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#### SUPPLEMENTARY INFORMATION:

##### I. Background

On October 26, 2009, Public Citizen, *et al.* (Petitioners) and FMCSA entered into a settlement agreement under which the parties agreed to seek to hold Petitioners' petition for judicial review of the November 19, 2008 Final Rule on drivers' hours of service in abeyance pending the publication of an NPRM. The settlement agreement states that FMCSA will submit the draft NPRM to the Office of Management and Budget (OMB) within nine months, and publish a Final Rule within 21 months, of the date of the settlement agreement. The current rule will remain in effect during the rulemaking proceedings.

On January 5, 2010, FMCSA announced its plans to hold three public listening sessions concerning the HOS rulemaking (75 FR 285). On January 15, 2010, FMCSA announced its plans to hold a fourth public listening session (75 FR 2467). FMCSA now announces a fifth public listening session to solicit additional written and/or oral comments and information on potential revisions to the HOS rule. The Agency will provide further opportunity for public comment when the NPRM is published.

##### II. Meeting Participation

This listening session is open to the public. Speakers' remarks will be limited to 10 minutes each. The public may submit material to the FMCSA staff at each session for inclusion in the public docket, FMCSA-2004-19608.

##### III. Questions for Discussion During the Listening Sessions

In preparing their comments, meeting participants should consider the following questions about possible alternatives to the current HOS requirements. These scenarios are merely set forth for discussion; FMCSA will not necessarily include them in an NPRM but would request similar information and data in an NPRM. Answers to these questions should be based upon the experience of the participants and any data or information they can share with FMCSA.

##### A. Rest and On-Duty Time

1. Would mandatory short rest periods during the work day improve driver alertness in the operation of a CMV? How long should these rest periods be? At what point in the duty cycle or drive-time would short rest periods provide the greatest benefit? What are the unintended consequences if these short rest periods are mandatory? Should the on-duty period be extended to allow for mandatory rest periods?

2. If rest or other breaks from driving improve alertness, could a driver who chooses to take specified minimum breaks be given scheduling flexibility—the ability to borrow an hour from another driving day once a week, for example—if that flexibility would not increase safety risks or adversely impact driver health?

3. How many hours per day and per week would be safe and healthy for a truck driver to work?

4. Would an hours-of-service rule that allows drivers to drive an hour less when driving overnight improve driver alertness and improve safety? Are there any adverse consequences that could arise from the implementation of a separate nighttime hours-of-service regulation?

##### B. Restart to the 60- and 70-Hour Rule

1. Is a 34-consecutive-hour off-duty period long enough to provide restorative sleep regardless of the number of hours worked prior to the restart? Is the answer different for a driver working a night or irregular schedule?

2. What would be the impact of mandating two overnight off-duty periods, e.g., from midnight to 6 a.m., as a component of a restart period? Would such a rule present additional enforcement challenges?

3. How is the current restart provision being used by drivers? Do drivers restart their calculations after 34 consecutive hours or do drivers take longer periods of time for the restart?

##### C. Sleeper Berth Use

1. If sleeper-berth time were split into two periods, what is the minimum time in each period necessary to provide restorative sleep?

2. Could the 14-hour on-duty limitation be extended by the amount of some additional sleeper-berth time without detrimental effect on highway safety? What would be the appropriate length of such a limited sleeper-berth rest period?

##### D. Loading and Unloading Time

1. What effect has the fixed 14-hour driving "window" had on the time drivers spend waiting to load or unload? Have shippers and receivers changed their practices to reduce the amount of time drivers spend waiting to load or unload?

##### E. General

1. Are there aspects of the current rule that do not increase safety risks or adversely impact driver health and that should be preserved?

Issued on: February 24, 2010.

**Larry W. Minor,**

*Associate Administrator for Policy and Program Development.*

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#### DEPARTMENT OF THE INTERIOR

##### Fish and Wildlife Service

##### 50 CFR Part 17

[Docket No. FWS-R8-ES-2010-0008]

[MO 92210-0-0008-B2]

[RIN 1018-AX07]

##### Endangered and Threatened Wildlife and Plants; Listing the Flat-Tailed Horned Lizard as Threatened

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Reinstatement of proposed rule, reopening of comment period, and notice of public hearings.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), notify the public of the reinstatement of our November 29, 1993, proposed rule to list the flat-tailed horned lizard (*Phrynosoma mcallii*) as threatened under the Endangered Species Act of 1973, as amended (Act). We also announce the reopening of a public comment period on the 1993 proposed rule and the scheduling of public hearings. This action will provide all interested parties with an additional opportunity to provide information and submit comments on the 1993 proposed rule.

