

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 300**

[FRL-7147-3]

**National Oil and Hazardous Substance Pollution Contingency Plan; National Priorities List****AGENCY:** Environmental Protection Agency.**ACTION:** Notice of intent to partially delete the California Gulch Superfund Site from the National Priorities List.

**SUMMARY:** The Environmental Protection Agency (EPA) Region 8 is issuing a notice of intent to partially delete the subunits A and B, residential waste rock piles, and parks and playgrounds within Operable Unit 9 of the California Gulch Superfund Site (Site), located in Lake County, Colorado, from the National Priorities List (NPL) and requests public comments on this notice of intent. The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is found at appendix B of 40 CFR part 300 which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the State of Colorado, through the Colorado Department of Public Health and Environment, have determined that all appropriate response actions under CERCLA, other than operation and maintenance and five-year reviews, have been completed. However, this partial deletion does not preclude future actions under Superfund. In the "Rules and Regulations" Section of today's **Federal Register**, we are publishing a direct final notice of partial deletion of the California Gulch Superfund Site without prior notice of intent to partially delete because we view this as a noncontroversial revision and anticipate no adverse comment. We have explained our reasons for this partial deletion in the preamble to the direct final partial deletion. If we receive no adverse comment(s) on this notice of intent to partially delete or the direct final notice of partial deletion, we will not take further action on this notice of intent to partially delete. If we receive adverse comment(s), we will withdraw the direct final notice of partial deletion and it will not take effect. We will, as appropriate, address all public comments in a subsequent final partial deletion notice based on this notice of intent to partially delete. We will not institute a second comment period on this notice of intent to

partially delete. Any parties interested in commenting must do so at this time. For additional information, see the direct final notice of partial deletion which is located in the Rules section of this **Federal Register**.

**DATES:** Comments concerning this Site must be received by March 22, 2002.**ADDRESSES:** Written comments should be addressed to: Rebecca Thomas, Remedial Project Manager, Environmental Protection Agency, Region 8, Mail Code 8EPR-SR, 999 18th Street, Suite 300, Denver, CO 80202. *Thomas.Rebecca@epamail.epa.gov*.**FOR FURTHER INFORMATION CONTACT:** Rebecca Thomas, Remedial Project Manager, Environmental Protection Agency, Region 8, Mail Code 8EPR-SR, 999 18th Street, Suite 300, Denver, CO 80202. *Thomas.Rebecca@epamail.epa.gov* (303) 312-6552 or toll free at (800) 227-8917.**SUPPLEMENTARY INFORMATION:** For additional information, see the Direct final notice of partial deletion which is located in the Rules section of this **Federal Register**.**Information Repositories**

Repositories have been established to provide detailed information concerning this decision at the following address:

U.S. EPA Region 8, Superfund Records Center, 999 18th Street, 5th Floor, Denver, CO 80202, (303) 312-6473 or toll free (800) 227-8917; Viewing hours: 8:00 a.m. to 4:30 p.m., Monday through Friday, excluding holidays.

Lake County Pubic Library, 1115 Harrison Avenue, Leadville, CO 80461, (719) 486-0569.

**List of Subjects in 40 CFR Part 300**

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

**Authority:** 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601-9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Dated: January 30, 2002.

**Jack W. McGraw,**

*Acting Regional Administrator, Region 8.*  
[FR Doc. 02-3920 Filed 2-19-02; 8:45 am]

**BILLING CODE 6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY****48 CFR Parts 1509 and 1552**

[FRL-7147-4]

**Acquisition Regulation: Contractor Performance Evaluations****AGENCY:** Environmental Protection Agency.**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to amend the EPA Acquisition Regulation to revise its policy and procedures regarding the evaluation of contractor performance. This action is necessary because EPA's current regulation eliminates the use of the National Institutes of Health (NIH) Contractor Performance System to record contractor performance histories for construction acquisitions. This revision will allow EPA contracting officers to utilize the NIH system for construction type acquisition in lieu of the Federal Acquisition Regulation prescribed Standard Form 1420, Performance Evaluation (Construction Contracts). The NIH obtained approval from the Civilian Agency Acquisition Council regarding the use of its construction module in lieu of Standard Form 1420.

