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# Presidential Documents

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Title 3—

Memorandum of August 14, 2017

The President

## Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology

### Memorandum for the United States Trade Representative

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby directed as follows:

**Section 1. Policy.** It is the policy of the United States for our trade relations to enhance our economic growth, contribute favorably to our balance of trade, promote reciprocal treatment of American goods and investment, and strengthen the American manufacturing base.

The United States is a world leader in research-and-development-intensive, high-technology goods. Violations of intellectual property rights and other unfair technology transfers potentially threaten United States firms by undermining their ability to compete fairly in the global market. China has implemented laws, policies, and practices and has taken actions related to intellectual property, innovation, and technology that may encourage or require the transfer of American technology and intellectual property to enterprises in China or that may otherwise negatively affect American economic interests. These laws, policies, practices, and actions may inhibit United States exports, deprive United States citizens of fair remuneration for their innovations, divert American jobs to workers in China, contribute to our trade deficit with China, and otherwise undermine American manufacturing, services, and innovation.

**Sec. 2. Determination of Whether to Conduct Investigation.** The United States Trade Representative shall determine, consistent with section 302(b) of the Trade Act of 1974 (19 U.S.C. 2412(b)), whether to investigate any of China's laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development.

**Sec. 3. General Provisions.** (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

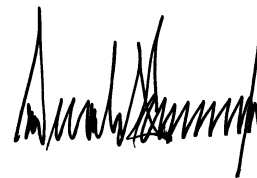
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) You are hereby authorized and directed to publish this memorandum in the *Federal Register*.

A handwritten signature in black ink, appearing to be "Donald Trump", located in the upper right quadrant of the page.

THE WHITE HOUSE,  
*Washington, August 14, 2017.*

[FR Doc. 2017-17528  
Filed 8-16-17; 8:45 am]  
Billing code 3290-F7-P



# Rules and Regulations

Federal Register

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Thursday, August 17, 2017

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents.

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 97

[Docket No. 31145; Amdt. No. 3757]

#### Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** This rule is effective August 17, 2017. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 17, 2017.

**ADDRESSES:** Availability of matters incorporated by reference in the amendment is as follows:

#### For Examination

1. U.S. Department of Transportation, Docket Ops-M30, 1200 New Jersey

Avenue SE., West Bldg., Ground Floor, Washington, DC 20590-0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

#### Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at [nfdc.faa.gov](http://nfdc.faa.gov) to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

#### FOR FURTHER INFORMATION CONTACT:

Thomas J. Nichols, Flight Procedure Standards Branch (AFS-420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) Telephone: (405) 954-4164.

**SUPPLEMENTARY INFORMATION:** This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or removes SIAPs, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA forms are FAA Forms 8260-3, 8260-4, 8260-5, 8260-15A, and 8260-15B when required by an entry on 8260-15A.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to

their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

#### Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and/or ODPS as identified in the amendatory language for part 97 of this final rule.

#### The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as Amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and

contrary to the public interest and, where applicable, under 5 U.S.C 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on July 14, 2017.

**John S. Duncan,**

*Director, Flight Standards Service.*

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

#### PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

##### Effective 17 August 2017

Akiak, AK, Akiak, RNAV (GPS) RWY 3, Orig-B  
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 Vacaville, CA, Nut Tree, VOR–A, Amdt 6  
 Colorado Springs, CO, City of Colorado Springs Muni, ILS OR LOC RWY 17L, ILS RWY 17L (SA CAT I), ILS RWY 17L (CAT II), Amdt 3A  
 Colorado Springs, CO, City of Colorado Springs Muni, ILS OR LOC RWY 35L, Amdt 38A  
 Colorado Springs, CO, City of Colorado Springs Muni, ILS OR LOC RWY 35R, Amdt 2A  
 Colorado Springs, CO, City of Colorado Springs Muni, NDB RWY 35L, Amdt 27A  
 Colorado Springs, CO, City of Colorado Springs Muni, RNAV (GPS) RWY 31, Amdt 2A  
 Colorado Springs, CO, City of Colorado Springs Muni, RNAV (GPS) Y RWY 17L, Amdt 3A  
 Colorado Springs, CO, City of Colorado Springs Muni, RNAV (GPS) Y RWY 17R, Amdt 3A  
 Colorado Springs, CO, City of Colorado Springs Muni, RNAV (GPS) Y RWY 35L, Amdt 1A  
 Colorado Springs, CO, City of Colorado Springs Muni, RNAV (GPS) Y RWY 35R, Amdt 4A  
 Colorado Springs, CO, City of Colorado Springs Muni, RNAV (RNP) Z RWY 17L, Amdt 2A  
 Colorado Springs, CO, City of Colorado Springs Muni, RNAV (RNP) Z RWY 17R, Amdt 1A  
 Colorado Springs, CO, City of Colorado Springs Muni, RNAV (RNP) Z RWY 35L, Amdt 1A  
 Colorado Springs, CO, City of Colorado Springs Muni, RNAV (RNP) Z RWY 35R, Amdt 1A  
 Denver, CO, Rocky Mountain Metropolitan, RNAV (GPS) RWY 12L, Orig

Danbury, CT, Danbury Muni, GPS RWY 8, Amdt 1A, CANCELED  
 Danbury, CT, Danbury Muni, RNAV (GPS) RWY 8, Orig  
 Danbury, CT, Danbury Muni, RNAV (GPS)–A, Orig  
 Danbury, CT, Danbury Muni, VOR OR GPS–A, Amdt 9B, CANCELED  
 Miami, FL, Miami Intl, ILS OR LOC RWY 27, Amdt 27  
 Miami, FL, Miami Intl, ILS OR LOC RWY 30, Amdt 1B  
 Savannah, GA, Savannah/Hilton Head Intl, ILS OR LOC RWY 10, ILS RWY 10 (SA CAT I), ILS RWY 10 (SA CAT II), Amdt 28  
 Muscatine, IA, Muscatine Muni, Takeoff Minimums and Obstacle DP, Amdt 3  
 Burley, ID, Burley Muni, VOR–A, Amdt 5  
 Marion, IL, Veterans Airport of Southern Illinois, ILS OR LOC RWY 20, Amdt 12B  
 Marion, IL, Veterans Airport of Southern Illinois, NDB RWY 20, Amdt 10D  
 Marion, IL, Veterans Airport of Southern Illinois, RNAV (GPS) RWY 2, Amdt 1C  
 Marion, IL, Veterans Airport of Southern Illinois, RNAV (GPS) RWY 20, Amdt 1C  
 Marion, IL, Veterans Airport of Southern Illinois, Takeoff Minimums and Obstacle DP, Amdt 1  
 Marion, IL, Veterans Airport of Southern Illinois, VOR RWY 2, Amdt 13E  
 Marion, IL, Veterans Airport of Southern Illinois, VOR RWY 20, Amdt 17D  
 Sheridan, IN, Sheridan, VOR–A, Amdt 6A  
 Abilene, KS, Abilene Muni, RNAV (GPS) RWY 17, Amdt 1B  
 Abilene, KS, Abilene Muni, RNAV (GPS) RWY 35, Amdt 1B  
 Abilene, KS, Abilene Muni, VOR–A, Amdt 3A  
 Dodge City, KS, Dodge City Rgnl, ILS OR LOC RWY 14, Amdt 3A  
 Dodge City, KS, Dodge City Rgnl, RNAV (GPS) RWY 14, Amdt 1B  
 Dodge City, KS, Dodge City Rgnl, VOR RWY 14, Amdt 19A  
 Leonardtown, MD, St Mary’s County Rgnl, RNAV (GPS) RWY 11, Amdt 1  
 Leonardtown, MD, St Mary’s County Rgnl, RNAV (GPS) RWY 29, Amdt 1  
 Aitkin, MN, Aitkin Muni–Steve Kurtz Field, NDB RWY 16, Amdt 5C  
 Aitkin, MN, Aitkin Muni–Steve Kurtz Field, RNAV (GPS) RWY 16, Amdt 1  
 Aitkin, MN, Aitkin Muni–Steve Kurtz Field, RNAV (GPS) RWY 34, Amdt 1  
 Pine River, MN, Pine River Rgnl, NDB RWY 34, Amdt 1A  
 St Louis, MO, St Louis Lambert Intl, ILS OR LOC RWY 12R, Amdt 22B  
 St Louis, MO, St Louis Lambert Intl, ILS OR LOC RWY 30L, Amdt 12B  
 St Louis, MO, St Louis Lambert Intl, RNAV (GPS) Y RWY 12R, Amdt 1C  
 St Louis, MO, St Louis Lambert Intl, RNAV (GPS) Y RWY 30L, Amdt 1C  
 St Louis, MO, St Louis Lambert Intl, RNAV (RNP) Z RWY 12R, Orig-B  
 St Louis, MO, St Louis Lambert Intl, RNAV (RNP) Z RWY 30L, Orig-B  
 Great Falls, MT, Great Falls Intl, ILS OR LOC RWY 3, ILS RWY 3 (SA CAT I), ILS RWY 3 (CAT II), ILS RWY 3 (CAT III), Amdt 5C  
 Great Falls, MT, Great Falls Intl, NDB RWY 34, Amdt 16C, CANCELED  
 Great Falls, MT, Great Falls Intl, RNAV (GPS) RWY 17, Orig

- Great Falls, MT, Great Falls Intl, RNAV (GPS) RWY 35, Orig
- Great Falls, MT, Great Falls Intl, RNAV (GPS) Y RWY 3, Amdt 3B
- Great Falls, MT, Great Falls Intl, RNAV (GPS) Y RWY 21, Orig-C
- Great Falls, MT, Great Falls Intl, RNAV (RNP) Z RWY 3, Orig-C
- Great Falls, MT, Great Falls Intl, RNAV (RNP) Z RWY 21, Orig-D
- Great Falls, MT, Great Falls Intl, Takeoff Minimums and Obstacle DP, Amdt 1
- Great Falls, MT, Great Falls Intl, VOR RWY 21, Amdt 10
- Kalispell, MT, Glacier Park Intl, RNAV (GPS) Z RWY 2, Amdt 3
- North Wilkesboro, NC, Wilkes County, ILS Y OR LOC Y RWY 1, Amdt 1
- North Wilkesboro, NC, Wilkes County, ILS Z OR LOC Z RWY 1, Orig
- North Wilkesboro, NC, Wilkes County, RNAV (GPS) RWY 1, Amdt 1
- North Wilkesboro, NC, Wilkes County, RNAV (GPS) RWY 19, Orig
- North Wilkesboro, NC, Wilkes County, Takeoff Minimums and Obstacle DP, Amdt 1
- Manchester, NH, Manchester, ILS OR LOC RWY 6, Amdt 2B
- Manchester, NH, Manchester, ILS OR LOC RWY 35, ILS RWY 35 (SA CAT I), ILS RWY 35 (CAT II), ILS RWY 35 (CAT III), Amdt 2B
- Manchester, NH, Manchester, ILS OR LOC/DME RWY 17, Amdt 2C
- Manchester, NH, Manchester, RNAV (GPS) RWY 6, Amdt 2B
- Manchester, NH, Manchester, RNAV (GPS) RWY 24, Amdt 1B
- Manchester, NH, Manchester, RNAV (GPS) Y RWY 17, Amdt 1B
- Manchester, NH, Manchester, RNAV (GPS) Y RWY 35, Amdt 1B
- Manchester, NH, Manchester, RNAV (RNP) Z RWY 17, Amdt 1A
- Manchester, NH, Manchester, RNAV (RNP) Z RWY 35, Orig-A
- Las Vegas, NV, Mc Carran Intl, ILS OR LOC RWY 1L, Amdt 2
- Las Vegas, NV, Mc Carran Intl, ILS OR LOC RWY 26L, Amdt 6
- Las Vegas, NV, Mc Carran Intl, ILS OR LOC RWY 26R, Amdt 19
- Las Vegas, NV, Mc Carran Intl, RNAV (GPS) RWY 19L, Amdt 2
- Las Vegas, NV, Mc Carran Intl, RNAV (GPS) RWY 19R, Amdt 2
- Las Vegas, NV, Mc Carran Intl, Takeoff Minimums and Obstacle DP, Amdt 8
- Las Vegas, NV, Mc Carran Intl, VOR RWY 26L/R, Amdt 4
- New York, NY, John F Kennedy Intl, ILS OR LOC RWY 4R, ILS RWY 4R (CAT II), ILS RWY 4R (CAT III), Amdt 30
- New York, NY, John F Kennedy Intl, RNAV (GPS) Y RWY 4L, Amdt 3
- New York, NY, John F Kennedy Intl, RNAV (GPS) Y RWY 4R, Amdt 2
- New York, NY, John F Kennedy Intl, RNAV (RNP) Z RWY 4L, Amdt 2
- New York, NY, John F Kennedy Intl, RNAV (RNP) Z RWY 4R, Amdt 1
- Majuro Atoll, RM, Marshall Islands Intl, RNAV (GPS) RWY 7, Orig-D
- Majuro Atoll, RM, Marshall Islands Intl, RNAV (GPS) RWY 25, Orig-D
- Hartsville, SC, Hartsville Rgnl, NDB RWY 21, Amdt 1B, CANCELED
- Hartsville, SC, Hartsville Rgnl, RNAV (GPS) RWY 3, Amdt 1
- Hartsville, SC, Hartsville Rgnl, RNAV (GPS) RWY 21, Amdt 1
- Hartsville, SC, Hartsville Rgnl, Takeoff Minimums and Obstacle DP, Amdt 1
- Hartsville, SC, Hartsville Rgnl, VOR-A, Orig Myrtle Beach, SC, Myrtle Beach Intl, ILS OR LOC RWY 18, ILS RWY 18 (SA CAT I), ILS RWY 18 (SA CAT II), Amdt 5
- Bristol/Johnson/Kingsport, TN, Tri-Cities, RNAV (GPS) RWY 9, Amdt 1
- Bristol/Johnson/Kingsport, TN, Tri-Cities, RNAV (GPS) RWY 27, Amdt 1
- Wheeler, TX, Wheeler Muni, RNAV (GPS)-A, Amdt 1
- Wheeler, TX, Wheeler Muni, RNAV (GPS)-B, Amdt 1
- Salt Lake City, UT, Salt Lake City Intl, ILS OR LOC RWY 16L, ILS RWY 16L (CAT II), ILS RWY 16L (CAT III), Amdt 3B
- Salt Lake City, UT, Salt Lake City Intl, ILS OR LOC RWY 16R, ILS RWY 16R (SA CAT I), ILS RWY 16R (CAT II), ILS RWY 16R (CAT III), Amdt 3C
- Salt Lake City, UT, Salt Lake City Intl, ILS OR LOC RWY 17, ILS RWY 17 (SA CAT I), ILS RWY 17 (SA CAT II), Amdt 14A
- Salt Lake City, UT, Salt Lake City Intl, ILS OR LOC RWY 34L, ILS RWY 34L (SA CAT I), ILS RWY 34L (CAT II), ILS RWY 34L (CAT III), Amdt 3B
- Salt Lake City, UT, Salt Lake City Intl, ILS OR LOC RWY 34R, ILS RWY 34R (SA CAT I), ILS RWY 34R (CAT II), ILS RWY 34R (CAT III), Amdt 4B
- Salt Lake City, UT, Salt Lake City Intl, LDA RWY 35, Orig-C
- Salt Lake City, UT, Salt Lake City Intl, RNAV (GPS) RWY 16L, Amdt 1A
- Salt Lake City, UT, Salt Lake City Intl, RNAV (GPS) RWY 16R, Amdt 1A
- Salt Lake City, UT, Salt Lake City Intl, RNAV (GPS) RWY 17, Amdt 2A
- Salt Lake City, UT, Salt Lake City Intl, RNAV (GPS) RWY 34L, Amdt 1B
- Salt Lake City, UT, Salt Lake City Intl, RNAV (GPS) RWY 34R, Amdt 1B
- Salt Lake City, UT, Salt Lake City Intl, RNAV (GPS) RWY 35, Amdt 3
- Wakefield, VA, Wakefield Muni, NDB RWY 20, Amdt 5
- Wakefield, VA, Wakefield Muni, RNAV (GPS) RWY 20, Amdt 1
- Wakefield, VA, Wakefield Muni, Takeoff Minimums and Obstacle DP, Amdt 1
- Auburn, WA, Auburn Muni, RNAV (GPS)-A, Amdt 1
- Seattle, WA, Boeing Field/King County Intl, ILS OR LOC RWY 14R, Amdt 31
- Seattle, WA, Boeing Field/King County Intl, LOC/DME RWY 13R, Amdt 2A, CANCELED
- Seattle, WA, Boeing Field/King County Intl, RNAV (GPS) Y RWY 14R, Amdt 1
- RESCINDED: On July 13, 2017 (82 FR 32230), the FAA published an Amendment in Docket No. 31141, Amdt No. 3753 to Part 97 of the Federal Aviation Regulations under section 97.23, 97.25, 97.29 and 97.33, the following entries for Livermore, CA, Orlando, FL, and Muscatine, IA, effective August 17, 2017, and are hereby rescinded in their entirety:
- Livermore, CA, Livermore Muni, ILS RWY 25R, Amdt 8
- Livermore, CA, Livermore Muni, LOC RWY 25R, Orig
- Orlando, FL, Orlando Sanford Intl, ILS OR LOC RWY 27R, Amdt 4
- Orlando, FL, Orlando Sanford Intl, RNAV (GPS) RWY 27R, Amdt 4
- Muscatine, IA, Muscatine Muni, VOR RWY 6, Orig-D, CANCELED

[FR Doc. 2017-17008 Filed 8-16-17; 8:45 am]

BILLING CODE 4910-13-P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 97

[Docket No. 31148; Amdt. No. 3759]

## Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** This rule is effective August 17, 2017. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 17, 2017.

**ADDRESSES:** Availability of matters incorporated by reference in the amendment is as follows:

## For Examination

1. U.S. Department of Transportation, Docket Ops-M30, 1200 New Jersey Avenue SE., West Bldg., Ground Floor, Washington, DC 20590-0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

#### Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at [nfdc.faa.gov](http://nfdc.faa.gov) to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

#### FOR FURTHER INFORMATION CONTACT:

Thomas J. Nichols, Flight Procedure Standards Branch (AFS-420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) Telephone: (405) 954-4164.

**SUPPLEMENTARY INFORMATION:** This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or removing SIAPs, Takeoff Minimums and/or ODPs. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA forms are FAA Forms 8260-3, 8260-4, 8260-5, 8260-15A, and 8260-15B when required by an entry on 8260-15A.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This

amendment provides the affected CFR sections and specifies the types of SIAPs, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

#### Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and/or ODPs as identified in the amendatory language for part 97 of this final rule.

#### The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as Amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44

FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on July 28, 2017.

**John S. Duncan,**

*Director, Flight Standards Service.*

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

#### PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721-44722.

■ 2. Part 97 is amended to read as follows:

#### Effective 14 September 2017

Magnolia, AR, Ralph C Weiser Field, Takeoff Minimums and Obstacle DP, Amdt 1B  
 Monticello, AR, Monticello Muni/Ellis Field, RNAV (GPS) RWY 21, Amdt 1  
 Keokuk, IA, Keokuk Muni, ILS OR LOC/DME RWY 26, Orig-D  
 Tipton, IA, Mathews Memorial, RNAV (GPS) RWY 11, Orig-A  
 Washington, IA, Washington Muni, VOR/DME RWY 36, Amdt 1B  
 Moline, IL, Quad City Intl, ILS OR LOC RWY 9, Amdt 31B  
 Angola, IN, Tri-State Steuben County, NDB RWY 5, Amdt 7B, CANCELED  
 Fort Wayne, IN, Fort Wayne Intl, LOC BC RWY 14, Amdt 15C, CANCELED  
 Kentland, IN, Kentland Muni, VOR/DME RNAV OR GPS RWY 27, Orig-A, CANCELED  
 Kentland, IN, Kentland Muni, VOR OR GPS-A, Amdt 3, CANCELED  
 Dodge City, KS, Dodge City Rgnl, RNAV (GPS) RWY 2, Orig  
 Dodge City, KS, Dodge City Rgnl, RNAV (GPS) RWY 20, Orig  
 St Louis, MO, St Louis Lambert Intl, Takeoff Minimums and Obstacle DP, Amdt 3  
 Emporia, VA, Emporia-Greenville Rgnl, RNAV (GPS) RWY 16, Amdt 2A

- East Troy, WI, East Troy Muni, VOR/DME–A, Amdt 1B
- Fort Atkinson, WI, Fort Atkinson Muni, VOR–A, Orig-D
- Effective 12 October 2017**
- Holy Cross, AK, Holy Cross, RNAV (GPS) RWY 1, Orig-C
- Holy Cross, AK, Holy Cross, RNAV (GPS) RWY 19, Orig-C
- Alexander City, AL, Thomas C Russell Fld, RNAV (GPS) RWY 18, Amdt 2
- Alexander City, AL, Thomas C Russell Fld, RNAV (GPS) RWY 36, Amdt 3
- Napa, CA, Napa County, RNAV (GPS) Y RWY 36L, Amdt 2B
- Okeechobee, FL, Okeechobee County, RNAV (GPS) RWY 32, Orig-D
- Orlando, FL, Orlando Sanford Intl, ILS OR LOC RWY 27R, Amdt 4
- Orlando, FL, Orlando Sanford Intl, RNAV (GPS) RWY 27R, Amdt 4
- Panama City, FL, Northwest Florida Beaches Intl, VOR/DME RWY 16, Orig, CANCELED
- Panama City, FL, Northwest Florida Beaches Intl, VOR/DME RWY 34, Orig, CANCELED
- West Palm Beach, FL, Palm Beach Intl, ILS OR LOC RWY 28R, Amdt 3B
- Cedar Rapids, IA, The Eastern Iowa, ILS OR LOC RWY 9, Amdt 18C
- Cedar Rapids, IA, The Eastern Iowa, ILS OR LOC RWY 27, Amdt 6E
- Iowa City, IA, Iowa City Muni, VOR–A, Orig-B
- Chicago, IL, Chicago O'Hare Intl, Takeoff Minimums and Obstacle DP, Amdt 20B
- Smith Center, KS, Smith Center Muni, RNAV (GPS) RWY 18, Amdt 1
- Smith Center, KS, Smith Center Muni, RNAV (GPS) RWY 36, Amdt 1
- Boston, MA, General Edward Lawrence Logan Intl, Takeoff Minimums and Obstacle DP, Amdt 14A
- Newberry, MI, Luce County, VOR RWY 11, Amdt 12, CANCELED
- Newberry, MI, Luce County, VOR RWY 29, Amdt 12, CANCELED
- Boonville, MO, Jesse Viertel Memorial, VOR–A, Amdt 5A
- Columbia, MO, Columbia Rgnl, ILS OR LOC RWY 2, Amdt 16
- Columbia, MO, Columbia Rgnl, LOC BC RWY 20, Amdt 13
- Columbia, MO, Columbia Rgnl, RNAV (GPS) RWY 2, Amdt 2
- Columbia, MO, Columbia Rgnl, RNAV (GPS) RWY 13, Amdt 1
- Columbia, MO, Columbia Rgnl, RNAV (GPS) RWY 20, Amdt 2
- Columbia, MO, Columbia Rgnl, RNAV (GPS) RWY 31, Amdt 1
- Columbia, MO, Columbia Rgnl, Takeoff Minimums and Obstacle DP, Amdt 6
- Columbia, MO, Columbia Rgnl, VOR RWY 13, Amdt 4
- Columbia, MO, Columbia Rgnl, VOR Y RWY 20, Amdt 4
- Columbia, MO, Columbia Rgnl, VOR Z RWY 20, Amdt 5
- Fulton, MO, Elton Hensley Memorial, VOR–A, Amdt 5
- Jefferson City, MO, Jefferson City Memorial, ILS OR LOC RWY 30, Amdt 6
- Lee's Summit, MO, Lee's Summit Muni, RNAV (GPS) RWY 11, Amdt 2
- Rolla/Vichy, MO, Rolla National, RNAV (GPS) RWY 22, Orig-A
- Fargo, ND, Hector Intl, ILS OR LOC RWY 36, Amdt 2
- Atlantic City, NJ, Atlantic City Intl, ILS OR LOC RWY 13, Amdt 8B
- Atlantic City, NJ, Atlantic City Intl, RNAV (GPS) RWY 22, Amdt 4B
- Atlantic City, NJ, Atlantic City Intl, RNAV (RNP) Z RWY 13, Orig-C
- Atlantic City, NJ, Atlantic City Intl, Takeoff Minimums and Obstacle DP, Orig-A
- Atlantic City, NJ, Atlantic City Intl, VOR RWY 4, Amdt 15C
- Berlin, NJ, Camden County, RNAV (GPS) RWY 5, Orig-E
- Berlin, NJ, Camden County, VOR–B, Amdt 2B
- Hammonton, NJ, Hammonton Muni, RNAV (GPS) RWY 3, Amdt 1C
- Hammonton, NJ, Hammonton Muni, VOR–B, Amdt 2C
- Millville, NJ, Millville Muni, ILS OR LOC RWY 10, Amdt 2C
- Millville, NJ, Millville Muni, VOR–A, Amdt 1B
- Ocean City, NJ, Ocean City Muni, VOR–A, Orig-B
- Vineland, NJ, Kroelinger, VOR OR GPS–B, Orig-A
- Artesia, NM, Artesia Muni, NDB RWY 13, Amdt 5
- Artesia, NM, Artesia Muni, NDB RWY 31, Amdt 5
- Artesia, NM, Artesia Muni, RNAV (GPS) RWY 13, Amdt 2
- Artesia, NM, Artesia Muni, RNAV (GPS) RWY 31, Amdt 2
- Artesia, NM, Artesia Muni, Takeoff Minimums and Obstacle DP, Amdt 1
- Syracuse, NY, Syracuse Hancock Intl, Takeoff Minimums and Obstacle DP, Amdt 8
- Ashtabula, OH, Northeast Ohio Rgnl, RNAV (GPS) RWY 9, Amdt 1
- Ashtabula, OH, Northeast Ohio Rgnl, RNAV (GPS) RWY 27, Amdt 1
- Ashtabula, OH, Northeast Ohio Rgnl, Takeoff Minimums and Obstacle DP, Amdt 1
- Ashtabula, OH, Northeast Ohio Rgnl, VOR RWY 9, Orig-D, CANCELED
- Ashtabula, OH, Northeast Ohio Rgnl, VOR RWY 27, Amdt 7
- Ashtabula, OH, Northeast Ohio Rgnl, VOR–A, Orig
- Cleveland, OH, Burke Lakefront, Takeoff Minimums and Obstacle DP, Amdt 6
- Finleyville, PA, Finleyville Airpark, RNAV (GPS)-A, Orig
- Finleyville, PA, Finleyville Airpark, Takeoff Minimums and Obstacle DP, Orig
- Crewe, VA, Crewe Muni, RNAV (GPS) RWY 15, Orig-A, CANCELED
- Crewe, VA, Crewe Muni, RNAV (GPS) RWY 33, Orig, CANCELED
- Crewe, VA, Crewe Muni, RNAV (GPS)-A, Orig
- Crewe, VA, Crewe Muni, RNAV (GPS)-B, Orig
- Newport, VT, Northeast Kingdom Intl, RNAV (GPS) RWY 36, Amdt 1A
- Newport, VT, Northeast Kingdom Intl, Takeoff Minimums and Obstacle DP, Amdt 3A
- Seattle, WA, Boeing Field/King County Intl, RNAV (RNP) Z RWY 14R, Amdt 1
- Seattle, WA, Boeing Field/King County Intl, Takeoff Minimums and Obstacle DP, Amdt 8
- Fond Du Lac, WI, Fond Du Lac County, LOC RWY 36, Amdt 1A
- Tomahawk, WI, Tomahawk Rgnl, RNAV (GPS) RWY 27, Amdt 2B
- Watertown, WI, Watertown Muni, NDB RWY 5, Amdt 1D
- Watertown, WI, Watertown Muni, NDB RWY 23, Amdt 2A
- Watertown, WI, Watertown Muni, RNAV (GPS) RWY 23, Orig-A
- Watertown, WI, Watertown Muni, RNAV (GPS) RWY 29, Orig-A
- Watertown, WI, Watertown Muni, VOR RWY 29, Orig-C
- Parkersburg, WV, Mid-Ohio Valley Rgnl, ILS OR LOC RWY 3, Amdt 14B
- Parkersburg, WV, Mid-Ohio Valley Rgnl, RNAV (GPS) RWY 10, Orig-B
- Parkersburg, WV, Mid-Ohio Valley Rgnl, RNAV (GPS) RWY 28, Orig-B
- Parkersburg, WV, Mid-Ohio Valley Rgnl, VOR RWY 21, Amdt 17C
- RESCINDED: On July 13, 2017 (82 FR 32228), the FAA published an Amendment in Docket No. 31139, Amdt No. 3751 to Part 97 of the Federal Aviation Regulations under section 97.29 and 97.33. The following entries for Orlando, FL, effective July 20, 2017, are hereby rescinded in their entirety:
- Orlando, FL, Orlando Sanford Intl, ILS OR LOC RWY 27R, Amdt 4
- Orlando, FL, Orlando Sanford Intl, RNAV (GPS) RWY 27R, Amdt 4
- [FR Doc. 2017–17005 Filed 8–16–17; 8:45 am]

BILLING CODE 4910-13-P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 97

[Docket No. 31146; Amdt. No. 3758]

## Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** This rule is effective August 17, 2017. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 17, 2017.

**ADDRESSES:** Availability of matter incorporated by reference in the amendment is as follows:

**For Examination**

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE., West Bldg., Ground Floor, Washington, DC 20590–0001;

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA).

For information on the availability of this material at NARA, call 202–741–6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

**Availability**

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at [nfdc.faa.gov](http://nfdc.faa.gov) to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

**FOR FURTHER INFORMATION CONTACT:**

Thomas J. Nichols, Flight Procedure Standards Branch (AFS–420) Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

**SUPPLEMENTARY INFORMATION:** This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs,

their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary.

This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

**Availability and Summary of Material Incorporated by Reference**

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

**The Rule**

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice

and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 97**

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on July 14, 2017.

**John S. Duncan,**

*Director, Flight Standards Service.*

**Adoption of the Amendment**

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

**PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES**

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

\* \* \* *Effective Upon Publication*

AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
17-Aug-17	AR	Rogers	Rogers Executive—Carter Field.	7/2644	5/26/17	This NOTAM, published in TL 17-17, is hereby rescinded in its entirety.
17-Aug-17	AR	Rogers	Rogers Executive—Carter Field.	7/2645	5/26/17	This NOTAM, published in TL 17-17, is hereby rescinded in its entirety.
17-Aug-17	MI	Three Rivers	Three Rivers Muni Dr Haines.	7/4244	6/20/17	This NOTAM, published in TL 17-17, is hereby rescinded in its entirety.
17-Aug-17	WA	Yakima	Yakima Air Terminal/Mcallister Field.	7/0247	6/29/17	RNAV (GPS) X RWY 27, Amdt 1B.
17-Aug-17	MD	Baltimore	Baltimore/Washington Intl Thurgood Marshall.	7/0382	7/6/17	RNAV (GPS) Y RWY 28, Amdt 2.
17-Aug-17	MD	Baltimore	Baltimore/Washington Intl Thurgood Marshall.	7/0387	7/6/17	RNAV (GPS) Y RWY 15R, Amdt 2.
17-Aug-17	IN	Indianapolis	Indianapolis Intl	7/0391	7/6/17	RNAV (GPS) Y RWY 5L, Amdt 4.
17-Aug-17	IN	Indianapolis	Indianapolis Intl	7/0394	7/6/17	RNAV (GPS) Y RWY 5R, Amdt 4.
17-Aug-17	OH	Wilmington	Wilmington Air Park	7/0707	7/5/17	RNAV (GPS) RWY 22R, Orig.
17-Aug-17	CA	San Jose	Norman Y Mineta San Jose Intl.	7/0708	7/6/17	RNAV (GPS) Y RWY 30L, Amdt 3A.
17-Aug-17	ND	Bismarck	Bismarck Muni	7/0710	7/5/17	RNAV (GPS) RWY 31, Amdt 1A.
17-Aug-17	OK	Tulsa	Tulsa Intl	7/0711	7/5/17	RNAV (GPS) RWY 36R, Amdt 1B.
17-Aug-17	SC	Myrtle Beach	Myrtle Beach Intl	7/0717	7/6/17	RNAV (GPS) RWY 18, Amdt 4.
17-Aug-17	SC	Charleston	Charleston AFB/Intl	7/0718	7/5/17	RNAV (GPS) Y RWY 15, Amdt 3B.
17-Aug-17	TX	Fort Worth	Fort Worth Meacham Intl.	7/0723	7/6/17	RNAV (GPS) RWY 16, Amdt 1A.
17-Aug-17	SC	Columbia	Columbia Metropolitan	7/0724	7/5/17	RNAV (GPS) RWY 11, Amdt 1.
17-Aug-17	TN	Nashville	Nashville Intl	7/0725	7/6/17	RNAV (GPS) Y RWY 20L, Amdt 2A.
17-Aug-17	TX	Dallas	Dallas Love Field	7/0726	7/5/17	RNAV (GPS) Z RWY 13L, Amdt 3.
17-Aug-17	TX	Abilene	Abilene Rgnl	7/0727	7/6/17	RNAV (GPS) RWY 35R, Amdt 1A.
17-Aug-17	TN	Memphis	Memphis Intl	7/0737	7/6/17	RNAV (GPS) RWY 27, Amdt 2B.
17-Aug-17	TX	Corpus Christi	Corpus Christi Intl	7/0740	7/6/17	RNAV (GPS) Y RWY 13, Amdt 2.
17-Aug-17	ME	Portland	Portland Intl Jetport	7/0750	7/5/17	RNAV (GPS) RWY 29, Amdt 3.
17-Aug-17	MI	Detroit	Detroit Metropolitan Wayne County.	7/0761	7/5/17	RNAV (GPS) RWY 21L, Amdt 3.
17-Aug-17	IN	Indianapolis	Indianapolis Intl	7/0913	6/29/17	RNAV (GPS) Y RWY 14, Amdt 4.
17-Aug-17	IN	Indianapolis	Indianapolis Intl	7/0921	6/29/17	RNAV (GPS) Y RWY 23L, Amdt 4.
17-Aug-17	IN	Indianapolis	Indianapolis Intl	7/0922	6/29/17	RNAV (GPS) Y RWY 23R, Amdt 4.
17-Aug-17	IN	Indianapolis	Indianapolis Intl	7/0927	6/29/17	RNAV (GPS) Y RWY 32, Amdt 4.
17-Aug-17	SC	Columbia	Columbia Metropolitan	7/0930	7/6/17	RNAV (GPS) RWY 29, Amdt 1.
17-Aug-17	MI	Flint	Bishop Intl	7/0940	7/5/17	RNAV (GPS) RWY 9, Amdt 1.
17-Aug-17	VA	Richmond	Richmond Intl	7/0944	7/6/17	RNAV (GPS) Z RWY 16, Amdt 1B.
17-Aug-17	IL	Belleville	Scott AFB/MidAmerica	7/1217	7/10/17	RNAV (GPS) RWY 32R, Orig-C.
17-Aug-17	IN	Fort Wayne	Fort Wayne Intl	7/1218	7/5/17	RNAV (GPS) RWY 32, Amdt 1A.
17-Aug-17	IN	Gary	Gary/Chicago Intl	7/1228	7/5/17	RNAV (GPS) Y RWY 30, Amdt 1.
17-Aug-17	NY	New York	John F Kennedy Intl	7/1338	7/5/17	RNAV (GPS) Y RWY 31R, Amdt 2.
17-Aug-17	TN	Crossville	Crossville Memorial-Whitson Field.	7/1343	6/29/17	RNAV (GPS) RWY 26, Orig-A.
17-Aug-17	KS	Chanute	Chanute Martin Johnson.	7/1427	6/29/17	RNAV (GPS) RWY 36, Orig-A.
17-Aug-17	TN	Memphis	Memphis Intl	7/1979	7/5/17	RNAV (GPS) Z RWY 18R, Amdt 2C.
17-Aug-17	AL	Dothan	Dothan Rgnl	7/1998	7/5/17	RNAV (GPS) RWY 32, Amdt 1A.
17-Aug-17	NC	Winston Salem	Smith Reynolds	7/2473	7/5/17	ILS OR LOC RWY 33, Amdt 29C.
17-Aug-17	NC	Winston Salem	Smith Reynolds	7/2484	7/5/17	RNAV (GPS) RWY 33, Orig-A.
17-Aug-17	NC	Winston Salem	Smith Reynolds	7/2514	7/5/17	RNAV (GPS) RWY 15, Amdt 1A.

AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
17-Aug-17	NC	Winston Salem	Smith Reynolds	7/2518	7/5/17	VOR/DME RWY 15, Amdt 1C.
17-Aug-17	LA	Shreveport	Shreveport Rgnl	7/2751	7/7/17	RNAV (GPS) RWY 24, AMDT 2.
17-Aug-17	LA	Alexandria	Alexandria Intl	7/3442	7/5/17	RNAV (GPS) RWY 14, Amdt 1.
17-Aug-17	KY	Covington	Cincinnati/Northern Kentucky Intl.	7/3449	7/5/17	RNAV (GPS) Y RWY 27, Orig-A.
17-Aug-17	KS	Wichita	Wichita Dwight D Eisenhower National.	7/3451	6/29/17	RNAV (GPS) RWY 1R, Amdt 2.
17-Aug-17	KS	Wichita	Wichita Dwight D Eisenhower National.	7/3452	6/29/17	RNAV (GPS) Y RWY 19R, Amdt 1A.
17-Aug-17	IN	Evansville	Evansville Rgnl	7/4198	7/5/17	RNAV (GPS) RWY 22, Amdt 1A.
17-Aug-17	AR	Rogers	Rogers Executive—Carter Field.	7/5115	7/7/17	RNAV (GPS) RWY 20, Amdt 1A.
17-Aug-17	AR	Rogers	Rogers Executive—Carter Field.	7/5116	7/7/17	VOR RWY 2, Amdt 13D.
17-Aug-17	NC	Fayetteville	Fayetteville Rgnl/Grannis Field.	7/5271	7/5/17	RNAV (GPS) RWY 4, Amdt 3A.
17-Aug-17	AK	Igiugig	Igiugig	7/5822	7/5/17	RNAV (GPS) RWY 5, Orig-B.
17-Aug-17	AK	Igiugig	Igiugig	7/5823	7/5/17	RNAV (GPS) RWY 23, Orig-B.
17-Aug-17	IN	Indianapolis	Indianapolis Metropolitan.	7/5836	7/5/17	NDB RWY 15, Amdt 2A.
17-Aug-17	IN	Indianapolis	Indianapolis Metropolitan.	7/5837	7/5/17	RNAV (GPS) RWY 15, Amdt 1.
17-Aug-17	IN	Indianapolis	Indianapolis Metropolitan.	7/5838	7/5/17	RNAV (GPS) RWY 33, Amdt 1.
17-Aug-17	IN	Indianapolis	Indianapolis Metropolitan.	7/5839	7/5/17	VOR RWY 33, Amdt 10B.
17-Aug-17	MI	Saginaw	MBS Intl	7/6134	7/5/17	RNAV (GPS) RWY 5, Amdt 1.
17-Aug-17	MI	Muskegon	Muskegon County	7/6136	7/5/17	RNAV (GPS) RWY 32, Amdt 2A.
17-Aug-17	MO	Kansas City	Kansas City Intl	7/6137	7/5/17	RNAV (GPS) Y RWY 27, Amdt 2A.
17-Aug-17	MS	Meridian	Key Field	7/6138	7/5/17	RNAV (GPS) RWY 1, Amdt 3A.
17-Aug-17	MA	New Bedford	New Bedford Rgnl	7/6203	7/5/17	RNAV (GPS) RWY 5, Amdt 1A.
17-Aug-17	CA	Santa Rosa	Charles M Schulz—Sonoma County.	7/6204	7/5/17	RNAV (GPS) RWY 32, Amdt 1B.
17-Aug-17	MA	Vineyard Haven	Martha's Vineyard	7/6206	7/5/17	RNAV (GPS) RWY 24, Amdt 2C.
17-Aug-17	WA	Bellingham	Bellingham Intl	7/6210	7/7/17	RNAV (GPS) Y RWY 16, Amdt 3.
17-Aug-17	CA	Los Angeles	Los Angeles Intl	7/6408	7/5/17	RNAV (GPS) Y RWY 6R, Amdt 2.
17-Aug-17	WA	Pasco	Tri-Cities	7/6618	7/5/17	RNAV (GPS) Y RWY 21R, Amdt 2.
17-Aug-17	OH	Wilmington	Wilmington Air Park	7/6620	7/5/17	RNAV (GPS) RWY 4L, Orig.
17-Aug-17	RI	Providence	Theodore Francis Green State.	7/6622	7/5/17	RNAV (GPS) Y RWY 23, Amdt 2.
17-Aug-17	OH	Akron	Akron-Canton Rgnl	7/6624	7/6/17	RNAV (GPS) RWY 23, Orig-A.
17-Aug-17	OH	Akron	Akron-Canton Rgnl	7/6628	7/6/17	RNAV (GPS) RWY 5, Orig-A.
17-Aug-17	OH	Akron	Akron-Canton Rgnl	7/6630	7/6/17	RNAV (GPS) RWY 19, Orig.
17-Aug-17	CA	San Francisco	San Francisco Intl	7/6632	6/29/17	RNAV (GPS) RWY 28L, Amdt 5A.
17-Aug-17	CA	San Francisco	San Francisco Intl	7/6636	6/29/17	RNAV (GPS) Z RWY 28R, Amdt 5A.
17-Aug-17	MI	Three Rivers	Three Rivers Muni Dr Haines.	7/6809	7/10/17	RNAV (GPS) RWY 27, Orig-B.
17-Aug-17	FL	Vero Beach	Vero Beach Muni	7/6938	6/29/17	Takeoff Minimums and Obstacle DP, Orig-A.
17-Aug-17	TX	Midland	Midland Intl Air And Space Port.	7/7019	6/29/17	VOR OR TACAN RWY 16R, Amdt 23B.
17-Aug-17	CO	Rifle	Garfield County Rgnl	7/7074	07/11/17	LOC/DME-A, Amdt 9.
17-Aug-17	CO	Rifle	Garfield County Rgnl	7/7076	07/11/17	RNAV (GPS) W RWY 26, Amdt 1.
17-Aug-17	CO	Rifle	Garfield County Rgnl	7/7077	07/11/17	RNAV (GPS) X RWY 26, Amdt 1A.
17-Aug-17	CO	Rifle	Garfield County Rgnl	7/7078	07/11/17	RNAV (RNP) Y RWY 26, Amdt 1A.
17-Aug-17	CO	Rifle	Garfield County Rgnl	7/7080	07/11/17	RNAV (GPS) Y RWY 8, Amdt 1.
17-Aug-17	CO	Rifle	Garfield County Rgnl	7/7082	07/11/17	RNAV (RNP) Z RWY 8, Amdt 1A.
17-Aug-17	CO	Rifle	Garfield County Rgnl	7/7084	07/11/17	RNAV (RNP) Z RWY 26, Amdt 1A.
17-Aug-17	CO	Rifle	Garfield County Rgnl	7/7085	07/11/17	VOR/DME-C, Amdt 3.
17-Aug-17	CO	Rifle	Garfield County Rgnl	7/7086	07/11/17	ILS RWY 26, Amdt 3A.
17-Aug-17	CO	Rifle	Garfield County Rgnl	7/7090	07/11/17	Takeoff Minimums and Obstacle DP, Amdt 10.
17-Aug-17	TX	Bay City	Bay City Muni	7/7163	7/6/17	VOR-A, Amdt 4C.



AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
17-Aug-17	NY	Albany	Albany Intl	7/7368	7/5/17	RNAV (GPS) Y RWY 19, Amdt 2.
17-Aug-17	WA	Spokane	Spokane Intl	7/7390	6/29/17	RNAV (GPS) Y RWY 21, Amdt 2A.
17-Aug-17	WA	Spokane	Spokane Intl	7/7391	6/29/17	RNAV (GPS) Y RWY 3, Amdt 2B.
17-Aug-17	NC	Greensboro	Piedmont Triad Intl	7/8293	7/5/17	RNAV (GPS) RWY 5R, Amdt 2C.
17-Aug-17	WI	Green Bay	Austin Straubel Intl	7/8444	7/5/17	ILS OR LOC RWY 36, Amdt 9.
17-Aug-17	WI	Green Bay	Austin Straubel Intl	7/8445	7/5/17	ILS OR LOC RWY 6, Amdt 21B.
17-Aug-17	WI	Green Bay	Austin Straubel Intl	7/8446	7/5/17	RNAV (GPS) RWY 6, Amdt 2.
17-Aug-17	WI	Green Bay	Austin Straubel Intl	7/8447	7/5/17	RNAV (GPS) RWY 18, Amdt 1A.
17-Aug-17	WI	Green Bay	Austin Straubel Intl	7/8448	7/5/17	RNAV (GPS) RWY 24, Amdt 1.
17-Aug-17	WI	Green Bay	Austin Straubel Intl	7/8449	7/5/17	RNAV (GPS) RWY 36, Amdt 3.
17-Aug-17	WI	Green Bay	Austin Straubel Intl	7/8450	7/5/17	LOC BC RWY 24, Amdt 19A.
17-Aug-17	WI	Green Bay	Austin Straubel Intl	7/8451	7/5/17	VOR-A, Orig-A.
17-Aug-17	WI	Green Bay	Austin Straubel Intl	7/8452	7/5/17	RADAR 1, Amdt 9C.
17-Aug-17	CA	Sacramento	Sacramento Intl	7/8500	7/5/17	RNAV (GPS) Y RWY 34L, Amdt 2.
17-Aug-17	CA	Sacramento	Sacramento Intl	7/8510	7/5/17	RNAV (GPS) Y RWY 16R, Amdt 2A.
17-Aug-17	CA	Oakland	Metropolitan Oakland Intl.	7/8514	7/5/17	RNAV (GPS) Y RWY 30, Amdt 5B.
17-Aug-17	CA	Oakland	Metropolitan Oakland Intl.	7/8519	7/5/17	RNAV (GPS) Y RWY 12, Amdt 3.
17-Aug-17	DC	Washington	Washington Dulles Intl	7/9191	7/6/17	RNAV (GPS) Y RWY 19L, Amdt 2A.
17-Aug-17	DC	Washington	Washington Dulles Intl	7/9192	7/6/17	RNAV (GPS) RWY 1L, Orig-B.
17-Aug-17	DC	Washington	Washington Dulles Intl	7/9195	7/6/17	RNAV (GPS) RWY 19R, Orig-A.
17-Aug-17	DC	Washington	Washington Dulles Intl	7/9197	7/6/17	RNAV (GPS) Y RWY 1C, Amdt 1B.
17-Aug-17	DC	Washington	Washington Dulles Intl	7/9199	7/6/17	RNAV (GPS) Y RWY 1R, Amdt 1B.
17-Aug-17	DC	Washington	Washington Dulles Intl	7/9205	7/6/17	RNAV (GPS) Y RWY 19C, Amdt 3C.
17-Aug-17	TX	Waco	Waco Rgnl	7/9683	7/6/17	RNAV (GPS) RWY 19, Orig-A.
17-Aug-17	OH	Columbus	Rickenbacker Intl	7/9688	7/6/17	RNAV (GPS) RWY 5R, Amdt 1A.
17-Aug-17	TX	Houston	William P Hobby	7/9693	7/5/17	RNAV (GPS) RWY 4, Amdt 3.
17-Aug-17	IL	Chicago	Chicago O'Hare Intl	7/9714	7/5/17	RNAV (GPS) RWY 15, Amdt 2D.
17-Aug-17	IL	Chicago	Chicago O'Hare Intl	7/9719	7/5/17	RNAV (GPS) RWY 22R, Amdt 2A.
17-Aug-17	IL	Chicago	Chicago O'Hare Intl	7/9720	7/5/17	RNAV (GPS) RWY 27R, Amdt 3.
17-Aug-17	IL	Chicago	Chicago O'Hare Intl	7/9722	7/5/17	RNAV (GPS) RWY 28C, Amdt 1.
17-Aug-17	IL	Chicago	Chicago O'Hare Intl	7/9728	7/5/17	RNAV (GPS) RWY 28R, Amdt 4.
17-Aug-17	IL	Chicago	Chicago O'Hare Intl	7/9729	7/5/17	RNAV (GPS) Z RWY 27L, Amdt 4.
17-Aug-17	IL	Chicago	Chicago O'Hare Intl	7/9730	7/5/17	RNAV (GPS) PRM RWY 10C (CLOSE PARALLEL), Orig.
17-Aug-17	IL	Chicago	Chicago O'Hare Intl	7/9732	7/5/17	RNAV (GPS) PRM RWY 28C, Orig.
17-Aug-17	KS	Wichita	Wichita Dwight D Eisenhower National.	7/9734	6/29/17	RNAV (GPS) Y RWY 1L, Amdt 1B.
17-Aug-17	LA	New Orleans	Louis Armstrong New Orleans Intl.	7/9736	7/5/17	RNAV (GPS) Y RWY 29, Amdt 4.
17-Aug-17	KY	Covington	Cincinnati/Northern Kentucky Intl.	7/9738	6/29/17	RNAV (GPS) Y RWY 36C, Amdt 1B.
17-Aug-17	KY	Covington	Cincinnati/Northern Kentucky Intl.	7/9743	6/29/17	RNAV (GPS) Y RWY 36L, Amdt 1B.
17-Aug-17	KY	Covington	Cincinnati/Northern Kentucky Intl.	7/9744	6/29/17	RNAV (GPS) Y RWY 9, Amdt 1.
17-Aug-17	KY	Covington	Cincinnati/Northern Kentucky Intl.	7/9772	6/29/17	RNAV (GPS) Y RWY 18C, Amdt 1B.
17-Aug-17	KY	Covington	Cincinnati/Northern Kentucky Intl.	7/9775	6/29/17	RNAV (GPS) Y RWY 18L, Amdt 1B.
17-Aug-17	KY	Covington	Cincinnati/Northern Kentucky Intl.	7/9777	6/29/17	RNAV (GPS) Y RWY 18R, Amdt 1B.
17-Aug-17	WI	Green Bay	Green Bay-Austin Straubel Intl.	7/9784	7/13/17	Takeoff Minimums and Obstacle DP, Amdt 2.

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 97**

[Docket No. 31149; Amdt. No. 3760]

**Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Final rule.

**SUMMARY:** This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** This rule is effective August 17, 2017. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 17, 2017.

**ADDRESSES:** Availability of matter incorporated by reference in the amendment is as follows:

**For Examination**

1. U.S. Department of Transportation, Docket Ops-M30, 1200 New Jersey Avenue SE., West Bldg., Ground Floor, Washington, DC 20590-0001;

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

**Availability**

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at [nfdc.faa.gov](http://nfdc.faa.gov) to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

**FOR FURTHER INFORMATION CONTACT:** Thomas J. Nichols, Flight Procedure Standards Branch (AFS-420) Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK. 73125) telephone: (405) 954-4164.

**SUPPLEMENTARY INFORMATION:** This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDG)/Permanent Notice to Airmen (P-NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary.

This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

**Availability and Summary of Material Incorporated by Reference**

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

**The Rule**

This amendment to 14 CFR part 97 is effective upon publication of each

separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 97**

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC on July 28, 2017.  
**John S. Duncan,**  
*Director, Flight Standards Service.*

**Adoption of the Amendment**

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, Part 97, (14 CFR part 97), is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

**PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES**

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME

or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

\* \* \* *Effective Upon Publication*

AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
17–Aug–17 .....	OH	Cleveland .....	Burke Lakefront .....	7/4788	6/9/17	This NOTAM, published in TL 17–17, is hereby rescinded in its entirety.
17–Aug–17 .....	OH	Cleveland .....	Burke Lakefront .....	7/5992	6/9/17	This NOTAM, published in TL 17–17, is hereby rescinded in its entirety.

[FR Doc. 2017–17010 Filed 8–16–17; 8:45 am]  
**BILLING CODE 4910–13–P**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

[Docket No. USCG–2017–0770]

**Drawbridge Operation Regulation; Carquinez Strait, Martinez, CA**

**AGENCY:** Coast Guard, DHS.  
**ACTION:** Notice of deviation from drawbridge regulation.

**SUMMARY:** The Coast Guard has issued a temporary deviation from the operating schedule that governs the Union Pacific Railroad Drawbridge across the Carquinez Strait, mile 7.0, at Martinez, CA. The deviation is necessary to allow the bridge owner to conduct emergency repairs. This deviation allows the bridge to remain in the closed-to-navigation position during the deviation period.

**DATES:** This deviation is effective from 10 a.m. to 4 p.m. on August 23, 2017.

**ADDRESSES:** The docket for this deviation, USCG–2017–0770, is available at <http://www.regulations.gov>. Type the docket number in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this deviation.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary deviation, call or email Carl T. Hausner, Chief, Bridge Section, Eleventh Coast Guard District; telephone 510–437–3516; email [Carl.T.Hausner@uscg.mil](mailto:Carl.T.Hausner@uscg.mil).

**SUPPLEMENTARY INFORMATION:** The Union Pacific Railroad Company has requested a temporary change to the operation of the Union Pacific Railroad Drawbridge, over the Carquinez Strait, mile 7.0, at Martinez, CA. The drawbridge navigation span provides a vertical clearance of 70 feet above Mean High Water in the closed-to-navigation position. The draw operates as required by 33 CFR 117.5. Navigation on the waterway is commercial and recreational.

The drawspan will be secured in the closed-to-navigation position from 10 a.m. to 4 p.m. on August 23, 2017, to allow the bridge owner to conduct emergency repairs. This temporary deviation has been coordinated with the waterway users. No objections to the proposed temporary deviation were raised.

Vessels able to pass through the bridge in the closed position may do so at any time. The bridge will not be able to open for emergencies and there is no immediate alternate route for vessels to pass. The Coast Guard will also inform the users of the waterway through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessel operators can arrange their transits to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: August 11, 2017.

**Carl T. Hausner,**  
*District Bridge Chief, Eleventh Coast Guard District.*

[FR Doc. 2017–17400 Filed 8–16–17; 8:45 am]  
**BILLING CODE 9110–04–P**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

[Docket No. USCG–2017–0273]

**Drawbridge Operation Regulation; Atlantic Intracoastal Waterway, Palm Beach, FL**

**AGENCY:** Coast Guard, DHS.  
**ACTION:** Notice of deviation from drawbridge regulation with request for comments.

**SUMMARY:** The Coast Guard has issued a temporary deviation from the operating schedule that governs the operation of the Flagler Memorial (SR A1A), Royal Park (SR 704), and the Southern Boulevard (SR 700/80) bridges, across the Atlantic Intracoastal Waterway (AICW), miles 1020.8, 1022.6 and 1024.7 at Palm Beach, Florida. This deviation will test for 180 days a change to the drawbridge operation schedules to determine whether a permanent change to the schedules is needed. This deviation is necessary to reduce traffic congestion and ensure the safety of the roadways, while meeting the needs of waterways users, whenever the President of the United States, members of the First Family, or other persons under the protection of the Secret Service are present or expected to be

visiting Mar-a-Lago. This deviation allows the Flagler Memorial and Royal Park bridges to open once an hour during a 4 hour period on weekdays when the President is staying at Mar-a-Lago, and the Southern Boulevard Bridge to remain closed to navigation when the presidential motorcade is in transit.

**DATES:** This deviation is effective from September 1, 2017, until February 27, 2018.

Comments and related material must reach the Coast Guard on or before October 16, 2017.

**ADDRESSES:** You may submit comments identified by docket number USCG–2017–0273 using Federal eRulemaking Portal at <http://www.regulations.gov>.

See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary deviation, call or email Mr. Eddie Lawrence with the Seventh Coast Guard District Bridge Office; telephone 305–415–6946, email [Eddie.H.Lawrence@uscg.mil](mailto:Eddie.H.Lawrence@uscg.mil).

**SUPPLEMENTARY INFORMATION:**

**I. Background, Purpose and Legal Basis**

When the President of the United States, members of the First Family, or other persons under the protection of the Secret Service are present or expected to be present at Mar-a-Lago, traffic backups have been caused by drawbridge openings in the Palm Beach area. The increase in traffic occurs due to the closure of Southern Boulevard when the President is visiting Mar-a-Lago. This requires through traffic to use the Flagler Memorial and Royal Park Bridges to cross the Atlantic Intracoastal Waterway (AICW). Due to the increased traffic using the Flagler Memorial and Royal Park bridges when the President is in town, the Mayor of Palm Beach has asked the Coast Guard and the bridge owner, Florida Department of Transportation, to test a change to the operating regulations of those bridges.

During this temporary deviation, the Flagler Memorial and Royal Park Bridges will only be required to open once an hour, on the quarter and half hour, respectively, starting at 2:15 p.m. through 5:30 p.m. during the weekdays only. The Flagler Memorial Bridge will open at 2:15 p.m., 3:15 p.m., 4:15 p.m. and 5:15 p.m., weekdays, if vessels are requesting an opening. The Royal Park (Middle) Bridge will open at 2:30 p.m., 3:30 p.m., 4:30 p.m. and 5:30 p.m.,

weekdays, if vessels are requesting an opening.

The operating schedule of the Southern Boulevard Bridge, which is closest to Mar-a-Lago and also crosses the AICW, will not be affected during the aforementioned times. However it will be allowed to remain closed whenever the presidential motorcade is in transit. At all other times all three bridges will operate per their normal schedules. The current operating regulation is under 33 CFR 117.261 at paragraphs (u), (v), and (w), respectively.

This general deviation will have an impact on marine traffic while alleviating some vehicle traffic backups. Tugs with tows are not exempt from this regulation.

The Coast Guard will inform waterway users of the schedule changes through our Local and Broadcast Notices to Mariners, so that vessel operators can arrange their transits to minimize any impact caused by the temporary deviation. Mariners should also listen to local news organizations to determine when the President, members of the First Family, or other persons under the protection of the Secret Service are visiting Mar-a-Lago.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35. The Coast Guard will continue to evaluate the impact to mariners navigating this area during the closure periods and is requesting comments be submitted during the first 60 days of this deviation.

Vessels able to pass through the bridge in the closed position may do so at anytime. The bridge will be able to open for emergencies.

**II. Public Participation and Request for Comments**

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using [http://](http://www.regulations.gov)

[www.regulations.gov](http://www.regulations.gov), contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086). Documents mentioned in this notice, and all public comments, are in our online docket at <http://www.regulations.gov> and can be viewed by following that Web site’s instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

**Barry Dragon,**

*Director, Bridge Branch, Seventh Coast Guard District.*

[FR Doc. 2017–17387 Filed 8–16–17; 8:45 am]

**BILLING CODE 9110–04–P**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 165**

[Docket No. USCG–2017–0764]

**RIN 1625–AA00**

**Safety Zone; Port Huron Float-Down, St. Clair River, Port Huron, MI**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone on the waters of the St. Clair River in the vicinity of Port Huron, MI. This zone is intended to restrict and control movement of vessels in a portion of the St. Clair River. Though this is an unsanctioned, non-permitted marine event, this zone is necessary to provide for the safety of life on the navigable waters near Port Huron, MI, during a float down event.

**DATES:** This temporary final rule is effective from 12 p.m. through 8 p.m. August 20, 2017.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG–2017–0764 in the “SEARCH” box and click “SEARCH.” Click on Open Docket

Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or email Tracy Girard, Prevention Department, Sector Detroit, Coast Guard; telephone 313-568-9564, or email [Tracy.M.Girard@uscg.mil](mailto:Tracy.M.Girard@uscg.mil).

**SUPPLEMENTARY INFORMATION:**

**I. Table of Abbreviations**

CFR Code of Federal Regulations  
 DHS Department of Homeland Security  
 FR Federal Register  
 NPRM Notice of Proposed Rulemaking  
 § Section  
 U.S.C. United States Code

**II. Background Information and Regulatory History**

During the afternoon of August 20, 2017, a non-sanctioned public event is scheduled to take place. The event is advertised over various social-media sites, in which a large number of persons float down a segment of the St. Clair River, using inner tubes and other similar floatation devices. The 2017 Float-Down event will occur between approximately 12 p.m. and 8 p.m. on August 20, 2017. This event has taken place in the month of August annually since 2009.

No private or municipal entity requested a marine event permit from the Coast Guard for this event, and it has not received state or federal permits since its inception. The event has drawn over 3,000 participants of various ages annually. Despite plans put together by federal, state and local officials, emergency responders and law enforcement officials have been overburdened pursuing safety during this event. Medical emergencies, people drifting across the international border, and people trespassing on residential property when trying to get out of the water before the designated finish line are some of the numerous difficulties encountered during the Float-Down event.

During the 2014 Float-Down event, a 19-year-old participant died. During the 2016 float down, a wind shift caused thousands of U.S. citizen rafters with no passports to drift into Canadian waters. The current and wind made it impossible for the rafters to paddle back into U.S. waters, causing significant coordination with the Canadian authorities. Despite these events, promotional information for the event continues to be published. More than 3,000 people are again anticipated to float down the river this year. No public or private organization holds themselves responsible as the event sponsor. Therefore, the Coast Guard does not

receive full and final details regarding the event or the number of participants until the time of the event.

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. The Coast Guard did not receive the final details of this float down event until there was insufficient time remaining before the event to publish an NPRM.

We are issuing this rule, and under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this temporary rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, waiting for a 30 day notice period to run would be impracticable.

**III. Legal Authority and Need for Rule**

The legal basis for the rule is the Coast Guard’s authority to establish safety zones: 33 U.S.C. 1231; 33 CFR 1.05–1, 160.5; Department of Homeland Security Delegation No. 0170.1. The Captain of the Port Detroit (COTP) determined the float down poses significant risk to public safety and property. The likely combination of large numbers of participants, strong river currents, limited rescue resources, and difficult emergency response scenarios could easily result in serious injuries or fatalities to Float-Down participants and spectators. Therefore, the COTP is establishing a safety zone around the event location to help minimize risks to safety of life and property during this event.

**IV. Discussion of the Rule**

This rule establishes a safety zone from 12 p.m. to 8 p.m. on August 20, 2017. The safety zone will begin at Lighthouse Beach and encompass all U.S. waters of the St. Clair River bound by a line starting at a point on land north of Coast Guard Station Port Huron at position 43°00.416’ N.; 082°25.333’ W., extending east to the international boundary to a point at position 43°00.416’ N.; 082°25.033’ W., following south along the international boundary to a point at position 42°54.500’ N.;

082°27.683’ W., extending west to a point on land just north of Stag Island at position 42°54.500’ N.; 082°27.966’ W., and following north along the U.S. shoreline to the point of origin (NAD 83).

Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the COTP or a designated representative. Vessel operators must contact the COTP or his on-scene representative to obtain permission to transit through this safety zone. Additionally, no one under the age of 18 will be permitted to enter the safety zone if they are not wearing a Coast Guard-approved Personal Floatation Device (PFD). The COTP or his on-scene representative may be contacted via VHF Channel 16.

The COTP or his designated on-scene representative will notify the public of the enforcement of this rule by all appropriate means, including a Broadcast Notice to Mariners and Local Notice to Mariners.

**V. Regulatory Analyses**

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on these statutes and executive orders, and we discuss First Amendment rights of protestors.

*A. Regulatory Planning and Review*

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”), directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process. This rule has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, it has not been reviewed by the Office of Management and Budget.

As this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771. See OMB’s Memorandum titled “Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017 titled ‘Reducing

Regulation and Controlling Regulatory Costs' ” (February 2, 2017).

We conclude that this rule is not a significant regulatory action. This regulatory action determination is based on the size, location, duration, and time-of-year of the safety zone. Vessel traffic will not be able to safely transit around this safety zone which will impact a designated area of the St. Clair River from 12 p.m. thru 8 p.m. on August 20, 2017. Moreover, the Coast Guard will issue Broadcast Notice to Mariners via VHF-FM marine channel 16 about the zone so vessel owners and operators can plan accordingly.

#### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in the *Regulatory Planning and Review* section above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or

complain about this rule or any policy or action of the Coast Guard.

#### C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

#### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

#### E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

#### F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human

environment. This rule involves a safety zone lasting eight hours on August 20, 2017 that will prohibit entry within the 7 mile portion of St. Clair River. It is categorically excluded under section 2.B.2, figure 2–1, paragraph 34(g) of the Instruction. A Record of Environmental Consideration (REC) supporting this determination is available in the docket where indicated in the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

#### G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

#### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record keeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

#### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

- 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

- 2. Add § 165.T09–0764 to read as follows:

#### § 165.T09–0764 Safety Zone; Port Huron Float-Down, St. Clair River, Port Huron, MI.

(a) *Location.* The following area is a temporary safety zone: all U.S. navigable waters of southern Lake Huron and the St. Clair River adjacent to Port Huron, MI, beginning at Lighthouse Beach and encompassing all U.S. waters of the St. Clair River bound by a line starting at a point on land north of Coast Guard Station Port Huron at position 43°00.416′ N.; 082°25.333′ W., extending east to the international boundary to a point at position 43°00.416′ N.; 082°25.033′ W., following south along the international boundary to a point at position 42°54.500′ N.; 082°27.683′ W., extending west to a point on land just north of Stag Island at position 42°54.500′ N.; 082°27.966′ W., and following north along the U.S.

shoreline to the point of origin (NAD 83).

(b) *Enforcement period.* The regulated area described in paragraph (a) will be enforced from 12 p.m. through 8 p.m. on August 20, 2017.

(c) *Regulations.* (1) No vessel or person may enter, transit through, or anchor within the safety zone unless authorized by the Captain of the Port Detroit, or his on-scene representative.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Detroit or his on-scene representative.

(3) The “on-scene representative” of the Captain of the Port Detroit is any Coast Guard commissioned, warrant or petty officer or a Federal, State, or local law enforcement officer designated by or assisting the Captain of the Port Detroit to act on his behalf.

(4) Vessel operators shall contact the Captain of the Port Detroit or his on-scene representative to obtain permission to enter or operate within the safety zone. The Captain of the Port Detroit or his on-scene representative may be contacted via VHF Channel 16 or at 313-568-9464. Vessel operators given permission to enter or operate in the regulated area must comply with all directions given to them by the Captain of the Port Detroit or his on-scene representative.

Dated: August 10, 2017.

**Jeffrey W. Novak,**

*Captain, U.S. Coast Guard, Captain of the Port Detroit.*

[FR Doc. 2017-17386 Filed 8-16-17; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[USCG-2017-0789; 1625-AA00]

#### Safety Zone; St. Marys River, Sault Ste. Marie, MI

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for navigable waters within a 200-yard radius of the position of the grounded vessel, M/V CALUMET on the north end of Sugar Island. The safety zone is needed to provide for the safety of life and property on the navigable waters during emergency salvage operations onboard a bulk carrier that ran aground. Entry of vessels or persons into this zone is prohibited unless specifically

authorized by the Captain of the Port, Sault Ste. Marie.

**DATES:** This rule is effective with actual notice from August 10, 2017 until August 17, 2017. This rule is effective without actual notice on August 17, 2017.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG-2017-0789 in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email LTJG Sean V. Murphy, Waterways Management Chief, Sector Sault Ste. Marie, U.S. Coast Guard; telephone 906-635-3223, email [Sean.V.Murphy@uscg.mil](mailto:Sean.V.Murphy@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Table of Abbreviations

CFR Code of Federal Regulations  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
§ Section  
U.S.C. United States Code  
M/V Motor Vessel

##### II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because M/V CALUMET ran aground on the north side of Sugar Island in the St. Marys River on the night of 09 August 2017 and immediate action is needed to investigate the incident and respond to the potential safety hazards associated with salvage of the vessel. It is impracticable to publish an NPRM because the Coast Guard must establish this safety zone by 10 August 2017.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable

because immediate action is needed to investigate the incident and respond to the potential safety hazards associated with emergency salvage operations of M/V CALUMET.

##### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Sault Ste. Marie (COTP) has determined that potential hazards associated with emergency salvage operations starting 10 August 2017 will be a safety concern for anyone within a 200-yard radius of the aground vessel in position 46-29.3N 084-18.1W. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the incident is investigated and the vessel is salvaged.

##### IV. Discussion of the Rule

This rule establishes a safety zone from August 10, 2017 to August 17, 2017. The safety zone will cover all navigable waters within 200 yards of the aground M/V CALUMET in position 46-29.3N 084-18.1W. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the incident is investigated and the vessel is salvaged. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

##### V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive Orders, and we discuss First Amendment rights of protestors.

##### A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a “significant regulatory action” under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, and limited duration of the safety zone. We conclude that this rule is not a

significant regulatory action because we anticipate that it will have minimal and short-term impact on the economy, especially as balanced against the risk of serious environmental consequences and potential long-term delays and economic loss to industry posed by the grounded vessel if this rule is not enacted. Further, this regulatory action will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this rule will be of relatively small size and short duration, and it is designed to minimize the impact on navigation. Moreover, vessels may still transit through the regulated area when permitted by the Captain of the Port or his on-scene representative.

#### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

(1) This rule will affect the following entities, some of which may be small entities: the owners and operators of vessels intending to transit or anchor in a portion of the navigable waters in the St. Marys River, Sault Ste. Marie, MI.

(2) This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: There is ample room in the channel for recreational vessels to transit outside of the safety zone. The Coast Guard will notify mariners before activating the zone by appropriate means which may include but are not limited to an Advisory Notice and Broadcast Notice to Mariners.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

#### C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

#### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

#### E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure,

we do discuss the effects of this rule elsewhere in this preamble.

#### F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting 7 days that will prohibit entry within 200 yards of the aground M/V CALUMET. It is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

#### G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

#### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

#### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

- 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

- 2. Add § 165.T09–0789 to read as follows:

#### § 165.T09–0789 Safety Zone; St. Marys River, Sault Ste. Marie, MI.

(a) *Location.* The following area is a safety zone: All waters within a 200 yard radius from the aground M/V CALUMET, in position 46–29.3N 084–18.1W, from surface to bottom. These coordinates are based on WGS 84.

(b) *Definitions.* As used in this section, *designated representative*



means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sault Ste. Marie (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by calling the Sector Sault Ste. Marie Command Center at 906-635-3319. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced between August 10, 2017 through August 17, 2017.

Dated: August 11, 2017.

**M.R. Broz,**

*Captain, U.S. Coast Guard, Captain of the Port Sault Ste. Marie.*

[FR Doc. 2017-17404 Filed 8-16-17; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG-2017-0772]

RIN 1625-AA00

#### Safety Zone; Willamette River, Lake Oswego, OR

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for navigable waters of the Willamette River in the vicinity of George Rogers Park in Lake Oswego, OR. This action is necessary to provide for the safety of life on these navigable waters during a fireworks display on September 9, 2017. This regulation prohibits persons and vessels from being in the safety zone unless authorized by the Captain of the Port Sector Columbia River or a designated representative.

**DATES:** This rule is effective from September 9, 2017 from 7:30 p.m. through 10:00 p.m.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG-2017-

0772 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email LCDR Laura Springer, Waterways Management Division, Marine Safety Unit Portland, U.S. Coast Guard; telephone 503-240-9319, email [msupdxwwm@uscg.mil](mailto:msupdxwwm@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Table of Abbreviations

CFR Code of Federal Regulations  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
§ Section  
U.S.C. United States Code

##### II. Background Information and Regulatory History

Western Display Fireworks, Ltd. will be conducting a fireworks display from 8:30 p.m. to 9 p.m. on September 9, 2017. The fireworks are to be launched from the beach at George Rogers Park. Hazards from firework displays include accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris. The Captain of the Port Sector Columbia River (COTP) has determined that potential hazards associated with the fireworks to be used in this display would be a safety concern for anyone within a 400-foot radius of the barge used to launch the fireworks display.

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because to do so would be impracticable as it would not be possible to conduct notice and comment rulemaking prior to the date of the event.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable due to the date of the event.

##### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Port Columbia River (COTP) has determined that potential hazards associated with the fireworks display on September 9, 2017 will be a safety concern for anyone within a 400 foot radius of launch site. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone before, during and after the scheduled event.

##### IV. Discussion of the Rule

This rule establishes a safety zone from 7:30 p.m. until 10:00 p.m. on September 9, 2017. The safety zone will cover all navigable waters within 400 feet of the barge being used to launch the fireworks display from position 45°24'36.30" N., 122°39'34.75" W. on the Willamette River in Lake Oswego, OR. The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled 7:30 p.m. to 10:00 p.m. fireworks display. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

##### V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

###### A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a "significant regulatory action," under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, duration, and time-of-day of the safety zone. Vessel traffic would be able to safely transit around this safety zone which would impact a small designated area of the Willamette River for two hours during the evening when vessel traffic is

normally low. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

#### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

#### C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

#### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

#### E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

#### F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting less than two and a half hours that will prohibit entry within 400 feet of the barge used to launch the fireworks display. It is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A Record of

Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

#### G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

#### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

#### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T13–0772 to read as follows:

#### § 165.T13–0772 Safety Zone; Willamette River, Lake Oswego, OR.

(a) *Safety zone.* The following area is designated a safety zone: Waters of the Willamette River, within a 400-foot radius of the fireworks barge located at 45°24′36.30″ N., 122°39′34.75″ W. at George Rogers Park in Lake Oswego, OR.

(b) *Regulations.* In accordance with § 165.23, no person may enter or remain in this safety zone unless authorized by the Captain of the Port Columbia River or his designated representative. Also in accordance with § 165.23, no person may bring into, or allow to remain in this safety zone any vehicle, vessel, or object unless authorized by the Captain of the Port Columbia River or his designated representative.

(c) *Enforcement period.* This section will be enforced from 7:30 p.m. to 10:00 p.m. on September 9, 2017.

Dated: August 9, 2017.

#### D.F. Berliner,

Captain, U.S. Coast Guard, Acting Captain of the Port, Sector Columbia River.

[FR Doc. 2017–17422 Filed 8–16–17; 8:45 am]

BILLING CODE 9110–04–P

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[EPA-R04-OAR-2007-0085; FRL-9966-24-Region 4]

**Air Plan Approval; NC; Air Curtain Burners****AGENCY:** Environmental Protection Agency.**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to approve portions of revisions to the North Carolina State Implementation Plan (SIP) submitted by the State of North Carolina through the North Carolina Department of Environmental Quality (formerly the North Carolina Department of Environment and Natural Resources), Division of Air Quality (DAQ), on October 14, 2004, March 24, 2006, and January 31, 2008. The revisions which EPA is approving are changes to the air curtain burner regulation of the North Carolina SIP. These revisions are part of North Carolina's strategy to meet and maintain the national ambient air quality standards (NAAQS). EPA has taken or will take action with respect to all other portions of these SIP revisions. This action is being taken pursuant to the Clean Air Act (CAA or Act) and its implementing regulations.

**DATES:** This direct final rule is effective October 16, 2017 without further notice, unless EPA receives adverse comment by September 18, 2017. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2007-0085 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](http://www.regulations.gov). EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary

submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Sean Lakeman or Nacosta C. Ward, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303-8960. Mr. Lakeman can be reached via telephone at (404) 562-9043 or via electronic mail at [lakeman.sean@epa.gov](mailto:lakeman.sean@epa.gov). Ms. Ward can be reached via telephone at (404) 562-9140, or via electronic mail at [ward.nacosta@epa.gov](mailto:ward.nacosta@epa.gov).

**SUPPLEMENTARY INFORMATION:****I. Background**

In this rulemaking, EPA is taking direct final action to approve portions of the revisions to the North Carolina SIP submitted on October 14, 2004, March 24, 2006, and January 31, 2008. EPA is taking direct final action on the changes to 15A NCAC Subchapter 2D—Air Pollution Control Requirements, Section .1904, *Air Curtain Burners*. These changes are a part of North Carolina's strategy to attain and maintain the NAAQS and are approvable into the North Carolina SIP pursuant to section 110 of the CAA. EPA is not taking action on 15A NCAC Subchapter 2D—Air Pollution Control Requirements, Section .1201, *Purpose and Scope*, submitted on January 31, 2008, because this rule pertains to incinerators and addresses emission guidelines under CAA sections 111(d) and 129 and 40 CFR part 60; it is not a part of the federally-approved SIP. EPA has taken or will take separate action on all other portions of these SIP submissions.

**II. Analysis of the State Submittals**

North Carolina submitted revisions to 15A NCAC Subchapter 2D—Air Pollution Control Requirements, Section .1904, *Air Curtain Burners* for incorporation into the federally-approved SIP. Detailed descriptions of the changes are below:

**A. Changes to 2D Section .1904—Submitted October 14, 2004**

The changes contained in the October 14, 2004, SIP submission require that permits be obtained for air curtain burners as defined by 40 CFR 60.2245 through 60.2265, permanent burning sites or materials transported from

burning site to burning site. These permitted air curtain burners must also have a certified visible emissions reader onsite at all times and during the operation of the burner to ensure that the visible emissions can be read for compliance purposes. A provision has also been added to cease operation of air curtain burners in fine particulate matter (PM<sub>2.5</sub>) and ozone nonattainment areas on ozone action days with status "orange" or above.

North Carolina's submission modifies the provision which governs air curtain burning where burning should be at least 500 feet away from any dwelling, group of dwellings, or commercial or institutional establishment or other occupied structure not located on the property where the burning is conducted. These burning occurrences must be approved before the initiation of the burn. The daily log at permanent air curtain burner sites must be maintained onsite for two years and be available for inspection. If an owner or operator is using a different technology or method other than an air curtain burner as defined under 2D Section .1902,<sup>1</sup> the owner or operator must demonstrate that the burner is at least as effective. The revision also specifies that if it is a burner constructed after November 30, 1999, or has been modified after June 1, 2001, it must comply with 40 CFR 60.2245 through 60.2265 (*i.e.*, the "Air Curtain Incinerators" portion of 40 CFR part 60, subpart CCCC (*Standards of Performance for Commercial and Industrial Solid Waste Incineration Units*)).

This SIP revision increases the six-minute average plume opacity limit during operation from five percent to ten percent. North Carolina states that the purpose of this change is to align the state rule with federal requirements. The revision also extends the allowed startup time of the burners from 30 to 45 minutes. The revision does not change an existing allowance for one six-minute period with an average opacity of more than ten percent but no more than 35 percent during any one-hour period.

On April 11, 2017, DAQ submitted a non-interference or section 110(l) demonstration which describes how these changes will not interfere with the attainment and maintenance of the NAAQS. North Carolina states there are

<sup>1</sup> "Air Curtain Burner" as defined in 2D Section .1902 is a stationary or portable combustion device that directs a plane of high velocity forced draft air through a manifold head into a pit or container with vertical walls in such a manner as to maintain a curtain of air over the surface of the pit and a circulating motion of air under the curtain.

currently seven air curtain burners in the State that are subject to 2D Section .1904 but that, due to source size and construction commencement dates, none are subject to 40 CFR part 60, subpart CCCC. Additionally, North Carolina states that any change in source emissions associated with the alignment of the opacity limit of 2D Section .1904 with the federal regulations would be minimal. North Carolina reports that these facilities are not routinely operational, as they are used primarily for elimination of debris after severe storms. North Carolina also demonstrates that reported pollutant emissions from these units have been very low and that the design values in the counties closest to them (all in the eastern part of the State) are well below the Fine Particulate Matter NAAQS. North Carolina also notes that there are currently no nonattainment areas for any NAAQS in the State and that these changes to the SIP are not anticipated to cause any area to come out of compliance with the NAAQS.

*B. Changes to Section .1904—Submitted March 24, 2006*

The changes contained in the March 24, 2006, SIP submission are clarifications to existing text in the regulation. The changes make the regulation applicable to air curtain burners in general and not only those currently identified in paragraph (a), which are burners subject to 40 CFR 60.2245–60.2265 or located at permanent burning sites or where materials are transported in from another burning site. The term “ozone forecast area” is also being replaced with “air quality forecast area” in order to address all pollutants instead of only ozone.

*C. Changes to Section .1904—Submitted January 31, 2008*

The changes contained in the January 31, 2008, SIP submission expand the scope of the types of air curtain burners for which air quality permits must be issued to also include air curtain burners subject to 40 CFR 60.2810 through 60.2870, 60.2970 through 60.2975, and 60.3062 through 60.3069. The changes specify the opacity standards to which the various air curtain burner types are subject as outlined in 40 CFR part 60, instead of the opacity standards as previously outlined in the existing subparagraphs of the regulation. Lastly, the recordkeeping and reporting requirements have also been expanded to note the applicability of the additional requirements for owner and operators of air curtain burners subject

to 40 CFR 60.2810 through 60.2870, 60.2970 through 60.2975, and 60.3062 through 60.3069.

### III. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of 15A NCAC Subchapter 2D—*Air Pollution Control Requirements*, Sect. .1904, *Air Curtain Burners* effective March 11, 2004, November 10, 2005, and July 1, 2007, revising air curtain burner requirements. Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally-enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA’s approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.<sup>2</sup> EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://www.regulations.gov) and/or at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

### IV. Final Action

EPA is approving the aforementioned revisions to the North Carolina SIP submitted by the State of North Carolina on October 14, 2004, March 24, 2006, and January 31, 2008, pursuant to section 110 because these revisions are consistent with the CAA. Changes to the other sections in these submissions will be or have been processed in a separate action, as appropriate, for approval into the North Carolina SIP. As noted above, EPA is not taking action on changes to 15A NCAC Subchapter 2D—*Air Pollution Control Requirements*, Section .1201, *Purpose and Scope*, as submitted on January 31, 2008, because this rule pertains to incinerators and addresses emission guidelines under CAA sections 111(d) and 129 and 40 CFR part 60 and is not a part of the federally-approved SIP.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision

should adverse comments be filed. This rule will be effective October 16, 2017 without further notice unless the Agency receives adverse comments by September 18, 2017.