**DATES:** *Written comments:* To ensure consideration of your comments, we must receive them on or before May 3, 2010.

*Public Hearings:* The public hearings will take place on March 23, 2010, from 1 p.m. to 3 p.m. and from 6 p.m. to 8 p.m. at University of California, Riverside (UCR) Palm Desert Graduate Center, 75-080 Frank Sinatra Drive,

Palm Desert, CA, and on March 24, 2010, from 1 p.m. to 3 p.m. and from 6 p.m. to 8 p.m. at the Radisson Hotel Yuma, 1501 South Redondo Center Drive, Yuma, AZ.

**ADDRESSES:** *Written comments:* You may submit comments and information by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Search for Docket No. FWS-R8-ES-2010-0008 and then follow the instructions for submitting comments.

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R8-ES-2010-0008; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

*Public Hearings:* The public hearings will be held at the University of California, Riverside (UCR) Palm Desert Graduate Center, 75-080 Frank Sinatra Drive, Palm Desert, CA 92211, and at the Radisson Hotel Yuma, 1501 South Redondo Center Drive, Yuma, AZ 85365.

We will post all comments and information we receive in writing and oral testimony offered at the public hearings on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Information Solicited section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760-431-9440; facsimile 760-431-5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### **SUPPLEMENTARY INFORMATION:**

##### **Information Solicited**

This document announces the reinstatement of the 1993 proposed rule, published in the **Federal Register** on November 29, 1993 (58 FR 62624), to list the flat-tailed horned lizard as a threatened species, and reopens the public comment period on this reinstated rulemaking. We intend any final action resulting from this proposal to be as accurate as possible. To ensure our determination is based on the best available scientific and commercial information, we request information on the flat-tailed horned lizard from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We particularly seek information on:

(1) The species' biology, range, and population trends.

(2) Past and ongoing conservation measures for the species, its habitat, or both, including how implementation of the Flat-tailed Horned Lizard Rangewide Management Strategy has affected the species in the United States.

(3) Conservation measures for the species in Mexico.

(4) The factors that are the basis for making a listing, delisting, or downlisting determination for a species under section 4(a) of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened

destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(5) The taxonomic status of this species, or whether any population segments of the flat-tailed horned lizard are discrete or significant under our February 7, 1996, policy regarding the recognition of distinct vertebrate population segments (61 FR 4722).

(6) The potential effects global climate change may have on the flat-tailed horned lizard or its habitat.

You may submit your information concerning the proposed rule by one of the methods listed in the **ADDRESSES** section. If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Information and materials we receive, as well as supporting documentation we used in preparing previous listing determinations for the species, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). If you submitted comments or information previously on the proposed rule or during any of the previous open comment periods related to this proposed rule, please do not resubmit them. These comments have been incorporated into the public record and

will be fully considered in the preparation of our final determination.

#### **Public Hearings**

We have scheduled two public hearings on the proposed rule. They will be held on the date listed in the **DATES** section at the address listed in the **ADDRESSES** section.

Anyone wishing to make an oral statement at a public hearing for the record is encouraged to provide a written copy of their statement to us at that hearing. In the event there is a large attendance, the time allotted for oral statements may be limited. Speakers can sign up only at the hearings. Oral and written statements receive equal consideration. There are no limits on the length of written comments submitted to us. If you have any questions concerning the public hearing or need reasonable accommodations to attend and participate in the public hearing, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible, but no later than 1 week before the hearing date, to allow sufficient time to process requests.

#### **Previous Federal Actions**

On November 29, 1993, we published in the **Federal Register** a proposed rule to list the flat-tailed horned lizard as a threatened species under the Act (58 FR 62624). On July 15, 1997, we published in the **Federal Register** a final determination to withdraw the proposed rule to list the flat-tailed horned lizard as a threatened species (62 FR 37852) based on various considerations including a reduction of threats to the species on public land and the existence of the Flat-tailed Horned Lizard Rangewide Management Strategy.

