

(2) Section 1902(a)(19) of the Act requires that States provide care and services consistent with the best interests of the recipients.

(3) Section 1902(a)(30) of the Social Security Act requires that State payment methods must be consistent with efficiency, economy, and quality of care.

(b) *Definitions.* As used in this section—

*Health care-acquired condition* means a condition identified as a HAC by the Secretary under section 1886(d)(4)(D)(iv) of the Act for purposes of the Medicare program and other HACs identified in the State plan that the State determines meet the requirements described in section 1886(d)(4)(D)(ii) and (iv) of the Act.

*Other provider-preventable condition* means a condition occurring in any health care setting that meets the following criteria:

(i) Could have reasonably been prevented through the application of evidence based guidelines.

(ii) Has a negative consequence for the beneficiary.

(iii) Is identified in the State plan.

(iv) Is auditable.

(v) Includes, at a minimum, wrong surgical or other invasive procedure performed on a patient; surgical or other invasive procedure performed on the wrong body part; surgical or other invasive procedure performed on the wrong patient.

*Provider-preventable condition* means a condition that meets the definition of a “health care-acquired condition” or an “other provider-preventable condition” as defined in this section.

(c) *General rules.*

(1) A State plan must provide that no medical assistance will be paid for “provider-preventable conditions” as defined in this section.

(2) Reductions in provider payment may be limited to the extent that the following apply:

(i) The identified provider-preventable conditions would otherwise result in an increase in payment.

(ii) The State can reasonably isolate for nonpayment the portion of the payment directly related to treatment for, and related to, the provider-preventable conditions.

(3) FFP will not be available for any State expenditure for provider-preventable conditions.

(4) A State plan must ensure that payment for services is sufficient to assure access to services for Medicaid beneficiaries in accordance with section 1902(a)(30)(A) of the Act.

(d) *Reporting.* State plans must require that providers identify provider-preventable conditions that are

associated with claims for Medicaid payment or with courses of treatment furnished to Medicaid patients for which Medicaid payment would otherwise be available.

**Authority:** Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program.

Dated: November 17, 2010.

**Donald M. Berwick,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: December 13, 2011.

**Kathleen Sebelius,**

*Secretary, Department of Health and Human Services.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 45 CFR Part 5b

**RIN 0906-AA91**

#### Privacy Act; Exempt Record System

**AGENCY:** Health Resources and Services Administration (HRSA), HHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This proposed rule would exempt the system of records (09-15-0054, the National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners, HHS/HRSA/BHPr) for the National Practitioner Data Bank (NPDB) from certain provisions of the Privacy Act. The exemption is necessary due to the recent expansion of the NPDB under section 1921 of the Social Security Act to include the investigative materials compiled for law enforcement purposes reported to the Healthcare Integrity and Protection Data Bank (HIPDB). The system of records for the HIPDB has an exemption from certain provisions of the Privacy Act. In order to maintain the exemption for the HIPDB investigative materials, which are now also available through the NPDB, it is necessary to expand the same privacy act exemptions for the HIPDB to the NPDB. This rule specifically seeks public comments on the proposed exemption.

**DATES:** To assure consideration, public comments must be delivered to the address provided below by no later than 5 p.m. on April 18, 2011.

**ADDRESSES:** You may submit comments in one of the three ways listed below. The first is the preferred method. Please submit your comments in only one of these ways, so that no duplicates are received.

• *Federal eRulemaking Portal.* You may submit comments electronically to <http://www.regulations.gov>. Click on the link “Submit electronic comments on HRSA regulations with an open comment period.” Submit your actual comments as an attachment to your message or cover letter. (Attachments should be in Microsoft Word or WordPerfect; however, we prefer Microsoft Word.)

• *By regular, express or overnight mail.* You may mail written comments to the following address only: Health Resources and Services Administration, Department of Health and Human Services, Attention: HRSA Regulations Officer, Parklawn Building Rm. 14A-11, 5600 Fishers Lane, Rockville, MD 20857. Please allow sufficient time for mailed comments to be received before the close of the comment period.

• *Delivery by hand (in person or by courier).* If you prefer, you may deliver your written comments before the close of the comment period to the same address: Parklawn Building Room 14A-11, 5600 Fishers Lane, Rockville, MD 20857. Please call in advance to schedule your arrival with one of our HRSA Regulations Office staff members at telephone number (301) 443-1785.

Because of staffing and resource limitations, and to ensure that no comments are misplaced, we cannot accept comments by facsimile (FAX) transmission.

In commenting, please refer to RIN 0906-AA91. Comments are available for public viewing on the Federal eRulemaking portal at <http://www.regulations.gov>. Comments received on a timely basis will be available for public inspection as they are received in Room 14A-11 of the Health Resources and Services Administration’s offices at 5600 Fishers Lane, Rockville, MD, Monday through Friday of each week (Federal holidays excepted) from 8:30 a.m. to 5 p.m. (phone: 301-443-1785).

