

(2) [Reserved]

Dated: September 16, 1993.

Michael R. Taylor,

Deputy Commissioner for Policy.

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**DEPARTMENT OF THE INTERIOR****Minerals Management Service****30 CFR Part 253****Oil Spill Financial Responsibility for Offshore Facilities Including State Submerged Lands and Pipelines****AGENCY:** Minerals Management Service, Interior.**ACTION:** Notice of extension of public comment period.

**SUMMARY:** This notice extends, by 60 days, the comment period for an advance notice of proposed rulemaking (ANPR) that the Minerals Management Service published in the Federal Register on August 25, 1993. The ANPR is concerned with financial responsibility requirements for offshore facilities pursuant to the Oil Pollution Act of 1990. It describes issues relating to the development of regulations to ensure that parties responsible for offshore facilities have sufficient financial resources to ensure the payment of oil spill cleanup costs and associated damages.

**DATES:** The comment period is extended to December 24, 1993. Comments should be received or postmarked by that date.

**ADDRESSES:** Comments should be mailed or hand delivered to the Department of the Interior, Minerals Management Service, Mail Stop 4700, 381 Elden Street, Herndon, VA 22070-4817, Attention: John Mirabella, Chief, Engineering and Standards Branch.

**FOR FURTHER INFORMATION CONTACT:**

William S. Cook, Chief, Inspection and Enforcement Branch, telephone (703) 787-1591 or FAX (703) 787-1575.

Dated: September 30, 1993.

Thomas Gernhofer,

Associate Director for Offshore Minerals Management.

[FR Doc. 93-24547 Filed 10-5-93; 8:45 am]

BILLING CODE 4310-MR-M

**30 CFR Part 253****Oil Spill Financial Responsibility for Offshore Facilities Including State Submerged Lands and Pipelines****AGENCY:** Minerals Management Service, Interior.**ACTION:** Notice of public meetings.

**SUMMARY:** This notice announces two public meetings that the Minerals Management Service (MMS) will conduct to acquire information and data pertinent to the development of regulations implementing financial responsibility requirements of the Oil Pollution Act of 1990 (OPA). An advance notice of proposed rulemaking on this matter was published in the Federal Register on August 25, 1993. It describes issues relating to the development of regulations to ensure that parties responsible for offshore facilities have sufficient financial resources to ensure the payment of oil-spill cleanup costs and associated damages.

**DATES:** The meetings are scheduled as follows:

1. November 2, 1993, 8:30 a.m. to 5 p.m., New Orleans, Louisiana.
2. November 4, 1993, 8:30 a.m. to 5 p.m., Houston, Texas.

**ADDRESSES:**

1. New Orleans meeting: MMS Regional Office, 1420 S. Clearview Parkway, New Orleans, Louisiana 70123-2394.
2. Houston meeting: Doubletree Hotel at Allen Center, 400 Dallas Street at Bagby, Houston, Texas 77002.

**FOR FURTHER INFORMATION CONTACT:** Jeff Zippin, Chief, Inspection, Compliance and Training Division; Minerals Management Service; 381 Elden Street; Herndon, Virginia 22070-4817; telephone (703) 787-1576.

**SUPPLEMENTARY INFORMATION:** Interested persons are invited to participate in public meetings to address the following issues:

- Types and locations of "offshore facilities" subject to OPA financial responsibility requirements;
- Methods available to evidence OPA financial responsibility;
- Interaction of States/Territories and Federal Government to enforce OPA financial responsibility;
- Protection for the responsible parties, the guarantors, and other financial participants; and
- Effects on the local and national economic conditions of OPA financial responsibility requirements.

Additional meetings on these matters are tentatively being considered for

other locations. Announcement of the addresses and dates of any additional meetings will be made at a later time. **PRESENTATIONS:** Presentations by interested parties should focus on the following:

- Proposals and suggestions for addressing the financial responsibility requirements.
- Economic impacts on affected parties of the financial responsibility requirements.

**REGISTRATION:** There will be no registration fee for these meetings. Participants need not register prior to arrival at the meetings. However, prior notification to Richard Gangerelli, Minerals Management Service, Mail Stop 4800, 381 Elden Street, Herndon, Virginia 22070-4817; or telephone (703) 787-1574, FAX (703) 787-1599, is requested in order to access the probable number of participants. Seating is limited and will be on a first-come-first-seated basis.

Dated: September 30, 1993.

Thomas Gernhofer,

Associate Director for Offshore Minerals Management.

[FR Doc. 93-24548 Filed 10-5-93; 8:45 am]

BILLING CODE 4310-MR-M

**DEPARTMENT OF TRANSPORTATION****Office of the Secretary****49 CFR Part 23**

[Docket No. 64]; Notice No. 93-20]

**RIN 2105-AB99****Participation by Disadvantaged Business Enterprises in Airport Concessions****AGENCY:** Office of the Secretary (DOT).**ACTION:** Proposed rule.

**SUMMARY:** This NPRM proposes to implement recent changes to the Airport and Airway Improvement Act (AAIA) of 1982, as amended. The proposed rule would allow airport sponsors to count new forms of disadvantaged business enterprise (DBE) participation toward the overall goals of a DBE concession plan. These new forms include purchases from DBE's of goods and services used in the operation of a concession, as well as management contracts and subcontracts with DBE's. The NPRM would amend the DOT's DBE regulations to make these and several other changes.

**DATES:** Comments must be received on or before November 22, 1993.

**ADDRESSES:** Comments to this notice may be mailed, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Docket No. 64j, 800 Independence Avenue, SW., Washington, DC 20591. Comments delivered must be marked Docket No. 64j. Comments may be examined in room 915F weekdays between 8:30 a.m. and 5 p.m. except on Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Irene H. Miels, Airport and Environmental Law Division (AGC-601), Office of the Chief Counsel, (202) 267-3199, or David S. Micklin, Office of Civil Rights (ACR-4), (202) 267-3270, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

#### **SUPPLEMENTARY INFORMATION:**

##### **Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they desire. Comments relating to the economic effects that might result from adoption of the proposals contained in this notice are invited. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 64j." The postcard will be dated and time stamped and returned to the commenter.

All communications received on or before the closing date for comments will be considered by the Secretary before taking action on the proposed rule. The proposal contained in the notice may be changed in light of comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with DOT personnel concerning this rulemaking will be filed in the docket.