The Defenders of Wildlife filed a complaint in the U.S. District Court for the Southern District of California challenging our 1997 withdrawal of the proposed rule. On June 16, 1999, the District Court upheld our decision to withdraw the proposed listing rule. The District Court's decision was appealed and on July 31, 2001, and the Ninth Circuit Court of Appeals vacated the previous ruling of the District Court. In accordance with the Appeals Court's ruling, we published a document in the **Federal Register** on December 26, 2001, reinstating the 1993 proposed rule and opening a 120-day public comment period (66 FR 66384).

Subsequently, we reopened the comment period on the 1993 proposed rule twice, once on May 30, 2002 (67 FR 37752) and again on September 24, 2002 (67 FR 59809).

On January 3, 2003, we again published in the **Federal Register** a decision to withdraw the November 29, 1993, proposed rule to list the flat-tailed horned lizard as a threatened species (68 FR 331). The Service found the lizard to be in danger of extirpation in the Coachella Valley; however, we determined that the Coachella Valley is not a significant portion of the species' range. We concluded in the January 3, 2003, withdrawal that the flat-tailed horned lizard populations on either side of the Imperial Valley/Salton Sea and in Arizona were not likely to become endangered in the foreseeable future and that listing the species was not warranted.

The Tucson Herpetological Society and others filed a complaint with the District Court for the District of Arizona challenging the January 3, 2003, withdrawal of the proposed rule. In a ruling issued on August 30, 2005, the District Court for the District of Arizona issued an order granting plaintiffs' motion for summary judgment, citing our failure to specifically evaluate the lost habitat of the flat-tailed horned lizard, and whether the amount of lost habitat represented a significant portion of the species' range. On December 7, 2005, we published a document in the **Federal Register** reinstating the 1993 proposed rule (70 FR 72776). On March 2, 2006, we reopened the public comment period on the 1993 proposed rule for the purpose of soliciting comments and information relevant to the specific issue identified in the District Court's November 2005 ruling (i.e., whether the flat-tailed horned lizard's lost historical habitat rendered the species likely to become in danger of extinction in the foreseeable future throughout all or a significant portion of

its range) (71 FR 10631). We reopened an additional public comment period on the 2006 **Federal Register** notice from April 21, 2006, to May 8, 2006 (71 FR 20637).

After re-examining the lost historical habitat of the flat-tailed horned lizard in relation to our January 3, 2003, withdrawal, we determined that the lost historical habitat is not a significant portion of the species' range, and its loss does not result in the species likely becoming endangered in the foreseeable future throughout all or a significant portion of its range. We published our decision to once again withdraw the November 29, 1993, proposed rule to list the flat-tailed horned lizard as a threatened species on June 28, 2006 (71 FR 36745).

Following a supplemental complaint from Tucson Herpetological Society and others challenging the 2006 withdrawal of the proposed rule to list the flat-tailed horned lizard under the Act, the United States District Court for the District of Arizona (the District Court) granted summary judgment in favor of the Secretary of the Interior; however, this ruling was appealed to the Court of Appeals for the Ninth Circuit. In a ruling issued on May 18, 2009, the Court of Appeals for the Ninth Circuit reversed the District Court's ruling when it determined that in the context of the analysis of whether the lizard's lost historical range constituted a significant portion of the species' range, the administrative record did not support what the Court of Appeals for the Ninth Circuit viewed as the Service's conclusion that flat-tailed horned lizard populations were stable and viable throughout most of its current range.

On November 3, 2009, the District Court remanded the 2006 withdrawal to

the Service for further consideration and reinstated the 1993 proposal to list the species. The District Court ordered the Service to complete this reconsideration within 12 months. The Service will complete its review of the best available scientific and commercial information, including information and comments submitted during this comment period, as part of the remand process. We will then complete a new listing determination. This document serves to notify the public of the reinstatement of the 1993 proposed rule, announce public hearings, and solicit information regarding the species and threats to it and its habitat.

You may obtain copies of the original 1993 proposed rule, and other previous Federal actions relating to the flat-tailed horned lizard by mail from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section), or on the Internet at <http://www.fws.gov/Carlsbad>, or by visiting the *Federal eRulemaking Portal* at <http://www.regulations.gov>.

#### Author

The primary authors of this notice are the staff members of the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

#### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: February 17, 2010.

**Daniel M. Ashe,**

*Acting Director, U.S. Fish and Wildlife Service.*

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