If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All adverse comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on October 16, 2017 and no further action will be taken on the proposed rule.

### V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

<sup>2</sup> 62 FR 27968 (May 22, 1997).

- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other

required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 16, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today’s **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to

enforce its requirements. *See* section 307(b)(2).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: August 4, 2017.

**V. Anne Heard,**

*Acting Regional Administrator, Region 4.*

40 CFR part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

■ 1. The authority citation for part 52 continues to read as follows:

*Authority:* 42 U.S.C. 7401 *et seq.*

**Subpart II—North Carolina**

■ 2. In § 52.1770, the table in paragraph (c) is amended by revising the entry “Sect .1904” to read as follows:

**§ 52.1770 Identification of plan.**

\* \* \* \* \*  
(c) \* \* \*

TABLE 1—EPA-APPROVED NORTH CAROLINA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
<b>Subchapter 2D Air Pollution Control Requirements</b>				
*	*	*	*	*
<b>Section .1900 Open Burning</b>				
*	*	*	*	*
Sect .1904 .....	Air Curtain Burners .....	7/1/2007	8/17/2017, [insert <b>Federal Register</b> citation].	
*	*	*	*	*

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-R08-OAR-2013-0557, FRL-9966-06-Region 8]

**Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 2010 SO<sub>2</sub> and 2012 PM<sub>2.5</sub> National Ambient Air Quality Standards; Colorado**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving elements of State Implementation Plan (SIP) revisions from the State of Colorado to demonstrate the State meets infrastructure requirements of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for sulfur dioxide (SO<sub>2</sub>) on June 2, 2010 and fine particulate matter (PM<sub>2.5</sub>) on December 14, 2012.

**DATES:** This rule is effective on September 18, 2017.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2013-0557. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some

information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. The EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Abby Fulton, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6563, [fulton.abby@epa.gov](mailto:fulton.abby@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Infrastructure requirements for SIPs are set forth in section 110(a)(1) and (2) of the CAA. Section 110(a)(2) lists the specific infrastructure elements that a

SIP must contain or satisfy. The elements that are the subject of this action are described in detail in our notice of proposed rulemaking published on June 6, 2017 (82 FR 25999).

In our proposed rule, the EPA proposed to approve some infrastructure elements and to take no action on others for the 2010 SO<sub>2</sub> and 2012 PM<sub>2.5</sub> NAAQS from the State's July 10, 2013 and December 1, 2015 certifications,<sup>1</sup> respectively. In this rulemaking, we are taking final action to approve those infrastructure elements from the State's certifications for which we proposed approval.

**II. Response to Comments**

No comments were received on our June 6, 2017 notice of proposed rulemaking.

**III. Final Action**

For reasons expressed in the proposed rule, the EPA is taking final action to approve infrastructure elements from the State's certifications as shown in Table 1. Elements we are taking no action on are reflected in Table 2.

A comprehensive summary of infrastructure elements and new rules being approved into the Colorado SIP through this final rule action are provided in Table 1 and Table 2.

TABLE 1—LIST OF COLORADO INFRASTRUCTURE ELEMENTS AND REVISIONS THAT THE EPA IS APPROVING

Approval
<p>July 10, 2013 <i>submittal</i>—2010 SO<sub>2</sub> NAAQS: (A), (B), (C), (D)(i)(II), (D)(ii), (E), (F), (G), (H), (J), (K), (L) and (M).                      December 1, 2015 <i>submittal</i>—2012 PM<sub>2.5</sub> NAAQS: (A), (B), (C), (D)(i)(II), (D)(ii), (E), (F), (G), (H), (J), (K), (L) and (M).</p>

TABLE 2—LIST OF COLORADO INFRASTRUCTURE ELEMENTS AND REVISIONS THAT THE EPA IS TAKING NO ACTION ON

No action (Revision to be made in separate rulemaking action)
<p>July 13, 2013 <i>submittal</i>—2010 SO<sub>2</sub> NAAQS: (D)(i)(I) prongs 1 and 2.                      December 1, 2015 <i>submittal</i>—2012 PM<sub>2.5</sub> NAAQS: (D)(i)(I) prongs 1 and 2.</p>

**IV. Statutory and Executive Orders Review**

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air

Act. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described

<sup>1</sup> "Where an air agency determines that the provisions in or referred to by its existing EPA approved SIP are adequate with respect to a given infrastructure SIP element (or subelement) even in

light of the promulgation of a new or revised NAAQS, the air agency may make a SIP submission in the form of a certification." EPA's "Guidance on Infrastructure State Implementation Plan (SIP

Elements under Clean Air Act Sections 110(a)(1) and (2)," September 13, 2013, at 7.

in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under Section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 16, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a

petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA Section 307(b)(2)).

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Greenhouse gases, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: July 28, 2017.

**Debra H. Thomas,**

*Acting Regional Administrator, Region 8.*

40 CFR part 52 is amended to read as follows:

#### PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

#### Subpart G—Colorado

■ 2. In 52.353, add paragraph (d) to read as follows:

##### § 52.353 Section 110(a)(2) infrastructure requirements.

\* \* \* \* \*

(d) The Colorado Department of Public Health and Environment provided submissions to meet infrastructure requirements for the State of Colorado for the 2010 SO<sub>2</sub> and 2012 PM<sub>2.5</sub> NAAQS were received on July 10, 2013 and December 1, 2015, respectively. The State’s Infrastructure SIP for the 2010 SO<sub>2</sub> and 2012 PM<sub>2.5</sub> NAAQS is approved with respect to section (110)(a)(1) and the following elements of section (110)(a)(2): (A), (B), (C) with respect to minor NSR and PSD requirements, (D)(i)(II), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).

[FR Doc. 2017–17232 Filed 8–16–17; 8:45 am]

**BILLING CODE** 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R03–OAR–2017–0382; FRL–9966–31–Region 3]

#### Approval and Promulgation of Air Quality Implementation Plans; Virginia; Revisions To Implement the Revocation of the 1997 Ozone NAAQS

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the Commonwealth of Virginia state implementation plan (SIP). The revisions pertain to amendments made to the Virginia Administrative Code. These amendments updated the State Air Pollution Control Board’s Regulations for the Control and Abatement of Air Pollution to be consistent with EPA’s final rule implementing the 2008 ozone national ambient air quality standards (NAAQS) and revoking the 1997 ozone NAAQS. See 80 FR 12264 (March 6, 2015). The amendments revised a regulation listing nonattainment areas under the 1997 ozone NAAQS and a regulation regarding the 1997 ozone standard to reflect the revocation of the 1997 ozone NAAQS, which was effective April 6, 2015. The amendments also added clarifying text to two transportation and general conformity regulations in order to reflect the revocation of the 1997 ozone NAAQS. EPA is approving these revisions updating the Virginia Administrative Code to reflect the revocation of the 1997 ozone NAAQS in accordance with the requirements of the Clean Air Act (CAA).

**DATES:** This rule is effective on October 16, 2017 without further notice, unless EPA receives adverse written comment by September 18, 2017. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R03–OAR–2017–0382 at <https://www.regulations.gov>, or via email to [stahl.cynthia@epa.gov](mailto:stahl.cynthia@epa.gov). For comments submitted at [Regulations.gov](https://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.regulations.gov). For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any

information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Sara Calcinore, (215) 814–2043, or by e-mail at [calcinore.sara@epa.gov](mailto:calcinore.sara@epa.gov).

**SUPPLEMENTARY INFORMATION:**

### I. Background

Ground level ozone is formed when nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOC) react in the presence of sunlight. NO<sub>x</sub> and VOC are referred to as ozone precursors and are emitted by many types of pollution sources, including motor vehicles, power plants, industrial facilities, and area wide sources, such as consumer products and lawn and garden equipment. Scientific evidence indicates that adverse public health effects occur following exposure to ozone. These effects are more pronounced in children and adults with lung disease. Breathing air containing ozone can reduce lung function and inflame airways, which can increase respiratory symptoms and aggravate asthma or other lung diseases. In response to this scientific evidence, EPA promulgated in 1979 the first ozone NAAQS, the 0.12 part per million (ppm) 1-hour ozone NAAQS. *See* 44 FR 8202 (February 8, 1979).

EPA is required to review and reevaluate the ozone NAAQS every 5 years in order to consider updated information regarding the effects of ozone on human health and the environment. Since February 8, 1979, the date of the first ozone NAAQS promulgation, EPA has reviewed and revised the ozone standard to protect the public health and welfare. On July 18, 1997, EPA promulgated a revised ozone NAAQS, referred to as the 1997 ozone NAAQS, of 0.08 ppm averaged over eight hours. 62 FR 38855. This 8-

hour ozone NAAQS was determined to be more protective of public health than the previous 1979 1-hour ozone NAAQS. In 2008, EPA revised the 8-hour ozone NAAQS from 0.08 to 0.075 ppm. The 0.075 ppm standard is referred to as the 2008 ozone NAAQS. *See* 73 FR 16436 (March 27, 2008).<sup>1</sup>

On March 6, 2015, EPA established a final rule addressing a range of nonattainment area SIP requirements for the 2008 ozone NAAQS. 80 FR 12264. This final rule also revoked the 1997 ozone NAAQS as of April 6, 2015 and established anti-backsliding requirements that became effective once the 1997 ozone NAAQS was revoked. The anti-backsliding provisions in 40 CFR 51.1105 require States to retain all applicable control requirements for the 1997 ozone NAAQS, while enabling areas, where possible, to focus planning efforts on meeting the more protective 2008 ozone NAAQS.

On February 10, 2017, the Commonwealth of Virginia Department of Environmental Quality (DEQ) submitted a formal SIP revision (Revision G16). The SIP revision consists of amendments made to the Virginia Administrative Code to reflect the revocation of the 1997 ozone NAAQS according to the final rule established by EPA on March 6, 2015 implementing the 2008 ozone NAAQS.

### II. Summary of SIP Revision and EPA Analysis

The February 10, 2017 SIP revision submittal includes amended versions of provisions in the State Air Pollution Control Board's Regulation for the Control and Abatement of Air Pollution including 9VAC5–20–204, 9VAC5–30–55, 9VAC5–151–20, and 9VAC5–160–30, which were adopted by the State Air Pollution Control Board on September 9, 2016 and effective November 16, 2016. Virginia requests that EPA approve this submittal so that these amended regulations become part of the Virginia SIP.

The amendment to 9VAC5–20–204 added text to the section stating that the list of Northern Virginia moderate nonattainment areas under the 1997 ozone NAAQS is no longer effective after April 6, 2015, the effective date of the revocation of the 1997 ozone NAAQS. *See* 80 FR 12264 (March 6, 2015). The amendment to 9VAC5–30–55 added text to the section stating that the primary and secondary ambient air quality standard of 0.08 ppm shall no

<sup>1</sup> On October 1, 2015, EPA strengthened the ground-level ozone NAAQS to 0.070 ppm. *See* 80 FR 65292 (October 26, 2015). This rulemaking addresses the 2008 ozone NAAQS and does not address the 2015 ozone NAAQS.

longer apply after April 6, 2015. Virginia also amended the Regulation for Transportation Conformity and the Regulation for General Conformity by adding clarifying text to 9VAC5–151–20 and 9VAC5–160–30 stating that “The provisions of this chapter shall not apply in nonattainment and maintenance areas that were designated nonattainment or maintenance under a federal standard that has been revoked.” These revisions to the Virginia Administrative Code reflect EPA's revocation of the 1997 ozone NAAQS.

EPA's review of this material indicates the February 10, 2017 submittal is approvable as it revises regulations to be consistent with EPA's final rule implementing the 2008 ozone NAAQS. *See* 80 FR 12264 (March 6, 2015). The revisions update regulations to reflect the revocation of the 1997 NAAQS, which was effective April 6, 2015. Therefore, the revisions do not affect emissions of air pollutants or interfere with any applicable requirement concerning attainment of reasonable further progress or any other applicable requirements in the CAA. Thus, EPA finds the revision approvable in accordance with section 110, including section 110(l), of the CAA.

### III. Final Action

EPA is approving the Virginia SIP revision submitted on February 10, 2017, which includes revisions to several sections of the Virginia Administrative Code, including 9VAC5–20–204, 9VAC5–30–55, 9VAC5–151–20, and 9VAC5–160–30 which will be incorporated by reference into the Virginia SIP. EPA is publishing this rule without prior proposal because EPA views this as a noncontroversial amendment and anticipates no adverse comment. However, in the “Proposed Rules” section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on October 16, 2017 without further notice unless EPA receives adverse comment by September 18, 2017. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule,



EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

#### V. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia’s legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia’s Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code § 10.1–1198, precludes granting a privilege to documents and information “required by law,” including documents and information “required by federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce federally authorized environmental programs in a manner that is no less stringent than their federal counterparts. . . .” The opinion concludes that “[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by federal law to maintain program delegation, authorization or approval.” Virginia’s Immunity law, Va. Code Sec.

10.1–1199, provides that “[t]o the extent consistent with requirements imposed by federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General’s January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

#### V. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the revisions to 9VAC5–20–204, 9VAC5–30–55, 9VAC5–151–20, and 9VAC5–160–30 of the State Air Pollution Control Board’s Regulation for the Control and Abatement of Air Pollution discussed in Section II of this preamble. Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA’s approval, and will be incorporated by reference by the Director of the Federal Register in the next update of the SIP compilation.<sup>2</sup> EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://www.regulations.gov)

<sup>2</sup> 62 FR 27968 (May 22, 1997).

and/or at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

#### VI. Statutory and Executive Order Reviews

##### A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land as defined

in 18 U.S.C. 1151 or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

*B. Submission to Congress and the Comptroller General*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

*C. Petitions for Judicial Review*

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 16, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today’s **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking action.

This action to approve revised provisions of the Virginia Administrative Code including 9VAC5–20–204, 9VAC5–30–55, 9VAC5–151–20, and 9VAC5–160–30 for inclusion in the Virginia SIP may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: August 3, 2017.

**Cecil Rodrigues,**

*Acting Regional Administrator, Region III.*

40 CFR part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

■ 1. The authority citation for part 52 continues to read as follows:

*Authority:* 42 U.S.C. 7401 *et seq.*

**Subpart VV—Virginia**

■ 2. In § 52.2420, the table in paragraph (c) is amended by revising the entries for Sections 5–20–204, 5–30–55, 5–151–20, and 5–160–30. The revised text reads as follows:

**§ 52.2420 Identification of plan.**

\* \* \* \* \*  
(c) \* \* \*

**EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES**

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
*	*	*	*	*
<b>9 VAC 5, Chapter 20 General Provisions</b>				
*	*	*	*	*
<b>Part II Air Quality Programs</b>				
5–20–204 .....	Nonattainment Areas .....	11/16/16	8/17/17, [Insert <b>Federal Register</b> Citation].	Addition of Subdivision C. Previous approval 8/14/15.
*	*	*	*	*
<b>9 VAC 5, Chapter 30 Ambient Air Quality Standards [Part III]</b>				
5–30–55 .....	Ozone (8-hour, 0.08 ppm)	11/16/16	8/17/17, [Insert <b>Federal Register</b> Citation].	Subdivision D. is revised to read that the 1997 8-hour ozone NAAQS no longer apply after April 6, 2015. Previous approval 6/11/13.
*	*	*	*	*
<b>9 VAC 5, Chapter 151 Transportation Conformity</b>				

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
*	*	*	*	*
<b>Part II General Provisions</b>				
5-151-20	Applicability	11/16/16	8/17/17, [Insert <b>Federal Register</b> Citation].	Subdivision B. is amended to address revoked federal standards. Previous approval 11/20/09.
*	*	*	*	*
<b>9 VAC 5, Chapter 160 General Conformity</b>				
*	*	*	*	*
<b>Part II General Provisions</b>				
5-160-30	Applicability	11/16/16	8/17/17, [Insert <b>Federal Register</b> Citation].	Subdivision A. is amended to address revoked federal standards. Previous approval 12/12/11.
*	*	*	*	*

\* \* \* \* \*

[FR Doc. 2017-17235 Filed 8-16-17; 8:45 am]  
 BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-R04-OAR-2017-0174; FRL-9966-29-Region 4]

**Air Plan Approval: Alabama; Transportation Conformity**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving a portion of a revision to the Alabama State Implementation plan (SIP) submitted by the State of Alabama on May 8, 2013, for the purpose of amending the transportation conformity rules to be consistent with Federal requirements.

**DATES:** This direct final rule is effective October 16, 2017 without further notice, unless EPA receives adverse comment by September 18, 2017. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2017-0174 at [http://](http://www.regulations.gov)

[www.regulations.gov](http://www.regulations.gov). Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](http://www.regulations.gov). EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:**

Kelly Sheckler, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9222. Ms. Sheckler can also be reached via

electronic mail at [sheckler.kelly@epa.gov](mailto:sheckler.kelly@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background and Purpose**

*A. Call to States for Conformity SIP Revisions*

In the Clean Air Act (CAA or Act), Congress recognized that actions taken by federal agencies could affect a State, Tribal, or local agency's ability to attain and maintain the national ambient air quality standards (NAAQS). Congress added section 176(c) (42 U.S.C. 7506) to the CAA to ensure federal agencies' proposed actions conform to the applicable SIP, Tribal Implementation Plan (TIP) or Federal Implementation Plan (FIP) for attaining and maintaining the NAAQS. That section requires federal entities to find that the emissions from the federal action will conform with the purposes of the SIP, TIP or FIP or not otherwise interfere with the State's or Tribe's ability to attain and maintain the NAAQS.

The CAA Amendments of 1990 clarified and strengthened the provisions in section 176(c). Because certain provisions of section 176(c) apply only to highway and mass transit funding and approvals actions, EPA published two sets of regulations to implement section 176(c). The Transportation Conformity Regulations, (40 CFR part 51, subpart T, and 40 CFR part 93, subpart A) first published on November 24, 1993 (58 FR 62188),

address federal actions related to highway and mass transit funding and approval actions. The conformity regulations have been revised numerous times since then.

When promulgated in 1993, the Federal Transportation Conformity Rule at 40 CFR 51.395 mandated that the transportation conformity SIP revisions incorporate several provisions of the rule in verbatim form, except insofar as needed to give effect to a stated intent in the revision to establish criteria and procedures more stringent than the requirements stated in these sections.

#### B. What is transportation conformity?

Transportation conformity is required under section 176(c) of the CAA to ensure that federally-supported highway projects, transit projects, and other activities are consistent with (“conform to”) the purpose of the SIP.

Transportation conformity currently applies to areas that are designated nonattainment, as well as those areas redesignated to attainment after 1990 (maintenance areas), with plans developed under section 175A of the Act for the following transportation related pollutants: Ozone, particulate matter (PM<sub>2.5</sub> and PM<sub>10</sub>), carbon monoxide, and nitrogen dioxide. Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant NAAQS. The transportation conformity regulation is found in 40 CFR part 93, subpart A and provisions related to conformity SIPs are found in 40 CFR 51.390.

#### C. Transportation Conformity Provisions Affected by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)

On August 10, 2005, the SAFETEA-LU was signed into law and provided changes to the CAA that streamlined the requirements for conformity SIPs at section 176(c). Prior to SAFETEA-LU, states were required to address all of the Federal conformity rule’s provisions in their conformity SIPs. After SAFETEA-LU amended CAA section 176(c)(4)(E) and EPA revised 40 CFR 51.390 to be consistent with those amendments, states are required to address and tailor only three sections of the conformity rule in their transportation conformity SIPs. (The requirement that states adopt the Federal conformity rule verbatim results in the need for states to submit a SIP revision within one year of EPA’s adoption of any changes, including minor changes, to the rule.) The three sections of the federal rule which must

meet a state’s individual circumstances are: 40 CFR 93.105, which addresses consultation procedures; 40 CFR 93.122(a)(4)(ii), which requires that written commitments be obtained for control measures that are not included in a Metropolitan Planning Organization’s transportation plan and transportation improvement program prior to a conformity determination, and that such commitments be fulfilled; and, 40 CFR 93.125(c) which requires that written commitments be obtained for mitigation measures prior to a project level conformity determination, and that project sponsors must comply with such commitments. In general, states are no longer required to submit conformity SIP revisions that address the other sections of the conformity rule, and they are able to streamline their SIP-approved conformity requirements consistent with changes made through SAFETEA-LU.

#### D. Prior Approval of Alabama Conformity SIP Revisions

EPA has approved several revisions to the Alabama SIP to incorporate transportation conformity requirements consistent with the Federal regulations. Initially, on May 11, 2000, EPA approved Alabama’s SIP revision to address consultation requirements for transportation conformity. See 65 FR 30358. On March 26, 2009, EPA approved revisions to the transportation conformity requirements in the Alabama SIP to cover the specific applicable areas and address new requirements related to both the 8-hour ozone and PM<sub>2.5</sub> NAAQS. See FR 74 13118. EPA also approved a subsequent revision to Alabama’s transportation conformity requirements on September 26, 2012. See 77 FR 59100.

#### II. Analysis of State’s Submittal

On May 8, 2013, the Alabama Department of Environmental Management submitted a SIP revision to EPA to make two changes to its transportation conformity requirements. First, the State changed its regulations at Alabama Administrative Code section 335-3-17-.01, *Transportation Conformity*, to reflect the January 24, 2008 (73 FR 4420) amendments to 40 CFR part 93, subpart A that address the 2005 SAFETEA-LU. That change in Alabama’s regulation streamlines the State’s transportation conformity SIP to include only §§ 93.105, 93.122(a)(4)(ii) and 93.125(c), consistent with Federal requirements, and not the provisions of 40 CFR 93 in entirety.

On March 14, 2012, EPA finalized the rule entitled “Transportation Conformity Rule Restructuring

Amendments.” See 77 FR 14979. Through that final action, EPA restructured several sections of the transportation conformity rule so that they apply to any new or revised NAAQS. Specifically, EPA amended §§ 93.101, 93.105, 93.109, 93.116, 93.118, 93.119, and 93.121 of the Transportation Conformity Rule. In its May 8, 2013, SIP revision, Alabama requests that EPA incorporate by reference subsequent Federal changes EPA promulgated in the Transportation Conformity Rule Restructuring Amendments. Although Alabama’s submission mentions that it is incorporating by reference provisions in EPA’s Transportation Conformity Rule Restructuring Amendments, the only relevant portion for incorporation by reference is the change that EPA made to section 93.105 because, in this same submission, Alabama changed the State regulations and transportation conformity requirements in its SIP to address only §§ 93.105, 93.122(a)(4)(ii) and 93.125(c), in accordance with EPA’s regulations. The changes EPA made to § 93.105 were administrative in nature and involved updates to citations, revision of introductory paragraphs, and redesignating paragraphs.

EPA has reviewed Alabama’s submittal to ensure consistency with the current CAA, as amended by SAFETEA-LU, and EPA regulations governing state procedures for transportation and general conformity (40 CFR part 93, subparts A and B). The May 8, 2013, SIP revision, upon final approval by EPA, removes specific provisions of Alabama Administrative Code section 335-3-17-.01, “*Transportation Conformity*,” from the SIP that are no longer required in light of the SAFETEA-LU amendments. With the removal of these specific provisions of 335-3-17-.01 from the SIP, the federal rules in 40 CFR part 93, subpart A will directly govern transportation conformity of federal actions in the State of Alabama. This revision complies with the requirements of CAA section 176(c)(4)(e) and 40 CFR 51.390(b). 40 CFR part 93, subpart A continues to subject certain Federal actions to transportation conformity requirements without the need for identical state rules and SIPs. Therefore, repealing the State rule will not impact continuity of the transportation conformity program in Alabama.

#### III. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is

proposing to incorporate by reference the ADEM. Regulation chapter 335–3–17.01 entitled “Transportation Conformity,” effective May 28, 2013, which incorporates by reference the Federal Transportation Conformity Rule that was restructured and amended on March 14, 2012 (77 FR 14979). EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://www.regulations.gov) and/or at the EPA Region 4 office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

#### IV. Final Action

Pursuant to section 110 of the CAA, EPA is approving the revision to the Alabama SIP regarding the State’s transportation conformity requirements. The approval of Alabama’s conformity SIP revisions will align the Alabama SIP with the current federal conformity requirements, as amended by SAFETEA–LU, and the most recent EPA regulations governing state procedures for transportation conformity.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective October 16, 2017 without further notice unless the Agency receives adverse comments by September 18, 2017.

If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on October 16, 2017 and no further action will be taken on the proposed rule.

#### V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. See 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action

merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General

of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 16, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today’s **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: August 4, 2017.

#### V. Anne Heard,

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

#### PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

#### Subpart B—Alabama

■ 2. Section 52.50(c) is amended by revising the entry for “Section 335–3–17-.01” to read as follows:

#### § 52.50 Identification of plan.

\* \* \* \* \*  
(c) \* \* \*

EPA APPROVED ALABAMA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
<b>Chapter No. 335–3–17 Conformity of Federal Actions to State Implementation Plans</b>				
Section 335–3–17–.01 .....	Transportation Conformity .....	5/28/2013	8/17/2017 [Insert citation of publication].	
*	*	*	*	*

\* \* \* \* \*  
 [FR Doc. 2017–17241 Filed 8–16–17; 8:45 am]  
 BILLING CODE 6560–50–P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 372**

[EPA–HQ–OPPT–2017–0197; FRL–9964–77]

RIN 2070–AK32

**Community Right-To-Know; Adopting 2017 North American Industry Classification System (NAICS) Codes for Toxics Release Inventory (TRI) Reporting**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** EPA is updating the list of North American Industry Classification System (NAICS) codes subject to reporting under the Toxics Release Inventory (TRI) to reflect the Office of Management and Budget (OMB) 2017 NAICS code revision. As a result of this action, facilities would be required to use 2017 NAICS codes when reporting to TRI beginning with TRI reporting forms that are due on July 1, 2018, covering releases and other waste management quantities for the 2017 calendar year. EPA is also modifying the list of exceptions and limitations associated with NAICS codes in the CFR for TRI reporting purposes by deleting the descriptive text. EPA believes that these amendments are non-controversial and does not expect to receive any adverse comments. However, in addition to this direct final rule, elsewhere in this issue of the **Federal Register**, EPA is issuing the same amendment as a Notice of Proposed Rulemaking that will be used in the event that adverse comment is received. If EPA receives no adverse comment, the Agency will not take further action on the proposed rule and the direct final rule will become effective as provided in this action. If EPA receives relevant

adverse comment, the Agency will publish a timely withdrawal in the **Federal Register** informing the public that this direct final action will not take effect and directing them to the Notice of Proposed Rulemaking. EPA would then address all relevant adverse public comments in a subsequent final rule. **DATES:** This final rule is effective on November 15, 2017 without further notice, unless EPA receives adverse comment by September 18, 2017. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect and directing them to the Notice of Proposed Rulemaking that appears elsewhere in this issue of the **Federal Register**.

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2007–0197, is available at <http://www.regulations.gov> or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

**FOR FURTHER INFORMATION CONTACT:**  
*For technical information contact:* Stephanie Griffin, Toxics Release Inventory Program Division, Mailcode 7410M, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–1463; email address: [griffin.stephanie@epa.gov](mailto:griffin.stephanie@epa.gov).

*For general information contact:* The Emergency Planning and Community Right-to-Know Information Center; telephone number: (800) 424–9346, TDD

(800) 553–7672; Web site: <https://www.epa.gov/home/epa-hotlines>.

**SUPPLEMENTARY INFORMATION:**

**I. Executive Summary**

*A. Does this action apply to me?*

You may be potentially affected by this action if you own or operate facilities that have 10 or more full-time employees or the equivalent of 20,000 employee hours per year that manufacture, process, or otherwise use toxic chemicals listed on the TRI, and that are required under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) or section 6607 of the Pollution Prevention Act (PPA) to report annually to EPA and States or Tribes their environmental releases or other waste management quantities of covered chemicals. (A rule was published on April 19, 2012 (77 FR 23409), requiring facilities located in Indian country to report to the appropriate tribal government official and EPA instead of to the state and EPA.)

The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Facilities included in the following NAICS manufacturing codes (corresponding to Standard Industrial Classification (SIC) codes 20 through 39): 311\*, 312\*, 313\*, 314\*, 315\*, 316, 321, 322, 323\*, 324, 325\*, 326\*, 327, 331, 332, 333, 334\*, 335\*, 336, 337\*, 339\*, 111998\*, 211112\*, 212324\*, 212325\*, 212393\*, 212399\*, 488390\*, 511110, 511120, 511130, 511140\*, 511191, 511199, 512220, 512230\*, 519130\*, 541712\*, or 811490\*.
- (\*Exceptions and/or limitations exist for these NAICS codes.)

- Facilities included in the following NAICS codes (corresponding to SIC codes other than SIC codes 20 through 39): 212111, 212112, 212113 (corresponds to SIC code 12, Coal

Mining (except 1241)); or 212221, 212222, 212231, 212234, 212299 (corresponds to SIC code 10, Metal Mining (except 1011, 1081, and 1094)); or 221111, 221112, 221113, 221118, 221121, 221122, 221330 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce) (corresponds to SIC codes 4911, 4931, and 4939, Electric Utilities); or 424690, 425110, 425120 (limited to facilities previously classified in SIC code 5169, Chemicals and Allied Products, Not Elsewhere Classified); or 424710 (corresponds to SIC code 5171, Petroleum Bulk Terminals and Plants); or 562112 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis (previously classified under SIC code 7389, Business Services, NEC)); or 562211, 562212, 562213, 562219, 562920 (limited to facilities regulated under the Resource Conservation and Recovery Act, subtitle C, 42 U.S.C. 6921 *et seq.*) (corresponds to SIC code 4953, Refuse Systems).

- Federal facilities. Under Executive Order 13693 (80 FR 15871, March 25, 2015), all Federal facilities are required to comply with the provisions set forth in section 313 of EPCRA and section

6607 of the PPA. On June 10, 2015, the White House Council on Environmental Quality (CEQ) issued *Instructions for Implementing Executive Order 13693*, requiring federal agencies and contractors to comply with these laws regardless of NAICS code delineations (see 80 FR 34149, June 15, 2015).

If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed in the **FOR FURTHER INFORMATION CONTACT** section.

*B. What is the Agency's authority for taking this action?*

EPA is taking this action under sections 313(g)(1) and 328 of EPCRA, 42 U.S.C. 11023(g)(1) and 11048. In general, section 313 of EPCRA requires owners and operators of covered facilities in specified SIC codes that manufacture, process, or otherwise use listed toxic chemicals in amounts above specified threshold levels to report certain facility specific information about such chemicals, including the annual releases and other waste management quantities. Section 313(g)(1) of EPCRA requires EPA to publish a uniform toxic chemical release form for these reporting purposes, and it also prescribes, in

general terms, the types of information that must be submitted on the form. Congress also granted EPA broad rulemaking authority to allow the Agency to fully implement the statute. EPCRA section 328 states that: "The Administrator may prescribe such regulations as may be necessary to carry out this chapter." 42 U.S.C. 11048.

*C. What action is the Agency taking?*

In response to OMB's revisions to the NAICS codes effective January 1, 2017, EPA is amending 40 CFR part 372 to include 2017 NAICS codes for TRI reporting. EPA is also modifying the list of exceptions and limitations of NAICS codes for TRI reporting purposes in the CFR.

Under this action, TRI reporting requirements remain unchanged. However, due to the 2017 NAICS modifications, some facilities will need to modify their reported NAICS codes as outlined in the table below, which identifies only the revised TRI NAICS reporting codes and is not an exhaustive list of all NAICS reporting codes subject to EPCRA section 313 and PPA section 6607. A complete listing of all TRI covered facilities can be found in the regulations at 40 CFR 372.23.

2012 NAICS code	2012 NAICS and U.S. description	2017 NAICS code	2017 NAICS and U.S. description
333911	Pump and Pumping Equipment Manufacturing	333914	Measuring, Dispensing, and Other Pumping Equipment Manufacturing.
333913	Measuring and Dispensing Pump Manufacturing	"	"
335221	Household Cooking Appliance Manufacturing	335220	Major Household Appliance Manufacturing.
335222	Household Refrigerator and Home Freezer Manufacturing.	"	"
335224	Household Laundry Equipment Manufacturing	"	"
335228	Other Major Household Appliance Manufacturing	"	"
512220	Integrated Record Production/Distribution	512250	Record Production and Distribution. <i>This merges both TRI-covered and non-TRI-covered NAICS codes. Only 512220 (Integrated Record Production/Distribution) was covered by TRI. TRI will note that only the "Integrated Record Production/Distribution" facilities under NAICS code 512250 are required to report.</i>
541712	Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology).	541713	Research and Development in Nanotechnology. <i>This merges both TRI-covered and non-TRI-covered NAICS codes. Only 541712 (Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology)) was covered by TRI. TRI will note that only the "Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology)" facilities under NAICS code 541713 are required to report. TRI does not include all facilities classified under NAICS code 541712, and the same limitations will be extended to NAICS code 541713.</i>
"	"	541715	Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology). <i>TRI does not include all facilities classified under NAICS code 541712, and the same limitations will be extended to NAICS code 541715. TRI will specify which facilities under NAICS code 541715 are required to report.</i>

2012 NAICS code	2012 NAICS and U.S. description	2017 NAICS code	2017 NAICS and U.S. description
212231 .....	Lead Ore and Zinc Ore Mining .....	* 212230	Copper, Nickel, Lead, and Zinc Mining.
212234 .....	Copper Ore and Nickel Ore Mining .....	"	"

\* A conforming update is also being made to 40 CFR 372.38(h).

Crosswalk tables between all 2012 NAICS codes and 2017 NAICS codes can be found on the Internet at <http://www.census.gov/epcd/www/naics.html>.

EPA is also modifying the list of exceptions and limitations of NAICS codes for TRI reporting purposes in the CFR. Because NAICS codes may cross-reference some SIC codes in both TRI-covered and non-covered TRI sectors, EPA has historically included descriptive text in 40 CFR part 372 to help indicate exceptions and limitations to TRI coverage for a specific NAICS code in line with the previous SIC code descriptors. However, NAICS codes are updated every five years, and these updates may require EPA to revise this text describing an exception or limitation to the scope of a particular NAICS code. Consequently, this descriptive text does not always align fully with SIC codes' full descriptions.

For example, historically, 40 CFR part 372 would list NAICS code 323211 with the following exception: "Exception is limited to facilities primarily engaged in reproducing text, drawings, plans, maps, or other copy, by blueprinting, photocopying, mimeographing, or other methods of duplication other than printing or microfilming (i.e., instant printing) (previously classified under SIC 7334, Photocopying and Duplicating Services, (instant printing))". This action simplifies the listing to display only the SIC code and title rather than include the description: "Exception is limited to facilities previously classified under SIC 7334, Photocopying and Duplicating Services".

Moving forward, in 40 CFR part 372, EPA will not include descriptive text for SIC codes when listing the limitations and exceptions applicable to TRI-covered NAICS codes. Instead, the Agency will simply list the SIC codes, including their titles, as applicable limitations and exceptions. Because exceptions and limitations are included in 40 CFR part 372.23(b) & (c) to align the listing of NAICS codes with the list of SIC codes covered by TRI reporting requirements as shown in 40 CFR part 372.23(a), the SIC codes rather than the descriptive text defines the types of facilities covered by TRI. By removing the descriptive text from the exceptions and limitations listed in these two paragraphs, this action mitigates potential confusion caused by

qualitative descriptions of SIC codes and does not alter the universe of the facilities affected by TRI reporting requirements. Facilities with questions regarding the SIC code descriptions should refer to the SIC manual, available at: <https://www.osha.gov/pls/imis/sicsearch.html>.

*D. Why is EPA taking this action?*

On April 9, 1997, OMB published a **Federal Register** Notice of final decision (62 FR 17288) to adopt the NAICS economic classification system, replacing the SIC system which had traditionally been used by the Federal Government for collecting and organizing industry-related statistics. Consistent with EPCRA, on June 6, 2006, EPA amended 40 CFR part 372 to include the 2002 NAICS codes that correspond to the SIC codes that are currently subject to section 313 of EPCRA and section 6607 of the PPA (71 FR 32464). OMB revises the NAICS codes every five years. Therefore, on June 9, 2008 (73 FR 32466), EPA amended 40 CFR part 372 to include the 2007 NAICS codes that correspond to the SIC codes that are currently subject to section 313 of EPCRA and section 6607 of the PPA, and again on July 18, 2013 (78 FR 42875), to include the 2012 NAICS codes.

In the **Federal Register** on August 4, 2015 (80 FR 46480), OMB announced updated NAICS codes for 2017, and on August 8, 2016 (81 FR 52584), finalized and further modified the NAICS codes for 2017. This direct final action will amend 40 CFR part 372 to include OMB's revised NAICS codes for 2017.

*E. How is EPA taking this action?*

Given the nature of this action, EPA is therefore taking this action by publishing this direct final rule and a Notice of Proposed Rulemaking elsewhere in this issue of the **Federal Register**.

1. *Direct final rule.* Although EPA believes that this action is non-controversial and is not expected to result in any adverse comments, a direct final rule provides an opportunity for adverse comment. If EPA receives no adverse comment, the Agency will not take further action on the proposed rule and the direct final rule will become effective as provided in this action. However, if EPA receives relevant

adverse comment, the Agency will publish a timely withdrawal in the **Federal Register** informing the public that this direct final action will not take effect and directing them to the proposed rule that appears elsewhere in this issue of the **Federal Register**. EPA would then address all adverse public comments in the context of issuing a subsequent final rule.

2. *Proposed rule.* In addition to this direct final rule, the same amendments are presented in a proposed rule that appears elsewhere in this issue of the **Federal Register**. As indicated previously, the proposed rule will be used in the event that relevant adverse comment is received on the amendment within this direct final rule.

*F. What are the incremental impacts of this action?*

EPA analyzed the potential costs and benefits associated with this action, and determined that since this action will not add or remove any reporting requirements, there is no net increase in respondent burden or other economic impacts to consider.

*G. How do I submit a comment on this action?*

Submit your relevant adverse comments, identified by docket identification (ID) number EPA-HQ-OPPT-2007-0197, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <http://www.epa.gov/dockets/contacts.html>.

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <http://www.epa.gov/dockets>.



## II. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

### B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden. Facilities that are affected by the rule are already required to report their industrial classification codes on the approved reporting forms under section 313 of EPCRA and 6607 of the PPA. In addition, OMB has previously approved the information collection requirements contained in 40 CFR part 372 under the provisions of the PRA, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2025-0009 (EPA ICR No. 1363-21) for Form R and Form A. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

### C. Regulatory Flexibility Act (RFA)

EPA certifies that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601 *et seq.* In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This direct final rule adds no new reporting requirements, and there would be no net increase in respondent burden. This rule would only update the NAICS codes already reported by respondents. This final rule will not impose any requirements on small entities.

### D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and does

not significantly or uniquely affect small governments. The action would impose no enforceable duty on any state, local or tribal governments or the private sector.

### E. Executive Order 13132: Federalism

This action does not have federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

### F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This final rule will not impose substantial direct compliance costs on Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

### G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866, and because EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

### H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

### I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards that would require Agency consideration under NTTAA section 12(d), 15 U.S.C. 272 note.

### J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.

EPA has determined that the human health or environmental risk addressed

by this action would not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

### K. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.*, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

### List of Subjects in 40 CFR Part 372

Environmental protection, Community right-to-know, Reporting and recordkeeping requirements, Toxic chemicals.

Dated: August 7, 2017,  
**Wendy Cleland-Hamnett,**  
*Acting Assistant Administrator, Office of  
 Chemical Safety and Pollution Prevention.*

Therefore, 40 CFR chapter I is amended as follows:

### PART 372—[AMENDED]

■ 1. The authority citation for part 372 continues to read as follows:

**Authority:** 42 U.S.C. 11023 and 11048.

■ 2. Amend § 372.22 by revising the introductory text for paragraph (b) to read as follows:

#### § 372.22 Covered facilities for toxic chemical release reporting.

\* \* \* \* \*

(b) The facility is in a Standard Industrial Classification (SIC) (as in effect on January 1, 1987) major group or industry code listed in § 372.23(a), for which the corresponding North American Industry Classification System (NAICS) (as in effect on January 1, 2017, for reporting year 2018 and thereafter) subsector and industry codes are listed in § 372.23(b) and (c) by virtue of the fact that it meets one of the following criteria:

\* \* \* \* \*

■ 3. Amend § 372.23 by revising paragraphs (b) and (c) to read as follows:

#### § 372.23 SIC and NAICS codes to which this Part applies.

\* \* \* \* \*

(b) NAICS codes that correspond to SIC codes 20 through 39.

Subsector code or industry code	Exceptions and/or limitations
311—Food Manufacturing .....	Except 311119—Exception is limited to facilities previously classified under SIC 0723, Crop Preparation Services for Market, Except Cotton Ginning; Except 311340—Exception is limited to facilities previously classified under SIC 5441, Candy, Nut, and Confectionery Stores; Except 311352—Exception is limited to facilities previously classified under SIC 5441, Candy, Nut, and Confectionery Stores; Except 311611—Exception is limited to facilities previously classified under SIC 0751, Livestock Services, Except Veterinary; Except 311612—Exception is limited to facilities previously classified under SIC 5147, Meats and Meat Products;
312—Beverage and Tobacco Product Manufacturing.	Except 311811— Exception is limited to facilities previously classified under SIC 5461, Retail Bakeries; Except 312112—Exception is limited to facilities previously classified under SIC 5149, Groceries and Related Products, Not Elsewhere Classified; Except 312230—Exception is limited to facilities previously classified under SIC 7389, Business Services, Not Elsewhere Classified, except facilities primarily engaged in solvent recovery services on a contract or fee basis;
313—Textile Mills .....	Except 313310—Exception is limited to facilities previously classified under SIC 5131, Piece Goods, Notions, and Other Dry Good; and facilities previously classified under SIC 7389, Business Services, Not Elsewhere Classified, except facilities primarily engaged in solvent recovery services on a contract or fee basis;
314—Textile Product Mills .....	Except 314120—Exception is limited to facilities previously classified under SIC 5714, Drapery, Curtain, and Upholstery Stores; Except 314999—Exception is limited to facilities previously classified under SIC 7389, Business Services, Not Elsewhere Classified, except facilities primarily engaged in solvent recovery services on a contract or fee basis;
315—Apparel Manufacturing .....	Except 315220—Exception is limited to facilities previously classified under SIC 5699, Miscellaneous Apparel and Accessory Stores;
316—Leather and Allied Product Manufacturing.	
321—Wood Product Manufacturing	
322—Paper Manufacturing .....	
323—Printing and Related Support Activities.	Except 323111—Exception is limited to facilities previously classified under SIC 7334, Photocopying and Duplicating Services;
324—Petroleum and Coal Products Manufacturing.	
325—Chemical Manufacturing .....	Except 325998—Exception is limited to facilities previously classified under SIC 7389, Business Services, Not Elsewhere Classified;
326—Plastics and Rubber Products Manufacturing.	Except 326212—Exception is limited to facilities previously classified under SIC 7534, Tire Retreading and Repair Shops;
327—Nonmetallic Mineral Product Manufacturing.	Except 327110—Exception is limited to facilities previously classified under SIC 5719, Miscellaneous home furnishing Stores;
331—Primary Metal Manufacturing	
332—Fabricated Metal Product Manufacturing.	
333—Machinery Manufacturing .....	
334—Computer and Electronic Product Manufacturing.	Except 334614—Exception is limited to facilities previously classified under SIC 7372, Prepackaged Software; and to facilities previously classified under SIC 7819, Services Allied to Motion Picture Production;
335—Electrical Equipment, Appliance, and Component Manufacturing.	Except 335312—Exception is limited to facilities previously classified under SIC 7694, Armature Rewinding Shops;
336—Transportation Equipment Manufacturing.	
337—Furniture and Related Product Manufacturing.	Except 337110—Exception is limited to facilities previously classified under SIC 5712, Furniture Stores;
	Except 337121—Exception is limited to facilities previously classified under SIC 5712, Furniture Stores;
	Except 337122—Exception is limited to facilities previously classified under SIC 5712, Furniture Stores;
339—Miscellaneous Manufacturing	Except 339113—Exception is limited to facilities previously classified under SIC 5999, Miscellaneous Retail Stores, Not Elsewhere Classified;
	Except 339115—Exception is limited to lens grinding facilities previously classified under SIC 5995, Optical Goods Stores;
	Except 339116—Exception is limited to facilities previously classified under SIC 8072, Dental Laboratories;
111998—All Other Miscellaneous Crop Farming.	Limited to facilities previously classified under SIC 2099, Food Preparations, Not Elsewhere Classified;
113310—Logging .....	
211112—Natural Gas Liquid Extraction.	Limited to facilities that recover sulfur from natural gas and previously classified under SIC 2819, Industrial Inorganic Chemicals, Not Elsewhere Classified;
212324—Kaolin and Ball Clay Mining.	Limited to facilities operating without a mine or quarry and previously classified under SIC 3295, Minerals and Earths, Ground or Otherwise Treated;
212325—Mining .....	Limited to facilities operating without a mine or quarry and previously classified under SIC 3295, Minerals and Earths, Ground or Otherwise Treated;
212393—Other Chemical and Fertilizer Mineral Mining.	Limited to facilities operating without a mine or quarry and previously classified under SIC 3295, Minerals and Earths, Ground or Otherwise Treated;

Subsector code or industry code	Exceptions and/or limitations
212399—All Other Nonmetallic Mineral Mining.	Limited to facilities operating without a mine or quarry and previously classified under SIC 3295, Minerals and Earths, Ground or Otherwise Treated;
488390—Other Support Activities for Water Transportation.	Limited to facilities previously classified under SIC 3731, Shipbuilding and Repairing;
511110—Newspaper Publishers ....	
511120—Periodical Publishers .....	
511130—Book Publishers .....	
511140—Directory and Mailing List Publishers.	Except facilities previously classified under SIC 7331, Direct Mail Advertising Services;
511191—Greeting Card Publishers	
511199—All Other Publishers .....	Except facilities previously classified under SIC 8999, Services, Not Elsewhere Classified;
512230—Music Publishers .....	Limited to facilities previously classified under SIC 3652, Phonograph Records and Prerecorded Audio Tapes and Disks;
512250—Record Production and Distribution.	Limited to facilities previously classified under SIC 2711, Newspapers: Publishing, or Publishing and Printing; facilities previously classified under SIC 2721, Periodicals: Publishing, or Publishing and Printing; facilities previously classified under SIC 2731, Books: Publishing, or Publishing and Printing; facilities previously classified under SIC 2741, Miscellaneous Publishing; facilities previously classified under SIC 2771, Greeting Cards; Except for facilities primarily engaged in web search portals;
519130—Internet Publishing and Broadcasting and Web Search Portals.	Limited to facilities previously classified under SIC 3764, Guided Missile and Space Vehicle Propulsion Units and Propulsion Unit Parts; and facilities previously classified under SIC 3769, Guided Missile and Space Vehicle Parts and Auxiliary Equipment, Not Elsewhere Classified;
541713—Research and Development in Nanotechnology.	Limited to facilities previously classified under SIC 3764, Guided Missile and Space Vehicle Propulsion Units and Propulsion Unit Parts; and facilities previously classified under SIC 3769, Guided Missile and Space Vehicle Parts and Auxiliary Equipment, Not Elsewhere Classified;
541715—Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology).	Limited to facilities previously classified under SIC 3764, Guided Missile and Space Vehicle Propulsion Units and Propulsion Unit Parts; and facilities previously classified under SIC 3769, Guided Missile and Space Vehicle Parts and Auxiliary Equipment, Not Elsewhere Classified;
811490—Other Personal and Household Goods Repair and Maintenance.	Limited to facilities previously classified under SIC 3732, Boat Building and Repairing.

(c) NAICS codes that correspond to SIC codes other than SIC codes 20 through 39.

Subsector or industry code	Exceptions and/or limitations
212111—Bituminous Coal and Lignite Surface Mining.	
212112—Bituminous Coal and Underground Mining.	
212113—Anthracite Mining .....	
212221—Gold Ore Mining .....	
212222—Silver Ore Mining .....	
212230—Copper, Nickel, Lead, and Zinc Mining.	
212299—Other Metal Ore Mining ...	
221111—Hydroelectric Power Generation.	Limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce.
221112—Fossil Fuel Electric Power Generation.	Limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce.
221113—Nuclear Electric Power Generation.	Limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce.
221118—Other Electric Power Generation.	Limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce.
221121—Electric Bulk Power Transmission and Control.	Limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce.
221122—Electric Power Distribution	Limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce.
221330—Steam and Air Conditioning Supply.	Limited to facilities previously classified under SIC 4939, Combination Utility Services, Not Elsewhere Classified.
424690—Other Chemical and Allied Products Merchant Wholesalers.	
424710—Petroleum Bulk Stations and Terminals.	
425110—Business to Business Electronic Markets.	Limited to facilities previously classified in SIC 5169, Chemicals and Allied Products, Not Elsewhere Classified
425120—Wholesale Trade Agents and Brokers.	Limited to facilities previously classified in SIC 5169, Chemicals and Allied Products, Not Elsewhere Classified.
562112—Hazardous Waste Collection.	Limited to facilities primarily engaged in solvent recovery services on a contract or fee basis and previously classified under SIC 7389, Business Services, Not Elsewhere Classified;

Subsector or industry code	Exceptions and/or limitations
562211—Hazardous Waste Treatment and Disposal.	Limited to facilities regulated under the Resource Conservation and Recovery Act, subtitle C, 42 U.S.C. 6921 <i>et seq.</i>
562212—Solid Waste Landfill .....	Limited to facilities regulated under the Resource Conservation and Recovery Act, subtitle C, 42 U.S.C. 6921 <i>et seq.</i>
562213—Solid Waste Combustors and Incinerators.	Limited to facilities regulated under the Resource Conservation and Recovery Act, subtitle C, 42 U.S.C. 6921 <i>et seq.</i>
562219—Other Nonhazardous Waste Treatment and Disposal.	Limited to facilities regulated under the Resource Conservation and Recovery Act, subtitle C, 42 U.S.C. 6921 <i>et seq.</i>
562920—Materials Recovery Facilities.	Limited to facilities regulated under the Resource Conservation and Recovery Act, subtitle C, 42 U.S.C. 6921 <i>et seq.</i>

■ 4. Amend § 372.38 by revising paragraph (h) to read as follows:

**§ 372.38 Exemptions.**

\* \* \* \* \*

(h) *Metal mining overburden.* If a toxic chemical that is a constituent of overburden is processed or otherwise used by facilities in SIC code 10, or in NAICS codes 212221, 212222, 212230 or 212299, a person is not required to consider the quantity of the toxic chemical so processed, or otherwise used when determining whether an applicable threshold has been met under § 372.25, § 372.27, or § 372.28, or determining the amounts to be reported under § 372.30.

[FR Doc. 2017-17413 Filed 8-16-17; 8:45 am]

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 216**

[Docket No. 170303228-7752-02]

RIN 0648-BG71

**Subsistence Taking of Northern Fur Seals on the Pribilof Islands; Final Annual Subsistence Harvest Levels for 2017-2019**

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

**ACTION:** Notice; Final annual fur seal subsistence harvest levels.

**SUMMARY:** Pursuant to the regulations governing the subsistence taking of North Pacific fur seals (*Callorhinus ursinus*) (northern fur seals), NMFS is publishing the expected harvest levels from 2017-2019 on St. George and St. Paul Islands, Alaska (the Pribilof Islands) to satisfy subsistence requirements of the Alaska Natives residing on the Pribilof Islands (Pribilovians). NMFS is establishing the 2017-2019 harvest levels at 1,645 to

2,000 fur seals for St. Paul Island and 300 to 500 fur seals for St. George Island.

**DATES:** Effective September 18, 2017.

**ADDRESSES:** Two Final Environmental Impact Statements (EISs), one Draft EIS, annual subsistence harvest reports, and other references are available on the Internet at the following address: <https://alaskafisheries.noaa.gov/pr/fur-seal>.

**FOR FURTHER INFORMATION CONTACT:** Michael Williams, NMFS Alaska Region, 907-271-5117, [michael.williams@noaa.gov](mailto:michael.williams@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Eastern Pacific stock of northern fur seals (fur seals) is considered depleted under the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361, *et seq.* The subsistence harvest from this stock on the Pribilof Islands is governed by regulations found in 50 CFR part 216, subpart F, published under the authority of the Fur Seal Act (FSA), 16 U.S.C. 1151, *et seq.* Pursuant to 50 CFR 216.72(b), every three years NMFS must publish in the **Federal Register** a summary of the Pribilovians' fur seal harvest for the previous three-year period. NMFS is also required to include an estimate of the number of fur seals expected to satisfy the subsistence requirements of Pribilovians in the subsequent three-year period. After a 30-day comment period, NMFS must publish a final notification of the expected annual harvest levels for the next three years.

On May 18, 2017 (82 FR 22797), NMFS published the summary of the 2014-2016 fur seal harvests and provided a 30-day comment period on the estimates of the number of fur seals expected to be taken annually to satisfy the subsistence requirements of the Pribilovians of each island for 2017-2019. In that notice, NMFS estimated the annual subsistence needs for 2017-2019 would be 1,645 to 2,000 fur seals for St. Paul Island and 300 to 500 fur seals for St. George Island and provided

background information related to these estimates.

**Summary of Changes From Proposed Annual Harvest Estimates**

NMFS did not make any changes from the proposed notice of annual harvest levels. The harvest levels for each island remain the same and therefore the annual harvest levels remain 1,645 to 2,000 fur seals for St. Paul Island and 300 to 500 fur seals for St. George Island.

**Comments and Response**

NMFS received nine distinct comments from four parties on the notice of the 2017-2019 proposed annual harvest estimates (82 FR 22797; May 18, 2017). A summary of the comments received and NMFS's responses follows.

*Comment 1:* In an effort to stabilize the ecosystems, only indigenous people should be allowed to take part in these kills and every effort should be made to establish a line of communication with indigenous leaders regarding concerns of human influence and its effects on the ecosystem. Removing fur seals could result in an increase in lower trophic levels and a decrease in higher trophic levels.

*Response 1:* Pursuant to the Fur Seal Act, 16 U.S.C. 1152, "it is unlawful, except as provided in the chapter or by regulation of the Secretary, for any person or vessel subject to the jurisdiction of the United States to engage in the taking of fur seals in the North Pacific Ocean or on lands or waters under the jurisdiction of the United States . . ." Regulations issued under the authority of the Fur Seal Act authorize Pribilovians to take fur seals on the Pribilof Islands if such taking is for subsistence uses and not accomplished in a wasteful manner (50 CFR 216.71). NMFS works in partnership with the Pribilovians under co-management agreements pursuant to the Marine Mammal Protection Act to discuss human influences on the ecosystem and issues of concern for the northern fur seal population on the

Pribilof Islands in particular. NMFS prepared an Environmental Impact Statement for Setting the Subsistence Harvest of Northern Fur Seals (NMFS 2005), which analyzed the effects of the subsistence harvest of fur seals on the Pribilof Islands. That analysis indicated that trophic level changes were not expected to occur, and NMFS has not observed trophic level changes resulting from the harvests in the intervening years. NMFS recently prepared a Supplemental Environmental Impact Statement for the Management of Subsistence Harvest of Northern Fur Seals on St. George, (NMFS 2014) and a Draft Supplemental Environmental Impact Statement for the Management of Subsistence Harvest of Northern Fur Seals on St. Paul (NMFS 2017). Both analyses indicate that trophic level changes still are not expected to occur.

*Comment 2:* The currently authorized harvest is higher than is justifiable given that actual harvest numbers have been lower than authorized harvest levels since 1985 and given the continued decline in fur seal pup production.

*Response 2:* NMFS disagrees. NMFS authorizes the harvest levels in order to satisfy the subsistence requirements of Alaska Natives on each island. NMFS evaluated the complexities of establishing an annual subsistence requirement in the EIS for the subsistence harvest of northern fur seals on the Pribilof Islands (NMFS 2005). The estimates of the number of seals expected to be taken annually over the next three years to satisfy the subsistence requirement reflects a combination of nutritional (food security), social, and cultural needs. The actual amount harvested in a given year may be less than the subsistence requirement and is dependent upon the seasonal availability of fur seals and other food resources as well as other factors such as environmental variability and the availability of harvesters. Through the co-management process NMFS and the Tribal governments have discussed the estimation of subsistence requirements and importance to community members to ensure the subsistence harvest levels are sufficient to account for environmental changes and changing needs of the Pribilovians.

NMFS arrived at the authorized harvest level of 1,645 to 2,000 fur seals for St. Paul Island and 300 to 500 fur seals for St. George Island after considering these factors, consulting with Tribal representatives, and reviewing information in the environmental analyses which indicated that harvests up to this level will not have significant consequences for the

fur seal population (NMFS 2005, 2014, and 2017). While NMFS acknowledges a decline in pup production, NMFS explained in the proposed notice that fur seal reproduction depends disproportionately on females. Consequently, the subsistence harvest of fur seals is limited to males that have not reached adulthood. Further, harvest at the maximum allowable level on St. George and St. Paul Islands would amount to 21.2 percent of the Potential Biological Removal (PBR) level (*i.e.*, 21.2 percent of the maximum number of animals, not including natural mortalities, that may be removed from the stock while allowing the stock to reach or maintain the optimum sustainable population level). However, PBR assumes random mortality across all ages and both sexes. Because the subsistence harvest is regulated to select only sub-adult male fur seals (including pups on St. George) the population-level effect of the subsistence harvest on the stock is lower than 21.2 percent of PBR.

*Comment 3:* The Pribilovians have managed to feed themselves and increase their own local population for over 30 years without the need of killing thousands of fur seals annually.

*Response 3:* NMFS disagrees that the local populations on St. Paul and St. George have increased over the past 30 years. Both the Alaska Native population and total population on St. Paul and St. George are smaller today than 30 years ago (NMFS 2017). In recent years fur seal harvests on both islands have been lower than the allowable harvest levels NMFS is identifying here (1,645 to 2,000 fur seals for St. Paul Island and 300 to 500 fur seals for St. George Island). As noted above in response to Comment 2, the actual amount harvested may be less than the full subsistence requirement due to factors such as environmental variability, availability of fur seals and other food resources, and the availability of harvesters.

*Comment 4:* NMFS should cap the harvest levels at the highest number killed in the most recent five year period.

*Response 4:* This comment is beyond the scope of this action. NMFS has developed the proposed and final notice pursuant to current regulations at 50 CFR 216.72(b). These regulations dictate that NMFS provide a summary of the preceding three years of harvesting and a discussion of the number of seals expected to be taken annually over the next three years to satisfy the subsistence requirements of St. George and St. Paul Islands. Through this notice NMFS is neither proposing nor

seeking comment on alternative ways to set harvest caps.

*Comment 5:* NMFS should refrain from relying on the PBR level as the basis for its conclusion that the proposed harvest levels will not have adverse effects on the Eastern North Pacific Stock of fur seals. Instead NMFS should be using an approach that assesses the impact of losses to the population from subsistence harvests in addition to the population decline that already is occurring and that may continue to occur.

*Response 5:* NMFS disagrees. Evaluating harvest levels relative to PBR is a valuable means to use the best available scientific information to evaluate the consequences of human caused mortality. As stated in response to Comment 2, harvest at the maximum allowable level on St. George and St. Paul Islands would amount to 21.2 of the PBR, and PBR assumes random mortality across all ages and both sexes. Because the subsistence harvest is regulated to select only sub-adult male fur seals (including pups on St. George) the population-level effects of the subsistence harvest on the stock is lower than 21.2 percent of PBR.

In addition, NMFS has modeled and analyzed the population consequences of various harvest levels and age and sex restrictions on the harvest using alternative methods besides PBR, and has come to a similar determination: That the harvests of non-breeding male fur seals at the upper limit defined do not measurably effect the abundance or reproductive potential of the fur seal population, even in light of the observed decline in the population (NMFS 2005, 2014). Analysis provided in the 2017 draft SEIS on population consequences of various harvest levels and age and sex restrictions for St. Paul Island is also consistent with those conclusions.

*Comment 6:* NMFS should provide a more rigorous analysis of subsistence needs, including a discussion of (1) why NMFS believes that those needs are more than five times higher than the average number of seals harvested per year on St. Paul over the past 15 years, (2) whether St. Paul residents have been foregoing the opportunity to stockpile meat during the harvest season for use later in the year and, if so, why this might be the case, and (3) how any shortfalls in the availability of seal meat may have been offset by greater reliance on other subsistence species (*i.e.*, are data available that show corresponding trends in these other harvests?).

*Response 6:* As indicated in response to Comment 2, NMFS, in consultation with the Tribal governments, considers recent harvest levels and nutritional

(food security), social, and cultural needs when developing estimates of the number of fur seals expected to be taken annually to satisfy the Pribilovians' subsistence requirements over the next three years. During co-management meetings between NMFS and the Tribal governments, the Pribilovians conveyed that sudden, unanticipated, and prolonged environmental and/or socioeconomic changes may alter the annual subsistence requirements. As a result, the Pribilovian communities need flexibility built into the estimate of the number of fur seals expected to satisfy their subsistence requirements. The estimated number of seals expected to satisfy the subsistence requirements must be higher than the average number of seals harvested annually in recent years in order to ensure the Pribilovians' subsistence requirements are satisfied annually over the next three years.

Pribilovians forego opportunities to stockpile fur seal meat during the harvest season due to practical limitations and costs of freezer space, limited availability of volunteer harvesters due to competition with wage-earning jobs, and competition for available labor from the local halibut fishery. The Pribilovians have repeatedly indicated that seal meat is not interchangeable or replaceable with other meat. No other marine mammals are available in the same manner on the Pribilof Islands. Steller sea lion and harbor seal hunting primarily occurs during the winter and spring in the nearshore waters of the Pribilof Islands when few if any fur seals are present, and the harvest levels are modest due to limited availability. Approximately 20 Steller sea lions were successfully retrieved each year on St. Paul over the past five years (Aleut Community of St. Paul Island unpublished data), and changes in any one year most likely represent a natural change in availability rather than the ability to substitute for the fur seal harvest by increasing hunting effort for sea lions.

There are no data available to evaluate how changes in availability of one subsistence resource may be offset by another, and the Pribilovians have indicated that subsistence resources are not interchangeable or replaceable. Pribilovians rely on fur seals to provide a significant portion of their annual meat requirement. In addition, as indicated in the response to Comment 2, the fur seal harvest provides a cultural sharing opportunity to connect the community with their environment and history. Even when fewer seals are harvested, the cultural component is important. Shortfalls of meat based on their availability can be offset, but not

replaced, by greater use of store-bought or other subsistence resources. Both Pribilof communities regularly experience a lack of diversity and availability of store-bought and wild foods. The price and availability of store-bought and wild food on the Pribilof Islands can undermine food security and impact estimates of the number of fur seals necessary to meet the subsistence requirements of the Pribilovians. Further, community members must regularly choose between spending time pursuing subsistence resources to maintain cultural practices and food security versus spending time in wage-earning jobs to purchase store-bought foods and other necessities.

*Comment 7:* Harvest levels proposed for St. George are higher than the actual harvest reported since the regulatory change in 2014. The recent regulatory revisions to authorize the subsistence harvest of both sub-adult males and pups on St. George may have changed harvest patterns and the yield of meat per seal. As such, NMFS should provide a more rigorous analysis of the subsistence requirements of Pribilovians residing on St. George.

*Response 7:* NMFS interprets this comment as requesting that we analyze the subsistence requirements of Pribilovians residing on St. George by analyzing the yield of meat per fur seal pup and sub-adult. Analyzing the yield of meat per fur seal pup and sub-adult would not provide an accurate estimate of the number of seals expected to be taken annually over the next three years to satisfy the subsistence requirements of Pribilovians on St. George. Meat is not the only edible subsistence resource obtained from fur seals. Seal oil, tongues, kidneys, and fermented seal flippers are highly valued subsistence resources which are not accurately reflected by measurements of edible meat.

In addition, previous efforts by NMFS to quantify the yield of meat per seal (58 FR 42027, August 6, 1993) created significant delays in the harvest process on St. Paul Island. This was largely a function of scientists and managers having to weigh and measure people's food multiple times on the killing field. The additional handling ultimately extended the duration of the harvest, extended the time that seals were held in groups on the harvest grounds prior to stunning, and required harvesters to volunteer for longer periods.

*Comment 8:* To the extent Native subsistence taking of northern fur seals is permitted, taking of fur seals for other than subsistence purposes should not be permitted.

*Response 8:* NMFS agrees. As noted in response to Comment 1 above, the Fur Seal Act and its implementing regulations restrict the take of fur seals to take for subsistence uses and not accomplished in a wasteful manner.

*Comment 9:* Pribilovians of St. Paul Island recently requested a revision of the harvest regulation to authorize, among other things, a longer harvest season, the use of firearms to harvest fur seals, the shooting of fur seals in the water, and the targeting of young animals that are not yet sexually dimorphic. The combined effect of the proposed revision in harvest guidelines appears likely to result in a dramatic increase in the number of animals killed each year such that close to 2000 fur seals could be killed annually. We support the "No Action" alternative that was presented in the notice of availability of the Draft Supplemental Environmental Impact Statement and opportunity for public comment published in 83 FR 4337, January 13, 2017.

*Response 9:* This comment is beyond the scope of this action. NMFS will solicit comments separately on any proposal to revise the harvest regulations for St. Paul Island.

### Classification

#### *National Environmental Policy Act*

NMFS prepared an EIS evaluating the impacts on the human environment of the subsistence harvest of northern fur seals, which is available on the NMFS Web site (see **ADDRESSES**). A draft EIS was available for public review (69 FR 53915; September 3, 2004), and NMFS incorporated the comments into the final EIS (May 2005). A draft SEIS was prepared regarding the management of the subsistence harvest of northern fur seals on St. George Island, made available for public review (79 FR 31110; May 30, 2014), and NMFS incorporated the public comments into the final SEIS (79 FR 49774; August 22, 2014). A draft SEIS was prepared regarding the management of the subsistence harvest of northern fur seals on St. Paul Island, made available for public review (82 FR 4336; January 13, 2017), and NMFS is reviewing those public comments separately from the action considered here. An SEIS should be prepared if (1) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (2) significant new circumstances or information exist relevant to environmental concerns and bearing on the proposed action or its impacts (40 CFR 1502.9(c)(1)). After reviewing the

information contained in the 2005 EIS and 2014 SEIS, the Regional Administrator has determined that (1) approval of the proposed 2017–2019 fur seal subsistence harvest notice does not constitute a change in the action; and (2) there are no significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Additionally, the proposed 2017–2019 fur seal subsistence harvest levels will result in environmental impacts within the scope of those analyzed and disclosed in the previous EIS. Therefore, supplemental NEPA documentation is not necessary to implement the 2017–2019 fur seal subsistence harvest levels discussed in this document.

*Executive Order 12866 and 13563*

This proposed action is authorized under 50 CFR 216.72(b) and is not significant for the purposes of Executive Orders 12866 and 13563.

*Regulatory Flexibility Act*

The Chief Counsel for Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed action stage that it would not have a significant economic impact on a substantial number of small entities. The harvest of northern fur seals on the Pribilof Islands, Alaska, is for subsistence purposes only, and the estimate of subsistence need would not have an adverse economic impact on any small entities. Background information related to the certification was included in the proposed estimates published in the **Federal Register** on May 18, 2017 (82 FR 22797). We received no comments on this certification and are not aware of anything that would change the conclusion of the certification; therefore a regulatory flexibility analysis is not required for this action, and none has been prepared.

*Paperwork Reduction Act*

This action does not contain any collections of information subject to the Paperwork Reduction Act.

*Executive Order 13132—Federalism*

This action does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 13132 because this action does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nonetheless,

NMFS worked closely with local governments in the Pribilof Islands, and these estimates of subsistence use and need were prepared by the local governments in St. Paul and St. George, with assistance from NMFS officials.

*Executive Order 13175—Native Consultation*

Executive Order 13175 of November 6, 2000 (25 U.S.C. 450 Note), the executive Memorandum of April 29, 1994 (25 U.S.C. 450 note), the American Indian Native Policy of the U.S. Department of Commerce (March 30, 1995), the Department of Commerce's Tribal Consultation Policy (including the Department of Commerce Administrative Order 218–8, April 26, 2012), and the NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations (November 12, 2013) outline the responsibilities of NMFS in matters affecting tribal interests. Section 161 of Public Law 108–100 (188 Stat. 452) as amended by section 518 of Public Law 108–447 (118 Stat. 3267) extends the consultation requirements of E.O. 13175 to Alaska Native corporations. NMFS contacted the tribal governments of St. Paul and St. George Islands and their respective local Native corporations (Tanadgusix and Tanaq) about setting the next three years' subsistence requirements and considered their input in formulating the proposed action. NMFS notified the tribal governments and Native corporations when the proposed action published in the **Federal Register** for a 30-day comment period (82 FR 22797, May 18, 2017); no comments were received.

*Executive Order 13175—Reducing Regulation and Controlling Regulatory Costs*

This rule is not expected to be an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

Dated: August 11, 2017.

**Samuel D. Rauch, III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 2017–17379 Filed 8–16–17; 8:45 am]

**BILLING CODE 3510–22–P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 635**

[Docket No. 150121066–5717–02]

RIN 0648–XF615

**Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries**

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

**ACTION:** Temporary rule; closure of the coastwide General category fishery.

**SUMMARY:** NMFS closes the coastwide General category fishery for large medium and giant (*i.e.*, measuring 73 inches curved fork length or greater) Atlantic bluefin tuna (BFT) until the General category reopens on September 1, 2017. This action is being taken to prevent further overharvest of the General category June through August subquota and help ensure the fishery continues to the end of the calendar year.

**DATES:** Effective 11:30 p.m., local time, August 16, 2017, through August 31, 2017.

**FOR FURTHER INFORMATION CONTACT:** Sarah McLaughlin or Brad McHale, 978–281–9260.

**SUPPLEMENTARY INFORMATION:**

Regulations implemented under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, per the allocations established in the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) (71 FR 58058, October 2, 2006) and amendments.

NMFS is required, under § 635.28(a)(1), to file a closure notice with the Office of the Federal Register for publication when a BFT quota is reached or is projected to be reached. On and after the effective date and time of such notification, for the remainder of the fishing year or for a specified period as indicated in the notification,

retaining, possessing, or landing BFT under that quota category is prohibited until the opening of the subsequent quota period or until such date as specified in the notice.

The base quota for the General category is 466.7 mt. See § 635.27(a). Each of the General category time periods (January, June through August, September, October through November, and December) is allocated a “subquota” or portion of the annual General category quota. Although it is called the “January” subquota, the regulations allow the General category fishery under this quota to continue until the subquota is reached or March 31, whichever comes first. The subquotas for each time period are as follows: 24.7 mt for January; 233.3 mt for June through August; 123.7 mt for September; 60.7 mt for October through November; and 24.3 mt for December. Any unused General category quota rolls forward within the fishing year, which coincides with the calendar year, from one time period to the next, and is available for use in subsequent time periods. On December 19, 2016, NMFS published an inseason action transferring 16.3 mt of BFT quota from the December 2017 subquota to the January 2017 subquota period (81 FR 91873). For 2017, NMFS also transferred 40 mt from the Reserve to the General category effective March 2, resulting in an adjusted General category quota of 506.7 mt (82 FR 12747, March 7, 2017).

Based on the best available landings information for the General category BFT fishery, NMFS has determined that the General category June through August 2017 subquota of 233.3 mt has been reached (*i.e.*, as of August 10, reported landings are approximately 259.0 mt). Therefore, retaining,

possessing, or landing large medium or giant BFT by persons aboard vessels permitted in the Atlantic tunas General and HMS Charter/Headboat categories (while fishing commercially) must cease at 11:30 p.m. local time on August 16, 2017. The General category will reopen automatically on September 1, 2017, for the September 2017 subperiod and there is additional quota available for October through December. This action applies to Atlantic tunas General category (commercial) permitted vessels and Highly Migratory Species (HMS) Charter/Headboat category permitted vessels when fishing commercially for BFT, and is taken consistent with the regulations at § 635.28(a)(1). The intent of this closure is to prevent any further overharvest of the available General category June through August BFT subquota and help ensure the fishery continues to the end of the calendar year.

Fishermen may catch and release (or tag and release) BFT of all sizes, subject to the requirements of the catch-and-release and tag-and-release programs at § 635.26. All BFT that are released must be handled in a manner that will maximize their survival, and without removing the fish from the water, consistent with requirements at § 635.21(a)(1). For additional information on safe handling, see the “Careful Catch and Release” brochure available at [www.nmfs.noaa.gov/sfa/hms/](http://www.nmfs.noaa.gov/sfa/hms/). General, HMS Charter/Headboat, Harpoon, and Angling category vessel owners are required to report the catch of all BFT retained or discarded dead, within 24 hours of the landing(s) or end of each trip, by accessing [hmspermits.noaa.gov](http://hmspermits.noaa.gov) or by using the Android or iPhone app.

## Classification

The Assistant Administrator for NMFS (AA) finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons:

The regulations implementing the 2006 Consolidated HMS FMP and amendments provide for inseason retention limit adjustments and fishery closures to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. These fisheries are currently underway and the quota for the subcategory has already been exceeded. Delaying this action would be contrary to the public interest because the subquota has already been exceeded and any delay could lead to further exceedance, which may result in the need to reduce quota for the General category later in the year and thus could affect later fishing opportunities. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons, there also is good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

This action is being taken under 50 CFR 635.28(a)(1), and is exempt from review under Executive Order 12866.

**Authority:** 6 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: August 11, 2017.

**Emily H. Menashes,**  
*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2017–17388 Filed 8–14–17; 4:15 pm]

**BILLING CODE 3510–22–P**



# Proposed Rules

Federal Register

Vol. 82, No. 158

Thursday, August 17, 2017

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL RESERVE SYSTEM

### 12 CFR Parts 211 and 238

[Docket No. R-1569]

RIN 7100-AE82

### Large Financial Institution Rating System; Regulations K and LL

**AGENCY:** Board of Governors of the Federal Reserve System (Board).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Board is seeking comment on a proposed new rating system for its supervision of large financial institutions. The proposed “Large Financial Institution Rating System” is closely aligned with the Federal Reserve’s new supervisory program for large financial institutions. The proposed rating system would apply to all bank holding companies with total consolidated assets of \$50 billion or more; all non-insurance, non-commercial savings and loan holding companies with total consolidated assets of \$50 billion or more; and U.S. intermediate holding companies of foreign banking organizations established pursuant to the Federal Reserve’s Regulation YY. The proposed rating system includes a new rating scale under which component ratings would be assigned for capital planning and positions, liquidity risk management and positions, and governance and controls; however, a standalone composite rating would not be assigned. The Federal Reserve proposes to assign initial ratings under the new rating system during 2018. The Federal Reserve is also seeking comment on proposed revisions to existing provisions in Regulations K and LL so they would remain consistent with certain features of the proposed rating system.

**DATES:** Comments must be received no later than October 16, 2017.

**ADDRESSES:** Interested parties are invited to submit written comments by following the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

[reserve.gov/generalinfo/foia/ProposedRegs.cfm](http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm).

• **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

• **Email:** [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include the docket number in the subject line of the message.

• **Fax:** (202) 452-3819 or (202) 452-3102.

• **Mail:** Address to Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments will be made available on the Board’s Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 3515, 1801 K Street NW. (between 18th and 19th Street NW.), Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays.

#### FOR FURTHER INFORMATION CONTACT:

Richard Naylor, Associate Director, (202) 728-5854, Vaishali Sack, Manager, (202) 452-5221, April Snyder, Manager, (202) 452-3099, Bill Charwat, Senior Project Manager, (202) 452-3006, Division of Supervision and Regulation, Scott Tkacz, Senior Counsel, (202) 452-2744, or Christopher Callanan, Senior Attorney, (202) 452-3594, Legal Division, Board of Governors of the Federal Reserve System, 20th and C Streets NW., Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact (202-263-4869).

#### SUPPLEMENTARY INFORMATION:

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## I. Background

The 2007–2009 financial crisis demonstrated the risks that large financial institutions (LFIs) pose to U.S. financial stability. As a group, these institutions were overleveraged, had insufficient capital to support their risks, and relied heavily on short-term wholesale funding that was susceptible to runs. This excessive risk-taking, combined with similar behavior outside the regulated financial sector, left the U.S. economy vulnerable. The ensuing financial crisis led to a deep recession and the loss of nearly nine million jobs.

In response, since the financial crisis, the Federal Reserve has placed materially heightened supervisory expectations on LFIs. The Federal Reserve has developed a supervisory program specifically designed to address the risks posed by such firms to U.S. financial stability. The Federal Reserve established the Large Institution Supervision Coordinating Committee (LISCC) in 2010 to coordinate its supervisory oversight for the systemically important firms that pose the greatest risk to U.S. financial stability.<sup>1</sup> The LISCC supervisory program conducts annual horizontal reviews of LISCC firms and firm-specific examination work focused on evaluating a firm’s (i) capital adequacy under normal and stressed conditions; (ii) liquidity positions and risk management practices; (iii) recovery and resolution preparedness; and (iv) governance and controls. For LFIs that are not LISCC firms, the Federal Reserve performs horizontal reviews and firm-specific supervisory work focused on capital,

<sup>1</sup> See the list of firms included in the LISCC supervisory program at <https://www.federalreserve.gov/bankinfo/large-institution-supervision.htm>.

liquidity, and governance and control practices, which are tailored to reflect the risk characteristics of these institutions.<sup>2</sup>

In 2012, the Federal Reserve implemented a new consolidated supervisory program for LFI's (referred to as the "LFI supervision framework") described in SR letter 12-17.<sup>3</sup> The LFI supervision framework is intended to (i) enhance each LFI's financial and operational strength and resilience to reduce the likelihood of an LFI's failure or material financial or operational distress, and (ii) reduce the risk to U.S. financial stability overall if an LFI were to fail.<sup>4</sup>

The LFI supervision framework includes heightened expectations regarding capital and liquidity, including both the amount of capital and liquidity and the related planning and risk management practices. The LFI supervision framework also outlined expectations for a firm's maintenance of operational strength and resilience and its compliance with laws and regulations, as provided by effective governance and control practices.

The Federal Reserve has not modified its supervisory rating system for bank holding companies since the 2007-2009 financial crisis. Since 2004, the Federal Reserve has used the "RFI/C(D)" rating system (referred to as the "RFI rating system") to communicate its supervisory assessment of every bank holding company (BHC) regardless of its

<sup>2</sup> Several LFIs which are not LISCC firms are subject to the Federal Reserve's Comprehensive Capital Analysis and Review (CCAR).

<sup>3</sup> See SR letter 12-17/CA letter 12-14, "Consolidated Supervision Framework for Large Financial Institutions," (referred to as "SR letter 12-17" in this notice) at <http://www.federalreserve.gov/bankinforeg/srletters/sr1217.htm>.

<sup>4</sup> "Financial strength and resilience" is defined as maintaining effective capital and liquidity governance and planning processes, and sufficiency of related positions, to provide for continuity of the consolidated organization and its core business lines, critical operations, and banking offices through a range of conditions.

"Operational strength and resilience" is defined as maintaining effective governance and controls to provide for continuity of the consolidated organization and its core business lines, critical operations, and banking offices, and promote compliance with laws and regulations, including those related to consumer protection, through a range of conditions.

"Critical operations" are a firm's operations, including associated services, functions and support, the failure or discontinuance of which, in the view of the firm or the Federal Reserve would pose a threat to the financial stability of the United States.

Under SR letter 12-17, "banking offices" are defined as U.S. depository institution subsidiaries and the U.S. branches and agencies of foreign banking organizations (FBOs). The Federal Reserve expects to use the LFI rating system to inform future revisions to other supervisory rating systems used to assess the U.S. operations of FBOs.

asset size, complexity, or systemic importance.<sup>5</sup> The RFI rating system focuses on the risk management practices (R component) and financial condition (F component) of the consolidated organization, and assesses the potential impact (I component) of a BHC's nondepository entities on its subsidiary depository institution(s).

Given the systemic risks posed by LFIs and the corresponding changes to the Federal Reserve's supervisory expectations and oversight of those firms, the Federal Reserve believes that a new rating system would be more effective than the RFI rating system for evaluating LFIs. The RFI rating system remains a relevant and effective tool for developing and communicating supervisory assessments for community and regional holding companies. Therefore, the RFI rating system will continue to be used in the supervision of these organizations.

## II. Overview of the Proposed LFI Rating System

The proposed LFI rating system provides a supervisory evaluation of whether a firm possesses sufficient financial and operational strength and resilience to maintain safe and sound operations through a range of conditions. The proposed LFI rating system is designed to:

- Fully align with the Federal Reserve's current supervisory programs and practices, which are based upon the LFI supervision framework's core objectives of reducing the probability of LFIs failing or experiencing material distress and reducing the risk to U.S. financial stability;
- Enhance the clarity and consistency of supervisory assessments and communications of supervisory findings and implications; and
- Provide appropriate incentives for LFIs to maintain financial and operational strength and resilience, including compliance with laws and regulations, by more clearly defining the supervisory consequences of a given rating.

<sup>5</sup> See SR letter 04-18, "Bank Holding Company Rating System," 69 FR 70444 (December 6, 2004), at <https://www.federalreserve.gov/boarddocs/srletters/2004/sr0418.htm>.