##### **Availability of NPRM**

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-430, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3464. Requests must identify

the notice number of this NPRM. Persons interested in being placed on the mailing list for future NPRM's also should request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes application procedures.

##### **Summary of Proposed Rule**

On April 30, 1992, the Department issued a final rule implementing section 511(a) of the AIA (57 FR 18400). These regulations, designated subpart F of 49 CFR part 23, established requirements for the participation of DBE's in airport concessions. The requirements apply to sponsors that have received a grant for airport development authorized under the AIA. Primary airports are required by the rule to prepare and implement a written DBE concession plan, while nonprimary airports are required to take outreach steps to encourage DBE's to participate as concessionaires whenever there is a concession opportunity.

Subpart F, as issued on April 30, 1992, references certain sections in the Department's overall DBE rule, 49 CFR part 23, since they are applicable to the DBE concession program. These include § 23.7, "Discrimination prohibited;" 23.45(g)(5) (factors to consider in setting overall goals); 23.51, "Certification of the eligibility of minority business enterprises;" 23.51(c) (circumstances that eliminate need for submission of Schedule A or B); 23.61 (definition of "DBE"); 23.69, "Challenge procedure;" 23.53, "Eligibility standards;" 23.53(d) (joint ventures awarded through set-asides); 23.55, "Appeals of denials of certification as an MBE;" and 23.41(f), "Exemptions."

On December 9, 1992, the Department published an NPRM which would revise 49 CFR part 23 as a whole (See 57 FR 58288.). The amended rule would reflect program changes since 1980, when the initial rule was published. It also would reflect 12 years of experience in implementing the program. If adopted, various sections would be renumbered, as well as substantially changed.

These proposed changes to 49 CFR part 23, if made, would require some revision of subpart F, either as proposed in this NPRM, or as it may be issued in the form of a Final Rule. In the interim, the references in this NPRM will be to the sections as they appear in existing 49 CFR part 23.

Since the December 9, 1992, NPRM to amend 49 CFR part 23 includes some changes that will impact substantially on sections now referenced in the NPRM to amend subpart F, the Department specifically seeks comments on the following sections in the

proposed overall revision, as they apply to the DBE concession program. Commenters who commented on the December 9, 1992, NPRM, from the standpoint of the DBE Federally-assisted contracting program, should review that NPRM again—this time in regard to the DBE concession program.

The relevant sections include: 23.1 (b) and (c) in "Purpose;" 23.5, "Definitions" of "Contract," "Contractor," "Department" or "DOT," "Disadvantaged Business Enterprise," "Joint venture," "Noncompliance," "Operating Administration," "Primary Recipient," "Recipient," "Secretary," "Set-aside," "Small Business Administration or SBA," "Small Business Concern," (as it applies to off-airport DBE's that sell goods or services to on-airport concessions and as it applies to DBE's holding management contracts or subcontracts on airports), and "Socially and economically disadvantaged individuals;" 23.7, "Discrimination prohibited" (as modified to apply to concessions); 23.9, "Exemptions and interpretations;" 23.11, "Reporting requirement;" 23.27 (c)(8) and (d) (application forms and reporting of changes in circumstances); 23.27(e) (1) through (3) (recertification reviews); 23.27 (f) and (g) (statewide unified certification program); 23.29 (a) and (b) "Certification standards;" 23.29(d), "Social and economic disadvantage (except for requirement that a net worth exceeding \$750,000 alone rebuts the presumption of social and economic disadvantage); 23.29(e), (section 8(a) certifications, as modified by size standards in subpart F);" 23.39 (f) through (i) (additional sections on certification standards); 23.31(b) (factors to consider in setting overall goals); subpart C, "Certification, Compliance and Enforcement Procedures" (except for 23.61); and Appendix A, "DBE Certification Form."

Although the above proposed sections differ somewhat from those in existing 49 CFR part 23, in general they reflect the basic principles of the DBE program as it has been implemented since 1980. The Department proposes to apply these provisions to the DBE concession program.

Regarding the proviso in § 23.29(d)(1) concerning a net worth of \$750,000 and its negative impact on a DBE owner's status as a socially and economically disadvantaged individual, the Department is not proposing application of this standard in the DBE concession program. Under section 511(a)(17) of the AIA, the Secretary may establish the size standards that will qualify DBE concessionaires as small business concerns.

Since DBE's often must compete with non-DBE "mega" firms for concessions, the Department concluded in 1992 that the size standards for DBE concessionaires should be raised. The new standards were published on April 30, 1992, as an appendix to the DBE concession requirements set forth in subpart F of 49 CFR part 23. With the exception of banks, pay telephones, and car rental agencies, concessionaires now may earn as much as \$30 million per year in gross receipts averaged over the 3 years preceding their bid for concession space. Car rentals may earn a maximum of \$40 million per year.

The SBA net worth standard was established to apply to firms with gross receipts far below those established for concessions and is not workable in this context. In effect, the net worth limitation would negate the Department's concession standard, so the Department is not proposing to apply this limitation.

Following issuance of subpart F, section 511(a) of the AAIA was amended by the Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992 (Pub. L. 102-581). The amendment added a reference to businesses that provide "ground transportation, baggage carts, automobile rentals, or other consumer services" to the public, thereby clarifying that these concessions, as well as those that sell goods, are covered. Since the current rule, through Departmental interpretation, is applicable to both types of concessions, no change to the rule is needed to implement the amendment to section 511(a).

The 1992 amendments to the AAIA also amended section 511 by adding paragraph (h), as follows:

(h) Administration of DBE Assurance—

(1) Management Contracts—In administering subsection (a)(17) of this section, an airport owner or operator is authorized to meet the overall percentage goal established under such subsection by including businesses operated through management contracts and subcontracts. The dollar amount of a management contract and subcontract with a DBE firm shall be added to the total DBE participation in airport concessions and to the base from which the airport's overall percentage goal is calculated. The dollar amount of management contracts and subcontracts with non-DBE firms and the gross revenues of business activities to which management contracts and subcontracts pertain shall not be added to this base.