**DATES:** Comments should be submitted no later than March 22, 2002.

**ADDRESSES:** Submit written comments to Frances Smith at the following address: U.S. Environmental Protection Agency, Office of Acquisition Management, Mail Code 3802R, 1200 Pennsylvania Avenue, NW., Ariel Rios Building, Washington, DC 20460. Comments may be sent electronically to *Smith.Frances@epa.gov*. Electronic comments must be submitted as an ASCII file, avoiding the use of special characters and any form of encryption. Floppy disks (3½ size) may also be submitted with comments in Corel WordPerfect format or ASCII file format. Do not submit confidential business information through E-mail.

**FOR FURTHER INFORMATION CONTACT:** Frances Smith, U.S. Environmental Protection Agency, Office of Acquisition Management, (202) 564-4368.**SUPPLEMENTARY INFORMATION:****A. Background**

This proposed rule amends the Environmental Protection Agency Acquisition Regulation Subpart 1509.170 and 1552.209-76 to allow EPA contracting officers to utilize the construction module in the National Institutes of Health's Contractor

Performance System. EPA currently uses the services module in the NIH system to evaluate contractor performances of both large and small businesses who are awarded EPA contracts in excess of \$100,000. This proposed rule will allow contracting officers to use either the services module or the construction module in the NIH system, depending on the type of acquisition.

#### **B. Executive Order 12866**

This proposed rule is not a significant regulatory action for the purposes of Executive Order 12866; therefore, no review is required by the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB).

#### **C. Paperwork Reduction Act**

The Paperwork Reduction Act applies to this proposed rule, and the information collection request has been evaluated by the Office of Management and Budget. The Office of Information and Regulatory Affairs within the Office of Management and Budget has issued OMB Clearance No. 9000-0142 for the collection of contractor performance information. Comments regarding Paperwork Reduction Act concerns should be sent to the Office of Management and Budget (Attn: EPA Desk Officer).

#### **D. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.**

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impact of today's proposed rule on small entities, small entity is defined as: (1) A small business that meets the definition of a small business found in the Small Business Act and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This proposed rule requires no reporting or record-keeping by small or large business contractors. Rather, it provides EPA contractors with a formal opportunity, generally once a year per contract, to review and comment on their specific performance evaluations as conducted by the cognizant EPA contracting officer. Therefore, this proposed rule will have no adverse or significant economic impact on small entities.

#### **E. Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess their regulatory actions on State, local, and Tribal governments, and the private sector. This proposed rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in one year. Any private sector costs for this action relate to paperwork requirements and associated expenditures that are far below the level established for UMRA applicability. Thus, this proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### **F. Executive Order 13045**

Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be economically significant as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If

the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposed rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions on environmental health or safety risks.

#### **G. Executive Order 13132**

Executive Order 13132 entitled "Federalism" (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" as defined in the Executive Order include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, the requirements of section 6 of the Executive Order do not apply to this proposed rule.

#### **H. Executive Order 13175**

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by

tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this proposed rule.

In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicits additional comment on this proposed rule from tribal officials.

#### **I. National Technology Transfer and Advancement Act of 1995**

EPA will use voluntary consensus standards, as directed by section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), in its procurement activities. The NTTAA directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking does not involve technical standards. Therefore, EPA is not considering use of any voluntary consensus standards. EPA welcomes comments on this aspect of the interim rulemaking, and, specifically, invites the public to identify potentially applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

#### **J. Executive Order 13211 (Energy Effects)**

This proposed rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

#### **List of Subjects in 48 CFR Parts 1509 and 1552.**

Government procurement.

Therefore, 48 CFR Chapter 15 is proposed to be amended as set forth below:

1. The authority citation for Parts 1509 and 1552 is revised to read as follows:

**Authority:** 5 U.S.C. 301; Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); and 41 U.S.C. 418b.

#### **PART 1509—[AMENDED]**

2. Section 1509.170-3 is amended by revising paragraphs (a), (c), and adding paragraph (d) to read as follows:

##### **1509.170-3 Applicability**

(a) This subpart applies to all EPA acquisitions in excess of \$100,000, except for architect-engineer acquisitions, acquisitions awarded under the Federal Acquisition Regulation (FAR) Subpart 8.6, Acquisitions from Federal Prison Industries, Incorporated, FAR Subpart 8.7, Acquisitions from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled, and FAR 13.5, Test Program for Certain Commercial Items. FAR 36.604 provides detailed instructions for architect-engineer contractor performance evaluations.