The Federal Reserve has only applied the RFI rating system to saving and loan holding companies (SLHCs) on an indicative basis since assuming supervisory responsibility for those firms from the Office of Thrift Supervision in 2011. The Federal Reserve has proposed to apply the RFI rating system to SLHCs on a fully implemented basis, excluding SLHCs engaged in significant insurance or commercial activities. See 81 FR 89941 (December 13, 2016).

### A. LFI Rating Components

Under the proposed LFI rating system, the Federal Reserve would evaluate and assign ratings for the following three components:<sup>6</sup>

- Capital Planning and Positions
- Liquidity Risk Management and Positions
- Governance and Controls

The Capital Planning and Positions component rating would encompass assessments of (i) the effectiveness of the governance and planning processes used by a firm to determine the amount of capital necessary to cover risks and exposures, and to support activities through a range of conditions; and (ii) the sufficiency of a firm's capital positions to comply with applicable regulatory requirements and to support the firm's ability to continue to serve as a financial intermediary through a range of conditions. Findings from CCAR for LISCC firms and certain other large and complex LFIs,<sup>7</sup> and from similar supervisory activities for other LFIs,<sup>8</sup> represent a material portion of the work that would be conducted to determine the Capital Planning and Positions component rating.

The Liquidity Risk Management and Positions component rating would encompass assessments of (i) the effectiveness of a firm's governance and risk management processes used to determine the amount of liquidity necessary to cover risks and exposures, and to support activities through a range of conditions; and (ii) the sufficiency of a firm's liquidity positions to comply with applicable regulatory requirements and to support the firm's ongoing obligations through a range of conditions.<sup>9</sup> The Liquidity Risk Management and Positions component rating would be based on findings of coordinated examinations of liquidity positions and risk management

<sup>6</sup> The proposed LFI rating system does not include subcomponent ratings.

<sup>7</sup> See SR letter 15-18, "Federal Reserve Supervisory Assessment of Capital Planning and Positions for LISCC Firms and Large and Complex Firms," at <https://www.federalreserve.gov/supervisionreg/srletters/sr1518.htm>.

Under SR letter 15-18, a "large and complex firm" is defined as any domestic BHC or intermediate holding company (IHC) that is not a LISCC firm and that has total consolidated assets of \$250 billion or more or consolidated total on-balance sheet foreign exposure of \$10 billion or more.

<sup>8</sup> See SR letter 15-19, "Federal Reserve Supervisory Assessment of Capital Planning and Positions for Large and Noncomplex Firms," at <https://www.federalreserve.gov/supervisionreg/srletters/sr1519.htm>.

<sup>9</sup> These requirements include the Board's Liquidity Coverage Ratio (LCR) rule in Regulation WW and the liquidity risk management and stress testing requirements in Regulation YY. See 12 CFR part 249 and 12 CFR 252.34-35 and 252.156-157.

practices conducted across several firms (horizontal examinations), as well as ongoing assessments of an individual firm's liquidity positions and risk management practices conducted through the supervisory process.

Horizontal examinations help to ensure that the liquidity positions and risk management practices of firms with similar liquidity risk profiles are evaluated in a consistent manner. LISCC firms are subject to the Comprehensive Liquidity Analysis and Review (CLAR), which is an annual horizontal exercise that assesses both liquidity positions and risk management. Other LFI firms are subject to more narrow horizontal examinations depending on their risk profile. The Federal Reserve also conducts targeted examinations of specific areas that are of high risk to an individual firm or have not been covered by a recent horizontal examination.

The Federal Reserve evaluates each firm's risk management practices by reviewing the processes that firms use to identify, measure, monitor, and manage liquidity risk and make funding decisions. The Federal Reserve evaluates a firm's liquidity positions against applicable regulatory requirements, and assesses the firm's ability to support its obligations through other means, such as its funding concentrations.

The Governance and Controls component rating would evaluate the effectiveness of a firm's (i) board of directors, (ii) management of core business lines and independent risk management and controls, and (iii) recovery planning (for domestic LISCC firms only).<sup>10</sup> This rating would assess a firm's effectiveness in aligning strategic business objectives with the firm's risk tolerance<sup>11</sup> and risk

<sup>10</sup> "Board" or "board of directors" also refers to committees of the board of directors, as appropriate.

At this time, recovery planning expectations only apply to domestic BHCs subject to the Federal Reserve's LISCC supervisory framework. See SR letter 14-8, "Consolidated Recovery Planning for Certain Large Domestic Bank Holding Companies." Should the Federal Reserve expand the scope of recovery planning expectations to encompass additional firms, this rating will reflect such expectations for the broader set of firms.

There are eight domestic firms in the LISCC portfolio: (1) Bank of America Corporation; (2) Bank of New York Mellon Corporation; (3) Citigroup, Inc.; (4) Goldman Sachs Group, Inc.; (5) JP Morgan Chase & Co.; (6) Morgan Stanley; (7) State Street Corporation; and (8) Wells Fargo & Company. In this guidance, these eight firms may collectively be referred to as "domestic LISCC firms."

<sup>11</sup> "Risk tolerance" is defined as the aggregate level and types of risk the board and senior management are willing to assume to achieve the firm's strategic business objectives, consistent with applicable capital, liquidity, and other requirements and constraints.

management capabilities; maintaining strong, effective, and independent risk management and control functions, including internal audit; promoting compliance with laws and regulations, including those related to consumer protection; and otherwise providing for the ongoing resiliency of the firm. Firm-specific and horizontal examination work focused on a firm's corporate governance, independent risk management, controls, and lines of business, among other areas, would provide the basis for determining the Governance and Controls component rating.

Unlike other supervisory rating systems, including the RFI rating system, the Federal Reserve would not assign a standalone composite rating under the proposed LFI rating system. The Federal Reserve believes assigning a standalone composite rating is not necessary because the three proposed LFI component ratings are designed to clearly communicate supervisory assessments and associated consequences for each of the core areas (capital, liquidity, and governance and controls) considered critical to a firm's strength and resilience. It is unlikely that the assignment of a standalone composite rating would convey new or additional information regarding supervisory assessments, and a standalone composite rating could dilute the clarity and impact of the component ratings.

#### B. LFI Rating Scale

Each LFI component rating would be assigned using a multi-level scale (*Satisfactory/Satisfactory Watch, Deficient-1, and Deficient-2*). A "Satisfactory" rating indicates that the firm is considered safe and sound and broadly meets supervisory expectations.<sup>12</sup> A "Satisfactory Watch" rating is a conditional "Satisfactory" rating, and is discussed in greater detail below. A "Deficient-1" rating indicates that although the firm's current condition is not considered to be materially threatened, there are financial and/or operational deficiencies that put its prospects for remaining safe and sound through a range of conditions at significant risk. A "Deficient-2" rating indicates that financial and/or operational deficiencies materially threaten the firm's safety and soundness, or have already put the firm in an unsafe and unsound condition.

<sup>12</sup> References to "safe and sound" or "safety and soundness" in the proposed LFI rating system also refer to a firm's consolidated organization and its critical operations and banking offices.

Supervisors may assign a "Satisfactory Watch" component rating which indicates that the firm is generally considered safe and sound; however certain issues are sufficiently material that, if not resolved in a timely manner in the normal course of business, would put the firm's prospects for remaining safe and sound through a range of conditions at risk. This would be consistent with existing supervisory practice where supervisors generally indicate to a firm that a rating downgrade is a strong possibility if the firm fails to resolve identified weaknesses in a timely manner. The "Satisfactory Watch" rating may also be used for firms previously rated "Deficient" when circumstances warrant.

In considering whether supervisory issues are likely to be resolved in the normal course of business, the Federal Reserve will assess the firm's ability to remediate or mitigate these issues (through compensating controls and/or a reduced risk profile) in a timely manner without material changes to, or investments in, a firm's governance, risk management or internal control structures, practices, or capabilities.

A "Satisfactory Watch" rating is not intended to be used for a prolonged period. Firms that receive a "Satisfactory Watch" rating would have a specified timeframe to fully resolve issues leading to that rating (as is the case with all supervisory issues), generally no longer than 18 months.<sup>13</sup> If the firm successfully resolved the issues leading to the "Satisfactory Watch" rating, the firm would typically be upgraded to "Satisfactory" as it has demonstrated an ability to successfully remediate or mitigate these issues in a timely manner in the normal course of business. However, if the firm failed to timely remediate or mitigate those issues, that failure would generally be viewed as evidence that the firm lacked sufficient financial and/or operational capabilities to remain safe and sound

<sup>13</sup> The timeframe initially specified by the Federal Reserve for resolving issues will become more precise over time, and may be extended as circumstances warrant. As noted in current guidance, defined timeframes for resolving supervisory issues are communicated within either "Matters Requiring Attention" (MRAs) or "Matters Requiring Immediate Attention" (MRIAs). See SR letter 13-13/CA letter 13-10, "Supervisory Considerations for the Communication of Supervisory Findings," at <https://www.federalreserve.gov/supervisionreg/srletters/sr1313.htm> (referred to as "SR letter 13-13" in this notice). Proposed guidance which would replace SR letter 13-13 has been released for public comment concurrent with this proposal and is discussed below in Section VII, "Related Proposed Guidance." An enforcement action will also specify the timeframe for a firm to resolve deficiencies.

through a range of conditions. In these instances, the firm would typically be downgraded to a “Deficient” rating.

When a firm is rated “Satisfactory Watch,” supervisors would focus on determining whether a firm’s issues are related to each other, similar in nature or root cause, or constitute a pattern reflecting deeper governance or risk management weaknesses, warranting a downgrade to a “Deficient” rating.

### III. Transition From the RFI Rating System to the LFI Rating System

As noted above, the LFI supervision framework—as described in SR 12–17 and accompanied by the issuance of enhanced regulatory requirements, supervisory expectations and practices—has been established over recent years to enhance the ability of large systemically important firms to sustain operations through a range of stressful conditions and events.

Introduction of a new rating system that is comprehensively aligned with the LFI supervision framework represents the natural next step in the build-out of this program. As such, transition to the proposed LFI rating system is intended to be evolutionary and expected to be routine in most respects for affected firms.

Approaches to assessing an LFI’s financial strength and resilience via effective capital and liquidity governance and planning, and sufficiency of related positions, are more prominent in the proposed LFI rating system versus the RFI rating system, and are fully reflective of current supervisory practices and expectations. Key conclusions of LFI supervision activities, including CCAR and CLAR, will be directly reflected within the Capital and Liquidity component rating assignments. By contrast, the RFI rating system was not designed to readily accommodate the results of these activities.

Similarly, the key elements within the Governance and Controls component rating, which underlie a firm’s operational resilience and overall risk management, are also consistent with current practices. Most of these elements can be traced to supervisory expectations for risk management and internal controls first introduced in 1995, and subsequently carried forth into the RFI rating system in 2004.<sup>14</sup> These foundational aspects of a firm’s governance and control framework, including expectations relating to the

effectiveness of boards of directors and emphasis on sound risk management, remain present in the proposed LFI rating system, albeit with some changes in emphasis and nomenclature.

The Governance and Controls component rating also provides an updated approach to assessing the effectiveness of risk management and control activities as conducted (i) directly within a firm’s business line operations (where risk-taking activities are initiated and implemented), and (ii) throughout a firm’s independent risk management and controls. More recently, key expectations regarding the alignment of a firm’s strategy with its risk tolerance and risk management capabilities were included in SR letter 12–17, and are also reflected within capital planning guidance issued in 2015.<sup>15</sup>

The chart included below in Section X, “Comparison of the RFI and LFI Rating Systems,” broadly compares and illustrates the structural differences between the two rating systems.

### IV. Consequences of LFI Ratings

Statutes and regulations applicable to LFIs grant a number of privileges to well managed firms.<sup>16</sup> Under the RFI rating system, a firm’s composite rating and Risk Management rating determine whether a holding company is considered to be “well managed” for purposes of these privileges.<sup>17</sup> Under the proposed LFI rating system, a firm must be rated “Satisfactory” or “Satisfactory Watch” for each of its three component ratings in order to be considered “well managed.”<sup>18</sup> A rating of “Deficient-1” or lower for any component would result in the firm not being deemed “well managed.” This reflects the judgment that an LFI is not in satisfactory condition overall unless it is considered sound in each of the key areas of capital, liquidity, and governance and controls.

A “Deficient-1” component rating could be a barrier for a firm seeking the

Federal Reserve’s approval to engage in new or expansionary activities, unless the firm can demonstrate that (i) it is making meaningful, sustained progress in resolving identified deficiencies and issues; (ii) the proposed new or expansionary activities would not present a risk of exacerbating current deficiencies or issues or lead to new concerns; and (iii) the proposed activities would not distract the board or senior management from remediating current deficiencies or issues.

The Federal Reserve would be extremely unlikely to approve any proposal seeking to engage in new or expansionary activities from a firm with a “Deficient-2” component rating.

Under the Bank Holding Company Act (BHC Act) and the Home Owners’ Loan Act,<sup>19</sup> companies that have elected to be treated as financial holding companies (FHCs) and that do not remain well managed face restrictions on commencement or expansion of certain activities. In addition, a firm with less than satisfactory ratings may be subject to restrictions or higher charges in attempting to access the Federal Reserve’s discount window or in gaining access to intraday credit.

A “Deficient-1” component rating would often be an indication that the firm should be subject to either an informal or formal enforcement action, and may also result in the designation of the firm as being in “troubled condition.”<sup>20</sup> A firm with a “Deficient-2” component rating should expect to be subject to a formal enforcement action and deemed to be in “troubled condition.”

### V. Applicability

The Federal Reserve would use the proposed LFI rating system to evaluate and communicate the supervisory condition of all bank holding companies that have total consolidated assets of \$50 billion or more; all non-insurance, non-commercial savings and loan holding companies that have total consolidated assets of \$50 billion or more; and all U.S. intermediate holding companies (IHCs) of foreign banking organizations established pursuant to section 252.153 of the Federal Reserve’s Regulation YY.<sup>21</sup> In the future, the

<sup>14</sup> See SR letter 15–18 and SR letter 15–19.

<sup>15</sup> 12 U.S.C. 1841 *et. seq.* and 12 U.S.C. 1461 *et seq.* See, e.g., 12 CFR 225.4(b)(6), 225.14, 225.22(a), 225.23, 225.85, and 225.86; 12 CFR 211.9(b), 211.10(a)(14), and 211.34; and 12 CFR 223.41.

<sup>16</sup> 12 U.S.C. 1841(o)(9)(A).

<sup>17</sup> For purposes of determining whether a firm is considered to be “well managed” under section 2(o)(9) of the BHC Act, the Federal Reserve considers the three component ratings, taken together, to be equivalent to assigning a standalone composite rating. In addition, the RFI rating system designates the “Risk Management” rating as the “management” rating when making “well managed” determinations under section 2(o)(9)(A)(ii) of the BHC Act. See SR letter 04–8. In contrast, the proposed LFI rating system would not designate any of the three component ratings as a “management” rating, because each component evaluates different areas of the firm’s management.

<sup>18</sup> 12 U.S.C. 1843(l) and 12 U.S.C. 1467a(c)(2).

<sup>19</sup> See 12 CFR 225.71(d).

<sup>20</sup> See SR letter 12–17 and 12 CFR 252.153.

<sup>21</sup> The Federal Reserve has only applied the RFI rating system to saving and loan holding companies (SLHCs) on an indicative basis since assuming supervisory responsibility for those firms from the Office of Thrift Supervision in 2011. The Federal Reserve has proposed to apply the RFI rating system to SLHCs on a fully implemented basis, excluding SLHCs engaged in significant insurance or

<sup>14</sup> See SR letter 95–51, “Rating the Adequacy of Risk Management Processes and Internal Controls at State Member Banks and Bank Holding Companies,” at <https://www.federalreserve.gov/boarddocs/srletters/1995/sr9551.htm>.

Federal Reserve plans to use the LFI rating system to assess systemically important nonbank financial companies designated by the Financial Stability Oversight Council (FSOC) for supervision by the Federal Reserve; however, this would be done through a separate rulemaking.

Until final adoption of a LFI rating system, the Federal Reserve will continue to evaluate firms using the existing RFI rating system. Holding companies with less than \$50 billion in total consolidated assets would continue to be evaluated using the RFI rating system.

## VI. Timing and Implementation

The Federal Reserve proposes to assign initial LFI ratings to all applicable firms during 2018. Due to differences in the timing of supervisory cycles across the portfolios that comprise the LFI supervisory program, firms in one portfolio may receive their initial LFI ratings at different times during the year than firms in another portfolio.

During the initial LFI rating supervisory cycle, each applicable firm would receive all three component ratings under the LFI rating system concurrently. Consistent with current Federal Reserve practice on the assignment and communication of supervisory ratings by examiners, ratings under the proposed LFI rating system would be assigned and communicated to firms on an annual basis, and more frequently as warranted. After the initial LFI rating supervisory cycle, examiners may assign and communicate individual component ratings on a rolling basis to the firms. Under the proposed LFI rating system, the Federal Reserve would continue to generally rely to the fullest extent possible on the information and assessments developed by other relevant supervisors and functional regulators. In accordance with the Federal Reserve's regulations governing confidential supervisory information,<sup>22</sup> ratings assigned under the LFI rating system would be communicated by the Federal Reserve to the firm but not disclosed publicly.

The proposed LFI rating system would apply if a firm reports total consolidated assets of \$50 billion or more, calculated based on the average of the firm's total consolidated assets in the four (4) most recent quarters as reported on the firm's quarterly financial reports filed with the Federal

commercial activities. See 81 FR 89941 (December 13, 2016).

<sup>22</sup> See 12 CFR 261.20.

Reserve. A firm that meets this criteria would generally receive the three LFI component ratings within one year of becoming subject to the LFI rating system. A firm would continue to be rated under the LFI rating system until it has less than \$45 billion in total consolidated assets, based on the average total consolidated assets as reported on the firm's four (4) most recent quarterly financial reports filed with the Federal Reserve. The Federal Reserve may determine to apply the RFI rating system or another applicable rating system in certain limited circumstances.<sup>23</sup>

## VII. Related Proposed Guidance

Concurrent with issuing this proposal, the Board is issuing another proposal for public comment addressing supervisory expectations for boards of directors of all Federal Reserve-supervised institutions.<sup>24</sup> That proposal includes proposed guidance concerning the effectiveness of boards of directors of large financial institutions, which is an element of the Governance and Controls component rating. The Board also plans to separately release additional proposed guidance seeking comment on supervisory expectations relating to a firm's management of core business lines and independent risk management and controls, which is also an element of the Governance and Controls component rating. The Federal Reserve expects to release this additional guidance in the near future. However, if the LFI rating system is finalized before the additional governance and controls guidance is finalized, firms would be evaluated using existing supervisory guidance until such time that the additional governance and controls guidance is finalized.<sup>25</sup>

<sup>23</sup> For example, if a firm rated under the proposed LFI rating system substantially reduces its total consolidated assets substantially below \$45 billion through a sale or divestiture (but remains subject to Federal Reserve supervision), the Federal Reserve may immediately begin to apply the RFI rating system, rather than waiting for the firm's four-quarter average to fall below the \$45 billion threshold described above.

<sup>24</sup> "Federal Reserve-supervised institutions" includes bank holding companies, savings and loan holding companies, state member banks, U.S. operations of foreign banking organizations, and systemically important financial institutions designated by FSOC for supervision by the Federal Reserve.

<sup>25</sup> The above section III, "Transition from the RFI Rating System to the LFI Rating System," lists prominent examples of existing supervisory guidance currently utilized to assess the effectiveness of an LFI's governance and controls, including SR letters 95–51, 12–17, 15–18, and 15–19. Other recent examples of related guidance include SR letter 13–19/CA letter 13–21, "Guidance on Managing Outsourcing Risk," at <https://www.federalreserve.gov/supervisionreg/srletters/sr1319.htm> and SR letter 13–1/CA letter 13–1,

The following section provides a summary of the planned guidance relating to a firm's management of core business lines and independent risk management and controls, as well as a summary of the proposed guidance relating to the effectiveness of a firm's board of directors.<sup>26</sup>

### A. Management of Core Business Lines and Independent Risk Management and Controls

The supervisory assessment of a firm's management of core business lines and independent risk management and controls would have three components: (1) Expectations for senior management with respect to both core business lines and independent risk management and controls; (2) expectations for the management of core business lines (CBLs); and (3) expectations for independent risk management (IRM) and controls.

#### 1. Senior Management

Senior management oversees both the management of core business lines and independent risk management and controls. The supervisory assessment of the effectiveness of senior management would include senior management's role in managing the firm's day-to-day operations, promoting safety and soundness and compliance with internal policies and procedures, laws, and regulations, including those related to consumer protection.<sup>27</sup>

Senior management is responsible for implementing the firm's strategy and risk tolerance as approved by the firm's board. Senior management should implement the strategic and risk objectives across the firm such that they support the firm's long-term resiliency and safety and soundness, including the firm's resilience to a range of stressed conditions. Senior management should ensure that the firm's infrastructure, staffing, and resources are sufficient to carry out the firm's strategic objectives.

Senior management should maintain and implement an effective risk management framework and ensure the firm can appropriately manage risk consistent with its strategy and risk

"Supplemental Policy Statement on the Internal Audit Function and Its Outsourcing," at <https://www.federalreserve.gov/supervisionreg/srletters/sr1301.htm>.

<sup>26</sup> The discussion below relating to a firm's management of core business lines and independent risk management and controls would only be applicable to domestic LFIs. Adjustments to extend applicability of this guidance to the U.S. operations of FBOs may be made prior to issuing the guidance for public comment.

<sup>27</sup> Hereinafter, when reference is made to "compliance with laws and regulations" in this guidance, this includes laws and regulations related to banking as well as to consumer protection.

tolerance. This should include establishing clear responsibilities and accountability for the identification, management, and control of risk. Senior management should also develop and maintain the firm's policies and procedures and system of internal controls to ensure compliance with laws and regulations.

Senior management is responsible for ensuring the resolution of key issues and effective firm-wide communication, including to and from the board of directors. Senior management should have in place robust mechanisms for keeping apprised of, among other things, current and emerging risks to the firm and other material issues, including by maintaining robust management information systems.

Senior management should have in place succession and contingency staffing plans for key positions and have compensation and performance management programs that promote and enforce prudent risk-taking behaviors and business practices.

## 2. Management of Core Business Lines

The Federal Reserve would consider the effectiveness of the management of core business lines in meeting its supervisory expectations.<sup>28</sup> For LISCC firms, all business lines would be considered CBLs. For other firms, CBLs would be defined as those business lines where a significant control disruption, failure, or loss event would result in a material loss of revenue, profit, or franchise value, or result in significant consumer harm.<sup>29</sup> The Federal Reserve is reserving discretion to identify other business lines or functions as core business lines, based on their size, risk profile, or other supervisory considerations.

CBL management should establish for each core business line specific business and risk objectives that align with the firm-wide strategy and risk tolerance.<sup>30</sup> CBL management should inform senior management when the risk management capabilities are insufficient to align those business and risk objectives. CBL management should also clearly present to senior management the risks

emanating from the business line's activities and explain how those risks are managed and align with the firm's risk tolerance.

CBL management should identify, measure, and manage current and emerging risks that stem from CBL activities and external factors. CBL management should also incorporate appropriate feedback from independent risk management (IRM) on business line risk positions, implementation of the risk tolerance, and risk management practices, including risk mitigation.

CBL management should manage the CBL's activities so they remain within risk limits established by IRM, consult with senior management before permitting any breaches of the limits, and follow appropriate procedures for obtaining exceptions to limits. CBL management should also adhere to the firm's policies and procedures for vetting new business products and initiatives, and escalate to senior management any required changes or modifications to risk management systems or internal control policies and procedures arising from the adoption of a new business or initiative.

CBL management should provide a CBL with sufficient resources and infrastructure to meet financial goals and strategic objectives while maintaining operational and financial resilience in a range of operating conditions, including stressful ones. Resources and infrastructure include sufficient personnel with appropriate training and expertise and management information systems.

CBL management should develop and maintain an effective system of sound and appropriate internal controls for its CBL that ensures compliance with laws and regulations.<sup>31</sup> CBL management should regularly test to ensure the effectiveness of controls within the business lines and ensure that deficiencies are remediated, and should escalate material deficiencies and systematic control violations to senior management, as well as provide periodic reports. Finally, CBL management should reassess controls periodically to ensure relevancy and alignment with current approved policies.

CBL management should establish policies and guidelines that delineate accountability, set forth clear lines of management authority within the CBL, and align desired behavior with the firm's performance management

incentives. CBL management should hold employees accountable for conduct that is inconsistent with the firm's policies or board and senior management directives or that could result in violations of law. CBL management should inform senior management of improper conduct when appropriate, including individual instances and when there are identified patterns of misconduct. CBL management should have ongoing and effective means to prevent, detect, and remediate risk management and compliance failures.

## 3. Independent Risk Management and Controls

The Federal Reserve would assess whether the firm's independent risk management and controls meet supervisory expectations. This assessment would focus on three related areas: The independent risk management function, internal controls, and internal audit.

### a. Independent Risk Management (IRM) Function

#### i. Chief Risk Officer (CRO)

A CRO must have sufficient capability and experience in identifying, assessing, and managing risk exposures of large, complex financial institutions.<sup>32</sup> The CRO should guide IRM to establish and monitor compliance with enterprise-wide risk limits, identify and aggregate the firm's risks, assess the firm's risk positions relative to the parameters of the firm's risk tolerance, and provide relevant risk information to senior management and the board of directors.

The CRO should inform the board of directors if his or her stature, independence, or authority is not sufficient or is at risk of being insufficient to provide unbiased and independent assessments of the firm's risks, risk management activities, and system of internal controls.<sup>33</sup> Further, the CRO should be included in discussions with other senior management and the board related to key decisions, such as strategic planning and capital and liquidity planning, and provide input to the board on incentive compensation.

The CRO should notify senior management and the board of directors when activities or practices at the firm-

<sup>28</sup> All of the expectations for the management of CBLs described herein also apply to critical operations, which are central to the Federal Reserve's supervisory focus.

<sup>29</sup> For large financial institutions that are not LISCC firms, a firm's CBLs should comprise at least 80 percent of total revenue in aggregate.

<sup>30</sup> "CBL management" refers to the core group of individuals responsible for prudent day-to-day management of a core business line and accountable to senior management for that responsibility. Depending on a firm's organizational structure, CBL management may or may not be members of senior management.

<sup>31</sup> For example, a CBL's system of controls should include access controls, change controls, and data integrity controls, including data reconciliations, variance analysis and data quality logic check.

<sup>32</sup> See 12 CFR 252.33.

<sup>33</sup> Other officers of the firm may oversee portions of functions involved in risk management and control activities. See SR letter 08-08/CA letter 08-11, "Compliance Risk Management Programs and Oversight at Large Banking Organizations with Complex Compliance Profiles," at <https://www.federalreserve.gov/boarddocs/srletters/2008/SR0808.htm>.

wide, risk-specific, or CBL level do not align with the firm's overall risk tolerance. As appropriate, the CRO should recommend constraints on risk taking and enhancements to risk management practices to senior management and the board of directors.

The CRO should support the independence of IRM from the business lines by establishing clearly defined roles and responsibilities and reporting lines.

#### ii. Chief Audit Executive (CAE)

The firm should have a CAE, appointed by the board, with sufficient capability, experience, independence, and stature to manage the internal audit function's responsibilities.<sup>34</sup> Under the direction of the CAE, the internal audit function performs an independent assessment of the effectiveness of the firm's system of internal controls and the risk management framework. The CAE should manage effectively all aspects of internal audit work on an ongoing basis, including any internal audit work that is outsourced. The CAE should have the authority to oversee all internal audit activities and to hire internal audit staff with sufficient capability and stature. The CAE should report findings, issues, and concerns to the board's audit committee and senior management.

#### iii. Risk Tolerance and Limits

IRM should evaluate whether the firm's risk tolerance appropriately captures the firm's material risks, whether it aligns with the firm's strategic plan and the corresponding business activities, and whether it is consistent with the capacity of the risk management framework. IRM, including through the CRO, should provide input to both senior management and the board to assist in the development, evaluation, and approval of the firm's risk tolerance. IRM should also determine whether the firm's risk profile is consistent with the firm's risk tolerance and assess whether the firm's risk management framework has the capacity to manage the risks outlined in the risk tolerance.

Under direction of the CRO, IRM should establish enterprise-wide risk limits as well as more granular risk limits, as appropriate, that are consistent with the firm's risk tolerance for the firm's full set of risks. IRM should monitor and update risk limits as appropriate, especially as the firm's risk tolerance, risk profile, or external conditions change. IRM should identify significant trends in risk levels to

evaluate whether risk-taking and risk management practices are consistent with the firm's strategic objectives. IRM should escalate to senior management material breaches to the firm's risk tolerance and enterprise-wide risk limits, as well as instances where IRM's conclusions differ from those of CBLs.

IRM should identify and measure under both normal and stressful operating conditions, where possible, current and emerging risks within and across business lines and risk types, as well as any other relevant perspective. Common risk types include credit, market, operational, liquidity, interest rate, legal, and compliance (such as consumer protection and Bank Secrecy Act/anti-money laundering).

IRM should aggregate risks across the entire firm and assess those risks relative to the firm's risk tolerance. IRM should identify material or critical concentrations of risks and assess the likelihood and potential impact of those risks on the firm. IRM should identify information gaps, uncertainties, or limitations in risk assessments for the board of directors and senior management, as appropriate.

Risk reporting should cover current and emerging risk, risk exposure and adherence to risk limits and risk concentrations as well as the firm's ongoing strategic, capital, and liquidity planning processes. Risk reporting should enable prompt escalation and remediation of material problems; enhance appropriate and timely responses to identified problems; provide current and forward-looking perspectives; and support or influence strategic decision-making.

#### b. Internal Controls

Developing and maintaining effective internal controls are the responsibility of senior management, IRM, and CBL management. Accordingly, a firm should appropriately assign management responsibilities for the establishment and maintenance of internal controls. To foster an appropriate control culture within the firm, adequate control activities should be integrated into the daily functions of all relevant personnel.

A firm should have mechanisms to monitor and test internal controls and to identify and escalate issues that appear to compromise the effectiveness of internal controls. The scope, frequency, and depth of testing should consider the complexity of the firm, the results of risk assessments, and the number and significance of the deficiencies identified during prior testing. A firm should test and monitor internal controls using a risk-based approach,

prioritizing efforts on controls in areas of highest risk and less effective controls.

A firm should evaluate and communicate internal control deficiencies in a timely manner to those parties responsible for taking corrective action, including senior management.

#### c. Internal Audit

The internal audit function should examine, evaluate, and perform an independent assessment of the effectiveness of the firm's risk management framework and internal control systems and report findings to senior management and the firm's audit committee. The Federal Reserve would assess the extent to which a firm complies with existing guidance on internal audit.<sup>35</sup>

#### B. Board Effectiveness

Concurrent with this proposal, the Board is issuing a related proposal for public comment addressing supervisory expectations for boards of directors of all Federal Reserve-supervised institutions. The Federal Reserve conducted a multi-year review of the practices of boards of directors, particularly at the largest financial institutions, which considered the factors that make boards effective, the challenges boards face, how boards influence the safety and soundness of their firms, and the impact of the Federal Reserve's expectations for boards of directors in existing supervisory guidance. The proposed guidance relating to boards of directors and its accompanying notice published in the **Federal Register** constitute the results of the review. The review identified three key issues that could potentially reduce a board's ability to be effective. First, supervisory expectations for boards of directors and senior management have become increasingly difficult to distinguish. Second, boards typically spend a significant amount of time focused on supervisory expectations that do not directly relate to the board's core responsibilities, which include guiding the development of the firm's strategy and risk tolerance, overseeing senior management and holding them accountable, supporting

<sup>35</sup> The Federal Reserve issued guidance outlining the key components of an effective internal audit function in SR letter 03-5, "Amended Interagency Guidance on the Internal Audit Function and its Outsourcing," at <https://www.federalreserve.gov/boarddocs/srletters/2003/sr0305.htm> and followed that with supplemental guidance in SR letter 13-1/CA letter 13-1. The supplemental guidance builds upon the 2003 interagency guidance of SR letter 03-5 and further addresses the characteristics, governance, and operational effectiveness of a firm's internal audit function.

<sup>34</sup> See SR letter 13-1/CA letter 13-1.

the stature and independence of the firm's independent risk management and internal audit functions, and adopting effective governance practices. Third, boards of large financial institutions often face significant challenges managing the overwhelming quantity of information provided by senior management in advance of board meetings.

The proposal would refocus existing supervisory expectations on a board's core responsibilities by more clearly distinguishing the roles and responsibilities of the board from those of senior management; eliminating redundant, outdated, or irrelevant supervisory expectations for boards; and ensuring that supervisory guidance is more closely aligned.

The proposal contains three parts, the first of which includes proposed supervisory guidance addressing effective boards of directors (proposed BE guidance), which would apply to the largest depository institution holding companies supervised by the Federal Reserve. The proposed BE guidance identifies five key attributes of effective boards of directors and would provide the framework the Federal Reserve would use to assess a firm's board of directors. The proposed BE guidance also would clarify supervisory expectations for boards as distinct from expectations for senior management.

The second part of the proposal would revise certain supervisory expectations for boards to ensure they are aligned with the Federal Reserve's supervisory framework, and would eliminate redundant, outdated, or irrelevant supervisory expectations. These changes reflect the Federal Reserve's review of approximately 170 existing supervisory expectations contained in 27 Supervision and Regulation letters (SR letters), and would apply to bank and savings and loan holding companies of all sizes.

The third part of the proposal includes proposed supervisory guidance that would replace Federal Reserve SR letter 13-13<sup>36</sup> and clarify expectations for communicating supervisory findings to an institution's board of directors and senior management. This proposed guidance, like the existing guidance, would apply to all financial institutions supervised by the Federal Reserve. The proposed guidance would facilitate the

execution of boards' core responsibilities by clarifying expectations for communicating supervisory findings to an institution's board of directors and senior management. The proposed guidance would indicate that Federal Reserve examiners and supervisory staff would direct most Matters Requiring Immediate Attention (MRIAs) and Matters Requiring Attention (MRAs) to senior management for corrective action. MRIAs and MRAs would only be directed to the board for corrective action when the board needs to address its corporate governance responsibilities or when senior management fails to take appropriate remedial action. The board would remain responsible for holding senior management accountable for remediating supervisory findings.

#### **VIII. Other Related Developments**

Upon finalizing the LFI rating system, the Federal Reserve expects to issue supervisory guidance to update and align the consolidated supervisory framework, including SR letter 12-17, to be fully consistent with any modifications made through the final adoption of the LFI rating system as well as supervisory guidance relating to governance and controls.

In the future, the Federal Reserve may propose to revise the LFI rating system to include an additional rating component to assess the sufficiency of resolution planning efforts undertaken by LISCC firms (and perhaps other select LFIs) to reduce the impact on the U.S. financial system in the event of the firm's failure. This proposed revision to the LFI rating system would be issued for notice and comment.

#### **IX. Proposed Changes to Existing Regulations**

References to holding company ratings are included in a number of the Federal Reserve's existing regulations. In certain cases, the regulations are narrowly constructed such that they contemplate only the assignment of a standalone composite rating using a numerical rating scale. This is consistent with the current RFI rating system but is not compatible with the proposed LFI rating system. Three provisions in the Federal Reserve's existing regulations are written in this manner, including two in Regulation K and one in Regulation LL. In Regulation K, section 211.2(z) of Regulation K

includes a definition of "well managed" which in part requires a bank holding company to have received a composite rating of 1 or 2 at its most recent examination or review; and section 211.9(a)(2) requires an investor (which by definition can be a bank holding company) to have received a composite rating of at least 2 at its most recent examination in order to make investments under the general consent or limited general consent procedures contained in sections 211.9(b) and (c). In Regulation LL, section 238.54(a)(1) restricts savings and loan holding companies from commencing certain activities without the Federal Reserve's prior approval unless the company received a composite rating of 1 or 2 at its most recent examination.

To ensure that the Federal Reserve's regulations are consistent and compatible with all aspects of both the RFI rating system as well as the proposed LFI rating system, the Federal Reserve proposes to amend those three regulatory provisions so they would apply to entities which receive numerical composite ratings as well as to entities which do not receive numerical composite ratings (including firms subject to the proposed LFI rating system).<sup>37</sup> To satisfy the requirements of those provisions, firms that do not receive numerical composite ratings would have to be considered satisfactory under the proposed LFI rating system. To be considered satisfactory, a firm would have to be rated "Satisfactory" or "Satisfactory Watch" for each component of the proposed LFI rating system; a firm which is rated "Deficient-1" or lower for any component would not be considered satisfactory. This standard would apply to any provision contained in the Federal Reserve's regulations which requires or refers to a firm having a satisfactory composite rating.

#### **X. Comparison of the RFI and LFI Rating Systems**

The proposed LFI rating system includes several structural changes from the RFI rating system. The following table provides a broad comparison between the two rating systems.

<sup>37</sup> The Board may propose additional necessary revisions to its regulations resulting from the adoption of a final LFI rating system.

<sup>36</sup> See SR letter 13-13.



RFI rating system	Proposed LFI rating system
<p><b>R—Risk Management</b> .....                      An evaluation of the ability of the BHC’s board of directors and senior management to identify, measure, monitor, and control risk.                      The rating is supported by four subcomponent ratings:</p> <ul style="list-style-type: none"> <li>• Board and Senior Management Oversight</li> <li>• Policies, Procedures, and Limits</li> <li>• Risk Monitoring and Management Information Systems</li> <li>• Internal Controls</li> </ul>	<p>Assessment of the effectiveness of a firm’s governance and risk management practices is central to the Governance and Controls component rating. The Governance and Controls rating evaluates a firm’s effectiveness in aligning strategic business objectives with risk management capabilities; maintaining strong and independent risk management and control functions, including internal audit; promoting compliance with laws and regulations, including those related to consumer protection; and otherwise providing for the ongoing resiliency of the firm.</p> <p>Governance and risk management practices specifically related to maintaining financial strength and resilience are also incorporated into the Capital Planning and Positions and Liquidity Risk Management and Positions component ratings.</p>
<p><b>F—Financial Condition</b> .....                      An evaluation of the consolidated organization’s financial strength .....                      The rating is supported by four subcomponent ratings:</p> <ul style="list-style-type: none"> <li>• Capital Adequacy</li> <li>• Asset Quality</li> <li>• Earnings</li> <li>• Liquidity</li> </ul>	<p>Assessment of a firm’s financial strength and resilience is specifically evaluated through the Capital Planning and Positions and Liquidity Risk Management and Positions component ratings. These component ratings assess the effectiveness of associated planning and risk management processes, and the sufficiency of related positions.</p> <p>Although asset quality and earnings are not rated separately, they continue to be important elements in assessing a firm’s safety and soundness and resiliency, and are important considerations within each of the LFI component ratings.</p>
<p><b>I—Impact</b> .....                      An assessment of the potential impact of the firm’s nondepository entities on its subsidiary depository institution(s).</p>	<p>Although a separate “Impact” rating would not be assigned, the LFI rating system would assess a firm’s ability to protect the safety and soundness of its subsidiary depository institutions, including whether the firm can provide financial and managerial strength to its subsidiary depository institutions.<sup>38</sup></p>
<p><b>D—Depository Institutions</b> .....                      Generally reflects the composite CAMELS rating assigned by the primary supervisor of the subsidiary depository institution(s).<sup>39</sup></p>	<p>A separate rating for a firm’s depository institution subsidiaries would not be assigned. The Federal Reserve will continue to rely to the fullest extent possible on supervisory assessments developed by the primary supervisor of the subsidiary depository institution(s).</p>
<p><b>C—Composite Rating</b> .....                      The overall composite assessment of the BHC as reflected by the R, F, and I ratings, and supported by examiner judgment with respect to the relative importance of each component to the safe and sound operation of the BHC.</p>	<p>A standalone composite rating would not be assigned. The three LFI component ratings are designed to clearly communicate supervisory assessments and associated consequences for each of the core areas (capital, liquidity and governance and controls) considered critical to an LFI’s strength and resilience.</p> <p>For purposes of determining whether a firm is “well managed,” the three component ratings taken together would be treated as equivalent to a standalone composite rating. Each component must be rated either “Satisfactory” or “Satisfactory Watch” in order for a firm to be deemed “well managed.”</p>

**XI. Request for Comments**

The Board invites comments on all aspects of the proposed LFI rating system, including responses to the following questions:

(1) Are there specific considerations beyond those outlined in this proposal that should be considered in the Federal Reserve’s assessment of whether an LFI has sufficient financial and operational strength and resilience to maintain safe and sound operations?

(2) Does the proposal clearly describe the firms that would be subject to the LFI rating system, and those firms that would continue to be subject to the RFI rating system?

(3) Does the proposal clearly describe the supervisory expectations for senior management in the evaluation of a

firm’s governance and controls under the proposed LFI rating system?

(4) Does the proposal clearly describe how and under what circumstances a “Satisfactory Watch” rating would or would not be assigned? Does that rating provide appropriate messaging and incentives to firms to correct identified deficiencies?

(5) Should the LFI rating system be revised at a future date to assess the sufficiency of a firm’s resolution planning efforts undertaken to reduce the impact on the financial system in the event of the firm’s failure? If yes, what should the Federal Reserve specifically consider in conducting that assessment?

(6) Are there options that should be considered to enhance the transparency of LFI ratings in order to incent more timely and comprehensive remediation of supervisory deficiencies or issues?

(7) What specific issues should the Federal Reserve consider when using the LFI rating system to inform future revisions to other supervisory rating

systems used to assess the U.S. operations of foreign banking organizations?

**XII. Regulatory Analysis**

*A. Paperwork Reduction Act*

There is no collection of information required by this proposal that would be subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

*B. Regulatory Flexibility Analysis*

The Board is providing an initial regulatory flexibility analysis with respect to this proposed rule. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), generally requires an agency to assess the impact a rule is expected to have on small entities. The RFA requires an agency either to provide an initial regulatory flexibility analysis with a proposed rule for which a general notice of proposed rulemaking is required or to certify that the proposed rule will not have a significant impact on a substantial number of small entities. Based on the Board’s analysis

<sup>38</sup> See Sections 616 of DFA (financial strength), 12 CFR 225.4 of the Board’s Regulation Y, and 12 CFR 238.8 of the Board’s Regulation LL.

<sup>39</sup> See SR letter 96–38, “Uniform Financial Institutions Rating System,” at <http://www.federalreserve.gov/boarddocs/srletters/1996/sr9638.htm>.

and for the reasons stated below, the Board believes that neither the proposed LFI rating system nor the proposed rule will have a significant economic impact on a substantial number of small entities. A final regulatory flexibility analysis will be conducted after comments received during the public comment period have been considered.

Under regulations issued by the Small Business Administration, a small entity includes a depository institution, bank holding company, or savings and loan holding company with assets of \$550 million or less (small banking organizations). As of June 1, 2017, there were approximately 3,539 small banking organizations. As described above, the proposed LFI rating system would apply only to all bank holding companies with total consolidated assets of \$50 billion or more; all non-insurance, non-commercial savings and loan holding companies with total consolidated assets of \$50 billion or more; and U.S. intermediate holding companies of foreign banking organizations established pursuant to section 252.153 of the Federal Reserve's Regulation YY. Small banking organizations would therefore not be subject to the proposed LFI rating system. Similarly, the proposed rule would make conforming changes to several regulations to reflect certain aspects of the proposed LFI rating system, but would not change the operation of those regulations for any entity that would not be subject to the proposed LFI rating system. As a result, neither the proposed LFI rating system nor the proposed rule should have any impact on small banking organizations. In light of the foregoing, the Board believes that the proposed LFI rating system will not have a significant economic impact on small banking organizations supervised by the Board.

#### *C. Solicitation of Comments on Use of Plain Language*

Section 722 of the Gramm-Leach-Bliley Act requires the Board to use plain language in all proposed and final rules published after January 1, 2000. The Board invites comment on how to make this proposed rule easier to understand. For example:

- Has the Board organized the material to suit your needs? If not, how could the proposal be more clearly stated?
- Does the proposal contain technical language or jargon that is not clear? If so, what language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the proposal easier to understand? If so, what changes

would make the proposal easier to understand?

- Would more, but shorter, sections be better? If so, what sections should be changed?
- What else could the Board do to make the proposal easier to understand?

#### **List of Subjects**

##### *12 CFR Part 211*

Exports, Federal Reserve System, Foreign banking, Holding companies, Investments, Reporting and recordkeeping requirements.

##### *12 CFR Part 238*

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements.

#### **Authority and Issuance**

For the reasons stated in the preamble, the Board proposes to amend 12 CFR parts 211 and 238 as follows:

#### **PART 211—INTERNATIONAL BANKING OPERATIONS (REGULATION K)**

- 1. The authority citations for part 211 continues to read as follows: 12 U.S.C. 221 *et seq.*, 1818, 1835a, 1841 *et seq.*, 3101 *et seq.*, 3901 *et seq.*, and 5101 *et seq.*; 15 U.S.C. 1681s, 1681w, 6801 and 6805.
- 2. Section 211.2 is amended by revising paragraph (z) to read as follows:

##### **§ 211.2 Definitions.**

\* \* \* \* \*

(z) *Well managed* means that the Edge or agreement corporation, any parent insured bank, and the bank holding company either received a composite rating of 1 or 2 or is considered satisfactory under the applicable rating system, and has at least a satisfactory rating for management if such a rating is given, at their most recent examination or review.

- 3. Section 211.9 is amended by revising paragraph (a) to read as follows:

##### **§ 211.9 Investment Procedures.**

\* \* \* \* \*

(a) \* \* \*

(2) *Composite rating*. Except as the Board may otherwise determine, in order for an investor to make investments under the general consent or limited general consent procedures of paragraphs (b) and (c) of this section, at the most recent examination the investor and any parent insured bank must have either received a composite rating of at least 2 or be considered satisfactory under the applicable rating system.

#### **PART 238—SAVINGS AND LOAN HOLDING COMPANIES (REGULATION LL)**

- 1. The authority citations for part 211 continues to read as follows:

**Authority:** 5 U.S.C. 552, 559; 12 U.S.C. 1462, 1462a, 1463, 1464, 1467, 1467a, 1468, 1813, 1817, 1829e, 1831i, 1972; 15 U.S.C. 78l.

- 2. Section 238.54 is amended by revising paragraph (a)(1) to read as follows:

##### **§ 238.54 Permissible bank holding company activities of savings and loan holding companies.**

(a) \* \* \*

(1) The holding company received a rating of satisfactory or above prior to January 1, 2008, or thereafter, either received a composite rating of “1” or “2” or be considered satisfactory under the applicable rating system in its most recent examination, and is not in a troubled condition as defined in § 238.72, and the holding company does not propose to commence the activity by an acquisition (in whole or in part) of a going concern; or

\* \* \* \* \*

#### **Appendix A**

**Note:** This Appendix A will not be published in the Code of Federal Regulations.

#### **Text of Proposed Large Financial Institution Rating System**

##### *A. Overview of LFI Rating System*

The Federal Reserve will use the large financial institution (LFI) rating system to evaluate and communicate the condition and prospects of domestic bank holding companies with total consolidated assets of \$50 billion or more, certain savings and loan holding companies with total consolidated assets of \$50 billion or more, and U.S. intermediate holding companies of foreign banking organizations.<sup>1</sup> The LFI rating system will replace the existing RFI/C(D) rating system that is presently used by the Federal Reserve to assign ratings to applicable holding companies.<sup>2</sup>

The LFI rating system draws from the supervisory objectives set forth in the

<sup>1</sup> The LFI rating system will apply to non-insurance, non-commercial savings and loan holding companies with total consolidated assets of \$50 billion or more. With respect to U.S. intermediate holding companies (IHCs) of foreign banking organizations (FBOs), the LFI rating system applies only to IHCs established under Regulation YY as required for FBOs with U.S. non-branch assets of \$50 billion or more. Plans are for systemically important nonbank financial companies designated by the Financial Stability Oversight Council (FSOC) for supervision by the Federal Reserve to be subject to the LFI rating system at a future date through a separate rulemaking.

<sup>2</sup> Refer to SR letter 04-18, “Bank Holding Company Rating System,” 69 FR 70444 (December 6, 2004), at <https://www.federalreserve.gov/boarddocs/srletters/2004/sr0418.htm>.

*Consolidated Supervisory Framework for Large Financial Institutions* for enhanced financial and operational strength and resilience for the largest and most systemically important firms.<sup>3</sup> The LFI rating system is designed to:

- Fully align with the Federal Reserve's current supervisory programs and practices, which are based upon the LFI supervision framework's core objectives of reducing the probability of LFIs failing or experiencing material distress and reducing the risk to U.S. financial stability;
- Enhance the clarity and consistency of supervisory assessments and communications of supervisory findings and implications; and
- Provide appropriate incentives for LFIs to maintain financial and operational strength and resilience, including compliance with laws and regulations, by more clearly defining the consequences of a given rating.

Consistent with current practice, LFI ratings will be assigned and communicated to firms on at least an annual basis, and more frequently as warranted to reflect the conclusions of supervisory activities performed by the Federal Reserve. In determining the LFI rating and identifying supervisory issues requiring corrective action by a firm, the Federal Reserve will generally rely to the fullest extent possible on the information and assessments developed by other relevant supervisors and functional regulators.

#### B. LFI Rating Framework

The LFI rating framework provides a supervisory evaluation of whether a firm possesses sufficient financial and operational strength and resilience to maintain safe and

sound operations through a range of conditions.<sup>4</sup>

The LFI rating system is comprised of three components, described below:

- **Capital Planning and Positions:** An evaluation of (i) the effectiveness of a firm's governance and planning processes used to determine the amount of capital necessary to cover risks and exposures, and to support activities through a range of conditions; and (ii) the sufficiency of a firm's capital positions to comply with applicable regulatory requirements and to support the firm's ability to continue to serve as a financial intermediary through a range of conditions.
- **Liquidity Risk Management and Positions:** An evaluation of (i) the effectiveness of a firm's governance and risk management processes used to determine the amount of liquidity necessary to cover risks and exposures, and to support activities through a range of conditions; and (ii) the sufficiency of a firm's liquidity positions to comply with applicable regulatory requirements and to support the firm's ongoing obligations through a range of conditions.
- **Governance and Controls:** An evaluation of the effectiveness of a firm's (i) board of directors, (ii) management of core business lines and independent risk management and controls, and (iii) recovery planning (for domestic LISCC firms only).<sup>5</sup> This rating assesses a firm's effectiveness in aligning strategic business objectives with the firm's risk tolerance and risk management capabilities; maintaining strong, effective, and independent risk management and

control functions, including internal audit; promoting compliance with laws and regulations, including those related to consumer protection; and otherwise planning for the ongoing resiliency of the firm.<sup>6</sup>

Assignment of the LFI Component Ratings

Each LFI component rating is assigned along a multi-level scale (*Satisfactory/Satisfactory Watch, Deficient-1, and Deficient-2*). A "Satisfactory" rating indicates that the firm is considered safe and sound and broadly meets supervisory expectations. A "Satisfactory Watch" rating is a conditional "Satisfactory" rating and is discussed in greater detail below. A "Deficient-1" rating indicates that although the firm's current condition is not considered to be materially threatened, there are financial and/or operational deficiencies that put its prospects for remaining safe and sound through a range of conditions at significant risk. A "Deficient-2" rating indicates that financial and/or operational deficiencies materially threaten the firm's safety and soundness, or have already put the firm in an unsafe and unsound condition.

Supervisors may assign a "Satisfactory Watch" component rating which indicates that the firm is generally considered safe and sound; however certain issues are sufficiently material that, if not resolved in a timely manner in the normal course of business, would put the firm's prospects for remaining safe and sound through a range of conditions at risk.<sup>7</sup> Use of the "Satisfactory Watch" rating is consistent with existing supervisory practice of giving notice that the Federal Reserve is likely to downgrade a firm to a less-than-satisfactory rating if identified weaknesses are not resolved in a timely manner. The "Satisfactory Watch" rating may also be used for firms previously rated "Deficient" when circumstances warrant.

A "Satisfactory Watch" rating is not intended to be used for a prolonged period. Firms that receive a "Satisfactory Watch" rating will have a specified timeframe to fully resolve issues leading to that rating (as is the case with all supervisory issues), generally no longer than 18 months.<sup>8</sup> If the firm

<sup>3</sup> Refer to SR letter 12-17/CA letter 12-14, "Consolidated Supervisory Framework for Large Financial Institutions," at <http://www.federalreserve.gov/bankinforeg/srletters/sr1217.htm>. This supervisory framework will be updated to more closely align with the LFI rating system when the rating system is released in its final form.

"Financial strength and resilience" is defined as maintaining effective capital and liquidity governance and planning processes, and sufficiency of related positions, to provide for continuity of the consolidated organization and its core business lines, critical operations, and banking offices through a range of conditions.

"Operational strength and resilience" is defined as maintaining effective governance and controls to provide for continuity of the consolidated organization and its core business lines, critical operations, and banking offices, and promote compliance with laws and regulations, including those related to consumer protection, through a range of conditions.

"Critical operations" are a firm's operations, including associated services, functions and support, the failure or discontinuance of which, in the view of the firm or the Federal Reserve would pose a threat to the financial stability of the United States.

Under SR letter 12-17, "banking offices" are defined as U.S. depository institution subsidiaries and the U.S. branches and agencies of FBOs. The Federal Reserve expects to use the LFI rating system to inform future revisions to other rating systems used to assess the U.S. operations of FBOs.

<sup>4</sup> Hereinafter, when "safe and sound" or "safety and soundness" is used in this framework, related expectations apply to the consolidated organization and a firm's critical operations and banking offices.

<sup>5</sup> References to "board" or "board of directors" in this framework includes the equivalent to a board of directors, as appropriate, as well as committees of the board of directors or the equivalent thereof, as appropriate.

A "business line" is a defined unit or function of a financial institution, including associated operations and support, that provides related products or services to meet the firm's business needs and those of its customers. "Core business lines" are defined as those business lines in which a significant control disruption, failure or loss event would result in a material loss of revenue, profit, franchise value, or result in significant consumer harm. Supervisory expectations applicable to management of core business lines apply equally to the management of critical operations. Additionally, critical operations are to be sufficiently resilient to be maintained, continued, and funded even in the event of a firm's material financial distress or failure.

At this time, recovery planning expectations only apply to domestic BHCs subject to the Federal Reserve's LISCC supervisory framework. Should the Federal Reserve expand the scope of recovery planning expectations to encompass additional firms, this rating will reflect such expectations for the broader set of firms.

There are eight domestic firms in the LISCC portfolio: (1) Bank of America Corporation; (2) Bank of New York Mellon Corporation; (3) Citigroup, Inc.; (4) Goldman Sachs Group, Inc.; (5) JP Morgan Chase & Co.; (6) Morgan Stanley; (7) State Street Corporation; and (8) Wells Fargo & Company. In this guidance, these eight firms may collectively be referred to as "domestic LISCC firms."

<sup>6</sup> "Risk tolerance" is defined as the aggregate level and types of risk the board and senior management are willing to assume to achieve the firm's strategic business objectives, consistent with applicable capital, liquidity, and other requirements and constraints.

<sup>7</sup> For purposes of the LFI rating system, "during the normal course of business" is when the Federal Reserve believes that supervisory issues can be resolved via remediation or mitigation (through compensating controls and/or a reduced risk profile) in a timely manner without material changes to, or investments in, a firm's governance, risk management or internal control structures, practices, or capabilities.

<sup>8</sup> The timeframe initially specified by the Federal Reserve for resolving issues will become more precise over time, and may be extended as circumstances warrant. As noted in current guidance, defined timeframes for resolving supervisory issues are communicated within either "Matters Requiring Attention" (MRAs) or "Matters Requiring Immediate Attention" (MRIAs). See SR letter 13-13/CA letter 13-10, "Supervisory Considerations for the Communication of Supervisory Findings," at <https://>

successfully resolves the issues leading to the “Satisfactory Watch” rating, the firm would typically be upgraded to “Satisfactory” as it has demonstrated an ability to successfully remediate or mitigate these issues in a timely manner in the normal course of business. However, if the firm fails to timely remediate or mitigate those issues, this failure would generally be viewed as evidence that the firm lacks sufficient financial and/or operational capabilities to remain safe and sound through a range of conditions. In these instances the firm would typically be downgraded to a “Deficient” rating.

When a firm is rated “Satisfactory Watch,” supervisors would focus on determining whether a firm’s issues are related to each other, similar in nature or root cause, or constitute a pattern reflecting deeper governance or risk management weaknesses, warranting a downgrade to a “Deficient” rating.

The weighting of individual elements within each LFI component rating will depend on their relative contribution to the rating definitions outlined below. For example, a limited number of significant deficiencies—or even just one significant deficiency—noted for management of a single core business line could be viewed as sufficiently important to warrant a “Deficient” Governance and Controls component rating, even if the firm meets supervisory expectations under the Governance and Controls component in all other respects.

A standalone composite rating is not assigned under the LFI rating system. The three LFI component ratings are designed to clearly communicate supervisory assessments and associated consequences to a firm for the core areas (capital, liquidity, and governance and controls) considered critical to an LFI’s strength and resilience.

Under the LFI rating system, a firm must be rated “Satisfactory” or “Satisfactory Watch” for each of its component ratings to be considered “well managed” in accordance with various statutes and regulations.<sup>9</sup> A “well managed” firm has sufficient financial and operational strength and resilience to maintain safe and sound operations through a range of conditions.

### C. LFI Rating Components

The LFI rating system is comprised of three component ratings:<sup>10</sup>

#### 1. Capital Planning and Positions Component Rating

The Capital Planning and Positions component rating evaluates (i) the

effectiveness of a firm’s governance and planning processes used to determine the amount of capital necessary to cover risks and exposures, and to support activities through a range of conditions; and (ii) the sufficiency of a firm’s capital positions to comply with applicable regulatory requirements and to support the firm’s ability to continue to serve as a financial intermediary through a range of conditions.

In developing this rating, the Federal Reserve will evaluate:

- **Capital Planning:** The extent to which a firm maintains sound capital planning practices through strong governance and oversight; strong risk management and controls; maintenance of updated capital policies and contingency plans for addressing potential shortfalls; and incorporation of appropriately stressful conditions and events into capital planning and projections of capital positions; and
- **Capital Positions:** The extent to which a firm’s capital is sufficient to comply with regulatory requirements, and to support its ability to meet its obligations to depositors, creditors, and other counterparties and continue to serve as a financial intermediary through a range of conditions.

#### Definitions for the Capital Planning and Positions Component Rating

##### Satisfactory

A firm’s capital planning and positions are considered sound and broadly meet supervisory expectations. Specifically:

- A firm is capable of producing sound assessments of capital adequacy through a range of conditions; and
- A firm’s current and projected capital positions comply with regulatory requirements, and support its ability to absorb current and potential losses, to meet obligations, and to continue to serve as a financial intermediary through a range of conditions.

Although a firm rated “Satisfactory” may have supervisory issues requiring corrective action, the firm is effectively mitigating the issues or the Federal Reserve has deemed the issues as unlikely to present a threat to the firm’s ability to maintain safe and sound operations.

##### Satisfactory Watch

In select circumstances, a “Satisfactory Watch” component rating may be assigned. In these instances a firm’s capital planning and positions are generally considered sound; however certain supervisory issues are sufficiently material that, if not resolved by the firm in a timely manner during the normal course of business, would put the firm’s prospects for remaining safe and sound through a range of conditions at risk.

A “Satisfactory Watch” rating may be assigned to a firm that meets these characteristics regardless of its prior rating (that is, it may be assigned to a firm previously rated “Satisfactory” or “Deficient”). In either instance, the Federal Reserve will not use the “Satisfactory Watch” rating for a prolonged period. In most instances, the firm will either (i) resolve the issues in a timely manner and be assigned a “Satisfactory” rating, or (ii) fail to resolve the

issues and be downgraded to a “Deficient” rating, as its inability to resolve those issues in a timely manner would indicate that the firm does not possess sufficient financial and operational capabilities to maintain its safety and soundness through a range of conditions.

The Federal Reserve will provide an expected timeframe for the firm to remediate or mitigate each issue leading to the “Satisfactory Watch” rating, and will closely monitor the firm’s progress.

##### Deficient-1

Although a firm’s current condition is not considered to be materially threatened, there are deficiencies in capital planning or positions that put its prospects for remaining safe and sound through a range of conditions at significant risk. Its practices and capabilities do not meet supervisory expectations, as:

- Deficiencies in a firm’s capital planning processes are not effectively mitigated. These deficiencies limit the firm’s ability to effectively assess capital adequacy through a range of conditions; and/or
- A firm’s projected capital positions may be insufficient to absorb potential losses, and to support its ability to meet prospective obligations and serve as a financial intermediary through a range of conditions.

These deficiencies require timely corrective action focused on restoring and maintaining capital planning capabilities and capital positions consistent with assignment of a “Satisfactory” component rating. To support supervisory efforts—and ensure the immediate attention of the firm’s board and senior management towards restoring financial and operational strength and resilience as necessary to maintain the firm’s safety and soundness through a range of conditions—there is a strong presumption that the firm will be subject to an informal or formal enforcement action by the Federal Reserve.

A “Deficient-1” component rating could be a barrier for a firm seeking the Federal Reserve’s approval of a proposal to engage in new or expansionary activities, unless the firm can demonstrate that (i) it is making meaningful, sustained progress in resolving identified deficiencies and issues; (ii) the proposed new or expansionary activities would not present a risk of exacerbating current deficiencies or issues or lead to new concerns; and (iii) the proposed activities would not distract the board or senior management from remediating current deficiencies or issues.

##### Deficient-2

Deficiencies in a firm’s capital planning or positions present a material threat to its safety and soundness, or have already put the firm in an unsafe and unsound condition. Its practices and capabilities fall well short of supervisory expectations, as:

- A firm’s capital planning processes are insufficient to effectively assess capital adequacy through a range of conditions; and/or
- A firm’s current and projected capital positions are insufficient to absorb current or potential losses, and to support its ability to meet current and prospective obligations and serve as a financial intermediary through a range of conditions.

[www.federalreserve.gov/supervisionreg/srletters/sr1313.htm](http://www.federalreserve.gov/supervisionreg/srletters/sr1313.htm). Proposed guidance which would replace SR letter 13–13 has been released for public comment. An enforcement action will also specify the timeframe for a firm to resolve deficiencies.

<sup>9</sup> 12 U.S.C. 1841 et. seq. and 12 U.S.C. 1461 et seq. See, e.g., 12 CFR 225.4(b)(6), 225.14, 225.22(a), 225.23, 225.85, and 225.86; 12 CFR 211.9(b), 211.10(a)(14), and 211.34; and 12 CFR 223.41.

<sup>10</sup> There may be instances where deficiencies or supervisory issues may be relevant to the Federal Reserve’s assessment of more than one component area. As such, the LFI rating will reflect these deficiencies or issues within multiple rating components when necessary to provide a comprehensive supervisory assessment.

To address these deficiencies, a firm is required to (i) implement comprehensive corrective measures sufficient to restore and maintain satisfactory capital planning capabilities and adequate capital positions; and (ii) demonstrate the sufficiency, credibility, and readiness of contingency planning and options in the event of further escalation of financial or operational deficiencies. To support supervisory efforts and ensure the immediate attention of the firm's board and senior management in addressing threats to safety and soundness, there is a strong presumption that the firm will be subject to a formal enforcement action.

The Federal Reserve would be extremely unlikely to approve any proposal from a firm with a "Deficient-2" rating to engage in new or expansionary activities.

## 2. Liquidity Risk Management and Positions Component Rating

The Liquidity Risk Management and Positions component rating evaluates (i) the effectiveness of a firm's governance and risk management processes used to determine the amount of liquidity necessary to cover risks and exposures, and to support activities through a range of conditions; and (ii) the sufficiency of a firm's liquidity positions to comply with applicable regulatory requirements and to support the firm's ongoing obligations through a range of conditions.

In developing this rating, the Federal Reserve will evaluate:

- *Liquidity Risk Management*: The extent to which a firm maintains sound liquidity risk management practices through strong governance and oversight; strong risk management and controls; maintenance of updated liquidity policies and contingency plans for addressing potential shortfalls; and incorporation of appropriately stressful conditions and events into liquidity planning and projections of liquidity positions; and

- *Liquidity Positions*: The extent to which a firm's liquidity is sufficient to comply with regulatory requirements, and to support its ability to meet current and prospective obligations to depositors, creditors and other counterparties through a range of conditions.

### Definitions for the Liquidity Risk Management and Positions Component Rating

#### Satisfactory

A firm's liquidity risk management and positions are considered sound and broadly meet supervisory expectations. Specifically:

- A firm is capable of producing sound assessments of liquidity adequacy through a range of conditions; and

- A firm's current and projected liquidity positions comply with regulatory requirements, and support its ability to meet current and prospective obligations and to continue to serve as a financial intermediary through a range of conditions.

Although a firm rated "Satisfactory" may have supervisory issues requiring corrective action, the firm is effectively mitigating the issues or the Federal Reserve has deemed the issues as unlikely to present a threat to the firm's ability to maintain safe and sound operations.

#### Satisfactory Watch

In select circumstances, a "Satisfactory Watch" component rating may be assigned. In these instances a firm's liquidity risk management and positions are generally considered sound; however certain supervisory issues are sufficiently material that, if not resolved by the firm in a timely manner during the normal course of business, would put the firm's prospects for remaining safe and sound through a range of conditions at risk.

A "Satisfactory Watch" rating may be assigned to a firm that meets these characteristics regardless of its prior rating (that is, it may be assigned to a firm previously rated "Satisfactory" or "Deficient"). In either instance, the Federal Reserve will not use the "Satisfactory Watch" rating for a prolonged period. In most instances, the firm will either (i) resolve the issues in a timely manner and be assigned a "Satisfactory" rating, or (ii) fail to resolve the issues and be downgraded to a "Deficient" rating, as its inability to resolve those issues in a timely manner would indicate that the firm does not possess sufficient financial and operational capabilities to maintain its safety and soundness through a range of conditions.

The Federal Reserve will provide an expected timeframe for the firm to remediate or mitigate each issue leading to the "Satisfactory Watch" rating, and will closely monitor the firm's progress.

#### Deficient-1

Although a firm's current condition is not considered to be materially threatened, there are deficiencies in liquidity risk management or positions that put its prospects for remaining safe and sound through a range of conditions at significant risk. Its practices and capabilities do not meet supervisory expectations, as:

- Deficiencies in a firm's liquidity risk management processes are not effectively mitigated. These deficiencies limit the firm's ability to effectively assess liquidity adequacy through a range of conditions; and/or

- A firm's projected liquidity positions may be insufficient to support its ability to meet prospective obligations and serve as a financial intermediary through a range of conditions.

These deficiencies require timely corrective action, focused on restoration and maintenance of liquidity risk management capabilities and liquidity positions consistent with assignment of a "Satisfactory" component rating. To support supervisory efforts—and ensure the immediate attention of the firm's board and senior management towards restoring financial and operational strength and resilience as necessary to maintain the firm's safety and soundness through a range of conditions—there is a strong presumption that the firm will be subject to an informal or formal enforcement action by the Federal Reserve.

A "Deficient-1" component rating could be a barrier for a firm seeking the Federal Reserve's approval of a proposal to engage in new or expansionary activities, unless the firm can demonstrate that (i) it is making meaningful, sustained progress in resolving

identified deficiencies and issues; (ii) the proposed new or expansionary activities would not present a risk of exacerbating current deficiencies or issues or lead to new concerns; and (iii) the proposed activities would not distract the board or senior management from remediating current deficiencies or issues.

#### Deficient-2

Deficiencies in a firm's liquidity risk management or positions present a material threat to its safety and soundness, or have already put the firm in an unsafe and unsound condition. Its practices and capabilities fall well short of supervisory expectations, as:

- A firm's liquidity risk management processes are insufficient to perform an effective assessment of liquidity adequacy through a range of conditions; and/or
- A firm's current and projected liquidity positions are insufficient to support its ability to meet current and prospective obligations and serve as a financial intermediary through a range of conditions.

To address these material deficiencies, a firm is required to immediately (i) implement comprehensive corrective measures sufficient to provide for the restoration and continued maintenance of satisfactory liquidity risk management capabilities and adequate liquidity positions; and (ii) demonstrate the sufficiency, credibility and readiness of contingency planning and options in the event of further escalation of financial or operational deficiencies. To support supervisory efforts and ensure the immediate attention of the firm's board and senior management in addressing threats to safety and soundness, there is a strong presumption that the firm will be subject to a formal enforcement action.

The Federal Reserve would be extremely unlikely to approve any proposal from a firm with a "Deficient-2" rating to engage in new or expansionary activities.

## 3. Governance and Controls Component Rating

The Governance and Controls component rating evaluates the effectiveness of a firm's (i) board of directors, (ii) management of core business lines and independent risk management and controls, and (iii) recovery planning (for domestic LISC firms only). This rating assesses a firm's effectiveness in aligning strategic business objectives with the firm's risk tolerance and risk management capabilities; maintaining strong, effective, and independent risk management and control functions, including internal audit; promoting compliance with laws and regulations, including those related to consumer protection; and otherwise providing for the ongoing resiliency of the firm.<sup>11</sup>

In developing this rating, the Federal Reserve will evaluate:

- *Effectiveness of the Board of Directors*: The extent to which the board exhibits attributes consistent with those of effective boards in carrying out its core roles and

<sup>11</sup> Hereinafter, references to "compliance with laws and regulations" include laws and regulations related to banking and consumer protection.

responsibilities, including setting a clear strategy for the firm that aligns with the firm's risk tolerance; actively managing information flow and board discussions; holding senior management accountable for implementing the firm's strategy and risk tolerance in an effective manner, and for maintaining the firm's risk management and control framework; supporting the independence and stature of the firm's independent risk management and internal audit functions; and maintaining its effectiveness by adapting its composition, governance structure and practices to changes that occur over time.

• *Management of Core Business Lines and Independent Risk Management and Controls*  
The extent to which:

○ Senior management effectively and prudently manages the day-to-day operations of the firm and provides for ongoing resiliency; implements the firm's strategy and risk tolerance; maintains an effective risk management framework and system of internal controls; and promotes prudent risk taking behaviors and business practices, including compliance with laws and regulations.

○ Core business line management executes business line activities consistent with the firm's strategy and risk tolerance; identifies and manages risks; and ensures an effective system of internal controls for its operations.

○ Independent risk management effectively evaluates whether the firm's risk tolerance appropriately captures material risks and is consistent with the firm's risk management capacity; establishes and monitors risk limits that are consistent with the firm's risk tolerance; identifies and measures the firm's risks; and aggregates, assesses and reports on the firm's risk profile and positions. Additionally, the firm demonstrates that its system of internal controls is appropriate and tested for effectiveness. Finally, internal audit effectively and independently assesses the firm's risk management framework and internal control systems, and reports findings to senior management and the firm's audit committee.

• *Recovery Planning (domestic LISCC firms only)*: The extent to which recovery planning processes effectively identify options that provide a reasonable chance of a firm being able to remedy financial weakness and restore market confidence without extraordinary official sector support.

Definitions for the Governance and Controls Component Rating

Satisfactory

A firm's governance and control practices are considered sound and broadly meet supervisory expectations. Specifically, a firm's practices and capabilities are sufficient to align strategic business objectives with the firm's risk tolerance and risk management capabilities; maintain strong and independent risk management and control functions, including internal audit; promote compliance with laws and regulations; and otherwise provide for the firm's ongoing resiliency through a range of conditions.

Although a firm rated "Satisfactory" may have supervisory issues requiring corrective

action, the firm is effectively mitigating the issues or the Federal Reserve has deemed the issues as unlikely to present a threat to the firm's ability to maintain safe and sound operations.

Satisfactory Watch

Supervisors may assign a "Satisfactory Watch" component rating, which indicates that governance and controls are generally considered sound; however certain supervisory issues are sufficiently material that, if not resolved by the firm in a timely manner during the normal course of business, would put the firm's prospects for remaining safe and sound through a range of conditions at risk.

A "Satisfactory Watch" rating may be assigned to a firm which meets these characteristics regardless of its prior rating (that is, it may be assigned to a firm previously rated "Satisfactory" or "Deficient"). In either instance, the Federal Reserve will not use the "Satisfactory Watch" rating for a prolonged period. In most instances, the firm will either (i) resolve the issues in a timely manner and be assigned a "Satisfactory" rating, or (ii) fail to resolve the issues and be downgraded to a "Deficient" rating, as its inability to resolve those issues in a timely manner would indicate that the firm does not possess sufficient financial and operational capabilities to maintain its safety and soundness through a range of conditions.

The Federal Reserve will provide an expected timeframe for the firm to remediate or mitigate each issue leading to the "Satisfactory Watch" rating, and will closely monitor the firm's progress.

Deficient-1

Although a firm's current condition is not considered to be materially threatened, there are deficiencies in a firm's governance or controls that put its prospects for remaining safe and sound through a range of conditions at significant risk.

The firm's practices and capabilities do not meet supervisory expectations, and deficiencies limit its ability to align strategic business objectives with the firm's risk tolerance and risk management capabilities; maintain strong and independent risk management and control functions, including internal audit; promote compliance with laws and regulations; and/or otherwise provide for the firm's ongoing resiliency through a range of conditions.

These deficiencies require timely corrective action by the firm, focused on restoring and maintaining its governance and control capabilities consistent with a "Satisfactory" component rating. To support supervisory efforts—and ensure the immediate attention of the firm's board and senior management towards restoring financial and operational strength and resilience as necessary to maintain the firm's safety and soundness through a range of conditions—there is a strong presumption that the firm will be subject to an informal or formal enforcement action by the Federal Reserve.

A "Deficient-1" component rating could be a barrier for a firm seeking the Federal Reserve's approval of a proposal to engage in new or expansionary activities, unless the

firm can demonstrate that (i) it is making meaningful, sustained progress in resolving identified deficiencies and issues; (ii) the proposed new or expansionary activities would not present a risk of exacerbating current deficiencies or issues or lead to new concerns; and (iii) the proposed activities would not distract the board or senior management from remediating current deficiencies or issues.

Deficient-2

Deficiencies in a firm's governance or controls present a material threat to its safety and soundness, or have already put the firm in an unsafe and unsound condition.

Its practices and capabilities fall well short of supervisory expectations, and are insufficient to align strategic business objectives with the firm's risk tolerance and risk management capabilities; maintain strong and independent risk management and control functions, including internal audit; promote compliance with laws and regulations; and/or otherwise provide for the firm's ongoing resiliency.

To address these material deficiencies, a firm is required to (i) implement comprehensive corrective measures sufficient to restore and maintain appropriate governance and control capabilities; and (ii) demonstrate the sufficiency, credibility and readiness of contingency planning and options in the event of further escalation of financial or operational deficiencies. To support supervisory efforts and ensure the immediate attention of the firm's board and senior management in addressing threats to safety and soundness, there is a strong presumption that the firm will be subject to a formal enforcement action.

The Federal Reserve would be extremely unlikely to approve any proposal from a firm with a "Deficient-2" rating to engage in new or expansionary activities.

By order of the Board of Governors of the Federal Reserve System, August 3, 2017.

**Margaret McCloskey Shanks,**  
*Deputy Secretary of the Board.*

[FR Doc. 2017-16736 Filed 8-16-17; 8:45 am]

**BILLING CODE 6210-01-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA-2017-0770; Product Identifier 2017-NM-030-AD]**

**RIN 2120-AA64**

**Airworthiness Directives; The Boeing Company Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to supersede Airworthiness Directive (AD) 2014-03-

07, which applies to certain The Boeing Company Model MD-11 and MD-11F airplanes. AD 2014-03-07 requires inspecting certain locations of the wire bundles of the center upper auxiliary fuel tank for damage, and corrective action if necessary. AD 2014-03-07 also requires installing nonmetallic barrier/shield sleeving, new clamps, new attaching hardware, and a new extruded channel. Since we issued AD 2014-03-07, we determined that it is necessary to require an inspection of the wire bundles for damage at additional center upper auxiliary fuel tank locations on certain airplanes. This proposed AD would add that inspection and expand the applicability. We are proposing this AD to address the unsafe condition on these products.

**DATES:** We must receive comments on this proposed AD by October 2, 2017.

**ADDRESSES:** You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110-SK57, Seal Beach, CA 90740; telephone 562-797-1717; Internet <https://www.myboeingfleet.com>. You may view this referenced service information at the FAA, Transport Standards Branch, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-0770.

#### Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-0770; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments

received, and other information. The street address for the Docket Office (phone: 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

#### FOR FURTHER INFORMATION CONTACT:

Samuel Lee, Aerospace Engineer, Propulsion Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712-4137; phone: 562-627-5262; fax: 562-627-5210; email: [samuel.lee@faa.gov](mailto:samuel.lee@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2017-0770; Product Identifier 2017-NM-030-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

##### Discussion

On January 21, 2014, we issued AD 2014-03-07, Amendment 39-17744 (79 FR 9392, February 19, 2014) ("AD 2014-03-07"), for certain The Boeing Company Model MD-11 and MD-11F airplanes. AD 2014-03-07 superseded AD 2009-26-16, Amendment 39-16155 (74 FR 69249, December 31, 2009). AD 2014-03-07 requires inspecting certain locations of the wire bundles of the center upper auxiliary fuel tank for damage, and corrective action if necessary. AD 2014-03-07 also requires installing nonmetallic barrier/shield sleeving, new clamps, new attaching hardware, and a new extruded channel. AD 2014-03-07 resulted from reports that identified additional locations where inspections and corrective actions of the center upper auxiliary fuel tank are needed. We issued AD 2014-03-07 to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

#### Actions Since AD 2014-03-07 Was Issued

Since we issued AD 2014-03-07, we determined that, for certain airplanes, it is necessary to inspect the wire bundles at additional center upper auxiliary fuel tank locations for damage. We have also expanded the applicability to add one airplane (Line Number 579) that is also affected by the identified unsafe condition.

#### Related Service Information Under 1 CFR Part 51

We reviewed Boeing Service Bulletin MD11-28-126, Revision 6, dated July 1, 2016. This service information describes procedures for inspecting certain wire bundles of the center auxiliary fuel tank for damage, and repairing or replacing damaged wires. This service information also describes procedures for installing barrier/shield sleeving, clamping, and an extruded channel. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

#### FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

#### Proposed AD Requirements

This proposed AD would retain all requirements of AD 2014-03-07. This proposed AD would add inspection requirements for certain airplanes and expand the applicability. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under "Difference between this Proposed AD and Service Information." For information on the procedures and compliance times, see this service information at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-0770.

#### Difference Between This Proposed AD and Service Information

Boeing Service Bulletin MD11-28-126, Revision 6, dated July 1, 2016, specifies to contact the manufacturer for certain instructions, but this proposed AD would require using repair methods, modification deviations, and alteration deviations in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and

that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

**Costs of Compliance**

We estimate that this proposed AD affects 125 airplanes of U.S. registry. We

estimate the following costs to comply with this proposed AD:

**ESTIMATED COSTS**

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection/installation [retained actions from AD 2009–26–16, Amendment 39–16155 (74 FR 69249, December 31, 2009)].	168 to 182 work-hours × \$85 per hour = \$14,280 to \$15,470 per inspection cycle.	\$15,708 to \$28,005	\$29,988 to \$43,475 per inspection cycle.	\$3,748,500 to \$5,434,375 per inspection cycle.
Inspection/installation for Groups 1, 2, and 5, all Configuration 2 airplanes (retained actions from AD 2014-03-07).	Up to 9 work-hours × \$85 per hour = \$765.	\$6,166	Up to \$6,931 .....	Up to \$866,375.
Inspection/installation for Groups 1, 2, and 5, all Configuration 2 airplanes (new proposed action).	Up to 4 work-hours × \$85 per hour = \$340.	\$0	Up to \$340 .....	Up to \$42,500.
Inspection/installation for Line Number 579 (new proposed action).	4 work-hours × \$85 per hour = \$340.	\$28,005	\$340 .....	\$28,345.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this proposed AD.

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA’s authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency’s authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, “General requirements.” Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes to the Director of the System Oversight Division.

**Regulatory Findings**

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Is not a “significant rule” under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),
- (3) Will not affect intrastate aviation in Alaska, and
- (4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**The Proposed Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

**PART 39—AIRWORTHINESS DIRECTIVES**

- 1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

- 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2014–03–07, Amendment 39–17744 (79 FR 9392, February 19, 2014), and adding the following new AD:

**The Boeing Company:** Docket No. FAA–2017–0770; Product Identifier 2017–NM–030–AD.

**(a) Comments Due Date**

The FAA must receive comments on this AD action by October 2, 2017.

**(b) Affected ADs**

This AD replaces AD 2014–03–07, Amendment 39–17744 (79 FR 9392, February 19, 2014) (“AD 2014–03–07”).

**(c) Applicability**

This AD applies to The Boeing Company Model MD–11 and MD–11F airplanes, certificated in any category, as identified in Boeing Service Bulletin MD11–28–126, Revision 6, dated July 1, 2016.

**(d) Subject**

Air Transport Association (ATA) of America Code 28, Fuel.

**(e) Unsafe Condition**

This AD was prompted by fuel system reviews conducted by the manufacturer that indicated the need to inspect wire bundles at certain locations of the center upper auxiliary fuel tanks in addition to inspection locations required by AD 2014–03–07. We are issuing this AD to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

**(f) Compliance**

Comply with this AD within the compliance times specified, unless already done.