(2) Purchase of Goods and Services—Except as provided in subsection (h)(3),

an airport owner or operator may meet the overall percentage goal established under subsection (a)(17) of this section by including the purchase from DBE's of goods or services used in businesses conducted on the airport, provided that good faith efforts shall be made by the airport owner or operator and the businesses conducted on the airport to explore all available options to achieve, to the maximum extent practical, compliance with such goal through direct ownership arrangements, including, but not limited to, joint ventures and franchises.

(3) Provision for Car Rental Firms—(A) In complying with subsection (a)(17) of this section, an airport owner or operator shall include the revenues of car rental firms on the airport in the base from which the overall percentage goal set forth in such subsection is calculated.

(B) An airport owner or operator may require a car rental firm to meet any requirement imposed under subsection (a)(17) of this section through the purchase or lease of goods or services from DBE's. In the event that an airport owner or operator requires the purchase or lease of goods or services from DBE's, a car rental firm shall be permitted to meet such requirement by including purchases or leases of vehicles from any vendor that qualifies as a small business concern (as defined by the Secretary by regulation) owned and controlled by socially and economically disadvantaged individuals (as defined under section 505(d)(2)(B)).

(C) Nothing in this subsection or subsection (a)(17) of this section shall require a car rental firm to change its corporate structure to provide for direct ownership arrangements in order to meet the requirements of such subsection or subsection (a)(17).

(4) General Provisions—(A) Nothing in this subsection or subsection (a)(17) shall preempt any State or local law, regulation, or policy enacted by the governing body of an airport owner or operator, or the authority of any State or local government or airport owner or operator to adopt or enforce any law, regulation, or policy relating to DBE's.

(B) An airport owner or operator shall be permitted to afford opportunities for small business concerns owned and controlled by socially and economically disadvantaged individuals to participate through direct contractual agreement with such concerns.

(5) Exclusion of Air Carrier Services—Air carriers in providing passenger or freight-carrying services and other businesses that conduct aeronautical activities at an airport shall not be included in the overall percentage goal

set forth in subsection (a)(17) of this section for participation of small business concerns at the airport.

With the exception of paragraph (3)(A), the provisions of section 511(h) are discussed further herein, in conjunction with the specific sections proposed to amend subpart F. No amendment is necessary to implement paragraph (3)(A), since subpart F already requires the gross receipts from car rental firms to be included in the base from which the overall goals of a DBE concession plan are calculated.

## Section by Section Analysis

### Section 23.89 Definitions

In a matter unrelated to the AAIA amendments, the Department proposes to amend the definition of "affiliation." Currently, the rule incorporates the definition used by the Small Business Administration (SBA) in 13 CFR part 121. Under § 121.401(l), affiliation may arise through a joint venture agreement, requiring the parties thereto to count the gross receipts earned by both in making a size determination.

The Department believes that joint venture agreements can offer DBE's a viable means of participating in the program when a lease, sublease, or other arrangement is not feasible. Since many of the major concessionaires, with whom DBE's may form joint ventures, are very large, such an arrangement would frequently put the DBE over the size standard.

Sections 511(a) and 511(h)(3)(B) of the AAIA delegate authority to the Secretary to designate the size standards. The Department chose to use the SBA's definition of "affiliation" in implementing section 511(a), but was not bound by the statute to do so. The NPRM proposes to retain the SBA's definition of "affiliation," except that § 121.401(l) of the SBA regulations 13 CFR part 121, "Affiliation under joint venture agreements," would not apply to the definition used in subpart F.

A minor change is proposed to the definition of "concession" to conform to the language of section 511(h)(5), which excludes air carrier services.

The NPRM proposes to adopt a new definition of "management contract or subcontract" in order to facilitate implementation of section 511(h)(1) of the AAIA. That term would mean "an agreement with a sponsor or a derivative subagreement under which a firm operates a business activity, the assets of which are owned by the sponsor." To qualify under the definition, the business activity must be located at an obligated airport and be engaged in the

sale of consumer goods or services to the public.

For the reasons discussed above, the NPRM proposes to modify the definition of "socially and economically disadvantaged individuals" to specify that the \$750,000 limitation on net worth does not apply to this subpart..

#### *Section 23.93 Requirements for Airport Sponsors*

This section would be amended to make the nondiscrimination provisions applicable to management contracts or subcontracts and to agreements for the purchase or lease of goods and services.

#### *Section 23.95 Elements of Disadvantaged Business Enterprise (DBE) Concession Plan*

Under proposed § 23.95(a)(6)(i), a sponsor that calculates its overall goals as a percentage of the estimated gross receipts from all concessions is permitted to add the estimated dollar value of a management contract or subcontract with a DBE to the total of DBE participation and to the base from which the goal is calculated. The dollar value of management contracts and subcontracts with non-DBE's is not added to the base.

Proposed § 23.95(a)(6)(ii) permits these sponsors to include in the overall goal and the base, the estimated dollar value of goods or services that a non-DBE concessionaire will purchase from DBE's and use in operating the concession. In accordance with section 511(h)(2) of the AIAA, credit for these purchases is subject to satisfying certain good faith efforts requirements, a provision that is discussed below in connection with § 23.95(j).

Finally, these sponsors may include in the goal and the base, the estimated dollar value of goods or services that a non-DBE car rental firm will purchase or lease from a DBE, including the purchase or lease of vehicles, and use in operating the concession. Section 511(h)(3) of the AIAA does not establish a good faith efforts test (discussed below under § 23.95(j)) as a condition of including these costs in the goal.

Under proposed § 23.95(a)(8)(ii), a sponsor that calculates the overall goals as a percentage of the total number of concessions may add the number of management contracts and subcontracts with DBE's to the total DBE participation and the base from which the goal is calculated. Management contracts and subcontracts with non-DBE's are not added to the base.

Section 23.95(b), "Goal Methodology," would be amended to require information on these new forms

of DBE participation that the sponsor expects to count toward its goals.

A new § 23.95(d) would be added to the rule entitled "Counting DBE Participation Toward Meeting the Goals" to accommodate the new DBE participants discussed above under § 23.95(a). This section also would formalize Departmental policy on crediting DBE participation toward concession goals under joint venture agreements.

Additionally, proposed § 23.95(d) would incorporate the "commercially useful function" provision from § 23.47(d) of part 23, which currently applies only to DOT-assisted contractors. While the requirement to perform a commercially useful function would be made applicable to any DBE eligible under subpart F, it would be particularly useful in evaluating firms which provide services or supplies, and which subsequently enter into subcontracts. Guidance is included in § 23.47(d) for determining whether a subcontracting practice meets the standard for a commercially useful function.

