropriate population estimate is the one for the North Pacific, which estimates 14,620–18,630 whales. Relative to the population size, this activity is anticipated to result only in a limited number of level B harassment takes. In the northern hemisphere, fin whales migrate seasonally from high Arctic feeding areas in the summer to low latitude breeding and calving areas in the winter. The MIRC activities are not expected to occur in an area/time of specific importance for reproduction, feeding, or other known critical behaviors. The fin whales' large size and detectability makes it unlikely that these animals would be exposed to the higher levels of sound expected to result in more severe effects. Consequently, the activities are not expected to adversely impact rates of recruitment or survival of fin whales. Based on the general information contained in the Negligible Impact Analysis section and this species-specific summary of the effects of the takes, NMFS has preliminarily determined that the Navy's specified activities will have a negligible impact on this species.

Sei Whale (MMPA Depleted/ESA-Listed)

Acoustic analysis predicts that 325 exposures of sei whales to MFAS/HFAS at sound levels likely to result in Level B harassment will occur, and that 0 exposures to explosives will occur. This estimate represents the total number of takes and not necessarily the number of individuals taken, as a single individual may be taken multiple times over the course of a year. These Level B takes are anticipated to be primarily in the form of behavioral disturbance as described in the Definition of Harassment: Level B Harassment section, although six TTS takes are also estimated. However, it is unlikely that any sei whales will incur TTS because of: The distance within which they would have to approach the MFAS source (approximately 140 m for the most powerful source for TTS), the fact that many animals will likely avoid active sonar sources to some degree, and the likelihood that Navy monitors would detect these animals prior to an approach within this distance (given their large size, average group size (3), and pronounced vertical blow) and implement active sonar powerdown or shutdown.

The most appropriate population estimate for the sei whale is the one for the North Pacific, which estimates 9,110 whales. Relative to the population size, this activity is anticipated to result only in a limited number of level B harassment takes. Sei whales are generally thought to feed in the summer in the north and spend winters in warm temperate or sub-tropical areas. The MIRC activities are not expected to occur in an area/time of specific importance for reproduction, feeding, or other known critical behaviors. The sei whales' large size and detectability makes it unlikely that these animals would be exposed to the higher levels of sound expected to result in more severe effects. Consequently, the activities are not expected to adversely impact rates of recruitment or survival of sei whales. Based on the general information contained in the Negligible Impact Analysis section and this species-specific summary of the effects of the takes, NMFS has preliminarily determined that the Navy's specified activities will have a negligible impact on this species.

Humpback Whale (MMPA Depleted/ESA-Listed)

Acoustic analysis predicts that 804 exposures of humpback whales to MFAS/HFAS at sound levels likely to result in Level B harassment will occur. This estimate represents the total number of takes and not necessarily the number of individuals taken, as a single individual may be taken multiple times over the course of a year. These Level B takes are anticipated to be primarily in the form of behavioral disturbance as described in the Definition of Harassment: Level B Harassment section, although ten TTS takes are also estimated. However, it is unlikely that any humpback whales will incur TTS because of: the distance within which they would have to approach the MFAS source (approximately 140 m for the most powerful source for TTS), the fact that many animals will likely avoid active sonar sources to some degree, and the likelihood that Navy monitors would detect these animals prior to an approach within this distance (given their large size and gregarious nature) and implement active sonar powerdown or shutdown.

The acoustic analysis further predicts that 1 humpback whale would be exposed to levels of pressure and/or energy from explosive detonations that would result in Level B harassment by TTS. NMFS believes that this is unlikely because of: (1) The distance within which they would have to approach the explosive source; and, (2) the likelihood that Navy monitors would, during pre- or during exercises monitoring, detect these large, gregarious animals prior to an approach within this distance and require a delay of the exercise.

The current estimate for the North Pacific is 18,302 humpback whales. Relative to the population size, this activity is anticipated to result only in a limited number of level B harassment takes. Humpback whales are generally thought to feed in the summer in the north and spend winters in warm temperate or sub-tropical areas. The MIRC activities are not expected to occur in an area/time of specific importance for reproduction, feeding, or other known critical behaviors. The humpback whales' large size and detectability makes it unlikely that these animals would be exposed to the higher levels of sound expected to result in more severe effects. Consequently, the activities are not expected to adversely impact rates of recruitment or survival of humpback whales. Based on the general information contained in the Negligible Impact Analysis section and this species-specific summary of the

effects of the takes, NMFS has preliminarily determined that the Navy's specified activities will have a negligible impact on this species.

Bryde's Whale

Acoustic analysis predicts that 457 exposures of Bryde's whales to MFAS/HFAS at sound levels likely to result in Level B harassment will occur, and that 0 exposures to explosives will occur. This estimate represents the total number of takes and not necessarily the number of individuals taken, as a single individual may be taken multiple times over the course of a year. These Level B takes are anticipated to be primarily in the form of behavioral disturbance as described in the Definition of Harassment: Level B Harassment section, although 8 TTS takes are also estimated. However, it is unlikely that any fin whales will incur TTS because of: the distance within which they would have to approach the MFAS source (approximately 140 m for the most powerful source for TTS), the fact that many animals will likely avoid active sonar sources to some degree, and the likelihood that Navy monitors would detect these animals prior to an approach within this distance (given their large size and pronounced blow) and implement active sonar powerdown or shutdown.

Bryde's whales are found worldwide in tropical and temperate waters. There are no current estimates of Bryde's whale in the Pacific but based on the MISTCS survey, abundance in MIRC is about 233 animals. Historical records show a consistent presence of Bryde's whales in the MIRC. Bryde's whales have been sighted with calves several times, but no regularly used reproductive areas have been identified. The Bryde's whales' large size and detectability makes it unlikely that these animals would be exposed to the higher levels of sound expected to result in more severe effects. Consequently, the activities are not expected to adversely impact rates of recruitment or survival of Bryde's whales. Based on the general information contained in the Negligible Impact Analysis section and this species-specific summary of the effects of the takes, NMFS has preliminarily determined that the Navy's specified activities will have a negligible impact on this species.

Minke Whale

Acoustic analysis predicts that 445 exposures of Minke whales to MFAS/HFAS at sound levels likely to result in Level B harassment will occur, and that 0 exposures to explosives will occur. This estimate represents the total number of takes and not necessarily the number of individuals taken, as a single individual may be taken multiple times over the course of a year. These Level B takes are anticipated to be primarily in the form of behavioral disturbance as described in the Definition of Harassment: Level B Harassment section, although 7 TTS takes are also estimated. It is somewhat unlikely that any fin whales will incur TTS because of: the distance within which they would have to approach the MFAS source (approximately 140 m for the most powerful source for TTS) and the fact that many animals will likely avoid active sonar sources to some degree. However, Minke whales are relatively cryptic at surface, making visual detection more difficult, although they are often detected acoustically.

Minke whales are found in the North Atlantic and North Pacific from tropical to polar waters, although there are no current estimates of Minke whales in the Pacific. Minke whales were the most frequently detected species of baleen whales in the MISTCS (acoustically, not visually). The MIRC activities are not expected to occur in an area/time of specific importance for reproduction, feeding, or other known critical behaviors. Consequently, the activities are not expected to adversely impact rates of recruitment or survival of Minke whales. Based on the general information contained in the Negligible Impact Analysis section and this species-specific summary of the effects of the takes, NMFS has preliminarily determined that the Navy's specified activities will have a negligible impact on this species.

Sperm Whale (MMPA Depleted/ESA-Listed)

Acoustic analysis predicts that 817 exposures of sperm whales to MFAS/HFAS at sound levels likely to result in Level B harassment will occur. This estimate represents the total number of takes and not necessarily the number of individuals taken, as a single individual may be taken multiple times over the course of a year. These Level B takes are anticipated to be primarily in the form of behavioral disturbance as described in the Definition of Harassment: Level B Harassment section, although 10 TTS takes and 1 PTS (Level A Harassment) are also estimated and proposed for authorization. However, it is unlikely that any sperm whales will incur TTS or PTS because of: The distance within which they would have to approach the MFAS source (approximately 140 m for the most powerful source for TTS and 10 m for PTS), the fact that many animals will likely avoid active sonar sources to some degree, and the likelihood that Navy monitors would detect these animals prior to an approach within this distance (given their large size, pronounced blow, and mean group size of 7).

The acoustic analysis further predicts that 9 sperm whales would be exposed to levels of pressure and/or energy from explosive detonations that would result in Level B harassment by TTS. NMFS believes that this is unlikely because of: (1) The distance within which they would have to approach the explosive source; and, (2) the likelihood that Navy monitors would, during pre- or during exercises monitoring, detect these animals for the reasons indicated above.