**(g) Retained Inspection and Corrective Action, With Revised Service Information**

This paragraph restates the requirements of paragraph (g) of AD 2014–03–07, with revised service information. For airplanes identified in Boeing Service Bulletin MD11–28–126, Revision 1, dated June 18, 2009; Within 60 months after February 4, 2010 (the effective date of AD 2009–26–16, Amendment 39–16155 (74 FR 69249, December 31, 2009)), do the actions specified in paragraphs (g)(1) through (g)(5) of this AD, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Service Bulletin MD11–28–126, Revision 1, dated June 18, 2009; Revision 4, dated November 29, 2011; or Revision 6, dated July 1, 2016; except as required by paragraph (k) of this AD. As of the effective date of this AD, only Boeing Service Bulletin MD11–28–126, Revision 6, dated July 1, 2016, may be used. Do all applicable corrective actions before further flight.

(1) Do a general visual inspection of the wire bundles between Stations 1238.950 and 1361.000 to determine if wires touch the upper surface of the center upper auxiliary fuel tank, and mark the location, as applicable.

(2) Do a detailed inspection for splices and damage of all wire bundles above the center upper auxiliary fuel tank between Stations 1218.950 and 1381.000.

(3) Do a detailed inspection for damage (burn marks) of the upper surface of the center upper auxiliary fuel tank.

(4) Do a detailed inspection for damage (burn marks) on the fuel vapor barrier seal.

(5) Install a nonmetallic barrier/shield sleeving, new clamps, new attaching hardware, and a new extruded channel.

**(h) Retained Additional Inspections and Corrective Action, With Revised Service Information**

This paragraph restates the requirements of paragraph (h) of AD 2014–03–07, with revised service information. For airplanes in Group 1, Configuration 2; Group 2, Configuration 2; and Group 5, Configuration 2; as identified in Boeing Service Bulletin MD11–28–126, Revision 4, dated November 29, 2011; Within 60 months after March 26, 2014 (the effective date of AD 2014–03–07), do a detailed inspection of wire bundles for splices and damage (chafing, arcing, and broken insulation) and damage (burn marks) on the upper surface of the center upper auxiliary fuel tank and fuel vapor barrier seal; install barrier/shield sleeving and clamping; and do all applicable corrective actions at the applicable locations specified in paragraphs (h)(1) through (h)(3) of this AD, in accordance with the Accomplishment Instructions of Boeing Service Bulletin MD11–28–126, Revision 4, dated November 29, 2011; or Boeing Service Bulletin MD11–28–126, Revision 6, dated July 1, 2016; except as required by paragraph (k) of this AD. As of the effective date of this AD, only Boeing Service Bulletin MD11–28–126, Revision 6, dated July 1, 2016, may be used for the actions required by this paragraph. Do all applicable corrective actions before further flight.

(1) For Group 1, Configuration 2 airplanes, between Stations 1238.950 and 1381.000, Stations 1238.950 and 1256.000, and Stations 1238.950 and 1256.800, depending on passenger or freighter configuration.

(2) For Group 2, Configuration 2 airplanes, between Stations 1238.950 and 1275.250, and Stations 1238.950 and 1275.250, passenger configuration only.

(3) For Group 5, Configuration 2 airplanes, between Stations 1381.000 and 1238.950.

**(i) New Inspections and Corrective Actions for Certain Airplanes**

For Groups 1, 2, and 5 Configuration 2 airplanes, as identified in Boeing Service Bulletin MD11–28–126, Revision 6, dated July 1, 2016; Within 60 months after the effective date of this AD, do the actions required by paragraphs (i)(1) and (i)(2) of this AD, in accordance with the Accomplishment Instructions of Boeing Service Bulletin MD11–28–126, Revision 6, dated July 1, 2016.

(1) Do a general visual inspection of the wire bundles at the additional center upper auxiliary fuel tank locations to determine if wires touch the upper surface of the fuel tank, and mark the location as applicable.

(2) Do a detailed inspection of the wire bundles for splices and damage on the upper surface of the center upper auxiliary fuel tank and fuel vapor barrier seal; install barrier/shield sleeving, clamping, and extruded channels, as applicable; and do all applicable corrective actions before further flight; except as required by paragraph (k) of this AD.

**(j) New Requirements for Line Number 579**

For airplane Line Number 579: Within 60 months after the effective date of this AD, do the actions specified in paragraphs (g)(1) through (g)(5) of this AD, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Service Bulletin MD11–28–126, Revision 6, dated July 1, 2016, except as required by paragraph (k) of this AD. Do all applicable corrective actions before further flight.

**(k) Exception to Service Information Specifications**

Where Boeing Service Bulletin MD11–28–126, Revision 1, dated June 18, 2009; Boeing Service Bulletin MD11–28–126, Revision 4, dated November 29, 2011; or Boeing Service Bulletin MD11–28–126, Revision 6, dated July 1, 2016; specifies to contact The Boeing Company for repair instructions: Before further flight, repair the auxiliary fuel tank using a method approved in accordance with the procedures specified in paragraph (m) of this AD.

**(l) Credit for Previous Actions**

(1) This paragraph provides credit for actions required by paragraph (g) of this AD, if those actions were performed before March 26, 2014 (the effective date of AD 2014–03–07), using the service information specified in paragraphs (l)(1)(i) or (l)(1)(ii) of this AD.

(i) Boeing Service Bulletin MD11–28–126, Revision 2, dated November 18, 2010.

(ii) Boeing Service Bulletin MD11–28–126, Revision 3, dated June 3, 2011.

(2) This paragraph provides credit for actions required by paragraph (h) of this AD, if those actions were performed before March 26, 2014 (the effective date of AD 2014–03–07), using Boeing Service Bulletin MD11–28–126, Revision 3, dated June 3, 2011.

**(m) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Los Angeles ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (n)(1) of this AD. Information may be emailed to: [9ANM-LAACO-AMOC-Requests@faa.gov](mailto:9ANM-LAACO-AMOC-Requests@faa.gov).

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) AMOCs approved previously for AD 2014–03–07 are approved as AMOCs for the corresponding provisions of this AD.

**(n) Related Information**

(1) For more information about this AD, contact Samuel Lee, Aerospace Engineer, Propulsion Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5262; fax: 562–627–5210; email: [samuel.lee@faa.gov](mailto:samuel.lee@faa.gov).

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110–SK57, Seal Beach, CA 90740; telephone 562–797–1717; Internet <https://www.myboeingfleet.com>. You may view this referenced service information at the FAA, Transport Standards Branch, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on July 28, 2017.

**John P. Piccola, Jr.,**

*Acting Director, System Oversight Division, Aircraft Certification Service.*

[FR Doc. 2017–16560 Filed 8–16–17; 8:45 am]

**BILLING CODE 4910–13–P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 71**

**[Docket No. FAA–2015–2891; Airspace Docket No. 15–ANE–1]**

**Proposed Establishment of Class E Airspace; Deblois, ME**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to establish Class E airspace extending upward from 700 feet above the surface in Deblois, ME, to accommodate new area navigation (RNAV) global positioning system (GPS) standard instrument approach procedures (SIAPs) serving Deblois Flight Strip. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations at the airport.

**DATES:** Comments must be received on or before October 2, 2017.

**ADDRESSES:** Send comments on this rule to: U. S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE., West Bldg Ground Floor Rm W12-140, Washington, DC 20590; Telephone: 1-800-647-5527, or (202) 366-9826. You must identify the Docket No. FAA-2015-2891; Airspace Docket No. 15-ANE-1, at the beginning of your comments. You may also submit and review received comments through the Internet at <http://www.regulations.gov>. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FAA Order 7400.11A, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at [http://www.faa.gov/air\\_traffic/publications/](http://www.faa.gov/air_traffic/publications/). For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC, 20591; telephone: (202) 267-8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11A at NARA, call (202) 741-6030, or go to [http://www.archives.gov/federal\\_register/code\\_of\\_federal-regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html).

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

**FOR FURTHER INFORMATION CONTACT:** John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305-6364.

**SUPPLEMENTARY INFORMATION:**

**Authority for This Rulemaking**

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the

authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish Class E airspace extending upward from 700 feet above the surface at Deblois Flight Strip, Deblois, ME, to support IFR operations in standard instrument approach procedures at the airport.

**Comments Invited**

Interested persons are invited to comment on this proposed rule by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA-2015-2891 and Airspace Docket No. 15-ANE-1) and be submitted in triplicate to DOT Docket Operations (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at <http://www.regulations.gov>.

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to Docket No. FAA-2015-2891; Airspace Docket No. 15-ANE-1." The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

**Availability of NPRMs**

An electronic copy of this document may be downloaded through the internet at <http://www.regulations.gov>. Recently published rulemaking

documents can also be accessed through the FAA's Web page at [http://www.faa.gov/air\\_traffic/publications/airspace\\_amendments/](http://www.faa.gov/air_traffic/publications/airspace_amendments/).

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays at the office of the Eastern Service Center, Federal Aviation Administration, room 350, 1701 Columbia Avenue, College Park, Georgia 30337.

**Availability and Summary of Documents for Incorporation by Reference**

This document proposes to amend FAA Order 7400.11A, Airspace Designations and Reporting Points, dated August 3, 2016, and effective September 15, 2016. FAA Order 7400.11A is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11A lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

**The Proposal**

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace extending upward from 700 feet above the surface within a 7-mile radius of Deblois Flight Strip, Deblois, ME, providing the controlled airspace required to support the new RNAV (GPS) standard instrument approach procedures for IFR operations at the airport.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.11A, dated August 3, 2016, and effective September 15, 2016, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

**Regulatory Notices and Analyses**

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February

26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### Environmental Review

This proposal would be subject to an environmental analysis in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

#### Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

#### The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

#### PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

##### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11A, Airspace Designations and Reporting Points, dated August 3, 2016, effective September 15, 2016, is amended as follows:

*Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.*

\* \* \* \* \*

#### ANE ME E5 Deblois Flight Strip, Deblois, ME [New]

Deblois Flight Strip, ME  
(Lat. 44°43'35" N., long. 67°59'27" W.)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Deblois Flight Strip, and within 1-mile either side of a 135° bearing from the airport, extending from the 7-mile radius to 10.5 miles southeast of the airport.

Issued in College Park, Georgia, on August 8, 2017

Ryan W. Almasy,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2017–17259 Filed 8–16–17; 8:45 am]

BILLING CODE 4910–13–P

#### AMERICAN BATTLE MONUMENTS COMMISSION

##### 36 CFR Part 407

RIN 3263–AA00

#### ABMC Privacy Program

**AGENCY:** American Battle Monuments Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This rule provides guidance and assigns responsibility for the privacy program under the American Battle Monuments Commission (ABMC) pursuant to the Privacy Act of 1974 and applicable Office of Management Budget (OMB) guidance.

**DATES:** Send comments on or before October 16, 2017.

**ADDRESSES:** You may send comments, identified by RIN number, by the following method:

• Federal Rulemaking Portal: <http://www.regulations.gov>.

Follow the instructions for submitting comments. All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR MORE INFORMATION CONTACT:** Edwin L. Fountain, General Counsel, American Battle Monuments Commission, 2300 Clarendon Boulevard Suite 500, Arlington VA 22201, [fountain@abmc.gov](mailto:fountain@abmc.gov).

**SUPPLEMENTARY INFORMATION:** The authority for this rulemaking is 5 U.S.C. 552a, the Privacy Act of 1974, as amended, which requires the implementation of the Act by Federal agencies.

This action ensures that ABMC's collection, use, maintenance, or dissemination of information about individuals for purposes of discharging its statutory responsibilities will be performed in accordance with the Privacy Act of 1974 and applicable OMB guidance. This rule:

• Establishes rules of conduct for ABMC personnel and ABMC contractors involved in the design, development, operation, or maintenance of any system of records.

• Establishes appropriate administrative, technical, and physical safeguards to ensure the security and confidentiality of records and to protect against any anticipated threats or

hazards to their security or integrity that could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual about whom information is maintained.

• Ensures that guidance, assistance, and subject matter expert support are provided ABMC staff, contractors and the public as needed in the implementation and execution of and compliance with the ABMC Privacy Program.

• Ensures that laws, policies, procedures, and systems for protecting individual privacy rights are implemented throughout ABMC.

#### Regulatory Procedures

*Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule benefits the public and the United States Government by providing clear procedures for members of the public, contractors, and employees to follow with regard to the ABMC privacy program. This rule has been designated a not significant regulatory action.

#### Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2016, that threshold is approximately \$146 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

#### Public Law 96–354, Regulatory Flexibility Act

The ABMC certifies this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. Ch. 6) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility

Act, as amended, does not require ABMC to prepare a regulatory flexibility analysis.

#### *Executive Order 13132, Federalism*

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This rule will not have a substantial effect on the States; the relationship between the National Government and the States; or the distribution of power and responsibilities among the various levels of Government.

#### *Public Law 96-511, Paperwork Reduction Act*

It has been determined that this rule does not impose reporting or record keeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

#### **List of Subjects in 36 CFR Part 407**

Privacy.

Dated: August 10, 2017.

**Robert J. Dalessandro,**

*Acting Secretary, ABMC.*

■ 36 CFR Chapter IV is proposed to be amended by adding part 407 to read as follows:

#### **PART 407—IMPLEMENTATION OF THE PRIVACY ACT OF 1974**

Sec.

- 407.1 Purpose and scope of the regulations in this part.
- 407.2 Definitions.
- 407.3 Inquiries about ABMC's systems of records or implementation of the Privacy Act.
- 407.4 Procedures for acquiring access to ABMC records pertaining to an individual.
- 407.5 Identification required when requesting access to ABMC records pertaining to an individual.
- 407.6 Procedures for amending or correcting an individual's ABMC record.
- 407.7 Procedures for appealing a refusal to amend or correct an ABMC record.
- 407.8 Fees charged to locate, review, or copy records.
- 407.9 Procedures for maintaining accounts of disclosures made by ABMC from its systems of records.

**Authority:** 5 U.S.C. 552a(f).

##### **§ 407.1 Purpose and scope of the regulations in this part.**

The regulations in this part set forth ABMC's procedures under the Privacy Act, as required by 5 U.S.C. 552a(f), with respect to systems of records maintained by ABMC. The rules in this

part apply to all records maintained by ABMC that are retrieved by an individual's name or by some identifying number, symbol, or other identifying particular assigned to the individual. These regulations establish procedures by which an individual may exercise the rights granted by the Privacy Act to determine whether an ABMC system of records contains a record pertaining to him or her; to gain access to such records; and to request correction or amendment of such records. These rules should be read together with the Privacy Act, which provides additional information about records maintained on individuals.

##### **§ 407.2 Definitions.**

The definitions in subsection (a) of the Privacy Act (5 U.S.C. 552a(a)) apply to this part. In addition, as used in this part:

*ABMC* means the American Battle Monuments Commission;

*ABMC system* means a system of records maintained by ABMC;

*Business day* means a calendar day, excluding Saturdays, Sundays, and legal public holidays.

*General Counsel* means the General Counsel of ABMC, or his or her designee.

*Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.

*Privacy Act or Act* means the Privacy Act of 1974, as amended (5 U.S.C. 552a);

*Secretary* means the Secretary of ABMC, or his or her designee;

*You, your,* or other references to the reader of the regulations in this part are meant to apply to the individual to whom a record pertains.

##### **§ 407.3 Inquiries about ABMC's systems of records or implementation of the Privacy Act.**

Inquiries about ABMC's systems of records or implementation of the Privacy Act should be sent to the following address: American Battle Monuments Commission, Office of the General Counsel, 2300 Clarendon Boulevard, Suite 500, Arlington VA 22201.

##### **§ 407.4 Procedures for accessing ABMC records pertaining to an individual.**

The following procedures apply to records that are contained in an ABMC system:

(a) You may request to be notified if a system of records that you name contains records pertaining to you, and to review any such records, by writing to the Office of the General Counsel (see § 407.3). You also may call the Office of the General Counsel at (703) 696-6902 on business days, between the hours of

9 a.m. and 5 p.m., to schedule an appointment to make such a request in person. A request for records should be presented in writing and should identify specifically the ABMC system(s) involved. Your request to access records pertaining to you will be treated as a request under both the Privacy Act, as implemented by this part, and the Freedom of Information Act (5 U.S.C. 552), as implemented by part 404 of this title (36 CFR 404.1 through 404.10).

(b) Access to the records, or to any other information pertaining to you that is contained in the system, shall be provided if the identification requirements of § 407.5 are satisfied and the records are determined otherwise to be releasable under the Privacy Act and these regulations. ABMC shall provide you an opportunity to have a copy made of any such records about you. Only one copy of each requested record will be supplied, based on the fee schedule in § 407.8.

(c) ABMC will comply promptly with requests made in person at scheduled appointments, if the requirements of this section are met and the records sought are immediately available. ABMC will acknowledge, within 10 business days, mailed requests or personal requests for records that are not immediately available, and the information requested will be provided promptly thereafter.

(d) If you make your request in person at a scheduled appointment, you may, upon your request, be accompanied by a person of your choice to review your records. ABMC may require that you furnish a written statement authorizing discussion of your records in the accompanying person's presence. A record may be disclosed to a representative chosen by you upon your proper written consent.

(e) Medical or psychological records pertaining to you shall be disclosed to you unless, in the judgment of ABMC, access to such records might have an adverse effect upon you. When such a determination has been made, ABMC may refuse to disclose such information directly to you. ABMC will, however, disclose this information to you through a licensed physician designated by you in writing.

(f) If you are unsatisfied with an adverse determination on your request to access records pertaining to you, you may appeal that determination using the procedures set forth in § 407.7(a).

##### **§ 407.5 Identification required when requesting access to ABMC records pertaining to an individual.**

ABMC will require reasonable identification of all individuals who

request access to records in an ABMC system to ensure that records are disclosed to the proper person.

(a) The amount of personal identification required will of necessity vary with the sensitivity of the record involved. In general, if you request disclosure in person, you will be required to show an identification card, such as a driver's license, containing your photograph and sample signature. However, with regard to records in ABMC systems that contain particularly sensitive and/or detailed personal information, ABMC reserves the right to require additional means of identification as are appropriate under the circumstances. These means include, but are not limited to, requiring you to sign a statement under oath as to your identity, acknowledging that you are aware of the criminal penalties for requesting or obtaining records under false pretenses or falsifying information (see 5 U.S.C. 552a(i)(3); 18 U.S.C. 1001).

(b) If you request disclosure by mail, ABMC will request such information as may be necessary to ensure that you are properly identified and for a response to be sent. Authorized means to achieve this goal include, but are not limited to, requiring that a mail request include a signed, notarized statement asserting your identity or a statement signed under oath as described in subsection (a) of this section.

#### **§ 407.6 Procedures for amending or correcting an individual's ABMC record.**

(a) You are entitled to request amendments to or corrections of records pertaining to you that you believe are not accurate, relevant, timely, or complete, pursuant to the provisions of the Privacy Act, including 5 U.S.C. 552a(d)(2). Such a request should be made in writing and addressed to the Office of the General Counsel (see § 407.3).

(b) Your request for amendments or corrections should specify the following:

- (1) The particular record that you are seeking to amend or correct;
- (2) The ABMC system from which the record was retrieved;
- (3) The precise correction or amendment you desire, preferably in the form of an edited copy of the record reflecting the desired modification; and
- (4) Your reasons for requesting amendment or correction of the record.

(c) ABMC will acknowledge a request for amendment or correction of a record within 10 business days of its receipt, unless the request can be processed and the individual informed of the General Counsel's decision on the request within that 10-day period.

(d) If after receiving and investigating your request, the General Counsel agrees that the record is not accurate, timely, or complete, based on a preponderance of the evidence, then the record will be corrected or amended promptly. The record will be deleted without regard to its accuracy, if the record is not relevant or necessary to accomplish the ABMC function for which the record was provided or is maintained. In either case, you will be informed in writing of the amendment, correction, or deletion. In addition, if accounting was made of prior disclosures of the record, all previous recipients of the record will be informed of the corrective action taken.

(e) If after receiving and investigating your request, the General Counsel does not agree that the record should be amended or corrected, you will be informed promptly in writing of the refusal to amend or correct the record and the reason for this decision. You also will be informed that you may appeal this refusal in accordance with § 407.7.

(f) Requests to amend or correct a record governed by the regulations of another agency will be forwarded to such agency for processing, and you will be informed in writing of this referral.

#### **§ 407.7 Procedures for appealing a refusal to amend or correct an ABMC record.**

(a) You may appeal a refusal to amend or correct a record to the Secretary of ABMC. Such appeal must be made in writing within 30 business days of your receipt of the initial refusal to amend or correct your record. Your appeal should be sent to the Office of the General Counsel (see § 407.3), should indicate that it is an appeal, and should include the basis for the appeal.

(b) The Secretary will review your request to amend or correct the record, the General Counsel's refusal, and any other pertinent material relating to the appeal. No hearing will be held.

(c) The Secretary shall render his or her decision on your appeal within 30 business days of its receipt by ABMC, unless the Secretary, for good cause shown, extends the 30-day period. Should the Secretary extend the appeal period, you will be informed in writing of the extension and the circumstances of the delay.

(d) If the Secretary determines that the record that is the subject of the appeal should be amended or corrected, the record will be so modified, and you will be informed in writing of the amendment or correction. Where an accounting was made of prior disclosures of the record, all previous

recipients of the record will be informed of the corrective action taken.

(e) If your appeal is denied, you will be informed in writing of the following:

(1) The denial and the reasons for the denial;

(2) That you may submit to ABMC a concise statement setting forth the reasons for your disagreement as to the disputed record. Under the procedures set forth in subsection (f) of this section, your statement will be disclosed whenever the disputed record is disclosed; and

(3) That you may seek judicial review of the Secretary's determination under 5 U.S.C. 552a(g)(1).

(f) Whenever you submit a statement of disagreement to ABMC in accordance with paragraph (e)(2) of this section, the record will be annotated to indicate that it is disputed. In any subsequent disclosure, a copy of your statement of disagreement will be disclosed with the record. If ABMC deems it appropriate, a concise statement of the Secretary's reasons for denying your appeal also may be disclosed with the record. While you will have access to this statement of the Secretary's reasons for denying your appeal, such statement will not be subject to correction or amendment. Where an accounting was made of prior disclosures of the record, all previous recipients of the record will be provided a copy of your statement of disagreement, as well as any statement of the Secretary's reasons for denying your appeal deemed appropriate.

#### **§ 407.8 Fees charged to locate, review, or copy records.**

(a) ABMC will charge no fees for search time or for any other time expended by ABMC to review a record. However, ABMC may charge fees where you request that a copy be made of a record to which you have been granted access. Where a copy of the record must be made in order to provide access to the record (e.g., computer printout where no screen reading is available), the copy will be made available to you without cost.

(b) Copies of records made by photocopy or similar process will be charged to you at the rate of \$0.15 per page. Where records are not susceptible to photocopying (e.g., punch cards, magnetic tapes, or oversize materials), you will be charged actual cost as determined on a case-by-case basis. Copying fees will not be charged if the cost of collecting a fee would be equal to or greater than the fee itself. Copying fees for contemporaneous requests by the same individual shall be aggregated to determine the total fee.

(c) Special and additional services provided at your request, such as certification or authentication, postal insurance, and special mailing arrangement costs, will be charged to you at the rates set forth in § 404.7(e) of this chapter.

(d) You may request that a copying fee not be charged or, alternatively, be reduced, by submitting a written petition to ABMC's General Counsel (see § 407.3) asserting that you are indigent. If the General Counsel determines, based on the petition, that you are indigent and that ABMC's resources permit a waiver of all or part of the fee, the General Counsel may, in his or her discretion, waive or reduce the copying fee.

(e) All fees shall be paid before any copying request is undertaken. Payments shall be made by check or money order payable to "American Battle Monuments Commission."

**§ 407.9 Procedures for accessing accountings of disclosures made by ABMC from its systems of records.**

(a) The Office of the General Counsel shall maintain a log containing the date, nature, and purpose of each disclosure of a record to any person or to another agency. Such accounting also shall contain the name and address of the person or agency to whom each disclosure was made. This log need not include disclosures made to ABMC employees in the course of their official duties, or pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552).

(b) ABMC will retain the accounting of each disclosure for at least five years after the disclosure for which the accounting is made or for the life of the record that was disclosed, whichever is longer.

(c) ABMC will make the accounting of disclosures of a record pertaining to you available to you at your request. Such a request should be made in accordance with the procedures set forth in § 407.4. This paragraph (c) does not apply to disclosures made for law enforcement purposes under 5 U.S.C. 552a(b)(7).

[FR Doc. 2017-17281 Filed 8-16-17; 8:45 am]

**BILLING CODE 6120-01-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-R04-OAR-2017-0415; FRL-9966-45-Region 4]

**Air Plan Approval; Alabama; Cross-State Air Pollution Rule**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve portions of the October 26, 2015, and May 19, 2017, State Implementation Plan (SIP) revisions from Alabama replacing the Cross-State Air Pollution Rule (CSAPR) federal implementation plan (FIP). Under CSAPR, large electricity generating units (EGUs) in Alabama are subject to FIP provisions requiring the units to participate in a federal allowance trading program for ozone season emissions of nitrogen oxides (NO<sub>x</sub>). This action would approve into Alabama's SIP the State's regulations requiring Alabama's affected units to participate in a new state allowance trading program for ozone season NO<sub>x</sub> emissions integrated with the CSAPR federal trading programs, replacing the corresponding CSAPR FIP requirements for Alabama. This state trading program is substantively identical to the federal trading program except with regard to the provisions allocating emission allowances among Alabama units. Under the CSAPR regulations, final approval of these portions of the SIP revisions would automatically eliminate Alabama units' FIP requirements to participate in CSAPR's federal allowance trading program for ozone season NO<sub>x</sub> emissions. Approval would also fully satisfy Alabama's good neighbor obligation under the Clean Air Act (CAA or Act) to prohibit emissions which will significantly contribute to nonattainment or interfere with maintenance of the 1997 8-hour Ozone National Ambient Air Quality Standards (NAAQS) in any other state; and would partially satisfy Alabama's good neighbor obligation under the CAA to prohibit emissions which will significantly contribute to nonattainment or interfere with maintenance of the 2008 8-hour Ozone NAAQS in any other state.

**DATES:** Comments must be received on or before September 18, 2017.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2017-0415 at <http://www.regulations.gov>. Follow the online

instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:**

Ashten Bailey, Air Regulatory Management Section, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303-8960. Ms. Bailey can be reached by telephone at (404) 562-9164 or via electronic mail at [bailey.ashten@epa.gov](mailto:bailey.ashten@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Summary**

EPA is proposing to approve the portions of the October 26, 2015, and May 19, 2017, SIP revisions from Alabama concerning CSAPR<sup>1</sup> allowance trading programs for ozone season emissions of NO<sub>x</sub>. Large EGUs in Alabama are currently subject to CSAPR FIPs that require the units to participate in the federal CSAPR NO<sub>x</sub> Group 2 Ozone Season Trading Program. The CSAPR regulations provide a process for the submission and approval of SIP revisions to replace the requirements of CSAPR FIPs with SIP requirements under which a state's units participate in CSAPR state trading programs that are integrated with and, with certain permissible exceptions, substantively

<sup>1</sup> Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (CSAPR Update), 81 FR 74504 (October 26, 2016) (codified as amended at 40 CFR 52.38 and 52.39 and subparts AAAAA through EEEEE of 40 CFR part 97); *see also* Federal Implementation Plans; Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 FR 48208 (August 8, 2011). EPA previously approved a SIP revision that replaced the CSAPR FIPs for the annual trading programs in Alabama. *See* 81 FR 59869 (Aug. 31, 2016).

identical to the CSAPR federal trading programs.

The portions of the SIP revisions proposed for approval would incorporate into Alabama's SIP state allowance trading program regulations for ozone season NO<sub>x</sub> emissions that would replace EPA's federal trading program regulations for those emissions from Alabama units. EPA is proposing to approve these portions of the SIP revisions, as clarified in a letter provided on August 4, 2017, because they meet the requirements of the CAA and EPA's regulations for approval of a CSAPR full SIP revision replacing a federal trading program with a state trading program that is integrated with and substantively identical to the federal trading program except for permissible differences with respect to emission allowance allocation provisions. Under the CSAPR regulations, approval of these portions of the SIP revisions would automatically eliminate the obligations of EGUs in Alabama (but not any units in Indian country within Alabama's borders) to participate in CSAPR's federal trading programs for ozone season NO<sub>x</sub> emissions under the corresponding CSAPR FIPs. EPA proposes to find that approval of these portions of the SIP revisions would satisfy Alabama's obligation pursuant to CAA section 110(a)(2)(D)(i)(I) to prohibit emissions which will significantly contribute to nonattainment or interfere with maintenance of the 1997 8-hour Ozone NAAQS in any other state. EPA also proposes to find that approval of these portions of the SIP revisions would partially satisfy Alabama's obligation pursuant to CAA section 110(a)(2)(D)(i)(I) to prohibit emissions which will significantly contribute to nonattainment or interfere with maintenance of the 2008 8-hour Ozone NAAQS in any other state.

Section II of this document summarizes relevant aspects of the CSAPR federal trading programs and FIPs as well as the range of opportunities states have to submit SIP revisions to modify or replace the FIP requirements while continuing to rely on CSAPR's trading programs to address the states' obligations to mitigate interstate air pollution. Section III describes the specific conditions for approval of such SIP revisions. Section IV contains EPA's analysis of Alabama's SIP submittal. Section V addresses incorporation by reference. Section VI sets forth EPA's proposed action on the submittal. Section VII addresses statutory and Executive Order reviews.

## II. Background on CSAPR and CSAPR-Related SIP Revisions

EPA issued CSAPR in July 2011 and the CSAPR Update<sup>2</sup> in 2016 to address the requirements of CAA section 110(a)(2)(D)(i)(I) concerning interstate transport of air pollution for specific NAAQS. As amended (including by the 2016 CSAPR Update), CSAPR requires 27 eastern states to limit their statewide emissions of sulfur dioxide (SO<sub>2</sub>) and/or NO<sub>x</sub> in order to mitigate transported air pollution unlawfully impacting other states' ability to attain or maintain four NAAQS: the 1997 annual PM<sub>2.5</sub> NAAQS, the 2006 24-hour PM<sub>2.5</sub> NAAQS, the 1997 8-hour Ozone NAAQS, and the 2008 8-hour Ozone NAAQS. The CSAPR emissions limitations are defined in terms of maximum statewide "budgets" for emissions of annual SO<sub>2</sub>, annual NO<sub>x</sub>, and/or ozone season NO<sub>x</sub> by each covered state's large EGUs. The CSAPR state budgets are implemented in two phases of generally increasing stringency: The Phase 1 budgets apply to emissions in 2015 and 2016; and the Phase 2 and CSAPR Update budgets apply to emissions in 2017 and later years. As a mechanism for achieving compliance with the emissions limitations, CSAPR establishes five federal emissions trading programs: a program for annual NO<sub>x</sub> emissions; two geographically separate programs for annual SO<sub>2</sub> emissions; and two geographically separate programs for ozone season NO<sub>x</sub> emissions. CSAPR also establishes FIP requirements applicable to the large EGUs in each covered state.<sup>3</sup> Currently, the CSAPR

<sup>2</sup> See 81 FR 74504 (October 26, 2016). The CSAPR Update was promulgated to address interstate pollution with respect to the 2008 8-hour Ozone NAAQS and to address a judicial remand of certain original CSAPR ozone season NO<sub>x</sub> budgets promulgated with respect to the 1997 8-hour Ozone NAAQS. *Id.* at 74505. The CSAPR Update established new emission reduction requirements addressing the more recent ozone NAAQS and coordinated them with the remaining emission reduction requirements addressing the older NAAQS, so that starting in 2017, CSAPR includes two geographically separate trading programs for ozone season NO<sub>x</sub> emissions covering EGUs in a total of 23 states. See 40 CFR 52.38(b)(1)–(2).

<sup>3</sup> States are required to submit good neighbor SIPs three years after a NAAQS is promulgated. CAA section 110(a)(1) and (2). Where EPA finds that a state fails to submit a required SIP or disapproves a SIP, EPA is obligated to promulgate a FIP addressing the deficiency. CAA section 110(c). EPA found that Alabama failed to make timely submissions required to address the good neighbor provision with respect to the 1997 annual PM<sub>2.5</sub> and 8-hour ozone NAAQS (70 FR 21147, Apr. 25, 2005), and the 2008 8-hour ozone NAAQS (80 FR 39961, June 13, 2015). In addition, EPA disapproved Alabama's SIP revision submitted to address the good neighbor provision with respect to the 2006 24-hour PM<sub>2.5</sub> NAAQS. See 76 FR 43128 (July 20, 2011). Accordingly, as a part of CSAPR and the

FIP provisions require each state's units to participate in up to three of the five CSAPR trading programs.

CSAPR includes provisions under which states may submit and EPA will approve SIP revisions to modify or replace the CSAPR FIP requirements while allowing states to continue to meet their transport-related obligations using either CSAPR's federal emissions trading programs or state emissions trading programs integrated with the federal programs, provided that the SIP revisions meet all relevant criteria.<sup>4</sup> Through such a SIP revision, a state may replace EPA's default provisions for allocating emission allowances among the state's units, employing any state-selected methodology to allocate or auction the allowances, subject to timing conditions and limits on overall allowance quantities. In the case of CSAPR's federal trading programs for ozone season NO<sub>x</sub> emissions (or an integrated state trading program), a state may also expand trading program applicability to include certain smaller EGUs.<sup>5</sup> If a state wants to replace the CSAPR FIP requirements with SIP requirements under which the state's units participate in a state trading program that is integrated with and identical to the federal trading program even as to the allocation and applicability provisions, the state may submit a SIP revision for that purpose as well. However, no emissions budget increases or other substantive changes to the trading program provisions are allowed. A state whose units are subject to multiple CSAPR federal trading programs may submit SIP revisions to modify or replace either some or all of those FIP requirements.

States can submit two basic forms of CSAPR-related SIP revisions effective for emissions control periods in 2017 or later years.<sup>6</sup> Specific conditions for approval of each form of SIP revision are set forth in the CSAPR regulations, as described in section III below. Under

CSAPR Update, EPA promulgated FIPs applicable to sources in Alabama addressing the good neighbor provision with respect to these standards.

<sup>4</sup> See 40 CFR 52.38, 52.39. States also retain the ability to submit SIP revisions to meet their transport-related obligations using mechanisms other than the CSAPR federal trading programs or integrated state trading programs.

<sup>5</sup> States covered by both the CSAPR Update and the NO<sub>x</sub> SIP Call have the additional option to expand applicability under the CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program to include non-EGUs that would have participated in the NO<sub>x</sub> Budget Trading Program.

<sup>6</sup> CSAPR also provides for a third, more streamlined form of SIP revision that is effective only for control periods in 2016 (or 2018 for CSAPR NO<sub>x</sub> Ozone Season Group 2 units) and is not relevant here. See § 52.38(a)(3), (b)(3), (b)(7); § 52.39(d), (g).

the first alternative—an “abbreviated” SIP revision—a state may submit a SIP revision that upon approval replaces the default allowance allocation and/or applicability provisions of a CSAPR federal trading program for the state.<sup>7</sup> Approval of an abbreviated SIP revision leaves the corresponding CSAPR FIP and all other provisions of the relevant federal trading program in place for the state’s units.

Under the second alternative—a “full” SIP revision—a state may submit a SIP revision that upon approval replaces a CSAPR federal trading program for the state with a state trading program integrated with the federal trading program, so long as the state trading program is substantively identical to the federal trading program or does not substantively differ from the federal trading program except as discussed above with regard to the allowance allocation and/or applicability provisions.<sup>8</sup> For purposes of a full SIP revision, a state may either adopt state rules with complete trading program language, incorporate the federal trading program language into its state rules by reference (with appropriate conforming changes), or employ a combination of these approaches.

The CSAPR regulations identify several important consequences and limitations associated with approval of a full SIP revision. First, upon EPA’s approval of a full SIP revision as correcting the deficiency in the state’s SIP that was the basis for a particular set of CSAPR FIP requirements, the obligation to participate in the corresponding CSAPR federal trading program is automatically eliminated for units subject to the state’s jurisdiction without the need for a separate EPA withdrawal action, so long as EPA’s approval of the SIP revision as meeting the requirements of the CSAPR regulations is full and unconditional.<sup>9</sup> Second, approval of a full SIP revision does not terminate the obligation to participate in the corresponding CSAPR federal trading program for any units located in any Indian country within the borders of the state, and if and when a unit is located in Indian country within a state’s borders, EPA may modify the SIP approval to exclude from the SIP, and include in the surviving CSAPR FIP instead, certain trading program provisions that apply jointly to units in the state and to units in Indian country

within the state’s borders.<sup>10</sup> Finally, if at the time a full SIP revision is approved EPA has already started recording allocations of allowances for a given control period to a state’s units, the federal trading program provisions authorizing EPA to complete the process of allocating and recording allowances for that control period to those units will continue to apply, unless EPA’s approval of the SIP revision provides otherwise.<sup>11</sup>

### III. Conditions for Approval of CSAPR-Related SIP Revisions

Each CSAPR-related abbreviated or full SIP revision must meet the following general submittal conditions:

- *Timeliness and completeness of SIP submittal.* If a state wants to replace the default allowance allocation or applicability provisions of a CSAPR federal trading program, the complete SIP revision must be submitted to EPA by December 1 of the year before the deadlines described below for submitting allocation or auction amounts to EPA for the first control period for which the state wants to replace the default allocation and/or applicability provisions.<sup>12</sup> This SIP submission deadline is inoperative in the case of a SIP revision that seeks only to replace a CSAPR FIP and federal trading program with a SIP and a substantively identical state trading program integrated with the federal trading program. The SIP submittal completeness criteria in section 2.1 of appendix V to 40 CFR part 51 also apply.

In addition to the general submittal conditions, a CSAPR-related abbreviated or full SIP seeking to address the allocation or auction of emission allowances must meet the following further conditions:

- *Methodology covering all allowances potentially requiring allocation.* For each federal trading program addressed by a SIP revision, the SIP revision’s allowance allocation or auction methodology must replace both the federal program’s default allocations to existing units<sup>13</sup> at 40 CFR

<sup>10</sup> 40 CFR 52.38(a)(5)(iv)–(v), (a)(6), (b)(5)(v)–(vi), (b)(9)(vi)–(vii), (b)(10)(i); 52.39(f)(4)–(5), (i)(4)–(5), (j).

<sup>11</sup> 40 CFR 52.38(a)(7), (b)(11); 52.39(k).

<sup>12</sup> 40 CFR 52.38(a)(4)(ii), (a)(5)(vi), (b)(4)(iii), (b)(5)(vii), (b)(8)(iv), (b)(9)(viii); 52.39(e)(2), (f)(6), (h)(2), (i)(6).

<sup>13</sup> In the context of the approval conditions for CSAPR-related SIP revisions, an “existing unit” is a unit for which EPA has determined default allowance allocations (which could be allocations of zero allowances) in the rulemakings establishing and amending CSAPR. A document describing EPA’s default allocations to existing units is available at <https://www.epa.gov/sites/production/>

97.411(a), 97.511(a), 97.611(a), 97.711(a), or 97.811(a), as applicable, and the federal trading program’s provisions for allocating allowances from the new unit set-aside (NUSA) for the state at 40 CFR 97.411(b)(1) and 97.412(a), 97.511(b)(1) and 97.512(a), 97.611(b)(1) and 97.612(a), 97.711(b)(1) and 97.712(a), or 97.811(b)(1) and 97.812(a), as applicable.<sup>14</sup> In the case of a state with Indian country within its borders, while the SIP revision may neither alter nor assume the federal program’s provisions for administering the Indian country NUSA for the state, the SIP revision must include procedures addressing the disposition of any otherwise unallocated allowances from an Indian country NUSA that may be made available for allocation by the state after EPA has carried out the Indian country NUSA allocation procedures.<sup>15</sup>

- *Assurance that total allocations will not exceed the state budget.* For each federal trading program addressed by a SIP revision, the total amount of allowances auctioned or allocated for each control period under the SIP revision (prior to the addition by EPA of any unallocated allowances from any Indian country NUSA for the state) generally may not exceed the state’s emissions budget for the control period less the sum of the amount of any Indian country NUSA for the state for the control period and any allowances already allocated to the state’s units for the control period and recorded by EPA.<sup>16</sup> Under its SIP revision, a state is free to not allocate allowances to some or all potentially affected units, to allocate or auction allowances to entities other than potentially affected units, or to allocate or auction fewer than the maximum permissible quantity of allowances and retire the remainder. Under the CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program only, additional allowances may be allocated if the state elects to expand applicability to non-EGUs that would have been subject to the NO<sub>x</sub> Budget Trading Program established for compliance with the NO<sub>x</sub> SIP Call.<sup>17</sup>

- *Timely submission of state-determined allocations to EPA.* The SIP revision must require the state to submit

[files/2017-05/documents/csapr\\_allowance\\_allocations\\_final\\_rule\\_tsd.pdf](https://www.epa.gov/sites/production/files/2017-05/documents/csapr_allowance_allocations_final_rule_tsd.pdf).

<sup>14</sup> 40 CFR 52.38(a)(4)(i), (a)(5)(i), (b)(4)(ii), (b)(5)(ii), (b)(8)(iii), (b)(9)(iii); 52.39(e)(1), (f)(1), (h)(1), (i)(1).

<sup>15</sup> See 40 CFR 97.412(b)(10)(ii), 97.512(b)(10)(ii), 97.612(b)(10)(ii), 97.712(b)(10)(ii), 97.812(b)(10)(ii).

<sup>16</sup> 40 CFR 52.38(a)(4)(i)(A), (a)(5)(i)(A), (b)(4)(ii)(A), (b)(5)(ii)(A), (b)(8)(iii)(A), (b)(9)(iii)(A); 52.39(e)(1)(i), (f)(1)(i), (h)(1)(i), (i)(1)(i).

<sup>17</sup> 40 CFR 52.38(b)(8)(iii)(A), (b)(9)(iii)(A).

<sup>7</sup> 40 CFR 52.38(a)(4), (b)(4), (b)(8); 52.39(e), (h).

<sup>8</sup> 40 CFR 52.38(a)(5), (b)(5), (b)(9); 52.39(f), (i).

<sup>9</sup> 40 CFR 52.38(a)(6), (b)(10)(i); 52.39(j).



to EPA the amounts of any allowances allocated or auctioned to each unit for each control period (other than allowances initially set aside in the state's allocation or auction process and

later allocated or auctioned to such units from the set-aside amount) by the following deadlines.<sup>18</sup> Note that the submission deadlines differ for amounts allocated or auctioned to units

considered existing units for CSAPR purposes and amounts allocated or auctioned to other units.

**CSAPR NO<sub>x</sub> ANNUAL, CSAPR NO<sub>x</sub> OZONE SEASON GROUP 1, CSAPR SO<sub>2</sub> GROUP 1, AND CSAPR SO<sub>2</sub> GROUP 2 TRADING PROGRAMS**

Units	Year of the control period	Deadline for submission to EPA of allocations or auction results
Existing .....	2017 and 2018 .....	June 1, 2016.
	2019 and 2020 .....	June 1, 2017.
	2021 and 2022 .....	June 1, 2018.
	2023 and later years .....	June 1 of the fourth year before the year of the control period.
Other .....	All years .....	July 1 of the year of the control period.

**CSAPR NO<sub>x</sub> OZONE SEASON GROUP 2 TRADING PROGRAM**

Units	Year of the control period	Deadline for submission to EPA of allocations or auction results
Existing .....	2019 and 2020 .....	June 1, 2018.
	2021 and 2022 .....	June 1, 2019.
	2023 and 2024 .....	June 1, 2020.
	2025 and later years .....	June 1 of the fourth year before the year of the control period.
Other .....	All years .....	July 1 of the year of the control period.

- *No changes to allocations already submitted to EPA or recorded.* The SIP revision must not provide for any change to the amounts of allowances allocated or auctioned to any unit after those amounts are submitted to EPA or any change to any allowance allocation determined and recorded by EPA under the federal trading program regulations.<sup>19</sup>

- *No other substantive changes to federal trading program provisions.* The SIP revision may not substantively change any other trading program provisions, except in the case of a SIP revision that also expands program applicability as described below.<sup>20</sup> Any new definitions adopted in the SIP revision (in addition to the federal trading program's definitions) may apply only for purposes of the SIP revision's allocation or auction provisions.<sup>21</sup>

In addition to the general submittal conditions, a CSAPR-related abbreviated or full SIP revision seeking to expand applicability under the CSAPR NO<sub>x</sub> Ozone Season Group 1 or CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Programs (or an integrated state trading program) must meet the following further conditions:

- *Only electricity generating units with nameplate capacity of at least 15*

MWe. The SIP revision may expand applicability only to additional fossil fuel-fired boilers or combustion turbines serving generators producing electricity for sale, and only by lowering the generator nameplate capacity threshold used to determine whether a particular boiler or combustion turbine serving a particular generator is a potentially affected unit. The nameplate capacity threshold adopted in the SIP revision may not be less than 15 MWe.<sup>22</sup> In addition or alternatively, applicability under the CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program may be expanded to non-EGUs that would have been subject to the NO<sub>x</sub> Budget Trading Program established for compliance with the NO<sub>x</sub> SIP Call.<sup>23</sup>

- *No other substantive changes to federal trading program provisions.* The SIP revision may not substantively change any other trading program provisions, except in the case of a SIP revision that also addresses the allocation or auction of emission allowances as described above.<sup>24</sup>

In addition to the general submittal conditions and the other applicable conditions described above, a CSAPR-related full SIP revision must meet the following further conditions:

- *Complete, substantively identical trading program provisions.* The SIP

revision must adopt complete state trading program regulations substantively identical to the complete federal trading program regulations at 40 CFR 97.402 through 97.435, 97.502 through 97.535, 97.602 through 97.635, 97.702 through 97.735, or 97.802 through 97.835, as applicable, except as described above in the case of a SIP revision that seeks to replace the default allowance allocation and/or applicability provisions.<sup>25</sup>

- *Only non-substantive substitutions for the term "State."* The SIP revision may substitute the name of the state for the term "State" as used in the federal trading program regulations, but only to the extent that EPA determines that the substitutions do not substantively change the trading program regulations.<sup>26</sup>

- *Exclusion of provisions addressing units in Indian country.* The SIP revision may not impose requirements on any unit in any Indian country within the state's borders and must not include the federal trading program provisions governing allocation of allowances from any Indian country NUSA for the state.<sup>27</sup>

<sup>18</sup> 40 CFR 52.38(a)(4)(i)(B)-(C), (a)(5)(i)(B)-(C), (b)(4)(ii)(B)-(C), (b)(5)(ii)(B)-(C), (b)(8)(iii)(B)-(C), (b)(9)(iii)(B)-(C); 52.39(e)(1)(ii)-(iii), (f)(1)(ii)-(iii), (h)(1)(ii)-(iii), (i)(1)(ii)-(iii).

<sup>19</sup> 40 CFR 52.38(a)(4)(i)(D), (a)(5)(i)(D), (b)(4)(i)(D), (b)(5)(i)(D), (b)(8)(iii)(D), (b)(9)(iii)(D); 52.39(e)(1)(iv), (f)(1)(iv), (h)(1)(iv), (i)(1)(iv).

<sup>20</sup> 40 CFR 52.38(a)(4), (a)(5), (b)(4), (b)(5), (b)(8), (b)(9); 52.39(e), (f), (h), (i).

<sup>21</sup> 40 CFR 52.38(a)(4)(i), (a)(5)(ii), (b)(4)(ii), (b)(5)(iii), (b)(8)(iii), (b)(9)(iv); 52.39(e)(1), (f)(2), (h)(1), (i)(2).

<sup>22</sup> 40 CFR 52.38(b)(4)(i), (b)(5)(i), (b)(8)(i), (b)(9)(i).

<sup>23</sup> 40 CFR 52.38(b)(8)(ii), (b)(9)(ii).

<sup>24</sup> 40 CFR 52.38(b)(4), (b)(5), (b)(8), (b)(9).

<sup>25</sup> 40 CFR 52.38(a)(5), (b)(5), (b)(9); 52.39(f), (i).

<sup>26</sup> 40 CFR 52.38(a)(5)(iii), (b)(5)(iv), (b)(9)(v); 52.39(f)(3), (i)(3).

<sup>27</sup> 40 CFR 52.38(a)(5)(iv), (b)(5)(v), (b)(9)(vi);

52.39(f)(4), (i)(4).

#### IV. Alabama's SIP Submittal and EPA's Analysis

##### A. Alabama's SIP Submittal

In the CSAPR rulemaking, among other findings, EPA determined that air pollution transported from Alabama would unlawfully affect other states' ability to attain or maintain the 1997 8-hour Ozone NAAQS.<sup>28</sup> In the CSAPR Update rulemaking, EPA determined that air pollution transported from Alabama would unlawfully affect other states' ability to attain or maintain the 2008 8-hour Ozone NAAQS and established an ozone season NO<sub>x</sub> budget for Alabama's EGUs representing a partial remedy for the State's interstate transport obligations with respect to that NAAQS;<sup>29</sup> determined that Alabama's previous ozone season NO<sub>x</sub> budget established in the CSAPR rulemaking as a partial remedy for the State's interstate transport obligations with respect to the 1997 8-hour Ozone NAAQS now represented a full remedy with respect to that NAAQS;<sup>30</sup> and coordinated compliance requirements by allowing compliance with the new CSAPR Update budget to serve the purpose of addressing the State's obligations with respect to both NAAQS.<sup>31</sup> Alabama units meeting the CSAPR applicability criteria are consequently subject to CSAPR FIP requirements for participation in the CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program in order to address the State's interstate transport obligations with respect to both the 1997 8-hour Ozone NAAQS (full remedy) and the 2008 8-hour Ozone NAAQS (partial remedy).<sup>32</sup>

On October 26, 2015, Alabama submitted to EPA a SIP revision including provisions that, if approved, would incorporate into Alabama's SIP state trading program regulations that would replace the CSAPR federal trading program regulations with regard to Alabama units' ozone season NO<sub>x</sub> emissions.<sup>33</sup> On May 19, 2017, Alabama submitted to EPA a SIP revision that

supersedes portions of the October 26, 2015, submittal to reflect changes from the CSAPR Update.<sup>34</sup> On August 4, 2017, Alabama sent a letter clarifying the State's interpretation concerning the allowances for the Indian country NUSA for Alabama. The Alabama ozone season submittals include duly adopted state rules at rules 335–3–8–.39 through 335–3–8–.70, which establish Alabama's "TR NO<sub>x</sub> Ozone Season Group 2 Trading Program."<sup>35</sup> In general, each individual rule in Alabama's CSAPR state trading program rules is designed to replace one individual section (or in a few cases two or three sections) of the corresponding federal trading program regulations, and the set of rules is designed to collectively replace all sections of the corresponding federal trading program regulations at subpart EEEEE of 40 CFR part 97 (*i.e.*, 40 CFR 97.801 through 97.835).

With regard to form, some of the individual rules for each Alabama CSAPR state trading program are set forth as full regulatory text—notably the rules addressing program applicability, emissions budgets and variability limits, and allowance allocations—but most of the rules incorporate the corresponding federal trading program section or sections by reference. Several of the Alabama rules adopt cross-references to other Alabama rules in place of cross-references to specific federal trading program sections that would be replaced by those other Alabama rules.

With regard to substance, the rules for the Alabama CSAPR state ozone season trading program differ from the corresponding CSAPR federal trading program regulations in three main ways. First, the applicability provisions in the Alabama rules require participation in Alabama's CSAPR state trading programs only for units in Alabama, not for units in any other state or in Indian country within the borders of Alabama or any other state. Second, the Alabama rules set forth a methodology for allocating emission allowances among Alabama units that differs from the default allowance allocation provisions in the federal trading program regulations.<sup>36</sup> Finally, the Alabama

rules omit a number of federal trading program provisions not applicable to Alabama's state trading programs, including: provisions setting forth the amounts of emissions budgets, NUSAs, Indian country NUSAs, and variability limits for other states; provisions addressing EPA's procedures for allocating allowances from Indian country NUSAs; and provisions addressing EPA's recordation of certain allowance allocations.

Each SIP revision was submitted to EPA by a letter from the Director of the Alabama Department of Environmental Management. The letters and enclosures describe steps taken by Alabama to provide public notice prior to adoption of the state rules.

EPA has previously approved portions of Alabama's October 26, 2015, submittal replacing the FIPs for the CSAPR NO<sub>x</sub> Annual Trading Program and the CSAPR SO<sub>2</sub> Group 2 Trading Program for Alabama.<sup>37</sup>

##### B. EPA's Analysis of Alabama's Submittals

As described in section IV.A above, at this time EPA is taking action on the portions of Alabama's ozone season submittals designed to replace the federal CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program. The analysis discussed in this section addresses only the portions of Alabama's ozone season submittals on which EPA is taking action at this time. For simplicity, throughout this section EPA refers to the portions of the submittals on which EPA is proposing to take action as "the Alabama ozone season submittals" or "the SIP revisions" without repeating the qualification that at this time EPA is analyzing and proposing to act on only portions of the SIP submittal.

##### 1. Timeliness and Completeness of SIP Submittal

Together, the Alabama ozone season submittals seek in part to replace the default allowance allocation provisions in the CSAPR federal trading program regulations for ozone season NO<sub>x</sub> emissions as applied to Alabama units with state regulations establishing a different state-determined methodology, starting with the control periods in 2019. Under 40 CFR 52.38(b)(9)(iii)(B), the deadline for submission of state-determined allowance allocations for the 2019 and 2020 control periods is June 1, 2018, which under § 52.38(b)(9)(viii) makes December 1, 2017, the deadline for submission to

<sup>28</sup> See 76 FR 48208, 48210, 48213 (August 8, 2011). EPA also determined in the CSAPR rulemaking that air pollution transported from Alabama would unlawfully affect other states' ability to attain or maintain the 1997 annual PM<sub>2.5</sub> NAAQS and the 2006 24-hour PM<sub>2.5</sub> NAAQS. Alabama previously submitted, and EPA previously approved, a SIP revision that replaces the CSAPR FIPs for the annual trading programs in Alabama. See 81 FR 59869 (August 31, 2016).

<sup>29</sup> CSAPR Update, 81 FR at 74507–08.

<sup>30</sup> *Id.* at 74525.

<sup>31</sup> *Id.* at 74563 n.169.

<sup>32</sup> 40 CFR 52.38(b)(2), (b)(2)(iii); 52.54(a), (b).

<sup>33</sup> As discussed above, the October 26, 2015 submittal also contained provisions related to the annual NO<sub>x</sub> and SO<sub>2</sub> trading programs, which EPA approved in a separate rulemaking. See 81 FR 59869 (August 31, 2016).

<sup>34</sup> For the purposes of this rulemaking, the October 26, 2015, and May 19, 2017, submittals together may also be referred to as the "Alabama ozone season submittals."

<sup>35</sup> Alabama's rules use the terms "Transport Rule" and "TR" instead of the updated terms "Cross-State Air Pollution Rule" and "CSAPR." For simplicity, EPA uses the updated terms here except where otherwise noted.

<sup>36</sup> EPA notes that in the CSAPR Update, the allocations of Alabama's allowance budget to the state's units under the federal CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program were determined using a methodology similar to the methodology in

Alabama's October 26, 2015 SIP submittal, 81 FR at 74564.

<sup>37</sup> See 81 FR 59869 (August 31, 2016).

EPA of a complete SIP revision establishing state-determined allocations for those control periods. Alabama submitted its SIP revisions on October 26, 2015 and May 19, 2017, and EPA has determined that the submittals comply with the applicable minimum completeness criteria in section 2.1 of appendix V to 40 CFR part 51. Because Alabama's SIP revisions were timely submitted and meet the applicable completeness criteria, they meet the conditions under 40 CFR 52.38(b)(9)(viii) for timely submission of a complete SIP revision.

## 2. Methodology Covering All Allowances Potentially Requiring Allocation

Paragraph 335-3-8-.46(1) of the Alabama rules sets forth total amounts of 13,211 CSAPR NO<sub>x</sub> Ozone Season Group 2 allowances that would be allocated to Alabama units for each control period in 2019 and later years according to the allocation procedures set forth under the remaining paragraphs of Alabama rule 335-3-8-.46 (Paragraph 335-3-8-.45(1) sets forth the same amounts as the respective state emissions budgets, in conjunction with the corresponding variability limits). These totals match the amounts of the Phase 2 emissions budgets for Alabama established under the federal trading program regulations for ozone NO<sub>x</sub> emissions, thereby addressing the full quantities of allowances that could be allocated to Alabama units under the default allocation provisions for the federal trading programs.<sup>38</sup> In addition, Alabama's rule—through provisions that create an iterative process for allocating allowances—addresses the disposition of otherwise unallocated allowances from an Indian country NUSA. The allocation provisions in the Alabama rules therefore enable Alabama's SIP revision to meet the condition under 40 CFR 52.38(b)(9)(iii) that the state's allocation or auction methodology must cover all allowances potentially requiring allocation by the state.

## 3. Assurance That Total Allocations Will Not Exceed the State Budget

As discussed in section IV.B.2 above, paragraph 335-3-8-.46(1) of the Alabama rules sets forth the total amount of CSAPR Ozone Season Group 2 NO<sub>x</sub> allowances to be allocated to Alabama units for each control period under the state trading program and this amount equals the amount of the ozone season NO<sub>x</sub> emissions budget established for Alabama units under the CSAPR federal trading program

regulations. Although under the State's rules, Alabama will provide EPA with allocations for allowances equal to the total amount of the state budget, the State has clarified in its August 4, 2017, letter that, under the State's interpretation of its rules, the allocations of a portion of the total state budget equal to the Indian country NUSA are to be implemented by EPA only if and when the total quantity of allowances in the State's Indian country NUSA is released for state allocation pursuant to 40 CFR 97.812(b)(10)(ii), and if that total quantity of allowances is not released for state allocation, then the State's allocations of that portion of the budget are void.<sup>39</sup> To clarify the separate, contingent nature of the State's allocations of the Indian country NUSA allowances, the State will submit its allocations of those allowances to the EPA as a separate set of allocations from the allocations of the remaining allowances in the state budget.<sup>40</sup> EPA has not yet allocated or recorded CSAPR allowances for the control periods in 2019 or later years. As interpreted by the State, the allocation methodology in Alabama's SIP revision therefore meets the condition under 40 CFR 52.38(b)(9)(iii)(A) that the total amount of allowances allocated under the SIP revision (before the addition of any otherwise unallocated allowances from an Indian country NUSA) may not exceed the state's budget for the control period less the amount of the Indian country NUSA for the state and any allowances already allocated and recorded by EPA.

## 4. Timely Submission of State-Determined Allocations to EPA

Paragraphs 335-3-8-.46(2)(a) through (d) of the Alabama rules provide for all allowance allocations to Alabama units established under the Alabama rules to be submitted to EPA by the following deadlines: Allocations for the control periods in 2019 and 2020, by June 1, 2017; allocations for the control periods in 2021 and 2022, by June 1, 2018; and allocations for later control periods, by June 1 of the fourth or fifth year before the year of the control period. These submission deadlines match or precede the submission deadlines discussed in section III above (specifically, the deadlines under 40 CFR 52.38(b)(9)(iii)(B) for allocations to units considered existing units for CSAPR purposes and the submission deadlines under § 52.38(b)(9)(iii)(C) for allocations

to other units). Alabama's SIP revision therefore meets the conditions under 40 CFR 52.38(b)(9)(iii)(B) and (C) requiring that the SIP revision provide for submission of state-determined allowance allocations to EPA by the deadlines specified in those provisions.

## 5. No Changes to Allocations Already Submitted to EPA or Recorded

The Alabama rules include no provisions allowing alteration of allocations after the allocation amounts have been provided to EPA and no provisions allowing alteration of any allocations made and recorded by EPA under the federal trading program regulations, thereby meeting the condition under 40 CFR 52.38(b)(9)(iii)(D).

## 6. No Other Substantive Changes to Federal Trading Program Provisions

With the exception of the provisions addressing the allowance allocation methodology discussed above, the Alabama state trading program rules generally incorporate sections of the corresponding federal trading program regulations by reference or set forth full text that is very similar to the text in the corresponding federal trading program regulations.<sup>41</sup> Some of the differences between the Alabama rules and the corresponding federal trading program regulations are clearly non-substantive. For example, in instances where an Alabama rule contains full text substituting for the text of a section of the federal trading program regulations, the remaining Alabama rules adopt cross-references to the full-text Alabama rule in place of cross-references to the section of the federal trading program regulations that would be replaced by the full-text Alabama rule. The Alabama rules also contain definitions for certain terms used in the State trading program's allocation provisions that are not used in the federal trading program regulations, as expressly permitted under the CSAPR regulations.<sup>42</sup> Most of the remaining differences between the Alabama rules and the corresponding sections of the federal trading program regulations consist of non-substantive renumbering of the provisions.<sup>43</sup>

In addition to the clearly non-substantive or expressly authorized

<sup>41</sup> The CSAPR federal regulations explicitly provide that terms in the federal CSAPR regulations that include "CSAPR" are considered synonymous with otherwise identical terms in approved SIP revisions that include "TR" instead of "CSAPR". 40 CFR 97.802 (introductory text).

<sup>42</sup> 40 CFR 52.38(b)(9)(iv).

<sup>43</sup> Instances where Alabama's CSAPR state trading program rules omit provisions of the CSAPR federal trading program regulations are discussed in sections IV.B.7 and 9 below.

<sup>38</sup> 40 CFR 97.810(a)(1)(i).

<sup>39</sup> August 4, 2017, Letter from R. Gore (ADEM) to B. Banister (EPA, Region 4), available in the docket for this action.

<sup>40</sup> *Id.*

differences summarized above, a few of Alabama's rules contain other differences from the federal trading program regulations. In each case, EPA has determined that the changes do not represent substantive changes to the federal trading program regulations. First, paragraphs 335-3-8-.40(1)(c), 335-3-8-.41(1)(a), and 335-3-8-.66(2)(a), of the Alabama rules require Alabama units to submit certain petitions, statements, and notices not only to EPA but also to the Alabama Department of Environmental Management. In addition, paragraph 335-3-8-.42(e) of the Alabama rules allow the Department to extend on-site storage of records beyond five years. Because the additional notification requirements do not alter the respective authorities or responsibilities of EPA and the Department, EPA considers the requirements to be non-substantive changes.

Second, paragraphs 335-3-8-.52(2)(a), and 335-3-8-.55(2)(a) of the Alabama rules provide that, like EPA, the Department will not adjudicate certain private legal disputes. Because the Department is not required to adjudicate such disputes under the federal trading program regulations in any event, these additions to the text of the state trading program rules merely clarify that the Department is not undertaking a new adjudication responsibility under the state trading programs. EPA therefore considers these additions to be non-substantive changes.

Third, paragraph 335-3-8-.61 of the Alabama rule substitutes references to Alabama rule 335-3-8-.46(3)(i) (the Alabama rule addressing units incorrectly allocated allowances). Because the Alabama rule substitution seeks to replace 40 CFR 97.811(c) with 335-3-8-.46(3)(i), which in turn incorporates by reference 40 CFR 97.811(c), EPA proposes to find that the provisions are substantively identical.

Fourth, paragraph 335-3-8-.65 of the Alabama rules substitutes references for Alabama rule 335-3-8-.41 (the Alabama rule covering retired unit exemptions). This substitution is appropriate as it substitutes Alabama's retired unit exemption for the CSAPR retired unit exemptions at 40 CFR 97.805. With the exception of the notification required above and changes related to identification of the state trading program instead of the federal trading program, Alabama has incorporated the text of 40 CFR 97.805 into Alabama Rule 335-3-8-.41. Because the referenced provisions are substantively identical, EPA proposes to determine that these substitutions have no substantive effect.

Finally, paragraphs 335-3-8-.42(2)(a) and (b) of the Alabama rules substitute references to Alabama rule 335.3.16-.13(3) (the Alabama rule addressing minor permit modification procedures) for references to 40 CFR 70.7(e)(2) (the minor permit modification procedures section of the federal regulations governing state operating permit programs under CAA title V) in the federal trading program regulations regarding title V permit requirements. As applied to Alabama units only, the substituted Alabama rule provisions are substantively identical to the provisions in 40 CFR 70.7(e)(2) that would be replaced. Because in the context of Alabama's CSAPR state trading programs these particular provisions need to address only Alabama units and not units from other states participating in the CSAPR trading programs, EPA proposes to determine that these substitutions have no substantive effect.

For the reasons discussed above, EPA has preliminarily determined that none of the textual additions or substitutions made to the CSAPR federal trading program regulations in Alabama's corresponding CSAPR state trading program rules are substantive, and that Alabama's SIP revision therefore meets the condition under 40 CFR 52.38(b)(9) of making no substantive changes to the provisions of the federal trading program regulations beyond the provisions addressing allowance allocations.

#### 7. Complete, Substantively Identical Trading Program Provisions

With the following exceptions, the Alabama rules comprising Alabama's CSAPR state trading program for ozone season NO<sub>x</sub> emissions either incorporate by reference or adopt full-text replacements for all of the provisions of 40 CFR 97.802 through 97.835. The first exception is that Alabama rule 335-3-8-.46, which generally addresses the amount of emissions budget and related quantities, omits the provisions of 40 CFR 97.810 setting forth the amounts of all emissions budgets, NUSAs, Indian country NUSAs, and variability limits for other states. Omission of the budget, NUSA, Indian country NUSA, and variability limit provisions for other states from state trading programs in which only Alabama units participate does not undermine the completeness of the state trading programs.

The second exception is that Alabama rule 335-3-8-.46, generally addressing allowance allocations, omits 40 CFR 97.811(b)(2) and 97.812(b), concerning EPA's administration of Indian country NUSAs. Omission of these provisions

from Alabama's state trading program rules is required, as discussed in section IV.B.9 below.

The third exception is that Alabama rule 335-3-8-.56, which generally incorporates by reference the federal trading programs' recordation schedule provisions, excludes from incorporation by reference 40 CFR 97.821(a), (b), (h), (i) and (j) concerning EPA's schedule for recording certain allowance allocations. The federal trading program provisions at § 97.821(a) and (b), which address recordation of allocations to units considered existing units for CSAPR purposes of allowances for the compliance periods in 2017 and 2018, do not need to be included in Alabama's state trading program rules because those allocations have already been recorded. The federal trading program provision at § 97.821(h), which address recordation of allocations from Indian country NUSAs, are appropriately excluded from state trading programs because a state may not administer an Indian country NUSA. The federal trading program provision at § 97.821(i) and (j), which address recordation of second-round NUSA allocations, are not needed in Alabama's state trading program rules because Alabama would provide EPA the amounts of its NUSA allocations on the earlier schedule applicable to allocations to units considered existing units for CSAPR purposes.<sup>44</sup> Omission of these provisions from Alabama's state trading programs therefore does not undermine the completeness of the state trading programs.

Because none of the omissions undermines the completeness of Alabama's state trading programs and because, as discussed in section IV.B.6 above, EPA has preliminarily determined that Alabama's SIP revision makes no other substantive changes to the provisions of the federal trading program regulations beyond the provisions addressing allowance allocations, Alabama's SIP revision meets the condition under 40 CFR 52.38(b)(9) that the SIP revision must adopt complete state trading program regulations substantively identical to the complete federal trading program regulations at 40 CFR 97.802 through

<sup>44</sup> For the same reason, Alabama's state rules could permissibly omit 40 CFR 97.821(g), which address recordation of first-round NUSA allocations. Note that notwithstanding the lack of provisions addressing recordation of NUSA allocations in Alabama's state trading program rules, EPA would retain authority to complete the recordation of 2017 NUSA allocations to Alabama units because EPA has already started recording allocations to Alabama units of allowances for the compliance periods in 2017. See 40 CFR 52.38(b)(11)(i).

97.835, except for permissible differences in allowance allocation and/or applicability provisions.

#### 8. Only Non-Substantive Substitutions for the Term “State”

Paragraph 335–3–8–.40(1)(a)1 of the Alabama rules substitute the term “the State of Alabama,” and paragraph 335–3–8–.40(1)(b) of the Alabama rules similarly substitute the term “the State” (meaning Alabama), for the phrase “a State (or Indian country within the borders of such State)” in the corresponding federal trading program regulations at 40 CFR 97.810(a)(1) and (b). These provisions of the Alabama rules define the units that are required to participate in Alabama’s CSAPR state trading programs. The substitutions appropriately exclude units located in other states and units located in Indian country within the borders of Alabama or any other state, thereby limiting the applicability of Alabama’s state trading programs to units that are subject to Alabama’s jurisdiction. These substitutions do not substantively change the provisions of CSAPR’s federal trading program regulations. The remaining Alabama rules do not substitute for the term “State” as used in the federal trading program regulations. EPA proposes to find that Alabama’s SIP revision therefore meets the condition under 40 CFR 52.38(b)(9)(v) that the SIP revision may substitute the name of the state for the term “State” as used in the federal trading program regulations, but only to the extent that EPA determines that the substitutions do not substantively change the provisions of the federal trading program regulations.

#### 9. Exclusion of Provisions Addressing Units in Indian Country

The Alabama rules do not set forth any full text provisions directly addressing units in Indian country within the state’s borders. As discussed in section IV.B.8 above, paragraph 335–3–8–.40(1)(a)1 of the Alabama rule define the units required to participate in Alabama’s state trading programs in a manner that appropriately excludes units located in Indian country within Alabama’s borders from coverage under Alabama’s CSAPR state trading programs. Although various other provisions of the CSAPR federal trading program regulations incorporated by reference into the Alabama rules without modification refer to units in Indian country, the clear exclusion of any such units from coverage under the state trading program applicability provisions—in other words, the fact that such units are not “TR NO<sub>x</sub> Ozone

Season Group 2 units” for purposes of the state trading program—renders the remaining provisions of Alabama’s state trading program rules inoperative as to the units. EPA therefore interprets the Alabama rules as not imposing any requirements on units located in Indian country within the State’s borders.

As discussed in section IV.B.7 above, Alabama rule 335–3–8–.46, which addresses allowance allocations under the state trading programs, contains no provisions replacing 40 CFR 97.811(b)(2) or 97.812(b), the portions of the federal trading program regulations governing allocations of allowances from Indian country NUSAs. Thus, the Alabama rules do not include any express state rule provisions concerning administration of Indian country NUSAs. Further, Alabama rules 335–3–8–.56, which generally incorporate by reference the federal trading programs’ recordation schedule provisions, excludes 40 CFR 97.821(h), addressing recordation of Indian country NUSA allocations. Similarly, paragraph 335–3–8–.46(3)(i) of the Alabama rules, which incorporates by reference the federal trading program regulations generally addressing corrections of incorrect allocations, excludes 40 CFR 97.811(c)(5)(iii), addressing corrections of certain incorrect Indian country NUSA allocations. EPA therefore interprets the Alabama state rules as sufficiently excluding provisions addressing administration of the Indian country NUSA provisions under the federal trading programs.

In summary, EPA has preliminarily determined that Alabama’s SIP revision adequately meets the condition under 40 CFR 52.38(b)(9)(vi) that a SIP submittal must not impose any requirement on any unit in Indian country within the borders of the State and must exclude certain provisions related to administration of Indian country NUSAs.

#### V. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference ADEM Administrative Code rules 335–3–8–.39 through 335–3–8–.70, state effective on June 9, 2017, comprising Alabama’s TR NO<sub>x</sub> Ozone Season Trading Program. EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://www.regulations.gov) and/or at the EPA Region 4 office (please contact the person identified in the **FOR FURTHER**

**INFORMATION CONTACT** section of this preamble for more information).

#### VI. EPA’s Proposed Action on Alabama’s Submittal

EPA is proposing to approve the portions the Alabama ozone season submittals concerning the establishment for Alabama units of CSAPR state trading programs for ozone season NO<sub>x</sub> emissions for compliance periods in 2019 and later years. The proposed revision would adopt into the SIP the state trading program rules codified in ADEM Administrative Code rules 335–3–8–.39 through 335–3–8–.70 (establishing Alabama’s “TR NO<sub>x</sub> Ozone Group 2 Trading Program”), as interpreted by the State in the August 5, 2017, clarification letter.<sup>45</sup> This Alabama CSAPR state trading program would be integrated with the federal CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program and would be substantively identical to the federal trading program except with regard to the allowance allocation provisions. If EPA approves these portions of the SIP revisions, Alabama units would generally be required to meet requirements under Alabama’s CSAPR state trading program equivalent to the requirements the units otherwise would have been required to meet under the corresponding CSAPR federal trading program, but allocations to Alabama units of CSAPR NO<sub>x</sub> Ozone Season Group 2 allowances for compliance periods in 2019 and later years would be determined according to the SIP’s allocation provisions at Alabama rule 335–3–8–.46 instead of EPA’s default allocation provisions at 40 CFR 97.811(a), 97.811(b)(1), and 97.812(a). EPA is proposing to approve these portions of the SIP revisions because, as clarified by the State’s August 4, 2017, letter, they meet the requirements of the CAA and EPA’s regulations for approval of a CSAPR full SIP revision replacing a federal trading program with a state trading program that is integrated with and substantively identical to the federal trading program except for permissible differences with respect to emission allowance allocation provisions, as discussed in section IV above.

EPA promulgated the FIP provisions requiring Alabama units to participate in the federal CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program in order to address Alabama’s obligations under CAA section 110(a)(2)(D)(i)(I)

<sup>45</sup>The Alabama rules use the terms “Transport Rule” and “TR” instead of the updated terms “Cross-State Air Pollution Rule” and “CSAPR,” which is permissible under the CSAPR Update. 81 FR at 74579.

with respect to the 1997 8-hour Ozone NAAQS and the 2008 8-hour Ozone NAAQS in the absence of SIP provisions addressing those requirements. Under the CSAPR regulations, upon EPA's full and unconditional approval of a SIP revision as correcting the SIP's deficiency that is the basis for a particular CSAPR FIP, the obligation to participate in the corresponding CSAPR federal trading program is automatically eliminated for units subject to the state's jurisdiction (but not for any units located in any Indian country within the state's borders).<sup>46</sup> Approval of the portions of Alabama's SIP submittal adopting CSAPR state trading program rules for ozone season NO<sub>x</sub> substantively identical to the corresponding CSAPR federal trading program regulations (or differing only with respect to the allowance allocation methodology) would satisfy Alabama's obligation pursuant to CAA section 110(a)(2)(D)(i)(I) to prohibit emissions which will significantly contribute to nonattainment or interfere with maintenance of the 1997 8-hour Ozone NAAQS in any other state. This proposed approval would also partially satisfy Alabama's obligation pursuant to CAA section 110(a)(2)(D)(i)(I) to prohibit emissions which will significantly contribute to nonattainment or interfere with maintenance of the 2008 8-hour Ozone NAAQS in any other state. Thus, the proposed approval would correct the same deficiency in the SIP that otherwise would be corrected by those CSAPR FIPs. The proposed approval of the portions of Alabama's SIP submittal establishing CSAPR state trading program rules for ozone season NO<sub>x</sub> emissions therefore would result in automatic termination of the obligations of Alabama units to participate in the federal CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program.

## VII. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

### List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: August 7, 2017.

**V. Anne Heard,**

*Acting Regional Administrator, Region 4.*

[FR Doc. 2017-17341 Filed 8-16-17; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R04-OAR-2017-0174; FRL-9966-27-Region 4]

### Air Plan Approval; Alabama; Transportation Conformity

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve the portion of a revision to the Alabama State Implementation plan submitted by the State of Alabama on May 8, 2013, for the purpose of amending the transportation conformity rules to be consistent with Federal requirements.

**DATES:** Comments must be received on or before September 18, 2017.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2017-0174 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:**

Kelly Sheckler, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW.,

<sup>46</sup> 40 CFR 52.38(b)(10); *see also* 40 CFR 52.54(b)(1) & (2).

Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9222. Ms. Sheckler can also be reached via electronic mail at [sheckler.kelly@epa.gov](mailto:sheckler.kelly@epa.gov).

**SUPPLEMENTARY INFORMATION:** In the Final Rules Section of this **Federal Register**, EPA is approving the State's implementation plan revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

Dated: August 4, 2017.

**V. Anne Heard,**

*Acting Regional Administrator, Region 4.*

[FR Doc. 2017–17239 Filed 8–16–17; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R04–OAR–2013–0389; FRL–9966–16–Region 4]

#### Approval and Promulgation of Implementation Plans; South Carolina; Regional Haze State Implementation Plan

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule; supplemental.

**SUMMARY:** The Environmental Protection Agency (EPA) is issuing a supplement to its proposed approval of a revision to the South Carolina State Implementation Plan (SIP) submitted by the State of South Carolina through the South Carolina Department of Health and Environmental Control (SC DHEC) on December 28, 2012. South Carolina's SIP revision (Progress Report) addresses requirements of the Clean Air Act (CAA or Act) and EPA's rules that require each state to submit periodic reports describing progress towards reasonable progress goals (RPGs) established for regional haze and a determination of the adequacy of the state's existing SIP addressing regional haze (regional haze

plan). EPA's proposed approval of South Carolina's Progress Report was published in the **Federal Register** on January 17, 2014. This supplemental proposal addresses the potential effects on EPA's proposed approval from the April 29, 2014, decision of the United States Supreme Court (Supreme Court) remanding to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) EPA's Cross-State Air Pollution Rule (CSAPR) for further proceedings and the D.C. Circuit's July 28, 2015, decision on remand.

**DATES:** Comments must be received on or before September 18, 2017.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R04–OAR–2013–0389 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](http://www.regulations.gov). EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:**

Michele Notarianni, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Ms. Notarianni can be reached via telephone at (404) 562–9031 and via electronic mail at [notarianni.michele@epa.gov](mailto:notarianni.michele@epa.gov).

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Each state is required to submit a progress report in the form of a SIP revision during the first implementation period that evaluates progress towards the RPGs for each mandatory Class I

federal area (Class I area)<sup>1</sup> within the state and in each mandatory Class I area outside the state that may be affected by emissions from within the state. *See* 40 CFR 51.308(g). In addition, the provisions under 40 CFR 51.308(h) require states to submit, at the same time as the progress report, a determination of the adequacy of the state's existing regional haze plan. The first progress report is due five years after submittal of the initial regional haze plan.

SC DHEC submitted its first regional haze plan on December 17, 2007, and submitted its Progress Report on December 28, 2012. The Progress Report and accompanying cover letter included a determination that South Carolina's existing regional haze plan requires no substantive revision to achieve the established regional haze visibility improvement and emissions reduction goals for 2018. EPA proposed to find that the State's Progress Report satisfied the requirements of 40 CFR 51.308(g) and (h) in a notice of proposed rulemaking (NPRM) published on January 17, 2014 (79 FR 3147). Today's notice supplements that 2014 NPRM by more fully explaining and soliciting comment on the basis for the Agency's proposed approval as it relates to the Clean Air Interstate Rule (CAIR) and CSAPR.

#### II. Summary of South Carolina's Progress Report and EPA's 2014 NPRM

In accordance with requirements in EPA's Regional Haze Rule (RHR), South Carolina's Progress Report describes the progress made towards the RPGs of Class I areas in and outside South Carolina that are affected by emissions from South Carolina's sources.<sup>2</sup> *See* 40 CFR 51.308(g). This Progress Report also included an assessment of whether South Carolina's existing regional haze plan is sufficient to allow it and other nearby states with Class I areas to achieve their RPGs by the end of the first implementation period. *See* 40 CFR 51.308(h). In the 2014 NPRM, EPA proposed to approve the State's Progress Report as adequately addressing 40 CFR

<sup>1</sup> Areas designated as mandatory Class I federal areas consist of national parks exceeding 6000 acres, wilderness areas and national memorial parks exceeding 5000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). These areas are listed at 40 CFR part 81, subpart D.

<sup>2</sup> EPA promulgated a rule to address regional haze, the RHR, on July 1, 1999. *See* 64 FR 35713. The RHR revised the existing visibility regulations to integrate into the regulation provisions addressing regional haze impairment and established a comprehensive visibility protection program for Class I areas. *See* 40 CFR 51.308 and 51.309. EPA revised the RHR on January 10, 2017. *See* 82 FR 3078.

51.308(g) and (h). EPA's proposed conclusions in the 2014 NPRM regarding South Carolina's Progress Report are briefly summarized below.

South Carolina's Progress Report included a description of the status of measures in its regional haze plan; a summary of the emissions reductions achieved; an assessment of the visibility conditions for Cape Romain Wilderness Area, the only Class I area in the State; an analysis of the changes in emissions from sources and activities within the State; an assessment of any significant changes in anthropogenic emissions within or outside the State that have limited or impeded visibility improvement progress in Class I areas impacted by the State's sources; an assessment of the sufficiency of the regional haze plan to enable South Carolina and states affected by South Carolina's sources to meet the RPGs for their Class I areas; and a review of the State's visibility monitoring strategy. As explained in the 2014 NPRM, EPA proposed to find that South Carolina's Progress Report adequately addressed the applicable provisions under 40 CFR 51.308(g).