The Department invites commenters to provide examples of typical or well-recognized purchasing and leasing practices, which may be useful to include in any final rule.

With the addition of the new DBE participants to the program, sponsors may expect to receive an increased number of applications for DBE certification. While the Department believes that it is very important to ensure that only eligible DBE's benefit from the program, it seeks to minimize administrative requirements.

Thus, § 23.95(g)(6) proposes to allow sponsors to give full faith and credit to a certification made by another DOT recipient when the certified firm is a management contractor or subcontractor or a provider of goods or services located off airport property. The term "full faith and credit" would mean that the certifying agency, not the accepting agency, assumes ultimate responsibility for the validity of the certification.

In the event that the Federal Aviation Administration (FAA) comes to believe that such a certification is defective, it could contact the certifying agency or, if that agency is not an FAA recipient, the Federal Highway Administration or Federal Transit Administration would be asked to inquire into the matter.

The Department invites comments on this proposal and solicits other suggestions for reducing regulatory requirements. In particular, the Department solicits comments on the feasibility of adopting a self-certification procedure in limited circumstances.

Under this procedure, a sponsor would be permitted to accept without further review the eligibility information submitted by an applicant.

Use of the procedure could be limited to special categories of contracts, such as to providers of goods or services, or to contracts of less than a designated dollar value, or to some combination of these factors. The Department does not propose to apply self-certification to concessionaires.

Additionally, the Department solicits comments on whether a sponsor should be permitted to accept a certification made by a local or state agency that receives no DOT funding, but which uses the same eligibility criteria as employed under the DOT's DBE program. The Department is aware of several agencies that fall into this category.

Proposed § 23.95(j)(2) implements the good faith efforts requirement set forth in § 511(h)(2) of the AIAA. As a condition of counting the purchases of goods and services toward DBE goals, the sponsor and concessionaire making the purchase would be required to make good faith efforts to explore all available options to achieve, to the maximum extent practical, DBE participation through direct ownership arrangements, including, but not limited to, joint ventures and franchises. Good faith efforts would include, but not be limited to, those which sponsors currently must make to achieve their overall DBE goals.

#### *Section 23.97 Obligations of Concessionaires and Competitors*

The "Provision for Car Rental Firms" found in sections 511(h)(3) (B) and (C) of the AIAA is incorporated into § 23.97 of the proposed rule. Section 511(h)(3)(C) provides that "Nothing in the [AIAA] shall require a car rental firm to change its corporate structure to provide for direct ownership arrangements in order to meet the requirements of the [AIAA]." Although the legislation does not define what is meant by a change to corporate structure, Senator Wendell Ford addressed this point, as follows:

Section 511(h)(3)(C) of AIAA, as amended, provides that nothing in the law on DBE assurance 'shall require a car rental firm to change its corporate structure to provide for direct ownership arrangements.' For example, a car rental firm is not required, but is permitted, by the DBE assurance sections 511(a)(17) and 511(h) of the AIAA, as amended, to transfer corporate assets or engage in joint ventures, partnerships, or subleases. I would like to repeat that this language has been agreed to by both the car rental industry and the airports.

138 Cong. Rec. S 17843 (October 8, 1992) (statement of Sen. Ford).

In an extension of his remarks on the floor of the House of Representatives on October 2, Representative James L. Oberstar submitted a similar statement for the Congressional Record on October 8, 1992 (138 Cong. Rec. E 3501). Representative William F. Clinger submitted the same statement to the Congressional Record, as an extension of his remarks. (138 Cong. Rec. E 3257.)

The proposed rule defines "change to corporate structure" so as to be consistent with the sense of Congress, as described above.

Section 23.97(c) incorporates the provision in section 511(h)(4)(B) of the AAIA, which permits a sponsor to afford DBE firms opportunities to participate as prime concessionaires through direct contractual relationships with the sponsor. Inclusion of this provision does not represent a change to the rule. Section 23.89 currently states under the definition of a "concessionaire" that a concession may be operated under a lease, as well as a sublease or other agreement.

#### *Section 23.109 Compliance and Enforcement*

This section would be expanded to include a new paragraph on complaint processing. The NPRM provides that any person who believes that there has been a violation of subpart F may file a written complaint in accordance with FAA regulations 14 CFR part 13, "Investigative and Enforcement Procedures." Complaints meeting the requirements in part 13 will be docketed and processed as formal complaints.

The FAA is required to utilize the procedures set forth in part 13 to investigate alleged violations of the AAIA, including the DBE provisions of sections 511(a) and 511(h). (See 14 CFR 13.1 and 13.3.) The complaint procedures in § 23.73 of 49 CFR part 23, which are based on title VI of the Civil Rights Act of 1964, are not used by the agency in processing DBE complaints.

This section implements section 519 of the AAIA, which empowers the FAA Administrator to take enforcement action against noncomplying recipients in regard to violations of the AAIA, including DBE provisions.

#### *Section 23.111 Effect of Subpart*

This section would be expanded to incorporate the provisions of section 511(h)(4) of the AAIA, which enables sponsors to adopt or enforce DBE programs under state or local authority. The rule would also make clear that in the event of a conflict between the requirements of subpart F and such

local program, the sponsor must, as a condition of remaining eligible for Federal financial assistance, take such steps as may be necessary to comply with the requirements in subpart F.

Proposed § 23.111(c), concerning set-asides, is virtually identical to a provision which the Department has proposed to use for construction and other DOT-assisted contracting. The proposal appeared in an NPRM to amend 49 CFR part 23, published on December 9, 1992 (see 57 FR 58288 at 59309, § 23.35(f)). Like the December 9 NPRM, subpart F would neither prohibit nor authorize the use of set-asides. Subpart F would clarify that sponsors are prohibited from using group-specific set-asides (e.g., a set-aside solely for a particular group of disadvantaged individuals, as opposed to a set-aside for all DBE firms).

#### *Appendix A to Subpart F—Size Standards for the Airport Concession Program*

While subpart F currently designates small business size standards for concessionaires, the Department must decide on standards to be used for the new DBE participants, including management contractors and subcontractors and providers of goods and services. As noted, the AAIA delegates authority to the Secretary to establish these standards.

