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Author

The primary author of this final rule is Angela Brooks (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Section 17.12(h) is amended by adding the following, in alphabetical order under the plant families indicated, to the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
*	*	*	*	*	*	*
Asteraceae—Aster family:						
*	*	*	*	*	*	*
Ambrosia cheiranthifolia.	South Texas ambrosia	U.S.A. (TX), Mexico	E	547	NA	NA
*	*	*	*	*	*	*
Sterculiaceae—Cacao family:						
Ayenia limitaris	Texas Ayenia	U.S.A. (TX), Mexico	E	547	NA	NA
*	*	*	*	*	*	*

Dated: July 11, 1994.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

[FR Doc. 94–20789 Filed 8–23–94; 8:45 am]

BILLING CODE 4310–55–P

50 CFR Part 17

RIN 1018–AB73

Endangered and Threatened Wildlife and Plants; Five Plants From the San Bernardino Mountains in Southern California Determined to be Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) determines *Erigeron parishii* (Parish's daisy) to be threatened and *Eriogonum ovalifolium* var. *vineum* (Cushenbury buckwheat), *Astragalus albens* (Cushenbury milk-vetch), *Lesquerella kingii* ssp. *bernardina* (San Bernardino Mountains bladderpod), and *Oxytheca parishii* var. *goodmaniana* (Cushenbury oxytheca) to be endangered pursuant to the Endangered Species Act of 1973, as amended (Act). These five plant species are endemic to the carbonate deposits (limestone and dolomite) of the San Bernardino Mountains, San Bernardino County, California. Most of the carbonate deposits in this mountain range are within actively used mining claims or mining claims that are being maintained for their mineral resources. Limestone, ranging from cement grade to pharmaceutical grade, is currently mined in the area; dolomite is not currently mined. The open or terraced mining techniques that are used, as well as associated overburden dumping and road construction, result in destruction of the plants' habitat. Other threats to the plants include off-highway vehicle use, urban development near the community of Big Bear, expansion of a ski area, and energy development projects. Several of the plants are also threatened with stochastic extinction due to the small numbers of populations or total number of individuals. This rule implements the Federal protection and recovery provisions afforded by the Act for these five plants.

EFFECTIVE DATE: September 23, 1994.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Ventura Field Office, 2140 Eastman Avenue, Suite 100, Ventura, California 93003.

FOR FURTHER INFORMATION CONTACT: Carl Benz at the above address or at (805) 644–1766.

SUPPLEMENTARY INFORMATION:

Background

The San Bernardino Mountains in southern California have been recognized for supporting a wide diversity of natural habitats that have resulted from their geographic position between desert and coastal environments, elevational zonation, and uncommon substrates such as limestone outcrops. The San Bernardino National Forest (Forest), which encompasses most of the San Bernardino Mountains, constitutes less than 1 percent of the land area of the State, yet contains populations of over 25 percent of all plant species that occur naturally in California.

Outcrops of carbonate substrates, primarily limestone and dolomite, occur

in several bands running on an east-west axis along the desert-facing slopes of the San Bernardino Mountains, with disjunct patches occurring just to the south of Sugarlump Ridge and to the east as far as the Sawtooth Hills. These outcrops are a remnant of an ancient formation of sandstone, shale, and limestone, through which the granitic core of the Transverse Ranges has emerged (Fife 1988).

The five taxa under discussion, *Erigeron parishii* (Parish's daisy), *Eriogonum ovalifolium* var. *vineum* (Cushenbury buckwheat), *Astragalus albens* (Cushenbury milk-vetch), *Lesquerella kingii* ssp. *bernardina* (San Bernardino Mountains bladderpod), and *Oxytheca parishii* var. *goodmaniana* (Cushenbury oxytheca), are restricted primarily to carbonate deposits or soils derived from them. These taxa, and other plants that occur on carbonate deposits, have commonly been referred to as "limestone endemics" by botanists, whether they occur on limestone or dolomite (Krantz 1990, Schoenherr 1992). Collectively, these five taxa span a range approximately 56 kilometers (km) (35 miles) long, ranging in elevation from 1,220 meters (4,000 feet (ft)) at the base of the mountains to approximately 2,440 meters (8,000 ft), and occur as components in the understory of a variety of plant communities, including Jeffrey pine-western juniper woodland, pinyon-juniper woodland, pinyon woodland, Joshua tree woodland, blackbrush scrub, and desert wash.

Pinyon-juniper woodland communities dominate the desert-facing slopes above 1,220 meters (4,000 ft) in elevation, and grade into a Joshua tree woodland at lower elevations (Vasek and Thorne 1988). Pinyon-juniper woodlands extend up to almost 2,100 meters (7,000 ft) in elevation, where they intergrade with a Jeffrey pine woodland on drier sites or mixed conifer forest on wetter sites. Open forests of lodgepole pine and limber pine are found at the highest elevations. A wide variation in the species composition exists within the pinyon-juniper woodland. *Pinus monophylla* (pinyon pine) or *Juniperus osteosperma* (Utah juniper), and more rarely *Juniperus occidentalis* (western juniper) or *Juniperus californica* (California juniper), are the structurally dominant species, occasionally occurring together. Holland (1986) has referred to separate Mojavean pinyon woodland and Mojavean juniper woodland and scrub communities. The understory varies with slope and elevation, but typically includes species such as *Cercocarpus ledifolius* (mountain mahogany), *Ephedra viridis* (Mormon tea), *Yucca schidigera* (Mohave yucca), *Yucca brevifolia* (Joshua tree), and *Encelia virginensis* (encelia). Patches of local dominance by *Coleogyne ramosissima* (blackbrush) on lower elevation desert facing slopes, or *Arctostaphylos* sp. (manzanita) on more interior canyons, are common.

Erigeron parishii is a small perennial herb of the aster family (Asteraceae) that reaches 1 to 3 decimeters (dm) (4 to 12 inches (in)) in height. The linear leaves are covered with soft, silvery hairs. Up to 10 solitary flower heads are borne on cauline stalks; ray flowers are deep rose to lavender, and heads have greyish green and glandular phyllaries. *E. parishii* was first described by Asa Gray in 1884 based on specimens collected by Samuel B. Parish in Cushenbury Canyon in 1881. *E. parishii* has sometimes been confused with *E. utahensis*, a plant found on carbonate substrates in the mountains of the Mojave Desert and in Utah, Colorado, and Arizona, but differs from the latter in the structure of the pappus and its silvery-white rather than grey-green stem.

Erigeron parishii is the most widely ranging of the five taxa discussed herein, with a range 56 km (35 miles) long. The plant is known from fewer than 25 occurrences, with the total population numbering approximately 16,000 individuals. Fewer than a third of the occurrences comprise more than 1,000 individuals each (Barrows 1988a). From White Knob at the western terminus, populations occur primarily along the belt of carbonaceous substrates, southeast to Pioneertown. The plant is typically found associated with pinyon woodlands, pinyon-juniper woodlands, and blackbrush scrub from 1,220 to 1,950 meters (4,000 to 6,400 ft) in elevation. It is usually found on dry rocky slopes, shallow drainages, and outwash plains on substrates derived from limestone or dolomite. Some populations occur on a granite/limestone interface, usually a granitic parent material overlain with an outwash of limestone materials. Two small outlying populations at the eastern edge of its range near Pioneertown occur on quartz monzonite substrates. Historic occurrences were recorded from Rattlesnake Canyon south of Old Woman Springs and from the Little San Bernardino Mountains; these locations have not been surveyed in over 50 years and merit additional field surveys (Andy Sanders, University of California, Riverside, pers. comm., 1992).

Eriogonum ovalifolium var. *vineum* is a low, densely-matted perennial of the buckwheat family (Polygonaceae). The flowers are whitish-cream, darken to a reddish or purple color with age, and are borne on flowering stalks reaching 1 dm (4 in) in height. The plant flowers from May through June. The round to ovate leaves are white-woolly on both surfaces and are 0.7 to 1.5 centimeters (cm) (0.3 to 0.6 in) long. The diameter of mats is typically 1.5 to 2.5 dm (6 to 10 in), but may reach up to 5 dm (20 in) in particularly well-developed individuals.

Eriogonum ovalifolium var. *vineum* was first collected by S.B. Parish near Rose Mine, San Bernardino Mountains, in 1894, and was described as *E. vineum* by John K. Small in 1898. In 1911, Aven Nelson published the combination *E. ovalifolium* var. *vineum*. Jepson in his manual used the combination of *E. ovalifolium* var. *vineum* in 1943. Munz (1959) accepted the work of Stokes (1936), and recognized it as *E. ovalifolium* ssp. *vineum*, in his flora of California. In 1968, Reveal clarified the relationship of the plant to *E. ovalifolium* var. *nivale*, with which it had been confused, and used the name *E. ovalifolium* var. *vineum* (Reveal and Munz 1968). Three other varieties of *E. ovalifolium* are distinguished on the basis of floral and leaf characteristics, but none of them occur in the San Bernardino Mountains.

Eriogonum ovalifolium var. *vineum* is limited in distribution to the belt of carbonate substrates of the north slopes of the San Bernardino Mountains. The plant is currently known from approximately 20 occurrences over a distance of about 40 km (25 miles). Only a quarter of those occurrences comprise more than 1,000 individuals each (Barrows 1988b), with the total population numbering approximately 13,000 individuals. *E. ovalifolium* var. *vineum* occurs from the White Knob area east to Rattlesnake Canyon. Surveys by Barrows (1988b) resulted in a slight range extension of the plant in the Rattlesnake Canyon drainage. Since publication of the proposal, additional surveys by the Forest staff located two previously unknown populations, one near Jacoby Springs and one just north of Mineral Mountain (CNDDB 1992). Tierra Madre Consultants (TMC) located a previously unknown population west of White Knob (TMC 1992), which extends the known range of the plant west by 1.6 km (1 mile). A dozen other extensions of existing occurrences were reported by the Forest Service and TMC; all of these were within the known range of the plant (CNDDB 1992, TMC 1992).

Eriogonum ovalifolium var. *vineum* occurs within openings of pinyon

woodland, pinyon-juniper woodland, Joshua tree woodland, and blackbrush scrub communities between 1,400 and 2,400 meters (4,600 and 7,900 ft) in elevation. Other habitat characteristics include open areas with little accumulation of organic material, a canopy cover generally less than 15 percent, and powdery fine soils with rock cover exceeding 50 percent. The plant typically occurs on moderate slopes, although a few occurrences are on slopes over 60 percent. On milder, north-facing slopes, it co-occurs with *Astragalus albens*.

Recent fieldwork by Howard Brown (Pluess-Staufer Inc., *in litt.*, 1992) has refined the information on the carbonate geology of the San Bernardino Mountains. *Eriogonum ovalifolium* var. *vineum* clearly occurs on limestone substrate in the White Knob area, and from Arctic/Bousic Canyon west to Terrace Springs, south to Top Spring, and along the north side of Lone Valley to Tip Top Mountain. However, *E. ovalifolium* var. *vineum* occurs on dolomite in the Bertha Ridge area, north Holcomb Valley, Jacoby Canyon, and along Nelson Ridge, according to Brown (*in litt.*, 1992). Additionally, a population just to the south of Mineral Mountain is clearly on non-carbonate substrates; a population in Furnace Canyon seems to be on a mixed lithology of granite, limestone, and dolomite; and a population on Heartbreak Ridge is on carbonate substrate.

Astragalus albens is a small silvery-white perennial herb in the pea family (Fabaceae). The slender stems are decumbent, grow to 30 cm (12 in) in length, and support leaves comprised of 5 to 9 small leaflets. The purple flowers, which bloom from March to May, occur toward the ends of the branches in 5-to 14-flowered racemes and develop 8- to 11-seeded pods. In 1885, *A. albens* was described by Edward L. Greene based on a collection made by Parish and Parish 3 years earlier (Greene 1885). In 1927, Per Axel Rydberg published the name *Hamosa albens* (Rydberg 1927). In 1964, R.C. Barneby synonymized the genus *Hamosa* and included the species in *Astragalus* (Barneby 1964). *A. leucolobus*, a common associate on carbonate soils, is distinguished from *A. albens* by its cobwebby pubescence on the leaflets, which are strongly folded along the midrib, and differently shaped pods.

Astragalus albens is currently known from fewer than 20 occurrences scattered throughout the eastern half of the carbonate belt, running from Furnace Canyon southeast to the head of Lone Valley, a range of 24 km (15 miles). The proposal stated that the total number of individuals was estimated at 2,000, but that this number is likely to be greater in years of substantial rainfall. Several known populations comprised a larger number of individuals during the 1992 field season than had previously been reported. That may, in part, be due to favorable rainfall during March 1992, which resulted in a large establishment of seedlings, and in part to a more thorough survey effort. Of significance is the extension of a population in the Top Spring-Smarts Ranch Road area; several thousand individuals were found in this area, making it the primary population center for the species. Population estimates for 1992 place the total number of individuals between 5,000 and 10,000.

The plant is typically found on carbonate substrates along rocky washes and gentle slopes within pinyon woodland, pinyon-juniper woodland, Joshua tree woodland, and blackbrush scrub communities. *Erigeron parishii* and *Eriogonum ovalifolium* var. *vineum* co-occur with *Astragalus albens* at several locations. Most occurrences are found between 1,500 and 2,000 meters (5,000 and 6,600 ft) in elevation on soils derived directly from decomposing limestone bedrock. Three occurrences are found below 1,500 meters (5,000 ft) in elevation in rocky washes that have received limestone outwash from erosion higher in the drainages. According to Brown (*in litt.*, 1992), two populations occur on granite substrates (Gordon Quarry and Granite Peaks), and one occurs on granite and quartzite (Cactus Flat). Other habitat characteristics include an open canopy cover with little accumulation of organic material, rock cover exceeding 75 percent, and gentle to moderate slopes (5 to 30 percent).

Lesquerella kingii ssp. *bernardina* is a silvery, short-lived perennial member of the mustard family (Brassicaceae) reaching 1 to 2 dm (4 to 8 in) in height. The plant has yellow flowers located toward the ends of the stems. The basal leaves are ovate and have long petioles. The type material was collected by Frank W. Peirson at the east end of Bear Valley in 1924. In 1932, Munz described this plant as *L. bernardina*. In 1958, Munz combined *L. bernardina* with *L. kingii*, and made the combination of *L. kingii* ssp. *bernardina* (Wilson and Bennett 1980). *L. kingii* ssp. *kingii* is found in the mountains of the eastern Mojave Desert and the Inyo-White ranges extending into Nevada. It is distinguished from *L. kingii* ssp. *bernardina* by its smaller petals and styles.

Lesquerella kingii ssp. *bernardina* is currently known from two areas, on either side of Bear Valley. One cluster of occurrences is on the north side of the valley, near the east end of Bertha Ridge, adjacent to the community of Big Bear, and is subject to impacts from urbanization. The other cluster is centered on the north-facing slope of Sugarlump Ridge to the south of the valley, approximately 10 km (6 miles) south of the Bertha Ridge occurrences. These latter occurrences were discovered during spring 1990 on an existing downhill ski run, and on and adjacent to proposed ski runs and lift lines within an existing ski area (California Natural Diversity Data Base (CNDDB) 1990). The estimate of total number of individuals in the Bertha Ridge occurrences was 25,000 in 1980 and less than 10,000 in 1988; it is unclear whether this was due to differences in sampling techniques or drought conditions (Wilson and Bennett 1980, CNDDB 1990). In 1991, the Sugarlump Ridge populations totalled approximately 10,000 individuals (CNDDB 1991).

The habitat for *Lesquerella kingii* ssp. *bernardina* is characterized by carbonate substrates, either brown sandy soils with white carbonate rocks or outcrops of large carbonate rock. According to geologic information supplied by Brown (*in litt.*, 1992), all populations of *L. kingii* ssp. *bernardina* both in the Bertha Ridge and the Sugarlump Ridge areas occur on dolomite. Slopes are typically gentle to moderate and are both north- and south-facing between 2,100 and 2,700 meters (6,800 and 8,800 ft) in elevation. Within Jeffrey pine-western juniper woodlands, as well as white fir forest in some locations, the subspecies is found in open areas with little accumulation of organic material. The plant seems to be tolerant of slight disturbance; scattered plants were found growing on old roads, undeveloped lots, and undeveloped yards within the Whispering Forest housing tract (Myers and Barrows 1988). However, the plant is conspicuously absent from heavily graded and mulched ski runs in the Bear Mountain ski area.

The carbonate substrates that support *Lesquerella kingii* ssp. *bernardina* lie south and west of those that support most of the populations of the other four taxa under discussion. However, near the east end of Bertha Ridge, the southernmost population of *Eriogonum ovalifolium* var. *vineum* occurs in close proximity to one colony of *Lesquerella kingii* ssp. *bernardina*.

Oxytheca parishii var. *goodmaniana* is a small wiry annual of the buckwheat

family (Polygonaceae). The type material was collected by Parish and Parish in 1882 near Cushenbury Spring. For a number of years, historical collections were mistakenly identified as *O. parishii* var. *abramsii* or *O. watsonii*. Barbara Ertter (1980) described the variety in honor of George J. Goodman, who was the first to recognize both the distinctiveness of the variety and its close relationship to *O. parishii*. *O. parishii* var. *goodmaniana* stands 0.5 to 3 dm (2 to 12 in) tall with a basal rosette of leaves 1 to 3 cm (0.4 to 1.2 in) long and stems with bracts at the nodes. The flowers consist of 6 small white to rose or greenish-yellow petals; clusters of 3 to 12 flowers are subtended by a distinct involucral bract. *O. parishii* var. *goodmaniana* is separated from the other three varieties of *O. parishii* by the presence of only four to five awns on the bracts, rather than seven or more.

Oxytheca parishii var. *goodmaniana* is the most restricted of the carbonate endemic species of the San Bernardino Mountains. Forest Service surveys in 1992 located three additional populations, bringing the total number of known occurrences to seven (CNDDB 1992). One location near Cushenbury Spring is located near an active limestone mine; two more occurrences are located near the abandoned Green Lead gold mine, one of which is bisected by a road; the fourth occurrence is located near the north side of Holcomb Valley. The three newly discovered populations are located along the Helendale Fault in the vicinity of Tip Top Mountain, Mineral Mountain, and Rose Mine. This represents a significant extension of approximately 19 km (12 miles) to the southeast from the previously known range of the plant. Given the availability of potentially suitable habitat between the newly discovered and the previously known populations, other sites supporting this taxon may be found with additional surveys.

With the exception of the north Holcomb Valley population, which occurs on dolomite, all populations of *Oxytheca parishii* var. goodmaniana occur on limestone or a mixed lithology of limestone and dolomite (TMC 1992). In 1990, the total known population consisted of fewer than 3,000 individuals. With discovery of the new populations, however, current estimates have been doubled. Since it is an annual species, the number of individuals might be higher in years with winter and spring rainfall and temperatures favorable to seed germination and seedling establishment. The low number of occurrences, however, as well as individuals, also subjects the species to the possibility of stochastic extinction.

Previous Federal Action

Federal action on three of the five plants began when the Secretary of the Smithsonian Institution, as directed by section 12 of the Act, prepared a report on those native U.S. plants considered to be endangered, threatened, or extinct in the United States. This report (House Document No. 94–51), which included *Erigeron parishii* and *Lesquerella kingii* ssp. *bernardina* as threatened and *Eriogonum ovalifolium* var. *vineum* as endangered, was presented to Congress on January 9, 1975. On July 1, 1975, the Service published a notice in the **Federal Register** (40 FR 27823) accepting the report as a petition within the context of section 4(c)(2) (now section 4(b)(3)) of the Act and of the Service's intention thereby to review the status of the plant taxa named therein, including *Erigeron parishii*, *Eriogonum ovalifolium* var. *vineum*, and *Lesquerella kingii* ssp. *bernardina*.

The Service published an updated notice of review for plants on December 15, 1980 (45 FR 82480). This notice included *Eriogonum ovalifolium* var. *vineum* and *Lesquerella kingii* ssp. *bernardina* as category 1 candidates (species for which the Service has substantial information on biological vulnerability and threat to support proposals for listing) and *Erigeron parishii* as a category 2 candidate (species for which data in the Service's possession indicate listing is possibly appropriate, but for which substantial information on biological vulnerability and threats is not currently available to support proposals for listing).

On February 15, 1983 (48 FR 6752), the Service published a notice of its prior finding that the listing of *Eriogonum ovalifolium* var. *vineum and Lesquerella kingii* ssp. *bernardina* is warranted but precluded in accordance with section 4(b)(3)(B)(iii) of the Act, as amended in 1982. Pursuant to section 4(b)(3)(C)(i) of the Act, the finding must be recycled on an annual basis, until the species is either proposed for listing or the petitioned action is found to be not warranted. In October 1983, 1984, 1985, 1986, 1987, 1988, 1989, and 1990, further findings were made that the listing of *Eriogonum ovalifolium* var. *vineum* and *Lesquerella kingii* ssp. *bernardina* was warranted, but that the listing of these species was precluded by other pending proposals of higher priority. In the September 27, 1985 (50 FR 39526), and February 21, 1990 (55 FR 6184), plant notices of review, *Eriogonum ovalifolium* var. *vineum* and *Lesquerella kingii* ssp. *bernardina* were again included as category 1 candidates, and *Erigeron parishii* as a category 2 candidate. The February 21, 1990, notice also included *Astragalus albens* in category 1 and *Oxytheca parishii* var. *goodmaniana* in category 2. Since publication of that notice, additional survey work was completed for *Oxytheca parishii* var. *goodmaniana*, providing new information on the status of that species. Similarly, the Service was made aware of increased threats to *Erigeron parishii*, in the form of two new pending mining operations that would likely adversely impact this species. As a result, on November 19, 1991 (56 FR 58332), the Service published a proposed rule in the **Federal Register** to list the five plants as endangered.

Summary of Comments and Recommendations

In the November 19, 1991, proposed rule and associated notifications, all interested parties were requested to submit factual reports or information relevant to a final decision on the listing proposal. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. Requests for a public hearing were received from eight parties, primarily mining industry representatives, but also including the National Inholders Association and the Bear Mountain Ski Resort. As a result, on May 15, 1992, and again on May 26, 1992, the Service published notices in the **Federal Register** (57 FR 20805 Bernardino Sun and the Barstow Desert Dispatch. Requests for a public hearing were received from eight parties, primarily mining industry representatives, but also including the National Inholders Association and the Bear Mountain Ski Resort. As a result, the Service conducted a hearing on June 3, 1992, at the San Bernardino County Government Center in San Bernardino. Testimony was taken from 1 p.m. to 4 p.m., and from 6 p.m. to 8 p.m., with 21 parties presenting testimony.

During the comment periods, the Service received written and oral comments from 51 parties. Multiple comments were received from mining industry representatives, both during and after the closure of the comment periods. The California Department of Fish and Game, The Nature Conservancy, California Native Plant Society, Audubon Society, Sierra Club, Natural Heritage Foundation, Center for Plant Conservation, Rancho Santa Ana Botanic Garden, University of California Natural Reserve System, and the Forest Service were 10 of 36 commenters

expressing support for the listing proposal. Eleven commenters, including seven mining industry representatives, two multiple-use groups, and one assemblyman opposed the listing. The Bureau of Mines initially opposed the listing during the public comment period. However, oral testimony at the public hearing by a Bureau of Mines representative indicated a more neutral stance and an offer to assist in data analysis to be used in the development of a Forest Service habitat management guide for the five taxa. Most of those opposed to the listing also asked for a 6-month extension to the rulemaking process to allow results of additional surveys completed during the 1992 field season to be included in the final determination. Four commenters were neutral, including a Congressman, one county supervisor, and the Big Bear Chamber of Commerce. In addition, results of additional surveys for the plants (CNDDB 1992, TMC 1992) and additional biological information that was submitted to the Service since publication of the proposal have been incorporated into this final rule. Opposing comments and other comments questioning the rule have been organized into specific issues. These issues and the Service's response to each are summarized as follows:

Issue 1: Numerous comments were received concerning the Service's reference to the five plants as "limestone endemics" in the proposal. This reference appears to be of great concern to the mining industry because a number of populations occur on dolomite, quartz monzonite, granite, or mixed lithologies of these substrates, and not solely on limestone, in the strict sense. Other commenters focused on the Service's use of inaccurate geologic maps that indicated that substrates at particular plant locations were limestone, while maps currently being revised by the U.S. Geological Survey (USGS) will indicate that substrates in those locations may actually consist of dolomite or other rock types. Many of these commenters believe that more accurate geologic data would disprove the hypothesis that these plants are "limestone endemics."

Service Response: According to the Dictionary of Geologic Terms, one definition of "limestone" is given as "(A) general term for that class of rocks that contain at least 80 per cent of the carbonates of calcium or magnesium" (American Geologic Institute 1976). Apparently in keeping with this definition, the USGS map for the Lucerne Valley quadrangle (7.5 minute series) referred to the Furnace Limestone unit as being comprised of white carbonate rocks, grey carbonate rocks, quartzite, and phyllite—metasedimentary rocks of Paleozoic age (USGS 1964). Similarly, the California Division of Mines and Geology map for the San Bernardino quadrangle (1:250,000) refers to the same units as upper Paleozoic limestone and marble, and Cambrian and uppermost Precambrian crystalline limestone (California Division of Mines and Geology 1986). These maps represent the best information available to the Service. The colloquial use of the term "limestone endemic" to refer to the five taxa under discussion is based, in part, on the generic use of the term "limestone" by geologists and botanists. While intending to use "limestone" as a generic term, the Service erred in the proposal by referring to such substrates as calcium carbonate deposits, rather than simply carbonate deposits. The term calcium carbonate, or limestone in the more technical sense, refers to carbonate with a high percent of calcium, as differentiated from dolomite, which is carbonate with a high percent of magnesium. The Service has used more precise descriptions of substrate type in this rule and generally refers to these species as "carbonate endemics." The Service looks forward to any additional information that the revised USGS maps will provide.

Issue 2: Numerous commenters contended that the plants are not endemic to the 35-mile range of the north slope of the San Bernardino Mountains but are also found to the east and west of that range and in mountain ranges of the Mojave Desert. Several commenters indicated that geologists had observed several of the taxa in the New York Mountains.

Service Response: The record of botanical collections and surveys from the San Bernardino Mountains and the Mojave Desert ranges is more than adequate to establish general ranges of the plants. Additional surveys were conducted in 1992 in four mountain ranges in the east Mojave Desert, in the San Bernardino Mountains, and in the San Gabriel Mountains to determine any range extensions for the five taxa. Only one of the four new populations of *Erigeron ovalifolium* var. *vineum* was located outside of the known range and this was within a mile of known locations. The Forest Service also conducted additional surveys in 1991 and 1992 for all five taxa, which resulted in a significant range extension for *Oxytheca parishii* var. *goodmaniana*. However, with the exception of the range extension for *Oxytheca parishii* var. *goodmaniana*, the newly located populations do not represent significant new biological or distributional data affecting the status of the remaining four plants. Although the new range extension for *Oxytheca parishii* var. *goodmaniana* is considered significant, the taxon is still so limited in distribution that listing as endangered is still appropriate. In addition, no unthreatened populations were discovered.

Issue 3: Numerous commenters contended that surveys for the plants were not adequate or up-to-date, that the plants have only been found on limestone because only limestone substrates were targeted for surveys, and that the discovery of additional populations with each new survey indicates that the plants are more widespread than previously thought. Some commenters stated that the surveys were performed by "biased individuals" whose unpublished reports had not been subject to peer review, and that information on which the proposal was based constituted "junk science." Other commenters stated that the existing knowledge of the plants was more than adequate to proceed with listing, and that a 6-month extension for the purpose of collecting additional information on the range and distribution of the plants, as requested by the mining industry, was unnecessary.