In addition, South Carolina simultaneously submitted a determination pursuant to 40 CFR 51.308(h) that its regional haze plan is sufficient to enable the State and states affected by South Carolina's sources to achieve the RPGs for Class I areas affected by South Carolina's sources. The State also declared that further revision of the existing regional haze plan was not needed at that time. As explained in detail in the 2014 NPRM, EPA proposed to determine that South Carolina had adequately addressed 40 CFR 51.308(h) because visibility has improved at Cape Romain; sulfur dioxide (SO<sub>2</sub>) emissions from the State's sources have decreased beyond original projections;<sup>3</sup> additional electric generating unit (EGU) control measures not relied upon in the State's regional haze plan have occurred or will occur in the implementation period; and the SO<sub>2</sub> emissions from EGUs in South Carolina are already below the levels projected for 2018 in the regional haze plan and are expected to continue to

<sup>3</sup> In its regional haze plan and Progress Report, South Carolina focused its assessment on SO<sub>2</sub> emissions from EGUs because the regional planning organization, the Visibility Improvement State and Tribal Association of the Southeast (VISTAS), determined that sulfates accounted for more than 70 percent of the visibility-impairing pollution in the Southeast and that SO<sub>2</sub> point source emissions in 2018 represent more than 95 percent of the total SO<sub>2</sub> emissions inventory. In its Progress Report, South Carolina states that sulfates continue to be the biggest single contributor to regional haze at Cape Romain.

trend downward, as will the SO<sub>2</sub> emissions from EGUs in the other VISTAS states. In the 2014 NPRM, EPA proposed to approve South Carolina's Progress Report SIP as meeting the requirements of 40 CFR 51.308(g) and (h).

### III. Impact of CAIR and CSAPR on South Carolina's Progress Report

Decisions by the courts regarding EPA rules addressing the interstate transport of pollutants have had a substantial impact on EPA's review of the regional haze plans of many states. In 2005, EPA issued regulations allowing states to rely on CAIR to meet certain requirements of the RHR. *See* 70 FR 39104 (July 6, 2005).<sup>4</sup> Like many other states subject to CAIR, South Carolina relied on CAIR in its regional haze plan to meet certain requirements of the RHR, including the criteria for alternatives to the best available retrofit technology (BART) requirements for emissions of SO<sub>2</sub> and nitrogen oxides (NO<sub>x</sub>) from certain EGUs in the State. This reliance was consistent with EPA's regulations. *See* 70 FR 39104 (July 6, 2005). However, in 2008, the D.C. Circuit remanded CAIR to EPA without vacatur to preserve the environmental benefits provided by the rule. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). On August 8, 2011 (76 FR 48208), acting on the D.C. Circuit's remand, EPA promulgated CSAPR to replace CAIR and issued Federal Implementation Plans (FIPs) to implement the rule in CSAPR-subject states.<sup>5</sup> Implementation of CSAPR was scheduled to begin on January 1, 2012, when CSAPR would have superseded the CAIR program. However, numerous parties filed petitions for review of CSAPR, and at the end of 2011, the D.C. Circuit issued an order staying CSAPR pending resolution of the petitions and directing EPA to continue to administer CAIR. Order of December 30, 2011, in *EME Homer City Generation, L.P. v. EPA*, D.C. Cir. No. 11-1302.

<sup>4</sup> CAIR created regional cap-and-trade programs to reduce SO<sub>2</sub> and NO<sub>x</sub> emissions in 27 eastern states, including South Carolina, that contributed to downwind nonattainment and maintenance of the 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS) and/or the 1997 fine particulate matter (PM<sub>2.5</sub>) NAAQS. *See* 70 FR 25162 (May 12, 2005).

<sup>5</sup> CSAPR requires 27 Eastern states to limit their statewide emissions of SO<sub>2</sub> and/or NO<sub>x</sub> in order to mitigate transported air pollution unlawfully impacting other states' ability to attain or maintain four NAAQS: The 1997 ozone NAAQS, the 1997 annual PM<sub>2.5</sub> NAAQS, the 2006 24-hour PM<sub>2.5</sub> NAAQS, and the 2008 8-hour ozone NAAQS. The CSAPR emissions limitations are defined in terms of maximum statewide budgets for emissions of annual SO<sub>2</sub>, annual NO<sub>x</sub>, and/or ozone-season NO<sub>x</sub> by each covered state's large EGUs.

On June 28, 2012 (77 FR 38509), EPA finalized a limited approval of South Carolina's regional haze plan addressing the first implementation period for regional haze. In a separate action, published on June 7, 2012 (77 FR 33642), EPA finalized a limited disapproval of regional haze plans from South Carolina and several other states because these plans relied on CAIR to meet certain regional haze requirements, and also amended the Regional Haze Rule to provide that participation by a state's EGUs in a CSAPR trading program for a given pollutant—either a CSAPR federal trading program implemented through a CSAPR FIP or an integrated CSAPR state trading program implemented through an approved CSAPR SIP revision—qualifies as a BART alternative for those EGUs for that pollutant.<sup>6</sup> *See* 40 CFR 51.308(e)(4). In that same June 7, 2012, action, EPA also finalized FIPs to replace reliance on CAIR with reliance on CSAPR to address deficiencies in CAIR-dependent regional haze plans of several states, including South Carolina's regional haze plan.

Following these EPA actions, however, the D.C. Circuit issued a decision in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), vacating and remanding CSAPR to EPA and ordering continued implementation of CAIR pending the promulgation of a valid replacement. On April 29, 2014, the Supreme Court reversed the D.C. Circuit's decision on CSAPR and remanded the case to the D.C. Circuit to resolve remaining issues in accordance with the high court's ruling.<sup>7</sup> *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). On remand, the D.C. Circuit affirmed CSAPR in most respects, but invalidated without vacating some of the CSAPR budgets for a number of states. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118

<sup>6</sup> Legal challenges to the CSAPR Better-than-BART rule from state, industry, and other petitioners are pending. *Utility Air Regulatory Group v. EPA*, No. 12-1342 (D.C. Cir. filed August 6, 2012).

<sup>7</sup> After the Supreme Court's decision, EPA filed a motion to lift the stay on CSAPR and asked the D.C. Circuit to toll CSAPR's compliance deadlines by three years, so that the Phase 1 emissions budgets apply in 2015 and 2016 (instead of 2012 and 2013), and the Phase 2 emissions budgets apply in 2017 and beyond (instead of 2014 and beyond). On October 23, 2014, the D.C. Circuit granted EPA's motion. Order of October 23, 2014, in *EME Homer City Generation, L.P. v. EPA*, D.C. Cir. No. 11-1302. EPA subsequently issued an interim final rule to clarify how EPA would implement CSAPR consistent with the D.C. Circuit's order lifting the stay and tolling the rule's deadlines. *See* 79 FR 71663 (December 3, 2014) (interim final rulemaking). Pursuant to the interim final rulemaking, EPA began implementation of CSAPR on January 1, 2015.



(D.C. Cir. 2015). The remanded budgets include the Phase 2 SO<sub>2</sub> emissions budget and ozone-season NO<sub>x</sub> budget for South Carolina. The CSAPR litigation ultimately delayed implementation of the rule for three years, from January 1, 2012, when CSAPR's cap-and-trade programs were originally scheduled to replace the CAIR cap-and-trade programs, to January 1, 2015. Thus, the rule's Phase 2 budgets, originally promulgated to begin on January 1, 2014, took effect on January 1, 2017.

On May 26, 2017, South Carolina submitted a draft SIP revision for parallel processing that adopts provisions for participation in the CSAPR annual NO<sub>x</sub> and annual SO<sub>2</sub> trading programs, including annual NO<sub>x</sub> and annual SO<sub>2</sub> budgets that are equal to the budgets for South Carolina in EPA's CSAPR FIP. EPA signed a NPRM on July 28, 2017 proposing to approve the SIP revision. As approval of that SIP revision would eliminate South Carolina's remanded federally-established Phase 2 SO<sub>2</sub> budget, it is EPA's opinion that finalization of approval of that action would address the judicial remand of South Carolina's federally-established Phase 2 SO<sub>2</sub> budget.<sup>8</sup>

CAIR was in effect at the time that South Carolina submitted its Progress Report on December 28, 2012, and the State included an assessment of the emission reductions from the implementation of CAIR in its report. South Carolina's Progress Report discussed the status of the litigation concerning CAIR and CSAPR, but because CSAPR was not at that time in effect, South Carolina did not take actual emissions reductions from CSAPR into account in assessing its regional haze plan. For the same reason, in the 2014 NPRM, EPA did not assess at that time the impact of CSAPR nor the CSAPR FIP on the abilities of South Carolina and its neighbors to meet their RPGs.

The purpose of this supplemental proposal is to seek comment on the effect of the D.C. Circuit's 2015 decision on the Agency's assessment of South

Carolina's Progress Report and the State's determination that its existing regional haze plan need not be revised at this time. Given the complex background summarized above, EPA is proposing to determine that South Carolina appropriately took CAIR into account in its Progress Report. CAIR was in effect during the 2007–2011 period addressed by South Carolina's Progress Report. EPA approved South Carolina's regulations implementing CAIR as part of the South Carolina SIP on October 16, 2009 (74 FR 53167), and at the time of submission of its Progress Report, neither South Carolina nor EPA had taken any action to remove CAIR from the South Carolina SIP. *See* 40 CFR 52.2120(c). Therefore, EPA proposes to find that South Carolina appropriately evaluated and relied on CAIR reductions to demonstrate the State's progress towards meeting its RPGs.

The State's Progress Report also demonstrated that Class I areas in other states impacted by South Carolina sources were on track to meet their RPGs as discussed in the 2014 NPRM. *See* 79 FR 3151. EPA's intention in requiring the progress reports pursuant to 40 CFR 51.308(g) was to ensure that emission management measures in the regional haze plans are being implemented on schedule and that visibility improvement appears to be consistent with the RPGs. *See* 64 FR 35713, 35747 (July 1, 1999). CAIR was in effect in South Carolina through 2014, providing the emission reductions relied upon in South Carolina's regional haze plan. Thus, EPA is proposing to determine that South Carolina appropriately took into account CAIR reductions in assessing the implementation of measures in the regional haze plan for the 2007–2011 timeframe, and EPA believes that it is appropriate to rely on CAIR emission reductions for purposes of assessing the adequacy of South Carolina's Progress Report demonstrating progress during this timeframe because CAIR remained effective and provided the requisite emission reductions.

In addition, EPA also believes that reliance upon CAIR reductions to show South Carolina's progress towards meeting its RPGs from 2007–2011 is consistent with the Agency's prior actions. During the continued implementation of CAIR per the direction of the D.C. Circuit through October 2014, EPA approved redesignations of areas to attainment of the 1997 PM<sub>2.5</sub> NAAQS in which states relied on CAIR as an "enforceable measure." *See* 77 FR 76415 (December 28, 2012) (redesignation of Huntingdon-Ashland, West Virginia); 78 FR 59841

(September 30, 2013) (redesignation of Wheeling, West Virginia); and 78 FR 56168 (September 12, 2013) (redesignation of Parkersburg, West Virginia). While EPA did previously state in a rulemaking action on the Florida regional haze plan that a five-year progress report may be the appropriate time to address changes, if necessary, for RPG demonstrations and long term strategies, EPA does not believe that the implementation of CSAPR impacts the adequacy of the South Carolina regional haze plan to address reasonable progress from 2007 through 2011 or to meet requirements in 40 CFR 51.308(g) and (h) because CAIR was implemented during the time period evaluated by South Carolina for its Progress Report. *See generally* 77 FR 73369, 73371 (December 10, 2012) (proposed action on the Florida regional haze plan).

EPA's December 3, 2014, interim final rule sunset CAIR compliance requirements on a schedule coordinated with the implementation of CSAPR compliance requirements. Because CSAPR should result in greater emissions reductions of SO<sub>2</sub> and NO<sub>x</sub> than CAIR throughout the affected region, including in South Carolina and neighboring states, EPA expects South Carolina to maintain and continue its progress towards its RPGs for 2018 through continued, and additional, SO<sub>2</sub> and NO<sub>x</sub> reductions. *See generally* August 8, 2011 (76 FR 48208) (promulgating CSAPR). Although the implementation of CSAPR was tolled for three years, the Rule is now being implemented, and by 2018, the endpoint for calculating RPGs for the first regional haze implementation period, CSAPR will reduce emissions of SO<sub>2</sub> and NO<sub>x</sub> from EGUs in South Carolina by the same amount assumed by EPA when it issued the CSAPR FIP for South Carolina in June 2012. *See* 76 FR 48208 (CSAPR promulgation), and 77 FR 33642 (limited disapproval of South Carolina regional haze plan and FIP for South Carolina for certain regional haze requirements).

At the present time, the requirements of CSAPR apply to sources in South Carolina under the terms of a FIP. If EPA approves South Carolina's May 26, 2017, SIP revision that incorporates the CSAPR requirements into its SIP, the requirements of CSAPR for annual NO<sub>x</sub> and SO<sub>2</sub> emissions will apply to sources in the State through its SIP at budget levels equal to those in the CSAPR FIP. The RHR requires an assessment of whether the current "implementation plan" is sufficient to enable the states to meet all established RPGs under 40 CFR 51.308(g). The term "implementation

<sup>8</sup> On September 7, 2016, EPA finalized an update to the CSAPR ozone-season program. *See* 81 FR 74504 (October 26, 2016). The update addresses summertime transport of ozone pollution in the eastern United States that crosses state lines to help downwind states and communities meet and maintain the 2008 8-hour ozone NAAQS and addresses the remanded Phase 2 ozone season NO<sub>x</sub> budgets. The update withdraws the remanded ozone-season NO<sub>x</sub> budgets, sets new Phase 2 CSAPR ozone season NO<sub>x</sub> emissions budgets for eight of the eleven states with remanded budgets, and removes the other three states from the CSAPR ozone season NO<sub>x</sub> trading program.

plan” is defined for purposes of the RHR to mean “any [SIP], [FIP], or Tribal Implementation Plan.” See 40 CFR 51.301. EPA is, therefore, proposing to determine that the Agency may consider measures in any issued FIP as well as those in a state’s regional haze plan in assessing the adequacy of the “existing implementation plan” under 40 CFR 51.308(g)(6) and (h). Because CSAPR will ensure the control of SO<sub>2</sub> and NO<sub>x</sub> emissions reductions relied upon by South Carolina and other states in setting their RPGs beginning in January 2015 at least through the remainder of the first implementation period in 2018, EPA is proposing to approve South Carolina’s finding that there is no need for revision of the existing implementation plan for South Carolina to achieve the RPGs for Cape Romain and the Class I areas impacted by South Carolina sources.

EPA notes that the RHR provides for periodic evaluation and assessment of a state’s reasonable progress towards achieving the national goal of natural visibility conditions under the CAA section 169A(b). The regional haze regulations at 40 CFR 51.308 required states to submit initial SIPs in 2007 providing for reasonable progress towards the national goal for the first implementation period from 2008 through 2018. See 40 CFR 51.308(b). Pursuant to 40 CFR 51.308(f), SIP revisions reassessing each state’s reasonable progress towards the national visibility goal are due by July 31, 2021, July 31, 2028, and every ten years thereafter. For such subsequent regional haze plans, 40 CFR 51.308(f) requires each state to reassess its reasonable progress and all the elements of its regional haze plan required by 40 CFR 51.308(d), taking into account improvements in monitors and control technology, assessing the state’s actual progress and effectiveness of its long term strategy, and revising RPGs as necessary. See 40 CFR 51.308(f)(1)–(3). Therefore, South Carolina has the opportunity to reassess its RPGs and the adequacy of its regional haze plan, including its reliance first upon CAIR and now upon CSAPR for emission reductions from EGUs, when it prepares and submits its second regional haze plan to cover the implementation period from 2018 through 2028. As discussed in the 2014 NPRM and in South Carolina’s Progress Report, emissions of SO<sub>2</sub> from EGUs are below original projections for 2018. In addition, the visibility data provided by South Carolina show that Cape Romain is currently on track to achieve its RPGs.

#### IV. Summary of Reproposal

In summary, EPA proposes to approve South Carolina’s Progress Report. EPA solicits comments on this supplemental proposal, but only with respect to the specific issues raised in this notice concerning the Agency’s interpretation of the term “implementation plan” in the RHR, and EPA’s proposed agreement with South Carolina’s assessment that the current regional haze plan for South Carolina, in combination with EPA’s CSAPR FIP or an approved CSAPR SIP, need not be revised at this time to achieve the established RPGs for South Carolina and other impacted states in light of the status of CAIR through 2014 and CSAPR starting in 2015. EPA is not reopening the comment period on any other aspect of the January 17, 2014, NPRM as an adequate opportunity to comment on those issues has already been provided. The purpose of this supplemental proposal is limited to review of South Carolina’s Progress Report in light of the D.C. Circuit’s 2015 ruling on CSAPR. This supplemental proposal reflects EPA’s desire for public input into how it should proceed in light of this decision when acting on the State’s pending Progress Report, in particular the requirements that the State assess whether the current implementation plan is sufficient to ensure that RPGs are met. See 40 CFR 51.308(g) and (h).<sup>9</sup>

#### V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. See 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the Act. Accordingly, this proposed action merely proposes to approve state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735,

<sup>9</sup>EPA previously determined that CSAPR (like CAIR before it) was “better than BART” because it would achieve greater reasonable progress toward the national goal than would source-specific BART. See 77 FR 33642 (June 7, 2012). EPA is not taking comment in this supplemental proposal on whether the South Carolina regional haze plan meets the BART requirements or whether CSAPR is an alternative measure to source-specific BART in accordance with 40 CFR 52.301(e)(2).

October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandates or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Act; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule for South Carolina does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not have substantial direct effects on an Indian Tribe. The Catawba Indian Nation Reservation is located within the state of South Carolina. Pursuant to the Catawba Indian Claims Settlement Act, S.C. Code Ann. 27–16–120, “all state and local environmental laws and regulations apply to the [Catawba Indian Nation] and Reservation and are fully enforceable by all relevant state and local agencies and authorities.” EPA notes this action will not impose substantial direct costs on Tribal governments or preempt Tribal law.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: August 4, 2017.

V. Anne Heard,

Acting Regional Administrator, Region 4.

[FR Doc. 2017-17222 Filed 8-16-17; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R04-OAR-2017-0359; FRL-9966-48-Region 4]

### Air Plan Approval; South Carolina: Minor Source Permit Program Revisions

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve changes to South Carolina's State Implementation Plan (SIP) to revise minor new source review (NSR) regulations. EPA is proposing to approve portions of SIP revisions modifying these regulations as submitted by the State of South Carolina, through the South Carolina Department of Health and Environmental Control (SC DHEC), on the following dates: October 1, 2007, July 18, 2011, June 17, 2013, August 8, 2014, January 20, 2016, and July 27, 2016. This action is being proposed pursuant to the Clean Air Act (CAA or Act).

**DATES:** Comments must be received on or before September 18, 2017.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2017-0359 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](http://www.regulations.gov). EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on

making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** D. Brad Akers, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303-8960. Mr. Akers can be reached via telephone at (404) 562-9089 or via electronic mail at [akers.brad@epa.gov](mailto:akers.brad@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. What action is EPA proposing?

On October 1, 2007, July 18, 2011, June 17, 2013, August 8, 2014, January 20, 2016, and July 27, 2016, SC DHEC submitted SIP revisions to EPA for approval that involve changes to South Carolina's minor source permitting regulations to clarify and streamline the State's federally-approved preconstruction and operating permitting program. This program requires minor stationary sources planning to construct or modify sources of air pollutants to first obtain a construction permit and to obtain and maintain operating permits in accordance with the South Carolina Code of Regulations Annotated (S.C. Code Ann. Regs.) at Regulation 61-62.1, Section II—"Permit Requirements." The portion of the SIP-approved permitting program covering construction permits is generally referred to as the minor source permitting program or the minor NSR program to distinguish it from additional permitting requirements for major sources of air pollutants.<sup>1</sup> The portion of the SIP-approved permitting program covering minor source operating permits is referred to as the federally enforceable state operating permit (FESOP) program. The changes made in these submittals clarify the applicability, streamline the permitting process, provide more options for the

<sup>1</sup> EPA's regulations governing the implementation of NSR permitting programs are contained in 40 CFR 51.160-.166; 52.21, .24; and part 51, Appendix S. The CAA NSR program is composed of three separate programs: prevention of significant deterioration (PSD), nonattainment new source review (NNSR), and Minor NSR. PSD is established in part C of title I of the CAA and applies to major stationary sources in areas that meet the national ambient air quality standards (NAAQS)—"attainment areas"—as well as areas where there is insufficient information to determine if the area meets the NAAQS—"unclassifiable areas." The NNSR program is established in part D of title I of the CAA and applies to major stationary sources in areas that are not in attainment of the NAAQS—"nonattainment areas." The Minor NSR program applies to stationary sources that do not require PSD or NNSR permits. Together, these programs are referred to as the NSR programs.

minor source permitting program, and generally reduce the overall burden on the state permitting program and the regulated community. The changes addressed in this proposed rulemaking also correct typographical errors, make internal references consistent, and recodify sections of the existing rules. In this action, EPA is proposing to approve certain portions of these SIP submissions that make changes to South Carolina's minor NSR regulations and FESOP requirements.

EPA is not acting on a portion of the revisions to Regulation 61-62.1, Section II—"Permit Requirements." Specifically, EPA is not acting on the renumbering and minor administrative language changes to paragraph G.6—"Emergency Provisions," in the October 1, 2007, submittal, nor the minor additional language changes to this portion of the minor source permitting regulations included in the August 8, 2014, submittal.<sup>2</sup>

At this time, EPA is not acting on the following changes included in the October 1, 2007, submittal: Regulation 61-62.5, Standard No. 4—"Emissions from Process Industries"; and Regulation 61-62.5, Standard No. 5.2—"Control of Oxides of Nitrogen (NO<sub>x</sub>)."

EPA is also not acting on changes in the July 18, 2011, submittal to the following regulations in South Carolina's SIP: Regulation 61-62.1, Section I—"Definitions"; Regulation 61-62.3—"Air Pollution Episodes"; Regulation 61-62.5, Standard No. 1—"Emissions from Fuel Burning Operations"; Regulation 61-62.5, Standard No. 4—"Emissions from Process Industries"; Regulation 61-62.5, Standard No. 6—"Alternative Emission Limitation Options (Bubble)"; Regulation 61-62.5, Standard No. 7—"Prevention of Significant Deterioration"; and Regulation 61-62.5, Standard No. 7.1—"Nonattainment New Source Review." EPA approved the changes to Regulation 61-62.5, Standard No. 2—"Ambient Air Quality Standards," included in the July 18, 2011, submittal, on April 3, 2013 (78 FR 19994).

EPA is not acting on the changes included in the June 17, 2013, submittal to the following regulations: Regulation 61-62.1, Section I—"Definitions"; Regulation 61-62.1, Section IV—"Source Tests"; Regulation 61-62.3—"Air Pollution Episodes"; Regulation 61-62.5, Standard No. 4—"Emissions from Process Industries"; and

<sup>2</sup> In this action, EPA is not proposing to approve or disapprove revisions to any existing emission limitations that apply during start up, shut down and malfunction events.

Regulation 61–62.5, Standard No. 5—“Volatile Organic Compounds.”

Additionally, EPA is not acting on the changes included in the August 8, 2014, submittal to the following regulations: Regulation 61–62.1, Section I—“Definitions”; Regulation 61–62.1, Section IV—“Source Tests”; Regulation 61–62.1, Section V—“Credible Evidence”; Regulation 61–62.5, Standard No. 1—“Emissions from Fuel Burning Equipment”; and Regulation 61–62.5, Standard No. 4—“Emissions from Process Industries.” EPA approved the changes to Regulation 61–62.1, Section III—“Emissions Inventory and Emissions Statement,” included in the August 8, 2014, submittal, on June 12, 2015 (80 FR 33413) and May 31, 2017 (82 FR 24851).

EPA is also not acting on the changes included in the January 20, 2016, submittal to the following regulations: Regulation 61–62.5, Standard No. 5—“Volatile Organic Compounds”; Regulation 61–62.5, Standard No. 7.1—“Nonattainment New Source Review”; and Regulation 61–62.6—“Control of Fugitive Particulate Matter.”

Finally, EPA is not acting on the changes included in the July 27, 2016, submittal to the following regulations: Regulation 61–62.1, Section I—“Definitions”; Regulation 61–62.5, Standard No. 4—“Emissions from Process Industries”; and Regulation 61–62.5, Standard No. 5.2—“Control of Oxides of Nitrogen (NO<sub>x</sub>).” EPA will address these remaining changes to the South Carolina SIP in separate actions.

## II. Analysis of State’s Submittal

### A. Overview of Changes to Section II—“Permit Requirements”

South Carolina has a SIP-approved minor source permitting program at Regulation 61–62.1, Section II—“Permit Requirements.” These regulations include requirements for obtaining preconstruction and operating permits for different types of minor sources. The program covers “true minor” sources, which have the potential to emit (PTE) of certain pollutants below major sources thresholds for new sources and modifications. The SIP-approved minor source permitting program also includes provisions for issuing permits that establish federally enforceable emission limits to restrict the PTE of certain pollutants below major source and major modification applicability thresholds: “synthetic minor” permits establish these limits for sources obtaining construction permits, and “conditional major” permits establish these emission limits in the corresponding operating permits. South

Carolina initially revised its minor NSR and FESOP rules in the October 1, 2007, submittal to clarify and streamline requirements for obtaining minor source construction and operating permits. The July 18, 2011, June 17, 2013, August 8, 2014, January 20, 2016, and July 27, 2017, submittals make other clarifying and administrative changes, which are discussed for each subsection of the regulation below.

EPA has reviewed the proposed changes to the minor source construction and operating permitting regulations and preliminarily finds them to be consistent with CAA sections 110(a)(2)(C) and 110(l), EPA’s minor NSR regulations found at 40 CFR 51.160–164, and the criteria applicable to an approvable State FESOP program.

### B. Analysis of Changes to Each Section

#### 1. Section II.A.—“Construction Permits”

Regulation 61–62.1, Section II.A—“Construction Permits” specifies applicability and certain requirements for obtaining permits for sources seeking to construct or modify emissions units. The October 1, 2007, submittal makes several changes to paragraph A. as follows: (1) Adds allowed preconstruction activities at subparagraph A.1.d. for true minor sources (*i.e.*, minor sources that are not synthetic minor sources); (2) adds the requirement that written notification be provided to the Department marking the commencement of construction and initial startup; (3) adds language requiring compliance with all terms, limits, and conditions of Department-issued construction permits; (4) adds time constraints for the validity of issued construction permits; and (5) removes the descriptions of permit application requirements from former paragraph A.2. to create a standalone subsection C. for construction permits, and to detail more specific requirements for other types of permits in other paragraphs.

The July 18, 2011, submittal makes subsequent clarifying and administrative changes to Section II.A., consolidating former subparagraph A.1.a. and paragraph A.5. into an introductory paragraph applicable to the entirety of Regulation 61–62.1, Section II. The submittal also makes other renumbering and administrative edits to the remaining subparagraphs.

The language moved to an introductory paragraph for Section II states: (1) The regulation will not supersede any state or federal requirements nor special permit conditions unless it imposes a more restrictive limit; (2) sources must

comply with all terms, conditions, and limitations of any permit issued by SC DHEC for sources or activities at its facility; and (3) a source’s permit status may change if new regulatory requirements become applicable. The effect of moving this language from subsection A. is to clarify that it is applicable to all of Section II—meaning it applies to any types of permits issued by the SC DHEC rather than only construction permits.

The August 8, 2014, submittal further modifies Section II.A. by making administrative edits and adding additional allowed preconstruction activities for true minor sources at subparagraph A.1.c. originally added in the October 1, 2007, submittal as subparagraph A.1.d.

The revision to subparagraph A.1.c.—added to the Regulation as A.1.d. in the October 1, 2007, submittal, renumbered in the July 18, 2011, submittal, and updated in the August 8, 2014, submittal—allows certain preconstruction activities prior to obtaining a final construction permit, provided that specific conditions are met. EPA has preliminarily determined that the preconstruction activities provision is consistent with the requirements of CAA sections 110(a)(2)(C) and 110(l), and federal regulations at 40 CFR 51.160–51.164.

Section 110(a)(2)(C) of the CAA requires that state SIPs include a program for regulating the construction and modification of stationary sources as necessary to ensure that the NAAQS are maintained. Federal regulations at 40 CFR 51.160(b) require states to have legally enforceable procedures to prevent construction or modification of a source if it would violate any SIP control strategies or interfere with attainment or maintenance of the NAAQS. Federal regulations limit the types of allowed preconstruction activities for new and modified major sources at 40 CFR 51.165(a)(1)(xv), 51.166(b)(11), and 52.21(b)(11) and, as discussed below, South Carolina has adopted these provisions into its SIP. But federal regulations do not impose a corresponding limitation on preconstruction activities for minor sources. SC DHEC provided additional clarification of its allowed minor source preconstruction activities in a December 30, 2016, letter, which is included in the Docket for this proposed action. In this letter, SC DHEC first explains that “[a]llowed preconstruction activities are extremely limited in nature and do not include construction of that actual process unit itself.” The State also points to a requirement under Section II.C.3.n. that sources applying for

construction permits demonstrate emissions will not interfere with attainment or maintenance of the NAAQS. This requirement corresponds to Section II.A.2. of the Regulation, which states that permits will not be issued if emissions interfere with any state or federal standard.

SC DHEC also points to its memorandum regarding allowed preconstruction activities for major sources prior to obtaining PSD permits.<sup>3</sup> SC DHEC notes that its minor source preconstruction activities provisions mirror the federal limits on major source preconstruction activities, with the exception of one additional activity: Allowing a facility to pour concrete foundation prior to obtaining a construction permit. This activity is only prohibited for major sources or major modifications prior to obtaining a permit in accordance with the definition of “begin actual construction” in the federal PSD regulations at 40 CFR 51.166(b)(11) and 52.21(b)(11), and the NNSR regulations at 51.165(a)(1)(xv). As SC DHEC explains in its clarifying letter, Section II.A.1.c.—which specifies which sources may engage in preconstruction activities—explicitly excludes “sources not requesting to use federally enforceable construction permit conditions to limit potential to emit, sources not subject to regulations with more stringent start of construction limitations, or sources not otherwise exempt from permit requirements.” In other words, the regulation excludes, among other sources, major sources subject to PSD regulations or CAA section 112 requirements for hazardous air pollutants (*i.e.*, major sources and modifications).

In its December 30, 2016 letter, SC DHEC references Section II.A.1.d., which clearly states that the owners or operators of any sources that would not qualify for the issuance of a construction permit assume the financial risk of commencing the preconstruction activities listed in Section II.A.1.c. SC DHEC also notes that a source could be subject to an enforcement action under Section II.F.2. and Section II.J.1.e.—or subject to permit revocation under Section II.J.1.b—if the source either did not comply with the regulations during construction or would not have qualified for the preconstruction activities undertaken.

Because SC DHEC does not allow for the construction of process units, there are no increased emissions associated with any of the preconstruction

activities allowed at Section II.A.1.c.i.–xvii. The gatekeeping applicability language at Section II.A.1.c. and major NSR applicability provisions at Regulation 61–62.5, Standard No. 7(a)(2) and Standard No. 7.1(a)(1), provide that no major sources or modifications may engage in the preconstruction activities allowed under Section II.A.1.c.i.–xvii. Additionally, SC DHEC does not allow synthetic minor sources to conduct the preconstruction activities. Finally, SC DHEC has legally enforceable procedures to prevent construction or modification of a source if it would violate SIP control strategies or interfere with attainment or maintenance of the NAAQS, as required by 40 CFR 51.160(b).

The changes to South Carolina’s minor NSR program are not inconsistent with the requirements of the CAA and EPA’s regulations, and are therefore approvable as part of the SIP. EPA is therefore proposing to approve the aforementioned changes to subsection A. and the introductory portion of Section II pursuant to the CAA and 40 CFR 51.160–164.

## 2. Section II.B.—“Exemptions From the Requirement To Obtain a Construction Permit”

Regulation 61–62.1, Section II.B.—“Exemptions from the Requirement to Obtain a Construction Permit” specifies which types of minor sources are exempt from obtaining minor source construction permits. The October 1, 2007, submittal makes several changes to subsection II.B. as follows: (1) Renumbers existing Section II.F. to Section II.B. and modifies the title to clarify that the paragraph applies only to construction permits; (2) adds language specifying that future source modifications or new regulatory requirements may trigger the need to obtain a permit for exempted facilities; (3) clarifies that the exemption for boilers and space heaters applies to those firing virgin solid and liquid fuels; (4) adds an exemption for boilers and space heaters firing only virgin gas fuels rated 10 million British thermal units per hour or less; (5) modifies the number of hours for testing and maintenance for exempted emergency generators; (6) modifies subparagraph B.2.h. to exempt additional sources with emissions less than the threshold of 1 pound per hour (lb/hr) PTE of sulfur dioxide, nitrogen oxides, and carbon monoxide; (7) adds the requirement for SC DHEC to periodically publish a list of sources exempted from the construction permit requirement under subparagraphs B.2.a.–g.—and any other sources determined to qualify for permit

exemptions based on subparagraph B.2.h.—in the *South Carolina State Register*; (8) adds procedures for sources requesting exemption from obtaining a construction permit under paragraph B.2. or paragraph B.4.; (9) adds paragraph B.6. to provide that exemptions under Section II.B. do not relieve the owner or operator of any source from any obligation to comply with any other applicable requirements; and (10) makes other administrative changes and adds references throughout subsection B.

The July 18, 2011, submittal makes subsequent revisions to clarify requirements and qualifications at Section II.B., as follows: (1) Adds language to subparagraph B.2.h. to require that emissions calculations or other information necessary to demonstrate a source qualifies for the exemption must be kept on site and provided to SC DHEC upon request; (2) revises language in paragraph B.3. to clarify that source types which are added to the list of exempted sources will be determined not to interfere with attainment or maintenance of any state or federal standard; (3) adds language stating that SC DHEC reserves the right to require a construction permit on a case-by-case basis, and that case-by-case determinations will consider, but not be limited to, “the nature and amount of the pollutants, location, proximity to residences and commercial establishments, etc.”; and (4) makes administrative edits to existing language.

Finally, the August 8, 2014, submittal makes additional changes to paragraph II.B., including: (1) Administrative edits to the title of the paragraph and to references and subparagraphs throughout; (2) revises the PTE criteria in subparagraph B.2.h. to a 5 ton per year (tpy) threshold rather than 1 lb/hr, and adds language to state that sources with higher PTE may be exempted under this subparagraph if they demonstrate that they are not subject to any applicable state or federal limits or requirements; (3) amends paragraph B.3. to include language asserting that SC DHEC may develop emission thresholds for exemption that are determined will not interfere with attainment or maintenance of state or federal standards to include in the list maintained pursuant to this paragraph, and that SC DHEC could be petitioned to consider adding additional sources to this list; and (4) adds paragraph B.5. stating that sources of volatile organic compounds (VOCs) with a PTE greater than the emission threshold listed in subparagraph B.2.h. may be exempted from the requirement to obtain a

<sup>3</sup> This memorandum is also included in the Docket for this proposed action.

construction permit on a case-by-case basis, and that exempt sources may later be required to be included in construction or operating permits.

Section 110(a)(2)(C) of the CAA requires that SIPs include a program for regulating the construction and modification of stationary sources as necessary to ensure that the NAAQS are maintained. Federal regulations at 40 CFR 51.160(e) require that states identify the types and sizes of sources subject to review and the basis for determining which sources are subject. Additionally, CAA section 110(l) provides that EPA shall not approve a revision to a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in CAA section 171), or any other applicable requirement of the CAA. SC DHEC has determined that specific sources listed at paragraphs B.1. and B.2. do not require permits because their size is not such that they are expected to interfere with attainment or maintenance of state or federal standards, including reasonable further progress.

SC DHEC's December 30, 2016, letter provides additional clarification for certain changes made to Section II.B. Subparagraph B.2.f. extends the testing and maintenance operation threshold for exempting emergency generators from 250 hours to 500 hours per year. SC DHEC considered CAA section 110(l), and asserts that the state expects no increase in actual emissions as a result of raising this exemption threshold. SC DHEC explains that the 500 hours per year threshold is commonly used to determine the PTE for title V and other major source applicability determinations, consistent with an EPA guidance memorandum.<sup>4</sup> These sources are still restricted to emergency conditions, meaning that other types of non-emergency activities—such as peak shaving—would not qualify for the exemption under paragraph II.B. Additionally, SC DHEC points to applicable federal requirements for emergency generators at 40 CFR part 63 at subpart ZZZZ and 40 CFR part 60 at subparts IIII and JJJJ to restrict non-emergency use of these sources to 100 hours per year. Therefore, this change to subparagraph B.2.f. will not result in any real increase in emissions and therefore will not affect the state's ability to attain or maintain state or federal standards or

reasonable further progress. The State also has the discretion to define the scope of its minor NSR program pursuant to 40 CFR 51.160(e).

SC DHEC in its letter also addresses changes made to subparagraph II.B.h. potentially allowing certain sources with PTE exceeding the thresholds of this subparagraph to be exempt from the requirement to obtain a construction permit. SC DHEC asserts that this provision is primarily intended to apply to sources with PTE only slightly above the thresholds in subparagraph II.B.h. SC DHEC notes the safeguards built into the language that sources subject to any applicable requirements are not exempt from obtaining construction permits. The letter then steps through an example of the process that small sources of VOC emissions would undergo, including an assessment of any potentially applicable requirements related to NAAQS, toxics, or hazardous air pollutants; consideration of the PTE relative to major source thresholds; and any other special considerations. SC DHEC determines the applicability of construction permits for these sources under close scrutiny on a case-by-case basis. This process in determining which types and sizes of sources need to undergo preconstruction review and permitting, afforded the State pursuant 40 CFR 51.160(e), is sufficient to protect the NAAQS and prevent interference with reasonable further progress, consistent with CAA sections 110(a)(2)(C) and 110(l).

SC DHEC's change to paragraph II.B.3. notes that SC DHEC may develop emission thresholds for exemptions that are not determined not to interfere with attainment or maintenance or any state or federal standard. EPA understands this language to reflect SC DHEC's flexibility for determining which types and sizes of sources need to undergo preconstruction review and permitting pursuant 40 CFR 51.160(e), and understands that these thresholds would need to be in the SIP, similar to Subparagraph II.B.h. The compiled list is available on SC DHEC's Web site.<sup>5</sup> EPA preliminarily agrees that SC DHEC clearly lays out the types and sizes of sources of interest for preconstruction review, and also the reasonable process by which case-by-case determinations are made to exempt sources with emissions above the thresholds in subparagraph B.2.h., but less than any thresholds for other applicable requirements like major NSR. EPA also

preliminarily agrees that this portion of South Carolina's minor NSR program does not interfere with attainment or maintenance of the NAAQS, reasonable further progress, or other applicable CAA requirements. Therefore, we are proposing to approve changes to the SIP made to Section II.B. pursuant to CAA sections 110(a)(2)(C) and 110(l), as well as 40 CFR 51.160–164.

### 3. Section II.C.—“Construction Permit Applications”

Regulation 61–62.1, Section II.C.—“Construction Permit Applications,” specifies the requirements for sources applying for and obtaining construction permits. The October 1, 2007, submittal makes several changes to subsection C. as follows: (1) Renumbers former paragraph A.2. to standalone subsection C and changes the title to specify that the requirements apply to construction permit applications; (2) makes administrative edits, including renumbering; (3) adds paragraph C.3. to reference SC DHEC forms which were created to ease the permit application process; and (4) renumbers former subparagraphs B.2.a.–g. to C.3.a.–p., reformatting and clarifying what information may be required in addition to the SC DHEC forms, including more specific process, chemical, and emissions information used to determine PTE, an air quality analysis demonstrating protection of the NAAQS, and a regulatory applicability determination.

The July 18, 2011, submittal further modifies Section II.C. at subparagraphs C.3.c.–d. to make administrative edits. South Carolina's August 8, 2014, submittal makes additional administrative and clarifying edits. The January 20, 2016, submittal also makes minor administrative edits. Finally, the July 27, 2016, submittal makes one change to subparagraph C.2.m. to clarify that scale drawings of the facility must include buildings that might affect dispersion of emissions.

EPA has reviewed the changes made to the construction permit application requirements and is proposing to approve them into the SIP, pursuant to CAA sections 110(a)(2)(C) and 110(l).

### 4. Section II.D.—“General Construction Permits”

Regulation 61–62.1, Section II.D.—“General Construction Permits” provides regulations by which SC DHEC can issue general construction permits for similar sources. South Carolina's October 1, 2007, submittal adds these provisions to the minor NSR program for construction permits to facilitate the permitting process for similar sources

<sup>4</sup> Seitz, John S. “Calculating Potential to Emit (PTE) for Emergency Generators.” Memorandum to Program Directors in EPA Regional Offices, Office of Air Quality Planning and Standards, Research Triangle Park, NC (September 6, 1995).

<sup>5</sup> The latest compiled list of exempted sources was updated as of December 2016: <http://www.scdhec.gov/Environment/docs/NewExemptions.pdf>.

qualifying for and applying for coverage under permits with general terms and conditions. The purpose of this general permitting minor NSR program is to protect the NAAQS while simplifying the permitting process for similar sources. The general construction permits paragraph provides for the following: (1) General permits will incorporate all applicable requirements for construction of similar sources and identify the criteria by which sources can qualify for the permit; (2) sources can submit construction permit applications to SC DHEC that include requests for coverage under the general permit, and sources later determined not to qualify for the general permit are subject to enforcement; (3) approval to operate under a permit is a final permit action for the purposes of judicial review; (4) the permit application can deviate from the provisions of Section II.C. if enough information is included to determine the source's qualification for the general permit; and (5) sources qualifying for general permits are able to apply for individual construction permits in lieu of coverage under the general permit.

The August 8, 2014, submittal makes administrative and clarifying edits to subsection II.D. throughout. EPA has reviewed the changes made to the minor NSR permitting program and is proposing to approve them into the SIP, pursuant to CAA sections 110(a)(2)(C) and 110(l).

#### 6. Section II.E.—“Synthetic Minor Construction Permits”

Regulation 61–62.1, Section II.E.—“Synthetic Minor Construction Permits” specifies requirements for obtaining construction permits with federally enforceable emissions limits to restrict PTE for sources. South Carolina's October 1, 2007, submittal revises the paragraph for synthetic minor sources as follows: (1) Renumbers subsection II.H. to subsection II.E.; (2) makes administrative and clarifying amendments to the title and throughout the paragraph to clearly indicate that this paragraph pertains to construction permits and to update references; (3) removes former subparagraphs II.2.c.–f. as these requirements are now redundant and covered by other portions of subsection E. or Section II; (4) adds paragraph E.3. to list required synthetic minor permit conditions; (5) adds administrative language to make applications for general synthetic minor construction permits consistent with other construction permit applications; and (6) adds paragraph E.5. to list additional requirements for synthetic minor construction permit applications

relative to other minor construction permit applications.

The August 8, 2014, submittal makes changes to subsection II.E. to update administrative language and references throughout the paragraph. The July 27, 2016, submittal also makes administrative edits to subparagraph E.2.b. EPA has reviewed the changes made to the requirements covering synthetic minor construction permits and is proposing to approve them into the SIP, pursuant to CAA sections 110(a)(2)(C) and 110(l), and 40 CFR 51.160–164.

#### 7. Section II.F.—“Operating Permits”

Regulation 61–62.1, Section II.F.—“Operating Permits” specifies requirements for obtaining minor source operating permits. South Carolina's October 1, 2007, submittal makes several changes to subsection II.F. to clarify and add requirements, including: (1) Renumbering subsection II.B. to II.F.; (2) adding paragraph F.1. to require sources to record the actual date of initial startup and submit it to SC DHEC; (3) adding paragraph F.2. to require certification that construction was completed in accordance with the specifications of the construction permit, to require any variances from the construction permit to be addressed, and to assert that construction variances which would trigger new requirements will be considered construction without a permit; (4) adding language to clarify that title V sources may comply with the Section II.F. operating permit requirements by submitting a permit modification request under 61–62.70.7(e); (5) adding language to clarify that the existing requirement to provide a written request to SC DHEC for a new or revised operating permit applies to minor sources and those major sources not yet covered by a title V permit; (6) adding subparagraph F.3.c. to specify that the written request for a new or revised operating permit must include a list of sources put into operation and the actual initial startup dates for those sources; (7) making other administrative edits throughout the paragraph; and (8) moving paragraph B.2. regarding permit renewals to a standalone subsection II.H.

The August 8, 2014 and July 27, 2016, submittals make administrative changes to Section II.F.—“Operating Permits.” EPA has reviewed the changes made to the existing SIP requirements for applying for an operating permit and is proposing to approve them into the SIP, pursuant to CAA sections 110(a)(2)(C) and 110(l).

38. Section II.G.—“Conditional Major Operating Permits”

Regulation 61–62.1, Section II.G.—“Conditional Major Operating Permits” specifies requirements for obtaining operating permits with federally enforceable emissions limits to restrict PTE for sources. South Carolina's October 1, 2007, submittal makes several changes to subsection II.G. to clarify applicability and requirements as follows: (1) Adds language to specify that paragraph II.G. applies to sources requesting federally enforceable limits to restrict PTE below major source thresholds; (2) adds language to specify that sources which received synthetic minor construction permits and that are not subject to title V will receive conditional major operating permits; (3) adds permit shield language to note that if the renewal request is submitted pursuant to paragraph II.H., conditional major sources can operate under the most recent conditional major permit until SC DHEC processes the renewal request; (4) adds language to note that the written request provided by new sources needs to include any additional information specified in subparagraph G.5.; (5) adds language and clarifies existing language to note that the permit conditions, including special conditions to verify compliance with operational and emissions limits, are located at subsection II.J.; (6) modifies existing language to specify additional requirements for conditional major operating permit applications only; (7) removes requirements pertaining to construction permit application requirements because subsections II.C. and II.E. otherwise cover these requirements; (8) removes requirements pertaining to standard operating permit applications because those are otherwise covered by subsection II.F.; (9) adds language to specify that the general information requirements in construction permit applications at paragraph C.3. also apply to conditional major operating permits; and (10) makes other administrative language changes throughout the paragraph.

The July 18, 2011, August 8, 2014, and July 27, 2016, submittals make additional administrative changes to subsection II.G. EPA has reviewed the changes made to SC DHEC's conditional major source program, which is a portion of the FESOP minor source program, and agrees that the revisions made to subsection II.G. clarify the requirements for obtaining conditional major operating permits. Further, EPA has determined that the conditional operating permit program remains consistent with the criteria for

approving FESOP programs.<sup>6</sup> Therefore, EPA is proposing to approve these changes into the SIP pursuant to CAA sections 110(a)(2)(C) and 110(l).

#### 9. Section II.H.—“Operating Permit Renewal Request”

Regulation 61–62.1, Section II.H.—“Operating Permit Renewal Request” specifies requirements for renewing operating permits for minor sources. South Carolina’s October 1, 2007, submittal makes several changes to subsection II.H. to clarify applicability and requirements as follows: (1) Renumbers former paragraph B.2. to make a standalone subsection at II.H.; (2) adds paragraph H.1. to clarify that operating permits must be renewed through a written request; (3) adds paragraph H.2. to clarify that subsection II.H does not apply to title V sources; (4) adds language to specify that sources must submit permit renewal requests no later than 90 days prior to expiration of the existing operating permit; (5) revises language to expand the type of information needed to verify special permit conditions; (6) adds language to require more specific information in the renewal request, including changes in the source information required for construction permits under paragraph C.3.; and (7) makes administrative language changes throughout the paragraph.

The July 18, 2011, June 17, 2013, August 8, 2014, and July 27, 2016, submittals make several administrative edits and correct typographical errors throughout subsection II.H. EPA has reviewed the changes made to the operating permit renewal requirements and believes these changes are more specific and help to ensure SC DHEC has the best information possible when evaluating renewal requests. EPA has also preliminarily determined that the changes will not interfere with attainment or maintenance of the NAAQS, reasonable further progress, or other applicable CAA requirements. EPA is therefore proposing to approve these changes into the SIP, pursuant to CAA sections 110(a)(2)(C) and 110(l).

#### 10. Section II.I.—“Registration Permits”

Regulation 61–62.1, Section II.I.—“Registration Permits” provides regulations by which SC DHEC can issue registration permits, covering the construction and operation of similar sources. South Carolina’s October 1, 2007, submittal adds these provisions to the minor source construction and operating permitting program to

facilitate the permitting process for similar true minor sources qualifying for and applying for coverage permits for specific source categories. The purpose of this registration permitting minor source program is to protect the NAAQS while simplifying the permitting process for similar true minor sources. The difference between registration permits and general construction permits or general operating permits is that this program develops permits for specific source categories exclusively for true minor sources.

The October 1, 2007, submittal provides the following requirements for registration permits under paragraph II.I: (1) Registration permits will be developed by SC DHEC and will specify all applicable requirements for construction and operation of similar true minor sources; (2) registration permits will be developed only for true minor sources; (3) sources can submit applications for coverage by certifying qualification for, and agreeing to the conditions of, registration permits, and sources later determined not to qualify for the registration permit are subject to enforcement; (4) approval to operate under a permit is a final permit action for the purposes of judicial review; and (5) sources will adhere to general requirements under paragraph II.J.1., and any other special permit conditions necessary to verify compliance with operational and emission limits.

The July 18, 2011, submittal makes subsequent changes to subsection II.I. as follows: (1) Makes administrative edits; (2) adds language to assert that regardless of qualification for registration permits, SC DHEC reserves the right to require construction and operating permits, as determined on a case-by-case basis; and (3) changes language to clarify that registration permits shall contain any applicable permit conditions under subsection II.J., rather than all permit conditions listed in paragraph II.J., as SC DHEC finds appropriate.

The August 8, 2014, submittal includes other changes to paragraph II.I., including administrative edits throughout and adding language to assert that SC DHEC can reopen registration permits for cause or to include new standards or regulations that become applicable during the lifetime of the permit. The August 8, 2014, submittal also removes language at subparagraph I.1.a. requiring SC DHEC to provide notice and opportunity for public participation prior to developing new registration permits. However, the State withdrew this change from EPA’s consideration in a

letter dated August 7, 2017.<sup>7</sup> In the letter, SC DHEC explained that its intent in withdrawing the change was to require the Department to comply with the public participation procedures at subsection II.N. when developing registration permits.

EPA has reviewed the changes made to the registration permit requirements, as clarified by the State’s August 7, 2017, letter, and is proposing to approve them into the SIP, pursuant to CAA sections 110(a)(2)(C) and 110(l), and 40 CFR part 51, subpart I.

#### 11. Section II.J.—“Permit Conditions”

Regulation 61–62.1, Section II.J.—“Permit Conditions” specifies required standard and special permit conditions. The October 1, 2007, submittal combines the standard and special permit conditions into a standalone section for required permit conditions. This submittal makes the following changes at paragraph J.: (1) Renumbers former subsection II.C. to II.J. and modifies the title to reflect that the subsection applies to all permit types; (2) requires sources to submit reports as specified in applicable permits, laws, regulations, or standards; (3) adds language to assert that a source may be subject to enforcement if it fails to construct in accordance with the application and any issued construction permit, or constructs without applying for approval; (4) adds language to clarify the time period over which construction permits are valid; (5) renumbers paragraph G.4. to paragraph J.2. and modifies the title to clarify that what follows are special permit conditions; (6) adds language stating that SC DHEC will require special permit conditions as it finds appropriate, such as operational limits or reporting and recordkeeping requirements; (7) removes former subparagraph G.4.g., which states conditions to limit PTE must be federally enforceable, because the State otherwise imposes this requirement for synthetic minor construction permits at subparagraph E.3. and conditional major operating permits at subparagraph G.5.; and (8) makes administrative language changes throughout subsection II.J.

One change made to subparagraph J.1.d., formerly C.4., in the October 1, 2007, submittal regards when emissions reports need to be made. In the place of a specific quarterly timeframe, the change directs sources to comply with reporting requirements derived from applicable permit requirements, laws and regulations, or standards. There are no specific reporting requirements for

<sup>6</sup> EPA approved SC DHEC’s FESOP program on December 11, 1995 (60 FR 63434).

<sup>7</sup> The August 7, 2017, letter has been included in the docket for this action.



minor sources specified in federal regulations at 40 CFR 51.160–164, so these reporting schedules can be developed as SC DHEC deems necessary.<sup>8</sup> Moreover, subparagraph J.1.a. states that “[n]o applicable law, regulation or standard will be contravened.” Thus, if there is a prescriptive state or federal requirement for reporting of emissions that applies to any of these minor sources, the permits will set the necessary reporting schedule accordingly. Therefore, EPA has determined that this change does not interfere with attainment or maintenance of the NAAQS, reasonable further progress, or any other applicable CAA requirements.

The July 18, 2011, submittal makes further revisions to subsection II.J., including: (1) Adding language stating that false information or misrepresentation in a permit application is grounds for permit revocation; (2) adding language stating that the issued construction or operating permit must be kept at the facility and that records must be kept as prescribed on site for at least five years; and (3) making administrative and clarifying edits. The August 8, 2014, submittal makes additional administrative changes.

EPA has reviewed the changes to standard and special permit requirements for the minor source construction and operating permit program and is proposing to approve them into the SIP pursuant to CAA section 110(a)(2)(C) and 110(l).

#### 12. Section II.K.—“Exceptions”

Regulation 61–62.1, Section II.K.—“Exceptions” sets forth factors that SC DHEC shall consider in determining whether to impose alternative emissions limits, compliance schedules, or other restrictions. The October 1, 2007, submittal makes non-substantive changes to this subsection, including renumbering this existing subsection from II.D. to II.K., and making administrative language changes. EPA is therefore proposing to approve the aforementioned changes into the SIP pursuant to CAA sections 110(a)(2)(C) and 110(l).

#### 13. Section II.M.—“Transfer of Ownership/Operation”

Regulation 61–62.1, Section II.M.—“Transfer of Ownership/Operation” specifies procedures for owners or operators of sources to undertake if the ownership or operation is transferred to another party. The October 1, 2007,

submittal makes minor changes to this regulation to renumber existing subsection II.E. to subsection II.M. and to add more specific requirements for the written request to transfer ownership or operation of a source. The August 8, 2014, submittal makes only administrative changes to language in this subsection.

EPA has reviewed the changes to this existing portion of the minor source permitting regulations and is proposing to approve the aforementioned changes into the SIP pursuant to CAA section 110(a)(2)(C) and 110(l).

#### 14. Section II.N.—“Public Participation Procedures”

Regulation 61–62.1, Section II.N.—“Public Participation Procedures,” specifies the public participation requirements for sources applying for and obtaining federally enforceable minor source construction and operating permits. The October 1, 2007, submittal makes several changes to subsection N. as follows: (1) Renumbers existing paragraph G.5. to create a standalone paragraph for public participation and clarify that these procedures can apply to other types of permit requests rather than only conditional major source operating permits; (2) adds language providing SC DHEC with discretion to require notice of permitting activity, even when not otherwise required by the State’s regulations; (3) adds language stating that SC DHEC can use means other than publishing in newspapers, the *State Register*, and mailing lists to notify the public of minor source permitting; and (5) makes administrative language edits for consistency.

The July 18, 2011, submittal makes one clarifying edit to reflect that an approved construction permit is required prior to the commencement of construction. The August 8, 2014, submittal makes administrative and clarifying edits to subsection II.N., including: (1) Adding language to subparagraph N.1. to identify the SC DHEC Web site as another method of notifying the public of permitting activity; (2) reformatting and revising paragraph N.2. to list the required elements of the public notice; (3) revising language to identify how SC DHEC will address and record comments, and broadening the SC DHEC procedures to note that the State will respond to all comments rather than only those received in writing or at the public hearing; (4) removing language requiring SC DHEC to respond to all comments in writing; and (5) making administrative edits.

The changes in the October 1, 2007, submittal to allow for other methods of public notice, and in the August 8, 2014, submittal to explicitly list the SC DHEC Web site as a possible method of public notice are consistent with the minor source permitting regulations at 40 CFR 51.161. EPA has existing policy asserting that the public notice requirement for minor source permitting activities at 40 CFR 51.161(b)(3) is media-neutral, meaning that the public notice requirement can be met as long as the State interprets the method to be “prominent advertising.”<sup>9</sup> SC DHEC can therefore make use of its Web site, mailing lists, and other methods in lieu of publication in a newspaper. The provisions at subsection II.N. pertain only to minor sources, and any major source public notice requirements are contained in the major source PSD, NNSR, and title V regulations.<sup>10</sup>

EPA has reviewed the public notice requirements and preliminarily finds that the changes currently before the Agency are not inconsistent with the CAA and EPA’s implementing regulations, including the criteria for approving FESOP programs. See 54 FR 27274 (June 28, 1989). Therefore, EPA is proposing to approve the changes to the existing public notice requirements for the minor NSR and FESOP programs, pursuant to CAA section 110(a)(2)(C) and 40 CFR 51.160–164.

#### 15. Section II.O.—“Inspection and Entry”

Regulation 61–62.1, Section II.O.—“Inspection and Entry,” specifies requirements to allow SC DHEC officials to enter and inspect facilities. South Carolina’s July 18, 2011, submittal adds these provisions to the minor source construction and operating permitting program to allow for verification of adherence to permit conditions. The August 8, 2014, submittal makes one additional administrative change to the introductory language at subsection II.O. The ability for SC DHEC to enter and inspect facilities enables the State to oversee the minor source permitting program, including assisting in potential enforcement actions. EPA is therefore proposing to approve this subsection

<sup>9</sup>McCabe, Janet, “Minor New Source Review Program Public Notice Requirements under 40 CFR 51.161(b)(3).” Memorandum to Regional Administrators, Office of Air and Radiation, Washington, DC (April 17, 2012).

<sup>10</sup>EPA published a final rule on October 18, 2016 (81 FR 71613) amending the public notice requirements for major source permitting programs to allow for other means of public notice, including Web sites. This proposed rulemaking only deals with changes to South Carolina’s minor source permitting regulations.

<sup>8</sup>40 CFR 70.6 generally requires semiannual emissions and compliance reporting.

and its updated provisions into the SIP, pursuant to CAA section 110(a)(2)(C).

#### IV. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference South Carolina Regulation 61–62.1, Section II—“Permit Requirements,” effective June 24, 2016,<sup>11</sup> which revises the federally enforceable minor source construction and operating permit program. EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://www.regulations.gov) and/or at the EPA Region 4 office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

#### V. Proposed Action

EPA is proposing to approve portions of revisions to the South Carolina SIP submitted by SC DHEC to EPA on October 1, 2007, July 18, 2011, June 17, 2013, August 8, 2014, January 20, 2016, and July 27, 2016. Specifically, EPA is proposing to approve the changes to S.C. Code Ann. Regs. 61–62.1, Section II—“Permit Requirements,” as discussed above, pursuant to CAA section 110(a)(2)(C), section 110(l), and 40 CFR 51.160–164.

#### VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. See 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule for South Carolina does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not have substantial direct effects on an Indian Tribe. The Catawba Indian Nation Reservation is located within the state of South Carolina. Pursuant to the Catawba Indian Claims Settlement Act, S.C. Code Ann. 27–16–120, “all state and local environmental laws and regulations apply to the [Catawba Indian Nation] and Reservation and are fully enforceable by all relevant state and local agencies and authorities.” EPA notes this action will not impose substantial direct costs on Tribal governments or preempt Tribal law.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: August 7, 2017.

#### V. Anne Heard,

*Acting Regional Administrator, Region 4.*

[FR Doc. 2017–17345 Filed 8–16–17; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R04–OAR–2017–0104; FRL–9966–18–Region 4]

### Air Plan Approval; Alabama; Regional Haze Plan and Prong 4 (Visibility) for the 2012 PM<sub>2.5</sub>, 2010 NO<sub>2</sub>, 2010 SO<sub>2</sub>, and 2008 Ozone NAAQS

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to take the following four actions regarding the Alabama State Implementation Plan (SIP), contingent upon a final determination from the Agency that a state’s participation in the Cross-State Air Pollution Rule (CSAPR) continues to meet the Regional Haze Rule (RHR)’s criteria to qualify as an alternative to the application of Best Available Retrofit Technology (BART): Approve the portion of Alabama’s October 26, 2015, SIP submittal seeking to change reliance from the Clean Air Interstate Rule (CAIR) to CSAPR for certain regional haze requirements; convert EPA’s limited approval/limited disapproval of Alabama’s July 15, 2008, regional haze SIP to a full approval; approve the visibility prong of Alabama’s infrastructure SIP submittals for the 2012 Fine Particulate Matter (PM<sub>2.5</sub>), 2010 Nitrogen Dioxide (NO<sub>2</sub>), and 2010 Sulfur Dioxide (SO<sub>2</sub>) National Ambient Air Quality Standards (NAAQS); and convert EPA’s disapproval of the visibility portion of Alabama’s infrastructure SIP submittal for the 2008 Ozone NAAQS to an approval.

**DATES:** Comments must be received on or before September 18, 2017.

**ADDRESSES:** Submit your comments, identified by Docket ID No EPA–R04–OAR–2017–0104 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary

<sup>11</sup> See Section I and Section II.C. of this proposed rule for additional detail.

submission (*i.e.*, on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Michele Notarianni, Air Regulatory Management Section, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Ms. Notarianni can be reached by telephone at (404) 562–9031 or via electronic mail at [notarianni.michele@epa.gov](mailto:notarianni.michele@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Regional Haze SIPs and Their Relationship With CAIR and CSAPR*

Section 169A(b)(2)(A) of the Clean Air Act (CAA or Act) requires states to submit regional haze SIPs that contain such measures as may be necessary to make reasonable progress towards the natural visibility goal, including a requirement that certain categories of existing major stationary sources built between 1962 and 1977 procure, install, and operate BART as determined by the state. Under the RHR, states are directed to conduct BART determinations for such “BART-eligible” sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or other alternative program as long as the alternative provides greater reasonable progress towards improving visibility than BART. See 40 CFR 51.308(e)(2). EPA provided states with this flexibility in the RHR, adopted in 1999, and further refined the criteria for assessing whether an alternative program provides for greater reasonable progress in two subsequent rulemakings. See 64 FR 35714 (July 1, 1999); 70 FR 39104 (July 6, 2005); 71 FR 60612 (October 13, 2006).

EPA demonstrated that CAIR would achieve greater reasonable progress than BART in revisions to the regional haze program made in 2005.<sup>1</sup> See 70 FR 39104. In those revisions, EPA amended its regulations to provide that states

participating in the CAIR cap-and-trade programs pursuant to an EPA-approved CAIR SIP or states that remain subject to a CAIR Federal Implementation Plan (FIP) need not require affected BART-eligible electric generating units (EGUs) to install, operate, and maintain BART for emissions of SO<sub>2</sub> and nitrogen oxides (NO<sub>x</sub>). As a result of EPA’s determination that CAIR was “better-than-BART,” a number of states in the CAIR region, including Alabama, relied on the CAIR cap-and-trade programs as an alternative to BART for EGU emissions of SO<sub>2</sub> and NO<sub>x</sub> in designing their regional haze SIPs. These states also relied on CAIR as an element of a long-term strategy (LTS) for achieving their reasonable progress goals (RPGs) for their regional haze programs. However, in 2008, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded CAIR to EPA without vacatur to preserve the environmental benefits provided by CAIR. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). On August 8, 2011 (76 FR 48208), acting on the D.C. Circuit’s remand, EPA promulgated CSAPR to replace CAIR and issued FIPs to implement the rule in CSAPR-subject states.<sup>2</sup> Implementation of CSAPR was scheduled to begin on January 1, 2012, when CSAPR would have superseded the CAIR program.

Due to the D.C. Circuit’s 2008 ruling that CAIR was “fatally flawed” and its resulting status as a temporary measure following that ruling, EPA could not fully approve regional haze SIPs to the extent that they relied on CAIR to satisfy the BART requirement and the requirement for a LTS sufficient to achieve the state-adopted RPGs. On these grounds, EPA finalized a limited disapproval of Alabama’s regional haze SIP on June 7, 2012, triggering the requirement for EPA to promulgate a FIP unless Alabama submitted and EPA approved a SIP revision that corrected the deficiency. See 77 FR 33642. EPA finalized a limited approval of Alabama’s regional haze SIP on June 28, 2012, as meeting the remaining

<sup>2</sup> CSAPR requires 28 eastern states to limit their statewide emissions of SO<sub>2</sub> and/or NO<sub>x</sub> in order to mitigate transported air pollution unlawfully impacting other states’ ability to attain or maintain four NAAQS: The 1997 ozone NAAQS, the 1997 annual PM<sub>2.5</sub> NAAQS, the 2006 24-hour PM<sub>2.5</sub> NAAQS, and the 2008 8-hour ozone NAAQS. The CSAPR emissions limitations are defined in terms of maximum statewide “budgets” for emissions of annual SO<sub>2</sub>, annual NO<sub>x</sub>, and/or ozone-season NO<sub>x</sub> by each covered state’s large EGUs. The CSAPR state budgets are implemented in two phases of generally increasing stringency, with the Phase 1 budgets applying to emissions in 2015 and 2016 and the Phase 2 budgets applying to emissions in 2017 and later years.

applicable regional haze requirements set forth in the CAA and the RHR. See 77 FR 38515.

In the June 7, 2012, limited disapproval action, EPA also amended the RHR to provide that participation by a state’s EGUs in a CSAPR trading program for a given pollutant—either a CSAPR federal trading program implemented through a CSAPR FIP or an integrated CSAPR state trading program implemented through an approved CSAPR SIP revision—qualifies as a BART alternative for those EGUs for that pollutant.<sup>3</sup> See 40 CFR 51.308(e)(4). Since EPA promulgated this amendment, numerous states covered by CSAPR have come to rely on the provision through either SIPs or FIPs.<sup>4</sup>

Numerous parties filed petitions for review of CSAPR in the D.C. Circuit, and on August 21, 2012, the court issued its ruling, vacating and remanding CSAPR to EPA and ordering continued implementation of CAIR. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 38 (D.C. Cir. 2012). The D.C. Circuit’s vacatur of CSAPR was reversed by the United States Supreme Court on April 29, 2014, and the case was remanded to the D.C. Circuit to resolve remaining issues in accordance with the high court’s ruling. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). On remand, the D.C. Circuit affirmed CSAPR in most respects, but invalidated without vacating some of the CSAPR budgets as to a number of states. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015). The remanded budgets include the Phase 2 SO<sub>2</sub> emissions budgets for Alabama, Georgia, South Carolina, and Texas and the Phase 2 ozone-season NO<sub>x</sub> budgets for 11 states. This litigation ultimately delayed implementation of CSAPR for three years, from January 1, 2012, when CSAPR’s cap-and-trade programs were originally scheduled to replace the CAIR cap-and-trade programs, to January 1, 2015. Thus, the rule’s Phase 2 budgets that were originally promulgated to begin on January 1, 2014, began on January 1, 2017.

<sup>3</sup> Legal challenges to the CSAPR-Better-than-BART rule from state, industry, and other petitioners are pending. *Utility Air Regulatory Group v. EPA*, No. 12–1342 (D.C. Cir. filed August 6, 2012).

<sup>4</sup> EPA has promulgated FIPs relying on CSAPR participation for BART purposes for Georgia, Indiana, Iowa, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia, 77 FR at 33654, and Nebraska, 77 FR 40150, 40151 (July 6, 2012). EPA has approved Minnesota’s and Wisconsin’s SIPs relying on CSAPR participation for BART purposes. See 77 FR 34801, 34806 (June 12, 2012) for Minnesota and 77 FR 46952, 46959 (August 7, 2012) for Wisconsin.

<sup>1</sup> CAIR created regional cap-and-trade programs to reduce SO<sub>2</sub> and NO<sub>x</sub> emissions in 27 eastern states (and the District of Columbia), including Alabama, that contributed to downwind nonattainment or interfered with maintenance of the 1997 8-hour ozone NAAQS or the 1997 PM<sub>2.5</sub> NAAQS.

On November 10, 2016, EPA published a notice of proposed rulemaking (NPRM) explaining the Agency's belief that the potentially material changes to the scope of CSAPR coverage resulting from the D.C. Circuit's remand will be limited to the withdrawal of the FIP provisions providing SO<sub>2</sub> and annual NO<sub>x</sub> budgets for Texas and ozone-season NO<sub>x</sub> budgets for Florida. This is due, in part, to EPA's approval of the portion of Alabama's October 26, 2015, SIP submittal adopting Phase 2 annual NO<sub>x</sub> and SO<sub>2</sub> budgets equivalent to the federally-developed budgets and to commitments from Georgia and South Carolina to submit SIP revisions adopting Phase 2 annual NO<sub>x</sub> and SO<sub>2</sub> budgets equal to or more stringent than the federally-developed budgets. *See* 81 FR 78954. Since publication of the NPRM, Georgia and South Carolina have submitted these SIP revisions to EPA.<sup>5</sup> In the NPRM, EPA also proposed to determine that the limited changes to the scope of CSAPR coverage do not alter EPA's conclusion that CSAPR remains "better-than-BART;" that is, that participation in CSAPR remains available as an alternative to BART for EGUs covered by the trading program. At this time, EPA has not finalized this proposed determination.

Alabama's October 26, 2015, SIP submittal also seeks to correct the deficiencies identified in the June 7, 2012, limited disapproval of its regional haze SIP by replacing reliance on CAIR with reliance on CSAPR.<sup>6</sup> Specifically, Alabama requests that EPA amend the State's regional haze SIP by replacing its reliance on CAIR with CSAPR to satisfy SO<sub>2</sub> and NO<sub>x</sub> BART requirements and SO<sub>2</sub> reasonable progress requirements for EGUs formerly subject to CAIR,<sup>7</sup> and

<sup>5</sup> Georgia's rulemaking to adopt the Phase 2 annual NO<sub>x</sub> and SO<sub>2</sub> budgets became state effective on July 20, 2017, and the State will submit a SIP revision to EPA in the near future. South Carolina submitted a SIP revision to EPA for parallel processing on May 26, 2017, to adopt the Phase 2 annual NO<sub>x</sub> and SO<sub>2</sub> budgets.

<sup>6</sup> On August 31, 2016 (81 FR 59869), EPA approved portions of the October 26, 2015, SIP submission incorporating into Alabama's SIP the State's regulations requiring Alabama EGUs to participate in CSAPR state trading programs for annual NO<sub>x</sub> and SO<sub>2</sub> emissions integrated with the CSAPR federal trading programs and thus replacing the corresponding FIP requirements. In the August 31, 2016, action, EPA did not take any action regarding Alabama's request in this October 26, 2015, SIP submission to revise the State's regional haze SIP nor regarding the prong 4 for the 2008 lead, 2008 8-hour ozone, 2010 1-hour NO<sub>2</sub>, and 2010 1-hour SO<sub>2</sub> NAAQS.

<sup>7</sup> In its regional haze SIP, Alabama concluded and EPA found acceptable the State's determination that no additional controls beyond CAIR are reasonable for SO<sub>2</sub> for affected Alabama EGUs for the first implementation period. *See* 77 FR 11949 (February 28, 2012).

to support the RPGs for the Sipsey Wilderness Area in Alabama for the first planning period. EPA is proposing to take these actions in this action.

#### B. Infrastructure SIPs

By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) of the CAA are to be submitted by states within three years (or less, if the Administrator so prescribes) after promulgation of a new or revised NAAQS to provide for the implementation, maintenance, and enforcement of the new or revised NAAQS. EPA has historically referred to these SIP submissions made for the purpose of satisfying the requirements of sections 110(a)(1) and 110(a)(2) as "infrastructure SIP" submissions. Sections 110(a)(1) and (2) require states to address basic SIP elements such as for monitoring, basic program requirements, and legal authority that are designed to assure attainment and maintenance of the newly established or revised NAAQS. More specifically, section 110(a)(1) provides the procedural and timing requirements for infrastructure SIPs. Section 110(a)(2) lists specific elements that states must meet for the infrastructure SIP requirements related to a newly established or revised NAAQS. The contents of an infrastructure SIP submission may vary depending upon the data and analytical tools available to the state, as well as the provisions already contained in the state's implementation plan at the time in which the state develops and submits the submission for a new or revised NAAQS.

Section 110(a)(2)(D) has two components: 110(a)(2)(D)(i) and 110(a)(2)(D)(ii). Section 110(a)(2)(D)(i) includes four distinct components, commonly referred to as "prongs," that must be addressed in infrastructure SIP submissions. The first two prongs, which are codified in section 110(a)(2)(D)(i)(I), are provisions that prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment of the NAAQS in another state (prong 1) and from interfering with maintenance of the NAAQS in another state (prong 2). The third and fourth prongs, which are codified in section 110(a)(2)(D)(i)(II), are provisions that prohibit emissions activity in one state from interfering with measures required to prevent significant deterioration of air quality in another state (prong 3) or from interfering with measures to protect visibility in another state (prong 4). Section 110(a)(2)(D)(ii) requires SIPs to include provisions ensuring

compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement.

Through this action, EPA is proposing to approve the prong 4 portion of Alabama's infrastructure SIP submissions for the 2010 1-hour NO<sub>2</sub>, 2010 1-hour SO<sub>2</sub>, and 2012 annual PM<sub>2.5</sub> NAAQS, and to convert EPA's disapproval of the prong 4 portion of Alabama's infrastructure SIP submission for the 2008 8-hour Ozone NAAQS to an approval, as discussed in section IV of this notice.<sup>8</sup> All other applicable infrastructure SIP requirements for these SIP submissions have been or will be addressed in separate rulemakings. A brief background regarding the NAAQS relevant to this proposal is provided below. For comprehensive information on these NAAQS, please refer to the **Federal Register** notices cited in the following subsections.

#### 1. 2010 1-Hour SO<sub>2</sub> NAAQS

On June 2, 2010, EPA revised the 1-hour primary SO<sub>2</sub> NAAQS to an hourly standard of 75 parts per billion (ppb) based on a 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations. *See* 75 FR 35520 (June 22, 2010). States were required to submit infrastructure SIP submissions for the 2010 1-hour SO<sub>2</sub> NAAQS to EPA no later than June 2, 2013. Alabama submitted an infrastructure SIP submission for the 2010 1-hour SO<sub>2</sub> NAAQS on April 23, 2013. This proposed action only addresses the prong 4 element of that submission.<sup>9</sup>

#### 2. 2010 1-Hour NO<sub>2</sub> NAAQS

On January 22, 2010, EPA promulgated a new 1-hour primary NAAQS for NO<sub>2</sub> at a level of 100 ppb, based on a 3-year average of the 98th percentile of the yearly distribution of 1-hour daily maximum concentrations. *See* 75 FR 6474 (February 9, 2010). States were required to submit infrastructure SIP submissions for the 2010 1-hour NO<sub>2</sub> NAAQS to EPA no later than January 22, 2013. Alabama submitted infrastructure SIP submissions for the 2010 1-hour NO<sub>2</sub> NAAQS on April 23, 2013, and December 9, 2015. This proposed action only addresses the prong 4 element of those submissions.<sup>10</sup>

<sup>8</sup> *See* 82 FR 9512 (February 7, 2017).

<sup>9</sup> The other portions of Alabama's April 23 2013, SO<sub>2</sub> infrastructure submission have been addressed in a previous EPA action. *See* 82 FR 3637 (January 12, 2017).

<sup>10</sup> The other portions for Alabama's April 23 2013, and December 9, 2015, NO<sub>2</sub> infrastructure submissions have been addressed in previous EPA actions. *See* 81 FR 83142 (November 21, 2016); 80 FR 14019 (March 18, 2015).

### 3. 2012 PM<sub>2.5</sub> NAAQS

On December 14, 2012, EPA revised the annual primary PM<sub>2.5</sub> NAAQS to 12 micrograms per cubic meter (µg/m<sup>3</sup>). See 78 FR 3086 (January 15, 2013). States were required to submit infrastructure SIP submissions for the 2012 PM<sub>2.5</sub> NAAQS to EPA no later than December 14, 2015. Alabama submitted an infrastructure SIP submission for the 2012 PM<sub>2.5</sub> NAAQS on December 9, 2015. This proposed action only addresses the prong 4 element of that submission.<sup>11</sup>

### 4. 2008 8-Hour Ozone NAAQS

On March 12, 2008, EPA revised the 8-hour Ozone NAAQS to 0.075 parts per million. See 73 FR 16436 (March 27, 2008). States were required to submit infrastructure SIP submissions for the 2008 8-hour Ozone NAAQS to EPA no later than March 12, 2011. Alabama submitted an infrastructure SIP for the 2008 8-hour Ozone NAAQS on August 20, 2012. On February 7, 2017, EPA disapproved the prong 4 element of Alabama's 2008 8-hour Ozone infrastructure submission. See 82 FR 9512. This proposed action addresses that disapproval and proposes to convert it to a full approval for prong 4.<sup>12</sup>

## II. What is EPA's approach to the review of infrastructure SIP submissions?

The requirement for states to make a SIP submission of this type arises out of section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)," and these SIP submissions are to provide for the "implementation, maintenance, and enforcement" of such NAAQS. The statute directly imposes on states the duty to make these SIP submissions, and the requirement to make the submissions is not conditioned upon EPA's taking any action other than promulgating a new or revised NAAQS. Section 110(a)(2) includes a list of specific elements that "each such plan" submission must address.

EPA has historically referred to these SIP submissions made for the purpose of satisfying the requirements of section 110(a)(1) and (2) as "infrastructure SIP"

submissions. Although the term "infrastructure SIP" does not appear in the CAA, EPA uses the term to distinguish this particular type of SIP submission from submissions that are intended to satisfy other SIP requirements under the CAA, such as "nonattainment SIP" or "attainment plan SIP" submissions to address the nonattainment planning requirements of part D of Title I of the CAA, "regional haze SIP" submissions required by EPA rule to address the visibility protection requirements of section 169A of the CAA, and nonattainment new source review (NSR) permit program submissions to address the permit requirements of CAA, Title I, part D.

Section 110(a)(1) addresses the timing and general requirements for infrastructure SIP submissions and section 110(a)(2) provides more details concerning the required contents of these submissions. The list of required elements provided in section 110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive program provisions, and some of which pertain to requirements for both authority and substantive program provisions.<sup>13</sup> EPA therefore believes that while the timing requirement in section 110(a)(1) is unambiguous, some of the other statutory provisions are ambiguous. In particular, EPA believes that the list of required elements for infrastructure SIP submissions provided in section 110(a)(2) contains ambiguities concerning what is required for inclusion in an infrastructure SIP submission.

The following examples of ambiguities illustrate the need for EPA to interpret some section 110(a)(1) and section 110(a)(2) requirements with respect to infrastructure SIP submissions for a given new or revised NAAQS. One example of ambiguity is that section 110(a)(2) requires that "each" SIP submission must meet the list of requirements therein, while EPA has long noted that this literal reading of the statute is internally inconsistent and would create a conflict with the nonattainment provisions in part D of Title I of the CAA, which specifically address nonattainment SIP

requirements.<sup>14</sup> Section 110(a)(2)(I) pertains to nonattainment SIP requirements and part D addresses requirements when attainment plan SIP submissions to address nonattainment area requirements are due. For example, section 172(b) requires EPA to establish a schedule for submission of such plans for certain pollutants when the Administrator promulgates the designation of an area as nonattainment, and section 107(d)(1)(B) allows up to two years or in some cases three years, for such designations to be promulgated.<sup>15</sup> This ambiguity illustrates that rather than apply all the stated requirements of section 110(a)(2) in a strict literal sense, EPA must determine which provisions of section 110(a)(2) are applicable for a particular infrastructure SIP submission.

Another example of ambiguity within section 110(a)(1) and (2) with respect to infrastructure SIPs pertains to whether states must meet all of the infrastructure SIP requirements in a single SIP submission, and whether EPA must act upon such SIP submission in a single action. Although section 110(a)(1) directs states to submit "a plan" to meet these requirements, EPA interprets the CAA to allow states to make multiple SIP submissions separately addressing infrastructure SIP elements for the same NAAQS. If states elect to make such multiple SIP submissions to meet the infrastructure SIP requirements, EPA can elect to act on such submissions either individually or in a larger combined action.<sup>16</sup> Similarly, EPA

<sup>14</sup> See, e.g., "Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call; Final Rule," 70 FR 25162, at 25163–65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

<sup>15</sup> EPA notes that this ambiguity within section 110(a)(2) is heightened by the fact that various subparts of part D set specific dates for submission of certain types of SIP submissions in designated nonattainment areas for various pollutants. Note, e.g., that section 182(a)(1) provides specific dates for submission of emissions inventories for the ozone NAAQS. Some of these specific dates are necessarily later than three years after promulgation of the new or revised NAAQS.

<sup>16</sup> See, e.g., "Approval and Promulgation of Implementation Plans; New Mexico; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) Permitting," 78 FR 4339 (January 22, 2013) (EPA's final action approving the structural PSD elements of the New Mexico SIP submitted by the State separately to meet the requirements of EPA's 2008 PM<sub>2.5</sub> NSR rule), and "Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Infrastructure and Interstate Transport Requirements for the 2006 PM<sub>2.5</sub> NAAQS," 78 FR 4337 (January 22, 2013) (EPA's final action on the infrastructure SIP for the 2006 PM<sub>2.5</sub> NAAQS).

<sup>11</sup> The other portions of Alabama's December 9, 2015, PM<sub>2.5</sub> infrastructure submission are being addressed in separate actions.

<sup>12</sup> The other portions of Alabama's March 12, 2008, ozone infrastructure SIP submission have been addressed in previous EPA actions. See 80 FR 14019 (March 3, 2015); 80 FR 17689 (April 2, 2015).