Although the Department is not required to use the SBA standards, the NPRM proposes to adopt these standards for management contractors and providers of goods and services other than automobile dealerships. Unlike concessionaires, these businesses generally are not required to make a substantial capital investment in a leasehold facility. Thus, these firms will not encounter the hardships associated with "graduating" from the program after exceeding the SBA standard that ordinarily would befall concessionaires. Moreover, this turnover would allow more DBE's to enter and benefit from the program.

On the other hand, the Department believes that SBA's size standard for automobile dealerships, currently set at a maximum of \$11.5 million (average annual gross receipts over preceding 3 years), is on the low side. Thus, the Department solicits comments as to what an appropriate standard might be.

#### *Economic Summary*

Executive Order 12291 established the requirement that, within the extent permitted by law, a Federal regulatory action may be undertaken only if the potential benefits to society for the regulation outweigh the potential costs

to society. In response to this requirement, and in accordance with Department of Transportation policies and procedures, the FAA has estimated the anticipated benefits and costs of this rulemaking action. The results are summarized in this section.

The proposed rule would implement recent changes to the airport grants program by allowing airport sponsors to count additional activities as Disadvantaged Business Enterprises towards the overall goals of a DBE concession plan. The proposed rule would allow purchases from DBE's of goods and services used in the operation of a concession, as well as management contracts and subcontracts with DBE's.

Under current procedures, the extent of DBE participation is ordinarily determined by dividing the gross receipts attributable to DBE enterprises by the total receipts generated by those activities in which DBE's may participate (i.e., airport concessions). In particular instances, the FAA has allowed goal setting to be based on the number of concessions. In other words, all receipts from concessions, including proceeds received from non-DBE enterprises, are added to the base from which the overall goal is calculated.

The result is that airport sponsors which have few current opportunities for DBE participation have considerable difficulty meeting the statutory goal of at least 10 percent DBE participation. They face two problems: (1) They cannot increase the number of new DBE concessions; and (2) they cannot require current lessees to involve sublessees, joint venturers, or franchisees. This has the effect of keeping the level of DBE participation below 10 percent.

Under the proposal, airports would have an opportunity to increase the amount of DBE participation through the direct purchase of goods and services from DBE firms. The dollar amount of the direct purchases of goods and services from DBE's and management contracts or subcontracts with DBE's would be added to the total DBE participation in airport concessions as well as to the base—the same method used to calculate DBE participation under current procedures. However, the dollar amount of management contracts and subcontracts with non-DBE firms as well as the dollar amount of direct purchases from non-DBE firms would not be added to the base.

Under the proposal, airport sponsors would be able to count direct purchases made by non-DBE concessionaires toward their goals provided that they made "good faith efforts" to explore all available options to achieve compliance through direct ownership arrangements,



including subleases, joint ventures, and franchises. This "good faith efforts" test would not apply to the goods or services purchased or leased by non-DBE car rental firms from a DBE firm due to the special problems direct ownership arrangements pose for car rental agencies.

Finally, sponsors would be allowed to give "full faith and credit" to certifications made by other DOT recipients when the DBE firm is a management contractor or subcontractor or a provider of goods or services. The purpose of the certification process is to determine if an applicant does in fact satisfy both the size and ownership requirements for DBE status. The term "full faith and credit" means that the certifying agency (e.g., a recipient of Federal Highway Administration funding) would assume ultimate responsibility for the validity of the certification. The FAA is considering other ways to lower certification costs, such as permitting self-certification for smaller enterprises (which may be located off-site) and by extending the "full faith and credit" provision to include certifications made by non-DOT agencies (e.g., local governments). The public is invited to submit comments on reducing these costs.

The expansion in the potential kinds of activities eligible for DBE participation would increase the range of firms that could be certified as DBE's. If firms engaging in these activities were generally smaller than firms that are currently eligible for DBE participation, the number of certifications made by airport sponsors could increase, which could add to their overhead costs (i.e., time spent investigating potential DBE's to validate their eligibility). The FAA solicits information from the public regarding the expected impact of the proposal, if any, on the types of business arrangements that airport sponsors and concessionaires would likely choose for satisfying DBE goals.

This proposal is expected to promote economic efficiency. The expansion in the types of business operations that can be counted toward satisfying DBE goals as well as changes in the method airport sponsors may use for calculating DBE goal attainment described above should afford these sponsors greater flexibility. Sponsors would be able to involve DBE's in more facets of their overall business using a broader array of financial vehicles. They would presumably have a greater opportunity to minimize the risks of failure for both themselves and the DBE's. Both airport operators and concessionaires would have access to a wider range of business relationships with DBE's, thereby

affording them an opportunity to better control their risks. These risks tend to be higher in business partnerships, such as joint ventures.

A key advantage of these alternative business arrangements is that they would reduce potential losses incurred by airport sponsors and non-DBE concessionaires in the event of the failure of a DBE. All partners in joint ventures are financially liable for any business losses. Small businesses have traditionally experienced a considerably higher rate of failure than larger business enterprises, especially in the early years. If a non-DBE concessionaire has made a good faith but unsuccessful search for a viable DBE to joint venture, sublease, or franchise, the non-DBE still will have an opportunity to help meet the goals through the purchase of goods and services from DBE's. In addition, the non-DBE would be spared the legal costs of establishing a business partnership with a DBE that may not be ready for the competition of airport concession activity.

Similarly, an airport can augment its capacity to reach its goals through management contracts and subcontracts. Under appropriate circumstances, these offer a triple benefit: (1) They enlarge the pool of available DBE's; (2) some management contracts result in greater economic benefit to the airport than a concession arrangement; and (3) since the airport exercises greater control over management contracts than over concessions, in some situations the airport is in a better position to avert business failures. The FAA concludes that the proposal has some potential for reducing the costs of complying with the DBE Program.

#### Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The RFA requires agencies to review rules which may have a "a significant economic impact on a substantial number of small entities." Small entities include businesses, nonprofit organizations, and governmental jurisdictions.

The proposal affects airports classified under Standard Industrial Classification (SIC) 4582. The FAA's small entity size standards criterion defines a small airport as one owned by a county, city, town or other jurisdiction having a population of 49,999 or less. There are currently 418 primary non-military airports that are subject to the provisions of part 23. According to 1980 Census data, 108 of the 418 primary

non-military airports are owned by jurisdictions with populations of less than 50,000.