Service Response: Botanists have been collecting plants in southern California for scientific study for over 150 years; all five plants were originally collected at least 100 years ago. Carbonate substrates in particular have been the focus of numerous surveys because botanists have recognized that these nutrient-deficient substrates often support unique taxa. As early as 1979, the Forest Service performed rangewide surveys of three of the taxa (*Erigeron parishii, Eriogonum ovalifolium* var. *vineum*, and *Lesquerella kingii* ssp. *bernardina*). Moreover, since 1979, the Forest Service has conducted surveys of almost all ground-disturbing projects on the San Bernardino National Forest to determine project impacts to species considered to be sensitive and has performed botanical investigations of at least 25 taxa. The surveys have been conducted on numerous substrates and throughout the geographic range of the San Bernardino and adjacent National Forests, including the San Bernardino, San Gabriel, and San Jacinto Mountains. While the Service recognizes that new occurrences may be discovered through additional surveys, the body of information is adequate to proceed with this listing. The Service accepts the reliability of the surveys performed and

considered this information the best scientific information available.

Issue 4: Several commenters charged that the Service ignored results of propagation studies on *Erigeron parishii* and *Eriogonum ovalifolium* var. *vineum* performed by Rancho Santa Ana Botanic Garden that indicate that 1) the two plants do not require limestone, and 2) the plants are easy to propagate from seeds and cuttings. The industry believes these results show a potential for successful reclamation after mining.

Service Response: The Service is fully aware of the propagation efforts for two of the species (*Erigeron parishii* and *Eriogonum ovalifolium* var. *vineum*) by Rancho Santa Ana Botanic Garden researchers (Mistretta 1991). However, germination or survival under horticultural conditions does not accurately represent conditions required for long-term survival in the wild. Other efforts to propagate *Erigeron parishii* from seed have met with less success (Forest Service 1992). The results of these studies are preliminary and inconclusive, and the long-term viability of species under cultivation is questionable. In addition, the normal life histories and other habitat characteristics of substrate endemics typically are not maintained in horticultural settings.

The success rate for salvage of *Eriogonum ovalifolium* var. *vineum* from the Gordon Quarry was less than 50 percent (Forest Service 1992). Although some potential for reclamation with these species after mining may exist, the purpose of the Act is to conserve ecosystems upon which listed species depend. Reintroduction is a potentially important recovery tool, but it has not been shown to restore mine sites to pre-disturbance conditions that would ensure the long-term survival of such plants and, therefore, does not preclude the need to list the species.

Issue 5: Several commenters were concerned that important information concerning the potential for reclamation of mined sites was not included in the proposal. They claim that three of the plants (Astragalus albens, Erigeron parishii, and *Eriogonum ovalifolium* var. *vineum*) are opportunistic, weedy intruders, or invaders. As evidence, they cited the Barrows surveys that document populations occurring on roadbeds, roadcuts, and quarry benches. They also state that accompanying notes indicate populations in these disturbed habitats are more vigorous or more dense than those on adjacent pristine areas, and the plants appear to tolerate light disturbances. Some commenters indicated that old roadbeds, roadcuts, and old quarry benches constituted more than "lightly disturbed" habitat, and that the plants in fact can recolonize heavily disturbed sites. One commenter stated that "the effects of mining as a possible positive influence" had not been considered.

Service Response: The Service did not reference *Astragalus albens, Erigeron parishii,* and *Eriogonum ovalifolium* var. *vineum* growing on old roadbeds, roadcuts, and quarry benches because, in most cases, these plants did not constitute independent self-perpetuating populations, but rather scattered individuals that had dispersed into disturbed habitat from adjacent populations on undisturbed habitat. The Forest Service has noted that *Eriogonum ovalifolium* var. *vineum* and *Erigeron parishii* have colonized infrequently used roads at three sites, and small quarries at two sites, each of which is less than 1 hectare (2 acres) in size, have been abandoned for 20 to 25 years, and had small patches of native vegetation left within them at the time of mining. In contrast, no colonization by any of the five plants has been observed in the larger quarries. Furthermore, Forest Service surveys at the Right Star site for *Astragalus albens* indicate that the mean density of individuals in disturbed areas is significantly lower than that in adjacent undisturbed areas (137 versus 679 per acre) (Forest Service, *in litt.*, 1992).

Initial flushes of recolonization by plants may occur in response to light and very intermittent disturbance. The mechanism under which recolonization occurs and its role in the long-term survival of the five species is unknown. Research on recolonization may indicate that the species can recolonize areas to aid in their long-term survival. However, data do not indicate that these plants have extensive recolonization capabilities. Heavily disturbed sites, (i.e., those stripped to bedrock with little residual fine-textured substrates, and with no nearby islands of native vegetation from which plants can recolonize) do not show any levels of successful recolonization.

Several recent reports document *Erigeron parishii* occurring on tailing slopes (Brown, *in litt.*, 1992). Recent observations by an interagency reclamation review team that visited all four current quarry operations on the north slope of the San Bernardino Mountains found that *Salsola* sp. (Russian thistle) was the most prevalent plant on tailing slopes and road berms (Forest Service 1992). *Erigeron parishii* or the other taxa under discussion on even "lightly disturbed" sites may or may not represent independent self-perpetuating populations.

Issue 6: Several commenters stated that a lack of understanding of mining operations has led to a premature conclusion about the impact of mining on plant habitat. One commenter noted that a block of mining claims does not represent the actual area that would be disturbed during mining operations. Brown (*in litt.*, 1992), who recently remapped the geology of the San Bernardino quadrangle in collaboration with USGS, stated that about 2 percent of the limestone in the San Bernardino Mountains is of commercial value and would be subject to mining within the next 75 years. The remaining limestone will not be mined, though virtually all of it is under claim.

Service Response: The impact of mining on plant habitat is not restricted to the quarry site itself, but includes loss of habitat through overburden (materials that need to be removed to reach the underlying limestone, as well as the low-grade limestone that is currently not being marketed) dumping, tailing dumping, road construction (including sidecasting), and exploratory mining activity, which may constitute a surface disturbance several times the size of the quarry. Additional biological values of the habitat may be lost through habitat fragmentation, alteration of hydrology, and an increase in airborne particulates that may depress pollinator success.

Aside from whether the extent of primary and secondary impacts of mining on plant habitat are being accurately assessed, the threat that exists to plant habitat from the mere presence of mining claims must be considered. According to the Mining Law of 1872 (30 U.S.C. 22 *et seq.*), a claimholder must have a sincere intent to mine; in fact, a claim can be legally seized by another party if the original claimholder is shown not to meet this requirement. No mechanisms are currently available to Federal land management agencies making regulatory decisions to protect sensitive natural resources on lands that are under claim. This situation is discussed more thoroughly under Factor D below.

Issue 7: A few commenters stated that the Endangered Species Act addresses species, and not varieties or subspecies. Therefore, if the range of the three species (*Eriogonum ovalifolium, Lesquerella kingii,* and *Oxytheca parishii*), which includes the Sierra Nevada Mountains, the desert mountain ranges, Oregon, and Nevada, is considered, none of the varieties or subspecies of these three plants could be considered endangered under the Act.

Service Response: Section 3(15) of the Act states that "The term "species"

includes any subspecies of fish or wildlife or plants. * * *" In response to concerns from the Smithsonian Institution that the definition included subspecies but not varieties, the Service published regulations on April 26, 1978 (43 FR 17912) that discussed common use of both terms by botanists and recognized plant "varieties" as equivalent to "subspecies" and, therefore, "species," as defined by the Act.

Issue 8: A few commenters thought that the five taxa do not meet the definition of "endangered" according to the Act. Similar comments stated that the taxa are so "regenerative" and so common they could never be endangered, farmers in Lucerne Valley have been trying to eradicate *Astragalus albens* for years without success, the California Department of Fish and Game has not listed these taxa as rare, and the only reason the taxa were being proposed for listing was to satisfy the California Native Plant Society lawsuit agreement.

Service Response: Although additional survey data and information on threats posed to the five plant taxa by mining were presented to the Service, none of the information contradicted the Service's contention that the five taxa are threatened by mining and other potential impacts in the San Bernardino Mountains (see Factor A in Summary of Factors Affecting the Species). In fact, a report submitted on behalf of the mining industry (TMC 1992) confirmed the limited distribution of these five taxa. For example, in the TMC report, the greatest increase in population size for any of the five taxa surveyed amounted to less than 2 percent for *Eriogonum ovalifolium* var. *vineum* and occurred primarily within the currently known range of the plant. Thus, the Service has concluded that the distribution of the five species was sufficiently well known prior to the proposed listing, and has not significantly changed with additional survey results. The comment concerning the commonness of *Astragalus albens* in Lucerne Valley is evidently a case of mistaken identity; A. *albens* has never been recorded from the Valley.

The procedures for designating species as threatened or endangered are outlined in section 4(a)(1) of the Act and promulgated regulations (50 CFR part 424). As discussed earlier in this rule, Federal action on several of these taxa began as early as 1975. While the California Native Plant Society lawsuit settlement may have accelerated the rate at which California plant species have been proposed for listing, the suit does not change the standards by which species are evaluated for potential listing. Moreover, preparation of the proposal was essentially completed prior to the California Native Plant Society settlement agreement. Although the State has not pursued listing any of these taxa, the California Department of Fish and Game has clearly stated its support for the listing of all five taxa and has provided a substantial amount of information to the Service that was used in preparation of this final rule.

Based upon information the Service has received regarding the status and distribution of these five species, including data from the Forest Service, The Nature Conservancy, local botanists, private consultants, and mining industry, the Service believes that the listing of these plants is warranted. The Service finds that *Astragalus albens, Eriogonum ovalifolium* var. *vineum, Lesquerella kingii* ssp. *bernardina,* and *Oxytheca parishii* var. *goodmaniana* are in danger of extinction throughout all or a significant portion of their ranges and, therefore, fit the definition of endangered as defined in the Act. *Erigeron parishii* has the widest range and largest number of populations of the species proposed herein for listing; moreover, several populations are known to occur on non-carbonate substrates that are not under claim. However, a large portion of its range is under mining claims, and only the population at the Burns Reserve currently has any permanent protection. Therefore, it is likely to become endangered in the foreseeable future and fits the definition of threatened as defined in the Act.

Issue 9: Several commenters stated that the effects of drought on the plants had not been considered in the proposal, implying that the plants would not be considered rare if surveys were performed during non-drought years when the species were more abundant. One commenter felt that the effects of drought should be studied and quoted Rupert Barneby who, when describing *Astragalus albens,* wrote "* * * in years of low rainfall, * * * the populations become decimated or even annihilated except for dormant seeds. In the first spring after a drought of several seasons duration, whole colonies of young plants can be found in prolific flower * * *" (Barneby 1964).

Service Response: It is well known that drought will reduce both vigor and abundance of annual as well as short-lived or herbaceous perennial species. In the same sentence that was quoted above, Rupert Barneby wrote that "* * * the plants flower precociously; and a good proportion of them are probably monocarpic, especially in years of low rainfall * * *" (Barneby 1964). Monocarpic plants, those which flower and fruit once and then die, may be particularly subject to the vagaries of climate, especially in regions that are typically arid. Seed for these plants may persist in the soil for years before favorably climatic conditions allow for successful seedling germination and establishment. This habit points out the need to maintain undisturbed habitat for the plants to accommodate the "boom and bust" cycles in population sizes. While the Service agrees that it would be interesting to study the effects of drought on the fluctuations in plant population sizes, the ranges of all five plants under discussion are small and their habitat currently receives little protection. Reference to the effects of drought on *Astragalus albens* and *Lesquerella kingii* ssp. bernardina is included in this rule in the Background section and under Factor E in the Summary of Factors Affecting the Species.

Summary of Factors Affecting the Species

Section 4 of the Endangered Species Act (16 U.S.C. 1533) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act set forth the procedures for adding species to the Federal Lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Erigeron parishii* Gray (Parish's daisy), *Eriogonum ovalifolium* Nuttall var. *vineum* (Small) A. Nelson (Cushenbury buckwheat), *Astragalus albens* Greene (Cushenbury milk-vetch), *Lesquerella kingii* Wats. ssp. *bernardina* (Munz) Munz (San Bernardino Mountains bladderpod), and *Oxytheca parishii* var. *goodmaniana* Ertter (Cushenbury oxytheca) are as follows:

A. The present or threatened destruction, modification, or curtailment of its habitat or range. All five species proposed for listing are restricted primarily to carbonate and adjacent carbonate/granitic substrates occupied by pinyon-juniper woodland on the northern side of the San Bernardino Mountains. The imminent and primary threat facing these species is the ongoing destruction of the carbonate substrates on which they grow by activities associated with limestone mining, including direct removal of mined materials, disposal of overburden on adjacent unmined habitat, and road construction.

Additional threats to their habitat include off-highway vehicle use, urban development near the community of Big Bear, development of a ski run, and energy development projects.

The first burst of mining activity in the San Bernardino Mountains occurred in the 1860s with the discovery of gold in Holcomb Valley. Historically, gold was extracted both by underground mining and by placer mining. Only small-scale and weekend prospecting for gold continues today. However, gold-bearing alluvium in Holcomb Valley has a low to medium potential for development in the future, and a good potential exists for a large gold extraction operation in the Blackhawk area (Forest Service 1988). Several silver mines were also in operation during the late 1800s in Cushenbury Canyon and near Blackhawk Mountain.

Limestone is considered a locatable mineral, as are gold and silver, and, therefore, is open to claim under the 1872 mining law. Virtually all of the approximately 13,210 hectares (32,620 acres) of carbonate substrates within the San Bernardino Mountains are currently under claim. Recent calculations by Brown (*in litt.*, 1992) break down the 13,210 hectares (32,620 acres) into component substrates as follows: 4,040 hectares (9,980 acres) of dolomite (30.6 percent), 7,910 hectares (19,530 acres) of limestone (59.9 percent); and 1,260 hectares (3,110 acres) mixed limestone and dolomite (9.5 percent).

Most of the currently mined limestone is being processed by four operations that are located along the base of the north slope of the mountains. Because of the limited availability of limestone in the western United States, those claims currently not under production are still being maintained either in anticipation of a future market, as a means of keeping claims from being mined by competing companies, or in anticipation of leasing out claims for the extraction of other valuable minerals.

In the surrounding Lucerne Valley mining district, the first limestone mines started operation in the 1940s; the current annual production of limestone is approximately 3.3 million tons (Forest Service 1988). Annual production, however, typically represents only the fraction of material that is trucked off the mine site as product. The ratio of disturbed material to product material may range from 1:1 up to more than 5:1. Forest Service records indicate that ratios at Riverside Cement (Partin) between 1972 and 1977 ranged from 4.9:1 to 13:1, and averaged 7.1:1. A 1988 calculation for the same operator placed the ratio at 6.7:1 (Forest Service 1988). Thus, based on the 1988 production of 3.3 million tons of limestone and a 5:1 ratio of disturbed material to limestone, 16.5 million tons of waste material would be generated. A typical mine site consists of an open pit or terraced pit, haul roads for hauling the blasted rock to a processing plant, and the processing plant itself, which sorts and crushes the material. The overburden is redistributed in piles on site. In the future, less low-grade limestone will be left onsite as the market for limestone products changes. The direct impacts to four of the five plants from limestone mining include the removal and destruction of individuals and habitat from mining, the construction of haul roads, and the deposition of overburden piles on top of currently occupied habitat. Certain operations targeting pharmaceutical grade limestone tend to create a higher ratio of exploratory roads and access roads relative to the size of the quarry operations since those deposits are smaller.

Aside from impacts associated with gold and limestone mining, several species are potentially threatened by destruction of habitat by other activities. Sand and gravel is currently being mined, and a new operation has been proposed for several washes on the lower desert-facing slopes that may impact at least one occurrence of *Erigeron parishii* (TMC 1989). Urban development has encroached upon several occurrences of *Lesquerella kingii* ssp. *bernardina* near Big Bear City and threatens to encroach upon an occurrence of *Erigeron parishii* near Pioneertown. The proposed addition of a downhill ski run to the ski area on the north side of Sugarlump Ridge may eliminate portions of an occurrence of *Lesquerella kingii* ssp. *bernardina*.

Other impacts include the destruction of individuals and habitat through increased off-highway vehicle and other recreational use that departs from roads built for mining assessment work as well as abandoned mine roads. The Forest Service has proposed construction of two new sections of the integrated off-highway vehicle system; these will potentially impact populations of all taxa except *Lesquerella kingii* ssp. *bernardina*.

Since publication of the proposal to list the five taxa, initial proposals for two energy developments have been received by the Forest Service. A proposed hydroelectric generation plant, which includes the use of an old mine quarry to hold water and new ground disturbance for construction of water delivery pipelines, would likely negatively affect populations of all five taxa except *Lesquerella kingii* ssp. *bernardina*. A 115-kilovolt powerline proposed for construction through Cushenbury Canyon may affect *Erigeron parishii*, *Eriogonum ovalifolium* var. *vineum*, *Astragalus albens*, and *Oxytheca parishii* var. *goodmaniana*.

Because the location of the five plants is tied primarily to the location of carbonate deposits, it is useful to discuss threats relative to the primary plant population centers. A description of the primary population centers of the five plants and the threats in each area follows.

The westernmost occurrences of two of the plants under discussion (*Erigeron parishii* and *Eriogonum ovalifolium* var. *vineum*) are in the vicinity of White Mountain, an outcrop that rises to 2,100 meters (6,900 ft) in elevation above the desert community of Lucerne Valley. The third largest of the limestone mines is located here, with an annual production of approximately 500,000 tons. The proximity of occurrences of *Erigeron parishii* and *Eriogonum ovalifolium* var. *vineum* to current mining operations indicates that these plants occurred on the mining site, but have been extirpated from it. The westernmost populations of these two species will soon be eliminated under a recently approved mining plan of operations. As compensation for this impact, the County of San Bernardino has directed the mining company to sponsor horticultural studies and experimental reseeding on reclaimed portions of the mine site.

Approximately 7.5 km (6 miles) to the east of White Mountain, the north side of Holcomb Valley drops off abruptly into Furnace Canyon. Habitat for *Erigeron parishii* and *Eriogonum ovalifolium* var. *vineum* was removed by quarry operations, including the construction of haul roads and the dumping of overburden at these quarry sites, which were primarily abandoned prior to 1974. In the areas adjacent to the quarry sites, populations of *Erigeron parishii*, *Eriogonum ovalifolium* var. *vineum*, and *Astragalus albens*, portions of which have been eliminated, are still found. A proposed hydroelectric generation plant would use one of the abandoned quarries. If the proposed hydroelectric plant is approved, new disturbance associated with the project would likely disturb habitat for *Erigeron parishii*, *Eriogonum ovalifolium* var. *vineum*, *Astragalus albens*, and *Oxytheca parishii* var. *goodmaniana*.

The second largest operating limestone mine, with an annual production of 800,000 tons, is operating in the vicinity of Marble Canyon, a few miles east of Furnace Canyon. A recent expansion of one overburden pile is

eliminating a sizable population of *Astragalus albens*.

Six kilometers (4 miles) to the east of Furnace Creek is the deeply incised Cushenbury Canyon. The mining operation located at this site has an annual production of 2,000,000 tons of limestone, the largest of the four currently operating limestone mines. *Erigeron parishii*, *Eriogonum ovalifolium* var. *vineum*, and *Astragalus albens* are found on the rocky slopes surrounding Cushenbury Canyon. A number of populations have already been negatively affected by mining and road construction. Up until several years ago, dust from the crushing operation was settling on the slopes downwind from the operation. The resultant and still present crust that formed on the slopes is thought to have inhibited the growth and survival of a number of plant species, including populations of *Erigeron parishii*, *Eriogonum ovalifolium* var. *vineum*, and *Astragalus albens*. A population of *Oxytheca parishii* var. *goodmaniana*, one of the most restricted of the five taxa under discussion, was also rediscovered in this area in 1978. The species was not searched for in a 1990 survey at this location due to continuing drought conditions. A few populations of *Erigeron parishii* are found on alluvial substrates below the mouth of Cushenbury Canyon. A recent proposal to mine these alluvia for sand and gravel would threaten these populations.

Erigeron parishii, *Eriogonum ovalifolium* var. *vineum*, and *Astragalus albens* occur 3.2 km (2 miles) to the east of Cushenbury Canyon on Blackhawk Mountain, which rises to an elevation of 2,000 meters (6,700 ft). Historically, gold and silver were mined near Blackhawk Mountain. New gold mining activity using cyanide heap-leach methods has been proposed for the north slope of Blackhawk Mountain, although to date only exploratory drilling has been done. Blackhawk Mountain currently supports one of the best assemblages of the carbonate endemic species. Old roads bisect the habitat, but the lack of limestone mining has left much of the landscape intact. Creek drainage, another dozen occurrences of these three species are scattered along Nelson Ridge and an unnamed ridge that flank Long Valley for a distance of approximately 6.4 km (4 miles). No active mining is currently found along the Helendale Fault, though historic mining may have affected certain occurrences, and some assessment work is currently being done.

Above Lone Valley, the main fork of Arrastre Creek slowly climbs for another 6.4 km (4 miles) towards the Rose Mine Valley-Tip Top Mountain area. Scattered occurrences of *Eriogonum ovalifolium* var. *vineum* are found along this stretch. Some of the densest stands of *Eriogonum ovalifolium* var. *vineum* have been bisected by motorcycle and jeep trails near Rose Mine Valley (Krantz 1979b); such use of the area continues.

Farther south and east, the tributaries of Arrastre Creek run off the north and west slopes of Tip Top Mountain, which rises to an elevation of 2,000 meters (6,700 ft). On the south and east side of Tip Top Mountain, tributaries flow into the Rattlesnake Canyon drainage. Along this drainage is another cluster of occurrences of *Erigeron parishii* and *Eriogonum ovalifolium* var. *vineum*. Significant new populations of *Oxytheca parishii* var. *goodmaniana* were located by Forest Service surveys in 1992 near Tip Top Mountain and nearby Mineral Mountain. The easternmost occurrences for *Oxytheca parishii* var. *goodmaniana* and *Eriogonum ovalifolium* var. *vineum* occur a few miles east of Tip Top Mountain. Historic mining has affected *Erigeron parishii* and *Eriogonum ovalifolium* var. *vineum*; Krantz (1979b) noted that a dirt road leading to an abandoned quarry had bisected habitat for both plants. *Erigeron parishii* may be able to tolerate some disturbance, as evidenced by its occurrence along roadsides, while *Eriogonum ovalifolium* var. *vineum* remains absent from roadsides in this area (Krantz 1979a, 1979b). Off-road vehicle traffic currently adversely impacts plants in this area.

About 24 km (15 miles) south and east of Tip Top Mountain, the mountains give way to the broad alluvial fans of the upper desert. Near Burns Reserve and Pioneertown, a few disjunct occurrences of *Erigeron parishii* are found. The Burns Reserve is protected by the State of California through the auspices of the Natural Reserve System of the University of California. The Pioneertown site has been proposed for urban development. The Nature Conservancy has secured a voluntary agreement with the landowner to protect the *Erigeron parishii* at this site.

Scattered patches of carbonate substrate occur outside the main belt that traverses the San Bernardino Mountains. On the east end of Bertha Ridge, north of Bear Valley, several small patches of *Lesquerella kingii* ssp. *bernardina* and *Eriogonum ovalifolium* var. *vineum* occur. These populations are adjacent to the community of Big Bear and are subject to impacts associated with urban development. Surveys by Myers and Barrows (1988) indicated that several occurrences of *Lesquerella kingii* ssp. *bernardina* have been reduced in size since the previous surveys were performed in 1980 (Wilson and Bennett 1980).

At the northern edge of Holcomb Valley, *Oxytheca parishii* var. *goodmaniana* is found near an old gold mine site. A low to moderate potential exists for the reactivation of mining activity in this area in the future, depending on the price of gold (Forest Service 1988).

On the north-facing slope of Sugarlump Ridge on the south side of Bear Valley, several large populations of *Lesquerella kingii* ssp. *bernardina* were recently discovered. Several of these populations may be affected by the proposed expansion of a downhill ski area (Michael Brandman & Associates 1990).

In summary, virtually all of the carbonate substrates where these five species occur are under claim and subject to being mined or are threatened by other disturbance. The only sizable carbonate substrates not under claim are located on the south side of Bear Valley near Sugarlump Ridge. Those claims that are not currently being mined are being maintained either in anticipation of expanding operations once current quarry supplies are depleted (as a means of keeping competing companies from mining the claims) or in anticipation of leasing the claims for the mining of other valuable minerals.

All five taxa, except *Erigeron parishii*, are limited mainly in distribution to carbonate substrates within a 40-km (25-mile) range along the primarily northern slopes of the San Bernardino Mountains. The range of the five taxa overlap for the most part, but *Erigeron parishii* extends to the southeast another 16 km (10 miles). Although *Erigeron parishii* is found primarily on carbonate substrates, several occurrences are on non-carbonate substrates. The five species occur on lands under mining claim or on lands that have been patented, which subjects them to habitat destruction. Other activities, such as off-highway vehicle recreation, urbanization, development of a ski run, and energy development projects, threaten to alter or destroy habitat for, as well as the limited number of occurrences of, these five species.

B. Overutilization for commercial, recreational, scientific, or educational purposes. Although these species are not presently sought after by collectors, they are vulnerable to taking because of their limited distribution. Some plant taxa have become vulnerable to collecting by curiosity seekers as a result of increased publicity following

listing. The increased public attention could potentially increase their desirability, thereby increasing the threat of collection.

C. Disease or predation. No data exist to substantiate whether or not disease threatens any of the plants. The seed capsules of *Lesquerella kingii* ssp. *bernardina* were observed to have been broken open by unknown seed predators at one of the Big Bear occurrences (C. Rutherford, U.S. Fish and Wildlife Service, and M. Lardner, U.S. Forest Service, pers. obs., 1990). It is unknown whether seed predation would affect the viability of the species. In the vicinity of Round Mountain, several occurrences of *Astragalus albens* are known to occur within a grazing allotment administered by the Bureau of Land Management (BLM). The effects of cattle grazing on this species have not yet been investigated.

D. The inadequacy of existing regulatory mechanisms. All five plants are on List 1B of the California Native Plant Society, indicating that, in accordance with chapter 10, sec. 1901 of the California Department of Fish and Game Code, they are eligible for State listing. If State listing were pursued, the Native Plant Protection Act and the California Endangered Species Act would prohibit the "take" of State-listed plants (Fish and Game Code chapter 10, sec. 1908, and chapter 1.5, sec. 2080), but would not protect the plants from taking via habitat modification or land use change by the landowner. After the California Department of Fish and Game notifies a landowner that a State-listed plant grows on his or her property, State law requires only that the landowner notify the agency "at least 10 days in advance of changing the land use to allow salvage of such plant" (chapter 10, sec. 1913). Although these State laws provide a measure of protection to the species, they are not adequate to protect the species in all cases. Numerous activities do not fall under the purview of this legislation, such as certain projects proposed by the Federal government and projects falling under State statutory exemptions. Where overriding social and economic considerations can be demonstrated, these laws allow project proposals to go forward, even in cases where the continued existence of the species may be jeopardized or where adverse impacts are not mitigated to the point of insignificance.

About 20 to 25 percent of the occurrences of *Erigeron parishii* and 15 to 20 percent of the occurrences of *Eriogonum ovalifolium* var. *vineum* occur on private land. The mining of limestone on private land is under the jurisdiction of the county of San Bernardino, which is responsible for administering regulations in accordance with the California Environmental Quality Act and the California Endangered Species Act. The county has included terms and conditions in the granting of certain operating permits that have directed the applicants to undertake efforts to restore the habitat and reintroduce *Erigeron parishii* and *Eriogonum ovalifolium* var. *vineum* to the site. Recently, the county included a permit condition for the expansion of an overburden pile that required the applicant to designate preserve areas with the concurrence of the California Department of Fish and Game and the Service. One population of *Erigeron parishii* occurs on land owned by the University of California at the Burns Pinyon Reserve; no activities are currently planned that would affect the population. The remaining occurrences of these two species, as well as almost all the occurrences of the other three species are primarily on lands managed by the Forest Service and, to a lesser degree, by BLM.