<sup>13</sup> For example: Section 110(a)(2)(E)(i) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a SIP-approved program to address certain sources as required by part C of Title I of the CAA; and section 110(a)(2)(G) provides that states must have legal authority to address emergencies as well as contingency plans that are triggered in the event of such emergencies.

interprets the CAA to allow it to take action on the individual parts of one larger, comprehensive infrastructure SIP submission for a given NAAQS without concurrent action on the entire submission. For example, EPA has sometimes elected to act at different times on various elements and sub-elements of the same infrastructure SIP submission.<sup>17</sup>

Ambiguities within section 110(a)(1) and (2) may also arise with respect to infrastructure SIP submission requirements for different NAAQS. Thus, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS. The states' attendant infrastructure SIP submissions for each NAAQS therefore could be different. For example, the monitoring requirements that a state might need to meet in its infrastructure SIP submission for purposes of section 110(a)(2)(B) could be very different for different pollutants, because the content and scope of a state's infrastructure SIP submission to meet this element might be very different for an entirely new NAAQS than for a minor revision to an existing NAAQS.<sup>18</sup>

EPA notes that interpretation of section 110(a)(2) is also necessary when EPA reviews other types of SIP submissions required under the CAA. Therefore, as with infrastructure SIP submissions, EPA also has to identify and interpret the relevant elements of section 110(a)(2) that logically apply to these other types of SIP submissions. For example, section 172(c)(7) requires attainment plan SIP submissions required by part D to meet the "applicable requirements" of section 110(a)(2); thus, attainment plan SIP submissions must meet the requirements of section 110(a)(2)(A) regarding enforceable emission limits and control measures and section 110(a)(2)(E)(i) regarding air agency resources and authority. By contrast, it is clear that attainment plan SIP submissions required by part D would not need to meet the portion of section

110(a)(2)(C) that pertains to the prevention of significant deterioration (PSD) program required in part C of Title I of the CAA, because PSD does not apply to a pollutant for which an area is designated nonattainment and thus subject to part D planning requirements. As this example illustrates, each type of SIP submission may implicate some elements of section 110(a)(2) but not others.

Given the potential for ambiguity in some of the statutory language of section 110(a)(1) and section 110(a)(2), EPA believes that it is appropriate to interpret the ambiguous portions of section 110(a)(1) and section 110(a)(2) in the context of acting on a particular SIP submission. In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the NAAQS in question or the history of SIP development for the relevant pollutant, would meet each of the requirements, or meet each of them in the same way. Therefore, EPA has adopted an approach under which it reviews infrastructure SIP submissions against the list of elements in section 110(a)(2), but only to the extent each element applies for that particular NAAQS.

Historically, EPA has elected to use guidance documents to make recommendations to states for infrastructure SIPs, in some cases conveying needed interpretations on newly arising issues and in some cases conveying interpretations that have already been developed and applied to individual SIP submissions for particular elements.<sup>19</sup> EPA most recently issued guidance for infrastructure SIPs on September 13, 2013 (2013 Guidance).<sup>20</sup> EPA developed this document to provide states with up-to-date guidance for infrastructure SIPs for any new or revised NAAQS. Within this guidance, EPA describes the duty of states to make infrastructure SIP submissions to meet basic structural SIP requirements within three years of promulgation of a new or revised NAAQS. EPA also made recommendations about many specific subsections of section 110(a)(2) that are

relevant in the context of infrastructure SIP submissions.<sup>21</sup> The guidance also discusses the substantively important issues that are germane to certain subsections of section 110(a)(2). EPA interprets sections 110(a)(1) and (2) such that infrastructure SIP submissions need to address certain issues and need not address others. Accordingly, EPA reviews each infrastructure SIP submission for compliance with the applicable statutory provisions of section 110(a)(2), as appropriate.

As an example, section 110(a)(2)(E)(ii) is a required element of section 110(a)(2) for infrastructure SIP submissions. Under this element, a state must meet the substantive requirements of section 128, which pertain to state boards that approve permits or enforcement orders and heads of executive agencies with similar powers. Thus, EPA reviews infrastructure SIP submissions to ensure that the state's SIP appropriately addresses the requirements of section 110(a)(2)(E)(ii) and section 128. The 2013 Guidance explains EPA's interpretation that there may be a variety of ways by which states can appropriately address these substantive statutory requirements, depending on the structure of an individual state's permitting or enforcement program (e.g., whether permits and enforcement orders are approved by a multi-member board or by a head of an executive agency). Regardless of how they are addressed by the state, the substantive requirements of section 128 are necessarily included in EPA's evaluation of infrastructure SIP submissions because section 110(a)(2)(E)(ii) explicitly requires that the state satisfy the provisions of section 128.

As another example, EPA's review of infrastructure SIP submissions with respect to the PSD program requirements in section 110(a)(2)(C), (D)(i)(II), and (J) focuses upon the structural PSD program requirements contained in part C and EPA's PSD regulations. Structural PSD program requirements include provisions necessary for the PSD program to address all regulated sources and NSR

<sup>17</sup> On December 14, 2007, the State of Tennessee, through the Tennessee Department of Environment and Conservation, made a SIP revision to EPA demonstrating that the State meets the requirements of sections 110(a)(1) and (2). EPA proposed action for infrastructure SIP elements (C) and (J) on January 23, 2012 (77 FR 3213) and took final action on March 14, 2012 (77 FR 14976). On April 16, 2012 (77 FR 22533) and July 23, 2012 (77 FR 42997), EPA took separate proposed and final actions on all other section 110(a)(2) infrastructure SIP elements of Tennessee's December 14, 2007, submittal.

<sup>18</sup> For example, implementation of the 1997 PM<sub>2.5</sub> NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

<sup>19</sup> EPA notes, however, that nothing in the CAA requires EPA to provide guidance or to promulgate regulations for infrastructure SIP submissions. The CAA directly applies to states and requires the submission of infrastructure SIP submissions, regardless of whether or not EPA provides guidance or regulations pertaining to such submissions. EPA elects to issue such guidance in order to assist states, as appropriate.

<sup>20</sup> "Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)," Memorandum from Stephen D. Page, September 13, 2013.

<sup>21</sup> EPA's September 13, 2013, guidance did not make recommendations with respect to infrastructure SIP submissions to address section 110(a)(2)(D)(i)(I). EPA issued the guidance shortly after the U.S. Supreme Court agreed to review the D.C. Circuit decision in *EME Homer City*, 696 F.3d 7 (D.C. Cir. 2012) which had interpreted the requirements of section 110(a)(2)(D)(i)(I). In light of the uncertainty created by ongoing litigation, EPA elected not to provide additional guidance on the requirements of section 110(a)(2)(D)(i)(I) at that time. As the guidance is neither binding nor required by statute, whether EPA elects to provide guidance on a particular section has no impact on a state's CAA obligations.

pollutants, including greenhouse gases. By contrast, structural PSD program requirements do not include provisions that are not required under EPA's regulations at 40 CFR 51.166 but are merely available as an option for the state, such as the option to provide grandfathering of complete permit applications with respect to the PM<sub>2.5</sub> NAAQS. Accordingly, the latter optional provisions are types of provisions EPA considers irrelevant in the context of an infrastructure SIP action.

For other section 110(a)(2) elements, however, EPA's review of a state's infrastructure SIP submission focuses on assuring that the state's SIP meets basic structural requirements. For example, section 110(a)(2)(C) includes, *inter alia*, the requirement that states have a program to regulate minor new sources. Thus, EPA evaluates whether the state has an EPA-approved minor NSR program and whether the program addresses the pollutants relevant to that NAAQS. In the context of acting on an infrastructure SIP submission, however, EPA does not think it is necessary to conduct a review of each and every provision of a state's existing minor source program (*i.e.*, already in the existing SIP) for compliance with the requirements of the CAA and EPA's regulations that pertain to such programs.

With respect to certain other issues, EPA does not believe that an action on a state's infrastructure SIP submission is necessarily the appropriate type of action in which to address possible deficiencies in a state's existing SIP. These issues include: (i) Existing provisions related to excess emissions from sources during periods of startup, shutdown, or malfunction (SSM) that may be contrary to the CAA and EPA's policies addressing such excess emissions;<sup>22</sup> (ii) existing provisions related to "director's variance" or "director's discretion" that may be contrary to the CAA because they purport to allow revisions to SIP-approved emissions limits while limiting public process or not requiring further approval by EPA; and (iii)

<sup>22</sup> Subsequent to issuing the 2013 Guidance, EPA's interpretation of the CAA with respect to the approvability of affirmative defense provisions in SIPs has changed. See "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," 80 FR 33839 (June 12, 2015). As a result, EPA's 2013 Guidance (p. 21 & n.30) no longer represents the EPA's view concerning the validity of affirmative defense provisions, in light of the requirements of section 113 and section 304.

existing provisions for PSD programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule," 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (NSR Reform). Thus, EPA believes that it may approve an infrastructure SIP submission without scrutinizing the totality of the existing SIP for such potentially deficient provisions and may approve the submission even if it is aware of such existing provisions.<sup>23</sup> It is important to note that EPA's approval of a state's infrastructure SIP submission should not be construed as explicit or implicit re-approval of any existing potentially deficient provisions that relate to the three specific issues just described.

EPA's approach to review of infrastructure SIP submissions is to identify the CAA requirements that are logically applicable to that submission. EPA believes that this approach to the review of a particular infrastructure SIP submission is appropriate, because it would not be reasonable to read the general requirements of section 110(a)(1) and the list of elements in section 110(a)(2) as requiring review of each and every provision of a state's existing SIP against all requirements in the CAA and EPA regulations merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts. These provisions, while not fully up to date, nevertheless may not pose a significant problem for the purposes of "implementation, maintenance, and enforcement" of a new or revised NAAQS when EPA evaluates adequacy of the infrastructure SIP submission. EPA believes that a better approach is for states and EPA to focus attention on those elements of section 110(a)(2) of the CAA most likely to warrant a specific SIP revision due to the promulgation of a new or revised NAAQS or other factors.

For example, EPA's 2013 Guidance gives simpler recommendations with respect to carbon monoxide than other NAAQS pollutants to meet the visibility

<sup>23</sup> By contrast, EPA notes that if a state were to include a new provision in an infrastructure SIP submission that contained a legal deficiency, such as a new exemption or affirmative defense for excess emissions during SSM events, then EPA would need to evaluate that provision for compliance against the rubric of applicable CAA requirements in the context of the action on the infrastructure SIP.

requirements of section 110(a)(2)(D)(i)(II), because carbon monoxide does not affect visibility. As a result, an infrastructure SIP submission for any future new or revised NAAQS for carbon monoxide need only state this fact in order to address the visibility prong of section 110(a)(2)(D)(i)(II).

Finally, EPA believes that its approach with respect to infrastructure SIP requirements is based on a reasonable reading of section 110(a)(1) and (2) because the CAA provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow EPA to take appropriately tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a "SIP call" whenever the Agency determines that a state's implementation plan is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or to otherwise comply with the CAA.<sup>24</sup> Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.<sup>25</sup> Significantly, EPA's determination that an action on a state's infrastructure SIP submission is not the appropriate time and place to address all potential existing SIP deficiencies does not preclude EPA's subsequent reliance on provisions in section 110(a)(2) as part of the basis for action to correct those deficiencies at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director's discretion provisions in the course of acting on an infrastructure SIP submission, EPA believes that section 110(a)(2)(A) may be among the statutory bases that EPA relies upon in the course of addressing

<sup>24</sup> For example, EPA issued a SIP call to Utah to address specific existing SIP deficiencies related to the treatment of excess emissions during SSM events. See "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revisions," 74 FR 21639 (April 18, 2011).

<sup>25</sup> EPA has used this authority to correct errors in past actions on SIP submissions related to PSD programs. See "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule," 75 FR 82536 (December 30, 2010). EPA has previously used its authority under section 110(k)(6) of the CAA to remove numerous other SIP provisions that the Agency determined it had approved in error. See, e.g., 61 FR 38664 (July 25, 1996) and 62 FR 34641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67062, November 16, 2004 (corrections to California SIP); and 74 FR 57051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

such deficiency in a subsequent action.<sup>26</sup>

### III. What are the Prong 4 requirements?

CAA section 110(a)(2)(D)(i)(II) requires a state's implementation plan to contain provisions prohibiting sources in that state from emitting pollutants in amounts that interfere with any other state's efforts to protect visibility under part C of the CAA (which includes sections 169A and 169B). The 2013 Guidance states that these prong 4 requirements can be satisfied by approved SIP provisions that EPA has found to adequately address any contribution of that state's sources that impacts the visibility program requirements in other states. The 2013 Guidance also states that EPA interprets this prong to be pollutant-specific, such that the infrastructure SIP submission need only address the potential for interference with protection of visibility caused by the pollutant (including precursors) to which the new or revised NAAQS applies.

The 2013 Guidance lays out how a state's infrastructure SIP may satisfy prong 4. One way that a state can meet the requirements is via confirmation in its infrastructure SIP submission that the state has an approved regional haze SIP that fully meets the requirements of 40 CFR 51.308 or 51.309. 40 CFR 51.308 and 51.309 specifically require that a state participating in a regional planning process include all measures needed to achieve its apportionment of emission reduction obligations agreed upon through that process. A fully approved regional haze SIP will ensure that emissions from sources under an air agency's jurisdiction are not interfering with measures required to be included in other air agencies' plans to protect visibility.

Alternatively, in the absence of a fully approved regional haze SIP, a state may meet the requirements of prong 4 through a demonstration in its infrastructure SIP submission that emissions within its jurisdiction do not interfere with other air agencies' plans to protect visibility. Such an infrastructure SIP submission would need to include measures to limit visibility-impairing pollutants and ensure that the reductions conform with any mutually agreed regional haze RPGs

<sup>26</sup> See, e.g., EPA's disapproval of a SIP submission from Colorado on the grounds that it would have included a director's discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, e.g., 75 FR 42342 at 42344 (July 21, 2010) (proposed disapproval of director's discretion provisions); 76 FR 4540 (January 26, 2011) (final disapproval of such provisions).

for mandatory Class I areas in other states.

### IV. What is EPA's analysis of how Alabama addressed Prong 4 and regional haze?

Alabama's August 20, 2012, 2008 8-hour Ozone infrastructure SIP submission; April 23, 2013, and December 9, 2015, 2010 1-hour NO<sub>2</sub> submissions; April 23, 2013, 2010 1-hour SO<sub>2</sub> submission; and December 9, 2015, 2012 annual PM<sub>2.5</sub> submission rely on the State having a fully approved regional haze SIP to satisfy its prong 4 requirements. However, EPA has not fully approved Alabama's regional haze SIP, as the Agency issued a limited disapproval of the State's original regional haze plan on June 7, 2012, due to its reliance on CAIR. To correct the deficiencies in its regional haze SIP and obtain approval of the aforementioned infrastructure SIPs that rely on the regional haze SIP, the State submitted a SIP revision on October 26, 2015, to replace reliance on CAIR with reliance on CSAPR.<sup>27</sup>

EPA is proposing to approve the regional haze portion of the State's October 26, 2015, SIP revision and convert EPA's previous action on Alabama's regional haze SIP from a limited approval/limited disapproval to a full approval because final approval of this portion of the SIP revision would correct the deficiencies that led to EPA's limited approval/limited disapproval of the State's regional haze SIP. Specifically, EPA's approval of this portion of Alabama's October 26, 2015, SIP revision would satisfy the SO<sub>2</sub> and NO<sub>x</sub> BART requirements and SO<sub>2</sub> reasonable progress requirements for EGUs formerly subject to CAIR and the requirement that a LTS include measures as necessary to achieve the State-adopted RPGs. Because a state may satisfy prong 4 requirements through a fully approved regional haze SIP, EPA is therefore also proposing to approve the prong 4 portion of Alabama's April 23, 2013, and December 9, 2015, 2010 1-hour NO<sub>2</sub> infrastructure submissions; the April 23, 2013, 2010 1-hour SO<sub>2</sub> infrastructure submission; and the December 9, 2015, 2012 annual PM<sub>2.5</sub> submission; and to convert EPA's February 7, 2017, disapproval of the prong 4 portions of Alabama's August 20, 2012, 2008 8-hour Ozone infrastructure submission to an approval. However, as noted above, EPA proposed in November 2016 to find that CSAPR remains "better than BART"

<sup>27</sup> See Alabama's October 26, 2015, SIP submittal, Part H—Proposed Revisions to Alabama Regional Haze State Implementation Plan (SIP).

given the changes to CSAPR's scope in response to the D.C. Circuit's remand, but the Agency has not finalized this national rulemaking. Therefore, EPA will not finalize the proposed approvals of Alabama's regional haze and prong 4 submissions described above unless it has finalized the CSAPR remains "better-than-BART" rulemaking or otherwise determined that participation in CSAPR remains a viable alternative to BART.

### V. Proposed Action

As described above, EPA is proposing to take the following actions, contingent upon a final determination that CSAPR continues to qualify as an alternative to the application of BART under the RHR: (1) Approve the regional haze portion of Alabama's October 26, 2015, SIP submission to change reliance from CAIR to CSAPR; (2) convert EPA's limited approval/limited disapproval of Alabama's July 15, 2008, regional haze SIP to a full approval; (3) approve the prong 4 portion of Alabama's April 23, 2013, and December 9, 2015, 2010 1-hour NO<sub>2</sub> submissions; April 23, 2013, 2010 1-hour SO<sub>2</sub> submission; and December 9, 2015, 2012 annual PM<sub>2.5</sub> submission; and (4) convert EPA's February 7, 2017, disapproval of the prong 4 portion of Alabama's August 20, 2012, 2008 8-hour Ozone submission to an approval. All other applicable infrastructure requirements for the infrastructure SIP submissions have been or will be addressed in separate rulemakings.

### VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. See 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, these proposed actions merely propose to approve state law as meeting Federal requirements and do not impose additional requirements beyond those imposed by state law. For that reason, these proposed actions:

- Are not "significant regulatory actions" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);



- are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate Matter, Reporting and recordkeeping requirements, Sulfur oxides.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: August 4, 2017.

**V. Anne Heard,**

*Acting Regional Administrator, Region 4.*

[FR Doc. 2017–17346 Filed 8–16–17; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R04–OAR–2007–0085; FRL–9966–23–Region 4]

#### Air Plan Approval; NC; Air Curtain Burners

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve portions of revisions to the North Carolina State Implementation Plan (SIP) submitted by the State of North Carolina through the North Carolina Department of Environmental Quality (formerly the North Carolina Department of Environment and Natural Resources (NCDENR)), Division of Air Quality (DAQ), on October 14, 2004, March 24, 2006, and January 31, 2008. The proposed revisions are changes to the air curtain burner regulation of the North Carolina SIP and are part of North Carolina's strategy to meet and maintain the national ambient air quality standards (NAAQS). EPA has taken or will take action with respect to all other portions of these SIP revisions. This action is being taken pursuant to the Clean Air Act (CAA or Act) and its implementing regulations.

**DATES:** Written comments must be received on or before September 18, 2017.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R04–OAR–2007–0085 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit

<http://www2.epa.gov/dockets/commenting-epa-dockets>.

#### FOR FURTHER INFORMATION CONTACT:

Sean Lakeman or Nacosta C. Ward, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Mr. Lakeman can be reached via telephone at (404) 562–9043 or via electronic mail at [lakeman.sean@epa.gov](mailto:lakeman.sean@epa.gov). Ms. Ward can be reached via telephone at (404) 562–9140, or via electronic mail at [ward.nacosta@epa.gov](mailto:ward.nacosta@epa.gov).

**SUPPLEMENTARY INFORMATION:** In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

Dated: August 4, 2017

**V. Anne Heard,**

*Acting Regional Administrator, Region 4.*

[FR Doc. 2017–17243 Filed 8–16–17; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R03–OAR–2017–0382; FRL–9966–30–Region 3]

#### Approval and Promulgation of Air Quality Implementation Plans; Virginia; Revisions To Implement the Revocation of the 1997 Ozone NAAQS

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) proposes to approve the state implementation plan (SIP) revision submitted by the Commonwealth of Virginia which includes revised provisions of the State Air Pollution Control Board's Regulations for the Control and Abatement of Air Pollution

to be consistent with EPA’s final rule revoking the 1997 ozone NAAQS and implementing the 2008 ozone national ambient air quality standards (NAAQS). See 80 FR 12264 (March 6, 2015). In the Final Rules section of this **Federal Register**, EPA is approving the State’s SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

**DATES:** Comments must be received in writing by September 18, 2017.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R03–OAR–2017–0382 at <http://www.regulations.gov>, or via email to [stahl.cynthia@epa.gov](mailto:stahl.cynthia@epa.gov). For comments submitted at [Regulations.gov](http://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](http://www.regulations.gov). For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Sara Calcinore, (215) 814 2043, or by email at [calcinore.sara@epa.gov](mailto:calcinore.sara@epa.gov).

**SUPPLEMENTARY INFORMATION:** For further information, please see the information provided in the direct final

action, with the same title, that is located in the “Rules and Regulations” section of this **Federal Register** publication. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: August 3, 2017.

**Cecil Rodrigues**,  
Acting Regional Administrator, Region III.  
[FR Doc. 2017–17234 Filed 8–16–17; 8:45 am]  
**BILLING CODE 6560–50–P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 80**

[EPA–HQ–OAR–2017–0146; FRL–9966–61–OAR]

**Relaxation of the Federal Reid Vapor Pressure (RVP) Gasoline Volatility Standard for Shelby County (Memphis), Tennessee**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve a request from Tennessee for EPA to relax the Federal Reid Vapor Pressure (RVP) standard applicable to gasoline introduced into commerce from June 1 to September 15 of each year for Shelby County, Tennessee (Memphis or Area). Specifically, EPA is proposing to amend the regulations to allow the RVP standard for Shelby County to change from 7.8 pounds per square inch (psi) to 9.0 psi for gasoline. EPA has preliminarily determined that this change to the Federal RVP regulation is consistent with the applicable provisions of the Clean Air Act (CAA).

**DATES:** Written comments must be received on or before September 18, 2017 unless a public hearing is requested by September 1, 2017. If EPA receives such a request, we will publish information related to the timing and location of the hearing and a new deadline for public comment.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2017–0146, to the *Federal eRulemaking Portal*: <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. EPA may publish any comment received to its public

docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information disclosure of which is restricted by statute. If you need to include CBI as part of your comment, please visit <https://www.epa.gov/dockets/commenting-epa-dockets> for instructions. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make.

For additional submission methods, the full EPA public comment policy, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:**

David Dickinson, Office of Transportation and Air Quality, Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20460; telephone number: (202) 343–9256; fax number: (202) 343–2804; email address: [dickinson.david@epa.gov](mailto:dickinson.david@epa.gov). You may also contact Rudolph Kapichak, Office of Transportation and Air Quality, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, Michigan 48105; telephone number: (734) 214–4574; fax number: (734) 214–4052; email address: [kapichak.rudolph@epa.gov](mailto:kapichak.rudolph@epa.gov).

**SUPPLEMENTARY INFORMATION:** The contents of this preamble are listed in the following outline:

- I. General Information
- II. Public Participation
- III. Background and Proposal
- IV. Statutory and Executive Order Reviews
- V. Legal Authority

**I. General Information**

*A. Does this action apply to me?*

Entities potentially affected by this proposed rule are fuel producers and distributors involved in the supplying of gasoline to Shelby County, TN.

Examples of potentially regulated entities	NAICS <sup>1</sup> codes
Petroleum refineries .....	324110
Gasoline Marketers and Distributors .....	424710
	424720
Gasoline Retail Stations .....	447110
Gasoline Transporters .....	484220
	484230

<sup>1</sup> North American Industry Classification System.

The above table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be

regulated by this action. The table lists the types of entities of which EPA is aware that potentially could be affected by this proposed rule. Other types of entities not listed on the table could also be affected. To determine whether your organization could be affected by this proposed rule, you should carefully examine the regulations in 40 CFR 80.27. If you have questions regarding the applicability of this action to a particular entity, call the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

*B. What is the Agency's authority for taking this action?*

The statutory authority for this action is granted to EPA by sections 211(h) and 301(a) of the CAA, as amended; 42 U.S.C. 7545(h) and 7601(a).

## II. Public Participation

EPA will not hold a public hearing on this matter unless a request is received by the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble by September 1, 2017. If EPA receives such a request, we will publish information related to the timing and location of the hearing and a new deadline for public comment.

## III. Background and Proposal

### A. Summary of the Proposal

EPA is proposing to approve a request from Tennessee to change the summertime Federal RVP standard for Shelby County from 7.8 psi to 9.0 psi by amending EPA's regulations at 40 CFR 80.27(a)(2). In a separate rulemaking, noted below, EPA has already approved a CAA section 110(l) non-interference demonstration which concludes that relaxing the Federal RVP requirement from 7.8 psi to 9.0 psi for gasoline sold from June 1 to September 15 of each year in Shelby County would not interfere with the maintenance of the ozone national ambient air quality standards (NAAQS) and the maintenance of the other NAAQS, or with any other applicable CAA requirement. When Tennessee previously requested that Shelby County be redesignated to attainment for the 2008 ozone standard, Tennessee took a conservative approach for the maintenance plan demonstration by modeling 9.0 psi for the RVP requirements as opposed to 7.8 psi. Tennessee did not, at that time, request the relaxation of the Federal RVP requirements for Shelby County. More recently, Tennessee requested a relaxation of the Federal RVP requirements. This has necessitated a demonstration that relaxing the Federal

RVP requirement from 7.8 psi to 9.0 psi for gasoline sold from June 1 to September 15 of each year in Shelby County would not interfere with maintenance of any NAAQS, including the 2008 and 2015 ozone NAAQS, or any other applicable CAA requirement, under CAA section 110(l). Therefore, by a subsequent rulemaking, EPA approved Tennessee's non-interference demonstration for its already approved maintenance plan for the 2008 ozone NAAQS.<sup>2</sup>

The preamble for this rulemaking is organized as follows: Section III.B. provides the history of the Federal gasoline volatility regulation. Section III.C. describes the policy regarding relaxation of gasoline volatility standards in ozone nonattainment areas that are redesignated as attainment areas. Section III.D. provides information specific to Tennessee's request for Shelby County.

### B. History of the Gasoline Volatility Requirement

On August 19, 1987 (52 FR 31274), EPA determined that gasoline nationwide was becoming increasingly volatile, causing an increase in evaporative emissions from gasoline-powered vehicles and equipment. Evaporative emissions from gasoline, referred to as volatile organic compounds (VOC), are precursors to the formation of tropospheric ozone and contribute to the nation's ground-level ozone problem. Exposure to ground-level ozone can reduce lung function, thereby aggravating asthma and other respiratory conditions, increase susceptibility to respiratory infection, and may contribute to premature death in people with heart and lung disease.

The most common measure of fuel volatility that is useful in evaluating gasoline evaporative emissions is RVP. Under CAA section 211(c), EPA promulgated regulations on March 22, 1989 (54 FR 11868) that set maximum limits for the RVP of gasoline sold during the regulatory control periods that were established on a state-by-state basis in that final rule. The regulatory control periods addressed the portion of the year when peak ozone concentrations were expected. These regulations constituted Phase I of a two-phase nationwide program, which was designed to reduce the volatility of gasoline during the high ozone season.

<sup>2</sup>EPA approved the redesignation request and maintenance plan for the portion of Tennessee that is within the Memphis, Tennessee-Mississippi-Arkansas (Memphis, TN-MS-AR) 2008 ozone nonattainment area on June 23, 2016 (81 FR 40816). EPA approved Tennessee's non-interference demonstration on July 7, 2017 (82 FR 31462).

On June 11, 1990 (55 FR 23658), EPA promulgated more stringent volatility controls as Phase II of the volatility control program. These requirements established maximum RVP standards of 9.0 psi or 7.8 psi (depending on the state, the month, and the area's initial ozone attainment designation with respect to the 1-hour ozone NAAQS).

The 1990 CAA Amendments established new CAA section 211(h) to address fuel volatility. CAA section 211(h) requires EPA to promulgate regulations making it unlawful to sell, offer for sale, dispense, supply, offer for supply, transport, or introduce into commerce gasoline with an RVP level in excess of 9.0 psi during the high ozone season. CAA section 211(h) also prohibits EPA from establishing a volatility standard more stringent than 9.0 psi in an attainment area, except that EPA may impose a lower (more stringent) standard in any former ozone nonattainment area redesignated to attainment.

On December 12, 1991 (56 FR 64704), EPA modified the Phase II volatility regulations to be consistent with CAA section 211(h). The modified regulations prohibited the sale of gasoline with an RVP above 9.0 psi in all areas designated attainment for ozone, effective January 13, 1992. For areas designated as nonattainment, the regulations retained the original Phase II standards published on June 11, 1990 (55 FR 23658), which included the 7.8 psi ozone season limitation for certain areas. As stated in the preamble to the Phase II volatility controls and reiterated in the proposed change to the volatility standards published in 1991, EPA will rely on states to initiate changes to their respective volatility programs. EPA's policy for approving such changes is described below in Section III.C.

### C. Relaxation of Gasoline Volatility Standards in Ozone Nonattainment Areas That Are Redesignated to Attainment

As stated in the preamble for EPA's amended Phase II volatility standards (56 FR 64706), any change in the gasoline volatility standard for a nonattainment area that was subsequently redesignated as an attainment area must be accomplished through a separate rulemaking that revises the applicable standard for that area. Thus, for former 1-hour ozone nonattainment areas where EPA mandated a Phase II volatility standard of 7.8 psi RVP in the December 12, 1991 rulemaking, the federal 7.8 psi gasoline RVP requirement remains in effect, even after such an area is redesignated to

attainment, until a separate rulemaking is completed that relaxes the Federal gasoline RVP standard in that area from 7.8 psi to 9.0 psi.

As explained in the December 12, 1991 rulemaking, EPA believes that relaxation of an applicable gasoline RVP standard is best accomplished in conjunction with the redesignation process. In order for an ozone nonattainment area to be redesignated as an attainment area, CAA section 107(d)(3) requires the state to make a showing, pursuant to CAA section 175A, that the area is capable of maintaining attainment for the ozone NAAQS for ten years. Depending on the area's circumstances, this maintenance plan will either demonstrate that the area is capable of maintaining attainment for ten years without the more stringent volatility standard or that the more stringent volatility standard may be necessary for the area to maintain its attainment with the ozone NAAQS. Therefore, in the context of a request for redesignation, EPA will not relax the gasoline volatility standard unless the state requests a relaxation and the maintenance plan demonstrates that the area will maintain attainment for ten years without the need for the more stringent volatility standard. Similarly, a maintenance plan may be revised to relax the gasoline volatility standard if the state requests a relaxation and the maintenance plan demonstrates that the area will maintain attainment for the duration of the maintenance plan.

#### *D. Tennessee's Request To Relax the Federal Gasoline RVP Requirement for Shelby County*

On April 12, 2017, Tennessee, through the Tennessee Department of Environment and Conservation (TDEC or State), submitted a request to relax the Federal gasoline RVP requirement in Shelby County. The State also submitted a CAA section 110(l) non-interference demonstration for approval by EPA. The non-interference demonstration shows that the relaxation would not interfere with maintenance of the 2008 ozone NAAQS or any other applicable CAA requirement including the 2015 ozone NAAQS. Tennessee did not request relaxation of the Federal RVP standard from 7.8 psi to 9.0 psi when TDEC originally submitted the CAA section 175A maintenance plan for the 2008 ozone NAAQS that was approved on June 23, 2016 (81 FR 40816).

On July 7, 2017, EPA approved Tennessee's April 12, 2017 request for approval of the CAA section 110(l) non-interference demonstration. In that rulemaking, EPA included an evaluation

of Tennessee's CAA section 110(l) non-interference demonstration for Shelby County.<sup>3</sup>

In this action, EPA is proposing to approve Tennessee's request to relax the summertime ozone season gasoline RVP standard for Shelby County from 7.8 psi to 9.0 psi. Specifically, EPA is proposing to amend the applicable gasoline RVP standard to allow the gasoline RVP requirements at 40 CFR 80.27(a)(2) for Shelby County to change from 7.8 psi to 9.0 psi. This proposal is based on EPA's separate approval of Tennessee's April 12, 2017 request for a non-interference demonstration approval and EPA's June 23, 2016 approval of the redesignation request and maintenance plan for the 2008 ozone NAAQS as described above.

#### **IV. Statutory and Executive Order Reviews**

##### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and therefore was not submitted to the Office of Management and Budget (OMB) for review.

##### *B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs*

This action is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

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

This action does not impose any new information collection burden under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.*, and therefore is not subject to these requirements.

##### *D. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. The small entities subject to the requirements of this action are refiners, importers or

blenders of gasoline that choose to produce or import low RVP gasoline for sale in Tennessee, and gasoline distributors and retail stations in Tennessee. This action, if finalized, would relax the Federal RVP standard for gasoline sold in Shelby County, Tennessee during the summertime ozone season (June 1 to September 15 of each year) to allow the RVP for gasoline sold in this county to rise from 7.8 psi to 9.0 psi. This rule does not impose any requirements or create impacts on small entities beyond those, if any, already required by or resulting from the CAA section 211(h) Volatility Control program. Therefore, this action would have no net regulatory burden for all directly regulated small entities.

##### *E. Unfunded Mandates Reform Act (UMRA)*

This proposed rule does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action would implement mandates that are specifically and explicitly set forth in CAA section 211(h) without the exercise of any policy discretion by EPA.

##### *F. Executive Order 13132: Federalism*

This action does not have federalism implications. It would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

##### *G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This proposed rule would affect only those refiners, importers or blenders of gasoline that choose to produce or import low RVP gasoline for sale in Shelby County and gasoline distributors and retail stations in the Area. Thus, Executive Order 13175 does not apply to this action.

##### *H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2–202 of the

<sup>3</sup> 82 FR 31462 (July 7, 2017).

Executive Order. EPA has no reason to believe that this action may disproportionately affect children since Tennessee has provided evidence that a relaxation of the gasoline RVP will not interfere with its attainment of the ozone NAAQS for Shelby County, or any other applicable CAA requirement. By separate action, EPA has approved Tennessee's non-interference demonstration regarding its maintenance plan for the 2008 ozone NAAQS, and that Tennessee's relaxation of the gasoline RVP standard in Shelby County to 9.0 RVP will not interfere with any other NAAQS or CAA requirement.

*I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

*J. National Technology Transfer Advancement Act (NTTAA)*

This rulemaking does not involve technical standards.

*K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

EPA believes the human health or environmental risk addressed by this action would not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations because it does not affect the applicable ozone NAAQS which establish the level of protection provided to human health or the environment. This rule would relax the applicable volatility standard of gasoline during the summer, possibly resulting in slightly higher mobile source emissions. However, Tennessee has demonstrated in its non-interference demonstration that this action will not interfere with maintenance of the ozone NAAQS in Shelby County for the 2008 ozone NAAQS, or with any other applicable requirement of the CAA. Therefore, disproportionately high and adverse human health or environmental effects on minority or low-income populations are not an anticipated result. The results of this evaluation are contained in EPA's proposed and final rules for Tennessee's non-interference demonstration. A copy of Tennessee's April 12, 2017 letter requesting that EPA relax the gasoline RVP standard, including the technical analysis demonstrating that the less stringent

gasoline RVP would not interfere with continued maintenance of the 2008 ozone NAAQS in Shelby County, or with any other applicable CAA requirement, has been placed in the public docket for this action.

**V. Legal Authority**

The statutory authority for this action is granted to EPA by sections 211(h) and 301(a) of the Clean Air Act, as amended; 42 U.S.C. 7545(h) and 7601(a).

**List of Subjects in 40 CFR Part 80**

Environmental protection, Administrative practice and procedures, Air pollution control, Fuel additives, Gasoline, Motor vehicle and motor vehicle engines, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: August 11, 2017.

**E. Scott Pruitt,**  
Administrator.

[FR Doc. 2017-17420 Filed 8-16-17; 8:45 am]

**BILLING CODE 6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 372**

[EPA-HQ-OPPT-2017-0197; FRL-9964-76]

**RIN 2070-AK32**

**Community Right-To-Know; Adopting 2017 North American Industry Classification System (NAICS) Codes for Toxics Release Inventory (TRI) Reporting**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to update the list of North American Industry Classification System (NAICS) codes subject to reporting under the Toxics Release Inventory (TRI) to reflect the Office of Management and Budget (OMB) 2017 NAICS code revision. As a result of this proposal, facilities would be required to use 2017 NAICS codes when reporting to TRI beginning with TRI reporting forms that are due on July 1, 2018, covering releases and other waste management quantities for the 2017 calendar year. EPA is also modifying the list of exceptions and limitations associated with NAICS codes in the CFR for TRI reporting purposes by deleting the descriptive text. EPA believes that the proposed amendments are non-controversial and does not expect to receive any adverse comments. Therefore, in addition to this Notice of Proposed Rulemaking, in the

"Rules and Regulations" section of today's **Federal Register**, EPA is promulgating the 2017 NAICS code update as a direct final rule. For more information on this proposal, please refer to the direct final rule.

**DATES:** Comments must be received on or before September 18, 2017.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA-HQ-OPPT-2007-0197, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <http://www.epa.gov/dockets/contacts.html>.

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <http://www.epa.gov/dockets>.

**FOR FURTHER INFORMATION CONTACT:**

*For technical information contact:* Stephanie Griffin, Toxics Release Inventory Program Division, Mailcode 7410M, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001; telephone number: (202) 564-1463; email address: [griffin.stephanie@epa.gov](mailto:griffin.stephanie@epa.gov).

*For general information contact:* The Emergency Planning and Community Right-to-Know Information Center; telephone number: (800) 424-9346, TDD (800) 553-7672; Web site: <https://www.epa.gov/home/epa-hotlines>.

**SUPPLEMENTARY INFORMATION:** For further information about the proposed update to TRI's covered NAICS codes, please see the information provided in the direct final action, with the same title, that is located in the "Rules and Regulations" section of this issue of the **Federal Register**. To comment on this proposed rule, and by extension the direct final rule, you must reference docket ID No. EPA-HQ-OPPT-2007-0197 in one of the manners described above in the **ADDRESSES** section.

**List of Subjects in 40 CFR Part 372**

Environmental protection,  
Community right-to-know, Reporting

and recordkeeping requirements, Toxic  
chemicals.

Dated: August 7, 2017.

**Wendy Cleland-Hamnett,**

*Acting Assistant Administrator, Office of  
Chemical Safety and Pollution Prevention.*

[FR Doc. 2017-17412 Filed 8-16-17; 8:45 am]

**BILLING CODE 6560-50-P**

# Notices

Federal Register

Vol. 82, No. 158

Thursday, August 17, 2017

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration

#### Opportunity To Comment on the Applicants for the South Carolina Area Consisting of the Entire State of South Carolina, Except Those Export Port Locations Within the State, Which Are Serviced by the South Carolina Department of Agriculture

**AGENCY:** Grain Inspection, Packers and Stockyards Administration (GIPSA), USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** GIPSA requests comments on the applicants for designation to provide official services in the South Carolina Area that was open for designation. South Carolina Department of Agriculture (SCDA) applied for the entire State of South Carolina. D.R. Schaal Agency, Inc. (Schaal) applied for all or part of the State of South Carolina.

**DATES:** GIPSA will consider comments received by September 18, 2017.

**ADDRESSES:** We invite you to submit comments on these applicants. You may submit comments by any of the following methods:

- *Mail, Courier or Hand Delivery:* Sharon Lathrop, Compliance Officer, USDA, GIPSA, FGIS, QACD, 10383 North Ambassador Drive, Kansas City, MO 64153.

- *Fax:* Sharon Lathrop, 816-872-1257.

- *Email:* [FGIS.QACD@usda.gov](mailto:FGIS.QACD@usda.gov).

- *Submit Comments Using the Internet:* Go to <http://www.regulations.gov>.

Instructions for submitting and reading comments are detailed on the site.

*Read Applications and Comments:* All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(c)).

#### FOR FURTHER INFORMATION CONTACT:

Sharon Lathrop, 816-891-0415 or [FGIS.QACD@usda.gov](mailto:FGIS.QACD@usda.gov).

**SUPPLEMENTARY INFORMATION:** In the May 22, 2017, *Federal Register* (82 FR 23175), GIPSA asked persons interested in providing official services in the South Carolina Area to submit an application for designation.

There were two applicants for the South Carolina Area, comprised of the entire State of South Carolina, except those export port locations which are serviced by SCDA, which was open for designation: SCDA applied for the entire area currently assigned to them. Schaal applied for the entire State or the following nine counties within the State of South Carolina: Allendale, Bamberg, Barnwell, Beaufort, Charleston, Colleton, Georgetown, Hampton, and Jasper.

#### Request for Comments

GIPSA is publishing this notice to provide interested persons the opportunity to present comments concerning the applicants. Commenters are encouraged to submit reasons and pertinent data for support or objection to the designation of the applicants. All comments must be submitted to QACD at the above address or at <http://www.regulations.gov>. GIPSA will consider all comments received timely along with other available information when making a final decision. GIPSA will then publish a notice of the final decision in the *Federal Register*, and GIPSA will send the applicants written notification of the decision.

**Authority:** 7 U.S.C. 71-87k.

**Randall D. Jones,**

*Acting Administrator, Grain Inspection, Packers and Stockyards Administration.*

[FR Doc. 2017-17358 Filed 8-16-17; 8:45 am]

**BILLING CODE P3410-KD-P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

[S-77-2017]

#### Foreign-Trade Zone 75—Phoenix, Arizona; Withdrawal of Application for Subzone Expansion; Conair Corporation, Glendale, Arizona

The City of Phoenix, Arizona, grantee of FTZ 75, submitted an application,

docketed on May 16, 2017, requesting expanded subzone status for the facilities of Conair Corporation (Conair), Subzone 75A, located in Glendale, Arizona (82 FR 25239, June 1, 2017). The City of Phoenix subsequently requested and obtained approval for the expanded subzone status for Conair under the alternative site framework. As a result, the City of Phoenix has withdrawn the initial application requesting expanded subzone status. For further information, contact Christopher Kemp at [Christopher.Kemp@trade.gov](mailto:Christopher.Kemp@trade.gov) or (202) 482-0862.

Dated: August 11, 2017.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2017-17363 Filed 8-16-17; 8:45 am]

**BILLING CODE P3510-DS-P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

#### In the Matter of: David L. Maricola, Inmate Number: 96672-038, FCI Fort Dix, P.O. Box 2000, Joint Base MDL, NJ 08640

#### Order Denying Export Privileges

On August 24, 2016, in the U.S. District Court for the District of Massachusetts, David L. Maricola (“Maricola”) was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2012)) (“AECA”). Specifically, Maricola was convicted of, among other things, 19 counts of knowingly and willfully exporting and attempting to export from the United States to various countries defense articles designated on the United States Munitions List, namely, firearm parts, without the required U.S. Department of State licenses. Maricola was sentenced to 33 months in prison, three years of supervised release, and a \$3,200 assessment.

Section 766.25 of the Export Administration Regulations (“EAR” or “Regulations”)<sup>1</sup> provides, in pertinent

<sup>1</sup> The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730-774 (2017). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. 4601-4623 (Supp. III 2015)) (available at <http://uscdo.house.gov>) (“EAA” or “the Act”). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which

Continued

part, that “[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the EAA [Export Administration Act], the EAR, or any order, license, or authorization issued thereunder; any regulation, license or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)); or section 38 of the Arms Export Control Act (22 U.S.C. 2778).” 15 CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. 4610(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. 4610(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security’s Office of Exporter Services may revoke any Bureau of Industry and Security (“BIS”) licenses previously issued pursuant to the Export Administration Act (“EAA” or “the Act”) or the Regulations in which the person had an interest at the time of his conviction.

BIS has received notice of Maricola’s conviction for violating the AECA, and has provided notice and an opportunity for Maricola to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has not received a submission from Maricola.

Based upon my review and consultations with BIS’s Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Maricola’s export privileges under the Regulations for a period of 10 years from the date of Maricola’s conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Maricola had an interest at the time of his conviction.

Accordingly, *it is hereby ordered*:

*First*, from the date of this Order until August 24, 2026, David L. Maricola, with a last known address of Inmate Number: 96672–038, FCI Fort Dix, P.O. Box 2000, Joint Base MDL, NJ 08640, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (the “Denied Person”), may not, directly or indirectly, participate in any way in any

transaction involving any commodity, software or technology (hereinafter collectively referred to as “item”) exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

*Second*, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation,

maintenance, repair, modification or testing.

*Third*, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Maricola by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

*Fourth*, in accordance with Part 756 of the Regulations, Maricola may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

*Fifth*, a copy of this Order shall be delivered to Maricola and shall be published in the **Federal Register**.

*Sixth*, this Order is effective immediately and shall remain in effect until August 24, 2026.

Issued: August 10, 2017.

**Karen H. Nies-Vogel,**

*Director, Office of Exporter Services.*

[FR Doc. 2017–17371 Filed 8–16–17; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

**In the Matter of: Alexandre Dos Anjos Oliveira, Inmate Number: 05753–104, McRae Federal Correctional Institution, P.O. Drawer 55030, McRae Helena, GA 31055; Order Denying Export Privileges**

On April 9, 2015, in the U.S. District Court for the Southern District of Florida, Alexandre Dos Anjos Oliveira (“Oliveira”) was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2012)) (“AECA”). Specifically, Oliveira was convicted of knowingly and willfully attempting to export from the United States to Brazil firearm barrels, cylinders, receivers, components, parts, and accessories designated as defense articles on the United States Munitions List, without the required State Department licenses. Oliveira was sentenced to 38 months in prison, one year of supervised release, and a \$100 assessment.

Section 766.25 of the Export Administration Regulations (“EAR” or “Regulations”)<sup>1</sup> provides, in pertinent

<sup>1</sup> The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–

has been extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52,587 (Aug. 8, 2016)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)).



part, that “[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the EAA [Export Administration Act], the EAR, or any order, license, or authorization issued thereunder; any regulation, license or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)); or section 38 of the Arms Export Control Act (22 U.S.C. 2778).” 15 CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. 4610(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. 4610(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security’s Office of Exporter Services may revoke any Bureau of Industry and Security (“BIS”) licenses previously issued pursuant to the Export Administration Act (“EAA” or “the Act”) or the Regulations in which the person had an interest at the time of his conviction.

BIS has received notice of Oliveira’s conviction for violating Section 38 of the AECA, and has provided notice and an opportunity for Oliveira to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has not received a submission from Oliveira.

Based upon my review and consultations with BIS’s Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Oliveira’s export privileges under the Regulations for a period of five (5) years from the date of Oliveira’s conviction. I also have decided to revoke all licenses issued pursuant to the Act or Regulations in which Oliveira had an interest at the time of his conviction.

Accordingly, it is hereby *ordered*:

*First*, from the date of this Order until April 9, 2020, Alexandre Dos Anjos Oliveira, with a last known address of Inmate Number: 05753–104, McRae

Federal Correctional Institution, P.O. Drawer 55030, McRae Helena, GA 31055, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (the “Denied Person”), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as “item”) exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

*Second*, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

*Third*, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person,

firm, corporation, or business organization related to Oliveira by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

*Fourth*, in accordance with Part 756 of the Regulations, Oliveira may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

*Fifth*, a copy of this Order shall be delivered to Oliveira, and shall be published in the **Federal Register**.

*Sixth*, this Order is effective immediately and shall remain in effect until April 9, 2020.

Issued: August 10, 2017.

**Karen H. Nies-Vogel**,

*Director, Office of Exporter Services.*

[FR Doc. 2017–17368 Filed 8–16–17; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

**In the Matter of: Mansour Moghtaderi Zadeh, a/k/a Mansour Zadeh, a/k/a Mita Zarek, a/k/a Mita Zadeh currently incarcerated at: Inmate Number: 43594–013, Rivers Correctional Institution, P.O. Box 630, Winton, NC 27986, and with prior known addresses at: 16 Kyraikou Matsi Ave., 3rd Floor, 1082 Nicosia, Cyprus, and Strovolou 77, Strovolos Center Suite 202, Strovolos P.C. 2018, Nicosia, Cyprus and P.O. Box 23973, 1687 Nicosia, Cyprus**

### Order Denying Export Privileges

On December 14, 2016, in the U.S. District Court for the District of Columbia, Mansour Moghtaderi Zadeh, a/k/a Mansour Zadeh, a/k/a Mita Zarek, a/k/a Mita Zadeh (“Zadeh”), was convicted of violating the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)) (“IEEPA”). Specifically, Zadeh was convicted of knowingly and willfully conspiring to export and cause the export of goods from the United States to Iran without the required U.S. Government authorization. The goods involved included aviation course indicators, aerospace metal sheets and rods, specialty paints and adhesives, and a fiber optic video transmitter and receiver. Zadeh’s unlawful conduct included violating an underlying

774 (2017). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. 4601–4623 (Supp. III 2015) (available at <http://uscdoe.house.gov>)) (“EAA” or “the Act”). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52,587 (Aug. 8, 2016)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)).

temporary denial order (“TDO”) that the Bureau of Industry and Security (“BIS”) had issued. The named respondents under the TDO included, among other parties, Zadeh (under his “Mita Zarek” alias) and Lavantia, Ltd., a Nicosia, Cyprus company that Zadeh owned and/or controlled. Zadeh was sentenced to 18 months in prison, 12 months of supervised release, and a special assessment of \$100.00. Additionally, Zadeh forfeited \$69,159.

Section 766.25 of the Regulations provides, in pertinent part, that “[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the EAA [Export Administration Act], the EAR, or any order, license, or authorization issued thereunder; any regulation, license or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)); or section 38 of the Arms Export Control Act (22 U.S.C. 2778).” 15 CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. 4610(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. 4610(h). In addition, Section 750.8 of the Regulations states that BIS’s Office of Exporter Services may revoke any BIS licenses previously issued pursuant to the Export Administration Act (“EAA” or “the Act”) or the Regulations in which the person had an interest at the time of his conviction.

BIS has received notice of Zadeh’s conviction for violating IEEPA, and has provided notice and an opportunity for Zadeh to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has received a seven-page submission from Zadeh, via his U.S. counsel.

Based upon my review, including of Zadeh’s submission, and my consultations with BIS’s Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Zadeh’s export privileges under the Regulations for a period of ten (10) years from the date of Zadeh’s conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Zadeh had an interest at the time of his conviction.

Accordingly, *it is hereby ordered:*

*First*, from the date of this Order until December 14, 2026, Mansour Moghtaderi Zadeh, a/k/a Mansour

Zadeh, a/k/a Mita Zarek, a/k/a Mita Zadeh, currently incarcerated at Inmate Number: 43594–013, Rivers Correctional Institution, P.O. Box 630, Winton, NC 27986, and with prior known addresses of 16 Kyraikou Matsi Ave, 3rd Floor, 1082 Nicosia, Cyprus, and Strovolou 77, Strovolos Center Suite 202, Strovolos P.C. 2018, Nicosia, Cyprus, and P.O. Box 23973, 1687 Nicosia, Cyprus, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (the “Denied Person”), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as “item”) exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

*Second*, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is

intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

*Third*, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Zadeh by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

*Fourth*, in accordance with Part 756 of the Regulations, Zadeh may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

*Fifth*, a copy of this Order shall be delivered to Zadeh and shall be published in the **Federal Register**.

*Sixth*, this Order is effective immediately and shall remain in effect until December 14, 2026.

Issued: August 10, 2017.

**Karen H. Nies-Vogel,**

*Director, Office of Exporter Services.*

[FR Doc. 2017–17369 Filed 8–16–17; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

**In the Matter of: Wenxia Man, a/k/a Wency Man, Inmate Number: 50772–298, FCI Dublin, 5701 8th Street—Camp Parks, Dublin, CA 94568**

### Order Denying Export Privileges

On August 19, 2016, in the U.S. District Court for the Southern District of Florida, Wenxia Man, a/k/a Wency Man (“Wenxia Man”), was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2012)) (“AECA”). Specifically, Wenxia Man was convicted of knowingly and willfully conspiring to export and cause

the export from the United States to the People's Republic of China of defense articles designated on the United States Munitions List, namely, fighter jet engines and an unmanned aerial vehicle, without the required U.S. Department of State licenses. Wenxia Man was sentenced to 50 months in prison, two years of supervised release, and a \$100 assessment.

Section 766.25 of the Export Administration Regulations ("EAR" or "Regulations")<sup>1</sup> provides, in pertinent part, that "[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the EAA [Export Administration Act], the EAR, or any order, license, or authorization issued thereunder; any regulation, license or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)); or section 38 of the Arms Export Control Act (22 U.S.C. 2778)." 15 CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. 4610(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. 4610(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security's Office of Exporter Services may revoke any Bureau of Industry and Security ("BIS") licenses previously issued pursuant to the Export Administration Act ("EAA" or "the Act") or the Regulations in which the person had an interest at the time of her conviction.

BIS has received notice of Wenxia Man's conviction for violating the AECA, and has provided notice and an opportunity for Wenxia Man to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has not received a submission from Wenxia Man.

Based upon my review and consultations with BIS's Office of Export Enforcement, including its

Director, and the facts available to BIS, I have decided to deny Wenxia Man's export privileges under the Regulations for a period of 10 years from the date of Wenxia Man's conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Wenxia Man had an interest at the time of her conviction.

Accordingly, *it is hereby ordered:*

*First*, from the date of this Order until August 19, 2026, Wenxia Man, a/k/a Wency Man, with a last known address of Inmate Number: 50772–298, FCI Dublin, 5701 8th Street—Camp Parks, Dublin, CA 94568, and when acting for or on her behalf, her successors, assigns, employees, agents or representatives (the "Denied Person"), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

*Second*, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

*Third*, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Wenxia Man by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

*Fourth*, in accordance with Part 756 of the Regulations, Wenxia Man may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

*Fifth*, a copy of this Order shall be delivered to Wenxia Man and shall be published in the **Federal Register**.

*Sixth*, this Order is effective immediately and shall remain in effect until August 19, 2026.

Issued: August 10, 2017.

**Karen H. Nies-Vogel**,

*Director, Office of Exporter Services.*

[FR Doc. 2017–17372 Filed 8–16–17; 8:45 am]

BILLING CODE P

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

**In the Matter of: Yasser Ahmad Obeid, Inmate Number: 60923–018, FCI Yazoo City Medium, Federal Correctional Institution, P.O. Box 5888, Yazoo City, MS 39194**

### Order Denying Export Privileges

On December 17, 2014, in the U.S. District Court for the Middle District of Florida, Tampa Division, Yasser Ahmad Obeid ("Obeid") was convicted of

<sup>1</sup> The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2017). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. 4601–4623 (Supp. III 2015) (available at <http://uscdoe.house.gov>)) ("EAA" or "the Act"). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52,587 (Aug. 8, 2016)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)).

violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2012)) (“AECA”). Specifically, Obeid was convicted of knowingly and willfully attempting to export and attempting to cause to be exported firearms designated as a defense article on the United States Munition List, without the required U.S. Department of State license. Obeid was sentenced to 51 months in prison, three years of supervised release, and a \$300 assessment.

Section 766.25 of the Export Administration Regulations (“EAR” or “Regulations”)<sup>1</sup> provides, in pertinent part, that “[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the EAA [Export Administration Act], the EAR, or any order, license, or authorization issued thereunder; any regulation, license or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)); or section 38 of the Arms Export Control Act (22 U.S.C. 2778).” 15 CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. 4610(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. 4610(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security’s Office of Exporter Services may revoke any Bureau of Industry and Security (“BIS”) licenses previously issued pursuant to the Export Administration Act (“EAA” or “the Act”) or the Regulations in which the person had an interest at the time of his conviction.

BIS has received notice of Obeid’s conviction for violating Section 38 of the AECA, and has provided notice and an opportunity for Obeid to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has not received a submission from Obeid.

<sup>1</sup> The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2017). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. 4601–4623 (Supp. III 2015) (available at <http://uscdoe.house.gov>)) (“EAA” or “the Act”). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52,587 (Aug. 8, 2016)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)).

Based upon my review and consultations with BIS’s Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Obeid’s export privileges under the Regulations for a period of 10 years from the date of Obeid’s conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Obeid had an interest at the time of his conviction.

Accordingly, *it is hereby ordered:*

*First*, from the date of this Order until December 17, 2024, Yasser Ahmad Obeid, with a last known address of Inmate Number: 60923–018, FCI Yazoo City Medium, Federal Correctional Institution, P.O. Box 5888, Yazoo City, MS 39194, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (“the Denied Person”), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as “item”) exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

*Second*, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted

acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

*Third*, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Obeid by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

*Fourth*, in accordance with Part 756 of the Regulations, Obeid may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

*Fifth*, a copy of this Order shall be delivered to Obeid, and shall be published in the **Federal Register**.

*Sixth*, this Order is effective immediately and shall remain in effect until December 17, 2024.

Issued: August 10, 2017.

**Karen H. Nies-Vogel**,

*Director, Office of Exporter Services.*

[FR Doc. 2017–17375 Filed 8–16–17; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

## Bureau of Industry and Security

**In the Matter of: Ricardo Humberto Varela, Inmate Number: 85044–379, Federal Correctional Institution Bastrop, P.O. Box 1010, Bastrop, TX 78602**

## Order Denying Export Privileges

On February 8, 2016, in the U.S. District Court for the Southern District of Texas, Ricardo Humberto Varela (“Varela”) was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2012)) (“AECA”). Specifically, Varela was convicted of intentionally and knowingly conspiring and agreeing to knowingly and willfully export and cause to be exported from the United States to Mexico defense articles designated on the United States Munitions List, namely, 5.56 caliber rifles, without the required U.S. Department of State licenses. Varela was sentenced to 46 months in prison, three years of supervised release, and a \$200 assessment.

Section 766.25 of the Export Administration Regulations (“EAR” or “Regulations”)<sup>1</sup> provides, in pertinent part, that “[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the EAA [Export Administration Act], the EAR, or any order, license, or authorization issued thereunder; any regulation, license or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)); or section 38 of the Arms Export Control Act (22 U.S.C. 2778).”<sup>15</sup> CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. 4610(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. 4610(h). In addition, Section 750.8 of the Regulations states that the Bureau of

Industry and Security’s Office of Exporter Services may revoke any Bureau of Industry and Security (“BIS”) licenses previously issued pursuant to the Export Administration Act (“EAA” or “the Act”) in which the person had an interest at the time of his conviction.

BIS has received notice of Varela’s conviction for violating the AECA, and has provided notice and an opportunity for Varela to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has not received a submission from Varela.

Based upon my review and consultations with BIS’s Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Varela’s export privileges under the Regulations for a period of five years from the date of Varela’s conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Varela had an interest at the time of his conviction.

Accordingly, *it is hereby ordered:*

*First*, from the date of this Order until February 8, 2021, Ricardo Humberto Varela, with a last known address of Inmate Number: 85044–379, Federal Correctional Institution Bastrop, P.O. Box 1010, Bastrop, TX 78602, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (the “Denied Person”), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as “item”) exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

*Second*, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

*Third*, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Varela by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

*Fourth*, in accordance with Part 756 of the Regulations, Varela may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

*Fifth*, a copy of this Order shall be delivered to Varela and shall be published in the **Federal Register**.

*Sixth*, this Order is effective immediately and shall remain in effect until February 8, 2021.

<sup>1</sup> The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2017). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. 4601–4623 (Supp. III 2015) (available at <http://uscdo.house.gov>)) (“EAA” or “the Act”). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52,587 (Aug. 8, 2016)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)).

Issued: August 10, 2017.

**Karen H. Nies-Vogel,**

*Director, Office of Exporter Services.*

[FR Doc. 2017-17373 Filed 8-16-17; 8:45 am]

BILLING CODE P

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

**In the Matter of: Jose Luis Benavides-Cira, Inmate Number: 85055-379, Great Plains Correctional Institution, P.O. Box 400, Hinton, OK 73047**

#### Order Denying Export Privileges

On November 30, 2015, in the U.S. District Court for the Southern District of Texas, Jose Luis Benavides-Cira was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2012)) (“AECA”). Specifically, Jose Luis Benavides-Cira was convicted of intentionally and knowingly conspiring and agreeing with other persons to knowingly and willfully export, and cause to be exported, from the United States to Mexico defense articles designated on the United States Munitions List, namely, 5.56 caliber rifles, without the required U.S. Department of State licenses. Jose Luis Benavides-Cira was sentenced to 46 months in prison and a \$100 assessment.

Section 766.25 of the Export Administration Regulations (“EAR” or “Regulations”)<sup>1</sup> provides, in pertinent part, that “[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the EAA [Export Administration Act], the EAR, or any order, license, or authorization issued thereunder; any regulation, license or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701-1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)); or section 38 of the Arms Export Control Act (22 U.S.C. 2778).” 15 CFR 766.25(a); *see also* Section 11(h) of

the EAA, 50 U.S.C. 4610(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. 4610(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security’s Office of Exporter Services may revoke any Bureau of Industry and Security (“BIS”) licenses previously issued pursuant to the Export Administration Act (“EAA” or “the Act”) or the Regulations in which the person had an interest at the time of his conviction.

BIS has received notice of Jose Luis Benavides-Cira’s conviction for violating Section 38 of the AECA, and has provided notice and an opportunity for Jose Luis Benavides-Cira to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has not received a submission from Jose Luis Benavides-Cira.

Based upon my review and consultations with BIS’s Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Jose Luis Benavides-Cira’s export privileges under the Regulations for a period of five years from the date of Jose Luis Benavides-Cira’s conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Jose Luis Benavides-Cira had an interest at the time of his conviction.

Accordingly, *it is hereby ordered:*

*First*, from the date of this Order until November 30, 2020, Jose Luis Benavides-Cira, with a last known address of Inmate Number: 85055-379, Great Plains Correctional Institution, P.O. Box 400, Hinton, OK 73047, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (“the Denied Person”), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as “item”) exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging

in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

*Second*, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

*Third*, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Jose Luis Benavides-Cira by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

*Fourth*, in accordance with Part 756 of the Regulations, Jose Luis Benavides-Cira may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply

<sup>1</sup> The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730-774 (2017). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. 4601-4623 (Supp. III 2015) (available at <http://uscdoe.house.gov>)) (“EAA” or “the Act”). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52,587 (Aug. 8, 2016)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)).

with the provisions of Part 756 of the Regulations.

*Fifth*, a copy of this Order shall be delivered to Jose Luis Benavides-Cira, and shall be published in the **Federal Register**.

*Sixth*, this Order is effective immediately and shall remain in effect until November 30, 2020.

Issued: August 10, 2017.

**Karen H. Nies-Vogel**,

*Director, Office of Exporter Services.*

[FR Doc. 2017-17374 Filed 8-16-17; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-570-010]

#### **Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Rescission of Antidumping Duty Administrative Review**

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is rescinding its administrative review of the antidumping duty order on certain crystalline silicon photovoltaic products from the People's Republic of China (PRC) covering the period February 1, 2016, through January 31, 2017.

**DATES:** Applicable August 17, 2017.

**FOR FURTHER INFORMATION CONTACT:** Aleksandras Nakutis, AD/CVD Operations, Office IV, Enforcement & Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-3147.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

On February 8, 2017, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on certain crystalline silicon photovoltaic products from the PRC.<sup>1</sup> The Department received a timely request from Shenzhen Topray Solar Co., Ltd. (Topray Solar) and SolarWorld Americas, Inc. (the petitioner), in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b), to conduct an

<sup>1</sup> See *Antidumping or Countervailing Duty Order, Finding, or Suspend Investigation; Opportunity To Request Administrative Review*, 82 FR 9709 (February 8, 2017).

administrative review of this antidumping duty order.<sup>2</sup> On March 24, 2017, Topray Solar timely withdrew its request for an administrative review.<sup>3</sup>

On April 10, 2017, the Department published in the **Federal Register** a notice of initiation<sup>4</sup> of an administrative review with respect to 27 companies. Because Topray Solar timely withdrew its request for an administrative review before the Department published its initiation notice, the Department did not initiate an administrative review with respect to Topray Solar. On May 11, 2017, the petitioner timely withdrew its request for an administrative review of all 27 companies for which it had requested a review.<sup>5</sup>

#### **Rescission of Administrative Review**

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation of the requested review. Topray Solar and the petitioner withdrew their requests for review by the 90-day deadline, and no other parties requested an administrative review of this order. Therefore, we are rescinding the administrative review of the antidumping duty order on certain crystalline silicon photovoltaic products from the PRC covering the period February 1, 2016 to January 31, 2017.

#### **Assessment**

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed at an amount equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days

<sup>2</sup> See Letter from Topray Solar, regarding "Crystalline Silicon Photovoltaic Products from the People's Republic of China Request for Administrative Review," dated February 27, 2017; see also Letter from the petitioner, regarding "Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Request for Administrative Review," dated February 28, 2017.

<sup>3</sup> See Letter from Topray Solar, regarding "Crystalline Silicon Photovoltaic Products from the People's Republic of China Withdrawal of Request for Administrative Review," dated March 24, 2017.

<sup>4</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 FR 17188 (April 10, 2017).

<sup>5</sup> See Letter from the petitioner, regarding "Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Withdrawal of Administrative Review Request," dated May 11, 2017.

after the date of publication of this notice in the **Federal Register**.

#### **Notification to Importers**

This notice serves as the only reminder to importers of their responsibility, under 19 CFR 351.402(f)(2), to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement may result in the presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

#### **Notification Regarding Administrative Protective Orders**

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is published in accordance with section 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: August 9, 2017.

**James Maeder**,

*Senior Director performing the duties of Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2017-17361 Filed 8-16-17; 8:45 a.m.]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF EDUCATION

#### **Annual Notice of Variable Interest Rates of Federal Student Loans Made Under the Federal Family Education Loan Program Prior to July 1, 2010**

**AGENCY:** Federal Student Aid, Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** The Chief Operating Officer for Federal Student Aid announces the variable interest rates for the period July 1, 2017, through June 30, 2018, for certain loans made under the Federal Family Education Loan (FFEL) Program. The Chief Operating Officer takes this action to give notice of FFEL Program loan variable interest rates to the public.

**DATES:** This notice is applicable August 17, 2017.

**FOR FURTHER INFORMATION CONTACT:** Rene Tionguico, U.S. Department of

Education, 830 First Street NE., 11th floor, Washington, DC 20202. Telephone: (202) 377-4270 or by email: *Rene.Tiongquico@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotope, or compact disc) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:** *Catalog of Federal Domestic Assistance (CFDA) Number: 84.032.*

Section 427A of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1077a), provides formulas for determining the interest rates charged to borrowers on loans made under the FFEL Program, including Federal Subsidized and Unsubsidized Stafford Loans, Federal PLUS Loans, and Federal Consolidation Loans.

The FFEL Program includes loans with variable interest rates and loans with fixed interest rates. Most loans made under the FFEL Program before July 1, 2006, have variable interest rates that change each year. In most cases, the variable interest rate formula that applies to a particular loan depends on the date of the first disbursement of the loan. The variable rates are determined annually and are effective for each 12-month period beginning July 1 of one year and ending June 30 of the following year.

Under section 427A(l) of the HEA, FFEL Program loans first disbursed on or after July 1, 2006, and before July 1, 2010, have a fixed interest rate. Interest rates for these loans may be found in a **Federal Register** notice published on September 15, 2015 (80 FR 55342).

Federal Consolidation Loans made prior to November 13, 1997, and on or after October 1, 1998, have a fixed interest rate that is based on the weighted average of the loans that are consolidated. Interest rates for Federal Consolidation Loans made between November 13, 1997, and September 30, 1998, are provided in Chart 3.

FFEL variable interest rates are based on formulas that use the bond equivalent rate of the 91-day Treasury bill auctioned at the final auction held before June 1 of each year plus a statutorily established add-on. These formulas apply to: All Federal Subsidized and Unsubsidized Stafford Loans first disbursed before October 1, 1992, that have been converted to variable rate loans; all Federal Subsidized and Unsubsidized Stafford Loans first disbursed on or after October 1, 1992, and before July 1, 2006; Federal PLUS Loans first disbursed on or after July 1, 1998, and before July 1, 2006; and Federal Consolidation Loans for which the Federal Consolidation Loan application was received on or after November 13, 1997, and before October 1, 1998. In each case, the calculated rate is capped by a maximum interest rate. The bond equivalent rate of the 91-day Treasury bills auctioned on May 30, 2017, which is used to calculate the interest rates on these loans, is 0.976 percent rounded up to 0.98 percent.

For Federal PLUS loans first disbursed before July 1, 1998, the interest rate is based on the weekly average of the one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System for the last day of the calendar week ending on or before June 26 of each year, plus a statutory add-on percentage. The calculated rate is capped by a maximum interest rate. The weekly average of the one-year constant

maturity Treasury yield published on June 26, 2017, which is used to calculate the interest rate on these loans, is 1.22 percent.

For Federal Consolidation loans for which the application was received by the lender on or after November 13, 1997, the interest rate that includes portions of Federal Consolidation Loans attributable to loans made by the U.S. Department of Health and Human Services under subpart I of part A of title VII of the Public Health Service Act, is based on the average of the bond equivalent rates of the 91-day Treasury bills auctioned for the quarter ending June 30, 2017, plus a statutory add-on percentage. There is no maximum interest rate for these loans. The average of the bond equivalent rates of the 91-day Treasury bill auctioned for the quarter ending on June 30, 2017, which is used to calculate the interest rate on these loans, is 0.92 percent.

This notice includes three charts containing specific information on the calculation of variable interest rates for loans made under the FFEL Program:

Chart 1 contains information on the interest rates for Federal Subsidized and Unsubsidized Stafford Loans that were made as fixed-rate loans, but were subsequently converted to variable-rate loans.

Chart 2 contains information on the interest rates for variable-rate Federal Subsidized and Unsubsidized Stafford Loans.

Chart 3 contains information on the interest rates for variable-rate Federal PLUS Loans, certain Federal Consolidation Loans, and Consolidation Loans that include loans made by the U.S. Department of Health and Human Services under subpart I of part A of title VII of the Public Health Service Act.

**CHART 1—“CONVERTED” VARIABLE-RATE FEDERAL SUBSIDIZED AND UNSUBSIDIZED STAFFORD LOANS INTEREST RATES IN EFFECT FOR THE PERIOD 7/1/2017 THROUGH 6/30/2018**

Cohort		Original fixed interest rate (%)	Max. rate (%)	91-Day T-bill rate (%)	Margin (%)	Total rate (%)
First disbursed on or after	First disbursed before					
7/1/1988	7/23/1992	8.00, increasing to 10.00 ...	10.00	0.98	3.25	4.23
7/23/1992	10/1/1992	8.00, increasing to 10.00 ...	10.00	0.98	3.25	4.23
7/23/1992	7/1/1994	7.00	7.00	0.98	3.10	4.08
7/23/1992	7/1/1994	8.00	8.00	0.98	3.10	4.08
7/23/1992	7/1/1994	9.00	9.00	0.98	3.10	4.08
7/23/1992	7/1/1994	8.00, increasing to 10.00 ...	10.00	0.98	3.10	4.08

**Note:** The FFEL Program loans represented by the second row of the chart were only made to “new borrowers” on or after July 23, 1992. Whether the FFEL Program loans represented by the third through sixth rows

of Chart 1 were made to a specific borrower depends on the interest rate on the borrower’s existing loans (see the “Original Fixed Interest Rate” column in Chart 1) at the

time the borrower received the loan(s) on or after July 23, 1992, and prior to July 1, 1994.

In Charts 2 and 3, a dagger following a date in a cohort field indicates that the



trigger for the rate to apply is a period of enrollment for which the loan was intended either “ending before” or “beginning on or after” the date in the cohort field.

**CHART 2—VARIABLE-RATE FEDERAL SUBSIDIZED AND UNSUBSIDIZED STAFFORD LOANS INTEREST RATES IN EFFECT FOR THE PERIOD 7/1/2017 THROUGH 6/30/2018**

Cohort		Max. rate	91-Day T-bill rate	Margin		Total rate (%)	
First disbursed on or after	First disbursed before			In-school, grace, deferment (%)	All other periods (%)	In-school, grace, deferment (%)	All other periods (%)
10/1/1992 .....	7/1/1994	9.00	0.98	3.10	3.10	4.08	4.08
7/1/1994 .....	7/1/1994†	9.00	0.98	3.10	3.10	4.08	4.08
7/1/1994 .....	7/1/1995	8.25	0.98	3.10	3.10	4.08	4.08
7/1/1995 .....	7/1/1998	8.25	0.98	2.50	3.10	3.48	4.08
7/1/1998 .....	7/1/2006	8.25	0.98	1.70	2.30	2.68	3.28

**Note:** The FFEL Program loans represented in the first row in Chart 2 were only made to “new borrowers” on or after October 1, 1992. The FFEL Program loans represented in the second row in Chart 2 were only made to “new borrowers” on or after July 1, 1994. The FFEL Program loans represented in the third row in Chart 2 must—in addition to having been first disbursed on or after July 1, 1994, and before July 1, 1995—have been made for a period of enrollment that began on or included July 1, 1994.

**CHART 3—VARIABLE-RATE FEDERAL PLUS, SLS, AND CONSOLIDATION LOANS INTEREST RATES IN EFFECT FOR THE PERIOD 7/1/2017 THROUGH 6/30/2018**

Loan type	Cohort		Max. rate (%)	Index rate			
	First disbursed on or after	First disbursed before		91-Day T-bill rate	1-Year constant Treasury maturity (%)	Margin (%)	Total rate (%)
PLUS and SLS .....	—	10/1/1992	12.00	—	1.22	3.25	4.47
SLS .....	10/1/1992	7/1/1994†	11.00	—	1.22	3.10	4.32
PLUS .....	10/1/1992	7/1/1994	10.00	—	1.22	3.10	4.32
PLUS .....	7/1/1994	7/1/1998	9.00	—	1.22	3.10	4.32
PLUS .....	7/1/1998	7/1/2006	9.00	0.98	—	3.10	4.08
Loan type .....	Application received on or after	Application received before	Max. rate	91-Day T-bill rate	Average of the Bond equivalent rates of the 91-Day T-bill for the quarter prior to July 1	Margin	Total rate
Consolidation .....	11/13/1997	10/1/1998	8.25	0.98	—	3.10	4.08
HHS Portion of Consolidation .....	11/13/1997	—	—	—	0.92	3.00	3.92

The last row in Chart 3 refers to portions of Federal Consolidation Loans attributable to loans made by the U.S. Department of Health and Human Services under subpart I of part A of title VII of the Public Health Service Act.

**Note:** No new loans have been made under the FFEL Program since June 30, 2010.

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other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site. You may also access documents of the Department published in the **Federal Register** by using the article search feature at: [www.federalregister.gov](http://www.federalregister.gov). Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

*Program Authority:* 20 U.S.C. 1071 *et seq.*

Dated: August 14, 2017.

**A. Wayne Johnson,**  
*Chief Operating Officer, Federal Student Aid.*  
 [FR Doc. 2017-17424 Filed 8-16-17; 8:45 am]

**BILLING CODE 4000-01-P**

**DEPARTMENT OF EDUCATION**

**Annual Notice of Interest Rates for Federal Student Loans Made Under the William D. Ford Federal Direct Loan Program Prior to July 1, 2013**

**AGENCY:** Federal Student Aid, Department of Education (ED).

**ACTION:** Notice.

**DATES:** This notice is applicable August 17, 2017.

**SUMMARY:** The Chief Operating Officer for Federal Student Aid announces the interest rates for loans made under the William D. Ford Federal Direct Loan (Direct Loan) Program prior to July 1, 2013. For loans that have a variable interest rate, the rates announced in this notice are in effect for the period July 1, 2017, through June 30, 2018. The Chief Operating Officer takes this action to give notice of Direct Loan interest rates to the public.

**FOR FURTHER INFORMATION CONTACT:** Rene Tiongquico, U.S. Department of Education, 830 First Street NE., 11th floor, Washington, DC 20202. Telephone: (202) 377-4270 or by email: [Rene.Tiongquico@ed.gov](mailto:Rene.Tiongquico@ed.gov).

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotope, or compact disc) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:** Catalog of Federal Domestic Assistance (CFDA) Number: 84.268.

Section 455(b) of the Higher Education Act of 1965, as amended

(HEA) (20 U.S.C. 1087e(b)), specifies the interest rates charged to borrowers for Federal Direct Subsidized Stafford/Ford Loans (Direct Subsidized Loans), Federal Direct Unsubsidized Stafford/Ford Loans (Direct Unsubsidized Loans), Federal Direct PLUS Loans (Direct PLUS Loans), and Federal Direct Consolidation Loans (Direct Consolidation Loans), collectively referred to as "Direct Loans." The interest rates for Direct Loans may be variable or fixed.

**Variable-Rate Direct Loans**

Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans that were first disbursed before July 1, 2006, and Direct Consolidation Loans for which the application was received before February 1, 1999, have variable interest rates that are determined each year in accordance with formulas specified in section 455(b) of the HEA. The variable interest rate formula that applies to a particular loan depends on the date of the first disbursement of the loan or, for some Direct Consolidation Loans, the date the application for the loan was received. The variable rates are determined annually and are effective for each 12-month period beginning July 1 of one year and ending June 30 of the following year.

Except for Direct PLUS Loans that were first disbursed before July 1, 1998, the variable interest rates for most types of Direct Loans are based on formulas that use the bond equivalent rates of the 91-day Treasury bills auctioned at the final auction held before June 1 of each year, plus a statutory add-on percentage. In each case, the calculated rate is capped by a maximum interest rate. The bond equivalent rate of the 91-day Treasury bills auctioned on May 30, 2017, which is used to calculate the interest rates on these loans, is 0.976 percent rounded up to 0.98 percent.

The interest rate for Direct PLUS Loans that were first disbursed on or after July 1, 1994, and before July 1, 1998, is based on the weekly average of the one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System for the last day of the calendar week ending on or before June 26 of each year, plus a statutory add-on percentage. The calculated rate is capped by a maximum interest rate. The weekly average of the one-year constant maturity Treasury yield published on June 26, 2017, which is used to calculate the interest rate on these loans, is 1.22 percent.

Charts 1 through 4 in this notice show the interest rates for variable-rate Direct Loans that are in effect for the period July 1, 2017, through June 30, 2018.

**CHART 1—VARIABLE-RATE DIRECT SUBSIDIZED AND DIRECT UNSUBSIDIZED LOANS INTEREST RATES IN EFFECT FOR THE PERIOD 7/1/2017 THROUGH 6/30/2018**

Cohort		Max. rate (%)	Index rate			Margin		Total rate	
First disbursed on or after	First disbursed before		91-day T-bill rate (%)	In-school, grace, deferment (%)	All other periods (%)	In-school, grace, deferment (%)	All other periods (%)		
7/1/1994 .....	7/1/1995 .....	8.25	0.98	3.10	3.10	4.08	4.08		
7/1/1995 .....	7/1/1998 .....	8.25	0.98	2.50	3.10	3.48	4.08		
7/1/1998 .....	7/1/2006 .....	8.25	0.98	1.70	2.30	2.68	3.28		

**CHART 2—VARIABLE-RATE DIRECT PLUS LOANS INTEREST RATES IN EFFECT FOR THE PERIOD 7/1/2017 THROUGH 6/30/2018**

Cohort		Max. rate (%)	Index rate		Margin (%)	Total rate (%)
First disbursed on or after	First disbursed before		91-day T-bill rate (%)	1-year constant treasury maturity (%)		
7/1/1994 .....	7/1/1998 .....	9.00	.....	1.22	3.10	4.32
7/1/1998 .....	7/1/2006 .....	9.00	0.98	.....	3.10	4.08

CHART 3—VARIABLE-RATE DIRECT SUBSIDIZED AND DIRECT UNSUBSIDIZED CONSOLIDATION LOANS INTEREST RATES IN EFFECT FOR THE PERIOD 7/1/2017 THROUGH 6/30/2018

Cohort		Max. rate (%)	Index rate		Margin		Total rate	
First disbursed on or after	First disbursed before		91-Day T-Bill rate (%)	In-School, grace, deferment (%)	All other periods (%)	In-School, grace, deferment (%)	All other periods (%)	
7/1/1994 .....	7/1/1995 .....	8.25	0.98	3.10	3.10	4.08	4.08	
7/1/1995 .....	7/1/1998 .....	8.25	0.98	2.50	3.10	3.48	4.08	
7/1/1998 .....	10/1/1998 .....	8.25	0.98	1.70	2.30	2.68	3.28	
First disbursed on or after	Application received before							
10/1/1998 .....	10/1/1998 .....	8.25	0.98	1.70	2.30	2.68	3.28	
Application received on or after	Application received before							
10/1/1998 .....	2/1/1999 .....	8.25	0.98	2.30	2.30	3.28	3.28	

CHART 4—VARIABLE-RATE DIRECT PLUS CONSOLIDATION LOANS INTEREST RATES IN EFFECT FOR THE PERIOD 7/1/2017 THROUGH 6/30/2018

Cohort		Max. rate (%)	Index rate		Margin		Total rate	
First disbursed on or after	First disbursed before		91-day T-Bill rate (%)	1-year constant treasury maturity (%)	In-school, grace, deferment (%)	All other periods (%)	In-School, grace, deferment (%)	All other periods (%)
7/1/1994 .....	7/1/1998 .....	9.00	.....	1.22	3.10	3.10	4.32	4.32
7/1/1998 .....	10/1/1998 .....	9.00	0.98	.....	3.10	3.10	4.08	4.08
First disbursed on or after	Application received before							
10/1/1998 .....	10/1/1998 .....	9.00	0.98	.....	3.10	3.10	4.08	4.08
Application received on or after	Application received before							
10/1/1998 .....	2/1/1999 .....	8.25	0.98	.....	2.30	2.30	3.28	3.28

**Fixed-Rate Direct Loans**

Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans first disbursed on or after July 1, 2006, and before July 1, 2013, and Direct Consolidation Loans for which the application was received on or after February 1, 1999, have fixed interest rates. The fixed interest rates for Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans first disbursed on or after July 1, 2006, and before July 1, 2013, and Direct Consolidation Loans for which the application was received on or after February 1, 1999 may be found in a **Federal Register** notice published on October 3, 2016 (81 FR 68003), under the heading “Chart 5—Fixed-Rate Direct Subsidized, Direct Unsubsidized, Direct PLUS Loans, and Direct Consolidation Loans First Disbursed On or After 7/1/2006 and Before 7/1/2013.”