Sperm whales occur throughout all ocean basins from equatorial to polar waters. Sperm whales are found throughout the North Pacific, but there are no current estimates of sperm whale abundance in the North Pacific, but based on the MISTCS survey, abundance in MIRC is about 705 animals. The sperm whale was the most frequently sighted cetacean in the MISTCS and was acoustically detected 3 times more often than it was visually detected. Sperm whales are present year-round in MIRC and have been sighted with calves, although no regularly used reproductive areas have been identified. The Sperm whales' large size and detectability makes it unlikely that these animals would be exposed to the higher levels of sound expected to result in more severe effects. Consequently, the activities are not expected to adversely impact rates of recruitment or survival of sperm whales. Based on the general information contained in the Negligible Impact Analysis section and this species-specific summary of the effects of the takes, NMFS has preliminarily determined that the Navy's specified activities will have a negligible impact on this species.

Pygmy and Dwarf Sperm Whale

Because of their similarity of appearance and cryptic behavior, these two species are difficult to differentiate in the field and are considered together. Acoustic analysis predicts that 6,677 exposures of pygmy or dwarf sperm whales to MFAS/HFAS at sound levels likely to result in Level B harassment will occur. This estimate represents the total number of takes and not necessarily the number of individuals taken, as a single individual may be taken multiple times over the course of a year. These Level B takes are anticipated to be primarily in the form of behavioral disturbance as described in the Definition of Harassment: Level B

Harassment section, although 103 TTS takes are also estimated. NMFS believes that it is unlikely that this number of pygmy or dwarf sperm whales will incur TTS because of the distance within which they would have to approach the MFAS source (approximately 140 m for the most powerful source for TTS) and the fact that many animals will likely avoid active sonar sources to some degree. However, the likelihood that Navy monitors would detect most of these animals at the surface prior to an approach within this distance is low because of their small size, non-gregarious nature, and cryptic behavior and profile. As mentioned above and indicated in Table 5, some pygmy or dwarf sperm whale vocalizations might overlap with the MFAS/HFAS TTS frequency range (2–20 kHz) (although most of their vocalizations are anticipated to be in a higher frequency range), which could potentially temporarily decrease an animal's sensitivity to the calls of conspecifics or returning echolocation signals. However, as noted previously, NMFS does not anticipate TTS of a long duration or severe degree to occur as a result of exposure to MFAS/HFAS.

The acoustic analysis further predicts that 6 pygmy or dwarf sperm whales would be exposed to levels of pressure and/or energy from explosive detonations that would result in Level B harassment by TTS, and 20 could be exposed to levels associated with behavioral disturbance.

Pygmy and dwarf sperm whales occur in tropical and temperate latitudes worldwide, although there are no current estimates of these whales in the Pacific or MIRC. The MIRC activities are not expected to occur in an area/time of specific importance for reproduction, feeding, or other known critical behaviors. Consequently, the activities are not expected to adversely impact rates of recruitment or survival of dwarf or pygmy sperm whales. Based on the general information contained in the Negligible Impact Analysis section and this species-specific summary of the effects of the takes, NMFS has preliminarily determined that the Navy's specified activities will have a negligible impact on this species.

Beaked Whales

Acoustic analysis predicts that 770 Blainville's beaked whales, 3,611 Cuvier's beaked whales, 430 Ginkgo-toothed beaked whales, and 206 Longman's beaked whales will be exposed to MFAS/HFAS at sound levels likely to result in Level B harassment. This estimate represents the total number of takes and not necessarily the number of individuals taken, as a single individual may be taken multiple times over the course of a year. These Level B takes are anticipated to be primarily in the form of behavioral disturbance as described in the Definition of Harassment: Level B Harassment section, although 12, 44, 7, and 2 (respectively) TTS takes are also estimated. NMFS believes that it is unlikely that this number of beaked whales will incur TTS because of the distance within which they would have to approach the MFAS source (approximately 140 m for the most powerful source for TTS) and the fact that many animals will likely avoid active sonar sources to some degree. However, the likelihood that Navy monitors would detect most of these animals at the surface prior to an approach within this distance is low because of their deep-diving behavior and cryptic profile. As mentioned above and indicated in Table 5, some beaked whale vocalizations might overlap with the MFAS/HFAS TTS frequency range (2–20 kHzge), which could potentially temporarily decrease an animal's sensitivity to the calls of conspecifics or returning echolocation signals. However, as noted previously, NMFS does not anticipate TTS of a long duration or severe degree to occur as a result of exposure to MFAS/HFAS.

The acoustic analysis further predicts that 4 Cuvier's beaked whales would be exposed to levels of pressure and/or energy from explosive detonations that would result in Level B harassment by TTS, and 14 could be exposed to levels associated with behavioral disturbance.

Cuvier's and Blainville's beaked whales are widespread throughout tropical and temperate latitudes worldwide, while Ginkgo-toothed and Longman's beaked whales are not well known, but thought to occur in the tropical and temperate waters of the Indo-Pacific. No abundance estimates are available for any of these species. The MIRC activities are not expected to occur in an area/time of specific importance for reproduction, feeding, or other known critical behaviors. Consequently, the activities are not expected to adversely impact rates of recruitment or survival of beaked whales. Based on the general information contained in the Negligible Impact Analysis section and this species-specific summary of the effects of the takes, NMFS has preliminarily determined that the Navy's specified activities will have a negligible impact on this species.

Social Pelagic Species (False/Pygmy Killer Whale, Killer Whale, Short-Finned Pilot Whale, and Melon-Headed Whale)

Acoustic analysis predicts that 1289 false killer whales, 230 killer whales, 2854 melon-headed whales, 160 pygmy killer whales, and 2274 short-finned pilot whales will be exposed to MFAS/HFAS at sound levels likely to result in Level B harassment. This estimate represents the total number of takes and not necessarily the number of individuals taken, as a single individual may be taken multiple times over the course of a year. These Level B takes are anticipated to be primarily in the form of behavioral disturbance as described in the Definition of Harassment: Level B Harassment section, although 23, 4, 46, 2, and 36 (respectively) TTS takes are also estimated. However, it is unlikely that many individuals of these species will incur TTS because of: The distance within which they would have to approach the MFAS source (approximately 140 m for the most powerful source for TTS), the fact that many animals will likely avoid active sonar sources to some degree, and the likelihood that Navy monitors would detect these animals prior to an approach within this distance (given their gregarious nature and large group size) and implement active sonar powerdown or shutdown. As mentioned above and indicated in Table 5, vocalizations of these species might overlap with the MFAS/HFAS TTS frequency range (2–20 kHz), which could potentially temporarily decrease an animal's sensitivity to the calls of conspecifics or returning echolocation signals. However, as noted previously, NMFS does not anticipate TTS of a long duration or severe degree to occur as a result of exposure to MFAS/HFAS.

The acoustic analysis further predicts that 2 melon-headed whales would be exposed to levels of pressure and/or energy from explosive detonations that would result in Level B harassment by TTS, and 6 could be exposed to levels associated with behavioral disturbance. NMFS believes that this is unlikely because of: (1) The distance within which they would have to approach the explosive source; and, (2) the likelihood that Navy monitors would, during pre- or during exercises monitoring, detect these large-grouped gregarious animals prior to an approach within this distance and require a delay of the exercise.

These species all have large ranges, primarily tropical (melon-headed and pygmy killer whales) and tropical/temperate (false killer and short-finned

pilot whales), although the killer whale is more abundant at higher latitudes. Abundance estimates are only available from the MISTCS and only for 3 species (melon-headed whales—2455, short-finned pilot whale—909, and false killer whale—637). The MIRC activities are not expected to occur in an area/time of specific importance for reproduction, feeding, or other known critical behaviors. Consequently, the activities are not expected to adversely impact rates of recruitment or survival of these social pelagic whales. Based on the general information contained in the Negligible Impact Analysis section and this species-specific summary of the effects of the takes, NMFS has preliminarily determined that the Navy's specified activities will have a negligible impact on these species.

Dolphins

Acoustic analysis predicts that individuals of all 8 of the dolphin species present in the MIRC will be exposed to MFAS/HFAS at sound levels likely to result in Level B harassment some number of times (see Table 8). These estimates represent the total number of takes and not necessarily the number of individuals taken, as a single individual may be taken multiple times over the course of a year. These Level B takes are anticipated to be primarily in the form of behavioral disturbance as described in the Definition of Harassment: Level B Harassment section, although some number of TTS takes are also estimated for all species and one PTS take is predicted for a pantropical spotted dolphin. However, it is unlikely that many individuals of these species will incur TTS because of: the distance within which they would have to approach the MFAS source (approximately 140 m for the most powerful source for TTS), the fact that many animals will likely avoid active sonar sources to some degree, and the likelihood that Navy monitors would detect these animals prior to an approach within this distance (given their gregarious nature and large group size) and implement active sonar powerdown or shutdown. However, the Navy's proposed mitigation has a provision that allows the Navy to continue operation of MFAS if the animals are clearly bow-riding even after the Navy has initially maneuvered to try and avoid closing with the animals. Since these animals sometimes bow-ride they could potentially be exposed to levels associated with TTS as they approach or depart from bow-riding. As mentioned above and indicated in Table 5, vocalizations of these species might overlap with the MFAS/HFAS TTS frequency range (2–20 kHz), which could potentially temporarily decrease an animal's sensitivity to the calls of conspecifics or returning echolocation signals. However, as noted previously, NMFS does not anticipate TTS of a long duration or severe degree to occur as a result of exposure to MFAS/HFAS.