Several laws enacted by Congress and regulations promulgated to implement them address surface management of Federal lands, including mining, but they provide limited protection for natural resources. For instance, the Federal Land Policy and Management Act (FLPMA) of 1976 (43 U.S.C. 1701 et seq.), as amended, was passed to provide policy for "the management, protection, development, and enhancement" of public lands managed by BLM. Section 302 of FLPMA, which addresses management of use, occupancy, and development of public lands, states "* * * the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands" (43 U.S.C. 1732 (b)). Unnecessary or undue degradation is defined to mean surface disturbance greater than that which would normally result by a prudent operator taking into account the effects of mining operations on other resources (43 CFR 3809.0–5(k)). The policy of FLPMA as expressed by regulation is that a person has a statutory right to mine certain Federal lands (43 CFR 3809.0–6). Mining operations that exceed 5 acres in extent and certain other defined operations require a plan of operations that must be approved by BLM (43 CFR 3809.1–4, 1–6). However, prior to approval of the plan, BLM must evaluate the action with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat if any.

Federal agencies, such as BLM, are required to (1) confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat, or (2) enter into formal consultation with the Service on any action that is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat. However, Federal agencies are not required to implement Service recommendations for proposed species or proposed critical habitat. Therefore, although FLPMA affords some general protection in that resources other than mining interests must be considered by an operator, the protections afforded listed species pursuant to section 7 of the Endangered Species Act are not required to be implemented unless listing takes place. Thus, listing affords additional protection to these particular species.

Additionally, section 601 of FLPMA specifically addresses management of public lands within the California Desert Conservation Area, which includes all BLM lands where four of the five plants occur (except *Lesquerella kingii* ssp. *bernardina*) (43 U.S.C. 1781). The purpose of this section is "to provide for the immediate and future protection and administration of the public lands in the California desert within the framework of a program of multiple use and sustained yield, and the maintenance of environmental quality" (43 U.S.C. 1781). Multiple use is defined, in part, to mean "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people . . ." (43 U.S.C. 1702(c)). The concept of multiple use includes the "harmonious and coordinated management of the various resources without permanent impairment of the . . . quality of the environment with consideration being given to the relative values of the resources . . ." (Id.).

Section 1781 of FLPMA states that the use of these desert resources should be provided for in a multiple use and sustained yield management plan (43 U.S.C. 1781(a)(4)). These resources specifically include "certain rare and endangered species of wildlife, plants, and fishes . . . [which] are seriously threatened by inadequate Federal management authority, and pressures of increased use . . ." (43 U.S.C. 1781(a)(3)). As a result, the Secretary of the Department of the Interior is directed to prepare and implement a

long-term plan for the "management, use, development, and protection" of the lands within this Conservation Area (43 U.S.C. 1781(d)). This plan is to take into account multiple use and sustained yield, and provide for resource use and development, which is to include "maintenance of environmental quality, rights-of-way, and mineral development" (Id.). So even though FLPMA may contain language to protect the five plant species to a certain degree through the maintenance of environmental quality, FLPMA was written to provide for multiple use. Such use does not necessarily elevate the needs of these species over other public land uses. Indeed, regulations promulgated to implement certain provisions of FLPMA provide for the approval of mining if the appropriate Federal official has complied with the section 7 consultation provisions of the Endangered Species Act (43 CFR 3809.1–6(a)(5)). However, the protections afforded listed species pursuant to section 7 of the Endangered Species Act are not required to be implemented unless listing takes place. Therefore, listing affords another layer of protection to these species.

Similar regulations have been promulgated for National Forest System lands (36 CFR part 228) so that mining "shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources" (36 CFR 228.8). Although these regulations do not specifically require compliance with section 7 of the Endangered Species Act as a prerequisite to approval of a mining plan of operations, the Act requires Service consultation for any action the Federal action agency authorizes, funds, or carries out (16 U.S.C. 1536) that may affect a federally listed species. Therefore, Forest Service approval of a mining plan of operations would require section 7 compliance, which would afford additional protection to listed plant species.

The Forest Service has attempted to reduce impacts of mining within carbonate plant habitat. As early as 1977, the Forest Service recognized four of the plants (all but *Oxytheca parishii* var. *goodmaniana*) as "sensitive species;" *Oxytheca parishii* var. *goodmaniana* was added to its list of sensitive species in 1990. The Forest Service has worked with the mining companies to minimize impacts to the plants since at least 1987 (Forest Service, *in litt.*, 1992). In the Management Plan for the San Bernardino National Forest (Forest Service 1988), the Forest Service recommended conserving at least two-thirds of the existing populations for three of the taxa (*Erigeron parishii, Eriogonum ovalifolium* var. *vineum*, and *Astragalus albens*) in perpetuity by establishing refugia for conserving selected occurrences of these five plants as part of a regional conservation plan. In addition, all of the habitat for *Lesquerella kingii* ssp. *bernardina* was recommended for protection. This would entail securing refugia sites either by withdrawal from mineral entry or by transferring claim rights. To date, the Forest Service has hosted several interagency meetings to develop strategies to implement this forest management plan direction by identifying criteria for refuge design and strategies for establishing a minerals withdrawal. A draft habitat management guide for the carbonate plants is expected to be released within several years. However, approval and implementation of recommended actions may not take place for several years subsequent to release of the guide.

In response to the proposal, Brown (*in litt.*, 1992) has claimed that the actual amount of limestone to be mined in the foreseeable future (defined as 75 years) is only 2 percent of the existing surface expression of limestone deposits in the San Bernardino Mountains. The 1872 mining law states that claimholders must have an actual intent to mine. The Service, therefore, must assume that all claims are being held with the intent to mine. One industry representative cited two reasons why claimholders would not relinquish claims even if no future mining were intended. First, it would prohibit a competing company from mining the mineral resource. Secondly, the claims could be mined for strategic minerals other than limestone. The 1872 mining law does not include a mechanism for voluntary relinquishment of a claim or transfer of a claim to a third party for the purposes of resource conservation even if a claimholder wished to do so. Once it was proven that the third party had no intent to mine, the claim could legally be seized by other mining interests (Bill Tilden, Pfizer, Inc., pers. comm., 1992).

The surface management of public lands under U.S. mining laws (43 CFR part 3809) requires BLM to process applications to "patent" mining claims on all Federal lands. BLM has reported that since the proposal to list the carbonate plants was published, it has received an increase in patent applications submitted by industry claimholders with claims occurring within the range of the five carbonate plants (Mike Ford, geologist, formerly BLM, pers. comm., 1992). One industry representative has indicated that changes in the 1872 mining law will require that the cost of the required annual assessment work per 8-hectare (20-acre) claim ($100) be paid as a fee directly to BLM, rather than performed as on-the-ground assessment work. This may provide additional incentive to claimholders to patent claims to avoid the increase in out-of-pocket costs for the annual assessment work. An increase in the number of claims being patented could remove these lands from continued Federal jurisdiction. The elimination of Federal jurisdiction becomes important regarding protection of plants because of the reduced protection afforded by the Endangered Species Act for plants on private lands.

E. Other natural or manmade factors affecting its continued existence. Populations consisting of a small number of individuals always face the possibility of stochastic extinction (i.e., extinction due to random events, including fire, flood, drought, landslide, disease, or predation). The total amount of annual precipitation, as well as the timing of such precipitation, may be crucial for seedling germination and subsequent establishment. A significant drop in the size of *Lesquerella kingii* ssp. *bernardina* populations in the Bertha Ridge area between 1980 and 1988 (from 25,000 to 15,000 individuals) may be in part due to several years of drought conditions. Conversely, the high amount of precipitation received during March 1992 may, in part, account for the increased number of *Astragalus albens* individuals observed during 1992 surveys compared to the number found in previous surveys. Such fluctuations in population sizes should be expected, but at the same time emphasize the need to maintain *in situ* seedbanks on suitable habitat. Moreover, drought-stressed plants can become vulnerable to additional damage from pathogens or insects. The risk of stochastic extinction for *A. albens* and *Oxytheca parishii* var. *goodmaniana*, which currently consist of fewer than 10,000 individuals each, is considered high.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these five species in determining to issue this final rule. Based on this evaluation, the preferred action is to list *Eriogonum ovalifolium* var. *vineum*, *Astragalus albens*, *Lesquerella kingii* ssp. *bernardina*, and *Oxytheca parishii* var. *goodmaniana* as endangered. Destruction of their habitat by activities associated with limestone mining, sand and gravel mining, off-road vehicle and other recreational use, and energy

development projects, as well as their vulnerability to stochastic events, exposes these four plant species to the danger of extinction throughout all or a significant portion of their ranges. These species thus fit the Act's definition of endangered. While *Erigeron parishii* faces the same threats as the other four species, it has the widest range of distribution; at least a few populations within the range of the species occur at locations with non-carbonate substrates, which are not currently under mining claim. Therefore, the preferred action is to list *Erigeron parishii* as threatened.

Critical Habitat

Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. The Service finds that designation of critical habitat for *Eriogonum ovalifolium* var. *vineum*, *Astragalus albens*, *Lesquerella kingii* ssp. *bernardina*, *Oxytheca parishii* var. *goodmaniana*, and *Erigeron parishii* is not presently prudent. The publication of critical habitat descriptions and maps required for critical habitat designation would increase the degree of threat to these plants from possible take or vandalism, and could contribute to their decline. The listing of species as either endangered or threatened publicizes the rarity of the plants and can make these plants attractive to researchers, curiosity seekers, or collectors of rare plants. All appropriate Federal agencies and local planning agencies have been notified of the location of these species and importance of protecting their habitat. Protection of these species' habitat will be addressed through the recovery process and potentially through the section 7 consultation process. Therefore, the Service finds that designation of critical habitat for these plants is not prudent at this time; such designation likely would increase the degree of threat from vandalism, collecting, or other human activities.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against certain activities involving listed plants are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Populations of all five plant species occur in large part on Federal land. *Erigeron parishii*, *Eriogonum ovalifolium* var. *vineum*, and *Astragalus albens* occur on land managed by the San Bernardino National Forest and the California Desert District of BLM. *Lesquerella kingii* ssp. *bernardina* and *Oxytheca parishii* var. *goodmaniana* occur primarily on land managed by the San Bernardino National Forest. Federal activities potentially impacting one or more of the five plants and likely to trigger formal consultation under section 7 of the Act include the approval of mining plans of operations; approval of mining reclamation plans; construction of recreational facilities, such as off-highway vehicle trails and the ski run; rights-of-way for various activities including access to mining claims and energy development corridors; and grazing allotments. The patenting of mining claims are processed by BLM; however, legal opinions differ as to whether this process can be considered a Federal activity subject to section 7 of the Endangered Species Act. The Army Corps of Engineers (Corps) will have permitting authority as described under section 404 of the Clean Water Act for construction of a hydroelectric power plant and a sand and gravel mining operation being proposed for the Cushenbury Springs area. By regulation, nationwide or individual permits cannot be issued where a federally listed endangered or threatened species would be affected by a proposed project without first completing formal consultation pursuant to section 7 of the Endangered Species Act. In addition, construction of the hydroelectric power plant most likely will require the approval of the Federal Energy Regulatory Commission and thus require formal consultation.

The Act and its implementing regulations found at 50 CFR 17.61, 17.62, and 17.63 for endangered plants and 17.71 and 17.72 for threatened plants set forth a series of general prohibitions and exceptions that apply to all listed plants. With respect to the five carbonate endemics from southern California, all trade prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61 and 17.71, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export; transport in interstate or foreign commerce in the course of a commercial activity; sell or offer for sale in interstate or foreign commerce; or to remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any area under Federal jurisdiction, or remove, cut, dig up, damage or destroy listed plants on any other area in knowing violation of any State law or regulation, or in the course of any violation of a State criminal trespass law. Seeds from cultivated specimens of threatened plant species are exempt from these prohibitions provided that a statement of "cultivated origin" appears on their containers. Certain exceptions apply to agents of the Service and State conservation agencies. The Act and 50 CFR 17.62, 17.63, and 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered and threatened plant species under certain circumstances.

It is anticipated that few trade permits would ever be sought or issued because the five plant species are not common in cultivation or in the wild. Requests for copies of the regulations on plants and inquiries regarding them may be addressed to the U.S. Fish and Wildlife Service, Endangered Species Permits, 911 N.E. 11th Avenue, Portland, Oregon 97232–4181 (telephone 503/231–6241, facsimile 503/231–6243).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, or Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination

was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited herein, as well as others, is available upon request from the Ventura Field Office (see **ADDRESSES** section).

Author

The primary author of this rule is Constance Rutherford, U.S. Fish and Wildlife Service, Ventura Field Office, 2140 Eastman Avenue, Suite 100, Ventura, California 93003 (805/644–1766).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.12(h) by adding the following, in alphabetical order under the plant families indicated, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
* *	*	* *		*		*
Asteraceae—Aster family:						
* *	*	* *		*		*
Erigeron parishii	Parish's daisy	U.S.A. (CA)	T	548	NA	NA
* *	*	* *		*		*
Brassicaceae—Mustard family:						
* *	*	* *		*		*
Lesquerella kingii ssp. *bernardina.*	San Bernardino Mountains bladderpod.	U.S.A. (CA)	E	548	NA	NA
* *	*	* *		*		*
Fabaceae—Pea family:						
* *	*	* *		*		*
Astragalus albens	Cushenbury milk-vetch	U.S.A. (CA)	E	548	NA	NA
* *	*	* *		*		*
Polygonaceae—Buckwheat family:						
* *	*	* *		*		*
Eriogonum ovalifolium var. *vineum.*	Cushenbury buckwheat	U.S.A. (CA)	E	548	NA	NA
* *	*	* *		*		*
Oxytheca parishii var. *goodmaniana.*	Cushenbury oxytheca	U.S.A. (CA)	E	548	NA	NA
* *	*	* *		*		*

Dated: August 3, 1994.

Mollie H. Beattie,

Director, U.S. Fish and Wildlife Service.

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Part IV

Department of Transportation

Federal Railroad Administration

49 CFR Part 209
Remedial Actions Reporting; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 209

[Docket No. RSEP–7, Notice No. 2]

RIN 2130–AA85

Remedial Actions Reporting

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final Rule.

SUMMARY: FRA is amending its railroad safety enforcement regulations to require railroads to report actions taken to remedy certain alleged violations of law. If a railroad receives notice from an FRA or State safety inspector that (i) the inspector is recommending that a civil penalty be assessed for an alleged violation of law and (ii) that a remedial actions report must be submitted, the railroad shall report to the inspector the actions that it took to remedy the alleged violation. In such a case, the railroad is required to submit the remedial actions report within 30 days after the end of the month in which the railroad received the notice. The rule also provides that if appropriate required remedial actions cannot be taken by the railroad within such 30-day period, it shall submit to the inspector (i) a written explanation of the reasons for any delay and (ii) a final report upon completion of the remedial actions.

EFFECTIVE DATE: This final rule will be effective January 1, 1995.

ADDRESSES: Any petition for reconsideration should reference Docket No. RSEP–7, Notice No. 2, and be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, 400 Seventh Street SW., Room 8201, Washington, D.C. 20590.

FOR FURTHER INFORMATION CONTACT: Edward R. English, Director, Office of Safety Enforcement (RRS–10), FRA, Office of Safety, 400 Seventh Street, S.W., Washington, D.C. 20590 (telephone number: 202–366–9252), or David H. Kasminoff, Trial Attorney (RCC–30), FRA, Office of Chief Counsel, 400 Seventh Street, S.W., Washington, D.C. 20590 (telephone number: 202–366–0635).

SUPPLEMENTARY INFORMATION:

Background

On June 18, 1993, FRA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to amend part 209, entitled "Railroad Safety Enforcement Procedures," by revising § 209.3 and adding a new "Subpart E—Reporting of Remedial Actions." The proposed Subpart E prescribed reporting procedures for railroads notified by an FRA or State safety inspector both that assessment of a civil penalty would be recommended against them for their alleged noncompliance with the Federal railroad safety laws and that a remedial actions report must be submitted to the inspector. 58 FR 33595.

In a study released on July 31, 1990 (GAO/RCED–90–194), the General Accounting Office (GAO) concluded that FRA had no assurance that railroads were correcting problems identified in FRA's routine inspections because there were no requirements that railroads respond in writing to indicate that an identified defect had been repaired. The GAO report acknowledged that, even in the absence of requirements to report corrective actions, railroads voluntarily responded in writing to FRA concerning most track and signal defects indicating that corrective actions have been taken. For example, in 1986 through 1988 FRA identified about 361,000 track defects, for which approximately 320,000, or 89 percent, had a railroad response recorded in the "Action" and "Date" columns of the railroad's copy of the Track Inspection Report. In the same period, FRA identified about 35,000 signal defects, for which approximately 30,000, or 86 percent, had a railroad response recorded in the "Action" and "Date" columns of the railroad's copy of the Signal and Train Control Inspection Report.

The GAO report further noted that, although some railroads also reported corrective actions for equipment and operating practices defects, FRA maintained no record of these written responses and that FRA did not reinspect in every case to verify the correction of a safety defect. The GAO recommended that FRA establish an effective inspection follow-up program that would include (i) requiring railroads to report actions taken on FRA inspection findings, (ii) determining what reinspection levels are needed to ensure that railroads are responding to inspection findings, and (iii) assessing civil penalties for failure to report corrective actions.

On September 3, 1992, the President signed into law the Rail Safety Enforcement and Review Act (RSERA), Pub. L. 102–365, 106 Stat. 972, which mandated in § 3 the issuance of rules requiring submission of remedial actions reports. On July 5, 1994, the general and permanent provisions of the RSERA and of all the other Federal railroad safety laws were simultaneously repealed, reenacted without substantive change, and recodified as positive law in title 49 of the U.S. Code by Public Law 103–272. See H.R. Rep. No. 103–180, 103d Cong., 1st Sess. (1993). Section 3 of the RSERA provided as follows:

(a) Regulations.—The Secretary of Transportation (hereafter in this Act referred to as the "Secretary") shall issue regulations to require that any railroad notified by the Secretary that assessment of a civil penalty will be recommended for a failure to comply with a provision of the Federal railroad safety laws, as such term is defined in section 212(e) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 441(e)), or any rule, regulation, order, or standard issued under such provision, shall report to the Secretary, within 30 days after the end of the month in which such notification is received, actions taken to remedy that failure.

(b) Explanation of Delay.—Regulations issued under subsection (a) shall provide that, if appropriate remedial actions cannot be taken by a railroad within such 30-day period, such railroad shall submit to the Secretary an explanation of the reasons for any delay.

(c) Schedule for Regulations.—The Secretary shall—(1) within 9 months after the date of enactment of this Act, issue a notice of proposed rulemaking for regulations to implement this section; and (2) within 2 years after the date of enactment of this Act, issue final regulations to implement this section.

49 U.S.C. 20111(d), formerly codified at 45 U.S.C. 437 note. As recodified at 49 U.S.C. 20111(d), the section now reads as follows:

(d) Regulations Requiring Reporting of Remedial actions.—(1) The Secretary shall prescribe regulations to require that a railroad carrier notified by the Secretary that imposition of a civil penalty will be recommended for a failure to comply with this part, chapter 51 or 57 of this title, or a regulation prescribed or order issued under any of those provisions, shall report to the Secretary, not later than the 30th day after the end of the month in which the notification is received—

(A) actions taken to remedy the failure; or

(B) if appropriate remedial actions cannot be taken by that 30th day, an explanation of the reasons for the delay.

(2) The Secretary—

(A) not later than June 3, 1993, shall issue a notice of a regulatory proceeding for proposed regulations to carry out this subsection; and

(B) not later than September 3, 1994, shall prescribe final regulations to carry out this subsection.

The Secretary has delegated these rulemaking responsibilities to the Federal Railroad Administrator. 49 CFR 1.49 (c), (d), (f), (g), (m), (s), (ee), (gg), and internal delegations.

The term "Federal railroad safety laws" in § 3 of the RSERA means the provisions of law that as a result of recodification are now, generally, at 49 U.S.C. subtitle V, part A or 49 U.S.C. chap. 51 or 57 and the rules, regulations, orders, and standards issued under any of those provisions. See Pub. L. 103–272 (1994). Before recodification, these statutory provisions were contained in the following statutes: (i) the *Federal Railroad Safety Act of 1970* (Safety Act) (49 U.S.C. 20101–20117, 20131, 20133–20141, 20143, 21301, 21302, 21304, 21311, 24902, and 24905, and §§ 4(b)(1), (i), and (t) of Pub. L. 103–272, formerly codified at 45 U.S.C. 421, 431 *et seq.*); (ii) the *Hazardous Materials Transportation Act* (Hazmat Act) (49 U.S.C. 5101 *et seq.*, formerly codified at 49 App. U.S.C. 1801 *et seq.*); (iii) the *Sanitary Food Transportation Act of 1990* (SFTA) (49 U.S.C. 5713, formerly codified at 49 App. U.S.C. 2801 (note)); and those *laws transferred to the jurisdiction of the Secretary of Transportation by subsection (e)(1), (2), and (6)(A) of section 6 of the Department of Transportation Act* (DOT Act), as in effect on June 1, 1994 (49 U.S.C. 20302, 21302, 20701–20703, 20305, 20502–20505, 20901, 20902, and 80504, formerly codified at 49 App. U.S.C. 1655(e)(1), (2), and (6)(A)). 49 U.S.C. 20111 and 20109, formerly codified at 45 U.S.C. 437 (note) and 441(e). Those laws transferred by the DOT Act include, but are not limited to, the following statutes: (i) the *Safety Appliance Acts* (49 U.S.C. 20102, 20301, 20302, 20304, 21302, and 21304, formerly codified at 45 U.S.C. 1–14, 16); (ii) the *Locomotive Inspection Act* (49 U.S.C. 20102, 20701–20703, 21302, and 21304, formerly codified at 45 U.S.C. 22–34); (iii) the *Accident Reports Act* (49 U.S.C. 20102, 20701, 20702, 20901–20903, 21302, 21304, and 21311, formerly codified at 45 U.S.C. 38–43); (iv) the *Hours of Service Act* (49 U.S.C. 20102, 21101–21107, 21303, and 21304, formerly codified at 45 U.S.C. 61–64b); and (v) the *Signal Inspection Act* (49 U.S.C. 20102, 20502–20505, 20902, 21302, and 21304, formerly codified at 49 App. U.S.C. 26).

FRA performs its safety inspections in order to monitor and enforce compliance with the Federal railroad safety laws by all entities subject to its jurisdiction, not simply by railroads. The entities themselves still retain ultimate responsibility for detecting, repairing, and avoiding violations of those laws. Nevertheless, the reporting requirement will assist FRA in monitoring followup actions by railroads with respect to conditions sufficiently serious to warrant possible future civil penalty actions.

If an FRA inspector, State inspector participating in investigative and surveillance activities under 49 C.F.R. Part 212, or other duly authorized official performing a railroad safety inspection (hereinafter referred to collectively as "FRA Safety Inspector") determines that a railroad has not complied with a provision of the Federal railroad safety laws and if the inspector decides to recommend the assessment of a civil penalty against the railroad for the noncompliance, the inspector will first prepare an inspection report. This report includes the following information: the name of the FRA Safety Inspector, his or her identification number, the report number, the name and job title of the railroad representative served with the report, the railroad's name and computer code, the railroad division and subdivision (if applicable), and the inspection report date. Further, the inspection report also indicates if the FRA Safety Inspector has checked the box specifying "Violation Recommended." If a violation is recommended, the FRA Safety Inspector will prepare a violation report including a recommendation for the assessment of a civil penalty.

The central requirement of the final regulations is that any railroad receiving notification on the new version of the inspection report that (i) the FRA Safety Inspector is recommending the assessment of a civil penalty for a failure by that railroad to comply with a provision of the Federal railroad safety laws and (ii) a report of remedial actions must be filed, shall fill out the "Railroad Followup" section of the railroad copy of the inspection report. The railroad must then return the form to the designated FRA Safety Inspector within 30 days after the end of the month in which such notification is received. The remedial actions report must include the name and job title of the individual completing the form on behalf of the railroad and indicate the date(s) on which the remedial actions occurred. A copy of the new inspection report on which to report to FRA remedial actions taken is appended to this final rule.

Under the terms of the final regulations, the duty to submit a remedial actions report does not arise merely upon notification that a recommendation for the assessment of a civil penalty will be made (*i.e.*, in the box stating "Violation Recommended," the word "yes" is selected). It arises only if notification is also provided to the railroad on the inspection report itself that submission of a remedial actions report for that specific failure is required (*i.e.*, in the box stating "Written Notification to FRA of Remedial Action is:" the word "Required" is selected). Broadly construed, under one permissible interpretation of the reporting requirement of § 3 of the RSERA, the requirement could apply to all violations for which the assessment of a civil penalty is recommended. This reading of § 3 would, of course, include all violations involving physical defects (*e.g.*, in track, equipment, and signals) where, absent remedial actions, the physical defect continues to pose a safety hazard, *e.g.*, a defective wheel on a freight car. However, this interpretation would also include violations involving a defect in human performance, such as permitting a locomotive engineer to work in excess of 12 hours in violation of the Federal hours of service laws. In that instance, the excess service creates a risk during the period of the excess service itself, but does not carry a continuing threat to safety.

FRA concludes that the intent of Congress in enacting § 3 of the RSERA was to require the reporting of remedial actions only for a failure to comply that, in the judgment of the FRA Safety Inspector, could literally and specifically be corrected by the specific railroad notified. In other words, we think that Congress required remedial actions reports only for violations that could still pose an ongoing risk to rail safety if not corrected (e.g., operation of a freight car that the railroad received in interchange in revenue service with a defective wheel). In light of FRA's interpretation of § 3 of the RSERA and in an effort to develop meaningful compliance data, the final regulations apply remedial actions reporting to only three general categories of failures to comply with a provision of the Federal railroad safety laws for which the assessment of a civil penalty is recommended. The three general categories consist of (i) physical defects, (ii) recordkeeping and reporting violations, and (iii) filing violations.

The final regulations neither compel nor permit any affected railroad to decide for itself whether a particular recommendation to FRA for the assessment of a civil penalty falls under one of the three general categories, and thus results in the need to submit a

remedial actions report. Consider, for example, a situation in which a railroad is informed that because of its operation of a box car with a plain bearing box having no visible free oil, in violation of 49 CFR 215.107, a recommendation will be made for the assessment of a civil penalty. However, the safety inspector neglects to include the requisite notification on the inspection report that submission of a remedial actions report is required. Although the inspector's omission would not affect the railroad's underlying obligation to pay any civil penalty assessed for the substantive freight car violation, FRA's failure to provide the required notification would, under this rule, mean that the railroad had no duty to file a remedial actions report regarding the substantive violation.

After a railroad returns the completed remedial actions report to the FRA Safety Inspector, he or she will first determine if the remedial actions taken were proper and adequate under the circumstances of the violation. If not, he or she will contact the representative of the railroad who completed the report form to obtain additional information. If necessary, the FRA Safety Inspector will return a deficient report to the appropriate railroad representative for revision. Once the remedial actions report is sufficient, the FRA Safety Inspector will submit a copy of this report to FRA's Office of Chief Counsel, which may make use of it during the penalty assessment and negotiation process. FRA's Office of Safety will then correlate the data representing the different types of remedial actions that entities affected by the reporting requirement have undertaken. This computerized data will assist FRA in systematically targeting inspections by integrating available accident and injury data with inspection and compliance data, so as to better determine if affected entities are minimizing and correcting safety problems.