**FOR FURTHER INFORMATION CONTACT:** Director, Division of Practitioner Data Banks, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, 5600 Fishers Lane, Room 8-103, Rockville, MD 20857; telephone number: (301) 443-2300.

**SUPPLEMENTARY INFORMATION:** On January 28, 2010, the Health Resources and Services Administration published a final rule in the **Federal Register** (75 FR 4656) designed to implement section 1921 of the Social Security Act (herein referred to as section 1921). Section 1921 expands the scope of the NPDB. Section 1921 requires each state to

adopt a system of reporting to the Secretary certain adverse licensure actions taken against health care practitioners and health care entities by any authority of the state responsible for the licensing of such practitioners or entities. It also requires each state to report any negative action or finding that a state licensing authority, a peer review organization, or a private accreditation entity has finalized against a health care practitioner or entity. Practically speaking, Section 1921 resulted in, among other consequences, the transfer of the vast majority of information contained in the HIPDB to the NPDB.

The HIPDB was created by the Health Insurance Portability and Accountability Act (HIPAA) of 1996, Public Law (Pub. L. 104–191), which required the Secretary, acting through the Office of Inspector General (OIG) and the United States Attorney General, to establish a new health care fraud and abuse control program to combat health care fraud and abuse.

Groups that have access to this information include all organizations eligible to query the NPDB under the Health Care Quality Improvement Act of 1986 (hospitals, other health care entities that conduct peer review and provide health care services, state medical or dental boards and other health care practitioner state boards), other state licensing authorities, agencies administering federal health care programs, including private entities administering such programs under contract, state agencies administering or supervising the administration of state health care programs, State Medicaid Fraud Control Units, and certain law enforcement agencies, and utilization and quality control peer review organizations (referred to as QIOs) as defined in Part B of title XI of the Social Security Act and appropriate entities with contracts under section 1154(a)(4)(C) of the Social Security Act. Individual health care practitioners and entities can self-query.

One of the primary purposes of these data will be use of this information by a federal or state government agency charged with the responsibility of investigating or prosecuting a case where there is an indication of a violation or potential violation of law, whether civil, criminal, or regulatory in nature. The information in this system may also be used in the preparation for a trial or hearing for such violation. Specifically, this proposed rule would exempt this data bank from certain

provisions of the Privacy Act.<sup>1</sup> This exemption is intended to protect, from release to the record subject, information on law enforcement queries to the data bank. It would also exempt the data bank from Privacy Act access and amendment procedures in order to establish access and amendment procedures in the NPDB regulations.

While subjects will have access to information on all other queries to the data bank, disclosure of law enforcement queries could compromise ongoing investigation activities. The premature disclosure of the existence of a law enforcement activity to an outside party (who may also be the subject of the investigation) could lead to, among other things, the destruction or alteration of evidence and the tampering with witnesses.

Record subjects are guaranteed access to, and correction rights for, substantive information reported to the NPDB. The procedures, appearing in 45 CFR part 60, use the Privacy Act access and correction procedures as a basic framework while, at the same time, providing significant additional rights (such as automatic notification to the record subject of any report filed with the data bank). Data bank subjects also have broader rights on NPDB correction procedures, including the right to file a statement of disagreement as soon as a report is filed with the data bank.

#### **Economic and Regulatory Impact**

The Office of Management and Budget has reviewed this proposed rule in accordance with the provisions of Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by Executive Orders 13258 and 13422, and has determined that it will have no major effect on the economy or federal expenditures. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when rulemaking is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health, safety distributive and equity effects.

The Secretary has determined that this proposed rule is not a “major rule” within the meaning of the statute providing for Congressional Review of Agency Rulemaking, 5 U.S.C. 801, and has determined that it does not meet the criteria for a significant regulatory action. In addition, under the Small Business Enforcement Act (SBEA) of

1996, if a rule has a significant economic effect on a substantial number of small businesses, the Secretary must specifically consider the economic effect of a rule on small business entities and analyze regulatory options that could lessen the impact of the rule. The Secretary has reviewed this proposed exemption in accordance with the provisions of the SBEA and certifies that this proposed exemption will not have a significant impact on a substantial number of small entities. Specifically, as indicated above, while the reports of adverse actions to the NPDB will be known to the subjects of the records in the data bank, the access and use of such information by law enforcement agencies would not be known to the subjects of the records. As a result, we believe that disclosure of this information could compromise ongoing law enforcement activities.

Similarly, it will not have effects on state, local, and tribal governments and on the private sector such as to require consultation under the Unfunded Mandates Reform Act of 1995.

The Secretary has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” This rule would not “have substantial direct effects on the states, or on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.”

The proposals made in this notice of proposed rulemaking, if implemented, would not adversely affect the following family elements: family safety, family stability, marital commitment; parental rights in the education, nurture and supervision of their children; family functioning, disposable income, or poverty; or the behavior and personal responsibility of youth, as determined under section 654(c) of the Treasury and General Government Appropriations Act of 1999.