The acoustic analysis further predicts that several individuals of several species of dolphins would be exposed to levels of pressure and/or energy from explosive detonations that would result in Level B harassment by TTS or behavioral harassment. NMFS believes that this is unlikely because of: (1) The distance within which they would have to approach the explosive source; and, (2) the likelihood that Navy monitors would, during pre- or during exercises monitoring, detect these large-grouped gregarious animals prior to an approach within this distance and require a delay of the exercise.

These species all have large ranges, primarily tropical and tropical/temperate. Abundance estimates are only available from the MISTCS and only for 5 species (bottlenose dolphin—122, pantropical spotted dolphin—12,981, rough-toothed dolphin—166, spinner dolphin—1803, and striped dolphin—3531). Three species were sighted with calves during the MISTCS, bottlenose dolphins, Risso's dolphins, and striped dolphins, however, no areas of regular use for breeding or calving have been identified.

Spinner dolphins, which rest primarily during the day in relatively large groups, are known to consistently use certain areas (usually Bays) for this function. Because of this, they are a regular target for whalewatching boats or other members of the public interested in viewing or interacting with them, which could potentially put them at increased energetic risk if their resting cycles are repeatedly interrupted in a significant manner. There are several resting areas for spinner dolphins in the MIRC Study Area: Agat Bay, Bile/Tougan Bay, and Double Reef. These areas usually occur in clear, calm, shallow waters sheltered from prevailing tradewinds. NMFS and the Navy considered spinner dolphin resting areas in relation to areas where the Navy plans to conduct training activities, including the Agat Bay UNDET areas. The outermost edge of the resting areas extends out approximately .5 nm (900m) from shore, which is 4 nm (7.4km) away from the Agat Bay UNDET area. The estimated threshold range for TTS exposure from explosives ordnance used in the Agat Bay UNDET area is approximately .3nm (500m). Therefore, explosive activities conducted at this site are not expected to impact resting spinner dolphins. Unlike the UNDET areas for MIW, there are no areas specifically designated for ASW and SUW exercises. They are, however, all conducted at least 3nm (5.6km) away from shore and can occur anywhere throughout the 500,000nm^2 MIRC Study Area. The Agat Bay, Bile/Tougan, and Double Reef resting areas extend aproximately .5nm, .4nm, and .3nm from shore. The TTS threshold distance for MFA ranges from 0 to 140m from the source and, therefore, spinner dolphins resting in these Bays are not expected to be exposed to levels associated with TTS. The received SPL level at 2.5nm (4.6km), is between 160 and 170dB and there could be potential for some behavioral impacts if spinner dophins were resting in the area when ASW was conducted at the closest possible spot, however, due to the large size of the MIRC study area (over 500,000nm^2), the probability that ASW training activities would be conducted in close proximity to any of the recognized resting areas when spinner dolphins are present is very low.

The MIRC activities are not expected to occur in an area/time of specific importance for reproduction, feeding, or other known critical behaviors. Consequently, the activities are not expected to adversely impact rates of recruitment or survival of dolphins. Based on the general information contained in the Negligible Impact Analysis section and this species-specific summary of the effects of the takes, NMFS has preliminarily determined that the Navy's specified activities will have a negligible impact on these species.

Preliminary Determination

Negligible Impact

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat and dependent upon the implementation of the mitigation and monitoring measures, NMFS preliminarily finds that the total taking from Navy training exercises utilizing MFAS/HFAS and underwater explosives in the MIRC will have a negligible impact on the affected species or stocks. NMFS has proposed regulations for these exercises that prescribe the means of effecting the least practicable adverse impact on marine mammals and their habitat and set forth requirements pertaining to the monitoring and reporting of that taking.

Subsistence Harvest of Marine Mammals

NMFS has preliminarily determined that the issuance of 5-year regulations and subsequent LOAs for Navy training exercises in the MIRC would not have an unmitigable adverse impact on the availability of the affected species or stocks for subsistence use.

As noted above, NMFS will consider all comments, suggestions and/or concerns submitted by the public during the proposed rulemaking comment period to help inform our final decision, particularly with respect to our negligible impact determination and the proposed mitigation and monitoring measures.

ESA

There are five marine mammal species and two sea turtle species that are listed as endangered under the ESA with confirmed or possible occurrence in the study area: humpback whale, sei whale, fin whale, blue whale, sperm whale, hawksbill sea turtle and leatherback sea turtle. An additional three species of sea turtles are also listed as threatened under the ESA: green sea turtle, loggerhead sea turtle, and olive ridley sea turtle. The Navy has begun consultation with NMFS and the USFWS pursuant to section 7 of the ESA, and NMFS will also consult internally on the issuance of LOAS under section 101(a)(5)(A) of the MMPA for MIRC activities. Consultation will be concluded prior to a determination on the issuance of the final rule and an LOA.

NEPA

NMFS has participated as a cooperating agency on the Navy's Draft Environmental Impact Statement (DEIS) for the MIRC, which was published on January 30, 2008. The Navy's DEIS is posted on NMFS' Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* NMFS intends to adopt the Navy's Final EIS (FEIS), if adequate and appropriate. Currently, we believe that the adoption of the Navy's FEIS will allow NMFS to meet its responsibilities under NEPA for the issuance of an LOA for MIRC. If the Navy's FEIS is deemed not to be adequate, NMFS would supplement the existing analysis to ensure that we comply with NEPA prior to the issuance of the final rule or LOA.

Classification

This action does not contain any collection of information requirements for purposes of the Paperwork Reduction Act.

The Office of Management and Budget has determined that this proposed rule is significant for purposes of Executive Order 12866.

Pursuant to the Regulatory Flexibility Act, the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act requires Federal agencies to prepare an analysis of a rule's impact on small entities whenever the agency is required to publish a notice of proposed rulemaking. However, a Federal agency may certify, pursuant to 5 U.S.C. 605 (b), that the action will not have a significant economic impact on a substantial number of small entities. The Navy is the sole entity that will be affected by this rulemaking, not a small governmental jurisdiction, small organization or small business, as defined by the Regulatory Flexibility Act (RFA). Any requirements imposed by a Letter of Authorization issued pursuant to these regulations, and any monitoring or reporting requirements imposed by these regulations, will be applicable only to the Navy. NMFS does not expect the issuance of these regulations or the associated LOAs to result in any impacts to small entities pursuant to the RFA. Because this action, if adopted, would directly affect the Navy and not a small entity, NMFS concludes the action would not result in a significant economic impact on a substantial number of small entities.

List of Subjects in 50 CFR Part 218

Exports, Fish, Imports, Incidental take, Indians, Labeling, Marine mammals, Navy, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Samuel D. Rauch III,

Deputy Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 218 is proposed to be amended as follows:

PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for part 218 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

Subparts D–K [Added and Reserved]

2. Subparts D–K are added to part 218 and reserved.

3. Subpart L is added to part 218 to read as follows:

Subpart L—Taking and Importing Marine Mammals; U.S. Navy's Mariana Islands Range Complex (MIRC)

Sec.

Subpart L—Taking and Importing Marine Mammals; U.S. Navy's Mariana Islands Range Complex (MIRC)

§ 218.100 Specified activity and geographical area.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the Mariana Islands Range Complex (MIRC) Study Area (as depicted in Figure 1–1 in the Navy's application for MIRC), which is bounded by a pentagon with the following five corners: 16°46′29.3376″ N. lat., 138°00′59.835″ E. long.; 20°02′24.8094″ N. lat., 140°10′13.8642″ E. long.; 20° 3′ 27.5538″ N. lat., 149° 17′ 41.0388″ E. long.; 7° 0′ 30.0702″ N. lat., 149° 16′ 14.8542''E. long; and 6° 59′ 24.633″ N. lat, 138° 1′ 29.7228″ E. long.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities within the designated amounts of use:

(1) The use of the following mid-frequency active sonar (MFAS) sources, high frequency active sonar (HFAS) sources for U.S. Navy anti-submarine warfare (ASW), in the amounts and in the locations indicated below (± 10%):

(i) AN/SQS–53 (hull-mounted active sonar)—up to 10865 hours over the course of 5 years (an average of 2173 hours per year), with no more than 10% of this use in the winter;

(ii) AN/SQS–56 (hull-mounted active sonar)—up to 705 hours over the course of 5 years (an average of 141 hours per year);

(iii) AN/SSQ–62 (Directional Command Activated Sonobuoy System

(DICASS) sonobuoys)—up to 8270 sonobuoys over the course of 5 years (an average of 1654 sonobuoys per year)

(iv) AN/AQS–22 (helicopter dipping sonar)—up to 2960 hours over the course of 5 years (an average of 592 hours per year);

(v) AN/BQQ–10 (submarine hull-mounted sonar)—up to 60 hours over the course of 5 years (an average of 12 hours per year);

(vi) MK–48, MK–46, or MK–54 (torpedoes)—up to 200 torpedoes over the course of 5 years (an average of 40 torpedoes per year);

(vii) AN/SSQ–110 (IEER)—up to 530 buoys deployed over the course of 5 years (an average of 106 per year);

(viii) AN/SSQ–125 (AEER)—up to 530 buoys deployed over the course of 5 years (an average of 106 per year);

(ix) Range Pingers—up to 1400 hours over the course of 5 years (an average of 280 hours per year); and

(x) PUTR Transponder—up to 1400 hours over the course of 5 years (an average of 280 hours per year).