Under certain unusual circumstances, a railroad may be notified that assessment of a civil penalty will be recommended for a failure of that railroad to comply with a provision of the Federal railroad safety laws unless the company undertakes a specific programmatic response to the compliance problem. In such cases, although penalty action may be withheld, it will be treated as if the penalty has already been recommended, that is submission of a remedial actions report would be required. Further, there are instances where a recommendation for the assessment of a civil penalty may be made, but later overturned by regional officials for technical or policy reasons or declined by FRA's Office of Chief Counsel for evidentiary or other legal deficiencies. FRA considers the phrase " * * * that has received written notification * * * from an FRA Safety Inspector both that assessment of a civil penalty will be recommended * * * and that it must submit a remedial actions report * * * "as the triggering language that requires a railroad to report its remedial actions to FRA within 30 days after the end of the month in which such notification is received. *See* 49 CFR 209.405.

Discussion of Comments and Conclusions

A total of 11 responses were received concerning the NPRM. At the public hearing held in Washington, D.C. on October 19, 1993, six organizations were represented: the Association of American Railroads (AAR); The American Short Line Railroad Association (ASLRA); Consolidated Rail Corporation (Conrail); National Railroad Passenger Railroad Corporation (Amtrak); Union Pacific Railroad Company (UP); and Brotherhood Railway Carmen Division, Transportation Communications International Union (BRC). Prepared statements were provided by the AAR, the ASLRA, and the BRC, and written comments were received from the AAR, the ASLRA, the UP, the BRC, the American Public Transit Association (APTA), Akzo Chemicals Inc. (Akzo), Chemical Manufacturers Association (CMA), and Southeastern Pennsylvania Transportation Authority (SEPTA). Discussions follow with respect to the primary issues raised by the commenters. In light of the comments received, FRA has reconsidered some of its proposals.

1. *Should the final rule require remedial actions reports for all categories of failures to comply with provisions of the Federal railroad safety laws for which assessment of civil penalties have been recommended, or just for failures that can literally and specifically be corrected?*

The NPRM set forth FRA's belief that the intent of Congress in enacting § 3 of the RSERA was to require reporting of remedial actions only for failures to comply that could literally and specifically be corrected. FRA, however, acknowledged that one permissible reading of the statute is that remedial actions reports are required for all categories of alleged violations, and encouraged commenters to submit their views on FRA's interpretation of § 3 of the RSERA. Specifically, FRA asked any commenter believing that expansive reporting is required by the statute, or inherently useful, to recommend specific ways that generally responsive measures taken to prevent violations similar to those involved in completed or past transactions could usefully be reported to FRA.

Five commenters agreed with FRA's position that the rule should apply to only three general categories of failures to comply with a provision of the Federal railroad safety laws for which the assessment of a civil penalty is recommended. The three general categories consist of (i) physical defects, (ii) recordkeeping and reporting violations, and (iii) filing violations.

The AAR believed that to require more expansive reporting would expand the scope of the rule beyond FRA's statutory authority, since in § 3(a) of the RSERA Congress ordered remedial actions reports only on "actions taken to remedy that failure," referring to the particular "failure" to comply for which a civil penalty would be sought. The AAR also stated that there is no policy or safety reason for FRA to expand the scope of the rule and that FRA already has sufficient information available to assist it in allocating agency resources. The ASLRA opined that to require reporting of actions not susceptible to physical change or administrative correction would be counterproductive, leading to unnecessary paperwork and costs. The CMA believed that FRA should be more selective in determining when a remedial actions report must be filed and that FRA Safety Inspectors (as that term is now defined in the final rule) should have discretion to decide if safety concerns warrant the submission of a report even for failures involving physical defects, recordkeeping and reporting violations, and filing violations.

In contrast, the BRC believed that FRA's proposed restrictive approach runs contrary to the legislative history and does not comport with Congressional intent, and that Congress specifically intended to limit FRA's discretion in implementation of the RSERA. The BRC stated that completed or past transactions in violation of the law and regulations are not usually isolated instances, but are indicative of an ongoing pattern of violations which can be remedied by additional instruction, education, or discipline. The BRC also indicated that even if the rule is applied to all categories of violations, remedial actions reporting would still address only violations that FRA Safety Inspectors could confirm with sufficient evidence to warrant the recommendation of assessment of a civil penalty.

While FRA disagrees with the AAR's conclusion that it would lack the statutory authority to expand the scope of the rule, FRA also disagrees with the BRC's conclusion that the legislative history, including House Report No. 102–205, establishes a Congressional intent to subject all violations to the reporting requirement. Section 3 of the RSERA required remedial actions reports for "actions taken to remedy *that* failure" (emphasis added), and FRA concludes that Congress was referring to actions taken to remedy the particular "failure" to comply for which a civil penalty would be sought (*i.e.*, to the specific instance that constituted a violation), not to the generic failure on other occasions to comply with the same regulatory or statutory provision.

After careful consideration of all of the comments, FRA has decided to require the reporting of remedial actions only for failures to comply that can literally and specifically be corrected, as set forth in the NPRM. In response to the concerns raised by the BRC, FRA emphasizes that for violations involving completed or past transactions that can no longer be remedied by the given railroad (*e.g.*, permitting a locomotive engineer to work in excess of 12 hours in violation of the Federal hours of service laws or offering a freight car in interchange with a defective wheel that FRA identified to the receiving railroad as requiring repair), FRA will expect the railroad against whom a civil penalty is recommended (or even against whom only a written warning is issued) to reassess its own overall policy and attitude toward future compliance, such as by reallocating its resources or providing additional employee training. Moreover, since the civil penalty that will be recommended is expected to serve as an incentive toward generally responsive actions, to require a remedial actions report for violations that can no longer be remedied by that railroad would be superfluous.

2. *Should the reporting requirement apply to all entities over which FRA has enforcement authority, e.g., shippers of hazardous materials, or just to railroads?*

The only two organizations that commented on this issue favored the proposed expanded coverage of the rule. The BRC believed that expanded coverage would promote better accountability and permit FRA to fully monitor compliance with the law and regulations. CMA generally supported the proposed reporting requirement, including expansion of the proposed definition of "responsible company" to include shippers, if improved safety in the shipment of hazardous materials by rail can be realized. However, CMA noted that a discussion of the rule's economic impact on shippers was omitted from FRA's regulatory impact analysis.

As acknowledged in the NPRM, § 3 of the RSERA mandated issuance of rules requiring remedial actions reports only from railroads. FRA proposed making the rule applicable to all persons other than individuals under our rulemaking authority under § 202 of the Safety Act, in furtherance of our enforcement authority under the Hazardous Materials Transportation Act, in order to develop more comprehensive safety data, better utilize its limited resources, and consistently treat all similarly situated violators of the Federal railroad safety laws.

FRA has reconsidered its proposal and decided to limit the applicability of the final rule to only railroads. First, FRA believes that if Congress had intended for all persons besides railroads to be included under § 3 of the RSERA, Congress would have expanded the scope of the rule. Second, FRA now concludes that in most instances in which FRA Safety Inspectors choose to cite shippers of hazardous materials for violations of the Hazardous Materials Regulations, the tank cars or shipping papers that are the subjects of the civil penalty recommendations are no longer under the control of the shipper. Accordingly, the majority of these violations are for completed or past transactions and thus would not subject shippers to the reporting requirement even under the proposed expanded approach.

The shippers would still, however, be expected to reevaluate their future compliance policies and procedures. For example, a shipper receives written notification from an FRA Safety Inspector that a recommendation for the assessment of a civil penalty is being made pursuant to 49 CFR 173.29 for failure to properly secure all of the closures on a residue tank car, but the car is found in a rail yard hundreds of miles from the shipper's facility. Although this failure would fall within one of the three general categories of correctable violations, under ordinary circumstances the required remedial actions (e.g., securement of the car's closures) would be performed exclusively by the railroad. The shipper might investigate the circumstances surrounding the tank car's preparation and then implement new procedures, but under the terms of the NPRM the shipper would not be required to submit a remedial actions report.

3. *Does FRA have the legal authority to impose civil or criminal penalties on railroads and/or individuals that either violate or cause a violation of the reporting requirements?*

The proposed rule identified the penalties that FRA might impose upon any person who violates or causes the violation of any requirement of Subpart E, and noted that penalties were authorized by § 209 of the Safety Act. However, the AAR, the ASLRA, and the UP stated that although the source of FRA's authority in promulgating the rule was § 3 of the RSERA, neither that section nor any other section of the RSERA authorized the imposition of civil or criminal penalties. The three commenters noted that while § 209 of the Safety Act authorized penalties for violations of safety rules or regulations issued under that Act, § 3 of the RSERA was neither an amendment nor an addition to the Safety Act. They then concluded that since FRA never provided any notice or a reasoned explanation for why the rule's substantive provisions are "necessary" for railroad safety under § 202(a) of the Safety Act (now codified at 49 U.S.C. 20103), or "necessary or appropriate" for safe transportation of hazardous materials under § 105(a)(1) of the Hazardous Materials Transportation Act (now codified at 49 U.S.C. 5103), neither civil nor criminal penalties are authorized.

These commenters opined that since the underlying violation is already subject to a civil penalty, and the necessary incentives to submit a remedial actions report are already in place, the possible imposition of an additional penalty would be superfluous. The BRC contended that the incentive provided by a separate penalty for submitting an improper remedial actions report increases accountability and forces the railroads to ensure completion of the report.

FRA adopts the NPRM proposal that civil and/or criminal penalties may be imposed upon any person, including a railroad, who either violates or causes the violation of any requirement of Subpart E. As stated in the authority citation for the proposed revised part 209, FRA's authority for including civil and criminal penalty provisions in the remedial actions reporting rule derives from our rulemaking authority under 49 U.S.C. 20103 (formerly contained in § 202 of the Safety Act). See 49 CFR 1.49(m). Contrary to the implication of the AAR, the ASLRA, and the UP, FRA is not issuing the remedial actions reporting rule with respect to violations of the Hazardous Materials Regulations under the authority of 49 U.S.C. 5103 (formerly contained in § 105(a)(1) of the Hazardous Materials Transportation

Act). With regard to submission of remedial actions reports for violations of the Hazardous Materials Regulations, our authority for including civil and criminal penalty provisions in the rule derives from our rulemaking authority under 49 U.S.C. 20103, in furtherance of our enforcement authority under the provisions of law formerly known as the Hazardous Materials Transportation Act. See 49 CFR 1.49 (m) and (s). Of course, FRA could issue these rules under the provisions of law formerly contained in the Safety Act even if the provisions of law formerly contained in § 3 of the RSERA did not exist, so this is an academic argument. For the record, FRA believes these rules are necessary for safety.

Accordingly, consistent with FRA's belief that Congress did not intend for FRA to lack the authority to enforce the remedial actions reporting rule, we are issuing the rule under both 49 U.S.C. 20111(d) and 49 U.S.C. 20103 in order to avail ourselves of all potential remedies that may be necessary to achieve compliance. To the extent that we are issuing the rule under 49 U.S.C. 20103, we have concluded that it is "necessary" to ensure railroad safety, as required by § 20103(a). FRA strongly disagrees with the AAR's conclusion that the NPRM failed to sufficiently set forth why the submission of remedial actions is "necessary" for railroad safety. The AAR quoted FRA's statement in the NPRM that "* * * it is doubtful that this proposed rule alone will reduce the number of defective conditions in the industry, or that it will materially impact on the already declining rate of train accidents." 58 FR 33601. The AAR also observed that FRA "* * * is unable to quantify any direct or indirect safety benefit from this proposed rule." 58 FR 33601. The AAR further noted that even if certain correctable violations (which, if uncorrected, pose ongoing safety risks) have meaningful connections to safety, this nexus does not establish that the submission of remedial actions reports is "necessary" to railroad safety.

Although FRA readily acknowledged in the NPRM that it is unable to quantify any direct or indirect safety benefit from the proposed rule, it also stated that the potential benefit will come about by increasing the ability of the railroad industry to manage quality control. 58 FR 33601. FRA also concluded that the rule will improve its ability to efficiently and effectively manage its inspection resources. 58 FR 33601. In addition, it was hoped that railroads (previously included under the term "responsible company"), after being required to report remedial actions to FRA, will create their own internal databases of the remedial actions reports. Although we noted that internal analyses of the information was not required by the NPRM, we stated that such analyses (in conjunction with other resource management data) might lead railroad management to take actions designed to reduce and/or effectively respond to defective conditions. 58 FR 33601.

We also stated in the NPRM that remedial actions reporting will assist FRA in monitoring follow-up actions by railroads with respect to conditions sufficiently serious to warrant possible future civil penalty actions. 58 FR 33601. FRA then noted that the rule also holds particular potential for reducing the amount of time that FRA Safety Inspectors spend returning to an inspection location to check on the status of a violation for which a violation report had previously been submitted. 58 FR 33601. The rule also will permit FRA to develop more comprehensive safety data, better utilize its limited resources, and consistently treat all similarly situated violators of the Federal railroad safety laws.

4. *Should notification to a railroad that it must submit a remedial actions report be provided to a specific person and place designated by that railroad?*

The proposed rule identified the entity itself as the person upon whom written notification of the requirement to submit a remedial actions report would be served. No provision was included to permit a railroad to direct FRA to serve the written notice upon either a named individual or an individual having a particular job title or job function on the railroad. FRA anticipated that written notice would be given directly to an appropriate local railroad official, such as a foreman, trainmaster, or supervisor.

Five commenters opined that unless FRA requires each railroad to identify a specific person or contact within that railroad, delays or failure to respond to the remedial actions report could result. The AAR proposed that FRA provide initial notification of a filing requirement to nonagreement officers (or their designates) involved in managerial field supervision, with duplicate notice sent to a location to be specified by each railroad. The AAR stated that while cost savings are difficult to quantify, providing notification to a headquarters location would enhance timeliness and compliance. The AAR requested that if the final rule does not require central notification, then FRA Safety Inspectors should be required to make every effort to hand deliver notification to the nonagreement managers (or their designates) who accompany the field inspectors. Conrail stated that many of its first-line supervisors, with whom FRA Safety Inspectors currently leave inspection reports, assume that the reports are not their responsibility to forward or answer because the problems did not exist or originate in their territories.

The BRC argued that if the railroads need to implement internal reforms in order to comply with FRA regulations then blame cannot be placed on the remedial actions reporting requirement. The BRC opined that to the extent that the railroads already monitor and control required repairs to track and equipment, their current internal accountability will foster compliance with this rule. It also believed that since most violations are resolved and handled locally, the remedial actions report form could be completed locally.

FRA is not persuaded that a requirement to provide notification of the duty to submit a remedial actions report to either a specific local-level nonagreement official and/or to an official at a central location of the railroad is either necessary or appropriate. Upon consideration of all of the comments, FRA believes that to require its inspectors to expend additional time serving notice upon only certain categories of railroad employees at each inspection location and also to maintain current lists of names and mailing addresses of designated railroad officials at central locations, would undermine FRA's ability to efficiently and effectively manage its inspection resources.

Under current FRA procedures, FRA Safety Inspectors usually will deliver their inspection report directly to the individual who accompanied them on the railroad's property during the inspection. Other times, the inspectors will communicate with an appropriate local railroad official (either agreement or nonagreement) shortly after they perform an unaccompanied inspection. In any event, the inspection report form shows to whom FRA has delivered the report, so there is a clear basis on which a railroad can insist on accountability by its own officers and employees. Accordingly, we believe that each railroad is uniquely qualified to establish its own internal control mechanism for ensuring that all information concerning remedial actions reporting, delivered by FRA to any relevant local employee of the railroad, is reported to the necessary individuals in the railroad's hierarchy in a timely and efficient manner.

5. *Should the inspection report itself be adapted and modified to serve as the remedial actions report form?*

The NPRM proposed the continued use by FRA Safety Inspectors of a different type of inspection report form specific to each discipline. However, only one generic remedial actions report form, regardless of the rule, regulation, order, or standard involved, would be used by all railroads required to report their remedial actions. It was anticipated that FRA would develop a number of specific remedial actions report forms unique to each discipline, either as part of, or as attachments to, the inspection reports themselves.

The AAR, the UP, and the ASLRA strongly urged FRA to amend its existing inspection reports to serve as remedial actions report forms, thus eliminating much of the paperwork and reporting burdens from the railroads. The AAR also noted that several of FRA's current inspection forms already serve this purpose, such as the "Railroad Followup" section on inspection reports for Track, Motive Power and Equipment, and Signal and Train Control inspections.

FRA agrees with the commenters that modifying the inspection report to serve as the remedial actions report form will generally ease the paperwork burden imposed by this rule on the railroads and will specifically reduce the amount of time required to complete the form. FRA has also decided to combine all four of its discipline-specific inspection reports into one new generic inspection report, to be designated as Form FRA F 6180.96. To denote that a railroad is required to submit a remedial actions report, the FRA Safety Inspector checks the box marked "required" in the section entitled "Remedial Actions" of the new inspection report form. The railroad will then provide the required remedial actions report information directly on its copy of the inspection report, and mail that form back to the appropriate FRA Safety Inspector.

6. *Should the instructions on the remedial actions report form be changed to make submission of a brief narrative statement optional, thus permitting a railroad to submit its report by only selecting the appropriate remedial action code?*

The NPRM proposed prohibiting a railroad from reporting its remedial actions simply by indicating that corrective actions were performed. The proposed rule would have required a railroad to report to FRA with the necessary level of specificity by selecting the appropriate reporting code along with a brief narrative description to indicate the nature of the actions taken.

The AAR and the ASLRA contended that, with the exception of the code "other remedial actions," FRA should not require written narrative statements when an applicable action code already exists. They believed that preparation of a narrative adds to compliance time and costs, but yields no railroad safety benefits. They further argued that the absence of a narrative would not undermine the quality of railroad compliance, since FRA could perform field audits and random samplings of railroad records.

The BRC strongly favored retention of the narrative description requirement and suggested that additional instructions be added to the reporting form to enhance the quality of the narrative statement, *e.g.*, when repairs to a railroad car are necessary the narrative statement should indicate the place of repair, the extent of the repair, and the name of the person performing the repair. The BRC opined that the narrative statement would assist FRA in determining if a railroad needed to take additional actions, without the need for a formal audit.

FRA agrees with the AAR and the ASLRA that under most circumstances the selection of a remedial action code on the reporting form will fully and accurately reflect the action or actions taken to remedy a failure to comply with a provision of the Federal railroad safety laws. Examples of such codes include the following: repair or replacement of a defective component without movement, movement of a locomotive or car for repair (where permitted) and its subsequent repair, completion of a required test or inspection, removal of a noncomplying item from service but not for repair (where permitted), or reduction of operating speed (where sufficient to achieve compliance). It is primarily this coded information that FRA anticipates entering into its computer database to augment FRA's ability to efficiently and effectively manage its inspection resources. With the exception of the residuary code for "other remedial actions," FRA concludes that requiring inclusion of a narrative statement on the report form would unnecessarily add to the time that a railroad would expend on completion of the form and would be of marginal value to railroad safety.

Contrary to the BRC's argument, FRA believes that the possibility of a followup FRA inspection, coupled with potential imposition of civil and criminal penalties for filing a false remedial actions report, will serve as a significant deterrent to any railroad considering filing a report with a false or misleading remedial action code selected. Accordingly, FRA is revising the final rule to require a railroad compelled to file a remedial actions report to select only an appropriate remedial action code to fully describe the remedial action or actions performed. Completion of the brief narrative description section will ordinarily be optional; however, for any railroad selecting the remedial action code "other remedial actions" completion of the brief narrative description section will be mandatory.

7. *Did FRA substantially underestimate the regulatory impact of the rule when it stated that it would cost the railroad industry only $66,500 per year to fill out the required remedial actions reports?*

The NPRM noted that the potential benefit of the rule comes from increasing the ability of the railroad industry to manage quality control, as well as by improving FRA's ability to efficiently and effectively manage its inspection resources. It was anticipated that it would not take the realization of many benefits to offset the relatively insignificant cost to society of approximately $75,000 per year ($66,500 to the railroad industry each year to fill out the required remedial actions reports and approximately $8,100 to FRA to review the reports). Moreover, the public reporting burden for the collection of information was estimated to average approximately 23 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The AAR argued that FRA's cost estimate is off by at least a factor of ten. This commenter believed that although a voluntary report may take only 15 minutes to complete, the risk of civil and criminal penalties would require a railroad to devote more management time and attention to reporting and would increase the completion time to at least one and one-half hours. The AAR further contended that FRA erred by estimating the actual employee cost per hour to be $24.00, rather than $36.00 per hour with fringe benefits included in the calculation.

The ASLRA agreed with the AAR that the cost of implementation was grossly understated. This commenter believed that based upon wage levels for the larger Class II and Class III railroads of approximately $28.00 to $30.00 per hour, along with an average 90-minute time period required for recording, checking accuracy, and senior

management clearance, the estimated annual administration cost to small railroads will be approximately $50,000 to $75,000. Both commenters, and the UP, argued that the reporting burden would be eased if FRA incorporated the reporting requirement directly onto the inspection report, and relied primarily on a checkoff of coded responses in lieu of a written description of remedial actions performed.

As already discussed in this preamble, FRA has addressed many of the concerns about time and cost raised by the three commenters by modifying the inspection report to serve as the remedial actions report form and by making a railroad's submission of a narrative description optional, under most circumstances, instead of required. Accordingly, FRA anticipates that the public reporting burden for collection of information required for this rule will remain as estimated in the NPRM, an average of approximately 23 minutes per response for all reports filed as a result of §§ 209.405 and 209.407.

FRA rejects the argument that the risk of civil and criminal penalties will increase the time required to complete a mandatory remedial actions report over the time now required to complete a voluntary report. A railroad is legally obligated to correct a cited violation and avoid continued noncompliance, regardless of whether it is required to inform FRA of its remedial actions. Presumably, a railroad that currently voluntarily submits remedial actions reports to FRA is not choosing to provide inaccurate and untruthful information merely because the threat of civil and criminal penalties may be lacking. Accordingly, FRA concludes that the time required to read the remedial actions report form and select an appropriate remedial action code will be minimal.

Section-by-Section Analysis

Section 209.3 is reorganized, the definition of "person" is revised, and definitions of three important terms employed in the remedial actions regulations are added. The first of the newly defined terms is "FRA Safety Inspector." It is defined to mean an FRA safety inspector, a State inspector participating in railroad safety investigative and surveillance activities under Part 212 of this chapter, or any other official duly authorized by FRA. The term "railroad" is defined as it appears in the recodification of the provisions of law formerly contained in the Safety Act. The term "Federal railroad safety laws" includes the provisions of law that before their repeal and reenactment in title 49 of the U.S. Code were contained in the Safety Act, the Hazmat Act, SFTA, and those laws transferred to the jurisdiction of the Secretary of Transportation by subsections (e)(1), (2), and (6)(A) of section 6 of the DOT Act. Those laws which were transferred include, but are not limited to, the Safety Appliance Acts, the Locomotive Inspection Act, the Accident Reports Act, the Hours of Service Act, and the Signal Inspection Act. In addition, the term "Federal railroad safety laws" encompasses the rules, regulations, orders, and standards issued pursuant to the above provisions of law.

As discussed elsewhere in this preamble, FRA has decided to limit the applicability of the final rule to railroads only. Accordingly, the term "responsible company" has been eliminated.

Section 209.401 describes the purpose and scope of the remedial actions reporting regulations. FRA seeks to prevent and avoid accidents and injuries that could result from a railroad's failure to remedy certain violations of the Federal railroad safety laws that have been recommended for the assessment of a civil penalty. The rules require a railroad notified by an FRA Safety Inspector both that assessment of a civil penalty will be recommended for a failure to comply with a provision of the Federal railroad safety laws and that a remedial actions report must be submitted, to report to the inspector actions taken to remedy that failure. The railroad must report within 30 days after the end of the month in which it receives such notification.

In response to AAR's request, FRA has added new subsection (d) to § 209.401 to clarify that FRA requires the submission of a remedial actions report from a railroad against whom a civil penalty is recommended only for a failure to comply that could literally and specifically be corrected by that railroad. For completed or past transactions that can no longer be remedied (*e.g.*, permitting an engineer to work over 12 hours in violation of the Federal hours of service laws), FRA expects the railroad against whom a civil penalty is recommended to reassess its own overall policy and attitude toward future compliance, perhaps by reallocating its resources or providing additional employee training. In all these situations, a civil penalty has already been recommended as an incentive toward such generally responsive actions. Accordingly, to require a railroad to inform FRA of remedial actions taken in response to a particular violation that can no longer be remedied by that railroad would be superfluous.

Accordingly, a railroad that has delivered a freight car in interchange with a defective wheel that FRA identifies to a receiving railroad as requiring repair might be recommended for the assessment of a civil penalty, but the offering railroad would not be required to submit a remedial actions report to FRA for this completed transaction. However, if the receiving railroad is recommended for the assessment of a civil penalty, it would be required to submit a report because the nature of its violation poses an ongoing risk to rail safety. Of course, for purposes of resource allocation with respect to future FRA inspection and enforcement activity, FRA welcomes the receipt of remedial actions reports from all entities (including railroads and shippers of hazardous materials) on a voluntary basis when the FRA Safety Inspector checks the "Optional Box" on the inspection report. However, no entity will be penalized for failing to submit a noncompulsory report.

Section 209.403 defines the applicability of these regulations. The final regulations do not expand the number of entities affected by the reporting requirement beyond the single category required by the provisions of law formerly contained in the RSERA, *i.e.*, all railroads receiving written notification from an FRA Safety Inspector both that a recommendation for the assessment of a civil penalty is being made and that a remedial actions report must be submitted. The primary impact of this change from the proposed rule is that hazardous materials shippers over which FRA exercises enforcement authority will not be required to report their remedial actions to the inspector. While the regulations do not directly apply to individuals, as the penalty provision in § 209.409 makes clear, any individual who willfully thwarts the reporting provisions of the proposed rule would be held individually liable for the violation.

Section 209.405(a) requires that upon receipt of written notification on Form FRA F 6180.96 from an FRA Safety Inspector both that assessment of a civil penalty will be recommended for a failure to comply with a provision of the Federal railroad safety laws and that a remedial actions report must be submitted, the railroad shall report to the inspector all actions taken to remedy that failure. The railroad shall have 30 days after the calendar month in which the notification is received to submit this report to the inspector in writing. The duty to report to the inspector is not triggered merely by receiving written

notification from the inspector that assessment of a civil penalty will be recommended, but only in conjunction with receiving written notification from the inspector that a remedial actions report must be submitted.

Since a recommendation for the assessment of a civil penalty must be made before submission of a remedial actions report is required, the duty would never arise merely upon notification that a defect has been discovered. Alternatively, if a recommendation for the assessment of a civil penalty is made and a railroad receives written notification that a remedial actions report must be submitted, but no civil penalty is later assessed either for policy or evidentiary reasons, the duty to report remedial actions taken pursuant to this section still exists. Accordingly, if the railroad is ultimately not required to pay a civil penalty for the underlying alleged violation, the railroad would still be liable for a civil penalty under § 209.405 for failing to file a required remedial actions report regarding the underlying alleged violation.

Written notification that the submission of a remedial actions report is required will occur only when a failure to comply with a provision of a Federal railroad safety law for which the assessment of a civil penalty is recommended falls into one of three general categories. The three general categories consist of (i) physical defects, (ii) recordkeeping and reporting violations, and (iii) filing violations. These categories represent types of violations that could still pose ongoing risks to rail safety if left uncorrected and/or can actually be specifically corrected. The obligation to determine whether a particular failure recommended for the assessment of a civil penalty triggers the requirement to submit a remedial actions report rests totally with FRA. Moreover, since a railroad's duty to submit a remedial actions report arises only upon specific notification to this effect, no violation can occur under this section unless such notification is properly provided by FRA.