Interest rates for Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans first disbursed on or after July 1, 2013, and before July 1, 2018, are published in earlier **Federal Register** notices, as follows:

- For loans first disbursed on or after July 1, 2013, and prior to July 1, 2014, see 78 FR 59011.
- For loans first disbursed on or after July 1, 2014, and prior to July 1, 2015, see 79 FR 37301.
- For loans first disbursed on or after July 1, 2015, and prior to July 1, 2016, see 80 FR 42488.
- For loans first disbursed on or after July 1, 2016, and prior to July 1, 2017, see 81 FR 38159.
- For loans first disbursed on or after July 1, 2017, and prior to July 1, 2018, see 82 FR 29062.

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**Register**. Free internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys). At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

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*Program Authority:* 20 U.S.C. 1087 *et seq.*

Dated: August 14, 2017.

**A. Wayne Johnson,**

Chief Operating Officer, Federal Student Aid.

[FR Doc. 2017-17425 Filed 8-16-17; 8:45 am]

BILLING CODE P4000-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC17-156-000.

*Applicants:* Hog Creek Wind Project, LLC.

*Description:* Application for Authorization for Disposition of Jurisdictional Facilities and Request for Expedited Action of Hog Creek Wind Project, LLC.

*Filed Date:* 8/9/17.

*Accession Number:* 20170809-5158.

*Comments Due:* 5 p.m. ET 8/30/17.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER15-794-006.

*Applicants:* Catalyst Paper Operations Inc.

*Description:* Compliance filing: Update MBR Tariff to be effective 1/27/2017.

*Filed Date:* 8/10/17.

*Accession Number:* 20170810-5032.

*Comments Due:* 5 p.m. ET 8/31/17.

*Docket Numbers:* ER17-2200-001.

*Applicants:* PJM Interconnection, L.L.C.

*Description:* Tariff Amendment: Errata to OATT Att O and P revisions submitted in ER17-2200 re: Solar Generation to be effective 9/29/2017.

*Filed Date:* 8/10/17.

*Accession Number:* 20170810-5056.

*Comments Due:* 5 p.m. ET 8/31/17.

*Docket Numbers:* ER17-2271-000.

*Applicants:* New York Independent System Operator, Inc.

*Description:* § 205(d) Rate Filing: NYISO 205 filing black start and system restoration service tariff revisions to be effective 10/8/2017.

*Filed Date:* 8/9/17.

*Accession Number:* 20170809-5114.

*Comments Due:* 5 p.m. ET 8/30/17.

*Docket Numbers:* ER17-2272-000.

*Applicants:* Wolverine Power Supply Cooperative, Inc.

*Description:* § 205(d) Rate Filing: Second Amended and Restated IFA Agreement to be effective 12/31/9998.

*Filed Date:* 8/9/17.

*Accession Number:* 20170809-5134.

*Comments Due:* 5 p.m. ET 8/30/17.

*Docket Numbers:* ER17-2273-000.

*Applicants:* Midcontinent

Independent System Operator, Inc.

*Description:* § 205(d) Rate Filing: 2017-08-09 SA 3041 Gratiot Farms-METC GIA (G934) to be effective 8/9/2017.

*Filed Date:* 8/9/17.

*Accession Number:* 20170809-5141.

*Comments Due:* 5 p.m. ET 8/30/17.

*Docket Numbers:* ER17-2274-000.

*Applicants:* Midcontinent

Independent System Operator, Inc.

*Description:* § 205(d) Rate Filing: 2017-08-10 SA 3037 Pine River Wind-METC GIA (J589) to be effective 7/27/2017.

*Filed Date:* 8/10/17.

*Accession Number:* 20170810-5008.

*Comments Due:* 5 p.m. ET 8/31/17.

*Docket Numbers:* ER17-2275-000.

*Applicants:* Green Power Energy LLC.

*Description:* Petition for Limited Waiver and Request for Expedited Action of Green Power Energy LLC.

*Filed Date:* 8/10/17.

*Accession Number:* 20170810-5026.

*Comments Due:* 5 p.m. ET 8/31/17.

*Docket Numbers:* ER17-2276-000.

*Applicants:* Midcontinent Independent System Operator, Inc.

*Description:* § 205(d) Rate Filing: 2017-08-10 Termination of Project J233 E&P Agreements (SA 2507 & SA 2696) to be effective 8/11/2017.

*Filed Date:* 8/10/17.

*Accession Number:* 20170810-5027.

*Comments Due:* 5 p.m. ET 8/31/17.

*Docket Numbers:* ER17-2277-000.

*Applicants:* Midcontinent Independent System Operator, Inc.

*Description:* § 205(d) Rate Filing: 2017-08-10 SA 1976 MEC-ITC Midwest 3rd Revised TIA to be effective 8/21/2017.

*Filed Date:* 8/10/17.

*Accession Number:* 20170810-5036.

*Comments Due:* 5 p.m. ET 8/31/17.

*Docket Numbers:* ER17-2278-000.

*Applicants:* Midcontinent Independent System Operator, Inc., Otter Tail Power Company.

*Description:* § 205(d) Rate Filing: 2017-08-10 SA 3035 OTP-Dakota Range I & II E&P (J436 J437) to be effective 7/29/2017.

*Filed Date:* 8/10/17.

*Accession Number:* 20170810-5052.

*Comments Due:* 5 p.m. ET 8/31/17.

*Docket Numbers:* ER17-2279-000.

*Applicants:* Duke Energy Progress, LLC.

*Description:* § 205(d) Rate Filing: Craven LGIA SA 271 Filing to be effective 10/10/2017.

*Filed Date:* 8/10/17.

*Accession Number:* 20170810-5071.

*Comments Due:* 5 p.m. ET 8/31/17.

*Docket Numbers:* ER17-2280-000.

*Applicants:* Southwestern Public Service Company.

*Description:* § 205(d) Rate Filing: SPS-GSEC-RBEC-CA-Wolves-668-0.0.0 to be effective 10/8/2017.

*Filed Date:* 8/10/17.

*Accession Number:* 20170810-5089.

*Comments Due:* 5 p.m. ET 8/31/17.

*Docket Numbers:* ER17-2281-000.

*Applicants:* Swamp Fox Solar, LLC.  
*Description:* Baseline eTariff Filing: Baseline new to be effective 10/10/2017.

*Filed Date:* 8/10/17.

*Accession Number:* 20170810-5093.

*Comments Due:* 5 p.m. ET 8/31/17.

*Docket Numbers:* ER17-2282-000.

*Applicants:* Champion Solar, LLC.  
*Description:* Baseline eTariff Filing: Baseline new to be effective 10/10/2017.

*Filed Date:* 8/10/17.

*Accession Number:* 20170810-5095.

*Comments Due:* 5 p.m. ET 8/31/17.

Take notice that the Commission received the following electric securities filings:

*Docket Numbers:* ES17-52-000.

*Applicants:* Upper Peninsula Power Company.

*Description:* Application of Upper Peninsula Power Company for Authorization under Section 204 of the Federal Power Act and Request for Expedited Treatment.

*Filed Date:* 8/10/17.

*Accession Number:* 20170810-5072.

*Comments Due:* 5 p.m. ET 8/31/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: August 10, 2017.

**Nathaniel J. Davis, Sr.,**

Deputy Secretary.

[FR Doc. 2017-17349 Filed 8-16-17; 8:45 am]

BILLING CODE P6717-01-P

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Docket No. CD17-18-000]

**Village of Waterbury; Notice of Preliminary Determination of a Qualifying Conduit Hydropower Facility and Soliciting Comments and Motions To Intervene**

On August 4, 2017, the Village of Waterbury filed a notice of intent to construct a qualifying conduit hydropower facility, pursuant to section 30 of the Federal Power Act (FPA), as amended by section 4 of the Hydropower Regulatory Efficiency Act

of 2013 (HREA). The proposed Guptil Road 4.0 kW In-conduit Hydroelectric Net-Metered Project (Guptil Road Project) would have an installed capacity of 4 kilowatts (kW), and would be located along a 12-inch diameter potable water pipeline. The project would be located near the Village of Waterbury in Washington County, Vermont.

*Applicant Contact:* William Shepeluk, Municipal Manager, Village of Waterbury, 28 North Main Street, Waterbury, VT 05676; Phone No. (802) 244-7033

*FERC Contact:* Robert Bell, Phone No. (202) 502-6062; Email: [robert.bell@ferc.gov](mailto:robert.bell@ferc.gov).

*Qualifying Conduit Hydropower Facility Description:* The proposed project would consist of: (1) A new 4 foot-long, 1.5-inch diameter intake pipe off of the 12-inch diameter potable water pipeline, (2) one generating unit with an installed capacity of four kW located within an existing 8-foot-long by 12-foot-wide pressure reducing vault; (3) a new 4-foot-long, 2-inch diameter outlet pipe returning water to the 12-inch diameter water main; and (4) appurtenant facilities. The proposed project would have an estimated annual generation of 35.6 megawatt-hours.

A qualifying conduit hydropower facility is one that is determined or deemed to meet all of the criteria shown in the table below.

TABLE 1—CRITERIA FOR QUALIFYING CONDUIT HYDROPOWER FACILITY

Statutory provision	Description	Satisfies (Y/N)
FPA 30(a)(3)(A), as amended by HREA ...	The conduit the facility uses is a tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.	Y
FPA 30(a)(3)(C)(i), as amended by HREA	The facility is constructed, operated, or maintained for the generation of electric power and uses for such generation only the hydroelectric potential of a non-federally owned conduit.	Y
FPA 30(a)(3)(C)(ii), as amended by HREA	The facility has an installed capacity that does not exceed 5 megawatts .....	Y
FPA 30(a)(3)(C)(iii), as amended by HREA	On or before August 9, 2013, the facility is not licensed, or exempted from the licensing requirements of Part I of the FPA.	Y

*Preliminary Determination:* The proposed hydroelectric project will utilize an existing potable water pipeline, the primary purpose of which is to convey drinking water to the Village of Waterbury. The addition of the Guptil Road Project will not alter the conduit's primary purpose. Therefore, based upon the above criteria, Commission staff preliminarily determines that the proposal satisfies the requirements for a qualifying conduit hydropower facility, which is not required to be licensed or exempted from licensing.

*Comments and Motions to Intervene:* Deadline for filing comments contesting whether the facility meets the qualifying criteria is 45 days from the issuance date of this notice.

Deadline for filing motions to intervene is 30 days from the issuance date of this notice.

Anyone may submit comments or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210 and 385.214. Any motions to intervene must be received on or before the specified deadline date for the particular proceeding.

*Filing and Service of Responsive Documents:* All filings must (1) bear in

all capital letters the "COMMENTS CONTESTING QUALIFICATION FOR A CONDUIT HYDROPOWER FACILITY" or "MOTION TO INTERVENE," as applicable; (2) state in the heading the name of the applicant and the project number of the application to which the filing responds; (3) state the name, address, and telephone number of the person filing; and (4) otherwise comply with the requirements of sections 385.2001 through 385.2005 of the Commission's regulations.<sup>1</sup> All comments contesting Commission staff's preliminary determination that the facility meets the qualifying criteria must set forth their evidentiary basis.

The Commission strongly encourages electronic filing. Please file motions to intervene and comments using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), (866)

208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

*Locations of Notice of Intent:* Copies of the notice of intent can be obtained directly from the applicant or such copies can be viewed and reproduced at the Commission in its Public Reference Room, Room 2A, 888 First Street NE., Washington, DC 20426. The filing may also be viewed on the web at <http://www.ferc.gov/docs-filing/elibrary.asp> using the "eLibrary" link. Enter the docket number (*i.e.*, CD17-18) in the docket number field to access the document. For assistance, call toll-free 1-866-208-3676 or email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov). For TTY, call (202) 502-8659.

<sup>1</sup> 18 CFR 385.2001-2005 (2017).

Dated: August 10, 2017.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2017-17351 Filed 8-16-17; 8:45 am]

BILLING CODE P6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP17-480-000]

#### Florida Gas Transmission Company, LLC; Notice of Request Under Blanket Authorization

Take notice that on August 2, 2017, Florida Gas Transmission Company, LLC (Florida Gas), 1300 Main Street, Houston, Texas 77002, filed in the above referenced Docket, a prior notice request pursuant to sections 157.205, 157.208, and 157.216 of the Commission's regulations under the Natural Gas Act (NGA) for authorization to abandon approximately 6.7 miles of the 8-inch-diameter Rinker Lateral, associated measurement and regulation station, and appurtenant facilities, all located in Miami-Dade County, Florida (Rinker Facilities Abandonment Project), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

The filing may also be viewed on the web at <http://www.ferc.gov> using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or toll free at (866) 208-3676, or TTY, contact (202) 502-8659.

Any questions concerning this prior notice request should be directed to Blair Lichtenwalter, Senior Director of Certificates, Florida Gas Transmission Company, LLC, 1300 Main St., Houston, Texas, 77002, or call (713) 989-2605, or fax (713) 989-1205, or via email [Blair.Lichtenwalter@energytransfer.com](mailto:Blair.Lichtenwalter@energytransfer.com).

Specifically, Florida Gas proposes to abandon in place the Rinker Lateral, which originates downstream of Lateral Line Valve (LLV) 20-90B at Mile Post 914.0 on Florida Gas's mainline and the Rinker Measurement and Regulation Station located at Rinker Portland Cement Corp's plant. Florida Gas also proposes to abandon by removal LLV 20-90B. Florida Gas states that Rinker Lateral and facilities have not been used to provide interruptible or firm transportation in over two years. Florida Gas further states that proposed abandonment would eliminate

additional capital and/or operating expenditures which could potentially result in an increased net operating loss for Florida Gas as time goes on.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the Natural Gas Act (NGA) (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site ([www.ferc.gov](http://www.ferc.gov)) under the e-Filing link.

Dated: August 11, 2017.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2017-17390 Filed 8-16-17; 8:45 am]

BILLING CODE P6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP17-477-000]

#### Columbia Gas Transmission, LLC; Notice of Request Under Blanket Authorization

Take notice that on July 31, 2017, Columbia Gas Transmission, LLC (Columbia), 700 Louisiana Street, Suite 700, Houston, Texas 77002-2700, filed in Docket No. CP17-477-000 a prior notice request pursuant to sections 157.205 and 157.216 of the Commission's regulations under the Natural Gas Act (NGA), as amended, requesting authorization to abandon two injection/withdrawal (I/W) wells, along with the associated pipelines and appurtenances at its Lucas Storage Field, located in Ashland and Richland Counties, Ohio. Columbia states that the Lucas 10697 and 10722 I/W wells have historically performed poorly in relation to other wells in the Lucas Storage Field and, based on the age of the wells, the wells would require an extensive case replacement job. Columbia asserts that the proposed abandonment of the Lucas 10697 well includes the abandonment of 977 feet of 3.5-inch-diameter pipeline and appurtenances and the proposed abandonment of the Lucas 10722 well includes the abandonment of 4.5-inch-diameter pipeline and appurtenances. Columbia avers that there will be no change to the existing boundary, total inventory, reservoir pressure, reservoir and buffer boundaries, or the certificated capacity of the Lucas Storage Field as a result of the proposed abandonment, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or toll free at (866) 208-3676, or TTY, contact (202) 502-8659.

Any questions concerning this application may be directed to Linda Farquhar, Manager, Project Determinations & Regulatory Administration, Columbia Gas Transmission, LLC, 700 Louisiana Street, Suite 700, Houston, Texas, 77002-2700, by telephone at (832) 320-5685, by fax at (832) 320-6685, or by email at [linda\\_farquhar@transcanada.com](mailto:linda_farquhar@transcanada.com).

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commentary, will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Dated: August 10, 2017.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2017-17352 Filed 8-16-17; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP17-482-000]

#### Ohio River System LLC; Notice of Application

Take notice that on August 3, 2017, Ohio River System LLC (ORS), 8111 Westchester Drive, Suite 600, Dallas, Texas 75225, filed in Docket No. CP17-482-000 an application pursuant to section 7(c) of the Natural Gas Act (NGA) requesting a limited jurisdiction certificate in order to provide jurisdictional transportation service on its Ohio River System gathering facilities (ORS System). ORS further seeks a determination by the Commission that the proposed interstate transportation service will not otherwise affect the status of the ORS System as a gathering system not otherwise subject to the Commission's jurisdiction or affect the non-jurisdictional status of any other operation in which ORS is currently engaged. ORS proposes to provide 150,000 million British thermal units per day of interstate transportation service, via displacement, for Rover Pipeline LLC (Rover) to allow Rover's shippers to deliver gas to Rockies Express Pipeline LLC's system utilizing the ORS System. The Rover system will interconnect with the ORS System near Cadiz, Ohio and no new facilities are proposed to be constructed, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or call

toll-free, (886) 208-3676 or TYY, (202) 502-8659.

Any questions concerning this application may be directed to Alan Vaina, Senior Vice President, Energy Transfer Partners, L.P., 6051 Wallace Road Ext, Suite 399, Wexford, Pennsylvania 15090, by telephone at (878) 332-2220, or by email at [Alan.Vaina@energytransfer.com](mailto:Alan.Vaina@energytransfer.com); or Lisa Tonery, Partner, Orrick, Herrington & Sutcliffe LLP, 51 West 52nd Street, New York, New York 10019, by telephone at (212) 506-3710, or by email at [lttonery@orrick.com](mailto:lttonery@orrick.com).

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit seven copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the

Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

*Comment Date:* 5:00 p.m. Eastern Time on August 31, 2017.

Dated: August 10, 2017.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2017-17354 Filed 8-16-17; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. EL17-83-000]

#### Piedmont Municipal Power Agency v. Duke Energy Carolinas, LLC; Notice of Complaint

Take notice that on August 10, 2017, pursuant to section 206 of the Federal

Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206 and 385.212 (2017) and sections 206 and 306 of the Federal Power Act, 16 U.S.C. 824(e) and 825(e), Piedmont Municipal Power Agency (Complainant) filed a formal complaint against Duke Energy Carolinas, LLC (Respondent) alleging that, Respondent assessed and collected charges that violate the service agreement on file with the Commission, all as more fully explained in the complaint.

The Complainant states that certifies copies of the complaint were served on the contacts for Respondent as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the eFiling link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the eLibrary link and is available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5:00 p.m. Eastern Time on September 11, 2017.

Dated: August 11, 2017.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2017-17391 Filed 8-16-17; 8:45 am]

**BILLING CODE P6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP17-483-000]

#### Columbia Gas Transmission, LLC; Notice of Request Under Blanket Authorization

Take notice that on August 4, 2017, Columbia Gas Transmission, LLC (Columbia), 700 Louisiana Street, Suite 700, Houston, Texas 77002-2700, filed in Docket No. CP17-483-000 a prior notice request pursuant to sections 157.205 and 157.216 of the Commission's regulations under the Natural Gas Act (NGA), and Columbia's blanket certificate issued in Docket No. CP83-76-000, to abandon approximately six miles of 6-inch-diameter steel pipe (Line H-107), along with the associated appurtenances and exposures, located in Hocking County, Ohio.

Columbia asserts that the proposed abandonment will not affect its ability to maintain service to its customers. Columbia Gas of Ohio, the Local Distribution Company, will be running a new line to the town of Carbon Hill to continue service to all customers and the abandonment of Line H-107 will take place after the new line is in place. Columbia estimates the cost of the abandonment to be \$824,672, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or toll free at (866) 208-3676, or TTY, contact (202) 502-8659.

Any questions concerning this application may be directed to Linda Farquhar, Manager, Project Determinations & Regulatory Administration, Columbia Gas Transmission, LLC, 700 Louisiana Street, Suite 700, Houston, Texas, 77002-2700, by telephone at (832) 320-5685, by facsimile at (832) 320-6685, or by email at [linda\\_farquhar@transcanada.com](mailto:linda_farquhar@transcanada.com).

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the



NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters, will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and seven copies of the protest or intervention to the Federal Energy

Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Dated: August 10, 2017.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2017-17355 Filed 8-16-17; 8:45 am]

**BILLING CODE P6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP17-478-000]

#### Texas Gas Transmission, LLC; Notice of Request Under Blanket Authorization

Take notice that on August 1, 2017, Texas Gas Transmission, LLC (Texas Gas), 9 Greenway Plaza, Suite 2800, Houston, Texas 77046 filed a prior notice request pursuant to sections 157.205 and 157.216(b) of the Commission's regulations under the Natural Gas Act for authorization to abandon certain natural gas pipeline assets, ancillary facilities and appurtenances, located in Terrebonne Parish, Louisiana and Louisiana State waters. Specifically, Texas Gas proposes to (1) abandon in place approximately 3.61 miles of 8.625-inch-diameter pipeline, known as the Bay Junop to Bay Round 8-inch pipeline; (2) abandon in place approximately 10.05 miles and abandon by removal approximately 0.24 miles of 8.625-inch-diameter pipeline, known as the Bay Round to Block 8 8-inch pipeline; and (3) abandon by removal the Bay Round Platform and the Brammer Old Camp Pass Platform. These Facilities have been idled since 2012 and abandonment avoids the ongoing maintenance costs of unused existing natural gas pipeline assets. There will be no impact to any customer's service as a result of the abandonment, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or call toll-free, (866) 208-3676 or TTY, (202) 502-8659.

Any questions regarding this Application should be directed to Kathy D. Fort, Manager, Certificates and Tariffs, Texas Gas Transmission, LLC, 610 West 2nd Street, Owensboro, Kentucky 42301, by phone (270) 688-

6825, or by email at [Kathy.fort@bwpmlp.com](mailto:Kathy.fort@bwpmlp.com).

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenter's will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenter's will not be required to serve copies of filed documents on all other parties. However, the non-party commentary, will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right

to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site ([www.ferc.gov](http://www.ferc.gov)) under the "e-Filing" link. Persons unable to file electronically should submit original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Dated: August 10, 2017.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2017-17353 Filed 8-16-17; 8:45 am]

BILLING CODE P6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER17-2275-000]

#### New York Independent System Operator, Inc.; Notice of Filing

Take notice that on August 10, 2017, pursuant to section 211 of the Federal Power Act<sup>1</sup> and section 9.3.3 of New York Independent System Operator, Inc. filed an application requesting a Petition for Limited Waiver and Request for Expedited Action of Green Power Energy LLC.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC.

There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5:00 p.m. Eastern Time on August 31, 2017.

Dated: August 10, 2017.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2017-17357 Filed 8-16-17; 8:45 am]

BILLING CODE P6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER17-1840-000]

#### Canton Mountain Wind, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Canton Mountain Wind, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is August 30, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: August 10, 2017.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2017-17356 Filed 8-16-17; 8:45 am]

BILLING CODE 6717-01-P

## ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2016-0243; FRL-9965-04-OEI]

### Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Plywood and Composite Wood Products National Emission Standards for Hazardous Air Pollutants (NESHAP) Risk and Technology Review (RTR)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), for the "Plywood and Composite Wood Products National Emission Standards for Hazardous Air Pollutants (NESHAP) Risk and Technology Review (RTR)" (EPA ICR No. 2552.01, OMB Control No. 2060-NEW) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a request for approval of a new collection. Public comments were previously requested via the **Federal Register** (81 FR 62125) on September 8, 2016, during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may not conduct or sponsor

<sup>1</sup> 16 U.S.C. 824j (2012).

and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

**DATES:** Additional comments may be submitted on or before September 18, 2017.

**ADDRESSES:** Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2016–0243, to (1) EPA online using [www.regulations.gov](http://www.regulations.gov) (our preferred method), by email to [A-and-R-docket@epa.gov](mailto:A-and-R-docket@epa.gov), or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov). Address comments to OMB Desk Officer for EPA.

The EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

**FOR FURTHER INFORMATION CONTACT:** John Bradfield, Sector Policies and Programs Division (E143–03), Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–3062; fax number: (919) 541–3470; email address: [bradfield.john@epa.gov](mailto:bradfield.john@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at [www.regulations.gov](http://www.regulations.gov) or in person at the EPA Docket Center, EPA WJC West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about the EPA's public docket, visit <http://www.epa.gov/dockets>.

**Abstract:** This ICR is being conducted by the EPA's Office of Air and Radiation to assist the EPA Administrator to fulfill his responsibilities under sections 112(d) and 112(f) of the Clean Air Act (CAA), as amended. The CAA requires a review of each NESHAP following the application of the standard to determine any remaining risk and whether the standard is protective to public health with an ample margin of safety and prevents adverse environmental effects. The CAA also requires that the standard be reviewed and revised, as necessary, taking into account developments in

practices, processes, and control technology. For efficiency and to reduce burden, these reviews are conducted concurrently and known as RTR. The federal emission standard that is the subject of this information collection is the National Emission Standards for Hazardous Air Pollutants: Plywood and Composite Wood Products (PCWP) (40 CFR part 63, subpart DDDD). On March 22, 2017, the EPA was ordered by the United States Court of Appeals for the District of Columbia Circuit to complete the PCWP RTR no later than June 30, 2020. In addition to the CAA reviews, in 2007, the United States Court of Appeals for the District of Columbia Circuit issued a remand requiring the administrator to develop standards for emission units identified in the PCWP NESHAP for which emission limits were not promulgated.

The ICR will provide specific, required information, including emission inventories, compliance demonstrations, process changes, and information about control technologies/practices adopted since the application of maximum achievable control technology (MACT). The ICR will be sent to all known operators of PCWP facilities that are major sources for hazardous air pollutants (HAP) regulated by the PCWP NESHAP and synthetic area sources that may have used technology to avoid major source status triggering NESHAP applicability. The information collection seeks to collect facility-level information (e.g., facility name, location, contact information, and process unit details), emissions information, compliance data, control information, and descriptions of technological innovations.

**Form Numbers:** None.

**Respondents/affected entities:** Major sources regulated by the PCWP NESHAP and synthetic area sources that may have used technology to avoid major source status triggering NESHAP applicability.

**Respondent's obligation to respond:** Mandatory under the authority of section 114 of the CAA.

**Estimated number of respondents:** 397 (total).

**Frequency of response:** Once.

**Total estimated burden:** 59,437 hours (one-time). Burden is defined at 5 CFR 1320.03(b).

**Total estimated cost:** \$4,199,272 (one-time), which includes \$6,650 in operation and maintenance costs (O&M) to cover mailing hard copies.

**Courtney Kerwin,**

*Director, Regulatory Support Division.*

[FR Doc. 2017–17385 Filed 8–16–17; 8:45 am]

**BILLING CODE P6560–50–P**

**FEDERAL COMMUNICATIONS COMMISSION**

[OMB 3060–0850]

**Information Collection Approved by the Office of Management and Budget (OMB)**

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for a revision of a currently approved public information collection pursuant to the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number, and no person is required to respond to a collection of information unless it displays a currently valid control number. Comments concerning the accuracy of the burden estimates and any suggestions for reducing the burden should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

**FOR FURTHER INFORMATION CONTACT:** Cathy Williams, Office of the Managing Director, at (202) 418–2918, or email: [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

**SUPPLEMENTARY INFORMATION:** The total annual reporting burdens and costs for the respondents are as follows:

*OMB Control Number:* 3060–0850.

*OMB Approval Date:* July 18, 2017.

*OMB Expiration Date:* July 31, 2020.

*Title:* Quick-Form Application for Authorization in the Ship, Aircraft, Amateur, Restricted and Commercial Operator, and General Mobile Radio Services, FCC Form 605.

*Form No.:* FCC Form 605.

*Respondents:* Individuals and Households, Business or Other For-Profit Entities; Not-For-Profit Institutions; State, Local or Tribal Governments.

*Number of Respondents and Responses:* 130,000 respondents and 130,000 responses.

*Estimated Time per Response:* 0.17 hours–0.44 hours.

*Frequency of Response:* On occasion reporting requirement; third party disclosure requirement, recordkeeping & other (5 & 10 years).

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 CFR 1.913(a)(4).

*Total Annual Burden:* 57,218 hours.

*Total Annual Cost:* \$ 2,676,700.

*Nature and Extent of Confidentiality:* In general there is no need for

confidentiality. The Commission is required to withhold from disclosure certain information about the individual such as date of birth or telephone number. FCC 605 application is a consolidated application form for Ship, Aircraft, Amateur, Restricted and Commercial Radio Operators, and General Mobile Radio Services and is used to collect licensing data for the Universal Licensing System. The Commission is requesting OMB approval for an extension (no change in the reporting, recordkeeping and/or third party disclosure requirements). The Commission is making minor clarifications to the instructions on the main form and schedule B as well as a clarification to Item 3 on the main form. 4 The data collected on this form includes the Date of Birth for Commercial Operator licensees however this information will be redacted from public view.

*Privacy Impact Assessment:* Yes.

*Needs and Uses:* The FCC uses the information in FCC Form 605 to determine whether the applicant is legally, technically, and financially qualified to obtain a license. Without such information, the Commission cannot determine whether to issue the licenses to the applicants that provide telecommunication services to the public, and therefore, to fulfill its statutory responsibilities in accordance with the Communications Act of 1934, as amended. The Commission is revising the basic qualifications section of the form to include a question regarding whether an application has been convicted of a felony in any state or federal court. Applicants, answering yes must provide an explanation. This item enables the FCC to determine whether an Applicant is eligible under §§ 310(d) and 308(b) of the Communications Act of 1934, as amended, to hold or have ownership interest in a station license. In addition we are seeking approval to change the ship application form require the applicant provide the official ship number. Coast Guard requests we change this question from optional to required. Obtaining the ship number is the only way to reliably link a license to a specific vessel. The Information provided on this form will also be used to update the database and to provide for proper use of the frequency spectrum as well as enforcement purposes.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2017-17394 Filed 8-16-17; 8:45 am]

**BILLING CODE P6712-01-P**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 13, 2017.

*A. Federal Reserve Bank of Minneapolis* (Brendan S. Murrin, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. *Border Bancshares, Inc., Greenbush, Minnesota;* to acquire 100 percent of First State Bank of Clearbrook, Clearbrook, Minnesota.

Board of Governors of the Federal Reserve System, August 14, 2017.

**Yao-Chin Chao,**

*Assistant Secretary of the Board.*

[FR Doc. 2017-17415 Filed 8-16-17; 8:45 am]

**BILLING CODE P6210-01-P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and

§ 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than September 5, 2017.

*A. Federal Reserve Bank of Kansas City* (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198-0001:

1. *Jeff Schumacher, Lincoln, Nebraska;* to acquire voting shares of Farm and Home Insurance Agency, Inc., and thereby acquire shares of First Northeast Bank of Nebraska, both of Lyons, Nebraska.

Board of Governors of the Federal Reserve System, August 14, 2017.

**Yao-Chin Chao,**

*Assistant Secretary of the Board.*

[FR Doc. 2017-17414 Filed 8-16-17; 8:45 am]

**BILLING CODE P6210-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Healthcare Research and Quality

#### Patient Safety Organizations: Voluntary Relinquishment From the Specialty Benchmarks PSO

**AGENCY:** Agency for Healthcare Research and Quality (AHRQ), Department of Health and Human Services (HHS).

**ACTION:** Notice of delisting.

**SUMMARY:** The Patient Safety Rule authorizes AHRQ, on behalf of the Secretary of HHS, to list as a PSO an entity that attests that it meets the statutory and regulatory requirements for listing. A PSO can be "delisted" by the Secretary if it is found to no longer meet the requirements of the Patient Safety Act and Patient Safety Rule, when a PSO chooses to voluntarily relinquish its status as a PSO for any reason, or when a PSO's listing expires. AHRQ has accepted a notification of voluntary relinquishment from the Specialty Benchmarks PSO of its status as a PSO, and has delisted the PSO accordingly.

**DATES:** The directories for both listed and delisted PSOs are ongoing and

reviewed weekly by AHRQ. The delisting was applicable at 12:00 Midnight ET (2400) on July 12, 2017.

**ADDRESSES:** Both directories can be accessed electronically at the following HHS Web site: <http://www.pso.ahrq.gov/listed>.

**FOR FURTHER INFORMATION CONTACT:**

Eileen Hogan, Center for Quality Improvement and Patient Safety, AHRQ, 5600 Fishers Lane, Room 06N94B, Rockville, MD 20857; Telephone (toll free): (866) 403-3697; Telephone (local): (301) 427-1111; TTY (toll free): (866) 438-7231; TTY (local): (301) 427-1130; Email: [psa@ahrq.hhs.gov](mailto:psa@ahrq.hhs.gov).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. 299b-21 to b-26, (Patient Safety Act) and the related Patient Safety and Quality Improvement Final Rule, 42 CFR part 3 (Patient Safety Rule), published in the **Federal Register** on November 21, 2008, 73 FR 70732-70814, establish a framework by which hospitals, doctors, and other health care providers may voluntarily report information to Patient Safety Organizations (PSOs), on a privileged and confidential basis, for the aggregation and analysis of patient safety events. The Patient Safety Act authorizes the listing of PSOs, which are entities or component organizations whose mission and primary activity are to conduct activities to improve patient safety and the quality of health care delivery.

HHS issued the Patient Safety Rule to implement the Patient Safety Act. AHRQ administers the provisions of the Patient Safety Act and Patient Safety Rule relating to the listing and operation of PSOs. The Patient Safety Rule authorizes AHRQ to list as a PSO an entity that attests that it meets the statutory and regulatory requirements for listing. A PSO can be "delisted" if it is found to no longer meet the requirements of the Patient Safety Act and Patient Safety Rule, when a PSO chooses to voluntarily relinquish its status as a PSO for any reason, or when a PSO's listing expires. Section 3.108(d) of the Patient Safety Rule requires AHRQ to provide public notice when it removes an organization from the list of federally approved PSOs.

AHRQ has accepted a notification from the Specialty Benchmarks PSO, a component entity of Market Share, LLC, PSO number P0113, to voluntarily relinquish its status as a PSO. Accordingly, the Specialty Benchmarks

PSO was delisted effective at 12:00 Midnight ET (2400) on July 12, 2017.

The Specialty Benchmarks PSO has patient safety work product (PSWP) in its possession. The PSO will meet the requirements of section 3.108(c)(2)(i) of the Patient Safety Rule regarding notification to providers that have reported to the PSO and of section 3.108(c)(2)(ii) regarding disposition of PSWP consistent with section 3.108(b)(3). According to section 3.108(b)(3) of the Patient Safety Rule, the PSO has 90 days from the effective date of delisting and revocation to complete the disposition of PSWP that is currently in the PSO's possession.

More information on PSOs can be obtained through AHRQ's PSO Web site at <http://www.pso.ahrq.gov>.

**Sharon B. Arnold,**

*Deputy Director.*

[FR Doc. 2017-17153 Filed 8-16-17; 8:45 am]

**BILLING CODE P4160-90-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Disease Control and Prevention**

[60Day-17-1048; Docket No. CDC-2017-0056]

**Proposed Data Collection Submitted for Public Comment and Recommendations**

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Notice with comment period.

**SUMMARY:** The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on the information collection project titled "Assessing Education Agency Staff Perceptions of School Climate and Youth Access to Services." This study provides in-depth assessment of HIV and STD prevention efforts in three local education agencies funded by CDC's Division of Adolescent and School Health.

**DATES:** Written comments must be received on or before October 16, 2017.

**ADDRESSES:** You may submit comments, identified by Docket No. CDC-2017-0056 by any of the following methods:

- **Federal eRulemaking Portal:** [Regulations.gov](http://www.Regulations.gov). Follow the instructions for submitting comments.

- **Mail:** Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS-D74, Atlanta, Georgia 30329.

**Instructions:** All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to [Regulations.gov](http://www.Regulations.gov), including any personal information provided. For access to the docket to read background documents or comments received, go to [Regulations.gov](http://www.Regulations.gov).

**Please note:** All public comment should be submitted through the [Federal eRulemaking portal \(regulations.gov\)](http://www.Regulations.gov) or by U.S. mail to the address listed above.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS-D74, Atlanta, Georgia 30329; phone: 404-639-7570; Email: [omb@cdc.gov](mailto:omb@cdc.gov).

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information

technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

### Proposed Project

Assessing Education Agency Staff Perceptions of School Climate and Youth Access to Services (OMB Control Number 0920–1048, expiration date 2/28/2018)—Revision—Division of Adolescent and School Health (DASH), National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, Centers for Disease Control and Prevention (CDC).

#### Background and Brief Description

HIV infections remain high among young men who have sex with men (YMSM). The estimated number of new HIV infections increased between 2008 and 2010 both overall and among MSM ages 13 to 24. Furthermore, sexual risk behaviors associated with HIV, other sexually transmitted disease (STD), and pregnancy often emerge in adolescence. For example, 2015 Youth Risk Behavior Surveillance System (YRBSS) data revealed 41.2% of U.S. high school students reported having had sex, and among those who had sex in the previous three months, only 56.9% reported having used a condom during last sexual intercourse. In addition, 2015 YRBSS data revealed high school students identifying as gay, lesbian, and bisexual were more likely to report engaging in sexual risk-taking behaviors than heterosexual students.

Given the disproportionate risk for HIV among YMSM ages 13–24, it is important to find ways to reach the younger youth (*i.e.*, ages 13–19) in this range to decrease sexual risk behaviors and increase health-promoting behaviors such as routine HIV testing. Schools provide one opportunity for this. Because schools enroll more than 22 million teens (ages 14–19) and often have existing health and social services

infrastructure, schools and their staff members are well-positioned to connect youth to a wide range of needed services, including housing assistance, support groups, and sexual health services such as HIV testing. As a result, CDC's DASH has focused a number of HIV and STD prevention efforts on strategies that can be implemented in or centered on schools.

However, conducting HIV and STD prevention work (particularly work that is designed to specifically meet the needs of YMSM), can be challenging. School is not always a welcoming environment for lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth. Harassment, bullying, and verbal and physical assault are often reported, and such unsupportive environments and victimization among LGBT youth are associated with a variety of negative outcomes, including truancy, substance use, poor mental health, HIV and STD risk, and even suicide.

The CDC requests a one-year OMB approval for the revision of the information collection entitled, "Assessing Education Agency Staff Perceptions of School Climate and Youth Access to Services." The information collection uses 2 separate, but complementary, information collections to conduct assessment of HIV and STD prevention efforts that are taking place in three local education agencies (LEA) funded by the Centers for Disease Control and Prevention (CDC), Division of Adolescent and School Health (DASH) under strategy 4 (School-Centered HIV/STD Prevention for Young Men Who Have Sex with Men) of PS13–1308: *Promoting Adolescent Health through School-Based HIV/STD Prevention and School-Based Surveillance*. This data collection will provide data and reports for the funded LEAs, and will allow the LEAs to identify areas of the program that are working well and other areas that will need additional improvement. In addition, the findings will allow CDC to determine the potential impact of currently recommended strategies and make changes to those recommendations if necessary. This revision request involves no changes to instruments, protocols, or burden estimates per respondent or per data collection cycle; however, annualized burden estimates have technical changes due to changes in the number of data collections planned and the length of clearance requested.

The first information collection will involve collecting information from a total of up to 735 LEA employees in 3 LEAs through a Web-based instrument tailored to each LEA. The instrument

will include items that ask education agency staff about professional development, referral practices, community linkages/partners, school climate for LGBTQ youth, school policies and practices, and staff comfort levels in helping address the health needs of YMSM.

The second information collection will be conducted in only 1 LEA (Broward County Public Schools) and is designed to provide an in-depth assessment of one LEA as a way to supplement the Web-based data collection with more detailed information. This information collection will involve in-person interviews with up to 44 LEA employees (2 district level employees, and up to 6 school level employees in each of 7 schools) to learn about six domains that can impact school climate: Policy, practice, programs, professional development, place, and pedagogy.

Both the Web-based instrument and in-person interviews will be administered in the 2017–2018 school year as the final data collection in a series of data collections for the 5-year PS13–1308 cooperative agreement. Although some staff may have participated in previous years' data collections, this is not a longitudinal design and individual staff member responses will not be tracked across the years. No personally identifiable information will be collected.

All school staff members will receive informed consent forms prior to participation in the information collection. The consent form explains the study and also explains participants may choose not to complete the Web-based instrument or participate in the interviews with no penalty and no impact on their job or relationship with the LEA. Participation is completely voluntary.

For the Web-based instrument, the estimated burden per response ranges from 20–25 minutes. This variation in burden is due to the slight variability in skip patterns that may occur with certain responses and variations in the reading speed of respondents. The burden estimates presented here are based on the assumption of a 25-minute response time per response. The estimated annualized burden of this data collection is 306 hours for respondents. There are no costs to respondents other than their time.

For the Web-based instrument, the estimated burden per response ranges from 60–90 minutes, depending on whether the respondent is a district-level administrator, a school-level administrator, or another school staff member. The burden estimates

presented here are based on the assumption of a 1-hour response time per district-level and school-level administrator response and a 1.5-hour response time per school staff member

response. The estimated annualized burden of this data collection is 58 hours for respondents. There are no costs to respondents other than their time.

The two information collections combine for a total estimated annualized burden of 367 hours for respondents.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
School staff .....	Web-based instrument for Broward County Public Schools.	245	1	25/60	102
School staff .....	Web-based instrument for Los Angeles Unified School District.	245	1	25/60	102
School staff .....	Web-based instrument for San Francisco Unified School District.	245	1	25/60	102
District-level Administrators .....	School Climate Index Interview Guide for District-level Administrators.	2	1	1	2
School-level Administrators .....	School Climate Index Interview Guide for School-level Administrators.	14	1	1	14
School Staff .....	School Climate Index Interview Guide for School Staff.	28	1	1.5	42
Total .....	.....	.....	.....	.....	364

**Leroy A. Richardson,**  
 Chief, Information Collection Review Office,  
 Office of Scientific Integrity, Office of the  
 Associate Director for Science, Office of the  
 Director, Centers for Disease Control and  
 Prevention.

[FR Doc. 2017-17402 Filed 8-16-17; 8:45 am]

BILLING CODE P4163-18-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**Submission for OMB Review; 30-Day Comment Request Chimpanzee Research Use Form (Office of the Director)**

**AGENCY:** National Institutes of Health, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in the **Federal Register** on June 2, 2017 (82 FR 25609) and allowed 60 days for public comment. The NIH received no requests to view the form and one comment expressing the opinion that chimpanzee research should be discontinued but did not receive any public comments on the form itself. The purpose of this notice is

to allow an additional 30 days for public comment.

**DATES:** Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA\_submission@omb.eop.gov* or by fax to 202-395-6974, Attention: Desk Officer for NIH.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: The Division of Program Coordination, Planning, and Strategic Initiatives, OD, NIH, Building 1, Room 260, 1 Center Drive, Bethesda, MD 20892; or call non-toll-free number 301-402-9852; or email your request, including your address, to *dpcpsi@od.nih.gov*.

**SUPPLEMENTARY INFORMATION:** The Office of the Director, National Institutes of Health, may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below.

*Proposed Collection:* Chimpanzee Research Use Form, 0925-0705, Extension Division of Program Coordination, Planning, and Strategic Initiatives (DPCPSI), Office of the Director (OD), National Institutes of Health (NIH).

*Need and Use of Information Collection:* The purpose of this form is to obtain information needed by the NIH to assess whether the proposed research satisfies the agency's policy for permitting only noninvasive research involving chimpanzees. The NIH will consider the information submitted through this form prior to the agency making funding decisions or otherwise allowing the research to begin. Completion of this form is a mandatory step toward receiving NIH support or approval for non-invasive research involving chimpanzees. The NIH does not fund any research involving chimpanzees proposed in new or other competing projects (renewals or revisions) unless the research is consistent with the definition of "noninvasive research," as described in the "Standards of Care for Chimpanzees Held in the Federally Supported Chimpanzee Sanctuary System" (42 CFR part 9). See NOT-OD-16-095 at

<https://grants.nih.gov/grants/guide/notice-files/NOT-OD-16-095.html> and 81 FR 6873.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total

estimated annualized burden hours are 10.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average time per response (in hours)	Total annual burden hour
Research Community .....	20	1	30/60	10
Total .....	.....	20	.....	10

Dated: August 11, 2017.  
**Lawrence A. Tabak,**  
*Principal Deputy Director, National Institutes of Health.*  
 [FR Doc. 2017-17411 Filed 8-16-17; 8:45 am]  
**BILLING CODE P4140-01-P**

**DEPARTMENT OF HOMELAND SECURITY**  
**Federal Emergency Management Agency**

[Docket ID FEMA-2017-0002; Internal Agency Docket No. FEMA-B-1737]

**Changes in Flood Hazard Determinations**

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR). The LOMR will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings. For rating purposes, the currently effective community number is shown in the table below and must be used for all new policies and renewals.

**DATES:** These flood hazard determinations will become effective on

the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

**ADDRESSES:** The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at [www.msc.fema.gov](http://www.msc.fema.gov) for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW., Washington, DC 20472, (202) 646-7659, or (email) [patrick.sacibit@fema.dhs.gov](mailto:patrick.sacibit@fema.dhs.gov); or visit the FEMA Map Information eXchange (FMIX) online at [www.floodmaps.fema.gov/fhm/fmx\\_main.html](http://www.floodmaps.fema.gov/fhm/fmx_main.html).

**SUPPLEMENTARY INFORMATION:** The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer

of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at [www.msc.fema.gov](http://www.msc.fema.gov) for comparison.

Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance."

Dated: July 13, 2017.

**Roy E. Wright,**  
*Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.*



State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Arizona:						
Pima .....	Town of Marana (17-09-0328P).	The Honorable Ed Honea, Mayor, Town of Marana, 11555 West Civic Center Drive, Marana, AZ 85653.	Engineering Department, 11555 West Civic Center Drive, Marana, AZ 85653.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 20, 2017 .....	040118
Pima .....	Unincorporated Areas of Pima County (17-09-0328P).	The Honorable Sharon Bronson, Chair, Pima County Board of Supervisors, 130 West Congress Street, 11th Floor, Tucson, AZ 85701.	Pima County Flood Control District, 201 North Stone Avenue, 9th Floor, Tucson, AZ 85701.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 20, 2017 .....	040073
California:						
Riverside	Agua Caliente Band of Cahuilla Indian Reservation (16-09-1551P).	The Honorable Jeff L. Grubbe, Chairman, Agua Caliente Band of Cahuilla Indians, 5401 Dinah Shore Drive, Palm Springs, CA 92264.	Planning and Natural Resources, 5401 Dinah Shore Drive, Palm Springs, CA 92264.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 20, 2017 .....	060763
Riverside	City of Cathedral City (16-09-1551P).	The Honorable Stanley E. Henry, Mayor, City of Cathedral City, 68700 Avenida Lalo Guerrero, Cathedral City, CA 92234.	Engineering Department, 68700 Avenida Lalo Guerrero, Cathedral City, CA 92234.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 20, 2017 .....	060704
Riverside	City of Palm Springs (16-09-1551P).	The Honorable Robert Moon, Mayor, City of Palm Springs, 3200 East Tahquitz Canyon Way, Palm Springs, CA 92262.	City Hall, 3200 East Tahquitz Canyon Way, Palm Springs, CA 92262.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 20, 2017 .....	060257
San Joaquin.	City of Lathrop (17-09-0203P).	The Honorable Sonny Dhaliwal, Mayor, City of Lathrop, 390 Towne Centre Drive, Lathrop, CA 95330.	City Hall, 390 Towne Centre Drive, Lathrop, CA 95330.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 23, 2017 .....	060738
Idaho:						
Ada .....	City of Boise (17-10-0875P).	The Honorable David H. Bieter, Mayor, City of Boise, P.O. Box 500, Boise, ID 83701.	Planning and Development Services, City Hall, 150 North Capital Boulevard, Boise, ID 83701.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 13, 2017 .....	160002
Kootenai ..	City of Coeur d'Alene (17-10-0479P).	The Honorable Steve Widmyer, Mayor, City of Coeur d'Alene, Coeur d'Alene City Hall, 710 East Mullan Avenue, Coeur d'Alene, ID 83814.	City Hall Planning Department, 710 East Mullan Avenue, Coeur d'Alene, ID 83814.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 17, 2017 .....	160078
Kootenai ..	Unincorporated Areas of Kootenai County (17-10-0479P).	Mr. Marc Eberlein, Chairman, Board of Commissioners, Kootenai County, 451 Government Way, Coeur d'Alene, ID 83814.	Assessors Department, Kootenai County Court House, 451 Government Way, Coeur d'Alene, ID 83816.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 17, 2017 .....	160076
Minnesota:						
Anoka .....	City of Coon Rapids (17-05-2891P).	The Honorable Jerry Koch, Mayor, City of Coon Rapids, Coon Rapids City Hall, 11155 Robinson Drive, Coon Rapids, MN 55433.	City Hall, 11155 Robinson Drive, Coon Rapids, MN 55433.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 6, 2017 .....	270011
Norman ...	City of Ada (17-05-1647P).	The Honorable Jim Ellefson, Mayor, City of Ada, Ada City Hall, 15 4th Avenue East, Ada, MN 56510.	City Hall, 15 4th Avenue East, Ada, MN 56510.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Sep. 20, 2017 .....	270323

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Norman ...	Unincorporated Areas of Norman County (17-05-1647P).	Mr. Marvin Gundersen, Chairman, Norman County Commissioners, Norman County Courthouse, 16 3rd Avenue East, Ada, MN 56510.	Norman County Courthouse, 16 3rd Avenue East, Ada, MN 56510.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Sep. 20, 2017 .....	270322
Nevada: Nye ..	Unincorporated Areas of Nye County (17-09-1129P).	The Honorable Dan Schinhofen, Chairman, Board of Commissioners, Nye County, 2100 East Walt Williams Drive, Suite 100, Pahrump, NV 89048.	Nye County, Department of Planning, 250 North Highway 160, Suite 1, Pahrump, NV 89060.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 26, 2017 .....	320018
Ohio: Stark ....	Unincorporated Areas of Stark County (17-05-1880P).	The Honorable Janet Weir Creighton, President, Board of Stark County Commissioners, 110 Central Plaza South, Suite 240, Canton, OH 44702.	Stark County Office Building, 110 Central Plaza South, Canton, OH 44702.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 11, 2017 .....	390780
Oregon: Lane .....	City of Springfield (16-10-1640P).	The Honorable Christine Lundberg, Mayor, City of Springfield, Springfield City Hall, 225 5th Street, Springfield, OR 97477.	Planning Department, 225 5th Street, Springfield, OR 97477.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 17, 2017 .....	415592
Lane .....	Unincorporated Areas of Lane County (16-10-1640P).	Mr. Sid Leiken, Commissioner, Lane County, Lane County Public Service Building, 125 East 8th Avenue, Eugene, OR 97401.	Lane County Planning Department, Public Service Building, 125 East 8th Avenue, Eugene, OR 97401.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 17, 2017 .....	415591
Texas: Dallas	City of Dallas (17-06-1494P).	The Honorable Michael S. Rawlings, Mayor, City of Dallas, 1500 Marilla Street, Suite 5en, Dallas, TX 75201.	City Hall, 320 East Jefferson Boulevard, Room 321, Dallas, TX 75203.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 12, 2017 .....	480171
Washington: King .....	City of Lake Forest Park (17-10-0060P).	The Honorable Jeff Johnson, Mayor, City of Lake Forest Park, City Hall, 17425 Ballinger Way Northeast, Lake Forest Park, WA 98155.	City Hall, 17425 Ballinger Way Northeast, Lake Forest Park, WA 98155.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 10, 2017 .....	530082
Whatcom	City of Bellingham (17-10-0520P).	The Honorable Kellie Linville, Mayor, City Bellingham, 210 Lottie Street, Bellingham, WA 98225.	Public Works/Engineering Department, City Hall, 210 Lottie Street, Bellingham, WA 98225.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Oct. 18, 2017 .....	530199

[FR Doc. 2017-16953 Filed 8-16-17; 8:45 am]  
BILLING CODE P9110-12-P

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

[FWS-R3-ES-2017-N090;  
FXES11130300000-178-FF03E00000]

**Endangered and Threatened Wildlife and Plants; Permit Applications**

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

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications for a permit to conduct activities intended to enhance the survival of endangered or threatened species. Federal law prohibits certain activities with endangered species unless a permit is obtained.

**DATES:** We must receive any written comments on or before September 18, 2017.

**ADDRESSES:** Send written comments by U.S. mail to the Regional Director, Attn: Carlita Payne, U.S. Fish and Wildlife Service, Ecological Services, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437-1458; or by electronic mail to [permitsR3ES@fws.gov](mailto:permitsR3ES@fws.gov).

**FOR FURTHER INFORMATION CONTACT:** Carlita Payne, (612) 713-5343.

**SUPPLEMENTARY INFORMATION:** We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications for a permit to conduct activities intended to enhance the survival of endangered or threatened

species. Federal law prohibits certain activities with endangered species unless a permit is obtained.

**Background**

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*; ESA), prohibits certain activities with endangered and threatened species unless the activities are specifically authorized by a Federal permit. The ESA and our implementing regulations in part 17 of title 50 of the Code of Federal Regulations (CFR) provide for the issuance of such permits and require that we invite public comment before issuing permits for activities involving endangered species.

A permit granted by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with U.S. endangered or threatened species for scientific purposes, enhancement of propagation or survival, or interstate commerce (the latter only in the event that it facilitates scientific purposes or enhancement of propagation or survival). Our regulations implementing section 10(a)(1)(A) of the ESA for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

**Applications Available for Review and Comment**

We invite local, State, Tribal, and Federal agencies and the public to comment on the following applications. Please refer to the permit number when you submit comments. Documents and other information the applicants have submitted with the applications are available for review, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

**Permit Applications**

Proposed activities in the following permit requests are for the recovery and enhancement of survival of the species in the wild.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
TE88224B ....	Joseph Snavely IV, Chambersburg, PA.	Dwarf wedgemussel ( <i>Alasmidonta heterodon</i> ).	North Carolina .....	Conduct presence/absence surveys.	Capture, handle, release.	Amend.
TE35856C ....	Marla Spivak, Saint Paul, MN.	Rusty patched bumble bee ( <i>Bombus affinis</i> ).	Minnesota .....	Conduct presence/absence surveys.	Capture, handle, release.	New.
TE06846A ....	Smithsonian Institution, Washington, DC.	Kirtland's warbler ( <i>Setophaga kirtlandii</i> ).	Michigan .....	Conduct presence/absence surveys, conduct population monitoring, assess diet.	Capture, handle, radio-tag, release.	Amend.
TE32959C ....	Daniel Cariveau, Roseville, MN.	Rusty patched bumble bee ( <i>Bombus affinis</i> ).	Minnesota, Wisconsin ....	Conduct presence/absence surveys.	Capture, handle, release.	New.

**National Environmental Policy Act**

The proposed activities in the requested permits qualify as categorical exclusions under the National Environmental Policy Act, as provided by Department of the Interior implementing regulations in part 46 of title 43 of the CFR (43 CFR 46.205, 46.210, and 46.215).

**Public Availability of Comments**

We seek public review and comments on these permit applications. Please refer to the permit number when you submit comments. Comments and materials we receive in response to this notice are available for public inspection, by appointment, during normal business hours at the address listed in **ADDRESSES**.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment

to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Authority**

We provide this notice under section 10 of the ESA (16 U.S.C. 1531 *et seq.*).

Dated: June 7, 2017.

**Sean O. Marsan,**

*Acting Assistant Regional Director, Ecological Services, Midwest Region.*

[FR Doc. 2017-17397 Filed 8-16-17; 8:45 am]

**BILLING CODE P4333-15-P**

**INTERNATIONAL TRADE COMMISSION**

**[Investigation Nos. 731-TA-1378-1379 (Preliminary)]**

**Low Melt Polyester Staple Fiber From Korea and Taiwan; Determination**

On the basis of the record<sup>1</sup> developed in the subject investigations, the United States International Trade Commission (“Commission”) determines, pursuant to the Tariff Act of 1930 (“the Act”), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of low melt polyester staple fiber from Korea and Taiwan, provided for in subheading 5503.20 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (“LTFV”).

Pursuant to section 207.18 of the Commission’s rules, the Commission also gives notice of the commencement

<sup>1</sup> The record is defined in sec. 207.2(f) of the Commission’s Rules of Practice and Procedure (19 CFR 207.2(f)).

of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce ("Commerce") of affirmative preliminary determinations in the investigations under section 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of an affirmative final determinations in those investigations under section 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

#### Background

On June 27, 2017, Nan Ya Plastics Corporation, America, Livingston, New Jersey filed a petition with the Commission and Commerce, alleging that an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports of low melt polyester staple fiber from Korea and Taiwan. Accordingly, on June 27, 2017, the Commission, pursuant to section 733(a) of the Act (19 U.S.C. 1673b(a)), instituted antidumping duty investigation Nos. 731-TA-1378-1379 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of July 3, 2017 (82 FR 30907). The conference was held in Washington, DC, on July 18, 2017, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to section 733(a) of the Act (19 U.S.C. 1673b(a)). It completed and filed its determinations in these investigations on August 11, 2017. The views of the Commission are contained in USITC Publication 4720 (August 2017), entitled *Low Melt Polyester Staple Fiber from Korea and*

*Taiwan: Investigation Nos. 1378-1379 (Preliminary).*

By order of the Commission.

Issued: August 11, 2017.

**Lisa R. Barton,**

*Secretary to the Commission.*

[FR Doc. 2017-17360 Filed 8-16-17; 8:45 am]

**BILLING CODE 7020-02-P**

#### INTERNATIONAL TRADE COMMISSION

##### Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Thermoplastic-Encapsulated Electric Motors, Components Thereof, and Products and Vehicles Containing Same II DN 3243*; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

**FOR FURTHER INFORMATION CONTACT:** Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at <https://edis.usitc.gov>, and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of

Intellectual Ventures II LLC on August 11, 2017. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain thermoplastic-encapsulated electric motors, components thereof, and products and vehicles containing same II. The complaint names as respondents Aisin Seiki Co., Ltd. of Japan; Aisin Holdings of America, Inc. of Seymour, IN; Aisin Technical Center of America, Inc. of Northville, MI; Aisin World Corporation of America of Northville, MI; Asmo Co. Ltd. of Japan; ASMO North America, LLC of Statesville, NC; ASMO North Carolina, Inc. of Statesville, NC; Bayerische Motoren Werke AG of Germany; BMW of North America, LLC of Woodcliff Lake, NJ; BMW Manufacturing Co., LLC of Greer, SC; Denso Corporation of Japan; Denso International America, Inc. of Southfield, MI; Honda Motor Co., Ltd. of Japan; Honda North America, Inc. of Torrance, CA; American Honda Motor Co., Inc. of Torrance, CA; Honda of America Mfg., Inc. of Marysville, OH; Honda Manufacturing of Alabama, LLC of Lincoln, AL; Honda R & D Americas, Inc. of Torrance, CA; Mistuba Corporation of Japan; American Mitsuba Corporation of Mount Pleasant, MI; Nidec Corporation of Japan; Nidec Automotive Motor Americas, LLC of Auburn Hills, MI; Toyota Motor Corporation of Japan; Toyota Motor North America, Inc., of New York, NY; Toyota Motor Sales, U.S.A., Inc. of Torrance CA; Toyota Motor Engineering & Manufacturing North America, Inc. of Erlanger, KY; Toyota Motor Manufacturing, Indiana, Inc. of Princeton, IN; and Toyota Motor Manufacturing, Kentucky, Inc. of Georgetown, KY. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or

directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

- (i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;
- (ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;
- (iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;
- (iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and
- (v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number ("Docket No. 3243") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, Electronic Filing Procedures<sup>1</sup>). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the

Commission is properly sought will be treated accordingly. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,<sup>2</sup> solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.<sup>3</sup>

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.  
Issued: August 11, 2017.

**Lisa R. Barton,**

*Secretary to the Commission.*

[FR Doc. 2017-17377 Filed 8-16-17; 8:45 am]

**BILLING CODE P7020-02-P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701-TA-388, 389, and 391 and 731-TA-817, 818, and 821 (Third Review)]**

### Cut-to-Length Carbon-Quality Steel Plate From India, Indonesia, and Korea; Scheduling of Full Five-Year Reviews; Correction

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Correction of notice.

**SUMMARY:** Correction is made to the December 20, 2017 hearing day in the *Hearing* section of the notice which was published on August 10, 2017 (82 FR

37465). The day of the hearing should be Wednesday, December 20, 2017.

### Correction

In the **Federal Register** of August 10, 2017, in FR Doc. 17-16893, on page 37466, in the second column, in the fourth paragraph, under the heading *Hearing*, in the fourth line, correct "Thursday, December 20, 2017" to read "Wednesday, December 20, 2017".

Issued: August 11, 2017.

**Lisa R. Barton,**

*Secretary to the Commission.*

[FR Doc. 2017-17370 Filed 8-16-17; 8:45 am]

**BILLING CODE P7020-02-P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701-TA-563 and 731-TA-1331-1332 (Final)]**

### Finished Carbon Steel Flanges From India and Italy; Determinations

On the basis of the record<sup>1</sup> developed in the subject investigations, the United States International Trade Commission ("Commission") determines, pursuant to the Tariff Act of 1930 ("the Act"), that an industry in the United States is materially injured by reason of imports of finished carbon steel flanges from India and Italy, provided for in subheading 7307.91.50 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce ("Commerce") to be sold in the United States at less than fair value ("LTFV"), and to be subsidized by the government of India.

### Background

The Commission, pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)), instituted these investigations effective June 30, 2016, following receipt of a petition filed with the Commission and Commerce by Weldbend Corporation, Argo, Illinois and Boltex Mfg. Co., L.P., Houston, Texas. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of finished carbon steel flanges from India were subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and that imports of finished carbon steel flanges from India and Italy were sold at LTFV within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)).

<sup>1</sup> Handbook for Electronic Filing Procedures: [https://www.usitc.gov/documents/handbook\\_on\\_filing\\_procedures.pdf](https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf).

<sup>2</sup> All contract personnel will sign appropriate nondisclosure agreements.

<sup>3</sup> Electronic Document Information System (EDIS): <https://edis.usitc.gov>.

<sup>1</sup> The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on February 17, 2017 (82 FR 11056). The hearing was held in Washington, DC, on April 25, 2017, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)). It completed and filed its determinations in these investigations on August 14, 2017. The views of the Commission are contained in USITC Publication 4717 (August 2017), entitled *Finished Carbon Steel Flanges from India and Italy: Investigation Nos. 701-TA-563 and 731-TA-1331-1332 (Final)*.

By order of the Commission.

Issued: August 14, 2017.

**William R. Bishop,**

*Supervisory Hearings and Information Officer.*

[FR Doc. 2017-17421 Filed 8-16-17; 8:45 am]

**BILLING CODE P7020-02-P**

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## DEPARTMENT OF JUSTICE

### Bureau of Alcohol, Tobacco, Firearms, and Explosives

[Docket No. ATF 2017R-13]

#### Granting of Relief; Federal Firearms Privileges

**AGENCY:** Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Department of Justice (DOJ).

**ACTION:** Notice of granting of restoration of Federal firearms privileges.

**SUMMARY:** Action Manufacturing Company (Action), has been granted relief from the disabilities imposed by Federal laws by the Director of ATF with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms.

**FOR FURTHER INFORMATION CONTACT:** Vivian S. Chu, Enforcement Programs and Services; Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice; 99 New York Avenue NE., Washington, DC 20226; telephone (202) 648-7070.

**SUPPLEMENTARY INFORMATION:** The Attorney General is responsible for enforcing the provisions of the Gun

Control Act of 1968 (GCA), 18 U.S.C. Chapter 44. He has delegated that responsibility to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. 28 CFR 0.130(a). ATF has promulgated regulations that implement the provisions of the GCA in 27 CFR part 478.

Section 922(g) of the GCA prohibits certain persons from shipping or transporting any firearm in interstate or foreign commerce, or receiving any firearm which has been shipped or transported in interstate or foreign commerce, or possessing any firearm in or affecting commerce. These prohibitions apply to any person who—

- (1) Has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
- (2) Is a fugitive from justice;
- (3) Is an unlawful user of or addicted to any controlled substance;
- (4) Has been adjudicated as a mental defective or committed to a mental institution;
- (5) Is an alien illegally or unlawfully in the United States; or with certain exceptions, aliens admitted to the United States under a nonimmigrant visa;
- (6) Has been discharged from the Armed Forces under dishonorable conditions;
- (7) Having been a citizen of the United States, has renounced U.S. citizenship;
- (8) Is subject to a court order that restrains the person from harassing, stalking, or threatening an intimate partner or child of such intimate partner; or
- (9) Has been convicted in any court of a misdemeanor crime of domestic violence.

The term "person" is defined in section 921(a)(1) as including "any individual, corporation, company, association, firm, partnership, society, or joint stock company." Section 925(c) of the GCA provides that a person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General to remove the firearms disability imposed under section 922(g) "if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." The Attorney General has delegated the authority to grant relief from firearms disabilities to the Director of ATF.

Section 925(c) further provides that "[w]henver the Attorney General grants relief to any person pursuant to this section he shall promptly publish in the **Federal Register** notice of such action, together with the reasons therefor." Regulations implementing the provisions of section 925(c) are set forth in 27 CFR 478.144.

Since 1992, Congress has prohibited ATF from expending appropriated funds to investigate or act upon applications for relief from federal firearms disabilities. However, since 1993 Congress has authorized ATF to expend appropriated funds to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities.

An application to ATF for relief from Federal firearms disabilities under 18 U.S.C. 925(c) was submitted for Action. In the matter under review, Action was convicted in Federal court of crimes punishable by imprisonment for a term exceeding one year. Specifically, Action was convicted on May 21, 2014, in the United States District Court for the Eastern District of Pennsylvania, for violations of 42 U.S.C. 6928(d)(2) and 49 U.S.C. 5124.

Pursuant to 18 U.S.C. 925(c), on May 22, 2017, Action was granted relief by ATF from the disabilities imposed by Federal law, 18 U.S.C. 922(g)(1), with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms as a result of these convictions. It has been established to ATF's satisfaction that the circumstances regarding Action's disabilities and its record and reputation are such that Action will not be likely to act in a manner dangerous to public safety, and that the granting of the relief would not be contrary to the public interest.

Date Approved: August 7, 2017.

**Thomas E. Brandon,**

*Acting Director.*

[FR Doc. 2017-17410 Filed 8-16-17; 8:45 am]

**BILLING CODE P4410-FY-P**

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## DEPARTMENT OF JUSTICE

[OMB Number 1122-NEW]

### Agency Information Collection Activities; Proposed eCollection eComments Requested; Approval of a New Collection

**AGENCY:** Office on Violence Against Women, Department of Justice.

**ACTION:** 60-Day notice.

**SUMMARY:** The Department of Justice, Office on Violence Against Women

(OVW) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for 60 days until October 16, 2017.

**FOR FURTHER INFORMATION CONTACT:** Written comments and/or suggestion regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to Cathy Poston, Office on Violence Against Women, at 202-514-5430 or [Catherine.poston@usdoj.gov](mailto:Catherine.poston@usdoj.gov).

**SUPPLEMENTARY INFORMATION:** Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### Overview of This Information Collection

(1) *Type of Information Collection:* Approval of a new collection.

(2) *Title of the Form/Collection:* Semi-annual progress report for the Grants for Outreach and Services to Underserved Populations Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122-XXXX. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the estimated 28 grantees under the Grants for Outreach and Services to

Underserved Populations (Underserved Program). A new grant program authorized in the Violence Against Women Reauthorization Act of 2013, the Underserved Program supports the development and implementation of strategies targeted at adult or youth victims of sexual assault, domestic violence, dating violence, or stalking in underserved populations, and victim services to meet the needs of such populations. Eligible applicants include nonprofit organizations that serve populations traditionally underserved due to geographic location, religion, sexual orientation, gender identity, underserved racial and ethnic populations, and populations underserved because of special needs (such as language barriers, disabilities, alienage status, or age).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the 28 respondents (Underserved Program grantees) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities that grantees may engage in (i.e. victim services, training,) and grantees will be expected to provide information only in connection with those activities supported by OVW funding.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the annual progress report is 56 hours.

*If additional information is required contact:* Melody Braswell, Deputy Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E, 405B, Washington, DC 20530.

Dated: August 13, 2017.

**Melody Braswell,**

*Department Clearance Officer, PRA, U.S. Department of Justice.*

[FR Doc. 2017-17381 Filed 8-16-17; 8:45 am]

**BILLING CODE P4410-FX-P**

#### DEPARTMENT OF JUSTICE

[OMB Number 1122-NEW]

#### Agency Information Collection Activities; Proposed eCollection eComments Requested; Approval of a New Collection

**AGENCY:** Office on Violence Against Women, Department of Justice.

**ACTION:** 60-Day notice.

**SUMMARY:** The Department of Justice, Office on Violence Against Women (OVW) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for 60 days until October 16, 2017.

**FOR FURTHER INFORMATION CONTACT:** Written comments and/or suggestion regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to Cathy Poston, Office on Violence Against Women, at 202-514-5430 or [Catherine.poston@usdoj.gov](mailto:Catherine.poston@usdoj.gov).

**SUPPLEMENTARY INFORMATION:** Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### Overview of This Information Collection

(1) *Type of Information Collection:* Approval of a new collection.

(2) *Title of the Form/Collection:* Semi-annual progress report for the Consolidated Grant Program to Address Children and Youth Experiencing Domestic and Sexual Assault and Engage Men and Boys as Allies.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122-XXXX. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the estimated 30 grantees under the Consolidated Youth Program. The Consolidated Grant Program to Address Children and Youth Experiencing Domestic and Sexual Assault and Engage Men and Boys as Allies (Consolidated Youth Program) was enacted in the FY 2012, 2013, 2014, 2015 and 2016 appropriation acts, which consolidated four previously authorized and appropriated programs into one comprehensive program. The previously authorized and appropriated four programs included in these consolidations were: Services to Advocate for and Respond to Youth, Grants to Assist Children and Youth Exposed to Violence, Engaging Men and Youth in Preventing Domestic Violence and Supporting Teens through Education and Prevention grant programs. The Consolidated Youth Program creates a unique opportunity for communities to increase collaboration among non-profit victim service providers, violence prevention programs, and child and youth organizations serving victims ages 0–24. Additionally, it supports organizations and programs that promote boys' and men's role in combating violence against women and girls. Eligible applicants are nonprofit, nongovernmental entities, Indian tribes or tribal nonprofit organizations, and territorial, tribal or unit of local government entities.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the 30 respondents (Consolidated Youth Program grantees) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities that grantees may engage in (*i.e.* victim services, training, prevention activities) and grantees will be expected to provide information only in connection with those activities supported by OVW funding.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the annual progress report is 60 hours.

*If additional information is required contact:* Melody Braswell, Deputy Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E, 405B, Washington, DC 20530.

Dated: August 13, 2017.

**Melody Braswell,**

*Department Clearance Officer, PRA, U.S. Department of Justice.*

[FR Doc. 2017–17380 Filed 8–16–17; 8:45 am]

**BILLING CODE P4410–FX–P**

## DEPARTMENT OF JUSTICE

[OMB Number 1122–0013]

### Agency Information Collection Activities; Proposed eCollection eComments Requested; Revisions to a Currently Approved Collection

**AGENCY:** Office on Violence Against Women, Department of Justice.

**ACTION:** 60-Day notice.

**SUMMARY:** The Department of Justice, Office on Violence Against Women (OVW) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for 60 days until October 16, 2017.

**FOR FURTHER INFORMATION CONTACT:** Written comments and/or suggestion regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to Cathy Poston, Office on Violence Against Women, at 202–514–5430 or [Catherine.poston@usdoj.gov](mailto:Catherine.poston@usdoj.gov).

**SUPPLEMENTARY INFORMATION:** Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology,

*e.g.*, permitting electronic submission of responses.

### Overview of This Information Collection

(1) *Type of Information Collection:* Revisions to a currently approved collection.

(2) *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from the Rural Domestic Violence, Dating Violence, Sexual Assault, Stalking, and Child Abuse Enforcement Assistance Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122–0013. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Affected public who will be asked or required to respond, as well as a brief abstract: The affected public includes the approximately 165 grantees of the Rural Program. The primary purpose of the Rural Program is to enhance the safety of victims of domestic violence, dating violence, sexual assault, stalking, and child victimization by supporting projects uniquely designed to address and prevent these crimes in rural jurisdictions. Grantees include States, Indian tribes, local governments, and nonprofit, public or private entities, including tribal nonprofit organizations, to carry out programs serving rural areas or rural communities.

OVW is proposing revisions to the progress reporting form to reflect statutory changes as a result of the reauthorization of grant programs in 2013 which included permitting grant funds to support the provision of legal services and the addition of new strategies to address sexual assault and special needs of victims in remote areas including providing training for Community Health aides involved in Indian Health Services programs.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 165 respondents (Rural Program grantees) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage (services, law enforcement, training etc.). A Rural Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.



(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 330 hours, that is 165 grantees completing a form twice a year with an estimated completion time for the form being one hour.

*If additional information is required contact:* Melody Braswell, Deputy Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E, 405B, Washington, DC 20530.

Dated: August 13, 2017.

**Melody Braswell,**

*Department Clearance Officer, PRA, U.S. Department of Justice.*

[FR Doc. 2017-17384 Filed 8-16-17; 8:45 am]

**BILLING CODE P4410-FX-P**

## DEPARTMENT OF JUSTICE

[OMB Number 1122-0006]

### Agency Information Collection Activities; Proposed eCollection eComments Requested; Revisions to a Currently Approved Collection

**AGENCY:** Office on Violence Against Women, Department of Justice.

**ACTION:** 60-Day notice.

**SUMMARY:** The Department of Justice, Office on Violence Against Women (OVW) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for 60 days until October 16, 2017.

**FOR FURTHER INFORMATION CONTACT:** Written comments and/or suggestion regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to Cathy Poston, Office on Violence Against Women, at 202-514-5430 or [Catherine.poston@usdoj.gov](mailto:Catherine.poston@usdoj.gov).

**SUPPLEMENTARY INFORMATION:** Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including

whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

### Overview of This Information Collection

(1) *Type of Information Collection:* Revisions to a currently approved collection.

(2) *Title of the Form/Collection:* Semiannual Progress Report for the Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122-0006. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes 200 grantees from the Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant Program (ICJR Program) (also known as Grants to Encourage Arrest Policies and Enforcement of Protection Orders) which encourages state, local, and tribal governments and state, local, and tribal courts to treat domestic violence, dating violence, sexual assault, and stalking as serious violations of criminal law requiring the coordinated involvement of the entire criminal justice system. Eligible applicants are states and territories, units of local government, Indian tribal governments, coalitions, victim service providers and state, local, tribal, and territorial courts.

OVW is proposing revisions to the progress reporting form to reflect statutory changes as a result of the reauthorization of VAWA grant programs in 2013 which added nine new purpose areas: training prosecutors; improving the response of the criminal justice system to immigrant victims; developing and promoting legislation and policies to enhance best practices

for responding to domestic violence, dating violence, sexual assault, and stalking; developing Sexual Assault Forensic Examiner programs; developing Sexual Assault Response Teams or similar CCRs to sexual assault; improving investigation and prosecution of sexual assault and treatment of victims; providing HIV testing, counseling, and prophylaxis for victims; addressing sexual assault evidence backlogs including notifying and involving victims; and developing multi-disciplinary high-risk teams for reducing domestic violence and dating violence homicides.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 200 respondents (ICJR Program grantees) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. An ICJR Program grantee will only be required to complete the sections of the form that pertain to its own specific activities (victim services, law enforcement, training, etc.).

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 400 hours, that is 200 grantees completing a form twice a year with an estimated completion time for the form being one hour.

*If additional information is required contact:* Melody Braswell, Deputy Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E, 405B, Washington, DC 20530.

Dated: August 13, 2017.

**Melody Braswell,**

*Department Clearance Officer, PRA, U.S. Department of Justice.*

[FR Doc. 2017-17383 Filed 8-16-17; 8:45 am]

**BILLING CODE P4410-FX-P**

## DEPARTMENT OF JUSTICE

[OMB Number 1122-0003]

### Agency Information Collection Activities; Proposed eCollection eComments Requested; Revisions to a currently approved collection

**AGENCY:** Office on Violence Against Women, Department of Justice

**ACTION:** 60-Day notice.

**SUMMARY:** The Department of Justice, Office on Violence Against Women (OVW) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for 60 days until October 16, 2017.

**FOR FURTHER INFORMATION CONTACT:** Written comments and/or suggestion regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to Cathy Poston, Office on Violence Against Women, at 202-514-5430 or *Catherine.poston@usdoj.gov*.

**SUPPLEMENTARY INFORMATION:** Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### Overview of This Information Collection

(1) *Type of Information Collection:* Revisions to a currently approved collection.

(2) *Title of the Form/Collection:* Annual Progress Report for the STOP Formula Grants Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122-0003. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes

the 56 STOP state administrators (from 50 states, the District of Columbia and five territories and commonwealths (Guam, Puerto Rico, American Samoa, Virgin Islands, Northern Mariana Islands)) and their subgrantees. The STOP Violence Against Women Formula Grants Program was authorized through the Violence Against Women Act of 1994 (VAWA) and reauthorized and amended by the Violence Against Women Acts of 2000, 2005 and 2013. Its purpose is to promote a coordinated, multi-disciplinary approach to improving the criminal justice system's response to violence against women. The STOP Formula Grants Program envisions a partnership among law enforcement, prosecution, courts, and victim advocacy organizations to enhance victim safety and hold offenders accountable for their crimes of violence against women. OVW administers the STOP Formula Grants Program. The grant funds must be distributed by STOP state administrators to subgrantees according to a statutory formula.

OVW is proposing revisions to the progress reporting form to reflect statutory changes as a result of the reauthorization of VAWA grant programs in 2013 which added seven new purpose areas: Developing and promoting legislation and policies to enhance best practices for responding to domestic violence, dating violence, sexual assault, and stalking; Developing Sexual Assault Response Teams and related coordinated community responses to sexual assault; improving investigation and prosecution of sexual assault cases and appropriate treatment of victims; responding to sexual assault against men, women, and youth in correctional settings; responding to backlogs of sexual assault evidence including developing protocols and policies for notifying and involving victims; improving responses to male and female victims whose ability to access traditional services and responses is affected by their sexual orientation or gender identity; and supporting prevention or educational programming (limited to five percent of the award amount). The reauthorization also ensured that domestic violence, dating violence, sexual assault, and stalking are included in all the statutory purpose areas and added legal assistance in purpose area for "victim assistance".

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the 56 respondents (STOP administrators) approximately one hour

to complete an annual progress report. It is estimated that it will take approximately one hour for roughly 2500 subgrantees<sup>1</sup> to complete the relevant portion of the annual progress report. The Annual Progress Report for the STOP Formula Grants Program is divided into sections that pertain to the different types of activities that subgrantees may engage in and the different types of subgrantees that receive funds, i.e. law enforcement agencies, prosecutors' offices, courts, victim services agencies, etc.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the annual progress report is 2,556 hours.

*If additional information is required contact:* Melody Braswell, Deputy Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E, 405B, Washington, DC 20530.

Dated: August 13, 2017.

**Melody Braswell,**

*Department Clearance Officer, PRA, U.S. Department of Justice.*

[FR Doc. 2017-17382 Filed 8-16-17; 8:45 am]

**BILLING CODE P4410-FX-P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 17-058]

### Notice of Intent To Grant an Exclusive Foreign Patent License

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of intent to grant exclusive U.S. and foreign patent license.

**SUMMARY:** NASA hereby gives notice of its intent to grant an exclusive patent license to practice the invention described and claimed in U.S. Patent No. 9,011,789, entitled "Treatment System for Removing Halogenated Compounds from Contaminated Sources" and Canadian Patent No. 2,868,843, entitled "Removing Halogenated Compounds from Contaminated Systems" (NASA Case No. KSC-13579) to ecoSPEARS, LLC having its principal place of business in Winter Springs, Florida. The aforementioned U.S. and foreign patents

<sup>1</sup> Each year the number of STOP subgrantees changes. The number 2,500 is based on the number of reports that OVW has received in the past from STOP subgrantees.

have been assigned to the Government of the United States of America.

**DATES:** The prospective exclusive license may be granted unless NASA receives written objections, including evidence and argument no later than September 1, 2017 that establish that the grant of the license would not be consistent with the requirements regarding the licensing of federally owned inventions as set forth in the Bayh-Dole Act and implementing regulations. Competing applications completed and received by NASA no later than September 1, 2017 will also be treated as objections to the grant of the contemplated exclusive license. Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act.

**ADDRESSES:** Objections relating to the prospective license may be submitted to Patent Counsel, Office of the Chief Counsel, Mail Code CC-A, NASA John F. Kennedy Space Center, Kennedy Space Center, FL 32899. Email: [ksc-patent-counsel@mail.ksc.nasa.gov](mailto:ksc-patent-counsel@mail.ksc.nasa.gov). Telephone: 321-867-2076; Facsimile: 321-867-1817.

**FOR FURTHER INFORMATION CONTACT:** Jonathan Leahy, Patent Attorney, Office of the Chief Counsel, Mail Code CC-A, NASA John F. Kennedy Space Center, Kennedy Space Center, FL 32899. Telephone: 321-867-6553; Facsimile: 321-867-1817.