(2) The detonation of the underwater explosives indicated in paragraph (c)(2)(i) of this section conducted as part of the training events indicated in paragraph (c)(2)(ii) of this section:

(i) Underwater Explosives:

(A) 5″ Naval Gunfire (9.5 lbs);

(B) 76 mm rounds (1.6 lbs);

(C) Maverick (78.5 lbs);

(D) Harpoon (448 lbs);

(E) MK–82 (238 lbs);

(F) MK–83 (574 lbs);

(G) MK–84 (945 lbs);

(H) MK–48 (851 lbs);

(I) Demolition Charges (10 lbs);

(J) AN/SSQ–110A (IEER explosive sonobuoy—5 lbs);

(K) Hellfire (16.5lbs);

(L) GBU 38/32/31.

(ii) Training Events:

(A) Gunnery Exercises (S–S GUNEX)—up to 60 exercises over the course of 5 years (an average of 12 per year);

(B) Bombing Exercises (BOMBEX)—up to 20 exercises over the course of 5 years (an average of 4 per year);

(C) Sinking Exercises (SINKEX)—up to 10 exercises over the course of 5 years (an average of 2 per year);

(D) Extended Echo Ranging and Improved Extended Echo Ranging (EER/IEER) Systems—up to 530 deployments over the course of 5 years (an average of 106 per year);

(E) Demolitions—up to 50 over the course of 5 years (an average of 10 per year); and

(F) Missile exercises (A–S MISSILEX)—up to 10 exercises over the course of 5 years (an average of 2 per year).

§ 218.101 [Reserved]

§ 218.102 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 218.107 of this chapter, the Holder of the Letter of Authorization (hereinafter ''Navy'') may incidentally, but not intentionally, take marine mammals within the area described in § 218.100(b), provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The incidental take of marine mammals under the activities identified in § 218.100(c) is limited to the following species, by the indicated method of take and the indicated number of times (estimated based on the authorized amounts of sound source operation):

(1) Level B Harassment (+/− 10% of the take estimate indicated below):

(i) Mysticetes:

(A) Humpback whale (*Megaptera novaeangliae*)—4025 (an average of 805 annually);

(B) Fin whale (*Balaenoptera physalus*)—910 (an average of 182 annually);

(C) Blue whale (*Balaenoptera musculus*)—650 (an average of 130 annually);

(D) Sei whale (*Balaenoptera borealis)*—1625 (an average of 325 annually);

(E) Minke whale (*Balaenoptera acutorostrata*)—2225 (an average of 445 annually);

(F) Bryde's whale (*Balaenoptera edeni*)—2285 (an average of 457 annually); and

(G) Unidentified Baleanopterid whales—360 (an average of 72 annually)

(ii) Odontocetes:

(A) Sperm whales (*Physeter macrocephalus*)—4130 (an average of 826 annually);

(B) Killer whale (*Orcinus orca*)—1150 (an average of 230 annually);

(C) Pygmy or dwarf sperm whales (*Kogia breviceps or Kogia sima*)—33515 (an average of 6703 annually);

(D) Blainville's beaked whales (Mesoplodon densirostris);—3850 (an average of 770 annually);

(E) Cuvier's beaked whales (*Ziphius cavirostris*)—18135 (an average of 3627 annually);

(F) Ginkgo-toothed beaked whales (*Mesoplodon ginkgodens*)—2150 (an average of 430 annually);

(G) Longman's beaked whale (Indopacetus pacificus)—1030 (an average of 206 annually);

(H) Short-finned pilot whale (*Globicephala macrorynchus*)—11370 (an average of 2274 annually);

(I) Melon-headed whale (*Peponocephala electra*)—14310 (an average of 2862 annually)

(J) Pygmy killer whale (*Feresa attenuata*)—800 (an average of 160 annually);

(K) False killer whale (*Pseudorca crassidens*)—6445 (an average of 1289 annually);

(L) Striped dolphin (*Stenella coeruleoalba*)—44280 (an average of 8856 annually);

(M) Short-beaked common dolphin (*Delphinus delphis*)—4715 (an average of 943 annually);

(N) Risso's dolphin (*Grampus griseus*)—33855 (an average of 6771 annually);

(O) Bottlenose dolphin (*Tursiops truncates*)—855 (an average of 171 annually);

(P) Fraser's dolphin (*Lagenodelphis hosei*)—23065 (an average of 4613 annually);

(Q) Pantropical spotted dolphin (*Stenella attenuata*)—162465 (an average of 32493 annually);

(R) Rough-toothed dolphin (*Steno bredanensis*)—1205 (an average of 241 annually);

(S) Spinner dolphin (*Stenella longirostris*)—10715 (an average of 2143 annually); and

(T) Unidentified delphinid—7690 (an average of 1538 annually).

(2) Level A Harassment:

(i) Sperm whale—5 (an average of 1 annually);

(ii) Pantropical spotted dolphin—5 (an average of 1 annually);

(3) Level A Harassment and/or mortality of no more than 10 beaked whales (total), of any of the species listed in § 218.102(c)(1)(ii)(D) through (G) over the course of the 5-year regulations.

§ 218.103 Prohibitions.

No person in connection with the activities described in § 218.100 may:

(a) Take any marine mammal not specified in § 218.102(c);

(b) Take any marine mammal specified in § 218.102(c) other than by incidental take as specified in § 218.102(c)(1), (c)(2), and (c)(3);

(c) Take a marine mammal specified in § 218.102(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of these regulations or a Letter of Authorization issued under §§ 216.106 and 218.107 of this chapter.

§ 218.104 Mitigation.

(a) When conducting training and utilizing the sound sources or

explosives identified in § 218.100(c), the mitigation measures contained in a Letter of Authorization issued under §§ 216.106 and 218.107 of this chapter must be implemented. These mitigation measures include, but are not limited to:

(1) Personnel Training:

(i) All commanding officers (COs), executive officers (XOs), lookouts, Officers of the Deck (OODs), junior OODs (JOODs), maritime patrol aircraft aircrews, and Anti-submarine Warfare (ASW)/Mine Warfare (MIW) helicopter crews shall complete the NMFS-approved Marine Species Awareness Training (MSAT) by viewing the U.S. Navy MSAT digital versatile disk (DVD). All bridge lookouts shall complete both parts one and two of the MSAT; part two is optional for other personnel.

(ii) Navy lookouts shall undertake extensive training in order to qualify as a watchstander in accordance with the Lookout Training Handbook (Naval Education and Training Command [NAVEDTRA] 12968–D).

(iii) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced lookout. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects). Personnel being trained as lookouts can be counted among required lookouts as long as supervisors monitor their progress and performance.

(iv) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure in order to facilitate implementation of protective measures if marine species are spotted.

(v) All lookouts onboard platforms involved in ASW training events will review the NMFS-approved Marine Species Awareness Training material prior to use of mid-frequency active sonar.

(vi) All COs, XOs, and officers standing watch on the bridge will have reviewed the Marine Species Awareness Training material prior to a training event employing the use of MFAS/HFAS.

(2) General Operating Procedures (for all training types):

(i) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order shall be issued to further disseminate the personnel training requirement and general marine species protective measures.

(ii) COs shall make use of marine species detection cues and information to limit interaction with marine mammals to the maximum extent possible consistent with safety of the ship.

(iii) While underway, surface vessels shall have at least two lookouts with binoculars; surfaced submarines shall have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts will watch for and report to the OOD the presence of marine mammals.

(iv) On surface vessels equipped with a multi-function active sensor, pedestal mounted ''Big Eye'' (20x110) binoculars shall be properly installed and in good working order to assist in the detection of marine mammals in the vicinity of the vessel.

(v) Personnel on lookout shall employ visual search procedures employing a scanning methodology in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(vi) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(vii) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a ''safe speed'', which means the speed at which the CO can maintain crew safety and effectiveness of current operational directives, so that the vessel can take action to avoid a collision with any marine mammal.

(viii) When marine mammals have been sighted in the area, Navy vessels shall increase vigilance and take all reasonable actions to avoid collisions and close interaction of naval assets and marine mammals. Such action may include changing speed and/or direction and are dictated by environmental and other conditions (e.g., safety, weather).