The proposed rule amendment is of a cost relieving nature and would therefore afford cost savings to airport sponsors. The impacts on the costs of complying with the DBE Program borne by individual airport sponsors are expected to be quite small, however. The FAA solicits comments from the operators of small airports (as defined above) so that the potential for differential impacts can be determined.

#### International Trade Impact

The proposed rulemaking action would affect only domestic airports. There is not expected to be any impact on international trade because these airports obviously do not compete with their foreign counterparts.

Issued this 17th day of September, 1993, at Washington, DC.

**Federico Peña,**  
*Secretary of Transportation.*

#### List of Subjects in 49 CFR Part 23

Airport concessions, Disadvantaged business enterprise, Government contracts, Minority businesses, Reporting and recordkeeping requirements, Transportation.

#### The Proposal

Accordingly, the DOT proposes to amend subpart F of part 23 of the Regulations of the Office of the Secretary of Transportation (49 CFR part 23) as follows:

1. The title of subpart F would be revised to read as follows:

#### Subpart F—Participation by Disadvantaged Business Enterprise in Airport Concessions

#### PART 23—[AMENDED]

2. The authority citation for part 23 would be revised to read as follows:

**Authority:** Sec. 905 of the Regulatory Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); sec. 520 of the Airport and Airway Improvement Act of 1982, as amended (49 U.S.C. App. 2219); sec. 19 of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1615); sec. 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (49 U.S.C. App. 1601 note); sec. 505(d), sec. 511(a)(17), and sec. 511(h) of the Airport and Airway Improvement Act, as amended (49 U.S.C. App. 2204(d), 2210(a)(17), and 2210(h)); title 23 of the U.S. Code (relating to highways and traffic safety, particularly sec. 324 thereof); title VI of the Civil Rights Act (42 U.S.C. 2000d *et seq.*); Executive Order 12265; Executive Order 12138.

3. In § 23.89, the introductory text of the definitions of "affiliation" and

"concession," and the definition of "socially and economically disadvantaged individuals" would be revised, and a definition of "management contractor or subcontract" would be added alphabetically to read as follows:

#### § 23.89 Definitions.

*Affiliation* has the same meaning the term has in regulations of the Small Business Administration, 13 CFR part 121, except that the provisions of § 121.401(l), "Affiliation under joint venture agreements," shall not apply to the definition used in this subpart. Except as otherwise provided in 13 CFR part 121 and in this section, concerns are affiliates of each other when, either directly or indirectly

\* \* \* \* \*

*Concession* means a for-profit business enterprise, located on an airport subject to this subpart, that is engaged in the sale of consumer goods or services to the public under an agreement with the sponsor, another concessionaire, or the owner of a terminal, if other than the sponsor. Businesses which conduct an aeronautical activity are not considered concessionaires for purposes of this subpart. Aeronautical activities include scheduled and nonscheduled air carriers, air taxis, air charters, and air couriers, in providing passenger or freight-carrying services; fixed base operators; flight schools; and sky-diving, parachute-jumping, flying guide services, and helicopter or other air tours.

\* \* \* \* \*

*Management contract or subcontract* means an agreement with a sponsor or a derivative subagreement under which a firm operates a business activity, the assets of which are owned by the sponsor. The managing agent generally receives, as compensation, a flat fee or a percentage of the gross receipts or profit from the business activity. For purposes of this subpart, the business activity operated by the managing agent must be located at an airport subject to this subpart and be engaged in the sale of consumer goods or services to the public.

\* \* \* \* \*

*Socially and economically disadvantaged individuals* has the same meaning the term has in § 23.61, except that for purposes of this subpart, the presumption of social and economic disadvantage shall not be considered to be rebutted solely on the basis that the net worth of the owner of a firm

presumed to be disadvantaged exceeds \$750,000.

\* \* \* \* \*

4. In § 23.93, paragraph (a)(1) and (a)(3)(i) would be revised to read as follows:

#### § 23.93 Requirements for airport sponsors.

(a) *General requirements.* (1) Each sponsor shall abide by the nondiscrimination requirements of § 23.7 with respect to the award and performance of any concession agreement, management contract or subcontract, purchase or lease agreement, or other agreement covered by this subpart.

(2) \* \* \*

(3) \* \* \*

(i) "This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR part 23, subpart F. The concessionaire agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management contract or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR part 23, subpart F.

\* \* \* \* \*

#### § 23.95 [Amended]

5. Section 23.95 would be amended by revising paragraphs (a) and (b)(2), adding paragraph (b)(5), revising paragraph (c), adding paragraph (f)(6), revising paragraph (g)(4), and revising paragraph (i) to read as follows: § 23.95 Elements of Disadvantaged Business Enterprise (DBE) concession plan.

(a) *Overall annual DBE goals.*

(1) The sponsor shall establish an overall goal for the participation of DBE's in concessions for each 12-month period covered by the plan. The goals shall be based on the factors listed in § 23.45(g)(5).

(2) Sponsors shall calculate the overall DBE goal as a percentage of one of the following bases:

(i) The estimated gross receipts that will be earned by all concessions operating at the airport during the goal period.

(ii) The total number of concession agreements operating at the airport during the goal period.

(3) The plan shall indicate which base the sponsor proposes to use in calculating the overall goals.

(4) Airport sponsors may establish an overall annual goal exceeding 10 percent.

(5) To the extent practicable, sponsors shall seek to obtain DBE participation in all types of concession activities and not

concentrate participation in one category or a few categories to the exclusion of others.

(6) Sponsors that employ the procedures of paragraph (a)(2)(i) of this section may add the following amounts to the total of DBE participation and to the base from which the overall percentage goal is calculated:

(i) The estimated dollar value of a management contract or subcontract with a DBE. (The dollar value of management contracts and subcontracts with non-DBE firms are not added to the base from which the overall percentage goal is calculated.)

(ii) Subject to the conditions set forth in paragraph (c)(1)(iv) of this section, the estimated dollar value of goods and services that a non-DBE concessionaire will purchase from DBE's and use in operating the concession.

(iii) The estimated dollar value of goods or services that a non-DBE car rental firm will purchase or lease from DBE's, including purchases or lease of vehicles, and use in operating the concession.