The ASLRA commented that since circumstances vary as to what constitutes a violation, FRA Safety Inspectors must receive clear guidance as to when a violation requires the submission of a remedial actions report. The commenter argues that without such guidance an inspector might impose the reporting requirement on all categories of violations, not just for the three general categories of violations discussed earlier. FRA is aware of the potential for inconsistent enforcement of the reporting regulations by its inspectors, and intends to provide them with comprehensive training concerning the types and circumstances of violations that require the submission of remedial actions reports.

The 30-day time period is merely provided for the administrative convenience of the railroad, so as to allow sufficient time to report its remedial actions by filling out the form provided to it. The pre-existing duty to correct the defect or take other appropriate remedial action remains the same as it was before the effective date of these regulations. Accordingly, a railroad would be subject to a new recommendation for the assessment of a civil penalty for a willful violation if, for example, it operated a freight car subject to the Freight Car Safety Standards, except under the provisions of 49 CFR 215.9, knowing it to be defective, but with the intent to delay making repairs until the end of the 30-day reporting deadline. Indeed, under 49 U.S.C. 21301 (formerly contained in § 209(c) of the Safety Act), each day the violation continued would constitute a separate offense. In an instance where the FRA Safety Inspector hand delivers the written notification directly to an appropriate official, such as a foreman, trainmaster, or supervisor on duty at the location where the failure to comply with the provision of a Federal railroad safety law is either found or discovered, the date of actual delivery will be the operative date for reporting purposes. This provision is intended to affect the same categories of railroads that currently receive notification from FRA either that a defect exists and/or that a recommendation for the assessment of a civil penalty is being made. A railroad receiving written notification by first class mail that a recommendation for the assessment of a civil penalty is being made would be deemed to have received such notification five business days after the date of mailing, as determined by the date accompanying the signature of the safety inspector.

This subsection also requires that the railroad reporting remedial actions shall not simply indicate that corrective actions were taken, but shall select the appropriate reporting code to indicate what actions were taken, including the date of corrective actions. To take an example from the accident/incident reporting regulations, if a railroad fails to submit to FRA a monthly report of railroad accidents/incidents within 30 days after the expiration of the month during which the accident/incident occurred, an example of remedial action would be to file a late report with FRA for the relevant month. The railroad would select the remedial action code "Report filed." *See* 49 CFR 225.11 and 225.13. Or if, under the Railroad Operating Rules, a railroad required to file with the Federal Railroad Administrator one copy of its code of operating rules, timetables, and timetable instructions failed to do so, an example of remedial action would be to file the copy of the relevant documents as soon as possible after receiving the notification. The railroad would select the remedial action code "Document filed." *See* 49 CFR 217.7.

Unless the railroad selects the remedial action code "other remedial actions," submission of a brief narrative description will be optional. Although a railroad selecting "other remedial actions" is required to describe its remedial actions in a somewhat precise manner, FRA does not expect a lengthy and technical step-by-step explanation of what remedial actions were taken.

Section 209.405(a)(3) provides that each railroad shall return the form only to the FRA Safety Inspector whose name and address are so designated. Although FRA presently employs a different type of inspection report specific to each discipline, the reporting form to be provided by FRA is the current version of a new inspection report (a copy of which is appended to this final rule) for use by all railroads required to report their remedial actions. The FRA inspector will submit a copy of the completed remedial actions report form to FRA's Office of Chief Counsel for use during the penalty assessment and negotiation process. It is anticipated that the available remedial action codes along with the brief narrative section (when applicable) will be sufficient to report the remedial actions involved. Accordingly, a railroad will not be permitted the option of submitting its own version of a reporting form to FRA, even if it contains the same information as the FRA form.

A railroad is expected to submit its remedial actions report to FRA within the time limit specified in § 209.405(a), even if the railroad believes that a question exists as to factual elements constituting a violation of the statute or regulation cited on the inspection report. The only exception to this requirement concerns a railroad unable either to initiate or complete remedial actions that comply with the "Delayed Reports" requirement of § 209.407. If a railroad does contest the allegation, § 209.405(b) permits the railroad to explain its reasons on the remedial actions report form. To illustrate, while FRA does not expect a railroad to make repairs to a component part that the railroad does not believe is broken or

defective, § 209.405(b) does require the railroad to explain what actions it took to reach the conclusion that FRA's allegation was incorrect. For example, consider a situation in which a railroad disagrees with an inspector's conclusion that the height of a wheel flange on a car, from the tread to the top of the flange, was 1½ inches or more, in violation of 49 C.F.R. 215.103(b). Rather than select the category code corresponding to an actual repair job, the railroad would be expected to discuss what actions it took to disprove the inspector's conclusion. In response to SEPTA's concern, that by requiring the reporting of remedial actions FRA is in reality obtaining a guilty plea which interferes with the review and negotiations process, FRA states in § 209.405(b) that a railroad's failure to raise all pertinent defenses on the remedial actions report does not preclude it from doing so later in response to a penalty demand.

Section 209.407 sets forth in subsection (a) the procedure that must be followed by a railroad if, upon receipt of written notification from FRA both that assessment of a civil penalty will be recommended for a failure by that railroad to comply with a provision of the Federal railroad safety laws and that a remedial actions report must be submitted, it is unable to either initiate and/or complete remedial actions within the time limit set forth in § 209.405. Each railroad shall have 30 days after the calendar month in which the notification is received to report to FRA in writing the reasons for such delay and a good faith estimate of the date by which the remedial actions will be completed. For purposes of determining the calendar month in which written notification is received, the same analysis as applied to § 209.405(a) applies to this subsection as well. Further, as explained in the analysis of § 209.405(a), the 30-day time period is provided for the administrative convenience of the railroad, and the pre-existing duty to correct the defect or take other appropriate remedial actions would remain the same as it was before the effective date of these regulations.

This subsection also requires that the railroad reporting a delay in either initiating and/or completing remedial actions in a timely manner pursuant to § 209.405, shall not simply indicate that corrective actions could not be taken. It shall report to FRA with the necessary level of specificity to indicate why these actions could not be taken. This subsection makes clear that although FRA does not expect a lengthy and technical step-by-step explanation of why remedial actions could not be taken, the regulations are intended to force a railroad to be somewhat precise in its report. Consider an example from the Track Safety Standards: A railroad is informed that a recommendation for the assessment of a civil penalty is being made pursuant to 49 C.F.R. 213.109 for the failure of a 39-foot segment of its track to have a sufficient number of crossties which in combination will hold gage within the limits prescribed in § 213.53(b). Under the wording of this subsection, a written explanation to FRA merely stating that "the defect could not be corrected" would be insufficient. However, an explanation briefly stating either that "no crossties are currently in stock but will arrive within 45 days and be installed within three days after arrival" or "no funds are currently available to initiate repairs and track has been taken out of service; repairs will be completed in 60 days when funds are expected to become available" would fulfill the regulatory requirement. However, if immediately upon receiving written notification from FRA that a remedial actions report must be submitted, a railroad in the above example makes a business decision to permanently cease operations over a segment of track, the appropriate section under which to report this remedial action would be § 209.405.

Section 209.407(a)(1) provides that each railroad shall submit its explanation of the reasons for its delay in a manner that provides the inspection report number, the inspection date, and the item number. A photocopy of both sides of the Form FRA F 6180.96 on which the railroad received notification may be used for this purpose. The railroad must retain the original of Form FRA F 6180.96 and, as soon as it finally takes all actions necessary to remedy its failure to comply with a provision of the Federal railroad safety laws, submit it to FRA in accordance with § 209.407(b).

Section 209.407(a)(2) requires that upon completing all actions necessary to remedy a failure to comply with a provision of the Federal railroad safety laws, each railroad shall have 30 days after the calendar month in which the actions are completed to report to FRA in writing, in accordance with the remedial action code reporting procedures referenced in § 209.405(a) and (b).

FRA will expect a railroad to exercise good faith to determine the date by which it will complete its remedial actions, and to do so as promptly as possible. However, FRA has dropped the proposed requirement of § 209.407(c) concerning a showing of good cause by any railroad failing to complete its remedial actions within 90 days of receiving written notification of a failure to comply with a provision of the Federal railroad safety laws.

As set forth in the discussion of § 209.405(b), § 209.407(b) requires a railroad to submit its remedial actions report to FRA under the provisions of § 209.405 even if the railroad believes that a question exists as to factual elements constituting a violation of the statute or regulation cited on the inspection report. As also set forth in the analysis of § 209.405(b), if a railroad does contest the allegation it may explain its reasons on the remedial action report form and later present all pertinent defenses in response to a penalty demand.

Section 209.409 identifies the penalties FRA may impose upon any person, including a railroad, that violates any requirement of this subpart. These penalties are authorized by 49 U.S.C. 21301, 21304, and 21311 (formerly contained in § 209 of the Safety Act). The penalty provision parallels penalty provisions included in numerous other regulations issued by FRA under authority of the provisions of law formerly contained in the Safety Act. Essentially, any person who violates any requirement of this subpart or causes the violation of any such requirement will be subject to a civil penalty of at least $500 and not more than $10,000 per violation. Civil penalties may be assessed against individuals only for willful violations, and where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to persons, or causes death or injury, a penalty not to exceed $20,000 per violation may be assessed. In addition, each day a violation continues will constitute a separate offense. Finally, a person may be subject to criminal penalties for knowingly and willfully falsifying reports required by these regulations. FRA believes that the inclusion of penalty provisions for failure to comply with the regulations is important in ensuring that compliance is achieved not only in terms of submitting the relevant reports of remedial actions taken, but also in development of more accurate inspection and compliance data so as to better determine if railroads are minimizing and correcting safety problems.

Environmental Impact

FRA has evaluated these final regulations in accordance with its procedures for ensuring full consideration of the potential environmental impacts of FRA actions.

as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and related directives. These final regulations meet the criteria that establish this as a non-major action for environmental purposes.

Regulatory Impact

Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures. It is considered to be non-significant under both Executive Order 12866 and the DOT policies and procedures (44 FR 11034; February 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of the final rule. It may be inspected and photocopied at Office of Chief Counsel, Federal Railroad Administration, 400 Seventh Street, S.W., Room 8201, Washington, D.C. 20590. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at the above address.

FRA believes that, in general, the railroad industry performs repairs or takes other remedial actions in response to notification by FRA of defects and violations in a timely and complete manner. Especially where violations have been filed, failure to take corrective action could lead to vastly increased penalties and even individual liability. These regulations may provide some additional incentive to take such corrective action where it otherwise might not be taken, but that potential benefit cannot be quantified. However, it is doubtful that these regulations alone will reduce the number of defective conditions in the industry, or that they will materially reduce the rate of train accidents. Further, these regulations will not change the manner in which FRA enforces the other Federal railroad safety laws; the types of violations for which safety inspectors currently recommend the assessment of a civil penalty will remain the same.

At this time, FRA is unable to quantify any direct or indirect safety benefit from this final rule. The potential benefit of this rule comes about by increasing the ability of the railroad industry to manage quality control, as well as by improving FRA's ability to efficiently and effectively manage its inspection resources. It is hoped that railroads, after being required by these regulations to report remedial actions, will create their own internal databases of these reports. Although not required by these regulations, an internal analysis of this information, in conjunction with other resource management data, might lead railroad management to take actions designed to reduce or effectively respond to defective conditions.

The regulations will assist FRA in monitoring follow-up actions by railroads with respect to conditions sufficiently serious to warrant possible future civil penalty actions. Moreover, the regulations hold particular potential for reducing the amount of time safety inspectors spend returning to an inspection location to check on the status of a violation for which a violation report had previously been submitted. Further, the regulations permit FRA to develop more comprehensive safety data, better utilize its limited resources, and consistently treat all similarly situated violators of the Federal railroad safety laws.

The extent to which these potential benefits will be realized will become clearer over time as both the railroads and FRA learn how to best use the data required by these regulations. What appears clear at this time, however, is that it will not take the realization of many benefits to offset the relatively insignificant cost to society of approximately $71,000 per year ($63,121 to the railroad industry each year to fill out the required remedial actions reports and approximately $7,700 to FRA to review the reports).

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of rules to assess their impact on small entities. In reviewing the economic impact of the rule, FRA has concluded that it will have a minimal economic impact on a minor number of small entities. There are no direct or indirect economic impacts for small units of government, businesses, or other organizations; therefore, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the provisions of the Regulatory Flexibility Act. State rail safety agencies remain free to participate in the administration of FRA's rules, but are not required to do so.

Federalism Implications

This rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, FRA has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

This final rule has information collection requirements in §§ 209.405 and 209.407. Section 209.405 provides that when a railroad is notified in writing by an FRA Safety Inspector that a civil penalty will be recommended for a failure to comply with a provision of the Federal railroad safety laws, and that a remedial actions report must be submitted, the railroad must report to FRA all actions taken to remedy that failure. Section 209.407 has an additional information collection requirement, stating that any railroad unable to either initiate and/or complete remedial actions within the time limit set forth in § 209.405 shall submit a written explanation of the reasons for the delay and a good faith estimate of the date by which the remedial actions will be completed. FRA is submitting this information collection requirement to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). The public reporting burden for this collection of information is estimated to average approximately 23 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. A **Federal Register** notice will be published when Paperwork Reduction Act approval is obtained.

List of Subjects in 49 CFR Part 209

Railroad safety, Railroad remedial actions reporting rules.

The Final Rule

In consideration of the foregoing, chapter II, subtitle B, of title 49, Code of Federal Regulations is amended as follows:

PART 209—[AMENDED]

1. The authority citation for part 209 is revised to read as follows:

Authority: 49 U.S.C. subtitle V, part A; 49 U.S.C. chap. 51 and 57; Pub. L. 103–272; 49 U.S.C. 20301, 20303, 20304, 21302, and 21304; 49 U.S.C. 21302 and 21304; 49 U.S.C. 21302, 21304, 21311, and 20901; 49 U.S.C. 21303, 21304, and 21102; 49 U.S.C. 20102, 20103, 20107, 20108, 20110–20114, 20131–20143, 21301, 21302, 21304, 21311, and 24902; 49 U.S.C. 103(c); 49 U.S.C. 21302 and 21304; 49 U.S.C. 20302, 20305, 20502–20505, 20701–20703, 20901, 20902, 21302, and 80504; 49 U.S.C. 5103, 5104, 5110, 5112, 5120, and 5123–5125; and 49 CFR 1.49(c), (d), (f), (g), (m), (s), (ee), (gg), and internal delegations.

2. By revising § 209.3 to read as follows:

§ 209.3. Definitions.

As used in this part—

Administrator means the Administrator of FRA, the Deputy Administrator of FRA, or the delegate of either.

Chief Counsel means the Chief Counsel of FRA or his or her delegate.

Day means calendar day.

Federal railroad safety laws means the provisions of law generally at 49 U.S.C. subtitle V, part A or 49 U.S.C. chap. 51 or 57 and the rules, regulations, orders, and standards issued under any of those provisions. See Pub. L. 103–272 (1994). Before recodification, these statutory provisions were contained in the following statutes: (i) the *Federal Railroad Safety Act of 1970* (Safety Act) (49 U.S.C. 20101–20117, 20131, 20133–20141, 20143, 21301, 21302, 21304, 21311, 24902, and 24905, and §§ 4(b)(1), (i), and (t) of Pub. L. 103–272, formerly codified at 45 U.S.C. 421, 431 *et seq.*); (ii) the *Hazardous Materials Transportation Act* (Hazmat Act) (49 U.S.C. 5101 *et seq.*, formerly codified at 49 App. U.S.C. 1801 *et seq.*); (iii) the *Sanitary Food Transportation Act of 1990* (SFTA) (49 U.S.C. 5713, formerly codified at 49 App. U.S.C. 2801 (note)); and those *laws transferred to the jurisdiction of the Secretary of Transportation by subsection (e)(1), (2), and (6)(A) of section 6 of the Department of Transportation Act* (DOT Act), as in effect on June 1, 1994 (49 U.S.C. 20302, 21302, 20701–20703, 20305, 20502–20505, 20901, 20902, and 80504, formerly codified at 49 App. U.S.C. 1655(e)(1), (2), and (6)(A)). 49 U.S.C. 20111 and 20109, formerly codified at 45 U.S.C. 437 (note) and 441(e). Those laws transferred by the DOT Act include, but are not limited to, the following statutes: (i) the *Safety Appliance Acts* (49 U.S.C. 20102, 20301, 20302, 20304, 21302, and 21304, formerly codified at 45 U.S.C. 1–14, 16); (ii) the *Locomotive Inspection Act* (49 U.S.C. 20102, 20701–20703, 21302, and 21304, formerly codified at 45 U.S.C. 22–34); (iii) the *Accident Reports Act* (49 U.S.C. 20102, 20701, 20702, 20901–20903, 21302, 21304, and 21311, formerly codified at 45 U.S.C. 38–43); (iv) the *Hours of Service Act* (49 U.S.C. 20102, 21101–21107, 21303, and 21304, formerly codified at 45 U.S.C. 61–64b); and (v) the *Signal Inspection Act* (49 U.S.C. 20102, 20502–20505, 20902, 21302, and 21304, formerly codified at 49 App. U.S.C. 26).

FRA means the Federal Railroad Administration, U.S. Department of Transportation.

FRA Safety Inspector means an FRA safety inspector, a state inspector participating in railroad safety investigative and surveillance activities under Part 212 of this chapter, or any other official duly authorized by FRA.

Motion means a request to a presiding officer to take a particular action.

Person generally includes all categories of entities covered under 1 U.S.C. 1, including but not limited to the following: a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor; however, *person*, when used to describe an entity that FRA alleges to have committed a violation of the provisions of law formerly contained in the Hazardous Materials Transportation Act or contained in the Hazardous Materials Regulations, has the same meaning as in 49 U.S.C. 5102(9) (formerly codified at 49 App. U.S.C. 1802(11)), *i.e.*, an individual, firm, copartnership, corporation, company, association, joint-stock association, including any trustee, receiver, assignee, or similar representative thereof, or government, Indian tribe, or authority of a government or tribe when offering hazardous material for transportation in commerce or transporting hazardous material to further a commercial enterprise, but such term does not include the United States Postal Service or, for the purposes of 49 U.S.C. 5123–5124 (formerly contained in §§ 110 and 111 of the Hazardous Materials Transportation Act and formerly codified at 49 App. U.S.C. 1809–1810), a department, agency, or instrumentality of the Federal Government.

Pleading means any written submission setting forth claims, allegations, arguments, or evidence.

Presiding Officer means any person authorized to preside over any hearing or to make a decision on the record, including an administrative law judge.

Railroad means any form of nonhighway ground transportation that runs on rails or electro-magnetic guideways, including (i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and (ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Respondent means a person upon whom FRA has served a notice of probable violation, notice of investigation, or notice of proposed disqualification.

3. By adding a new Subpart E—Reporting of Remedial Actions, to read as follows:

Subpart E—Reporting of Remedial Actions

Sec.

(a) The purpose of this subpart is to prevent accidents and casualties arising from the operation of a railroad that result from a railroad's failure to remedy certain violations of the Federal railroad safety laws for which assessment of a civil penalty has been recommended.

(b) To achieve this purpose, this subpart requires that if an FRA Safety Inspector notifies a railroad both that assessment of a civil penalty will be recommended for its failure to comply with a provision of the Federal railroad safety laws and that a remedial actions report must be submitted, the railroad shall report to the FRA Safety Inspector, within 30 days after the end of the calendar month in which such notification is received, actions taken to remedy that failure.

(c) This subpart does not relieve the railroad of the underlying responsibility to comply with a provision of the Federal railroad safety laws. The 30-day period after the end of the calendar month in which notification is received is intended merely to provide the railroad with an opportunity to prepare its report to FRA, and does not excuse continued noncompliance.

(d) This subpart requires the submission of remedial actions reports for the general categories of physical defects, recordkeeping and reporting violations, and filing violations, where the railroad can literally and specifically correct a failure to comply with a provision of the Federal railroad safety laws, as reasonably determined by the FRA Safety Inspector. No railroad is required to submit a report for a failure involving either a completed or past transaction or a transaction that it can no longer remedy.

§ 209.403. Applicability.

This subpart applies to any railroad that receives written notification from

an FRA Safety Inspector both (i) that assessment of a civil penalty will be recommended for its failure to comply with a provision of the Federal railroad safety laws and (ii) that it must submit a remedial actions report.

§ 209.405. Reporting of remedial actions.

(a) Except as provided in § 209.407, each railroad that has received written notification on Form FRA F 6180.96 from an FRA Safety Inspector both that assessment of a civil penalty will be recommended for the railroad's failure to comply with a provision of the Federal railroad safety laws and that it must submit a remedial actions report, shall report on this form all actions that it takes to remedy that failure. The railroad shall submit the completed form to the FRA Safety Inspector within 30 days after the end of the calendar month in which the notification is received.

(1) *Date of receipt of notification.* If the FRA Safety Inspector provides written notification to the railroad by first class mail, then for purposes of determining the calendar month in which notification is received, the railroad shall be presumed to have received the notification five business days following the date of mailing.

(2) *Completion of Form FRA F 6180.96, including selection of railroad remedial action code.* Each railroad shall complete the remedial actions report in the manner prescribed on the report form. The railroad shall select the one remedial action code on the reporting form that most accurately reflects the action or actions that it took to remedy the failure, such as, repair or replacement of a defective component without movement, movement of a locomotive or car for repair (where permitted) and its subsequent repair, completion of a required test or inspection, removal of a noncomplying item from service but not for repair (where permitted), reduction of operating speed (where sufficient to achieve compliance), or any combination of actions appropriate to remedy the noncompliance cited. Any railroad selecting the remedial action code "other remedial actions" shall also furnish FRA with a brief narrative description of the action or actions taken.

(3) *Submission of Form FRA F 6180.96.* The railroad shall return the form by first class mail to the FRA Safety Inspector whose name and address appear on the form.

(b) Any railroad concluding that the violation alleged on the inspection report may not have occurred may submit the remedial actions report with an appropriate written explanation. Failure to raise all pertinent defenses does not foreclose the railroad from doing so in response to a penalty demand.

§ 209.407. Delayed reports.

(a) If a railroad cannot initiate or complete remedial actions within 30 days after the end of the calendar month in which the notification is received, it shall—

(1) Prepare, in writing, an explanation of the reasons for such delay and a good faith estimate of the date by which it will complete the remedial actions, stating the name and job title of the preparer and including either:

(i) A photocopy of both sides of the Form FRA F 6180.96 on which the railroad received notification; or

(ii) The following information:

(A) The inspection report number;

(B) The inspection date; and

(C) The item number; and

(2) Sign, date, and submit such written explanation and estimate, by first class mail, to the FRA Safety Inspector whose name and address appear on the notification, within 30 days after the end of the calendar month in which the notification is received.

(b) Within 30 days after the end of the calendar month in which all such remedial actions are completed, the railroad shall report in accordance with the remedial action code procedures referenced in § 209.405(a). The additional time provided by this section for a railroad to submit a delayed report shall not excuse it from liability for any continuing violation of a provision of the Federal railroad safety laws.

§ 209.409. Penalties.

Any person who violates any requirement of this subpart or causes the violation of any such requirement is subject to a civil penalty of at least $500 and not more than $10,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $20,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. A person may also be subject to the criminal penalties provided for in 49 U.S.C. 21311 (formerly codified in 45 U.S.C. 438(e)) for knowingly and willfully falsifying reports required by this subpart.

Issued in Washington, D.C., on August 16, 1994.

Note: The following Inspection Report/Remedial Actions Report will not appear in the Code of Federal Regulations.

Jolene M. Molitoris,

Administrator.

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION (FRA)

INSPECTION REPORT

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OMB Approval No.: 2130-xxxx

Inspector's Name	Inspector's Signature	Inspector's ID No.	Report No.	Date (yy / mm / dd)	Violation Recommended ☐ Yes ☐ No

Railroad/Company Name & Address	R/C	Division	RR/Co. Representative (Receipt Acknowledged) Name
	RR/Co. Code	Subdivision	Title
			Signature

From: City	Codes	Destination City & County	Codes	Mile Post: From ____ To ____
State		City		Inspection Point:
County		County		

Activity Code:											
Units:											

Item	Initials/Milepost	Equipment/Track #	Type/Kind	49 CFR/USC	Defect Code	Subrule	Speed	Class	Train #/Site	SNFR*	# of Occ.**	QIP Code

Description

Written Notification to FRA of Remedial Action is: Required ☐ Optional ☐ | Railroad Action Code ☐ | Date (y/m/d) __/__/__ | Comments on back? (y/n) ☐

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FORM FRA F 6180.xx   * SNFR - Special Notice for Repairs   ** # of Occ. - Number of Occurrences

RAILROAD FOLLOW-UP INSTRUCTIONS

1. Cease violating the Federal Railroad safety laws **immediately**. The time allowed to file this report does not allow a violation to continue.
2. Report remedial actions within 30 days after the end of the month in which notification of the recommendation for the assessment of a civil penalty was received. NOTE: If remedial actions cannot be taken within the 30-day period, an explanation of the reason for the delay must be submitted to the address indicated on this report.
3. Enter the type of remedial actions taken, using the appropriate Remedial Actions Source Codes for each item number.
4. Enter the completion date of the remedial actions for each item number.
5. The individual completing the remedial actions report form for the railroad must sign and date the form, thereby attesting to the completion of the remedial actions report for all line numbers. NOTE: This remedial actions report is intended to provide FRA with information of specific actions taken by the railroad in response to notification that a failure to comply with a provision of the Federal Railroad safety laws has been alleged; submission of this report does not preclude the railroad from later raising all pertinent defenses in response to a penalty demand.
6. Mail to the address indicated on the top right of this page.

WARNING! Any person who violates any requirement of 49 CFR Subpart E-Remedial Actions or causes the violation of any such requirement is subject to a civil penalty of at least $500 and not more than $10,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $20,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. A person may also be subject to the criminal penalties provided for in 49 U.S.C. 21311 (formerly codified at 45 U.S.C. 438(e)) for knowingly and willfully falsifying reports required by Subpart E-Remedial Actions.

RR/Co. Representative's Title	Date Signed
RR/Co. Representative's Signature	

Return this form to the following address:

RAILROAD REMEDIAL ACTION CODES

A - Disciplinary action/decertification
B - Document filed
C - Inspection performed
D - Locomotive or car moved for repair (where permitted)
E - Removed from service
F - Repaired
G - Replaced
H - Report filed
J - Secured
K - Speed restriction, if applicable and sufficient
L - Test performed
M - Training/remedial actions training
N - Other remedial actions

Item	Railroad Remedial Comments

Item	Railroad Remedial Comments

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DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION (FRA)

INSPECTION REPORT
(Continuation)

PAGE ____ OF ____
OMB Approval No.: 2130-xxxx

Inspector's Name	Inspector's Signature	Inspector's ID No.	Report No.	Date			Violation Recommended
				yy	mm	dd	☐ Yes ☐ No

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federal register

Wednesday
August 24, 1994

Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; Proposed Frameworks for Late-Season Migratory Bird Hunting Regulations; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

RIN 1018–AA24

Migratory Bird Hunting; Proposed Frameworks for Late-Season Migratory Bird Hunting Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; supplemental.

SUMMARY: The Fish and Wildlife Service (hereinafter the Service) is proposing to establish the 1994–95 late-season hunting regulations for certain migratory game birds. The Service annually prescribes frameworks, or outer limits, for dates and times when hunting may occur and the number of birds that may be taken and possessed in late seasons. These frameworks are necessary to allow State selections of final seasons and limits and to allow recreational harvest at levels compatible with population and habitat conditions.

DATES: The comment period for proposed late-season frameworks will end on September 2, 1994.