(ix) Navy aircraft participating in exercises at-sea shall conduct and maintain surveillance for marine mammals as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties.

(x) All marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate when it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(3) Operating Procedures (for Anti-submarine Warfare Operations):

(i) On the bridge of surface ships, there shall always be at least three people on watch whose duties include observing the water surface around the vessel.

(ii) All surface ships participating in ASW training events shall have, in addition to the three personnel on watch noted in paragraph (a)(3)(i) of this section, at least two additional personnel on watch as lookouts at all times during the exercise.

(iii) Personnel on lookout and officers on watch on the bridge will have at least one set of binoculars available for each person to aid in the detection of marine mammals.

(iv) Personnel on lookout shall be responsible for reporting all objects or anomalies sighted in the water (regardless of the distance from the vessel) to the Officer of the Deck, since any object or disturbance (e.g., trash, periscope, surface disturbance, discoloration) in the water may be indicative of a threat to the vessel and its crew or indicative of a marine mammal that may need to be avoided.

(v) All personnel engaged in passive acoustic sonar operation (including aircraft, surface ships, or submarines) shall monitor for marine mammal vocalizations and report the detection of any marine mammal to the appropriate watch station for dissemination and appropriate action.

(vi) During mid-frequency active sonar operations, personnel shall utilize all available sensor and optical systems (such as night vision goggles) to aid in the detection of marine mammals.

(vii) Aircraft with deployed sonobuoys shall use only the passive capability of sonobuoys when marine mammals are detected within 200 yds (183 m) of the sonobuoy.

(viii) Helicopters shall observe/survey the vicinity of an ASW exercise for 10 minutes before the first deployment of active (dipping) sonar in the water.

(ix) Helicopters shall not dip their sonar within 200 yards of a marine mammal and shall cease pinging if a marine mammal closes within 200 yards after pinging has begun.

(x) Safety Zones—When marine mammals are detected by any means (aircraft, shipboard lookout, or acoustically) within or closing to inside 1,000 yds (914 m) of the sonar dome (the bow), the ship or submarine shall limit active transmission levels to at least 6 decibels (dB) below normal operating levels for that source (i.e., limit to at most 229 dB for AN/SQS–53C and 219 for AN/SQS–56C, etc.).

(A) Ships and submarines shall continue to limit maximum transmission levels by this 6-dB factor until the animal has been seen to leave the 1000-yd exclusion zone, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

(B) Should a marine mammal be detected within or closing to inside 500 yds (457 m) of the sonar dome, active sonar transmissions shall be limited to at least 10 dB below the equipment's normal operating level (i.e., limit to at most 225 dB for AN/SQS–53C and 215 for AN/SQS–56C, etc.). Ships and submarines shall continue to limit maximum ping levels by this 10-dB factor until the animal has been seen to leave the 500-yd exclusion zone (at which point the 6-dB powerdown applies until the animal leaves the 1000-yd exclusion zone), has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

(C) Should the marine mammal be detected within or closing to inside 200 yds (183 m) of the sonar dome, active sonar transmissions shall cease. Sonar shall not resume until the animal has been seen to leave the 200-yd exclusion zone (at which point the 10-dB or 6-dB powerdowns apply until the animal leaves the 500-yd or 1000-yd exclusion zone, respectively), has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

(D) Special conditions applicable for dolphins and porpoises only: If, after conducting an initial maneuver to avoid close quarters with dolphins or porpoises, the OOD concludes that dolphins or porpoises are deliberately closing to ride the vessel's bow wave, no further mitigation actions are necessary while the dolphins or porpoises continue to exhibit bow wave riding behavior.

(xi) Prior to start up or restart of active sonar, operators will check that the Safety Zone radius around the sound source is clear of marine mammals.

(xii) Active sonar levels (generally)—Navy shall operate active sonar at the lowest practicable level, not to exceed 235 dB, except as required to meet tactical training objectives.

(xiii) Submarine sonar operators will review detection indicators of close-aboard marine mammals prior to the commencement of ASW training events involving MFAS.

(xiv) If the need for power-down should arise (as detailed in § 218.114(a)(3)(x)) when the Navy was operating a hull-mounted or sub-mounted source above 235 db (infrequent), the Navy shall follow the requirements as though they were operating at 235 dB—the normal operating level (i.e., the first power-down will be to 229 dB, regardless of at what level above 235 dB active sonar was being operated).

(4) Operating Procedures for Underwater Detonations (up to 10-lb charges):

(i) Exclusion Zones—All demolitions and ship mine countermeasures training exercises involving the use of explosive charges must include exclusion zones for marine mammals to prevent physical and/or acoustic effects to those species. These exclusion zones shall extend in a 700-yard arc radius around the detonation site. Should a marine mammal be present within the the surveillance area, the explosive event shall not be started until the animal leaves the area.

(ii) Pre-Exercise Surveys—For Demolition and Ship Mine Countermeasures Operations, pre-exercise surveys shall be conducted within 30 minutes prior to the commencement of the scheduled explosive event. The survey may be conducted from the surface, by divers, and/or from the air, and personnel shall be alert to the presence of any marine mammal. Should such an animal be present within the survey area, the explosive event shall not be started until the animal voluntarily leaves the area. The Navy will ensure the area is clear of marine mammals for a full 30 minutes prior to initiating the explosive event. Personnel will record any marine mammal observations during the exercise as well as measures taken if species are detected within the exclusion zone.

(iii) Post-Exercise Surveys—Surveys within the same exclusion zone radius shall also be conducted within 30 minutes after the completion of the explosive event.

(iv) Reporting—If there is evidence that a marine mammal may have been stranded, injured or killed by the action, Navy training activities shall be immediately suspended and the situation immediately reported by the participating unit to the Officer in Charge of the Exercise (OCE), who will follow Navy procedures for reporting the incident to Commander, Pacific Fleet, Commander, Navy Region Northwest, Environmental Director, and the chain-of-command. The situation shall also be reported to NMFS (see Stranding Plan for details).

(5) Sinking Exercise:

(i) All weapons firing shall be conducted during the period 1 hour after official sunrise to 30 minutes before official sunset.

(ii) An exclusion zone with a radius of 1.0 nm (1.9 km) will be established around each target. An additional buffer of 0.5 nm (0.9 km) will be added to account for errors, target drift, and animal movements. Additionally, a safety zone, which will extend beyond the buffer zone by an additional 0.5 nm (0.9 km), would be surveyed. Together, the zones extend out 2 nm (3.7 km) from the target.

(iii) A series of surveillance over-flights shall be conducted within the exclusion and the safety zones, prior to and during the exercise, when feasible. Survey protocol shall be as follows:

(A) Overflights within the exclusion zone shall be conducted in a manner that optimizes the surface area of the water observed. This may be accomplished through the use of the Navy's Search and Rescue Tactical Aid, which provides the best search altitude, ground speed, and track spacing for the discovery of small, possibly dark objects in the water based on the environmental conditions of the day. These environmental conditions include the angle of sun inclination, amount of daylight, cloud cover, visibility, and sea state.

(B) All visual surveillance activities shall be conducted by Navy personnel trained in visual surveillance. At least one member of the mitigation team will have completed the Navy's marine mammal training program for lookouts.

(C) In addition to the overflights, the exclusion zone shall be monitored by passive acoustic means, when assets are available. This passive acoustic monitoring would be maintained throughout the exercise. Additionally, passive sonar onboard submarines may be utilized to detect any vocalizing marine mammals in the area. The OCE will be informed of any aural detection of marine mammals and will include this information in the determination of when it is safe to commence the exercise.

(D) On each day of the exercise, aerial surveillance of the exclusion and safety zones shall commence 2 hours prior to the first firing.

(E) The results of all visual, aerial, and acoustic searches shall be reported immediately to the OCE. No weapons launches or firing may commence until the OCE declares the safety and exclusion zones free of marine mammals.

(F) If a marine mammal is observed within the exclusion zone, firing will be delayed until the animal is re-sighted

outside the exclusion zone, or 30 minutes have elapsed. After 30 minutes, if the animal has not been re-sighted it can be assumed to have left the exclusion zone. The OCE will determine if the marine mammal is in danger of being adversely affected by commencement of the exercise.

(G) During breaks in the exercise of 30 minutes or more, the exclusion zone shall again be surveyed for any marine mammal. If marine mammals are sighted within the exclusion zone or buffer zone, the OCE shall be notified, and the procedure described above shall be followed.

(H) Upon sinking of the vessel, a final surveillance of the exclusion zone shall be monitored for 2 hours, or until sunset, to verify that no marine mammals were harmed.

(iv) Aerial surveillance shall be conducted using helicopters or other aircraft based on necessity and availability. The Navy has several types of aircraft capable of performing this task; however, not all types are available for every exercise. For each exercise, the available asset best suited for identifying objects on and near the surface of the ocean shall be used. These aircraft shall be capable of flying at the slow safe speeds necessary to enable viewing of marine vertebrates with unobstructed, or minimally obstructed, downward and outward visibility. The exclusion and safety zone surveys may be cancelled in the event that a mechanical problem, emergency search and rescue, or other similar and unexpected event preempts the use of one of the aircraft onsite for the exercise.