\* \* \* \* \*

(c) EPA Form 1900-26, Contracting Officer's Evaluation of Contractor Performance, and EPA Form 1900-27, Project Officer's Evaluation of Contractor Performance, applies to all performance evaluations completed prior to May 26, 1999. Thereafter, EPA Forms 1900-26 and 1900-27 are obsolete, and contracting officers shall complete all contractor performance evaluations by use of the National Institutes of Health's Contractor Performance System in accordance with EPAAR paragraph (a) of this section.

(d) Construction acquisitions shall be completed by use of the NIH construction module. Performance evaluations for construction acquisitions shall be completed in accordance with EPAAR 1509.170-5.

3. Section 1509.170-4 is amended by revising the last sentence of paragraph (f) to read as follows:

##### **1509.170-4 Definitions**

\* \* \* \* \*

(f) \* \* \* Performance categories include quality, cost control, timeliness of performance, business relations, compliance with labor standards, compliance with safety standards, and meeting Small Disadvantaged Business subcontracting requirements.

4. Section 1509.170-5 is amended by revising paragraph (b) to read as follows:

##### **1509.170-5 Policy**

\* \* \* \* \*

(b) For service type acquisitions, contracting officers shall use the National Institutes of Health (NIH) Contractor Performance System to record evaluations for all contract performance periods expiring after May 26, 1999. For construction type acquisitions, contracting officers shall use the NIH system to record evaluations for all contract performance periods expiring after [the effective date of the final rule].

\* \* \* \* \*

5. Section 1509.170-8 is amended by revising paragraph (b) to read as follows:

##### **1509.170-8 Contractor Performance Report**

\* \* \* \* \*

(b) The performance categories and ratings used in the evaluation of contractor performance are described in the clause at 1552.209-76. The NIH system provides instructions to assist contracting officers and project officers with completing evaluations.

#### **PART 1552—[AMENDED]**

6. Section 1552.209-76 is amended by revising the undesignated text between the section heading and paragraph (a), revising paragraphs (a)(2), (b)(2) and (b)(4) to read as follows:

##### **1552.209-76 Contractor Performance Evaluations.**

As prescribed in section 1509-170-1, insert the following clause in all applicable solicitations and contracts.

##### **Contractor Performance Evaluations (XX 2002)**

The contracting officer shall complete a Contractor Performance Report (Report) within ninety (90) business days after the end of each 12 months of contract performance (interim Report) or after the last 12 months (or less) of contract performance (final Report) in accordance with EPAAR 1509.170-5. The contractor shall be evaluated based

on the following ratings: 0 = Unsatisfactory, 1 = Poor, 2 = Fair, 3 = Good, 4 = Excellent, 5 = Outstanding, N/A = Not Applicable.

The contractor may be evaluated based on the following performance categories: Quality, Cost Control, Timeliness of Performance, Business Relations, Compliance with Labor Standards, Compliance with Safety Standards, and Meeting Small Disadvantaged Business Subcontracting Requirements.

(a) \* \* \*

(2) Evaluate contractor performance and assign a rating for quality, cost control, timeliness of performance, compliance with labor standards, and compliance with safety standards performance categories (including a narrative for each rating);

\* \* \* \* \*

(b) \* \* \*

(2) Assign a rating for the business relations and meeting small disadvantaged business subcontracting requirements performance categories (including a narrative for each rating).

\* \* \* \* \*

(4) Provide any additional information concerning the quality, cost control, timeliness of performance, compliance with labor standards, and compliance with safety standards performance categories if deemed appropriate for the evaluation or future evaluations (if any), and provide any information regarding subcontracts, key personnel, and customer satisfaction; and

\* \* \* \* \*

Dated: January 24, 2002.