ADDRESSES: Comments should be mailed to Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms 634—ARLSQ, 1849 C Street, NW., Washington, DC 20240. Comments received will be available for public inspection during normal business hours in room 634, Arlington Square Building, 4401 N. Fairfax Drive, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Paul R. Schmidt, Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms 634—ARLSQ, 1849 C Street, NW., Washington, DC 20240, (703) 358–1714.

SUPPLEMENTARY INFORMATION:

Regulations Schedule for 1994

On April 7, 1994, the Service published for public comment in the **Federal Register** (59 FR 16762) a proposal to amend 50 CFR part 20, with comment periods ending July 21 for early-season proposals and September 2 for late-season proposals. On June 8, 1994, the Service published for public comment a second document (59 FR 29700) which provided supplemental proposals for early- and late-season migratory bird hunting regulations frameworks.

On June 23, 1994, a public hearing was held in Washington, DC, as announced in the April 7 and June 8 **Federal Registers** to review the status of migratory shore and upland game birds. Proposed hunting regulations were discussed for these species and for other early seasons.

On July 12, 1994, the Service published in the **Federal Register** (59 FR 35566) a third document which dealt specifically with proposed early-season frameworks for the 1994–95 season.

On August 4, 1994, a public hearing was held in Washington, DC, as announced in the April 7, June 8, and July 12 **Federal Registers**, to review the status of waterfowl. Proposed hunting regulations were discussed for these late seasons. The Service later published a fourth document containing final frameworks for early seasons from which wildlife conservation agency officials from the States and Territories selected early-season hunting dates, hours, areas, and limits.

This document is the fifth in the series of proposed, supplemental, and final rulemaking documents for migratory bird hunting regulations and deals specifically with proposed frameworks for the late-season migratory bird hunting regulations. It will lead to final frameworks from which States may select season dates, hours, areas, and limits. All pertinent comments on the proposals received through August 4, 1994, have been considered in developing this document. In addition, new proposals for certain late-season regulations are provided for public comment. The comment period is specified above under DATES. Final regulatory frameworks for late-season migratory game bird hunting are scheduled for publication in the **Federal Register** on or about September 23, 1994.

Presentations at Public Hearing

A report on the status of waterfowl was presented. This report is briefly reviewed below as a matter of public information, and is a summary of information contained in the "Status of Waterfowl and Fall Flight Forecast" report.

The onset of spring in arctic and subarctic nesting areas this year was intermediate between that of 1992, which was one of the latest springs on record, and 1993, which was one of the earliest. Nesting phenology in the Arctic was more variable than last year and production from most populations will be near average. In nesting areas farther south, several Canada goose populations will benefit from improved habitat conditions in central Canada and the northcentral U.S. Most goose and swan populations in North America remain numerically sound and the size of most fall flights will be only slightly smaller than those of last year. Of continuing concern, however, is the declining number of Atlantic and Southern James Bay Canada geese. Also of concern are dusky Canada geese, whose numbers appear to have stabilized, but at a level approximately half of those observed in the 1970's.

In 1993, the breeding population of ducks was lower than in 1992. However, improved habitat conditions in the northcentral U.S. resulted in increased production from that region, and led to a fall flight similar in size to that of 1992. During the 1993 hunting season, recovery rates of mallards were lower than rates from the 1992 season. However, recovery rates of immature mallards during the last two waterfowl seasons were greater than those from the 1988–91 period. In 1994, the estimated number of ducks in the surveyed area was 32.5 million, an increase of 24 percent from that in 1993 and similar to the long-term average. The estimated number of mallards was 7.0 million, which was higher than the estimate of 5.7 million in 1993 and similar to the long-term average. Estimates for seven of the other nine principal species were higher in 1994 than in 1993; the estimates for canvasbacks and scaup were similar to those of last year. Numbers of gadwall, green-winged teal, blue-winged teal, and northern shovelers were above their respective long-term averages; whereas estimates for mallards, American wigeon, redheads, and canvasback were similar to long-term averages. Estimates of northern pintails and scaup remained below their 1955-93 means. The number of ponds in May increased 47 percent this year, and was higher than the long-term average. Improved habitat conditions throughout most of the mid-continent region led to large increases in production indices. The predicted fall-flight index for mallards (12.0 million) is 36 percent higher than that of last year. The total duck fall-flight index for 1994 is 71 million birds, which is similar in size to those which occurred during the early 1980's.

Dr. Robert Trost reviewed harvest and hunter participation statistics from the 1993–94 hunting season. Harvest and hunter activity remained essentially unchanged from the previous year, with notable exceptions of increases in Canada goose and wood duck harvests. Harvest age ratio information suggested that production improved for ducks and was markedly improved for geese in 1993. Band-recovery data indicate that the reduced harvest rates of ducks in recent years continued in the 1993–94

hunting season. Although harvests of Canada geese are increasing with increasing Canada goose populations, harvests of some snow goose stocks appear to be declining despite marked increases in populations. This has happened despite increasingly more liberal harvest regulations. Further discussion was presented on the complexities of population-specific harvest management of geese when populations of different status overlap during the period of harvest. Final comments highlighted the importance of accurate information to ensure proper management of all migratory game bird populations.

Review of Comments Received at Public Hearing

Ten individuals presented statements at the August 4, 1994, public hearing. These comments are summarized below.

Dr. Rollin Sparrowe, President of the Wildlife Management Institute, expressed optimism for the recovery of duck populations this year following many years of decline due to poor habitat conditions and praised many wildlife agencies, private organizations, and individuals for maintaining their support during several years of adversity. However, now that recovery appears to be under way, he indicated that some liberalization in harvest regulations was warranted but the major question was how much and how fast should these liberalizations be implemented. He strongly urged all those participating in the process to listen to one another and to not confuse the public by disagreements in regulatory proposals between the Service and Flyway Councils. He added that a single year of recovery did not constitute an upward trend. Finally, he requested everyone to work together and to focus their efforts on habitat programs, since habitat is the principal component needed to sustain a full recovery of duck populations to objective levels.

The California Waterfowl Association, represented by Mr. Walter Sikes, urged the Service to adopt waterfowl hunting regulations proposed by the Pacific Flyway Council. They believe that the proposed regulations would provide greater incentives for duck hunters to maintain habitats and manage private lands for waterfowl than continuing with the proposed restrictive regulations. They believe that increases in the waterfowl breeding population size and the fall flight, this year, also justify liberalizing hunting regulations. The California Waterfowl Association questioned if previous harvest restrictions assisted in the recovery of waterfowl populations from low levels. They suggested that the Service has imposed restrictions based on a trend towards continental waterfowl management and a desire for simplified regulations. They believe that this may unnecessarily restrict hunting opportunities on healthy populations and that regulations should be consistent with population distribution and habitat conditions within a flyway.

Mr. Brian Cavey, a legislative assistant for Senator Max Baucus of Montana, supported recommendations put forth by the Central and Pacific Flyway Councils. He stated that Montana is a primary production area for most of the U.S., Canada, and other nations to the south and that this year's duck breeding population reached 1.4 million. He pointed out that this is an all-time high estimate and 60 percent greater than the 30-year average and that this great response was inpartly due to improved habitat conditions and landowner-sportsman-government cooperation in habitat programs.

Mr. Cavey indicated that last year about 14,000 hunters pursued waterfowl in Montana and numbered over 400,000 in the Central and Pacific Flyways. However, he was disappointed in the significant declining trends in waterfowl hunters observed over the past 20 years. He pointed out that this decline was in part due to the reduction in hunting stocks of birds and hunting restrictions which accompanied these losses.

Mr. Cavey pointed out that this year's duck breeding population estimate represented the second successive year of increases. Although it was known that a variety of circumstances contributed to this improvement, the Conservation Reserve Program (CRP) and the cooperative efforts of private landowners and State and Federal agencies have resulted in significant improvement in duck breeding habitat. He indicated that the hunters in Montana and the surrounding States expect and deserve the opportunity to share in the wealth of these improved waterfowl resources. Further, he recommended that the conservative increases in bag limits and season lengths recommended reflect an appropriate response to the current abundance of birds in the two flyways.

Mr. Bruce Barbour, representing the National Audubon Society, indicated that Eastern and Western Populations of tundra swans are increasing and stable, respectively, and had no concern over current population levels. He supported efforts to restore breeding populations of trumpeter swans throughout their historic breeding range. With respect to Canada geese, he pointed out that most populations are doing well, but that there is continued concern for the status of dusky, Aleutian, Southern James Bay, and Atlantic Populations. The Mid-Continent Population of snow geese remains of concern, as record high populations are degrading brood-rearing areas and as a result are exhibiting density-dependent population characteristics such as reduced clutch size, declines in gosling growth rates and body size and reduced juvenile survival. Increasing long-term habitat degradation on breeding areas is highly probable and a resultant future population crash is possible. For these reasons, the National Audubon Society supports extension of the closing framework date to February 28 in all southern tier (wintering) States in the Central Flyway.

For ducks, he identified a series of factors that have contributed to exceptionally good production across primary duck producing areas of the prairie and parkland region of the U.S. and Canada. However, he indicated that even though one excellent production year is not yet a trend, excellent water conditions have persisted through the summer and recovery in duck populations appears to have started. For these reasons, he stated that some liberalization in hunting regulations is possible, but advised cautious restraint that would not jeopardize recovery. He suggested that our goal should be to return as many breeding pairs as possible to the nesting grounds and to take full advantage of the likely excellent nesting conditions again in 1995 and continue the progressive recovery that is underway. He recommended that the Service continue the restrictive harvest regulations on pintail, hen mallards, black ducks, redheads, and canvasbacks. With respect to canvasbacks, the National Audubon Society supports the Service's proposed harvest strategy. However, he cautioned that the Service should consider the use of area closures in specific areas where canvasbacks heavily concentrate and where they may be especially vulnerable. Finally, he supported various types of existing Federal programs and legislation that would protect migratory bird habitats. In addition, he urged increased funding for the National Wildlife Refuge Program and indicated great concern for the proposed extension of the Intracoastal Waterway in Texas and its potential impact on the Laguna Madre and to those populations of redheads,

reddish egrets, and other species that depend on these habitats.

Mr. K.L. Cool, representing the Central Flyway Council, stated his concern for the long-term downward trend in the number of waterfowl hunters. He pointed out that the factors responsible for this decline have not been identified, but undoubtedly include: decreased duck numbers from drought, habitat loss and change, controversy over non-toxic shot implementation, cost of licenses and ammunition, and complex hunting regulations. He noted that this year we have a chance to reverse this trend by developing both a biological and practical hunting framework that will protect waterfowl populations.

Mr. Cool provided substantial evidence of the contribution of the United States Department of Agriculture's CRP to improvements in this year's duck production and predicted increase in this year's fall flight. He indicated that an estimated 3 million ducks were hatched in CRP fields in the northcentral U.S. this spring. He commended the Service for their realistic proposed increase in bag limits for ducks. He suggested that the change will send the correct message that waterfowl numbers are improving and will call appropriate attention to duck species and sexes still of concern. With the recommended bag-limit structure, we will be able to work with hunters to direct harvest away from certain species and sexes, while welcoming waterfowl hunters and conservationists back to the marsh to harvest an abundant renewable natural resource.

Mr. Cool then provided the rationale for the Central Flyway Council's desire to amend the Duck Stamp Act to change the minimum age requirement from 16 to 18. He could not support the decision to eliminate the point-system option from the regulatory frameworks. In this regard, he pointed out the success in States using the point system in directing harvest pressure towards species of abundance and away from species and sexes of concern. He requested that the Service offer a point system at parity this year and in the coming year provide the Flyways with a forum for further evaluation of this bag-limit option. He also requested reconsideration of the request to allow all Flyways an additional 7 days of hunting opportunity for ducks. He applauded the Service for accepting all goose and swan recommendations.

Representative Steve Gunderson (Wisconsin) expressed concern about a 9-day special September teal season being offered to "non-production States" while production States must wait for the late-season period. He supported the opening of the canvasback season Flyway-wide with certain minimum restrictions as recommended by the Upper-Region Regulations Committee of the Mississippi Flyway Council. He also endorsed a procedure recommended by the Upper-Region Regulations Committee of the Mississippi Flyway Council to manage Canada goose harvests in the Mississippi River Subzone in southwest Wisconsin.

Mr. Scott Sutherland, representing Ducks Unlimited (DU), Inc., commented that this has been an exceptional year for waterfowl production and the basis for much optimism. The DU Continental Plan has now been completed and now serves as a guide for directing DU's resources to the areas and species of greatest need. With respect to geese, he stated that although most populations are healthy, nine populations still remain a concern, including: cackling, dusky, Aleutian, Atlantic, and the Southern James Bay Populations of Canada geese; Pacific white-fronted geese; Pacific black brant; emporer geese; and Wrangle Island snow geese. He stated that breeding-population surveys and banding should be improved, and encouraged the National Biological Survey and the Service to direct sufficient resources to the collection and analysis of this information. With respect to ducks, he stated that several species are still below North American Waterfowl Management Plan goals, including the mallard, black duck, American wigeon, blue-winged teal, canvasback, and scaup; Steller's and spectacled eiders are also of concern. Overall, this year showed dramatic increases in the status of most ducks and underscores the need to continue to expand and improve operational survey and banding programs. These improvements in the database would allow the development of more refined regional and flyway management plans for all species. This year's fall flight will show a dramatic increase over last year and is directly related to improved precipitation and habitat programs currently in place, especially in the prairie areas of the north-central U.S. The CRP has greatly benefitted ground-nesting ducks. The funding for the North American Wetlands Conservation Act must also be maintained to restore and enhance wetland habitats.

Mr. Sutherland supported the recommendations of the four Flyway Councils. He pointed out that these recommendations were based on sound biological rationale and that careful liberalization for ducks is now warranted.

Representative Jay Dickey from the 4th Congressional District in Arkansas, supported a 10-day extension of the duck-hunting season in Arkansas and other areas. This would allow families additional time to spend together, while providing a boost to our economies. He congratulated the Service for guarding our duck resources through the past difficult times and making this request for liberalization possible at this time.

Representative Tim Petrie from the 6th Congressional District in Wisconsin, indicated that he would like to summarize concerns of 4,200 sportsman that signed a petition that requested an additional 9 days of duck hunting opportunity. He pointed out that the increase in the number of days from 30 to 39 would compensate Wisconsin hunters for days not allowed for special September teal seasons that are given to most Mississippi Flyway States. He noted that duck stamp sales in Wisconsin have fallen from 95,000 in 1990 to 77,000 in 1992. In contrast, he stated that duck populations have recovered and are now above long-term averages. Wisconsin sportsmen have contributed to these expanding populations by participating in habitat and nest-improvement programs and are deserving of additional duck-hunting opportunity.

Dr. Gary Will, representing the Pacific Flyway Council, agreed with most proposed frameworks governing duck hunting, with the exceptions that the daily bag limit of pintails should be increased by 1 drake and the season length should be increased by 7 days in all Flyways. Regarding the pintail limit, he said that the 1994 breeding population of 2.9 million pintails is 45 percent more than in 1993 and higher than when regulations allowed 7 pintails in the Pacific Flyway and up to 10 birds elsewhere. Mitigating the effects of the increased limit, he noted that the number of active adult hunters was down 61 percent in 1993 from that in 1984 and the direct recovery rates for pintails, which were about half of that for mallards, decreased from 0.0225 to 0.0111 during 1985–87 and 1988–92, respectively. Considering the forecasted size of the fall flight, the additional week was both reasonable and biologically sound.

Dr. Will recommended allowing modest liberalization of the take of white-fronted geese in California, Oregon, and Washington, which he estimated would result in an additional harvest of approximately 3,750 while still allowing a 5–10 percent annual population growth. He said that the

population would likely be at an objective level this fall, and development of the Service's requested long-term harvest strategy for this population would be completed. Lack of that strategy should not be a prerequisite to the Council's recommended changes.

Dr. Will reemphasized the Council's support for restrictions on tundra swan hunting in portions of the Pacific Flyway to minimize the accidental take of trumpeter swans, including an early closure in Utah and closing a portion of the Green River area in Utah to swan hunting. However, he urged adding 300 permits to Utah in compensation for lost harvest opportunities because of these restrictive measures. He encouraged the Service to continue to cooperate with the Council and participating States in the management of the Rocky Mountain Population of trumpeter swans. Efforts would include allowing a continued reasonable harvest of tundra swans while accommodating trumpeter swan range expansion to solve winter bottleneck problems in southeastern Idaho.

Flyway Council Recommendations and Written Comments

The preliminary proposed rulemaking which appeared in the April 7 **Federal Register**, opened the public-comment period for late-season migratory game bird hunting regulations. As of August 4, 1994, the Service had received 82 comments; 54 of these specifically addressed late-season issues. The Service also received recommendations from all four Flyway Councils. The Flyway Councils generally supported "no change" in frameworks for most migratory game bird hunting seasons. Only those written comments are included herein where there is a difference between a Council recommendation and the Service's proposal. Late-season comments are summarized and discussed in the order used in the April 7 **Federal Register**. Only the numbered items pertaining to late seasons for which written comments were received are included.

General

The California Waterfowl Association urged the Service to consider the link between hunting opportunities and hunter support of habitat programs when formulating regulations. They believe that the current sizes of waterfowl populations justify a relaxation of restrictions.

An individual from California requested that waterfowl harvests should be managed on a flyway basis.

The Nebraska Low Plains Waterfowlers' Association requested liberalizations in duck hunting frameworks this year. They requested that, if both season length and bag limits cannot be increased, season length alone should be liberalized. They believe that it is time to reward sportsmen for their support of waterfowl management.

The Minnesota Department of Natural Resources urged the Service to liberalize season length rather than bag limits if both could not be liberalized this year.

Dr. Robert McLandress, Director of the Waterfowl and Wetland Program of the California Waterfowl Association, expressed his concern for the 65 percent decrease in California waterfowl hunters during the past two decades and the impact of such losses on wetland habitat preservation and maintenance. He noted that the number of California waterfowl hunters was more highly correlated with pintail harvests and pintail breeding populations than with harvests and populations of other ducks.

Walter R. Sikes, representing the California Waterfowl Association, noted that 1994 would be the second year of good production for Pacific Flyway duck populations which should provide relief to the existing restrictions. He said that reduced waterfowl populations and hunting opportunities had discouraged support for habitat restoration efforts in California; but nonetheless, California waterfowlers have spent millions of dollars on waterfowl habitat improvement programs in that State. He indicated that historical data support relaxation of regulations, noting that during years with similar duck populations, seasons were 31 percent longer, bag limits were 75 percent higher, and hunter numbers were at least 35 percent greater than in 1993.

Two local sportsmen's organizations from Massachusetts requested thresholds figures for all species of waterfowl as to when seasons shall be opened or closed.

1. Ducks

A. General Harvest Strategy

Council Recommendations: The Pacific Flyway Council recommended seasons and limits similar to those in effect during 1985–87 (with the exception of pintail) when significant reductions in bag and season length were imposed to protect certain declining duck populations. The Council presented information on duck populations, hunter numbers, and duck harvest in support of their recommendations. Compared to that period, the current breeding population estimates of mallards, pintails and total ducks are up 22 percent, 13 percent and 20 percent respectively. Additionally, current breeding population estimates for all ducks except scaup are above their respective levels of 1985, which was the first year restrictive regulations were mandated.

Recent trends of duck breeding populations are upward compared to generally declining trends through the 1980's. Production estimates this year are excellent and the fall flight forecast of 71 million ducks is substantially above the estimates for 1985–87 which ranged from 55 to 66 million. The 1993 estimate of Pacific Flyway adult waterfowl hunters was 29 percent below the 1985–87 average, and was the second lowest on record. Although hunter numbers in 1993 increased for the first time since 1983, and additional hunters are anticipated in 1994, hunter numbers are not expected to approach the 1985–87 level. Band-recovery rates from birds banded in reference areas important to the Pacific Flyway indicate that substantial reductions in harvest rate for mallards and pintails occurred between 1985–87 and 1988–92, e.g. –27 and –51 percent for mallards and pintails, respectively.

B. Framework Dates

Council Recommendations: The Central Flyway Council recommended that the hunting season frameworks for duck, coot, and merganser seasons begin on the Saturday nearest October 1, (October 1, 1994) and extend until the Sunday nearest January 20 (January 22, 1995).

The Upper-Region and Lower-Region Regulations Committees of the Mississippi Flyway Council recommended framework opening and closing dates of the Saturday nearest October 1 to January 20. The Lower-Region Regulations Committee also recommended that opening and closing dates be established as a basic regulation and not fluctuate annually.

The Pacific Flyway Council recommended outside season dates of the Saturday closest to October 1 to the Sunday closest to January 20. Floating framework dates are recommended because (1) the flyway has traditionally been offered Saturday openings and Sunday closing for most migratory game birds, (2) implementing a fixed calendar date, as recommended by the Service, will further restrict hunting opportunity in those States that traditionally open hunting on Saturday and close on Sunday, (3) departure from this traditional format will be confusing and unnecessarily restrictive, (4) there are no biological consequences to floating frameworks since we are dealing with

only plus or minus 3 days in opening and closing dates, (5) a Saturday opening allows participation by school-age hunters and those that have a traditional work week, (6) there are no biological or political justifications which warrant a change from previous outside framework dates.

C Season Lengths

Council Recommendations: The Atlantic Flyway Council and the Upper-Region and Lower Region Regulations Committees of the Mississippi Flyway Council recommended a 40-day duck season.

The Central Flyway Council recommended that for the High Plains Mallard Management Unit, season length would be 69 days, 16 of which must occur starting no earlier than the Saturday closest to December 10 (December 10, 1994). For the remainder of the Flyway (Low Plains portion), the Council recommended a season length of 53 days.

The Pacific Flyway Council recommended a season length of 79 days, with 7 additional days in the Columbia Basin Mallard Management Unit.

Written Comments: The Minnesota Department of Natural Resources supported the Mississippi Flyway Council's Upper-Region Regulations Committee recommendation for a 40-day duck season.

An individual from California asked that the Service consider allowing 86 days of duck hunting in the Pacific Flyway.

The Nebraska Low Plains Waterfowlers' Association urged the Service to allow 46 days of duck hunting in the Low Plains portion of the Central Flyway.

The Wisconsin Department of Natural Resources requested that the Service reconsider its proposal for a 30-day duck season with a 4-bird daily bag limit. They suggested that if the Service feels a more conservative season is necessary this year, then a 40-day season with a 3-bird daily bag limit would be more acceptable.

The Wisconsin Department of Natural Resources endorsed the recommendations of the Mississippi Flyway Council's Upper-Region Regulations Committee. They also expressed concern that "non-production States" are offered a 9-day special teal season while production States are not offered some type of compensatory opportunity.

Two local sportsmen's organizations from Massachusetts requested a 35-day season for duck hunting in the Atlantic Flyway.

Several individuals from Arkansas asked that instead of increasing the daily bag limits from 3 to 4 birds, the Service consider increasing the season length from 30 to 40 days for duck hunting.

Congressman Don Sundquist of Tennessee endorsed the Mississippi Flyway Council's recommendation for a 40-day season with a 4-bird daily bag limit and urged the Service to reconsider the 30 day season proposal.

The Tennessee Wildlife Resources Agency encouraged the Service to adopt a season framework for ducks that included additional days and supported 40 days as biologically justified.

The Illinois Department of Conservation urged the Service to consider a 40-day season framework with a 3-bird daily bag limit.

Congressman Steve Gunderson of Wisconsin expressed concern for the Service's proposal to allow a 30-day season and asked that consideration be given to a 40-day season with a 3-bird daily bag limit to provide more recreational opportunity for hunters.

Both the Wisconsin Wildlife Federation and the Wisconsin Conservation Congress asked the Service to consider a 40-day season with a 3-bird daily bag limit.

The Michigan Department of Natural Resources expressed concern that the Service did not support the Mississippi Flyway proposal for a 40-day season with a 4-bird bag limit and suggested if further protection was warranted, they would prefer a 40-day season with a 3-bird daily bag limit.

The Indiana Department of Natural Resources disagreed with the Service's proposal and asked for reconsideration of a 40-day, 4-bird bag limit, but would accept a 3-bird bag limit and a 40-day season, if necessary.

The Kentucky Department of Fish and Wildlife Resources indicated preference for an increase in the season length rather than an increase in the daily bag limit, but stated that they may support the decisions of the Service, if conservative measures were necessary, based on additional information.

The Ohio Department of Natural Resources asked for a season of 40 days with a 4-bird bag limit, but if not acceptable to the Service, would opt for a longer season over an expanded bag limit.

The South Carolina Department of Natural Resources felt that State input was being disregarded and that the Service's restrictive proposal does not show support for hunting and will be difficult to explain to the sportsman.

E. Bag Limits

Council Recommendations: The Atlantic Flyway Council requested a 4-bird bag limit for their regular duck season, which will include no more than 1 canvasback, 1 black duck, and 1 pintail; 2 wood ducks and 2 redheads; and 3 mallards of which only 1 may be a hen.

The Central Flyway Council requested that the Service review its policy for the use of the point-system bag limit option that requires that it be no more liberal than the conventional bag limit.

The Central Flyway Council recommended that with respect to duck, coot and merganser hunting regulations, that States selecting the High Plains Mallard Management Unit season option of additional late hunting opportunity may select either the point system or the conventional bag for establishing daily possession limits in the entire State.

The Central Flyway Council recommended that for those States where the daily bag and possession limits are established by the conventional bag limit, the daily bag would be 4 birds with species and sex restrictions as follows: hen mallard, pintail, redhead, mottled duck, and canvasback, 1 bird; wood duck, 2 birds; all other species and sexes not mentioned above, 4 birds. The possession limit would be twice the daily bag limit.

The Central Flyway Council recommended that for those States where the daily bag and possession limits are established by the point-system bag limit, point values for species and sexes would be as follows: redhead, canvasback, hen mallard, pintail, hooded merganser and mottled duck, 100 points each; wood duck, 50 points each; mallard drake, gadwall, wigeon, green-winged teal, blue-winged teal, cinnamon teal, shoveler, whistling duck, common and red-breasted merganser, 20 points each; all other species and sexes of ducks, 35 points each. The possession limit under the point system would be the maximum number of birds that legally could have been taken in 2 days.

The Lower-Region Regulations Committee of the Mississippi Flyway Council recommended a point-system bag-limit option that would provide, for several species, 1 more bird in the daily bag limit than the conventional bag limit.

The Upper-Region and Lower-Region Regulations Committees of the Mississippi Flyway Council requested that the Service review its current point-system bag-limit policy. They feel that

at least 1 more bird should be allowed in the point system than in the conventional bag limit.

The Upper-Region and Lower-Region Regulations Committees of the Mississippi Flyway Council recommended that the overall duck bag limit be increased from 3 to 4, that the number of male mallards allowed be increased from 2 to 3, and that 1 canvasback be allowed daily. The Lower-Region Regulations Committee also recommended a restriction of 3 mottled ducks in the 4-bird daily limit. Other species/sex restrictions would be the same as last year.

The Pacific Flyway Council recommended that the Service: (1) review its current point-system policy, (2) work with both Pacific and Central Flyway Technical Committees to interpret available data, and (3) consider all available new information and evaluate the point system against other bag-limit systems.

The Pacific Flyway Council recommended a daily bag limit of 5 ducks, including not more than: 4 mallards, only 1 of which may be a hen; 2 pintails, only 1 of which may be a hen; 2 redheads; and 1 canvasback.

Written Comments: The Minnesota Department of Natural Resources supported the Mississippi Flyway Council's Upper-Region Regulations Committee recommendation for a daily bag limit of 4 ducks.

An individual from California requested that the Service consider increasing the total duck daily bag limit to 5, the mallard limit to 5, and the pintail limit to 2 in the Pacific Flyway.