(v) Every attempt shall be made to conduct the exercise in sea states that are ideal for marine mammal sighting, Beaufort Sea State 3 or less. In the event of a 4 or above, survey efforts shall be increased within the zones. This shall be accomplished through the use of an additional aircraft, if available, and conducting tight search patterns.

(vi) The exercise shall not be conducted unless the exclusion zone and the buffer zone could be adequately monitored visually. Should low cloud cover or surface visibility prevent adequate visual monitoring as described previously, the exercise would be delayed until conditions improved, and all of the above monitoring criteria could be met.

(vii) In the event that any marine mammals are observed to be harmed in the area, a detailed description of the animal shall be taken, the location noted, and if possible, photos taken of the marine mammal. This information shall be provided to NMFS via the Navy's regional environmental coordinator for purposes of identification (see the draft Stranding Plan for detail).

(viii) An after action report detailing the exercise's time line, the time the surveys commenced and terminated, amount, and types of all ordnance expended, and the results of survey efforts for each event shall be submitted to NMFS.

(6) Surface-to-Surface Gunnery (up to 5-inch Explosive Rounds).

(i) For exercises using targets towed by a vessel, target-towing vessels shall maintain a trained lookout for marine mammals when feasible. If a marine mammal is sighted in the vicinity, the tow vessel will immediately notify the firing vessel, which will suspend the exercise until the area is clear.

(ii) A 600 yard (585 m) radius buffer zone will be established around the intended target.

(iii) From the intended firing position, trained lookouts will survey the buffer zone for marine mammals prior to commencement and during the exercise as long as practicable. Due to the distance between the firing position and the buffer zone, lookouts are only expected to visually detect breaching whales, whale blows, and large pods of dolphins and porpoises.

(iv) The exercise will be conducted only when the buffer zone is visible and marine mammals are not detected within it.

(7) Surface-to-Surface Gunnery (non-explosive rounds)

(i) A 200-yd (183 m) radius buffer zone shall be established around the intended target.

(ii) From the intended firing position, trained lookouts shall survey the buffer zone for marine mammals prior to commencement and during the exercise as long as practicable.

(iii) If available, target towing vessels shall maintain a lookout (unmanned towing vessels will not have a lookout available). If a marine mammal is sighted in the vicinity of the exercise, the tow vessel shall immediately notify the firing vessel in order to secure gunnery firing until the area is clear.

(iv) The exercise shall be conducted only when the buffer zone is visible and marine mammals are not detected within the target area and the buffer zone.

(8) Surface-to-Air Gunnery (Explosive and Non-explosive Rounds).

(i) Vessels will orient the geometry of gunnery exercises in order to prevent debris from falling in the area of sighted marine mammals.

(ii) Vessels will expedite the attempt to recover of any parachute deploying aerial targets to reduce the potential for entanglement of marine mammals.

(iii) Target towing aircraft shall maintain a lookout if feasible. If a marine mammal is sighted in the vicinity of the exercise, the tow aircraft will immediately notify the firing vessel in order to secure gunnery firing until the area is clear.

(9) Air-to-Surface Gunnery (Explosive and Non-explosive Rounds).

(i) A 200 yard (183 m) radius buffer zone will be established around the intended target.

(ii) If surface vessels are involved, lookout(s) will visually survey the buffer zone for marine mammals to and during the exercise.

(iii) Aerial surveillance of the buffer zone for marine mammals will be conducted prior to commencement of the exercise. Aerial surveillance altitude of 500 feet to 1,500 feet (152–456 m) is optimum. Aircraft crew/pilot will maintain visual watch during exercises. Release of ordnance through cloud cover is prohibited; aircraft must be able to actually see ordnance impact areas.

(iv) The exercise will be conducted only if marine mammals are not visible within the buffer zone.

(10) Small Arms Training (Grenades, Explosive and Non-explosive Rounds)—Lookouts will visually survey for marine mammals. Weapons will not be fired in the direction of known or observed marine mammals.

(11) Air-to-Surface At-sea Bombing Exercises (explosive bombs and rockets):

(i) If surface vessels are involved, trained lookouts shall survey for marine mammals. Ordnance shall not be targeted to impact within 1,000 yds (914 m) of known or observed marine mammals.

(ii) A 1,000 yd (914 m) radius buffer zone shall be established around the intended target.

(iii) Aircraft shall visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area shall be made by flying at 1,500 ft (152 m) or lower, if safe to do so, and at the slowest safe speed. When safety or other considerations require the release of weapons without the releasing pilot having visual sight of the target area, a second aircraft, the ''wingman,'' will clear the target area and perform the clearance and observation functions required before the dropping plane may release its weapons. Both planes must have direct communication to assure immediate notification to the dropping plane that the target area may have been fouled by encroaching animals or people. The clearing aircraft will assure

it has visual site of the target area at a maximum height of 1500 ft. The clearing plane will remain within visual sight of the target until required to clear the area for safety reasons. Survey aircraft shall employ most effective search tactics and capabilities.

(iv) The exercise will be conducted only if marine mammals are not visible within the buffer zone.

(12) Air-to-Surface At-Sea Bombing Exercises (Non-explosive Bombs and Rockets).

(i) If surface vessels are involved, trained lookouts will survey for marine mammals. Ordnance shall not be targeted to impact within 1,000 yards (914 m) of known or observed marine mammals.

(ii) A 1,000 yard (914 m) radius buffer zone will be established around the intended target.

(iii) Aircraft will visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area will be made by flying at 1,500 feet (152 m) or lower, if safe to do so, and at the slowest safe speed. When safety or other considerations require the release of weapons without the releasing pilot having visual sight of the target area, a second aircraft, the ''wingman,'' will clear the target area and perform the clearance and observation functions required before the dropping plane may release its weapons. Both planes must have direct communication to assure immediate notification to the dropping plane that the target area may have been fouled by encroaching animals or people. The clearing aircraft will assure it has visual site of the target area at a maximum height of 1500 ft. The clearing plane will remain within visual sight of the target until required to clear the area for safety reasons. Survey aircraft shall employ most effective search tactics and capabilities.

(iv) The exercise will be conducted only if marine mammals are not visible within the buffer zone.

(13) Air-to-Surface Missile Exercises (explosive and non-explosive):

(i) Aircraft will visually survey the target area for marine mammals. Visual inspection of the target area will be made by flying at 1,500 (457 m) feet or lower, if safe to do so, and at slowest safe speed. Firing or range clearance aircraft must be able to actually see ordnance impact areas.

(ii) Explosive ordnance shall not be targeted to impact within 1,800 yds (1646 m) of sighted marine mammals.

(14) Aircraft Training Activities Involving Non-Explosive Devices: Non-explosive devices such as some sonobuoys, inert bombs, and Mining Training Activities involve aerial drops of devices that have the potential to hit marine mammals if they are in the immediate vicinity of a floating target. The exclusion zone (200 yd), therefore, shall be clear of marine mammals and around the target location. Pre- and post-surveillance and reporting requirements outlined for underwater detonations shall be implemented during Mining Training Activities.

(15) Extended Echo Ranging/Improved Extended Echo Ranging (EER/IEER):

(i) Crews shall conduct visual reconnaissance of the drop area prior to laying their intended sonobuoy pattern. This search shall be conducted at an altitude below 457 m (500 yd) at a slow speed, if operationally feasible and weather conditions permit. In dual aircraft operations, crews are allowed to conduct coordinated area clearances.

(ii) Crews shall conduct a minimum of 30 minutes of visual and aural monitoring of the search area prior to commanding the first post detonation. This 30-minute observation period may include pattern deployment time.

(iii) For any part of the briefed pattern where a post (source/receiver sonobuoy pair) will be deployed within 914 m (1,000 yd) of observed marine mammal activity, the Navy shall deploy the receiver ONLY and monitor while conducting a visual search. When marine mammals are no longer detected within 914 m (1,000 yd) of the intended post position, the Navy shall co-locate the explosive source sonobuoy (AN/SSQ–110A) (source) with the receiver.

(iv) When operationally feasible, Navy crews shall conduct continuous visual and aural monitoring of marine mammal activity. This is to include monitoring of own-aircraft sensors from first sensor placement to checking off station and out of RF range of these sensors.

(v) Aural Detection—If the presence of marine mammals is detected aurally, then that shall cue the Navy aircrew to increase the diligence of their visual surveillance. Subsequently, if no marine mammals are visually detected, then the crew may continue multi-static active search.