(7) Sponsors that employ the procedures of paragraph (a)(2)(i) of this section shall also:

(i) Use the net payment to the airport for banks and banking services, including automated teller machines (ATM) and foreign currency exchanges, in calculating the overall goals.

(ii) Exclude from the overall goal calculation any portion of a firm's estimated gross receipts that will not be generated from a concession activity.

*Example.* A firm operates a restaurant in the airport terminal which services the traveling public and under the same lease agreement, provides in-flight catering service to the air carriers. The projected gross receipts from the restaurant are included in the overall goal calculation, while the gross receipts to be earned by the in-flight catering service are excluded.

(iii) State in the plan which concession agreements, if any, do not provide for the sponsor to know the value of the gross receipts earned. For such agreements, the sponsor shall use net payment to the airport and combine these figures with estimated gross receipts from other agreements, for purposes of calculating overall goals.

(8)(i) Sponsors that will employ the procedures of paragraph (a)(2)(ii) of this section shall submit a rationale as required by § 23.99.

(ii) In calculating overall goals, these sponsors may add the number of management contracts and subcontracts with DBE's to the total of DBE participation and to the base from which the overall percentage goal is

calculated. Management contracts and subcontracts with non-DBE's shall not be included in this base.

(b) *Goal methodology.*

(1) \* \* \*

(2) The plan shall provide information on other projected expenditures with DBE firms that the sponsor proposes to count toward meeting overall goals, including:

(i) Name of each DBE firm (if known).

(ii) Type of business arrangement (e.g. management contract, vehicle purchases, cleaning services).

(iii) Estimated value of funds to be credited toward the overall goals.

(iv) Identification of entity purchasing or leasing the goods or services from the DBE (i.e., the sponsor or name of non-DBE concessionaire).

(3) \* \* \*

(4) \* \* \*

(5) The plan shall include a narrative description of the types of efforts the sponsor intends to make, in accordance with paragraph (i) of this section, to achieve the overall annual goals.

(c) *Counting DBE participation toward meeting the goals.*

(1) If the sponsor is covered by paragraph (a)(2)(i) of this section, DBE participation shall be counted toward meeting the overall goals and any contract goals set under this subpart as follows:

(i) A sponsor or concessionaire may count toward its goal the total dollar value of the gross receipts earned by a certified DBE under a concession agreement.

(ii) A sponsor or concessionaire may count toward its goal a portion of the total dollar value of gross receipts earned by a joint venture under a concession agreement, equal to the percentage of the ownership and control of the DBE partner in the joint venture.

(iii) A sponsor or concessionaire may count toward its goal the total dollar value of a management contract or subcontract with a certified DBE (but not the value of the gross receipts of the business activity to which the management contract or subcontract pertains).

(iv) Except as provided in paragraph (c)(1)(v) of this section, a sponsor or non-DBE concessionaire may count toward its goal the total dollar value of purchases from certified DBE's of goods and services used in the concession, provided that the sponsor and concessionaire have complied with the good faith effort requirements set forth in paragraph (i)(2) of this section.

(v) A non-DBE car rental firm may count toward a contract goal set under § 23.97(b), the total value of the purchase or lease of goods and services

from a certified DBE, including purchases or leases of vehicles, that are used in the concession. A sponsor may count these same expenditures toward its overall goal.

(vi) A sponsor or concessionaire may count toward its goals only expenditures to DBE's that perform a commercially useful function, as defined in § 23.47(d), in the work of the contract.

(2) If the sponsor is covered by paragraph (a)(2)(ii) of this section, DBE participation shall be counted toward meeting the overall goals and any contract goals set under this subpart as follows:

(i) A sponsor or concessionaire may count toward its goal each concession agreement with a certified DBE.

(ii) A sponsor may count toward its goal each management contract or subcontract with a certified DBE.

(iii) A sponsor or concessionaire may count toward its goal only those agreements in which the DBE firm performs a commercially useful function, as defined in

§ 23.47(d), in the work of the contract.

\* \* \* \* \*

(f) \* \* \*

(6) The following additional guidelines apply to the certification of management contractors and subcontractors and to providers of goods or services located off airport property.

(i) A sponsor may give full faith and credit to the certification made by another DOT recipient.

(ii) *Reserved.*

(g) \* \* \*

(4) Joint ventures described in § 23.53 (c) and (d) are eligible for certification as DBE's under this subpart.

(h) \* \* \*

(i) *Good faith efforts.* (1) The sponsor shall make good faith efforts to achieve the overall goals of the approved plan. The efforts shall include:

(i) Locating and identifying DBE's who may be interested in participating as concessionaires;

(ii) Notifying DBE's and other organizations of concession opportunities and encouraging them to compete, when appropriate;

(iii) Informing competitors for concession opportunities of any DBE requirements during pre-solicitation meetings;

(iv) Providing information concerning the availability of DBE firms to competitors to assist them in meeting DBE requirements; and

(v) When practical, structuring contracting activities so as to encourage and facilitate the participation of DBE's.

(2) As a condition of counting the purchase of goods and services toward

DBE goals in accordance with paragraph (c)(1)(iv) of this section, the sponsor and concessionaire shall make good faith efforts to explore all available options to achieve, to the maximum extent practical, DBE participation through direct ownership arrangements, including, but not limited to, joint ventures and franchises. For purposes of this paragraph (i)(2), good faith efforts shall include, but not be limited to, those listed in paragraph (i)(1) of this section, which are made applicable, as appropriate, to concessionaires referenced in this section.

§§ 23.97, 23.99, 23.101, 23.103

[Redesignated as 23.99, 23.101, 23.103, 23.97, respectively.]

6. Sections 23.97, 23.99, 23.101 and 23.103 are redesignated as follows:

Old section	New section
23.97 .....	23.99
23.99 .....	23.101
23.101 .....	23.103
23.103 .....	23.97

7. Newly designated § 23.97 would be amended by redesignating paragraphs (a) and (b) as (a)(1) and (a)(2) respectively; by adding a heading for (a); and by adding new paragraphs (b) and (c) to read as follows:

§ 23.97 *Obligations of concessionaires and competitors.*

(a) *General.*

\* \* \* \* \*

(b) *Provision for car rental firms.* (1) A sponsor may require a car rental firm to meet any requirement imposed under this subpart through the purchase or lease of goods or services from DBE's. In the event the sponsor requires the purchase or lease of goods or services from DBE's, a car rental firm shall be permitted to meet such requirement by including purchases or leases of vehicles from any vendor that qualifies as a DBE, as defined in this subpart.