The Nebraska Low Plains Waterfowlers' Association urged the Service to allow a daily bag limit of 3 mallards in the Low Plains portion of the Central Flyway.

An individual from California requested that the duck daily bag limit be increased to 6, with a 1 or 2 daily bag limit for mallards, or no mallards at all as an acceptable alternative. He also requested increasing the daily bag limit of pintails to 2.

Dr. Robert McLandress, Director of the Waterfowl and Wetland Program of the California Waterfowl Association, presented historical information on regulations and harvests of pintails and believed that an increase in the pintail daily bag limit to at least 3 birds was warranted and would provide much needed encouragement for hunters and habitat management in California. He believed bag limit restrictions for mallards in California were inappropriate given evidence of a preponderance of California produced mallards in the harvest, consistently high nesting success and good brood survival. He believed the breeding population decline in California in 1994 was caused by the elimination of set-aside rice lands, favored by nesting mallards; however, there were significant increases elsewhere in the State. In addition to increased limits of mallards and pintails, he recommended an addition of 1 duck to the daily bag limit and 8 additional days.

The Oklahoma Department of Wildlife Conservation requested that the Service work with the Flyway Councils to cooperatively review its policy on the use of the point system for determining daily bag limits for ducks. It was pointed out that the Central Flyway Council believes that the 1990 point-system review contained misinterpretations and omissions that should be cooperatively resolved prior to any decision on the use of this important harvest-management tool. Further, they stated that the process used for the handling of the updated review of the point system appeared to be a breach of the cooperative spirit and partnership approach to migratory bird management programs in the Central Flyway.

F. Zones and Splits

Council Recommendations: The Pacific Flyway Council recommended continuation of the Southern San Joaquin Valley Waterfowl Zone in California in 1994 and that this zone be made permanent. About 3,500 acres of Tulare Basin wetlands are managed as duck clubs, which represents a loss of about 1,500 acres of managed wetlands between 1971 and 1988. About 200 additional acres of wetlands had been flooded for waterfowl and other wetland-dependent wildlife in response to the creation of the zone. During 1991–93, this zone has allowed for a month delay in the opening date from the surrounding Balance-of-the-State and Southern California zones. This delay allows private wetland owners to take advantage of reduced electric pumping rates which become effective November 1, as well as reduced evapotranspiration rates which occur as temperatures decline. This results in an approximate 20 percent reduction in the cost of flooding. Any reductions in water cost provides an incentive for the continued flooding of private wetlands. The situation is not relieved by improvements in rainfall, because although surface water availability improves somewhat, ground water pumping costs are still high.

Establishment of the zone has not affected harvest. Estimated harvest of ducks from Kern, Kings and Tulare Counties constituted between 3.0 and 5.6 percent of the Statewide harvest in the periods 1961–1990. Since implementation of the zone in 1991, 2.5 percent of the State duck harvest has occurred in the zone. Pintail harvest in the zone declined from a high of 4.5 percent of the State harvest to 2.5 percent.

Written Comments: Two local sportsmen's organizations from Massachusetts requested continuation of zoning for their State.

G. Special Seasons/Species Management

i. Canvasback

Council Recommendations: The Atlantic Flyway Council recommended that an open season for canvasbacks be allowed with a 1-bird daily bag limit throughout the length of the 1994 season in the Atlantic Flyway.

The Central Flyway Council recommended that the Service adopt the alternative canvasback harvest management strategy developed by State representatives from all four flyways of the Adaptive Harvest Management Working Group.

The Central Flyway Council recommended that an open season for canvasbacks throughout the regular duck season be allowed for all four Flyways with a 1-bird daily bag limit beginning in 1994, contingent upon breeding population and habitat conditions.

The Upper-Region and Lower-Region Regulations Committees of the Mississippi Flyway Council recommended that an open season for canvasbacks be allowed in the Mississippi Flyway with a 1-bird daily bag limit throughout the regular duck season.

The Pacific Flyway Council recommended adoption of an interim canvasback strategy that would allow harvest of that species throughout the regular duck season in all four Flyways, with a daily bag limit of 1 canvasback (either sex), when the 3-year running average of estimated May breeding population is at or above 480,000 birds. No season should be allowed when the average index is below that level.

Written Comments: The Michigan Department of Natural Resources supported the Service's strategy for canvasback harvest management. They recommended allowing a canvasback season in 1994 and continuing the season for at least 3 years.

The Wisconsin Department of Natural Resources opposed the reestablishment of closed areas for canvasback hunting, preferring instead that the season be open Flyway-wide.

3. Mergansers

Council Recommendations: The Central Flyway Council recommended that the hunting season for mergansers under the conventional regulation remain unchanged from last year and run concurrently with the duck season; the daily bag limit would remain at 5, of which no more than 1 may be a hooded merganser; the possession limit would be twice the daily bag limit.

The Central Flyway Council also recommended point value changes under the point system option in determining bag limits and framework dates that involve mergansers. See item **1. Ducks.**

4. Canada Geese

A. Special Seasons

Council Recommendations: The Atlantic Flyway Council recommended that the Service amend the criteria for late special Canada goose seasons to require 2-year data collection for proposal submission. They also recommended a 3-year late experimental season in northeastern New Jersey for 1995-97. The Atlantic Flyway Council requested that the late special Canada goose season in Long Island, New York, be discontinued.

B. Regular Seasons

Council Recommendations: The Central Flyway Council recommended that the dark goose hunting regulations in the east tier States (Kansas, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas [Eastern Goose Zone]) be 86 days with a bag limit of 2 in North Dakota and 2 with no more than 1 white-fronted goose in Kansas, Nebraska, Oklahoma, South Dakota and the eastern goose zone of Texas. The white-fronted goose season in Texas should not exceed 72 days, and during the remaining 14 days of the season, the bag limit will be no more than 2 Canada geese.

The Central Flyway Council recommended that the bag limits for dark geese in the western tier States (Colorado [east of the Continental Divide], Montana (Counties of Blaine, Carbon, Fergus, Judith Basin, Stillwater, Sweetgrass, Wheatland, and all counties east thereof], New Mexico [east of the Continental Divide except the Jicarilla Apache Indian Reservation], Texas [Western Goose Zone], and Wyoming [east of the Continental Divide]) remain unchanged from last year. The dark goose bag and possession limits would be 3 and 6, respectively, except in Montana. In Montana, excluding Sheridan County, dark goose bag and possession limits would be 4 and 8, respectively; and in Sheridan County they would be 2 and 4, respectively.

The Central Flyway Council recommended that the framework dates for dark geese hunting in the east tier States be unchanged from last year and remain as the Saturday nearest October 1 (October 1 in 1994) and end on January 31. The recommended dates for dark geese in the west tier States would be unchanged from last year as the Saturday nearest October 1 (October 1, 1994) through January 31, 1995.

The Upper-Region and Lower-Region Regulations Committees of the Mississippi Flyway Council recommended several changes in Canada goose quotas, season lengths, etc., based on population status and population management plans and programs. The Upper-Region Regulations Committee also recommended that the Service allow seasons for geese to be split into 3 segments.

The Pacific Flyway Council recommended allowing cackling Canada geese to be taken outside their normal range in California, Oregon, and Washington as part of the prevailing limit on Canada geese. Within their normal range, the Council recommended that the bag limit would include not more than 1 cackling Canada goose. The 1-cackler limit would apply to the Southwestern Washington Goose Quota Area, all of Oregon, and a majority of California where the season would be concurrent with the restricted white-fronted goose season.

The Pacific Flyway Council recommended that for Oregon, the Malheur County Zone be incorporated into a Harney, Klamath, Lake, and Malheur Counties Zone, thereby allowing the season on dark geese to end on the Saturday closest to January 20 instead of the first Sunday in January and the dark goose limit increased from 3 to 4, including not more than 2 whitefronts. The adjacent Southwestern Zone in Idaho would be permitted similar frameworks to that recommended for Malheur County.

The Pacific Flyway Council sought a limited resumption of cackling Canada goose hunting throughout the population's range and recommended that the Service provide an expedited Section 7 Consultation review of their recommended changes in cackling Canada goose regulations for possible impacts on Aleutian Canada geese.

Written Comments: The Delaware Division of Fish and Wildlife requested that the Service review the Federal frameworks for hunting Canada geese on the DelMarva Peninsula. They believe that the existing frameworks are more liberal than can be justified based on the size of the population. They maintain that high harvest rates on adult birds are suppressing the population and preventing a recovery. During the 1993–94 hunting season, Delaware voluntarily restricted their seasons, but because these Canada goose populations move about the Peninsula, they believe that harvest pressure should be reviewed in parts of Delaware, Maryland, and Virginia and appropriate action taken to reduce harvest and protect these migrant Canada geese.

Representative Steve Gunderson (Wisconsin) requested that the Mississippi River Subzone in Wisconsin be declared a giant Canada goose harvest area and removed from Canada goose harvest-quota considerations for the State.

The Minnesota Department of Natural Resources requested a change in the boundary of their West-Central Goose Zone, as required by State legislation. They indicated that they had requested endorsement of the proposed change by the Upper-Region Regulations Committee of the Mississippi Flyway Council; however, the Committee did not endorse it.

5. White-fronted Geese

Council Recommendations: The Central Flyway recommendations regarding dark geese involve white-fronted geese. See item **4. Canada Geese.**

The Mississippi Flyway Council recommended no change in frameworks.

The Pacific Flyway Council recommended that: for Washington, the special bag restriction on white-fronted geese be removed, allowing them to be within the overall 4-dark goose limit; for Oregon, the season on white-fronted geese be allowed to open at the same time as the dark goose season, which would be approximately 1 week earlier than currently allowed; and for California, the white-fronted goose season would be extended by 2 weeks within the Sacramento Valley special goose closure portion of the "Balance-of-the-State" Zone.

The 1993 fall index of 295,300 geese represents a 28 percent increase from 1992. The current 3-year average is 254,300, with a population objective of 300,000. Favorable nesting conditions and the resulting good reproduction indicate an increase in the fall flight for 1994. Changes to be proposed in California, Oregon, and Washington would likely result in an increase in harvest of approximately 3,750 birds. This represents less than 2 percent of the current population index and

should continue to meet management plan objectives of 5–10 percent annual rates of increase. These changes would also simplify regulations in Washington while allowing Oregon and the Northeastern Zone of California seasons to open at the same time.

The Association of Village Council Presidents, representing Native American interests in the Yukon-Kuskokwim Delta area of Alaska, supported modest liberalizations of white-fronted goose seasons in Alaska and Washington. However, they did not support further liberalizations in Oregon or California, noting that liberalizations occurred during each of the preceding years and that it was difficult to measure the effects of these incremental changes.

6. Brant

Council Recommendations: The Atlantic Flyway Council recommended a 2-bird daily bag limit and a 50-day season length for brant.

The Central Flyway recommendations regarding dark geese involve brant. See item **4. Canada Geese.**

The Upper-Region Regulations Committee of the Mississippi Flyway Council recommended that the daily bag limit for brant be reduced to 2 birds to better conform with limits in other Flyways.

7. Snow and Ross' (Light) Geese

Council Recommendations: The Central Flyway Council recommended that the east and west tier States be allowed a light goose hunting season of 107 days, which is unchanged from last year. For east tier States, the Council recommended light goose bag and possession limits of 10 and 20, respectively, which is unchanged from last year. The Council recommended that for west tier States the light goose bag and possession limits would be unchanged from last year at 5 and 10, respectively, except in the Middle Rio Grande Valley (Socorro and Valencia Counties) of New Mexico, where the bag and possession limits would be 10 and 20, respectively, which are also unchanged from last year.

The Central Flyway Council recommended that the framework dates for the hunting of light geese in both the east and west tier States would be from the Saturday nearest October 1 (October 1, 1994) through the Sunday nearest February 15 (February 12, 1995), except in Colorado, New Mexico, Texas, Oklahoma, and Kansas where the closing framework date would be extended to February 28, 1995.

The Central Flyway Council recommended that the State of Kansas be allowed to modify its boundaries for light goose hunting as follows:

The zone boundary for Zone 1 (Light goose) be modified to include that portion of Kansas east of the Kansas Highway 99, and Zone 2 include the remainder of the State west of Highway 99.

The Mississippi Flyway Council recommended that the season length for light geese be increased from 80 to 107 days.

The Pacific Flyway Council recommended a season framework adjustment to extend the light goose closing date for Malheur County of Oregon and southwest Idaho from the first Sunday in January to the Sunday closest to January 20. Malheur County would become part of a Harney, Klamath, Lake, and Malheur Counties Zone. This adjustment aligns the framework of the affected area with the remainder of the Flyway.

Written Comments: The Texas Parks and Wildlife Department supported a change in the Federal frameworks that would extend the hunting of light geese until February 28. This change would allow for increased harvest of the mid-continent population of lesser snow geese which are at record high levels and, because of these increases, may be threatening their own breeding habitat.

8. Tundra swans.

Council Recommendations: The Central Flyway Council recommended that the experimental swan season in North Dakota be granted an additional year of experimental status with a final report due on June 1, 1995.

The Pacific Flyway Council recommended that the number of permits authorizing the take of 1 tundra swan per season be increased in Utah from 2,500 to 2,800 to compensate for lost hunting opportunity from a State-imposed early season closure. As an informational item, the Council recommends that Montana, Nevada, and Utah be more restrictive than Federal frameworks by: (1) implementing a monitoring program to assess the number of trumpeter swans, if any, taken accidentally during the tundra swan season, (2) Utah's season would end on or before December 15 and the Green River Area would be closed to swan hunting. The 3-year-average Midwinter population index of 79,406 tundra swans is well above the Flyway objective level of 38,000. Proposed frameworks will result in harvest levels within those prescribed in the 1989 Tundra Swan Hunt Plan endorsed by the Pacific Flyway Council. The changes are premised on the implementation of the State-Federal cooperative program for hazing trumpeter swans from winter concentration areas near Harriman State Park in Idaho to more favorable sites.

Written Comments: Mr. D. C. Carlton, representing the Biodiversity Legal Foundation (Foundation), commented on the management of the Rocky Mountain Population (RMP) of trumpeter swans. He detailed the status and perceived threats to these swans, reviewed past and current management actions, and concluded that leadership, actions, and funding by the Service are inadequate to assure the population's recovery and believes they warrant listing under the Endangered Species Act. Among many recommendations directed at improving the effectiveness of range-expansion efforts directed at benefiting these swans, those germane to hunting regulations included: (1) not allowing either a permitted or incidental take of trumpeter swans during a tundra swan season, (2) having no open seasons for hunting tundra swans in the most critical trumpeter swan range expansion areas, including all of Utah and Nevada, (3) modifying hunting regulations on National Wildlife Refuges in Montana, Utah, and Nevada to provide sanctuary for resting, reproduction, and rearing of cygnets, and (4) ending waterfowl hunting after October 20 at two sites on the Snake River in Idaho, at a site on the Green River, including Seedskadee National Wildlife Refuge in Wyoming, and in unspecified areas within the Tristate Yellowstone region.

Ms. Heidi Prescott, on behalf of The Fund for Animals, Inc., highlighted recent survey reports, reviewed portions of the Pacific Flyway Council's management plan and a report by Ms. Ruth Shea, a Service employee, and presented the group's views regarding management action pertaining to RMP trumpeter swans. The Fund for Animals, Inc., concurred with the recommendations of the Biodiversity Legal Foundation pertaining to migratory game bird hunting contained in the aforementioned letter from Mr. D. C. Carlton.

Mr. D. J. Schubert, also on behalf of the Fund for Animals, Inc., reiterated certain concerns and needed actions deemed necessary for successful range expansion of RMP trumpeter swans. He believed that a mandatory check of swans taken by hunters in Utah and Nevada is necessary to measure the level of accidental take. While the purposeful hazing of trumpeter swans to more favorable winter sites has merit, it put more trumpeter swans at risk in tundra swan hunt areas; and he therefore recommended a new management strategy. The Fund for Animals believes there are two possible management strategy changes that

would minimize excessive killing of trumpeter swans and still be consistent with the Migratory Bird Treaty Act: (1) prohibit hunting of tundra swans in Utah and Nevada; or, although less preferred, (2) prohibit hunting in certain critical areas in Utah. Under both options, security areas should be established in Idaho, and recreational activities such as waterfowl hunting and boating should be evaluated for possible negative impacts on trumpeter swan behavior and habitat use. Should intensive hazing be pursued to disperse birds to more favorable wintering sites, and if law enforcement policy is to be changed to facilitate the collection of information on the accidental take of trumpeter swans during the tundra swan season, the Fund for Animals recommended that: (1) both Idaho and Wyoming Game and Fish Departments provide sanctuaries in designated areas; (2) the Utah Division of Wildlife Resources, at the maximum, not hunt swans or, at the minimum, not hunt swans in Box Elder, Cache, and Rich Counties; (3) the Nevada Division of Wildlife close Stillwater Wildlife Management Area to swan hunting; (4) the Service close all National Wildlife Refuges in Utah and Nevada to the hunting of tundra swans; and (5) should the aforenamed States not exercise the recommended action, the Service should do so. Additionally, all States should enhance their hunter-education programs to emphasize proper identification of swans and waterfowl to minimize the accidental take of trumpeter swans as a result of other hunting seasons.

Mr. Michael Roy, on behalf of the National Wildlife Federation, expressed concern about the successful continuation of the RMP trumpeter swan range-expansion program, in part because of a perceived ineffective and confusing management structure that is not adequately represented by all interested parties, and in part by accidental take of trumpeter swans during tundra swan seasons in Utah. He believes certain recommendations provided by Ms. Ruth Shea, a Service employee, were reasoned and practical and, if implemented, would enhance range-expansion efforts. Premised on Ms. Shea's recommendations, he recommended that tundra swan hunting in Utah be discontinued from the southern boundary of the Bear River National Wildlife Refuge north and east to the Idaho and Wyoming borders for an initial 5-year period. This closure would be intended to minimize the accidental take of trumpeter swans during translocation activities and, hopefully, tundra swan hunting could be reinstated afterwards.

Ms. Louisa Willcox, representing the Greater Yellowstone Coalition, raised questions regarding the Service's role in managing RMP trumpeter swans and funding efforts to increase their numbers and expand their distribution. She asked how the Service will monitor the accidental take of trumpeter swans during tundra swan hunting seasons in Montana, Nevada, North Dakota, South Dakota, and Utah and what measures will be taken to minimize the potential losses. She also asked why the Service has not sought establishment of trumpeter swan wintering sites outside the Montana-Idaho-Wyoming region. She requested that the Service develop a long-term strategy to prevent wintering waterfowl, including trumpeter swans, from damaging vegetation and fish habitat at Harriman State Park in Idaho.

10. Coots

Council Recommendations: The Central Flyway Council recommended that the hunting season for coots remain unchanged from last year and would run concurrently with the duck season with the daily bag limit as 15 and the possession limit as twice the daily bag limit.

23. Other

Council Recommendations: The Atlantic Flyway Council recommended that the Service provide compensatory days for State-imposed Sunday-hunting prohibitions.

Written Comments: Two local sportsmen's organizations from Massachusetts suggested compensatory days for those days lost due to State-imposed Sunday-hunting prohibitions.

Public Comment Invited

Based on the results of migratory game bird studies now in progress, and having due consideration for any data or views submitted by interested parties, the possible amendments resulting from this supplemental rulemaking will specify open seasons, shooting hours, and bag and possession limits for designated migratory game birds in the United States.

The Service intends that adopted final rules be as responsive as possible to all concerned interests, and therefore desires to obtain for consideration the comments and suggestions of the public, other concerned governmental agencies, and private interests on these proposals. Such comments, and any additional information received, may lead to final regulations that differ from these proposals.

Special circumstances are involved in the establishment of these regulations which limit the amount of time that the Service can allow for public comment. Specifically, two considerations compress the time in which the rulemaking process must operate: (1) the need to establish final rules at a point early enough in the summer to allow affected State agencies to appropriately adjust their licensing and regulatory mechanisms; and (2) the unavailability of specific, reliable data on this year's status before mid-June for migratory shore and upland game birds and some waterfowl, and before late July for most waterfowl. Therefore, the Service believes that to allow comment periods past the dates specified is contrary to the public interest.

Comment Procedure

It is the policy of the Department of the Interior, whenever practical, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may participate by submitting written comments to the Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms 634—ARLSQ, 1849 C Street, NW., Washington, DC 20240. Comments received will be available for public inspection during normal business hours at the Service's office in room 634, Arlington Square Building, 4401 N. Fairfax Drive, Arlington, Virginia.

All relevant comments received during the comment period will be considered. The Service will attempt to acknowledge comments received, but a substantive response to individual comments may not be provided.

NEPA Consideration

NEPA considerations are covered by the programmatic document, "Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FSES 88-14)," filed with EPA on June 9, 1988. Notice of Availability was published in the **Federal Register** on June 16, 1988 (53 FR 22582). The Service's Record of Decision was published on August 18, 1988 (53 FR 31341). However, this programmatic document does not prescribe year-specific regulations; those are developed annually. The annual regulations and options are being considered in the Environmental Assessment, "Waterfowl Hunting Regulations for 1993," which is available upon request.

Endangered Species Act Consideration

In August 1994, the Division of Endangered Species concluded that the proposed action is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of their critical habitats. Hunting regulations are designed, among other things, to remove or alleviate chances of conflict between seasons for migratory game birds and the protection and conservation of endangered and threatened species and their habitats. The Service's biological opinions resulting from its consultation under Section 7 are considered public documents and are available for inspection in the Division of Endangered Species and the Office of Migratory Bird Management.

Regulatory Flexibility Act; Executive Order 12866; and the Paperwork Reduction Act

In the **Federal Register** dated April 7, 1994 (59 FR 16762), the Service reported measures it had undertaken to comply with requirements of the Regulatory Flexibility Act and the Executive Order. These included preparing an Analysis of Regulatory Effects and an updated Final Regulatory Impact Analysis, under the Regulatory Flexibility Act (5 U.S.C. 601 et seq), and publication of a summary of the latter. This information is included in the present document by reference. This action was not subject to review by the Office of Management and Budget under E.O. 12866. This rule does not contain any information collection requiring approval by the Office of Management and Budget under 44 U.S.C. 3504.

Authorship

The primary author is Robert J. Blohm, Office of Migratory Bird Management.

List of Subjects in 50 CFR Part 20

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

The rules that eventually will be promulgated for the 1994–95 hunting season are authorized under the Migratory Bird Treaty Act (July 3, 1918), as amended, (16 U.S.C. 703–711); the Fish and Wildlife Improvement Act (November 8, 1978), as amended, (16 U.S.C. 712); and the Fish and Wildlife Act of 1956 (August 8, 1956), as amended, (16 U.S.C. 742 a—j)

Dated: August 18, 1994

George T. Frampton, Jr.

Assistant Secretary for Fish and Wildlife and Parks

Proposed Regulations Frameworks for 1994–95 Late Hunting Seasons on Certain Migratory Game Birds

Pursuant to the Migratory Bird Treaty Act and delegated authorities, the Director has approved frameworks for season lengths, shooting hours, bag and possession limits, and outside dates within which States may select seasons for hunting waterfowl and coots between the dates of September 1, 1994, and March 10, 1995.

General

Dates: All outside dates noted below are inclusive.

Shooting and Hawking (taking by falconry) Hours: Unless otherwise specified, from one-half hour before sunrise to sunset daily.

Possession Limits: Unless otherwise specified, possession limits are twice the daily bag limit.

Definitions: For the purpose of hunting regulations listed below, the collective terms "dark" and "light" geese include the following species:

Dark geese - Canada geese, white-fronted geese, and brant.

Light geese - lesser snow (including blue) geese, greater snow geese, and Ross' geese.

Area, Zone, and Unit Descriptions: Geographic descriptions that differ from those published in the September 22, 1992, **Federal Register** (at 57 FR 43876) are contained in a later portion of this document.

Area-Specific Provisions: Frameworks for open seasons, season lengths, bag and possession limits, and other special provisions are listed below by flyway.

Atlantic Flyway

The Atlantic Flyway includes Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia.

Ducks, Mergansers, and Coots

Outside Dates: Between October 1 and January 20.

Hunting Seasons and Duck Limits: Either (a) 30 days and daily bag limit of 4 ducks, including no more than 3 mallards (no more than 1 of which may be a female), 2 wood ducks, 2 redheads, 1 canvasback, 1 black duck, 1 mottled duck, 1 pintail, and 1 fulvous whistling duck or (b) 40 days and daily bag limit of 3 ducks, and the other restrictions shown above.

Closures: The season on harlequin ducks is closed.

Sea Ducks: In all areas outside of special sea duck areas, sea ducks are included in the regular duck daily bag and possession limits. However, during the regular duck season within the special sea duck areas, the sea duck daily bag and possession limits may be in addition to the regular duck daily bag and possession limits.

Merganser Limits: The daily bag limit of mergansers is 5, only 1 of which may be a hooded merganser.

Coot Limits: The daily bag limit is 15 coots.

Lake Champlain Zone, New York: The waterfowl seasons, limits, and shooting hours shall be the same as those selected for the Lake Champlain Zone of Vermont.

Zoning and Split Seasons: Delaware, Maryland, North Carolina, Rhode Island, and Virginia may split their seasons into three segments; Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Vermont, and West Virginia may select hunting seasons by zones and may split their seasons into two segments in each zone; while Florida, Georgia, and South Carolina may split their Statewide seasons into two segments.

Canada Geese

Season Lengths, Outside Dates, and Limits: Unless specified otherwise, seasons may be split into two segments. Seasons in States, and in independently described goose management units within States, may be as follows:

Connecticut: 70 days between October 1 and January 31, with 1 goose per day through October 15; 2 geese per day through December 31; and 3 geese per day thereafter; 1 goose per day for the first 8 days after the opening. In addition, a special experimental season may be held in the South Zone between January 15 and February 15, with 5 geese per day.

Delaware: 60 days between November 16 and January 20, with 1 goose per day for the first 20 days; 2 geese per day thereafter.

Florida: Closed season.

Georgia: In specific areas, an 8–day experimental season may be held between November 15 and February 5, with a limit of 5 Canada geese per day.

Maine: 70 days between October 1 and January 31, with 1 goose per day through October 15; 2 geese per day through December 31; and 3 geese per day thereafter; 1 goose per day for the first 8 days after the opening.

Maryland: 60 days between November 16 and January 20, with 1 goose per day for the first 20 days and 2 geese per day thereafter.

Massachusetts: 70 days between October 1 and January 31, with 1 goose per day through October 15; 2 geese per day through December 31; and 3 geese per day thereafter; 1 goose per day for the first 8 days after the opening. In addition, a special 16–day season for resident Canada geese may be held in the Coastal and Central Zones during January 21 to February 5, with 5 geese per day.

New Hampshire: 70 days between October 1 and January 31, with 1 goose per day through October 15; 2 geese per day through December 31; and 3 geese per day thereafter; 1 goose per day for the first 8 days after the opening.

New Jersey: 70 days between October 15 and January 31, with 1 goose per day through November 15; 2 geese per day through December 31; 3 geese per day thereafter; 1 goose per day for the first 8 days after the opening; no more than 15 days before November 16. In addition, an experimental special season may be held in a designated area of Northeastern New Jersey from January 28 to February 11, 1995, with 5 geese per day.

New York:

Northeastern Zone - 70 days between October 1 and January 31, with 1 goose per day through October 15; 2 geese per day through December 31; and 3 geese per day thereafter; 1 goose per day for the first 8 days after the opening.

Remainder of State - 70 days between October 15 and January 31, with 1 goose per day through November 15; 2 geese per day through December 31; 3 geese per day thereafter; 1 goose per day for the first 8 days after the opening; no more than 15 days before November 16.

North Carolina:

East Zone - Suspended.

West Zone - Suspended.