(vi) Visual Detection—If marine mammals are visually detected within 914 m (1,000 yd) of the explosive source sonobuoy (AN/SSQ–110A) intended for use, then that payload shall not be detonated. Aircrews may utilize this post once the marine mammals have not been re-sighted for 30 minutes, or are observed to have moved outside the 914 m (1,000 yd) safety buffer. Aircrews may shift their multi-static active search to another post, where marine mammals are outside the 914 m (1,000 yd) safety buffer.

(vii) Aircrews shall make every attempt to manually detonate the unexploded charges at each post in the pattern prior to departing the operations area by using the ''Payload 1 Release'' command followed by the ''Payload 2 Release'' command. Aircrews shall refrain from using the ''Scuttle'' command when two payloads remain at a given post. Aircrews will ensure that a 914 m (1,000 yd) safety buffer, visually clear of marine mammals, is maintained around each post as is done during active search operations.

(viii) Aircrews shall only leave posts with unexploded charges in the event of a sonobuoy malfunction, an aircraft system malfunction, or when an aircraft must immediately depart the area due to issues such as fuel constraints, inclement weather, and in-flight emergencies. In these cases, the sonobuoy will self-scuttle using the secondary or tertiary method.

(ix) The Navy shall ensure all payloads are accounted for. Explosive source sonobuoys (AN/SSQ–110A) that can not be scuttled shall be reported as unexploded ordnance via voice communications while airborne, then upon landing via naval message.

(x) Mammal monitoring shall continue until out of own-aircraft sensor range.

(16) The Navy shall abide by the letter of the ''Stranding Response Plan for Major Navy Training Exercises in the MIRC'' (available at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*), which is incorporated herein by reference, to include the following measures:

(i) Shutdown Procedures—When an Uncommon Stranding Event (USE—defined in § 216.271) occurs during a Major Training Exercise (MTE) (as defined in the Stranding Plan, meaning including Multi-strike group exercises, Joint Expeditionary exercises, and Marine Air Ground Task Force exercises in the MIRC), the Navy shall implement the procedures described below.

(A) The Navy shall implement a Shutdown (as defined in the Stranding Response Plan for MIRC) when advised by a NMFS Office of Protected Resources Headquarters Senior Official designated in the MIRC Stranding Communication Protocol that a USE (as defined in the Stranding Response Plan for MIRC) involving live animals has been identified and that at least one live animal is located in the water. NMFS and Navy shall communicate, as needed, regarding the identification of the USE and the potential need to implement shutdown procedures.

(B) Any shutdown in a given area shall remain in effect in that area until NMFS advises the Navy that the subject(s) of the USE at that area die or are euthanized, or that all live animals involved in the USE at that area have left the area (either of their own volition or herded).

(C) If the Navy finds an injured or dead marine mammal floating at sea during an MTE, the Navy shall notify NMFS immediately or as soon as operational security considerations allow. The Navy shall provide NMFS with species or description of the animal(s), the condition of the animal(s) including carcass condition if the animal(s) is/are dead), location, time of first discovery, observed behaviors (if alive), and photo or video of the animals (if available). Based on the information provided, NMFS shall determine if, and advise the Navy whether a modified shutdown is appropriate on a case-by-case basis.

(D) In the event, following a USE, that: (a) Qualified individuals are attempting to herd animals back out to the open ocean and animals are not willing to leave, or (b) animals are seen repeatedly heading for the open ocean but turning back to shore, NMFS and the Navy shall coordinate (including an investigation of other potential anthropogenic stressors in the area) to determine if the proximity of MFAS/HFAS activities or explosive detonations, though farther than 14 nm from the distressed animal(s), is likely decreasing the likelihood that the animals return to the open water. If so, NMFS and the Navy shall further coordinate to determine what measures are necessary to further minimize that likelihood and implement those measures as appropriate.

(ii) Within 72 hours of NMFS notifying the Navy of the presence of a USE, the Navy shall provide available information to NMFS (per the MIRC Communication Protocol) regarding the location, number and types of acoustic/explosive sources, direction and speed of units using MFAS/HFAS, and marine mammal sightings information associated with training activities occurring within 80 nm (148 km) and 72 hours prior to the USE event. Information not initially available regarding the 80 nm (148 km), 72 hours, period prior to the event shall be provided as soon as it becomes available. The Navy shall provide NMFS investigative teams with additional relevant unclassified information as requested, if available.

(iii) Memorandum of Agreement (MOA)—The Navy and NMFS shall develop a MOA, or other mechanism, that will establish a framework whereby the Navy can (and provide the Navy examples of how they can best) assist NMFS with stranding investigations in certain circumstances.

(b) [Reserved]

§ 218.105 Requirements for monitoring and reporting.

(a) *General notification of injured or dead marine mammals.* Navy personnel shall ensure that NMFS is notified immediately ((see Communication Plan) or as soon as clearance procedures allow) if an injured, stranded, or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing MFAS, HFAS, or underwater explosive detonations. The Navy will provide NMFS with species or description of the animal (s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video of the animals (if available). In the event that an injured, stranded, or dead marine mammal is found by the Navy that is not in the vicinity of, or during or shortly after, MFAS, HFAS, or underwater explosive detonations, the Navy will report the same information as listed above as soon as operationally feasible and clearance procedures allow.

(b) *General notification of ship strike.* In the event of a ship strike by any Navy vessel, at any time or place, the Navy shall do the following:

(1) Immediately report to NMFS the species identification (if known), location (lat/long) of the animal (or the strike if the animal has disappeared), and whether the animal is alive or dead, or whether its status is unknown.

(2) Report to NMFS as soon as operationally feasible the size and length of animal, an estimate of the injury status (ex., dead, injured but alive, injured and moving, unknown, etc.), vessel class/type and operational status.

(3) Report to NMFS the vessel length, speed, and heading as soon as feasible.

(4) Provide NMFS a photo or video of the animal(s), if equipment is available

(c) The Navy must conduct all monitoring and/or research required under the Letter of Authorization including abiding by the MIRC Monitoring Plan. (*http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*)

(d) *Report on monitoring required in paragraph (c) of this section.* The Navy shall submit a report annually on November 15 describing the implementation and results (through June 1 of the same year) of the monitoring required in paragraph (c) of this section. Navy will standardize data collection methods across ranges to allow for comparison in different geographic locations.

(e) *Sonar exercise notification.* The Navy shall submit to the NMFS Office of Protected Resources (specific contact information to be provided in LOA) either an electronic (preferably) or verbal report within fifteen calendar days after the completion of any MTER indicating:

(1) Location of the exercise;

(2) Beginning and end dates of the exercise; and

(3) Type of exercise.

(f) *Annual MIRC Report.* The Navy will submit an Annual Exercise MIRC Report on November 15 of every year (covering data gathered through September 15). This report shall contain the subsections and information indicated below.

(1) MFAS/HFAS Major Training Exercises—This section shall contain the following information for the following Coordinated and Strike Group exercises, which for simplicity will be referred to as major training exercises for reporting (MTERs): Joint Multi-strike Group Exercises; Joint Expeditionary Exercises; and Marine Air Ground Task Force MIRC:

(i) Exercise Information (for each MTER):

(A) Exercise designator;

(B) Date that exercise began and ended;

(C) Location;

(D) Number and types of active sources used in the exercise;

(E) Number and types of passive acoustic sources used in exercise;

(F) Number and types of vessels, aircraft, etc., participating in exercise;

(G) Total hours of observation by watchstanders;

(H) Total hours of all active sonar source operation;

(I) Total hours of each active sonar source (along with explanation of how hours are calculated for sources typically quantified in alternate way (buoys, torpedoes, etc.)); and

(J) Wave height (high, low, and average during exercise).

(ii) Individual marine mammal sighting info (for each sighting in each MTER):

(A) Location of sighting;

(B) Species (if not possible—indication of whale/dolphin/pinniped);

(C) Number of individuals;

(D) Calves observed (y/n);

(E) Initial Detection Sensor;

(F) Indication of specific type of platform observation made from (including, for example, what type of surface vessel, i.e., FFG, DDG, or CG);

(G) Length of time observers maintained visual contact with marine mammal(s);
(H) Wave height (in feet);
(I) Visibility;
(J) Sonar source in use (y/n);
(K) Indication of whether animal is <200yd, 200–500yd, 500–1000yd, 1000–2000yd, or >2000yd from sonar source in § 218.104(a)(3)(x);
(L) Mitigation Implementation—Whether operation of sonar sensor was delayed, or sonar was powered or shut down, and how long the delay was;
(M) If source in use in § 218.104(a)(3)(x) is hullmounted, true bearing of animal from ship, true direction of ship's travel, and estimation of animal's motion relative to ship (opening, closing, parallel); and
(N) Observed behavior—Watchstanders shall report, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming, etc.).

(iii) An evaluation (based on data gathered during all of the MTERs) of the effectiveness of mitigation measures designed to avoid exposing marine mammals to MFAS. This evaluation shall identify the specific observations that support any conclusions the Navy reaches about the effectiveness of the mitigation.