(2) Nothing in this subpart shall require a car rental firm to change its corporate structure to provide for direct ownership arrangements in order to meet the requirements of this subpart. For purposes of this subpart, a change in corporate structure shall include a transfer of corporate assets or execution of a joint venture, partnership, or sublease agreement.

(c) *DBE's as prime concessionaires.* A sponsor is permitted to afford DBE firms opportunities to participate as prime concessionaires through direct contractual agreements with the sponsor.

8. Section 23.109 would be revised to read as follows:



**§ 23.109 Compliance and enforcement.**

(a) *Complaints.* Any person who believes that there has been a violation of this subpart may personally or through a representative, file a written complaint in accordance with FAA regulations 14 CFR part 13. The complaint must be submitted to the Federal Aviation Administration, Office of the Chief Counsel, Attention: Enforcement Docket (AGC-10), 800 Independence Avenue, SW., Washington, DC 20591. Complaints which meet the requirements of 14 CFR part 13, shall be docketed and processed as formal complaints.

(b) *Compliance procedures.* In the event of noncompliance with this subpart by a sponsor, the FAA Administrator may take any action provided for in Section 519 of the Airport and Airway Improvement Act of 1982, as amended.

9. Section 23.111 would be amended by revising the heading; redesignating paragraph (a) as (a)(1) and paragraph (b) as (a)(2); designating the introductory text as paragraph (a); and adding new paragraphs (b) and (c) to read as follows:

**§ 23.111 Effect of subpart.**

(a) \* \* \*

(b) Nothing in this subpart shall preempt any State or local law, regulation, or policy enacted by the governing body of a sponsor, or the authority of any State or local government or sponsor to adopt or enforce any law, regulation, or policy relating to DBE's. In the event that a State or local law, regulation, or policy conflicts with the requirements of this subpart, the sponsor shall, as a condition of remaining eligible to receive Federal financial assistance from the DOT, take such steps as may be necessary to comply with the requirements of this subpart.

(c) Nothing in this subpart prohibits a sponsor with its own legal authority to employ set-asides from using a DBE set-aside in the award of a concession. This subpart does not provide independent legal authority to employ set-asides. Sponsors shall not use group-specific set-asides in concessions.

10. Appendix A to subpart F would be amended by revising the heading as set forth below and adding a second category to the table as follows:

*Appendix A to Subpart F—Size Standards for the Airport Concession Program*

\* \* \* \* \*

**Other Participants**

Management contractors:  
Parking lots ..... \$3.5

**Other Participants—Continued**

Other .....	3.5
Automotive dealerships .....	To be defined.
Other providers of goods or services.	As defined in 13 CFR Part 121.

[FR Doc. 93-24265 Filed 10-5-93; 8:45 am]

BILLING CODE 4910-62-P

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

RIN 1018-AB83

**Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule to Determine *Lepidium montanum* var. *stellae* (Kodachrome Pepper-grass) as an Endangered Species.**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; withdrawal.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) withdraws the proposed rule (57 FR 49671; November 3, 1992) to list a Utah plant, *Lepidium montanum* var. *stellae* (Kodachrome pepper-grass), to be an endangered species. Additional field research has provided new information on the abundance and distribution of *Lepidium montanum* var. *stellae*. It is now known to have a much larger population size, and it is more widely distributed. Hence, the Kodachrome pepper-grass is relatively secure from threats to its existence because of its larger numbers and greater range. The Service has determined that this species is not likely to become either endangered or threatened throughout all or a significant portion of its range in the foreseeable future, and it does not qualify for protection under the Endangered Species Act.

**ADDRESSES:** The file of this proposal is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, 2060 Administration Building, 1745 West 1700 South, Salt Lake City, Utah 84104.

**FOR FURTHER INFORMATION CONTACT:** John L. England at the above address, telephone (801) 975-3620.

**SUPPLEMENTARY INFORMATION:****Background**

The Fish and Wildlife Service (Service) published a proposed rule to determine *Lepidium montanum* var.

*stellae* (Kodachrome pepper-grass) to be an endangered species on November 3, 1992 (57 FR 49671). This proposal was supported by biological information indicating the species was extremely limited in numbers (less than 1,000 plants) and that it was found only in restricted microhabitats (Franklin 1990). Because of this small population, a restricted distribution, and imminent threats to this known population (57 FR 49671), Service biologists and others (Welsh 1978) believed that it should be afforded protection of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*).

The Service published the proposed rule to determine *Lepidium montanum* var. *stellae* an endangered species using the best available information. Nine comments were received during the comment period. Six commenters supported the listing on the basis of the information supporting the proposed rule. One commenter opposed listing but provided no substantive rationale. The Bureau of Land Management and the State of Utah recommended that the Service conduct an additional review of *L. montanum* var. *stellae* before the promulgation of a final rule because a recent survey had documented additional populations of the plant. These populations were previously identified as the relatively common *L. montanum* var. *jonesii* and *L. montanum* var. *montanum*, but were subsequently identified as *L. montanum* var. *stellae* in the recent survey (Welsh and Thorne 1992).

The Service and Bureau of Land Management conducted a survey during the spring of 1993. This joint survey confirmed the additional populations of *Lepidium montanum* var. *stellae* found by Welsh and Thorne (1992), and additional data and estimates were obtained (Armstrong and England 1993). The range of *L. montanum* var. *stellae* was found to extend about 100 km (60 mi) in an area of central Kane County, Utah. Plants were common, but discontinuously distributed on highly gypsiferous soils of the Carmel and Moenkopi formations. Its population size was estimated to be in excess of 100,000 individuals (Armstrong and England 1993).

**Finding and Withdrawal**

Recent rare plant surveys have shown a much larger population size and distribution for *Lepidium montanum* var. *stellae* (Welsh and Thorne 1992). In addition to the population in the Kodachrome Basin, it occurs on the Skutumpah Bench and in the Johnson Wash drainage; all in Kane County, Utah. The known population size of *L.*