#### **Paperwork Reduction Act**

This proposed rule does not have any information collection requirements.

Dated: December 22, 2010.

**Mary Wakefield,**

*Administrator, Health Resources and Services Administration.*

Approved: January 19, 2011.

**Kathleen Sebelius,**

*Secretary.*

#### **List of Subjects in 45 CFR Part 5b**

Privacy.

<sup>1</sup> Subsections (c)(3), (d)(1)–(4), and (e)(4)(G) and (H) of the Privacy Act, in accordance with 5 U.S.C. 552a(k)(2) and proposed 45 CFR 5b.11(b)(2)(ii)(L).

Accordingly, 45 CFR part 5b is proposed to be amended as set forth below:

## PART 5b—PRIVACY ACT REGULATIONS

1. The authority citation for part 5b continues to read as follows:

**Authority:** 5 U.S.C. 301, 5 U.S.C. 552a.

2. In § 5b.11, add paragraph (b)(2)(ii)(L) to read as follows:

### § 5b.11 Exempt systems.

\* \* \* \* \*  
(b) \* \* \*  
(2) \* \* \*  
(ii) \* \* \*

(L) Investigative materials compiled for law enforcement purposes for the National Practitioner Data Bank (NPDB). (See § 60.16 of this title for access and correction rights under the NPDB by subjects of the Data Bank.)

\* \* \* \* \*

[FR Doc. 2011-3513 Filed 2-16-11; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R2-ES-2009-0014; 92210-1117-0000-B4]

RIN 1018-AW50

### Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for Roswell Springsnail, Koster's Springsnail, Noel's Amphipod, and Pecos Assimineae

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

**ACTION:** Proposed rule; revision and reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce reopening of the public comment period on the June 22, 2010, proposal to revise designated critical habitat for the Pecos assimineae (*Assimineae pecos*), and to newly designate critical habitat for the Roswell springsnail (*Pyrgulopsis roswellensis*), Koster's springsnail (*Juturnia kosteri*), and Noel's amphipod (*Gammarus desperatus*), under the Endangered Species Act of 1973, as amended (Act). We also announce revisions to the proposed critical habitat, as it was described in the proposed rule published in the **Federal Register** on June 22, 2010 (75 FR 35375). In total, we are proposing to designate as critical

habitat 520.8 acres (210.8 hectares) for the four species. In this proposal we include as critical habitat for Noel's amphipod an additional 5.8 acres (2.3 hectares) for Chaves County, New Mexico, as a population of amphipods was recently confirmed to be Noel's amphipod at this location. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the revised proposed rule, the associated economic analysis, environmental assessment, and the amended required determinations.

**DATES:** We will consider comments received on or before March 21, 2011. Comments must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be fully considered in the final decision on this action.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for docket number FWS-R2-ES-2009-0014 and then follow the instructions for submitting comments.

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS-R2-ES-2009-0014; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Wally "J" Murphy, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Rd., NE., Albuquerque, NM 87113; telephone 505-761-4781; facsimile 505-246-2542. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### SUPPLEMENTARY INFORMATION:

##### Public Comments

We will accept written comments and information during this reopened comment period on our proposed designation of the proposed revisions to critical habitat for the Pecos assimineae (*Assimineae pecos*), and the proposed critical habitat for the Roswell springsnail (*Pyrgulopsis roswellensis*), Koster's springsnail (*Juturnia kosteri*), and Noel's amphipod (*Gammarus desperatus*) (four invertebrates) that was published in the **Federal Register** on June 22, 2010, (75 FR 35375), and the additional area proposed in this notice.

As a result of information sent to us in response to our June 22, 2010, proposal and request for comments, we became aware that a population of amphipods was confirmed to be Noel's amphipod along the Rio Hondo, on the South Tract of Bitter Lake National Wildlife Refuge. We are particularly interested in information on our proposed inclusion of this new habitat in our final critical habitat designation, including comments on the economic analysis and environmental assessment of the proposed designation related to this new area. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The amount and distribution of habitat for the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assimineae;

(b) What areas occupied at the time of listing and that contain features essential to the conservation of the species we should include in the designation and why. We are particularly interested in information on the additional habitat containing the recently discovered Noel's amphipod population on the South Tract of Bitter Lake National Wildlife Refuge;

(c) Special management considerations or protections for areas that contain the features essential to the conservation of the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assimineae that have been identified in this proposal, including management for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(3) Land use management and current or planned activities in the subject areas and their possible impacts on proposed critical habitat, particularly in the area occupied by the recently discovered Noel's amphipod population on the South Tract of Bitter Lake National Wildlife Refuge.

(4) Any foreseeable economic, national security, or other relevant impacts of designating any area that may be included in the final designation. We are particularly