**John Oliver,**

*Acting Director, Office of Acquisition Management.*

[FR Doc. 02-4068 Filed 2-19-02; 8:45 am]

BILLING CODE 6560-50-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 226

[Docket No. 020124019-2019-01, I.D. 030601D]

#### Endangered and Threatened Species; Determination on a Petition to Revise Critical Habitat for Northern Right Whales in the Pacific

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

**ACTION:** Response to petition; final determination.

**SUMMARY:** On October 13, 2000, NMFS received a petition dated October 4,

2000, requesting that NMFS revise the present critical habitat designation for the northern right whale under the Endangered Species Act (ESA) by designating a new area within the eastern Bering Sea as critical habitat for right whales in the North Pacific. NMFS has determined that the petition is not warranted at this time. NMFS recognizes that the revision of critical habitat may be prudent, but finds that the extent of critical habitat cannot be determined at this time because the essential biological requirements of the population in the North Pacific Ocean are not sufficiently understood. NMFS will continue to analyze issues raised by the petition following the completion of planned 2002 right whale surveys and research.

**ADDRESSES:** Comments and requests for copies of this determination should be addressed to the Division Chief, Marine Mammal Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

#### FOR FURTHER INFORMATION CONTACT:

Bradley Smith, Alaska Regional Office, NMFS, Anchorage, AK, (907) 271-5006; Michael Payne, Alaska Regional Office, NMFS, Juneau, AK, (907) 586-7236; or Caroline Good, Marine Mammal Division, Office of Protected Resources, NMFS, Silver Spring, MD, (301) 713-2322.

#### SUPPLEMENTARY INFORMATION:

##### Background

Right whales in the North Pacific are one of three populations of endangered right whales worldwide. The other populations occur in the North Atlantic and the Southern Hemisphere. The southern right whale is recognized as a separate species but the North Atlantic and North Pacific stocks have heretofore been described as a single species. Recent genetic studies, however, provide conclusive evidence supporting separate species status for these populations, one in the North Atlantic and another in the North Pacific. The International Whaling Commission's (IWC) Scientific Committee formally recognized a three species classification for right whales at its 2000 meeting in Adelaide, Australia. NMFS has reviewed and concurs with the taxonomic changes suggested by the IWC and is working to have the right whale populations listed as distinct species under the Endangered Species Act.

##### Status of the North Pacific Right Whale

*Exploitation:* Right whales in the North Pacific historically occurred across the Pacific Ocean north of 35

degrees North latitude, with concentrations in the Gulf of Alaska, eastern Aleutian Islands, southcentral Bering Sea, Sea of Okhotsk, and the Sea of Japan. They were heavily exploited by commercial whaling in the western North Pacific in the 18th and 19th centuries from the Sea of Japan into the Okhotsk Sea, and along the east side of the Kamchatka peninsula. Considerable offshore hunting also occurred eastward of the Kurile Islands as far as 170 degrees East longitude. Right whales were harvested in the eastern North Pacific from the southeastern Bering Sea to, and throughout, the Gulf of Alaska in the 19th and 20th centuries. In the mid 1900s illegal whaling by the Soviets is believed to have decimated the remaining population of right whales in the eastern North Pacific (Doroshenko 2000). Practically all right whaling in the northern hemisphere occurred during summer months.

*Abundance and Trends:* Data are insufficient to estimate the pre-exploitation size of this population of right whales. However, based upon catch levels, right whale abundance likely exceeded 10,000 animals in the North Pacific. This stock was severely depleted due to commercial and illegal whaling and remains so today. No reliable population estimate presently exists for this stock. Rice (1974) stated that only a few hundred individuals remained in the North Pacific stock and that for all practical purposes this stock was extinct because no sightings of a cow with a calf have been confirmed since 1900. This number has remained in the literature as the maximum number estimated for this stock although fewer than several hundred are believed to remain in the eastern North Pacific. Ferrero *et al.* (2000) indicated that only 14 individual animals were photographed from 1998 through 2000 with 2 re-sightings. This paucity of sightings and re-sightings, despite considerable survey effort, suggests that the population is indeed very small, perhaps in the tens of animals.

*Recent Sightings:* Prior to 1996 right whale sightings were so rare in the eastern North Pacific that single sightings have resulted in scientific publications (e.g. Carretta *et al.* 1994; Rowlett *et al.* 1994). The paucity of sightings of right whales in the eastern North Pacific was apparent despite high levels of survey effort in the region, notably from Japanese sighting surveys (Miyashita *et al.* 1995). Recent summer sightings of right whales in the eastern Bering Sea (Goddard and Rugh 1998; Tynan 1998, 1999; Tynan *et al.* 2001; Moore *et al.* 2000; LeDuc *et al.* 2001) represent the first reliable observations