Pennsylvania:

South Zone - 70 days between October 15 and January 31, with 1 goose per day through November 15; 2 geese per day through December 31; 3 geese per day thereafter; 1 goose per day for the first 8 days after the opening; no more than 15 days before November 16. In addition, an experimental season may be held in the Susquehanna/Juniata Zones from January 20 to February 5 with 5 geese per day.

Erie, Mercer, and Butler Counties - 70 days between October 1 and January 31, with 1 goose per day through October 15; 2 geese per day thereafter; 1 goose per day for the first 8 days after the opening.

Crawford County - 35 days between October 1 and January 20; with 1 goose per day.

Remainder of State - 70 days between October 1 and January 31, with 1 goose per day through October 15; 2 geese per day through December 31; and 3 geese per day thereafter; 1 goose per day for the first 8 days after the opening.

Rhode Island: 70 days between October 1 and January 31, with 1 goose per day through October 15; 2 geese per day through December 31; and 3 geese per day thereafter; 1 goose per day for the first 8 days after the opening.

South Carolina: Suspended regular season. A 4–day special season may be held in the Central Piedmont, Western Piedmont, and Mountain Hunt Units during January 15 to February 15, with a daily bag limit of 5 Canada geese per day.

Vermont: 70 days between October 1 and January 31, with 1 goose per day through October 15; 2 geese per day through December 31; and 3 geese per day thereafter; 1 goose per day for the first 8 days after the opening.

Virginia:

Back Bay - Suspended.

Remainder - 60 days between November 16 and January 20, with 1 goose per day for the first 20 days; 2 geese per day thereafter.

West Virginia: 70 days between October 1 and January 20, with 3 geese per day.

Light Geese

Season Lengths, Outside Dates, and Limits: States may select a 107–day season between October 1 and February 10, with 5 geese per day. States may split their seasons into two segments.

Brant

Season Lengths, Outside Dates, and Limits: States may select a 50–day season between October 1 and January 20, with 2 brant per day.

Mississippi Flyway

The Mississippi Flyway includes Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Ohio, Tennessee, and Wisconsin.

Ducks, Mergansers, and Coots

Outside Dates: Between October 1 and January 20.

Hunting Seasons and Duck Limits: Either (a) 30 days and daily bag limit of 4 ducks, including no more than 3 mallards (no more than 1 of which may be a female), 3 mottled ducks, 1 black duck, 1 pintail, 2 wood ducks, 1 canvasback, and 1 redhead or (b) 40 days and daily bag limit of 3 ducks, including no more than 2 mallards (no more than 1 of which may be a female), and the other restrictions shown above.

Merganser Limits: The daily bag limit is 5, only 1 of which may be a hooded merganser.

Coot Limits: The daily bag limit is 15 coots.

Zoning and Split Seasons: Alabama, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Missouri, Ohio, Tennessee, and Wisconsin may select hunting seasons by zones.

In Alabama, Indiana, Iowa, Kentucky, Louisiana, Michigan, Ohio, Tennessee, and Wisconsin, the season may be split into two segments in each zone.

In Mississippi, the season may be split into two segments.

In Arkansas and Minnesota, the season may be split into three segments.

Pymatuning Reservoir Area, Ohio: The seasons, limits, and shooting hours shall be the same as those selected in the adjacent portion of Pennsylvania (Northwest Zone).

Geese

Split Seasons: Seasons for geese may be split into two segments.

Season Lengths, Outside Dates, and Limits: States may select seasons for geese not to exceed 70 days for dark geese between the Saturday nearest October 1 (October 1) and January 31, and 107 days for light geese between the Saturday nearest October 1 (October 1), and February 14. The daily bag limit is 7 geese, to include no more than 2 Canada geese, 2 white-fronted geese, and 2 brant. Specific regulations for Canada geese and exceptions to the above general provisions are shown below by State.

Alabama: In the SJBP Goose Zone, the season for Canada geese may not exceed 35 days. Elsewhere, the season for Canada geese may extend for 70 days in the respective duck-hunting zones. The daily bag limit is 2 Canada geese.

Arkansas: The season for Canada geese may extend for 23 days in the East Zone. In the West Zone, an experimental season for Canada geese of up to 14 days may be selected. In both zones, the season may extend to February 15. The daily bag limit is 2 Canada geese. In the remainder of the State, the season for Canada geese is closed.

Illinois: The total harvest of Canada geese in the State will be limited to 109,600 birds.

(a) Southern Illinois Quota Zone - The season for Canada geese will close after 51 days or when 39,800 birds have been harvested, whichever occurs first. Limits are 2 Canada geese daily and 10

in possession. All harvested Canada geese in excess of twice the daily bag limit that are transported outside the zone must be tagged with tags containing the name and signature of the hunter and the date and location where the birds were taken. If any of the following conditions exist after December 20, the State, after consultation with the Service, will close the season by emergency order with 48 hours notice:

1. 10 consecutive days of snow cover, 3 inches or more in depth.
2. 10 consecutive days of daily high temperatures less than 20 degrees F.
3. Average body weights of adult female geese less than 3,200 grams as measured from a weekly sample of a minimum of 50 geese.
4. Starvation or a major disease outbreak resulting in observed mortality exceeding 5,000 birds in 10 days, or a total mortality exceeding 10,000 birds.

(b) Rend Lake Quota Zone - The season for Canada geese will close after 51 days or when 11,400 birds have been harvested, whichever occurs first. Limits are 2 Canada geese daily and 10 in possession. All harvested Canada geese in excess of twice the daily bag limit that are transported outside the zone must be tagged with tags containing the name and signature of the hunter and the date and location where the birds were taken.

(c) Northern Illinois Quota Zone - The season for Canada geese will close after 51 days or when 13,000 birds have been harvested, whichever occurs first. The daily bag limit is 2 Canada geese.

(d) Central Illinois Quota Zone - The season for Canada geese will close after 51 days or when 22,400 birds have been harvested, whichever occurs first. The daily bag limit is 2 Canada geese.

(e) Remainder of the State - The season for Canada geese may extend for 51 days in the respective goose zones. The daily bag limit is 2 Canada geese.

Indiana: The total harvest of Canada geese in the State will be limited to 61,900 birds.

(a) Posey County - The season for Canada geese will close after 53 days or when 4,550 birds have been harvested, whichever occurs first. The daily bag limit is 2 Canada geese.

(b) Remainder of the State - The season for Canada geese may extend for 70 days in the respective duck-hunting zones, except in the SJBP Zone, where the season may not exceed 35 days. The daily bag limit is 2 Canada geese.

Iowa: The season may extend for 55 days in the respective duck-hunting zones and may open no earlier than October 8. The daily bag limit is 2 Canada geese.

Kentucky:

(a) Western Zone - The season for Canada geese may extend for 53 days (66 days in Fulton County), and the harvest will be limited to 21,900 birds. Of the 21,900–bird quota, 14,300 birds will be allocated to the Ballard Reporting Area and 4,200 birds will be allocated to the Henderson/Union Reporting Area. If the quota in either reporting area is reached prior to completion of the 53–day season, the season in that reporting area will be closed. If this occurs, the season in those counties and portions of counties outside of, but associated with, the respective subzone (listed in State regulations) may continue for an additional 7 days, not to exceed a total of 53 days (66 days in Fulton County). The season in Fulton County may extend to February 13. The daily bag limit is 2 Canada geese.

(b) Pennyroyal/Coalfield Zone - The season may extend for 35 days. The daily bag limit is 2 Canada geese.

(c) Remainder of the State - The season may extend for 50 days. The daily bag limit is 2 Canada geese.

Louisiana: Louisiana may hold 107-day seasons for light geese and 70-day seasons for white-fronted geese and brant between the Saturday nearest October 1 (October 1) and February 14 in the respective duck-hunting zones. The daily bag limit is 7 geese, to include no more than 2 white-fronted geese and 2 brant, except as noted below. In the Southwest Zone, a 9-day season for Canada geese may be held. During the Canada goose season, the daily bag limit for Canada and white-fronted geese in the Southwest Zone is 2, no more than 1 of which may be a Canada goose. Hunters participating in the Canada goose season must possess a special permit issued by the State.

Michigan: The total harvest of Canada geese in the State will be limited to 63,100 birds.

(a) North Zone - The framework opening date for all geese is September 24 and the season for Canada geese may extend for 23 days. The daily bag limit is 2 Canada geese.

(b) Middle Zone - The season for Canada geese may extend for 23 days. The daily bag limit is 2 Canada geese.

(c) South Zone

(1) Allegan County GMU - The season for Canada geese will close after 50 days or when 2,000 birds have been harvested, whichever occurs first. The daily bag limit is 2 Canada geese.

(2) Muskegon Wastewater GMU - The season for Canada geese will close after 53 days or when 400 birds have been harvested, whichever occurs first. The daily bag limit is 2 Canada geese.

(3) Saginaw County GMU - The season for Canada geese will close after 40 days or when 2,000 birds have been harvested, whichever occurs first. The daily bag limit is 2 Canada geese.

(4) Tuscola/Huron GMU - The season for Canada geese will close after 40 days or when 750 birds have been harvested, whichever occurs first. The daily bag limit is 2 Canada geese.

(5) Remainder of South Zone - The season for Canada geese may extend for 30 days. The daily bag limit is 1 Canada goose.

(d) Southern Michigan GMU - An experimental special Canada goose season may be held between January 7 and February 5. The daily bag limit is 2 Canada geese.

Minnesota:

(a) West Zone

(1) West Central Zone - The season for Canada geese may extend for 30 days. In the Lac Qui Parle Zone the season will close after 30 days or when a harvest index of 4,000 birds has been reached, whichever occurs first. Throughout the West Central Zone, the daily bag limit is 1 Canada goose.

(2) Remainder of West Zone - The season for Canada geese may extend for 40 days. The daily bag limit is 1 Canada goose.

(b) Northwest Zone - The season for Canada geese may extend for 40 days. The daily bag limit is 1 Canada goose.

(c) Southeast Zone - The season for Canada geese may extend for 70 days, except in the Twin Cities Metro Zone and Olmsted County, where the season may not exceed 80 days. The daily bag limit is 2 Canada geese.

(d) Remainder of the State - The season for Canada geese may extend for 50 days. The daily bag limit is 2 Canada geese.

(e) Fergus Falls/Alexandria Zone - An experimental special Canada goose season of up to 10 days may be held in December. During the special season, the daily bag limit is 2 Canada geese.

Mississippi: The season for Canada geese may extend for 70 days. The daily bag limit is 2 Canada geese.

Missouri:

(a) Swan Lake Zone - The season for Canada geese will close after 40 days or when 5,000 birds have been harvested, whichever occurs first. The daily bag limit is 2 Canada geese.

(b) Schell-Osage Zone - The season for Canada geese may extend for 40 days. The daily bag limit is 2 Canada geese.

(c) Central Zone - The season for Canada geese may extend for 50 days. The daily bag limit is 2 Canada geese. An experimental special season of up to 10 consecutive days prior to October 15 may be selected in addition to the regular season. During the special season, the daily bag limit is 3 Canada geese.

(d) Remainder of the State - The season for Canada geese may extend for 50 days in the respective duck-hunting

zones. The daily bag limit is 2 Canada geese.

Ohio: The season may extend for 70 days in the respective duck-hunting zones, with a daily bag limit of 2 Canada geese, except in the Lake Erie SJBP Zone, where the season may not exceed 30 days and the daily bag limit is 1 Canada goose. In the Pymatuming Reservoir Area, the seasons, limits, and shooting hours for all geese shall be the same as those selected in the adjacent portion of Pennsylvania.

Tennessee:

(a) Northwest Zone - The season for Canada geese will close after 75 days or when 8,100 birds have been harvested, whichever occurs first. The season may extend to February 15. The daily bag limit is 2 Canada geese.

(b) Southwest Zone - The season for Canada geese may extend for 59 days, and the harvest will be limited to 1,000 birds. The daily bag limit is 2 Canada geese.

(c) Kentucky/Barkley Lakes Zone - The season for Canada geese will close after 50 days or when 1,800 birds have been harvested, whichever occurs first. All geese harvested must be tagged. The daily bag limit is 2 Canada geese.

(d) Remainder of the State - The season for Canada geese may extend for 70 days. The daily bag limit is 2 Canada geese.

Wisconsin: The total harvest of Canada geese in the State will be limited to 76,800 birds.

(a) Horicon Zone - The framework opening date for all geese is September 24. The harvest of Canada geese is limited to 41,000 birds. The season may not exceed 80 days. All Canada geese harvested must be tagged. The daily bag limit is 1 Canada goose and the season limit will be the number of tags issued to each permittee.

(b) Collins Zone - The framework opening date for all geese is September 24. The harvest of Canada geese is limited to 1,300 birds. The season may not exceed 61 days. All Canada geese harvested must be tagged. The daily bag limit is 2 Canada geese and the season limit will be the number of tags issued to each permittee.

(c) Exterior Zone - The framework opening date for all geese is October 1. The harvest of Canada geese is limited to 30,000 birds, with 500 birds allocated to the Mississippi River Subzone. The season may not exceed 70 days and the daily bag limit is 1 Canada goose. In the Mississippi River Subzone, the season for Canada geese may extend for 70 days in each duck zone. In that portion of the Exterior Zone outside the Mississippi River Subzone, the progress of the harvest must be monitored, and the season closed, if necessary, to ensure that the harvest does not exceed 29,500 birds.

Additional Limits: In addition to the harvest limits stated for the respective zones above, an additional 4,500 Canada geese may be taken in the Horicon Zone under special agricultural permits.

Quota Zone Closures: When it has been determined that the quota of Canada geese allotted to the Northern Illinois, Central Illinois, Southern Illinois, and Rend Lake Quota Zones in Illinois, Posey County in Indiana, the Ballard and Henderson-Union Subzones in Kentucky, the Allegan County, Muskegon Wastewater, Saginaw County, and Tuscola/Huron Goose Management Units in Michigan, the Lac Qui Parle Zone in Minnesota, the Swan Lake Zone in Missouri, and the Northwest and Kentucky/Barkley Lakes Zones in Tennessee will have been filled, the season for taking Canada geese in the respective area will be closed by either the Director upon giving public notice through local information media at least 48 hours in advance of the time and date of closing, or by the State through State regulations with such notice and time (not less than 48 hours) as they deem necessary.

Central Flyway

The Central Flyway includes Colorado (east of the Continental Divide), Kansas, Montana (Counties of Blaine, Carbon, Fergus, Judith Basin, Stillwater, Sweetgrass, Wheatland, and all counties east thereof), Nebraska, New Mexico (east of the Continental Divide except the Jicarilla Apache Indian Reservation), North Dakota, Oklahoma, South Dakota, Texas, and Wyoming (east of the Continental Divide).

Ducks, Mergansers, and Coots

Outside Dates: October 1 through January 20.

Hunting Seasons and Duck Limits:

(1) High Plains Mallard Management Unit (roughly defined as that portion of the Central Flyway which lies west of the 100th meridian): Either (a) 51 days and daily bag limit of 4 ducks, including no more than 1 of which may be a female mallard, 1 mottled duck, 1 pintail, 1 redhead, 1 canvasback and 2 wood ducks or (b) 61 days and daily bag limit of 3, and the other restrictions shown above. Under both options, the last 12 days may start no earlier than the Saturday nearest December 10 (December 10).

(2) Remainder of the Central Flyway: Either (a) 39 days and daily bag limit of 4 ducks, including no more than 1 female mallard, 1 mottled duck, 1 pintail, 1 redhead, 1 canvasback and 2 wood ducks or (b) 49 days and daily bag limit of 3 ducks, and the other restrictions shown above.

Merganser Limits: The daily bag limit of 5 mergansers may be taken, only 1 of which may be a hooded merganser.

Coot Limits: The daily bag limit is 15 coots.

Zoning and Split Seasons: Montana, Nebraska (Low Plains portion), New Mexico, Oklahoma (Low Plains portion), and South Dakota (Low Plains portion) may select hunting seasons by zones.

In Montana, Nebraska (Low and High Plains portions), New Mexico, North Dakota (Low Plains portion), Oklahoma (Low and High Plains portions), South Dakota (High Plains portion), and Texas (Low Plains portion), the season may be split into two segments.

In Colorado, Kansas (Low and High Plains portions), North Dakota (High Plains portion), and Wyoming, the season may be split into three segments.

Geese

Season Lengths, Outside Dates, and Limits: Seasons may be split into two segments. The Saturday nearest October 1 (October 1), through January 31, for dark geese and the Saturday nearest October 1 (October 1), through the Sunday nearest February 15 (February 12), except in Colorado, Kansas, New Mexico, Oklahoma, and Texas, where the closing date is February 28, for light geese. Seasons in States, and independently in described goose management units within States, may be as follows:

Colorado: No more than 107 days, with a daily bag limit of 5 light and 3 dark geese.

Kansas: For dark geese, no more than 86 days, with a daily bag limit of 2, including no more than 1 white-fronted goose.

For light geese, no more than 107 days, with a daily bag limit of 10.

Montana: No more than 107 days, with daily bag limits of 2 dark and 5 light geese in Sheridan County and 4 dark and 5 light geese in the remainder of the Central Flyway portion.

Nebraska: For dark geese, no more than 86 days, with a daily bag limit of not more than 2, which may include no more than 1 white-fronted goose.

For light geese, no more than 107 days, with a daily bag limit of 10.

New Mexico: No more than 107 days, with a daily bag limit of 5 light and 3 dark geese, except in the Middle Rio Grande Valley where the daily bag limit of light geese is 10.

North Dakota: For dark geese, no more than 86 days, with a daily bag limit of 2.

For light geese, no more than 107 days, with a daily bag limit of 10.

Oklahoma: For dark geese, no more than 86 days, with a daily bag limit of 2, including no more than 1 white-fronted goose.

For light geese, no more than 107 days, with a daily bag limit of 10.

South Dakota: For dark geese, no more than 86 days, with a daily bag limit of not more than 2, including no more than 1 white-fronted goose.

For light geese, no more than 107 days, with a daily bag limit of 10.

Texas: For the West Unit, no more than 107 days, with a daily bag limit of 5 light and 3 dark geese.

For dark geese in the East Unit, no more than 86 days. The daily bag limit is 2, including no more than 1 white-fronted goose during the first 72 days; during the last 14 days, the season is closed on white-fronted geese and the daily bag limit is 2 Canada geese.

For light geese in the East Unit, no more than 107 days, with a daily bag limit of 10.

Wyoming: No more than 107 days, with a daily bag limit of 5 light and 3 dark geese.

Pacific Flyway

Ducks, Mergansers, Coots, and Common Moorhens

Hunting Seasons and Duck Limits: Either (a) Concurrent 59 days and daily bag limit of 5 ducks, including no more than 4 mallards (no more than 1 of which may be a female), 1 pintail, 2 redheads and 1 canvasback or (b) Concurrent 69 days and daily bag limit of 4 ducks, including no more than 3 mallards, and the other restrictions shown above.

In the Columbia Basin Mallard Management Unit, the seasons may be an additional 7 days. The season on coots and common moorhens may be between the outside dates for the season on ducks, but not to exceed 93 days.

Coot and Common Moorhen Limits: The daily bag and possession limits of coots and common moorhens are 25, singly or in the aggregate.

Outside Dates: Between October 1 and January 20.

Zoning and Split Seasons: Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington may select hunting seasons by zones.

Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington may split their seasons into two segments either Statewide or in each zone.

Colorado, Montana, New Mexico, and Wyoming may split their duck seasons into three segments.

Colorado River Zone, California: Seasons and limits shall be the same as seasons and limits selected in the adjacent portion of Arizona (South Zone).

Geese

Season Lengths, Outside Dates, and Limits: Except as subsequently noted, 100–day seasons may be selected, with outside dates between the Saturday nearest October 1 (October 1), and the Sunday nearest January 20 (January 22), and the basic daily bag limits are 3 light geese and 3 dark geese, including no more than 2 white-fronted geese.

Brant Season - A 16–consecutive-day season may be selected in Oregon and Washington, and a 30–consecutive day season may be selected in California. In only California, Oregon, and Washington, the daily bag limit is 2 brant and is additional to dark goose limits, and the open season on brant in those States may differ from that for other geese.

Closures: There will be no open season on Aleutian Canada geese in the Pacific Flyway. The States of California, Oregon, and Washington must include a statement on the closure for that subspecies in their respective regulations leaflet. Emergency closures may be invoked for all Canada geese should Aleutian Canada goose distribution patterns or other circumstances justify such actions.

Arizona: The daily bag limit for dark geese is 2 geese.

California:

Northeastern Zone - White-fronted geese and cackling Canada geese may be taken only during the first 23 days of the goose season. The daily bag limit is 3 geese and may include no more than 2 dark geese; including not more than 1 cackling Canada goose.

Colorado River Zone - The seasons and limits must be the same as those selected in the adjacent portion of Arizona (Balance-of-the-State Zone).

Southern Zone - The daily bag and possession limits for dark geese is 2 geese, including not more than 1 cackling Canada goose.

Balance-of-the-State Zone - A 79–day season may be selected, except that white-fronted geese and cackling Canada geese may be taken during only the first 65 days of such season. Limits may not include more than 3 geese per day and in possession, of which not more than 1 may be a dark goose. The dark goose limits may be expanded to 2, provided that they are Canada geese other than cackling Canada geese for which the daily limit is 1.

Three areas in the Balance-of-the-State Zone are restricted in the hunting of certain geese:

(1) In the Counties of Del Norte and Humboldt, there will be no open season for Canada geese.

(2) In the Sacramento Valley Area, the season on white-fronted geese and cackling Canada geese must end on or before November 30, and, except in the Western Canada Goose Hunt Area, there will be no open season for Canada geese.

(3) In the San Joaquin Valley Area, the hunting season for Canada geese will close no later than November 23.

Colorado: The daily bag limit for dark geese is 2 geese.

Idaho:

Northern Unit - The daily bag limit is 4 geese, including 4 dark geese, including not more than 2 white-fronted geese, and 3 light geese.

Southwest Unit - The daily bag limit on dark geese is 4, including not more than 2 white-fronted geese.

Southeastern Unit - The daily bag limit is 3 geese, including not more than 2 white-fronted geese.

Montana:

West of Divide Zone - The daily bag limit on dark geese is 4, including not more than 2 white-fronted geese.

Nevada:

Clark County Zone - The daily bag limit of dark geese is 2 geese.

New Mexico: The daily bag limit for dark geese is 2 geese.

Oregon: Except as subsequently noted, the dark goose limit is 4, including not more than 2 white-fronted geese and 1 cackling Canada goose.

Harney, Lake, Klamath, and Malheur Counties Zone - The season length may be 100 days. White-fronted geese may not be taken before October 17 during the regular goose season.

Western Zone - In the Special Canada Goose Management Area, except for designated areas, there shall be no open season on Canada geese. In the designated areas, individual quotas shall be established which collectively shall not exceed 210 dusky Canada geese. See section on quota zones. In those designated areas, the daily bag limit of dark geese is 3, including not more than 2 white-fronted geese and 1 cackling Canada goose.

Utah: The daily bag limit for dark geese is 2 geese.

Washington: The daily bag limit is 4 geese, including 4 dark geese, but not more than 2 white-fronted geese, and 3 light geese.

West Zone - In the Lower Columbia River Special Goose Management Area, except for designated areas, there shall be no open season on Canada geese. In the designated areas, individual quotas shall be established which collectively shall not exceed 90 dusky Canada geese. See section on quota zones.

Wyoming: In Lincoln, Sweetwater, and Sublette Counties, the combined special September Canada goose seasons and the regular goose season shall not exceed 100 days.

Quota Zones: Seasons on Canada geese must end upon attainment of individual quotas of dusky Canada geese allotted to the designated areas of Oregon and Washington. Hunting of Canada geese in those designated areas shall only be by hunters possessing a State-issued permit authorizing them to do so. In a Service-approved investigation, the State must obtain quantitative information on hunter compliance of those regulations aimed at reducing the take of dusky Canada geese and eliminating the take of Aleutian Canada geese. The daily bag limit of Canada geese may not include more than 1 cackling Canada goose.

Tundra Swans

In Montana, Nevada, New Jersey, North Carolina, North Dakota, South Dakota, Utah, and Virginia, an open season for taking a limited number of tundra swans may be selected. Permits will be issued by the States and will authorize each permittee to take no more than 1 tundra swan per season. The States must obtain harvest and hunter participation data. These seasons will be subject to the following conditions:

In the Atlantic Flyway

—The season will be experimental.

—The season may be 90 days, must occur during the light goose season, but may not extend beyond January 31.

—In New Jersey, no more than 200 permits may be issued.

—In North Carolina, no more than 6,000 permits may be issued.

—In Virginia, no more than 600 permits may be issued.

In the Central Flyway

—The season may be 107 days and must occur during the light goose season.

—In the Central-Flyway portion of Montana, no more than 500 permits may be issued.

—In North Dakota, no more than 2,000 permits may be issued during the experimental season.

—In South Dakota, no more than 1,500 permits may be issued during the experimental season.

In the Pacific Flyway

—Except as subsequently noted, a 100–day season may be selected between the Saturday nearest October 1 (October 1), and the Sunday nearest January 20 (January 22). Seasons may be split into 2 segments. The States of Montana, Nevada, and Utah must implement a harvest-monitoring program to measure the extent of accidental harvest of trumpeter swans.

—In Utah, no more than 2,500 permits may be issued. The season must end on or before December 15.

—In Nevada, no more than 650 permits may be issued.

—In the Pacific-Flyway portion of Montana, no more than 500 permits may be issued.

Area, Unit and Zone Descriptions

Geese

Atlantic Flyway

New Jersey:

Special Area for Canada Geese: That portion of the State within a continuous line that runs east along the New York State boundary line to the Hudson River; then south along the New York State boundary to its intersection with Route 440 at Perth Amboy; then west on Route 440 to its intersection with Route 287; then west along Route 287 to its intersection with Route 206 in Bedminster (Exit 18); then north along Route 206 to its intersection with the Pennsylvania State boundary; then north along the Pennsylvania boundary in the Delaware River to its intersection with the New York State boundary.

Mississippi Flyway

Illinois

North Goose Zone: Same as for ducks.

Northern Illinois Quota Zone: The Counties of McHenry, Lake, Kane, DuPage, and those portions of LaSalle and Will Counties north of Interstate Highway 80.

Central Goose Zone: That portion of the State between the North and South Goose Zone boundaries.

Central Illinois Quota Zone: The Counties of Grundy, Woodford, Peoria, Knox, Fulton, Tazewell, Mason, Cass, Morgan, Pike, Calhoun, and Jersey, and those portions of LaSalle and Will Counties south of Interstate Highway 80.

South Goose Zone: That portion of the State south of a line extending east from the Missouri border along the Modoc Ferry route to Randolph County Highway 12, north along County 12 to Illinois Highway 3, north along Illinois 3 to Illinois 159, north along Illinois 159 to Illinois 161, east along Illinois 161 to Illinois 4, north along Illinois 4 to Interstate Highway 70, east along I-70 to the Bond County line, north and east along the Bond County line to Fayette County, north and east along the Fayette County line to Effingham County, east and south along the Effingham County line to I-70, then east along I-70 to the Indiana border.

Central Flyway

Kansas:

Light Geese

Unit 1: That portion of Kansas east of KS 99.

Dark Geese

Texas:

West Unit: That portion of the State lying west of a line from the international toll bridge at Laredo; north along I-35 and I-35W to Fort Worth; northwest along US 81 and US 287 to Bowie; and north along US 81 to the Oklahoma border.

East Unit: Remainder of State.

Pacific Flyway

Harney, Klamath, Lake, and Malheur Counties Zone: All of Harney, Klamath, Lake, and Malheur Counties.

Swans

Pacific Flyway

Utah:

Open Area: Statewide, except Cache, Daggett, Rich and Uintah Counties.

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