(2) ASW Summary—This section shall include the following information as summarized from non-major training exercises (unit-level exercises, such as TRACKEXs):

(i) Total Hours—Total annual hours of each type of sonar source (along with explanation of how hours are calculated for sources typically quantified in alternate way (buoys, torpedoes, etc.))

(ii) Cumulative Impacts—To the extent practicable, the Navy, in coordination with NMFS, shall develop and implement a method of annually reporting non-major training (i.e., ULT) utilizing hull-mounted sonar. The report shall present an annual (and seasonal, where practicable) depiction of non-major training exercises geographically across MIRC. The Navy shall include (in the MIRC annual report) a brief annual progress update on the status of the development of an effective and unclassified method to report this information until an agreed-upon (with NMFS) method has been developed and implemented.

(3) Sinking Exercises (SINKEXs)—This section shall include the following information for each SINKEX completed that year:

(i) Exercise Info:
(A) Location;
(B) Date and time exercise began and ended;
(C) Total hours of observation by watchstanders before, during, and after exercise;
(D) Total number and types of rounds expended/explosives detonated;
(E) Number and types of passive acoustic sources used in exercise;
(F) Total hours of passive acoustic search time;
(G) Number and types of vessels, aircraft, etc., participating in exercise;
(H) Wave height in feet (high, low and average during exercise); and
(I) Narrative description of sensors and platforms utilized for marine mammal detection and timeline illustrating how marine mammal detection was conducted.

(ii) Individual marine mammal observation during SINKEX (by Navy lookouts) information:
(A) Location of sighting;
(B) Species (if not possible—indication of whale/dolphin/pinniped);
(C) Number of individuals;
(D) Calves observed (y/n);
(E) Initial detection sensor;
(F) Length of time observers maintained visual contact with marine mammal;
(G) Wave height;
(H) Visibility;
(I) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;
(J) Distance of marine mammal from actual detonations (or target spot if not yet detonated)—use four categories to define distance:
(*1*) The modeled injury threshold radius for the largest explosive used in that exercise type in that OPAREA (TBD m for SINKEX in MIRC);
(*2*) The required exclusion zone (1 nm for SINKEX in MIRC);
(*3*) The required observation distance (if different than the exclusion zone (2 nm for SINKEX in MIRC); and
(*4*) Greater than the required observed distance. For example, in this case, the observer shall indicate if < TBD m, from 426 m–1 nm, from 1 nm–2 nm, and > 2 nm.
(K) Observed behavior—Watchstanders will report, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction.
(L) Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long.
(M) If observation occurs while explosives are detonating in the water, indicate munitions type in use at time of marine mammal detection.

(4) Improved Extended Echo-Ranging System (IEER) Summary:
(i) Total number of IEER events conducted in MIRC;
(ii) Total expended/detonated rounds (buoys); and
(iii) Total number of self-scuttled IEER rounds.

(5) Explosives Summary—The Navy is in the process of improving the methods used to track explosive use to provide increased granularity. To the extent practicable, the Navy shall provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they will provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.
(i) Total annual number of each type of explosive exercise (of those identified as part of the ''specified activity'' in this final rule) conducted in MIRC; and
(ii) Total annual expended/detonated rounds (missiles, bombs, etc.) for each explosive type.

(g) *MIRC 5-Yr Comprehensive Report.* The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during ASW and explosive exercises for which annual reports are required (Annual MIRC Exercise Reports and MIRC Monitoring Plan Reports). This report will be submitted at the end of the fourth year of the rule (November 2013), covering activities that have occurred through July 15, 2014.

(h) *Comprehensive National ASW Report.* By June, 2014, the Navy shall submit a draft National Report that analyzes, compares, and summarizes the active sonar data gathered (through January 1, 2014) from the watchstanders and pursuant to the implementation of the Monitoring Plans for the Northwest Training Range Complex, the Southern California Range Complex, the Atlantic Fleet Active Sonar Training, the Hawaii Range Complex, the Marianas Islands Range Complex, and the Gulf of Alaska.

§ 218.106 Applications for Letters of Authorization.

To incidentally take marine mammals pursuant to these regulations, the U.S. Citizen (as defined by § 216.103 of this chapter) conducting the activity identified in § 218.100(c) (i.e., the Navy) must apply for and obtain either an initial Letter of Authorization in

accordance with § 218.107 or a renewal under § 218.108.

§ 218.107 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually subject to annual renewal conditions in § 218.108.

(b) Each Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

§ 218.108 Renewal of Letters of Authorization and adaptive management.

(a) A Letter of Authorization issued under § 216.106 and § 218.177 of this chapter or the activity identified in § 218.170(c) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.246 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Receipt of the monitoring reports and notifications within the indicated timeframes required under § 218.105(b) through (j); and

(3) A determination by the NMFS that the mitigation, monitoring and reporting measures required under § 218.104 and the Letter of Authorization issued under §§ 216.106 and 218.107 of this chapter, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 216.248 of this chapter indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

(d) Adaptive Management—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with the Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from the MIRC Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011.

(3) Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the Integrated Comprehensive Monitoring Plan).

(4) Results from specific stranding investigations (either from the MIRC Study Area or other locations, and involving coincident MFAS/HFAS or explosives training or not involving coincident use).

(5) Results from the Long Term Prospective Study described in the preamble to these regulations.

(6) Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise).

§ 218.109 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §§ 216.106 and 218.107 of this chapter and subject to the provisions of this subpart, shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 218.108, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 218.100(b), a Letter of Authorization issued pursuant to §§ 216.106 and 218.107 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

[FR Doc. E9–24837 Filed 10–19–09; 8:45 am]

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Federal Register

Tuesday,
October 20, 2009

Part III

The President

Proclamation 8439—White Cane Safety Day, 2009

Notice of October 16, 2009—Continuation of the National Emergency With Respect to Significant Narcotics Traffickers Centered in Colombia

Federal Register
Vol. 74, No. 201
Tuesday, October 20, 2009

Presidential Documents

Title 3—

The President

Proclamation 8439 of October 15, 2009

White Cane Safety Day, 2009

By the President of the United States of America

A Proclamation

All Americans deserve the freedom to participate in every aspect of our society and pursue their full measure of happiness. For blind Americans, the white cane is a potent symbol of that freedom—affording them greater independence and mobility. Today we renew our commitment to provide full inclusion and equal opportunities for those among us who are blind or have low vision. As Americans, we must nurture a society that values the unique abilities and individual contributions of all its people.

Individuals who are blind or have low vision are less constrained and better integrated in our country than ever before, but much work remains to ensure they have the opportunity to reach their full potential. My Administration is committed to securing full and equal access to education and employment for blind Americans and all those with disabilities. The American Recovery and Reinvestment Act substantially increased funding for the Individuals with Disabilities Education Act, as well as vocational rehabilitation services, including job training, education, and placement.

For Americans who are blind or have low vision, a white cane is just one of a wide range of tools that sustain independence and productivity. In recent years, refreshable Braille displays and speech synthesis devices have given these individuals access to the Internet, unlocking a new frontier of limitless possibility. As we encourage the development of new assistive technologies, we must also improve access to existing tools. The Braille code has opened a doorway to literacy for countless individuals, but far too many blind children in our country are not learning to read it. By improving Braille literacy, we will secure a brighter future for these young Americans.

In the 45 years since White Cane Safety Day was first proclaimed by President Lyndon Johnson, Americans who are blind or have low vision have achieved substantial progress. As leaders in government and business, academics, and the arts, they have made remarkable contributions to our Nation, proving that sight is no requisite for success. We will continue to strive for a more just and equitable Nation that celebrates diversity in all its forms and promotes the full inclusion of all individuals in our communities.

By joint resolution approved on October 6, 1964 (Public Law 88–628, as amended), the Congress designated October 15 of each year as White Cane Safety Day to recognize the contributions of Americans who are blind or have low vision.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim October 15, 2009, as White Cane Safety Day. I call upon all Americans to observe this day with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of October, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.

[FR Doc. E9–25409
Filed 10–19–09; 11:15 am]
Billing code 3195–W9–P

Presidential Documents

Notice of October 16, 2009

Continuation of the National Emergency With Respect to Significant Narcotics Traffickers Centered in Colombia

On October 21, 1995, by Executive Order 12978, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by the actions of significant narcotics traffickers centered in Colombia, and the extreme level of violence, corruption, and harm such actions cause in the United States and abroad.

Because the actions of significant narcotics traffickers centered in Colombia continue to threaten the national security, foreign policy, and economy of the United States and to cause an extreme level of violence, corruption, and harm in the United States and abroad, the national emergency declared on October 21, 1995, and the measures adopted pursuant thereto to deal with that emergency, must continue in effect beyond October 21, 2009. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to significant narcotics traffickers centered in Colombia.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

THE WHITE HOUSE,
October 16, 2009.

[FR Doc. E9–25414
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S. 1707/P.L. 111–73

Enhanced Partnership with Pakistan Act of 2009 (Oct. 15, 2009; 123 Stat. 2060)

Last List October 15, 2009

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