**SUPPLEMENTARY INFORMATION:** This notice of intent to grant an exclusive patent license is issued in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(b)(1). The patent rights in these inventions have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective exclusive license will comply with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Information about other NASA inventions available for licensing can be found online at <http://technology.nasa.gov>.

**Mark P. Dvorscak,**

*Agency Counsel for Intellectual Property.*

[FR Doc. 2017-17396 Filed 8-16-17; 8:45 am]

**BILLING CODE 7510-13-P**

## NUCLEAR REGULATORY COMMISSION

[Docket No. 50-333; NRC-2017-0177]

### James A. FitzPatrick Nuclear Power Plant; Consideration of Approval of Transfer of License and Conforming Amendment

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Application for direct transfer of license; opportunity to comment, request a hearing, and petition for leave to intervene.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) received and is considering approval of an application filed by Exelon Generation Company, LLC and its wholly owned subsidiary, Exelon FitzPatrick, LLC (collectively, "the applicants") on July 24, 2017. The applicants seek NRC's approval of the direct transfer of ownership of Facility Operating License No. DPR-59 for the James A. FitzPatrick Nuclear Power Plant (FitzPatrick) and general license for the Independent Spent Fuel Storage Installation from Exelon Generation Company, LLC, to Exelon FitzPatrick, LLC. The NRC is also considering amending the renewed facility operating license for administrative purposes to reflect the proposed transfer. The application contains sensitive unclassified non-safeguards information (SUNSI).

**DATES:** Comments must be filed by September 18, 2017. A request for a hearing must be filed by September 6, 2017. Any potential party as defined in § 2.4 of title 10 of the *Code of Federal Regulations* (10 CFR) who believes access to SUNSI is necessary to respond to this notice must follow the instructions in Section VI of the **SUPPLEMENTARY INFORMATION** section of this notice.

**ADDRESSES:** You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to <http://www.regulations.gov> and search for Docket ID NRC-2017-0177. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; email: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Email comments to:* [Hearingdocket@nrc.gov](mailto:Hearingdocket@nrc.gov). If you do not receive an automatic email reply confirming receipt, then contact us at 301-415-1677.

- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301-415-1101.

- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

- *Hand deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern Time) Federal workdays; telephone: 301-415-1677.

For additional direction on obtaining information and submitting comments, see "Obtaining Information and Submitting Comments" in the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Booma Venkataraman, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington DC 20555-0001; telephone: 301-415-2934, email: [Booma.Venkataraman@nrc.gov](mailto:Booma.Venkataraman@nrc.gov).

#### SUPPLEMENTARY INFORMATION:

#### I. Obtaining Information and Submitting Comments

##### A. Obtaining Information

Please refer to Docket ID NRC-2017-0177 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Web site:* Go to <http://www.regulations.gov> and search for Docket ID NRC-2017-0177.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "ADAMS Public Documents" and then select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). The application for the direct license transfer of FitzPatrick is available in ADAMS under Accession No. ML17206A395.

- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

##### B. Submitting Comments

Please include Docket ID NRC-2017-0177 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly

disclosed in your comment submission. The NRC posts all comment submissions at <http://www.regulations.gov>

as well as entering the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

## II. Introduction

The NRC is considering the issuance of an order under § 50.80 of title 10 of the Code of Federal Regulations (10 CFR), approving the direct transfer of control of FitzPatrick, currently held by Exelon Generation Company, LLC. The transfer would be to Exelon FitzPatrick, LLC. The NRC is also considering amending the renewed facility operating licenses for administrative purposes to reflect the proposed transfer.

Following approval of the proposed direct transfer of control of the license, Exelon FitzPatrick, LLC would acquire ownership of the facility. Exelon Generation Company, LLC would be responsible for the operation and maintenance of FitzPatrick.

No physical changes to FitzPatrick or operational changes are being proposed in the application.

The NRC's regulations at 10 CFR 50.80 state that no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission gives its consent in writing. The Commission will approve an application for the direct transfer of a license if the Commission determines that the proposed transferee is qualified to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission.

Before issuance of the proposed conforming license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

As provided in 10 CFR 2.1315, unless otherwise determined by the Commission with regard to a specific application, the Commission has

determined that any amendment to the license of a utilization facility or to the license of an Independent Spent Fuel Storage Installation, which does no more than conform the license to reflect the transfer action involves no significant hazards consideration and no genuine issue as to whether the health and safety of the public will be significantly affected. No contrary determination has been made with respect to this specific license amendment application. In light of the generic determination reflected in 10 CFR 2.1315, no public comments with respect to significant hazards considerations are being solicited, notwithstanding the general comment procedures contained in 10 CFR 50.91.

## III. Opportunity To Comment

Within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted as described in the ADDRESSES section of this document.

## IV. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 20 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's "Agency Rules of Practice and Procedure" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC's regulations are accessible electronically from the NRC Library on the NRC's Web site at <http://www.nrc.gov/reading-rm/doc-collections/cfr/>. Alternatively, a copy of the regulations is available at the NRC's Public Document Room, located at One White Flint North, Room O1-F21, 11555 Rockville Pike, Rockville, Maryland 20852. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d), the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of

the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 20 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the "Electronic Submission (E-Filing)" section of this document.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 20 days from

the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the "Electronic Submissions (E-Filing)" section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a hearing is granted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

#### V. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities that request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562, August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC's Web site at <http://www.nrc.gov/site-help/e-submittals.html>. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at [hearing.docket@nrc.gov](mailto:hearing.docket@nrc.gov), or by telephone at 301-415-1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/getting-started.html>. Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public Web site at <http://www.nrc.gov/site-help/electronic-sub-ref-mat.html>. A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the "Contact Us" link located

on the NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals.html>, by email to [MSHD.Resource@nrc.gov](mailto:MSHD.Resource@nrc.gov), or by a toll-free call at 1-866-672-7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at <https://adams.nrc.gov/ehd>, unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click cancel when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate

proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

For further details with respect to this application, see the application dated July 24, 2017.

#### VI. Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

Any person who desires access to proprietary, confidential commercial information that has been redacted from the application should contact the applicants by telephoning David P. Helker, Exelon Corporation, at 610-765-5525 for the purpose of negotiating a confidentiality agreement or a proposed protective order with the applicants. If no agreement can be reached, persons who desire access to this information may file a motion with the Secretary and addressed to the Commission that requests the issuance of a protective order.

Dated at Rockville, Maryland, this 14th day of August, 2017.

For the Nuclear Regulatory Commission.

**Booma Venkataraman,**

*Project Manager, Plant Licensing Branch I, Division of Operator Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2017-17403 Filed 8-16-17; 8:45 am]

**BILLING CODE P7590-01-P**

#### POSTAL SERVICE

##### Product Change—Priority Mail Negotiated Service Agreement

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

**DATES:** *Date of notice required under 39 U.S.C. 3642(d)(1):* August 17, 2017.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth A. Reed, 202-268-3179.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 9, 2017, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 340 to Competitive Product List*. Documents are available at [www.prc.gov](http://www.prc.gov), Docket Nos. MC2017-169, CP2017-262.

**Stanley F. Mires,**

*Attorney, Federal Compliance.*

[FR Doc. 2017-17350 Filed 8-16-17; 8:45 am]

**BILLING CODE 7710-12-P**

#### SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-495, OMB Control No. 3235-0553]

##### Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of FOIA Services, 100 F St. NE., Washington, DC 20549-2736

*Extension:*

Rule 19b-7 and Form 19b-7

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.* “PRA”), the Securities and Exchange Commission (“SEC” or “Commission”) has submitted to the Office of Management and Budget (“OMB”) a request for approval of extension of the existing collection of information provided for in Rule 19b-7 (17 CFR 240.19b-7) and Form 19b-7—Filings with respect to proposed rule changes submitted pursuant to Section 19b(7) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (“Exchange Act”).

The Exchange Act provides a framework for self-regulation under which various entities involved in the securities business, including national securities exchanges and national securities associations (collectively, self-regulatory organizations or “SROs”), have primary responsibility for regulating their members or participants. The role of the Commission in this framework is primarily one of oversight; the Exchange Act charges the Commission with supervising the SROs and assuring that each complies with and advances the policies of the Exchange Act.

The Exchange Act was amended by the Commodity Futures Modernization Act of 2000 (“CFMA”). Prior to the CFMA, federal law did not allow the trading of futures on individual stocks or on narrow-based stock indexes (collectively, “security futures products”). The CFMA removed this restriction and provided that trading in security futures products would be regulated jointly by the Commission and the

Commodity Futures Trading Commission (“CFTC”).

The Exchange Act requires all SROs to submit to the SEC any proposals to amend, add, or delete any of their rules. Certain entities (Security Futures Product Exchanges) would be notice registered national securities exchanges only because they trade security futures products. Similarly, certain entities (Limited Purpose National Securities Associations) would be limited purpose national securities associations only because their members trade security futures products. The Exchange Act, as amended by the CFMA, established a procedure for Security Futures Product Exchanges and Limited Purpose National Securities Associations to provide notice of proposed rule changes relating to certain matters.<sup>1</sup> Rule 19b-7 and Form 19b-7 implemented this procedure. Effective April 28, 2008, the SEC amended Rule 19b-7 and Form 19b-7 to require that Form 19b-7 be submitted electronically.<sup>2</sup>

The collection of information is designed to provide the Commission with the information necessary to determine, as required by the Exchange Act, whether the proposed rule change is consistent with the Exchange Act and the rules thereunder. The information is used to determine if the proposed rule change should remain in effect or abrogated.

The respondents to the collection of information are SROs. Three respondents file an average total of approximately 3 responses per year.<sup>3</sup> Each response takes approximately 12.5 hours to complete and each amendment takes approximately 3 hours to complete, which correspond to an estimated annual response burden of 37.5 hours ((3 rule change proposals × 12.5 hours) + (0 amendments<sup>4</sup> × 3 hours)). The average internal cost of compliance per response is \$4,761 (11.5 legal hours multiplied by an average hourly rate of \$396<sup>5</sup> plus 1 hour of paralegal work

<sup>1</sup> These matters are higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products; sales practices for security futures products for persons who effect transactions in security futures products; or rules effectuating the obligation of Security Futures Product Exchanges and Limited Purpose National Securities Associations to enforce the securities laws. *See* 15 U.S.C. 78s(b)(7)(A).

<sup>2</sup> *See* Securities Exchange Act Release No. 57526 (March 19, 2008), 73 FR 16179 (March 27, 2008).

<sup>3</sup> There are currently four Security Futures Product Exchanges and one Limited Purpose National Securities Association, the National Futures Authority. However, two Security Futures Product Exchanges currently do not trade security futures products and, as a result, have not been filing proposed rule changes. Therefore, there are currently three respondents to Form 19b-7.

<sup>4</sup> SEC staff notes that even though no amendments were received in the previous three years and that staff does not anticipate the receipt of any amendments, calculation of amendments is a separate step in the calculation of the PRA burden and it is possible that amendments are filed in the future. Therefore, instead of removing the calculation altogether, staff has shown the calculation as anticipating zero amendments.

<sup>5</sup> The \$396 per hour figure for an Attorney is from SIFMA's *Management & Professional Earnings in the Securities Industry 2013*, modified by

multiplied by an average hourly rate of \$207<sup>6</sup>). The total resulting internal cost of compliance for a respondent is \$14,283 per year (3 responses × \$4,761 per response).

In addition to filing its proposed rule changes, and any amendments thereto, with the Commission, a respondent is also required to post each of its proposals and any amendments thereto, on its Web site. This process takes approximately 0.5 hours to complete per proposal and 0.5 hours per amendment. Thus, for the approximately 3 responses and 0 amendments,<sup>7</sup> the total annual reporting burden on a respondent to post these on its Web site is 1.5 hours ((3 proposals per year × 0.5 hours per filing) + (0 amendments × 0.5 hours)). Further, a respondent is required to update its rulebook, which it maintains on its Web site, to reflect the changes that it makes in each proposal and any amendment thereto. Thus, for all filings that were not withdrawn by a respondent (0 withdrawn filings in calendar years 2014–2016) or disapproved by the Commission (0 disapproved filings in calendar years 2014–2016), a respondent was required to update its online rulebook to reflect the effectiveness of 3 filings on average, each of which takes approximately 4 hours to complete per proposal. Thus, the total annual reporting burden for updating an online rulebook is 12 hours ((3 filings per year—0 withdrawn filings—0 disapproved filings) × 4 hours).

Compliance with Rule 19b–7 is mandatory. Information received in response to Rule 19b–7 is not kept confidential; the information collected is public information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following Web site: [www.reginfo.gov](http://www.reginfo.gov). Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: [Shagufta\\_Ahmed@omb.eop.gov](mailto:Shagufta_Ahmed@omb.eop.gov); and (ii) Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or by sending an email to: [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov). Comments must be submitted to OMB within 30 days of this notice.

Commission staff to account for inflation and an 1800-hour work-year and then multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

<sup>6</sup> The \$207 per hour figure for a Paralegal is from SIFMA's *Management & Professional Earnings in the Securities Industry 2013*, modified by Commission staff to account for inflation and an 1800-hour work-year and then multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

<sup>7</sup> See *supra* note 4.

Dated: August 14, 2017.

**Eduardo A. Aleman,**

*Assistant Secretary.*

[FR Doc. 2017–17405 Filed 8–16–17; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available*

*From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549–2736

*Extension:*

Rule 17a–10, SEC File No. 270–154, OMB Control No. 3235–0122

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (“PRA”), the Securities and Exchange Commission (“Commission”) has submitted to the Office of Management and Budget (“OMB”) a request for approval of extension of the previously approved collection of information provided for in Rule 17a–10 (17 CFR 240.17a–10) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (“Exchange Act”).

The primary purpose of Rule 17a–10 is to obtain the economic and statistical data necessary for an ongoing analysis of the securities industry. Paragraph (a)(1) of Rule 17a–10 generally requires broker-dealers that are exempted from the requirement to file monthly and quarterly reports pursuant to paragraph (a) of Exchange Act Rule 17a–5 (17 CFR 240.17a–5) to file with the Commission the Facing Page, a Statement of Income (Loss), and balance sheet from Part IIA of Form X–17A–5<sup>1</sup> (17 CFR 249.617), and Schedule I of Form X–17A–5 not later than 17 business days after the end of each calendar year.

Paragraph (a)(2) of Rule 17a–10 requires a broker-dealer subject to Rule 17a–5(a) to submit Schedule I of Form X–17A–5 with its Form X–17A–5 for the calendar quarter ending December 31 of each year. The burden associated with filing Schedule I of Form X–17A–5 is accounted for in the PRA filing associated with Rule 17a–5.

Paragraph (b) of Rule 17a–10 provides that the provisions of paragraph (a) do not apply to members of national securities exchanges or registered national securities associations that maintain records containing the

<sup>1</sup> Form X–17A–5 is the Financial and Operational Combined Uniform Single Report (“FOCUS Report”), which is used by broker-dealers to provide certain required information to the Commission.

information required by Form X–17A–5 and which transmit to the Commission copies of the records pursuant to a plan which has been declared effective by the Commission.

The Commission estimates that approximately 38 broker-dealers will spend an average of 12 hours per year complying with Rule 17a–10. Thus, the total compliance burden is estimated to be approximately 456 burden-hours per year.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information at the following Web site: [www.reginfo.gov](http://www.reginfo.gov). Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: [Shagufta\\_Ahmed@omb.eop.gov](mailto:Shagufta_Ahmed@omb.eop.gov); and (ii) Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE. Washington, DC 20549, or by sending an email to: [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov). Comments must be submitted to OMB within 30 days of this notice.

Dated: August 14, 2017.

**Eduardo A. Aleman,**

*Assistant Secretary.*

[FR Doc. 2017–17407 Filed 8–16–17; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available*

*From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549–2736.

*Extension:* Rule 17f–2(e); SEC File No. 270–037; OMB Control No. 3235–0031.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (“PRA”) (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (“Commission”) has submitted to the Office of Management and Budget (“OMB”) a request for approval of extension of the previously approved collection of information provided for in Rule 17f–2(e) (17 CFR 240.17f–2(e))

under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 17f-2(e) requires every member of a national securities exchange, broker, dealer, registered transfer agent, and registered clearing agency (“covered entities”) claiming an exemption from the fingerprinting requirements of Rule 17f-2 to make and keep current a statement entitled “Notice Pursuant to Rule 17f-2” (“Notice”) containing the information specified in paragraph (e)(1) to support their claim of exemption.

Rule 17f-2(e) contains no filing requirement. Instead, paragraph (e)(2) requires covered entities to keep a copy of the Notice in an easily accessible place at the organization’s principal office and at the office employing the persons for whom exemptions are claimed and to make the Notice available upon request for inspection by the Commission, appropriate regulatory agency (if not the Commission), or other designated examining authority. Notices prepared pursuant to Rule 17f-2(e) must be maintained for as long as the covered entity claims an exemption from the fingerprinting requirements of Rule 17f-2. The recordkeeping requirement under Rule 17f-2(e) assists the Commission and other regulatory agencies with ensuring compliance with Rule 17f-2. This rule does not involve the collection of confidential information.

We estimate that approximately 75 respondents will incur an average burden of 30 minutes per year to comply with this rule, which represents the time it takes for a staff person at a covered entity to properly document a claimed exemption from the fingerprinting requirements of Rule 17f-2 in the required Notice and to properly retain the Notice according to the entity’s record retention policies and procedures. The total annual burden for all covered entities is approximately 38 hours (75 entities × .5 hours, rounded up).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following Web site: [www.reginfo.gov](http://www.reginfo.gov). Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: [Shagufta.Ahmed@omb.eop.gov](mailto:Shagufta.Ahmed@omb.eop.gov); and (ii) Pamela Dyson, Director/Chief Information Officer, Securities and Exchange

Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or by sending an email to: [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov). Comments must be submitted to OMB within 30 days of this notice.

Dated: August 14, 2017.

**Eduardo A. Aleman,**

*Assistant Secretary.*

[FR Doc. 2017-17406 Filed 8-16-17; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Proposed Collection; Comment Request

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549-2736

#### *Extension:*

Form N-17f-2, SEC File No. 270-317, OMB Control No. 3235-0360

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the “Commission”) is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Form N-17f-2 (17 CFR 274.220) under the Investment Company Act is entitled “Certificate of Accounting of Securities and Similar Investments in the Custody of Management Investment Companies.” Form N-17f-2 is the cover sheet for the accountant examination certificates filed under rule 17f-2 (17 CFR 270.17f-2) by registered management investment companies (“funds”) maintaining custody of securities or other investments. Form N-17f-2 facilitates the filing of the accountant’s examination certificates prepared under rule 17f-2. The use of the form allows the certificates to be filed electronically, and increases the accessibility of the examination certificates to both the Commission’s examination staff and interested investors by ensuring that the certificates are filed under the proper Commission file number and the correct name of a fund.

Commission staff estimates that it takes: A. On average 1.25 hours of fund accounting personnel at a total cost of

\$255 to prepare each Form N-17f-2;<sup>1</sup> and B. .75 hours of administrative assistant time at a total cost of \$57 to file the Form N-17f-2 with the Commission.<sup>2</sup> Approximately 194 funds currently file Form N-17f-2 with the Commission. Commission staff estimates that on average each fund files Form N-17f-2 three times annually for a total annual hourly burden per fund of approximately 6 hours at a total cost of \$918. The total annual hour burden for Form N-17f-2 is therefore estimated to be approximately 1,164 hours. Based on the total annual costs per fund listed above, the total cost of Form N-17f-2’s collection of information requirements is estimated to be approximately \$178,092.<sup>3</sup>

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. Complying with the collections of information required by Form N-17f-2 is mandatory for those funds that maintain custody of their own assets. Responses will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The Commission requests written comments on: A. Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; B. the accuracy of the Commission’s estimate of the burdens of the collection of information; C. ways to enhance the quality, utility, and clarity of the information collected; and D. ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 100 F Street NE.,

<sup>1</sup> This estimate is based on the following calculation: 1.25 × \$204 (fund senior accountant’s hourly rate) = \$255.

<sup>2</sup> This estimate is based on the following calculation: .75 × \$76 (administrative assistant hourly rate) = \$57.

<sup>3</sup> This estimate is based on the following calculation: 194 funds × \$918 (total annual cost per fund) = \$178,092.



Washington, DC 20549; or send an email to: [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov).

Dated: August 11, 2017.

**Eduardo A. Aleman,**

*Assistant Secretary.*

[FR Doc. 2017-17408 Filed 8-16-17; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33-10399; 34-81389; File No. 265-27]

### SEC Advisory Committee on Small and Emerging Companies

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Notice of meeting.

**SUMMARY:** The Securities and Exchange Commission Advisory Committee on Small and Emerging Companies is providing notice that it will hold a public meeting on Wednesday, September 13, 2017, in Multi-Purpose Room LL-006 at the Commission's headquarters, 100 F Street NE., Washington, DC. The meeting will begin at 9:30 a.m. (ET) and will be open to the public. The meeting will be webcast on the Commission's Web site at [www.sec.gov](http://www.sec.gov). Persons needing special accommodations to take part because of a disability should notify the contact person listed below. The public is invited to submit written statements to the Committee. The agenda for the meeting includes matters relating to rules and regulations affecting small and emerging companies under the federal securities laws.

**DATES:** The public meeting will be held on Wednesday, September 13, 2017. Written statements should be received on or before September 11, 2017.

**ADDRESSES:** The meeting will be held at the Commission's headquarters, 100 F Street NE., Washington, DC. Written statements may be submitted by any of the following methods:

#### *Electronic Statements*

- Use the Commission's Internet submission form (<http://www.sec.gov/info/smallbus/acsec.shtml>); or
- Send an email message to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number 265-27 on the subject line; or

#### *Paper Statements*

- Send paper statements to Brent J. Fields, Federal Advisory Committee Management Officer, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File No. 265-27. This file number should be included on the subject line if email is used. To help us process and review your statement more efficiently, please use only one method. The Commission will post all statements on the Advisory Committee's Web site (<https://www.sec.gov/info/smallbus/acsec.shtml>).

Statements also will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All statements received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Julie Z. Davis, Senior Special Counsel, at (202) 551-3460, Office of Small Business Policy, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-3628.

**SUPPLEMENTARY INFORMATION:** In accordance with Section 10(a) of the Federal Advisory Committee Act, 5 U.S.C.-App. 1, and the regulations thereunder, William H. Hinman, Designated Federal Officer of the Committee, has ordered publication of this notice.

Dated: August 14, 2017.

**Brent J. Fields,**

*Committee Management Officer.*

[FR Doc. 2017-17409 Filed 8-16-17; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81381; File No. SR-BX-2017-037]

### Self-Regulatory Organizations; NASDAQ BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Further Clarify When the Exchange Will Utilize the Secondary Source of Data Pursuant to Rule 4759

August 11, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 2, 2017, NASDAQ BX, Inc. ("BX" or "Exchange") filed with the Securities and Exchange Commission

("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to further clarify when the Exchange will utilize the Secondary Source of data pursuant to Rule 4759.

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqbx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The purpose of the proposed rule change is to clarify when the Exchange will utilize the Secondary Source of data pursuant to Rule 4759. Rule 4759 lists the proprietary and network processor feeds that are utilized for the handling, routing, and execution of orders, as well as for the regulatory compliance processes related to those functions. Rule 4759 also lists Secondary Sources of data that are utilized in emergency market conditions, and only until those emergency conditions are resolved. The Exchange proposes to amend this rule to describe how the BX trading system decides when to use the Primary or Secondary Source of data. Specifically, the Exchange proposes to amend Rule 4759 to clarify that the Primary Source of data is used unless it is delayed by a configurable amount compared to the

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

Secondary Source of data.<sup>3</sup> The Exchange will revert to the Primary Source of data once the delay has been resolved. The configurable amount described in this rule will be made available to members via Equity Trader Alert.

The Exchange believes that this clarification is necessary in light of the re-launch of NYSE MKT as NYSE American, which is scheduled for July 24, 2017.<sup>4</sup> NYSE American rules provide for an intentional 350 microsecond access delay to certain inbound and outbound order messages on that exchange, including all outbound communications to proprietary market data feeds. NYSE American will not apply a similar delay to outbound communications to the securities information processor (“SIP”). Due to the intentional delay of proprietary market data to be disseminated by NYSE American, the Exchange believes that fail over to the Secondary Source of Data may sometimes be necessary even during otherwise normal operation to ensure that the fastest and most reliable data is used for the handling, routing, and execution of orders, and for regulatory compliance purposes.

Currently, the BX trading system utilizes proprietary market data as the Primary Source for the following markets that provide a reliable proprietary data feed: NYSE MKT, NASDAQ OMX BX, DirectEdge A, DirectEdge X, CHX, NYSE, NYSE Arca, NASDAQ, NASDAQ OMX PSX, BATS Y-Exchange, and BATS Exchange. For each of these markets, the Exchange uses SIP data as the Secondary Source.<sup>5</sup> The trading system then uses certain real-time logic to determine whether emergency market conditions exist that should result in the failover to the Secondary Source of data from the Primary Source. Specifically, the trading system fails over to the Secondary Source of data for these markets if the Primary Source of data is delayed by a configurable amount compared to the Secondary Source.<sup>6</sup> A significant delay

of the Primary Source of data compared to the Secondary Source of data indicates that there is an emergency market condition pursuant to Rule 4759. In such an instance, the Exchange believes that it is appropriate to fail over to the Secondary Source of data as the Secondary Source of data is more current. If the Exchange fails over to the Secondary Source of data it will re-elect the Primary Source of data if the Primary Source of data is no longer delayed compared to the Secondary Source. This process ensures that the BX’s trading and other systems have the most accurate view of the trading interest available across other markets.

With the upcoming launch of NYSE American, the Exchange believes that its current rule should be amended to better reflect intentional delays to the Primary Source of data. Specifically, the Exchange desires to make clear that even otherwise normal operation of the Primary Source of data may result in the Exchange electing the Secondary Source of data if that operation includes an intentional delay. This would be the case even if such operation would not normally be deemed an emergency market condition. Although the Exchange’s process for determining which data to use will not change at this time,<sup>7</sup> the Exchange believes that it is important to clarify that process so that members and other market participants are adequately apprised of when the Exchange will use the Primary or Secondary Source of data.

As explained earlier in this proposed rule change, the Exchange employs an automated, real-time, process to determine if there is an emergency market condition pursuant to Rule 4759. In particular, the Exchange determines whether there is an emergency market condition by comparing the timestamp of the Primary Source of data with the timestamp of the Secondary Source of data. The Exchange believes that a significant delay in the Primary Source of data compared to the Secondary Source is an emergency market condition because such a delay is not consistent with normal operation of such data feeds. The Exchange does not

a more recent timestamp than the Primary Source. Fail over then occurs once such a delay has reached a configurable value. The configurable amount described in this rule will be made available to members via Equity Trader Alert. Currently, this configurable value is set to 1.5 seconds. The Exchange will issue an Equity Trader Alert to members to notify them of the current value and in the event that it changes this value.

<sup>7</sup> The Exchange may decrease the amount of delay required to switch to the Secondary Source of data at a later date. The Exchange will alert members of any such change with an Equity Trader Alert. *See id.*

believe that the current emergency market conditions language is clear, however, when dealing with markets such as NYSE American that have employed an intentional delay in the data disseminated over the direct data feeds utilized by the Exchange as the Primary Source of data. Currently, the Primary Source of data is used unless it is delayed by a configurable amount compared to the Secondary Source of data. The Exchange then reverts to the Primary Source of data once the delay has been resolved. The Primary Source of data may be delayed due to technical issues that would normally be considered an emergency market condition, or during otherwise normal operation of the Primary Source of data if an intentional delay has been implemented. In this respect, the Exchange notes that even NYSE Arca—an affiliate of NYSE American—has decided to use SIP data as the primary source of data for NYSE American due to the intentional delay of messages on their proprietary market data.<sup>8</sup> Although the Exchange is not proposing to change its Primary Source of data for NYSE American, the Exchange believes that modifying its rules to clarify the conditions where the Secondary Source of data may be elected will increase transparency of the operation of the Exchange to the benefit of members and other market participants.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>10</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that the proposed rule change removes impediments to and perfects the mechanism of a free and open market and protects investors and the public interest because it provides additional transparency around when BX will elect to use the Secondary Source of data for the handling, routing, and execution of orders, and for regulatory compliance purposes. The proposed rule change does not change the operation of the Exchange or its use of data feeds; rather it clarifies when the Exchange will elect

<sup>3</sup> As a conforming change, the Exchange proposes to remove the current rule text that indicates that the Secondary Source of data is, where applicable, utilized only in emergency market conditions and only until those emergency conditions are resolved. The Exchange does not believe that this language is needed as the amended rule would now indicate with more specificity when the Exchange fails over to the Secondary Source of data.

<sup>4</sup> *See* Securities Exchange Act Release No 80700 (May 16, 2017), 82 FR 23381 (May 22, 2017) (SR-NYSEMKT-2017-05) (Approval Order).

<sup>5</sup> SIP data is used as the Primary Source for NSX, FINRA ADF, and IEX. There is no Secondary Source for these markets.

<sup>6</sup> A delay is indicated by data being received by the Exchange from the Secondary Source that has

<sup>8</sup> *See* Securities Exchange Act Release No. 34-81061 (June 30, 2017), 82 FR 31642 (July 7, 2017) (SR-Arca-2017-70).

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

the Secondary Source of data pursuant to Rule 4759. Currently, Rule 4759 indicates that the Exchange will fail over to the Secondary Source of data if there is an emergency market condition but does not specify what counts as an emergency market condition pursuant to the rule. In fact, the Exchange has an automated, real-time, process for determining whether an emergency market condition exists by measuring the amount of delay between the Primary and Secondary Sources of data. The proposed rule change therefore clarifies that the Exchange will elect the Secondary Source of data if the Primary Source of data is delayed by a configurable amount (made available to members via Equity Trader Alert), and will then revert to the Primary Source of data once the delay has been resolved. The Secondary Source of data may be elected even during otherwise normal operation because of intentional delays in the dissemination of market data over an exchange's proprietary market data feeds. The Exchange believes that this change is appropriate in light of the launch of the NYSE American exchange, which will come with an intentional delay of market data provided through proprietary data products used by BX as the Primary Source of data. The Exchange believes the additional transparency of the operation of the Exchange as described in the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issue but rather would provide members and other market participants with information about when BX will utilize its Secondary Source of data. The Exchange believes that this change will increase transparency around the operation of the Exchange without any significant impact on competition.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>11</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>12</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>13</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>14</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest as it will allow the Exchange to clarify the conditions under which the Secondary Source of data may be elected and increase transparency of the operation of the Exchange. Accordingly, the Commission hereby waives the operative delay and designates the proposal operative upon filing.<sup>15</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>15</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BX-2017-037 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-BX-2017-037. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BX-2017-037 and should be submitted on or before September 7, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2017-17366 Filed 8-16-17; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81382; File No. SR-Phlx-2017-65]

### Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Further Clarify When Nasdaq PSX Will Utilize the Secondary Source of Data Pursuant to Rule 3304

August 11, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 2, 2017, NASDAQ PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to a proposed rule change to further clarify when Nasdaq PSX (“PSX”) will utilize the Secondary Source of data pursuant to Rule 3304.

The text of the proposed rule change is available on the Exchange’s Web site at <http://nasdaqphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The

Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

#### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The purpose of the proposed rule change is to clarify when PSX will utilize the Secondary Source of data pursuant to Rule 3304. Rule 3304 lists the proprietary and network processor feeds that are utilized for the handling, routing, and execution of orders, as well as for the regulatory compliance processes related to those functions. Rule 3304 also lists Secondary Sources of data that are utilized in emergency market conditions, and only until those emergency conditions are resolved. The Exchange proposes to amend this rule to describe how the PSX trading system decides when to use the Primary or Secondary Source of data. Specifically, the Exchange proposes to amend Rule 3304 to clarify that the Primary Source of data is used unless it is delayed by a configurable amount compared to the Secondary Source of data.<sup>3</sup> The Exchange will revert to the Primary Source of data once the delay has been resolved. The configurable amount described in this rule will be made available to members via Equity Trader Alert.

The Exchange believes that this clarification is necessary in light of the re-launch of NYSE MKT as NYSE American, which is scheduled for July 24, 2017.<sup>4</sup> NYSE American rules provide for an intentional 350 microsecond access delay to certain inbound and outbound order messages on that exchange, including all outbound communications to proprietary market data feeds. NYSE American will not apply a similar delay to outbound communications to the securities information processor (“SIP”). Due to the intentional delay of proprietary market data to be disseminated by NYSE American, the Exchange believes that fail over to the Secondary Source of Data may

sometimes be necessary even during otherwise normal operation to ensure that the fastest and most reliable data is used for the handling, routing, and execution of orders, and for regulatory compliance purposes.

Currently, the PSX trading system utilizes proprietary market data as the Primary Source for the following markets that provide a reliable proprietary data feed: NYSE MKT, NASDAQ OMX BX, DirectEdge A, DirectEdge X, CHX, NYSE, NYSE Arca, NASDAQ, NASDAQ OMX PSX, BATS Y-Exchange, and BATS Exchange. For each of these markets, the Exchange uses SIP data as the Secondary Source.<sup>5</sup> The trading system then uses certain real-time logic to determine whether emergency market conditions exist that should result in the failover to the Secondary Source of data from the Primary Source. Specifically, the trading system fails over to the Secondary Source of data for these markets if the Primary Source of data is delayed by a configurable amount compared to the Secondary Source.<sup>6</sup> A significant delay of the Primary Source of data compared to the Secondary Source of data indicates that there is an emergency market condition pursuant to Rule 4759 [sic]. In such an instance, the Exchange believes that it is appropriate to fail over to the Secondary Source of data as the Secondary Source of data is more current. If the Exchange fails over to the Secondary Source of data it will re-elect the Primary Source of data if the Primary Source of data is no longer delayed compared to the Secondary Source. This process ensures that the PSX’s trading and other systems have the most accurate view of the trading interest available across other markets.

With the upcoming launch of NYSE American, the Exchange believes that its current rule should be amended to better reflect intentional delays to the Primary Source of data. Specifically, the Exchange desires to make clear that even otherwise normal operation of the Primary Source of data may result in the Exchange electing the Secondary Source of data if that operation includes an intentional delay. This would be the

<sup>5</sup> SIP data is used as the Primary Source for NSX, FINRA ADF, and IEX. There is no Secondary Source for these markets.

<sup>6</sup> A delay is indicated by data being received by the Exchange from the Secondary Source that has a more recent timestamp than the Primary Source. Fail over then occurs once such a delay has reached a configurable value. The configurable amount described in this rule will be made available to members via Equity Trader Alert. Currently, this configurable value is set to 1.5 seconds. The Exchange will issue an Equity Trader Alert to members to notify them of the current value and in the event that it changes this value.

<sup>16</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> As a conforming change, the Exchange proposes to remove the current rule text that indicates that the Secondary Source of data is, where applicable, utilized only in emergency market conditions and only until those emergency conditions are resolved. The Exchange does not believe that this language is needed as the amended rule would now indicate with more specificity when the Exchange fails over to the Secondary Source of data.

<sup>4</sup> See Securities Exchange Act Release No 80700 (May 16, 2017), 82 FR 23381 (May 22, 2017) (SR-NYSEMKT-2017-05) (Approval Order).

case even if such operation would not normally be deemed an emergency market condition. Although the Exchange's process for determining which data to use will not change at this time,<sup>7</sup> the Exchange believes that it is important to clarify that process so that members and other market participants are adequately apprised of when the Exchange will use the Primary or Secondary Source of data.

As explained earlier in this proposed rule change, the Exchange employs an automated, real-time, process to determine if there is an emergency market condition pursuant to Rule 4759 [sic]. In particular, the Exchange determines whether there is an emergency market condition by comparing the timestamp of the Primary Source of data with the timestamp of the Secondary Source of data. The Exchange believes that a significant delay in the Primary Source of data compared to the Secondary Source is an emergency market condition because such a delay is not consistent with normal operation of such data feeds. The Exchange does not believe that the current emergency market conditions language is clear, however, when dealing with markets such as NYSE American that have employed an intentional delay in the data disseminated over the direct data feeds utilized by the Exchange as the Primary Source of data. Currently, the Primary Source of data is used unless it is delayed by a configurable amount compared to the Secondary Source of data. The Exchange then reverts to the Primary Source of data once the delay has been resolved. The Primary Source of data may be delayed due to technical issues that would normally be considered an emergency market condition, or during otherwise normal operation of the Primary Source of data if an intentional delay has been implemented. In this respect, the Exchange notes that even NYSE Arca—an affiliate of NYSE American—has decided to use SIP data as the primary source of data for NYSE American due to the intentional delay of messages on their proprietary market data.<sup>8</sup> Although the Exchange is not proposing to change its Primary Source of data for NYSE American, the Exchange believes that modifying its rules to clarify the conditions where the Secondary Source of data may be elected will increase

transparency of the operation of the Exchange to the benefit of members and other market participants.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>10</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that the proposed rule change removes impediments to and perfects the mechanism of a free and open market and protects investors and the public interest because it provides additional transparency around when PSX will elect to use the Secondary Source of data for the handling, routing, and execution of orders, and for regulatory compliance purposes. The proposed rule change does not change the operation of the Exchange or its use of data feeds; rather it clarifies when the Exchange will elect the Secondary Source of data pursuant to Rule 3304. Currently, Rule 4759 [sic] indicates that the Exchange will fail over to the Secondary Source of data if there is an emergency market condition but does not specify what counts as an emergency market condition pursuant to the rule. In fact, the Exchange has an automated, real-time, process for determining whether an emergency market condition exists by measuring the amount of delay between the Primary and Secondary Sources of data. The proposed rule change therefore clarifies that the Exchange will elect the Secondary Source of data if the Primary Source of data is delayed by a configurable amount (made available to members via Equity Trader Alert), and will then revert to the Primary Source of data once the delay has been resolved. The Secondary Source of data may be elected even during otherwise normal operation because of intentional delays in the dissemination of market data over an exchange's proprietary market data feeds. The Exchange believes that this change is appropriate in light of the launch of the NYSE American exchange, which will come with an intentional delay of market data provided through proprietary data products used by PSX as the Primary Source of data. The Exchange believes the additional transparency of the

operation of the Exchange as described in the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

## B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issue but rather would provide members and other market participants with information about when PSX will utilize its Secondary Source of data. The Exchange believes that this change will increase transparency around the operation of the Exchange without any significant impact on competition.

## C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>11</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>12</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>13</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>14</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>7</sup> The Exchange may decrease the amount of delay required to switch to the Secondary Source of data at a later date. The Exchange will alert members of any such change with an Equity Trader Alert. See *id.*

<sup>8</sup> See Securities Exchange Act Release No. 34-81061 (June 30, 2017), 82 FR 31642 (July 7, 2017) (SR-Arca-2017-70).

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest as it will allow the Exchange to clarify the conditions under which the Secondary Source of data may be elected and increase transparency of the operation of the Exchange. Accordingly, the Commission hereby waives the operative delay and designates the proposal operative upon filing.<sup>15</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2017-65 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-Phlx-2017-65. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

<sup>15</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission’s Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2017-65 and should be submitted on or before September 7, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

[FR Doc. 2017-17367 Filed 8-16-17; 8:45 am]

**BILLING CODE 8011-01-P**

**SMALL BUSINESS ADMINISTRATION**

**[Disaster Declaration #15245 and #15246; NEW HAMPSHIRE Disaster Number NH-00038]**

**Presidential Declaration of a Major Disaster for Public Assistance Only for the State of New Hampshire**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of New Hampshire (FEMA-4329-DR), dated 08/09/2017.

*Incident:* Severe Storms and Flooding.  
*Incident Period:* 07/01/2017 through 07/02/2017.

**DATES:** Issued on 08/09/2017.

*Physical Loan Application Deadline Date:* 10/09/2017.

*Economic Injury (EIDL) Loan Application Deadline Date:* 05/09/2018.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A Escobar, Office of Disaster Assistance, U.S. Small Business Administration,

<sup>16</sup> 17 CFR 200.30-3(a)(12).

409 3rd Street SW., Suite 6050, Washington, DC 20416, (202) 205-6734.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the President’s major disaster declaration on 08/09/2017, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Grafton.

The Interest Rates are:

	Percent
For Physical Damage: Non-Profit Organizations With Credit Available Elsewhere ...	2.500
Non-Profit Organizations Without Credit Available Elsewhere .....	2.500
For Economic Injury: Non-Profit Organizations Without Credit Available Elsewhere .....	2.500

The number assigned to this disaster for physical damage is 15245B and for economic injury is 152460.

(Catalog of Federal Domestic Assistance Number 59008)

**Rafaela Monchek,**  
*Acting Associate Administrator, Disaster Assistance.*

[FR Doc. 2017-17389 Filed 8-16-17; 8:45 am]

**BILLING CODE 8025-01-P**

**DEPARTMENT OF STATE**

[Public Notice: 10084]

**In the Matter of the Designation of Hizbul Mujahideen Also Known as Hizb-ul-Mujahideen Also Known as HM as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter “INA”) (8 U.S.C. 1189), exist with respect to Hizbul Mujahideen, also known as Hizb-ul-Mujahideen, also known as HM.

Therefore, I hereby designate the aforementioned organization and its

aliases as a foreign terrorist organization pursuant to section 219 of the INA.

This determination shall be published in the **Federal Register**.

Rex W. Tillerson,

Secretary of State.

[FR Doc. 2017-17024 Filed 8-16-17; 8:45 am]

BILLING CODE 4710-AD-P

## DEPARTMENT OF STATE

[Public Notice: 10085]

### E.O. 13224 Designation of Hizbul Mujahideen, aka Hizb-ul-Mujahideen, aka HM as a Specially Designated Global Terrorist

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the person known as of Hizbul Mujahideen, also known as Hizb-ul-Mujahideen, also known as HM, committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Rex Tillerson,

Secretary of State.

[FR Doc. 2017-17026 Filed 8-16-17; 8:45 am]

BILLING CODE 4710-AD-P

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2012-0032]

### Commercial Driver's License Standards: Application for Exemption; Daimler Trucks North America (Daimler)

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of final disposition; grant of application for exemption.

**SUMMARY:** FMCSA announces its decision to grant an exemption to Daimler Trucks North America (Daimler) for one of its commercial motor vehicle (CMV) drivers. Daimler requested a 5-year exemption from the Federal requirement to hold a U.S. commercial driver's license (CDL) for Mr. Philipp Helbing, a project engineer for the Daimler Trucks and Bus Division. Mr. Helbing holds a valid German commercial license and wants to test-drive Daimler vehicles on U.S. roads to better understand product requirements for these systems in "real world" environments, and verify results. Daimler believes the requirements for a German commercial license ensure that holders of the license will likely achieve a level of safety equal to or greater than that of drivers who hold a U.S. State-issued CDL.

**DATES:** This exemption is applicable August 17, 2017 and expires August 17, 2022.

**ADDRESSES:**

*Docket:* For access to the docket to read background documents or comments, go to [www.regulations.gov](http://www.regulations.gov) at any time or visit Room W12-140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The on-line FDMS is available 24 hours each day, 365 days each year.

*Privacy Act:* In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas Yager, Chief, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: 614-942-6477.

Email: [MCPSD@dot.gov](mailto:MCPSD@dot.gov). If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

**SUPPLEMENTARY INFORMATION:**

### I. Public Participation

#### Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to [www.regulations.gov](http://www.regulations.gov) and insert the docket number, "FMCSA-2012-0032" in the "Keyword" box and click "Search." Next, click the "Open Docket Folder" button and choose the document to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

### II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from the Federal Motor Carrier Safety Regulations. FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews the safety analyses and the public comments, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reason for the grant or denial, and, if granted, the specific person or class of persons receiving the exemption, and the regulatory provision or provisions from which exemption is granted. The notice must also specify the effective period of the exemption (up to 5 years), and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

### Request for Exemption

On behalf of Mr. Philipp Helbing, Daimler has applied for a 5-year exemption from 49 CFR 383.23, which prescribes licensing requirements for drivers operating CMVs in interstate or intrastate commerce. Mr. Helbing is

unable to obtain a CDL in any of the States due to his lack of residency in the United States. A copy of the application is in Docket No. FMCSA–2012–0032.

The exemption would allow Mr. Helbing to operate CMVs in interstate or intrastate commerce to support Daimler field tests designed to meet future vehicle safety and environmental requirements and to develop improved safety and emission technologies. Mr. Helbing needs to drive Daimler vehicles on public roads to better understand “real world” environments in the U.S. market. According to Daimler, Mr. Helbing will typically drive for no more than 6 hours per day for 2 consecutive days, and that 10 percent of the test driving will be on two-lane State highways, while 90 percent will be on Interstate highways. The driving will consist of no more than 200 miles per day, for a total of 400 miles during a two-day period on a quarterly basis. He will in all cases be accompanied by a holder of a U.S. CDL who is familiar with the routes to be traveled.

Mr. Helbing would be required to comply with all applicable Federal Motor Carrier Safety Regulations (FMCSRs) (49 CFR parts 350–399) except the CDL provisions described in this notice.

Mr. Helbing holds a valid German commercial license, and as explained by Daimler in its exemption request, the requirements for that license ensure that the same level of safety is met or exceeded as if this driver had a U.S. CDL. Furthermore, according to Daimler, Mr. Helbing is familiar with the operation of CMVs worldwide.

#### IV. Method To Ensure an Equivalent or Greater Level of Safety

FMCSA has previously determined that the process for obtaining a German commercial license is comparable to, or as effective as, the requirements of part 383, and adequately assesses the driver’s ability to operate CMVs in the U.S. Since 2012, FMCSA has granted Daimler drivers similar exemptions [May 25, 2012 (77 FR 31422); July 22, 2014 (79 FR 42626); March 27, 2015 (80 FR 16511); October 5, 2015 (80 FR 60220); December 7, 2015 (80 FR 76059); December 21, 2015 (80 FR 79410)].

#### V. Public Comments

On May 15, 2017, FMCSA published notice of this application and requested public comments (82 FR 22378). No comments were submitted.

#### VI. FMCSA Decision

Based upon the merits of this application, including Mr. Helbing’s

extensive driving experience and safety record, FMCSA has concluded that the exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption, in accordance with § 381.305(a).

#### VII. Terms and Conditions for the Exemption

FMCSA grants Daimler and Philipp Helbing an exemption from the CDL requirement in 49 CFR 383.23 to allow Mr. Helbing to drive CMVs in this country without a U.S. State-issued CDL, subject to the following terms and conditions: (1) The driver and carrier must comply with all other applicable provisions of the FMCSRs (49 CFR parts 350–399); (2) the driver must be in possession of the exemption document and a valid German commercial license; (3) the driver must be employed by and operate the CMV within the scope of his duties for Daimler; (4) at all times while operating a CMV under this exemption, the driver must be accompanied by a holder of a U.S. CDL who is familiar with the routes traveled; (5) Daimler must notify FMCSA in writing within 5 business days of any accident, as defined in 49 CFR 390.5, involving this driver; and (6) Daimler must notify FMCSA in writing if this driver is convicted of a disqualifying offense under § 383.51 or § 391.15 of the FMCSRs.

In accordance with 49 U.S.C. 31315 and 31136(e), the exemption will be valid for 5 years unless revoked earlier by the FMCSA. The exemption will be revoked if: (1) Mr. Helbing fails to comply with the terms and conditions of the exemption; (2) the exemption results in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would be inconsistent with the goals and objectives of 49 U.S.C. 31315 and 31136.

#### VIII. Preemption

In accordance with 49 U.S.C. 31315(d), as implemented by 49 CFR 381.600, during the period this exemption is in effect, no State shall enforce any law or regulation applicable to interstate or intrastate commerce that conflicts with or is inconsistent with this exemption with respect to a firm or person operating under the exemption.

Issued on: August 5, 2017.

**Daphne Y. Jefferson,**  
*Deputy Administrator.*

[FR Doc. 2017–17393 Filed 8–16–17; 8:45 am]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0032]

#### Commercial Driver’s License Standards: Application for Renewal of Exemption; Daimler Trucks North America (Daimler)

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of final disposition; granting of application for renewal of exemption.

**SUMMARY:** FMCSA announces its decision to grant Daimler Trucks North America’s (Daimler) application for renewal of an exemption from the requirement for a commercial driver’s license (CDL) for one of its commercial motor vehicle (CMV) drivers, Sven Ennerst. Mr. Ennerst has operated safely under this exemption since July 22, 2014. The renewal allows Mr. Ennerst, a Daimler engineering executive who holds a German commercial license, to continue to test-drive Daimler CMVs on U.S. roads to improve Daimler’s understanding of product requirements in “real world” environments. FMCSA has concluded that this exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved if Mr. Ennerst were required to obtain a U.S. CDL.

**DATES:** This exemption is renewed effective July 22, 2017 and will expire July 22, 2022.

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas Yager, Chief, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: 614–942–6477. Email: [MCPSD@dot.gov](mailto:MCPSD@dot.gov). If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

#### SUPPLEMENTARY INFORMATION:

##### I. Public Participation

###### *Viewing Comments and Documents*

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to [www.regulations.gov](http://www.regulations.gov) and insert the docket number, “FMCSA–2012–0032 in the “Keyword” box and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West



Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

## II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from the Federal Motor Carrier Safety Regulations. FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews the safety analyses and the public comments, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reason for the grant or denial, and, if granted, the specific person or class of persons receiving the exemption, and the regulatory provision or provisions from which exemption is granted. The notice must also specify the effective period of the exemption (up to 5 years), and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

## III. Daimler Application for Exemption Renewal

Daimler has applied for a renewal of an exemption for one of its engineers from 49 CFR 383.23, which prescribes licensing requirements for drivers operating CMVs in interstate or intrastate commerce. This driver, Sven Ennerst, holds a valid German commercial license but is unable to obtain a CDL in any of the U.S. States due to residency requirements. A copy of the request for renewal, dated February 15, 2017, is in the docket identified at the beginning of this notice.

Effective July 22, 2015, FMCSA renewed for 2 years Mr. Ennerst's previous 1-year exemption (80 FR 45576, July 30, 2015). That exemption expired on July 22, 2017. Detailed information about the qualifications and experience of Mr. Ennerst was provided by Daimler in its original application, a copy of which is in the docket referenced above. Renewal of the exemption will enable Mr. Ennerst to operate CMVs in interstate or intrastate commerce to support Daimler field tests

designed to meet future vehicle safety and environmental requirements and to develop improved safety and emission technologies. According to Daimler, Mr. Ennerst will typically drive for no more than 6 hours per day for 2 consecutive days, and 10 percent of the test driving will be on two-lane State highways, while 90 percent will be on interstate highways. The driving will consist of no more than 200 miles per day, for a total of 400 miles during a two-day period on a quarterly basis. He will in all cases be accompanied by a holder of a U.S. CDL who is familiar with the routes to be traveled. Daimler requests that the exemption cover the maximum allowable duration of 5 years.

Daimler has explained in prior exemption requests that the German knowledge and skills tests and training program ensure that Daimler's drivers operating under the exemption will achieve a level of safety that is equivalent to, or greater than, the level of safety obtained by complying with the U.S. requirement for a CDL.

## IV. Method To Ensure an Equivalent or Greater Level of Safety

FMCSA has previously determined that the process for obtaining a German commercial license is comparable to, or as effective as, the requirements of part 383, and adequately assesses the driver's ability to operate CMVs in the U.S. Since 2012, FMCSA has granted Daimler drivers similar exemptions [May 25, 2012 (77 FR 31422); July 22, 2014 (79 FR 42626); March 27, 2015 (80 FR 16511); October 5, 2015 (80 FR 60220); July 12, 2016 (81 FR 45217); July 25, 2016 (81 FR 48496)].

## V. Public Comments

On May 15, 2017, FMCSA published notice of this application and requested public comments (82 FR 22371). No comments were submitted.

## VI. FMCSA Decision

Based upon the merits of this application, including Mr. Ennerst's extensive driving experience and safety record, FMCSA has concluded that the exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption, in accordance with § 381.305(a).

## VII. Terms and Conditions for the Exemption

FMCSA grants Daimler and Sven Ennerst an exemption from the CDL requirement in 49 CFR 383.23 to allow Mr. Ennerst to drive CMVs in this country without a U.S. State-issued CDL, subject to the following terms and

conditions: (1) The driver and carrier must comply with all other applicable provisions of the FMCSRs (49 CFR parts 350–399); (2) the driver must be in possession of the exemption document and a valid German commercial license; (3) the driver must be employed by and operate the CMV within the scope of his duties for Daimler; (4) at all times while operating a CMV under this exemption, the driver must be accompanied by a holder of a U.S. CDL who is familiar with the routes traveled; (5) Daimler must notify FMCSA in writing within 5 business days of any accident, as defined in 49 CFR 390.5, involving this driver; and (6) Daimler must notify FMCSA in writing if this driver is convicted of a disqualifying offense under § 383.51 or § 391.15 of the FMCSRs.

In accordance with 49 U.S.C. 31315 and 31136(e), the exemption will be valid for 5 years unless revoked earlier by the FMCSA. The exemption will be revoked if: (1) Mr. Ennerst fails to comply with the terms and conditions of the exemption; (2) the exemption results in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would be inconsistent with the goals and objectives of 49 U.S.C. 31315 and 31136.

## VIII. Preemption

In accordance with 49 U.S.C. 31315(d), as implemented by 49 CFR 381.600, during the period this exemption is in effect, no State shall enforce any law or regulation applicable to interstate or intrastate commerce that conflicts with or is inconsistent with this exemption with respect to a firm or person operating under the exemption.

Issued on: August 5, 2017.

**Randi F. Hutchinson,**  
*Chief Counsel.*

[FR Doc. 2017–17392 Filed 8–16–17; 8:45 am]

BILLING CODE 4910-EX-P

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## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2016–0136]

### Pipeline Safety: Meetings of the Gas Pipeline Advisory Committee and the Liquid Pipeline Advisory Committee

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice of advisory committee meetings.

**SUMMARY:** This notice announces both a public meeting of the Technical

Pipeline Safety Standards Committee, also known as the Gas Pipeline Advisory Committee (GPAC), to discuss topics and provisions of the proposed rule titled "Safety of Gas Transmission and Gathering Pipelines," and a joint meeting of the GPAC and the Technical Hazardous Liquid Pipeline Safety Standards Committee, also known as the Liquid Pipeline Advisory Committee (LPAC). The purpose of the joint meeting of the GPAC and LPAC is to discuss a variety of policy issues and topics relative to pipeline safety.

**DATES:** The GPAC and LPAC will meet in a joint session on September 6, 2017, from 8:30 a.m. to 5:00 p.m., and the GPAC only will meet on September 7, 2017, from 8:30 a.m. to 5:00 p.m. and on September 8, 2017, from 8:30 a.m. to 12:00 p.m. ET. Members of the public who wish to attend in person are asked to register no later than August 28, 2017. Individuals requiring accommodations, such as sign language interpretation or other ancillary aids, are asked to notify PHMSA by August 28, 2017. For additional information see the **ADDRESSES** section.

**ADDRESSES:** The meetings will be held at a location yet to be determined in the Washington, DC metropolitan area. The location, agenda, and any additional information for the meetings will be published on the following pipeline advisory committee meeting and registration page: <https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=127>.

The meetings will not be webcast; however, presentations will be available on the meeting Web site and posted on the E-Gov Web site, <https://www.regulations.gov/>, under docket number PHMSA-2016-0136 within 30 days following the meeting.

### Public Participation

These meetings will be open to the public. Members of the public who attend in person will also be provided an opportunity to make a statement during the meetings.

**Written comments:** Persons who wish to submit written comments on the meetings may submit them to the docket in the following ways:

**E-Gov Web site:** <https://www.regulations.gov>. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

**Fax:** 1-202-493-2251.

**Mail:** Docket Management Facility; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., West Building, Room W12-140, Washington, DC 20590-0001.

**Hand Delivery:** Room W12-140 on the ground level of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except on Federal holidays.

**Instructions:** Identify the docket number PHMSA-2016-0136 at the beginning of your comments. Note that all comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided. Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Therefore, consider reviewing DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000; (65 FR 19477), or view the Privacy Notice at <https://www.regulations.gov> before submitting comments.

**Docket:** For docket access or to read background documents or comments, go to <https://www.regulations.gov> at any time or to Room W12-140 on the ground level of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: "Comments on PHMSA-2016-0136." The docket clerk will date stamp the postcard prior to returning it to you via the U.S. mail.

### Privacy Act Statement

In accordance with 5 U.S.C. 553(c), the DOT solicits comments from the public to better inform its rulemaking process. The DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov) as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

**Services for Individuals with Disabilities:** The public meeting will be physically accessible to people with disabilities. Individuals requiring accommodations, such as sign language interpretation or other ancillary aids, are asked to notify Cheryl Whetsel at [cheryl.whetsel@dot.gov](mailto:cheryl.whetsel@dot.gov).

**FOR FURTHER INFORMATION CONTACT:** For information about the meeting, contact Cheryl Whetsel by phone at 202-366-4431 or by email at [cheryl.whetsel@dot.gov](mailto:cheryl.whetsel@dot.gov).

### SUPPLEMENTARY INFORMATION:

### I. Meeting Details and Agenda

The GPAC and LPAC will meet in a joint session to discuss a variety of topics to keep committee members up-to-date on the pipeline safety program and policy issues.

The GPAC will be considering the proposed rule titled "Safety of Gas Transmission and Gathering Pipelines," which was published in the **Federal Register** on April 8, 2016; (81 FR 20722), and the associated regulatory analysis. Based on discussions at the previous GPAC meetings, the topics that will be discussed at this meeting are material documentation and the integrity verification process. If time permits, strengthened assessment requirements would also be discussed.

Prior to these meetings, PHMSA will finalize the agendas and will publish them on the PHMSA meeting page at <https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=127>.

### II. Committee Background

The GPAC and the LPAC are statutorily mandated advisory committees that advise PHMSA on proposed gas pipeline and hazardous liquid pipeline safety standards, respectively, and their associated risk assessments. The committees are established in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2, as amended) and 49 U.S.C. 60115. The committees consist of 15 members with membership evenly divided among Federal and State governments, the regulated industry, and the general public. The committees advise PHMSA on the technical feasibility, reasonableness, cost-effectiveness, and practicability of each proposed pipeline safety standard.

Issued in Washington, DC, on August 11, 2017, under authority delegated in 49 CFR 1.97.

**Alan K. Mayberry,**

*Associate Administrator for Pipeline Safety.*

[FR Doc. 2017-17359 Filed 8-16-17; 8:45 am]

**BILLING CODE 4910-60-P**

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Notice of OFAC Sanctions Actions

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated

Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

**DATES:** OFAC's actions described in this notice were applicable on July 28, 2017, as further specified below.

**FOR FURTHER INFORMATION CONTACT:**

OFAC: Greg Gatjanis, Associate Director for Global Targeting, tel.: 202-622-2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202-622-2490; Assistant Director for Licensing, tel.: 202-622-2480; Assistant Director for Regulatory Affairs, tel. 202-622-4855; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202-622-2410.

**SUPPLEMENTARY INFORMATION:**

**Electronic Availability**

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's Web site ([www.treasury.gov/ofac](http://www.treasury.gov/ofac)).

**Notice of OFAC Actions**

On July 28, 2017, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

*Entities*

1. AMIR AL MO'MENIN INDUSTRIES (a.k.a. AMIR-AL-MO'MENIN COMPLEX; a.k.a. AMIROLMOMENIN FACTORIES; a.k.a. AMIROLMOMENIN INDUSTRIES), Esfahan, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [NPWMD] [IFSR] (Linked To: SHAHID HEMMAT INDUSTRIAL GROUP).

Designated pursuant to section l(a)(iv) of Executive Order 13382 of June 28, 2005, "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters" ("E.O. 13382") for being owned or controlled by SHAHID HEMMAT INDUSTRIAL GROUP, a person whose property and interests in property are blocked pursuant to E.O. 13382.

2. SHAHID CHERAGHI INDUSTRIES, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [NPWMD] [IFSR] (Linked To: SHAHID HEMMAT INDUSTRIAL GROUP).

Designated pursuant to section l(a)(iv) of E.O. 13382 for being owned or

controlled by SHAHID HEMMAT INDUSTRIAL GROUP, a person whose property and interests in property are blocked pursuant to E.O. 13382.

3. SHAHID KALHOR INDUSTRIES, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [NPWMD] [IFSR] (Linked To: SHAHID HEMMAT INDUSTRIAL GROUP).

Designated pursuant to section l(a)(iv) of E.O. 13382 for being owned or controlled by SHAHID HEMMAT INDUSTRIAL GROUP, a person whose property and interests in property are blocked pursuant to E.O. 13382.

4. SHAHID KARIMI INDUSTRIES, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [NPWMD] [IFSR] (Linked To: SHAHID HEMMAT INDUSTRIAL GROUP).

Designated pursuant to section l(a)(iv) of E.O. 13382 for being owned or controlled by SHAHID HEMMAT INDUSTRIAL GROUP, a person whose property and interests in property are blocked pursuant to E.O. 13382.

5. SHAHID RASTEGAR INDUSTRIES, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [NPWMD] [IFSR] (Linked To: SHAHID HEMMAT INDUSTRIAL GROUP).

Designated pursuant to section l(a)(iv) of E.O. 13382 for being owned or controlled by SHAHID HEMMAT INDUSTRIAL GROUP, a person whose property and interests in property are blocked pursuant to E.O. 13382.

6. SHAHID VARAMINI INDUSTRIES, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [NPWMD] [IFSR] (Linked To: SHAHID HEMMAT INDUSTRIAL GROUP).

Designated pursuant to section l(a)(iv) of E.O. 13382 for being owned or controlled by SHAHID HEMMAT INDUSTRIAL GROUP, a person whose property and interests in property are blocked pursuant to E.O. 13382.

Dated: August 7, 2017.

**Andrea M. Gacki,**

*Acting Director, Office of Foreign Assets Control.*

[FR Doc. 2017-16912 Filed 8-16-17; 8:45 am]

**BILLING CODE 4810-AL-P**

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**Request for Applications for the IRS Advisory Committee on Tax Exempt and Government Entities**

**AGENCY:** Internal Revenue Service (IRS), Tax Exempt and Government Entities Division, Treasury.

**ACTION:** Notice and request for applicants or nominations.

**SUMMARY:** The Internal Revenue Service (IRS) is requesting applications for membership to serve on the Advisory Committee on Tax Exempt and Government Entities (ACT).

Applications will be accepted for the following vacancies that will occur in June 2018: Two (2) Employee Plans (with additional experience in federal, state and local governments preferred); one (1) Exempt Organizations (with additional experience in tax-exempt bonds preferred); and one (1) Tax Exempt Bonds (with additional experience in exempt organizations preferred). To ensure an appropriate balance of membership, final selection from qualified candidates will be determined based on experience, qualifications and other expertise.

**DATES:** Written applications or nominations must be received on or before September 18, 2017.

**ADDRESSES:** Submit all applications and nominations to [tege.advisory.comm@irs.gov](mailto:tege.advisory.comm@irs.gov) or Fax at 888-269-7419.

Application: Applicants must use the ACT Application Form (Form 12399-C) on the IRS Web site ([IRS.gov](http://IRS.gov)).

Applications should describe and document the proposed member's qualifications for membership on the ACT. Applications should also specify the vacancy for which they wish to be considered. *Incomplete applications will not be processed.*

**FOR FURTHER INFORMATION CONTACT:** Mark O'Donnell, 202-317-8632, [Mark.F.ODonnell@irs.gov](mailto:Mark.F.ODonnell@irs.gov).

**SUPPLEMENTARY INFORMATION:** The Advisory Committee on Tax Exempt and Government Entities (ACT), governed by the Federal Advisory Committee Act, Public Law 92-463, is an organized public forum for discussion of relevant employee plans, exempt organizations, tax-exempt bonds, and federal, state, local and Indian tribal government issues between officials of the IRS and representatives of the above communities. The ACT enables the IRS to receive regular input with respect to the development and implementation of IRS policy

concerning these communities. ACT members present the interested public's observations about current or proposed IRS policies, programs and procedures, as well as suggest improvements. The Secretary of the Treasury will appoint ACT members, who will serve three-year terms. ACT members will not be paid for their time or services. ACT members will be reimbursed for their travel-related expenses to attend working sessions and public meetings, in accordance with 5 U.S.C. 5703.

The Secretary of the Treasury invites those individuals, organizations and groups affiliated with employee plans, exempt organizations, tax-exempt bonds, and federal, state, local and Indian tribal governments to nominate individuals for membership on the ACT. Nominations should describe and document the proposed member's qualifications for ACT membership, including the nominee's past or current affiliations and dealings with the particular community or segment of the community that he or she would represent (such as, employee plans). Nominations should also specify the vacancy for which they wish to be considered. The Department of the Treasury seeks a diverse group of members representing a broad spectrum of persons experienced in employee plans, exempt organizations, tax-exempt bonds, and federal, state, local and Indian tribal governments. Nominees must go through a clearance process before selection by the Department of the Treasury. In accordance with Department of the Treasury Directive 21-03, the clearance process includes, among other things, pre-appointment and annual tax checks, and an FBI criminal and subversive name check, fingerprint check and security clearance.

**Mark F. O'Donnell,**

*Designated Federal Officer, Tax Exempt and Government Entities Division, Internal Revenue Service.*

[FR Doc. 2017-17365 Filed 8-16-17; 8:45 am]

**BILLING CODE 4830-01-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### Proposed Information Collection; Comment Request Relating to CPEO Forms

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning Form 14737, Request for Voluntary IRS Certification of a Professional Employer Organization (Application), Form 14737-A, CPEO Responsible Individual Personal Attestation, Form 14751 Certified Professional Employer Organization Surety Bond, Form 8973, Certified Professional Employer Organization/ Customer Reporting Agreement.

**DATES:** Written comments should be received on or before October 16, 2017 to be assured of consideration.

**ADDRESSES:** Direct all written comments to L. Brimmer, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224. Please send separate comments for each specific information collection listed below. You must reference the information collection's title, form number, reporting or record-keeping requirement number, and OMB number (if any) in your comment. To obtain additional information, or copies of the information collection and instructions, or copies of any comments received, contact LaNita Van Dyke, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at [lanita.vandyke@irs.gov](mailto:lanita.vandyke@irs.gov).

**SUPPLEMENTARY INFORMATION:** Currently, the IRS is seeking comments concerning the following forms, and reporting and record-keeping requirements:

#### Certified Professional Employer Organization (CPEO)

*OMB Number:* 1545-2266.

*Form Numbers:* 14737 and 14737-A, 14751, and 8973.

*Abstract:* Section 206 of the Achieving a Better Life Experience (ABLE) Act passed Dec. 19, 2014) created the Certified Professional Employer Organization (CPEO) designation. The application, attestation and supporting information will be used by IRS to qualify professional employer organizations to become and remain a Certified Professional Employer Organization, which entitles them to certain tax benefits. This certification is renewed annually and the CPEO will submit annual and quarterly financial statements in addition to supporting documentation. Responsible individuals

will submit annual attestation forms and fingerprint cards. Form 14737, Request for Voluntary IRS Certification of a Professional Employer Organization (Application), Form 14737-A, CPEO Responsible Individual Personal Attestation, Form 14751, Certified Professional Employer Organization Surety Bond, and Form 8973, Certified Professional Employer Organization/ Customer Reporting Agreement, will only be used by program applicants and related responsible individuals.

*Current Actions:* There are no changes in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations & individuals.

*Estimated Number of Respondents:* 1,725.

*Estimated Time per Respondent:* 52.66 hours.

*Estimated Total Annual Burden Hours:* 90,830.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments will become a matter of public record. Please do not include any confidential or inappropriate material in your comments.

*We invite comments on:* (a) Whether the collection of information is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation,

maintenance, and purchase of services to provide the requested information.

Approved: August 8, 2017.

**L. Brimmer,**

*Senior Tax Analyst.*

[FR Doc. 2017-17364 Filed 8-16-17; 8:45 am]

**BILLING CODE 4830-01-P**

**DEPARTMENT OF VETERANS  
AFFAIRS**

**Geriatrics and Gerontology Advisory  
Committee; Notice of Meeting  
Cancellation**

The Department of Veterans Affairs gives notice under the Federal Advisory Committee Act that the meeting of the Geriatrics and Gerontology Advisory Committee, previously scheduled to be held at the Department of Veterans Affairs, 810 Vermont Avenue NW., Conference Room 630, Washington, DC

20420, on September 18-19, 2017, *has been cancelled.*

For more information, please contact Alejandra Paulovich, Program Analyst, Geriatrics and Extended Care Services at (202) 461-6016 or via email at *Alejandra.Paulovich@va.gov.*

Dated: August 11, 2017.

**Jelessa M. Burney,**

*Federal Advisory Committee Management  
Officer.*

[FR Doc. 2017-17362 Filed 8-16-17; 8:45 am]

**BILLING CODE P**



# FEDERAL REGISTER

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Part II

## Department of Commerce

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National Oceanic and Atmospheric Administration

50 CFR Part 226

Endangered and Threatened Species; Designation of Critical Habitat for the Endangered New York Bight, Chesapeake Bay, Carolina and South Atlantic Distinct Population Segments of Atlantic Sturgeon and the Threatened Gulf of Maine Distinct Population Segment of Atlantic Sturgeon; Final Rule

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 226**

[Docket No. 150818735-7452-02]

RIN 0648-BF28

**Endangered and Threatened Species; Designation of Critical Habitat for the Endangered New York Bight, Chesapeake Bay, Carolina and South Atlantic Distinct Population Segments of Atlantic Sturgeon and the Threatened Gulf of Maine Distinct Population Segment of Atlantic Sturgeon**

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

**ACTION:** Final rule.

**SUMMARY:** We (NMFS) are issuing this final rule to designate critical habitat for the threatened Gulf of Maine distinct population segment (DPS) of Atlantic sturgeon, the endangered New York Bight DPS of Atlantic sturgeon, the endangered Chesapeake Bay DPS of Atlantic sturgeon, the endangered Carolina DPS of Atlantic sturgeon and the endangered South Atlantic DPS of Atlantic sturgeon pursuant to the Endangered Species Act (ESA). Specific occupied areas designated as critical habitat for the Gulf of Maine DPS of Atlantic sturgeon contain approximately 244 kilometers (km; 152 miles) of aquatic habitat in the following rivers of Maine, New Hampshire, and Massachusetts: Penobscot, Kennebec, Androscoggin, Piscataqua, Cocheco, Salmon Falls, and Merrimack. Specific occupied areas designated as critical habitat for the New York Bight DPS of Atlantic sturgeon contain approximately 547 km (340 miles) of aquatic habitat in the following rivers of Connecticut, Massachusetts, New York, New Jersey, Pennsylvania, and Delaware: Connecticut, Housatonic, Hudson, and Delaware. Specific occupied areas designated as critical habitat for the Chesapeake Bay DPS of Atlantic sturgeon contain approximately 773 km (480 miles) of aquatic habitat in the following rivers of Maryland, Virginia, and the District of Columbia: Potomac, Rappahannock, York, Pamunkey, Mattaponi, James, Nanticoke, and the following other water body: Marshyhope Creek. Specific occupied areas designated as critical habitat for the Carolina DPS of Atlantic sturgeon contain approximately 1,939 km (1,205

miles) of aquatic habitat in the following rivers of North Carolina and South Carolina: Roanoke, Tar-Pamlico, Neuse, Cape Fear, Northeast Cape Fear, Waccamaw, Pee Dee, Black, Santee, North Santee, South Santee, and Cooper, and the following other water body: Bull Creek. Specific occupied areas designated as critical habitat for the South Atlantic DPS of Atlantic sturgeon contain approximately 2,883 km (1,791 miles) of aquatic habitat in the following rivers of South Carolina, Georgia, and Florida: Edisto, Combahee-Salkehatchie, Savannah, Ogeechee, Altamaha, Ocmulgee, Oconee, Satilla, and St. Marys Rivers.

**DATES:** This rule becomes effective September 18, 2017.

**ADDRESSES:** The final rule, maps, Final Impacts Analysis Reports and Final Regulatory Flexibility Analyses used in preparation of this final rule are available on the NMFS Greater Atlantic Regional Fisheries Office (GARFO) Web site at <http://www.greateratlantic.fisheries.noaa.gov/>, and NMFS Southeast Regional Fisheries Office (SERO) Web site at <http://sero.nmfs.noaa.gov/>, or by contacting Lynn Lankshear, NMFS, GARFO, 55 Great Republic Drive, Gloucester, MA 01930 or Andrew Herndon, NMFS, SERO, 263 13th Avenue South, Saint Petersburg, FL 33701.

**FOR FURTHER INFORMATION CONTACT:** Lynn Lankshear, NMFS, GARFO at the address above or at 978-282-8473; Andrew Herndon, NMFS, SERO at the address above or at 727-824-5312; or Marta Nammack, NMFS, Office of Protected Resources at 301-427-8469.

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

In 2012, we listed five DPSs of Atlantic sturgeon under the ESA: Four were listed as endangered (New York Bight DPS and Chesapeake Bay DPS; 77 FR 5880; February 6, 2012; Carolina DPS and South Atlantic DPS; 77 FR 5914; February 6, 2012) and one as threatened (Gulf of Maine DPS; 77 FR 5880; February 6, 2012). On March 18, 2014, two non-governmental organizations filed a lawsuit alleging we had violated the ESA by failing to issue proposed and final rules designating critical habitat for the Atlantic sturgeon DPSs. Pursuant to a court-ordered settlement agreement, as modified, we agreed to submit proposed rules designating critical habitat for all DPSs of Atlantic sturgeon to the Office of the Federal Register by May 30, 2016. NMFS met that deadline and the two proposed critical habitat rules for the five Atlantic sturgeon DPSs were

published on June 3, 2016. The proposed designations can be found at 81 FR 35701 for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon and at 81 FR 36077 for the Carolina and South Atlantic DPSs of Atlantic sturgeon. A subsequent correction notice clarifying the types of manmade structures not included in the proposed designation for the Carolina and South Atlantic DPSs was published on June 28, 2016 (81 FR 41926). On February 11, 2016, NMFS and the USFWS published a final rule, Implementing Changes to the Regulations for Designating Critical Habitat (81 FR 7414) (the Implementation rule). As the Implementation rule discussed, the changes to these regulations were meant to more clearly describe the Services' past and ongoing practices for designating critical habitat. The proposed rules designating critical habitat for Atlantic sturgeon were largely drafted at the time the final Implementation rule was published, and were based on past practices incorporated into that rule. Thus, no substantive changes were made to the Atlantic sturgeon proposed rules as a result of finalizing the Implementation rule.

We solicited comments from the public on all aspects of the proposed rules and held public hearings in Gloucester, Massachusetts; Brunswick, Georgia; Charleston, South Carolina; and Morehead City, North Carolina. The initial regulatory flexibility analysis (IRFA) and the draft Impacts Analysis (DIA) prepared for each proposed rule pursuant to section 4(b)(2) of the ESA were made available for public review and comment along with the proposed rules. Upon request, we re-opened the public comment period of both proposed rules for an additional 15 days, from September 29, 2016, to October 14, 2016 (81 FR 66911; Sept. 29, 2016); the entire public comment period totaled 105 days. After receiving public comment, we decided to complete the critical habitat designations with one final rule. Combining the designations into a single final rule will provide greater clarity to the public about the total extent of the Atlantic sturgeon critical habitat designations, reduce redundancy, and enable the public to better understand the need to designate the affected areas.

Final regulatory flexibility analyses (FRFAs) and final Impacts Analysis reports (IAs) updating the initial analyses and reports, that were published with the proposed rules, have been prepared to accompany this final rule. Combining the regional FRFAs and

IAs into single documents would make it difficult for the public to keep track of which parts of the single documents built upon the underlying data from the individual analyses published with the proposed rules. In addition, at the proposed rule stage, our two NMFS regions used different methodologies to evaluate impacts, relying on consultation databases that are region specific to address the different circumstances applicable to a specific region. Courts have noted the ESA provides the USFWS and NMFS (the Services) with broad discretion and flexibility in determining which particular methodologies or approaches are best for each specific set of circumstances (*See, e.g., Bldg. Indus. Ass'n of the Bay Area et al. v. U.S. Dep't. of Commerce et al.*, No. 13–15132, 9th Cir., July 7, 2015 (upholding district court's ruling that the ESA does not require the agency to follow a specific methodology when designating critical habitat under section 4(b)(2)). Accordingly, we maintained the separate sets because combining the two distinct sets of regional analyses would not have gained any efficiencies and would have created overly complicated reports that would be difficult for the public to follow. The final analyses are publicly available (see **ADDRESSES**).

We determined that a key conservation objective for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs is to increase the abundance of each DPS by facilitating increased successful reproduction and recruitment to the marine environment. We know that each of these DPSs is at a low level of abundance and that successful reproduction and recruitment, which are essential to the conservation of the species, occur in a limited number of rivers for each DPS. Based on the best scientific information available for the life history needs of the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs, the physical features essential to the conservation of the species and that may require special management considerations or protection are:

(1) Hard bottom substrate (*e.g.*, rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (*i.e.*, 0.0 to 0.5 parts per thousand (ppt) range) for settlement of fertilized eggs, refuge, growth, and development of early life stages;

(2) Aquatic habitat with a gradual downstream salinity gradient of 0.5 up to as high as 30 ppt and soft substrate (*e.g.*, sand, mud) between the river mouth and spawning sites for juvenile foraging and physiological development;

(3) Water of appropriate depth and absent physical barriers to passage (*e.g.*, locks, dams, thermal plumes, turbidity, sound, reservoirs, gear, etc.) between the river mouth and spawning sites necessary to support:

(i) Unimpeded movement of adults to and from spawning sites;

(ii) Seasonal and physiologically dependent movement of juvenile Atlantic sturgeon to appropriate salinity zones within the river estuary; and

(iii) Staging, resting, or holding of subadults or spawning condition adults. Water depths in main river channels must also be deep enough (*e.g.*, at least 1.2 m) to ensure continuous flow in the main channel at all times when any sturgeon life stage would be in the river.

(4) Water, between the river mouth and spawning sites, especially in the bottom meter of the water column, with the temperature, salinity, and oxygen values that, combined, support:

(i) Spawning;

(ii) Annual and interannual adult, subadult, larval, and juvenile survival; and

(iii) Larval, juvenile, and subadult growth, development, and recruitment (*e.g.*, 13 °C to 26 °C for spawning habitat and no more than 30 °C for juvenile rearing habitat, and 6 milligrams per liter (mg/L) dissolved oxygen (DO) or greater for juvenile rearing habitat).

We determined that the key conservation objectives for the Carolina and South Atlantic DPSs of Atlantic sturgeon are to increase the abundance of each DPS by facilitating increased survival of all life stages and facilitating adult reproduction and juvenile and subadult recruitment into the adult population. We determined the physical features essential to the conservation of the species and that may require special management considerations or protection, which support the identified conservation objectives, are:

(1) Hard bottom substrate (*e.g.*, rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (*i.e.*, 0.0–0.5 ppt range) for settlement of fertilized eggs and refuge, growth, and development of early life stages;

(2) Transitional salinity zones inclusive of waters with a gradual downstream gradient of 0.5– up to 30 ppt and soft substrate (*e.g.*, sand, mud) between the river mouths and spawning sites for juvenile foraging and physiological development;

(3) Water of appropriate depth and absent physical barriers to passage (*e.g.*, locks, dams, thermal plumes, turbidity, sound, reservoirs, gear, etc.) between the river mouths and spawning sites necessary to support:

(i) Unimpeded movement of adults to and from spawning sites;

(ii) Seasonal and physiologically-dependent movement of juvenile Atlantic sturgeon to appropriate salinity zones within the river estuary; and

(iii) Staging, resting, or holding of subadults or spawning condition adults. Water depths in main river channels must also be deep enough (at least 1.2 m) to ensure continuous flow in the main channel at all times when any sturgeon life stage would be in the river.

(4) Water quality conditions, especially in the bottom meter of the water column, between the river mouths and spawning sites with temperature and oxygen values that support:

(i) Spawning;

(ii) Annual and inter-annual adult, subadult, larval, and juvenile survival; and

(iii) Larval, juvenile, and subadult growth, development, and recruitment. Appropriate temperature and oxygen values will vary interdependently, and depending on salinity in a particular habitat. For example, 6.0 mg/L DO or greater likely supports juvenile rearing habitat, whereas DO less than 5.0 mg/L for longer than 30 days is less likely to support rearing when water temperature is greater than 25 °C. In temperatures greater than 26 °C, DO greater than 4.3 mg/L is needed to protect survival and growth. Temperatures of 13 to 26 °C likely to support spawning habitat.

#### *Atlantic Sturgeon Natural History and Status*

There are two subspecies of Atlantic sturgeon—the Gulf sturgeon (*Acipenser oxyrinchus desotoi*) and the Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*). Historically, the Gulf sturgeon occurred from the Mississippi River east to Tampa Bay in Florida. Its present range extends from Lake Pontchartrain and the Pearl River system in Louisiana and Mississippi east to the Suwannee River in Florida. The Gulf sturgeon was listed as threatened under the ESA in 1991. This rule addresses the Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*), which is distributed along the eastern coast of North America. Historically, sightings of Atlantic sturgeon have been reported from Hamilton Inlet, Labrador, Canada, south to the St. Johns River, Florida, United States. Reported occurrences south of the St. Johns River, Florida, have been rare but have increased recently with the evolution of acoustic telemetry coupled with increased receiver arrays.

Although there is considerable variability among species, all sturgeon species (Order *Acipenseriformes*) have



some common life history traits. They all: (1) Occur within the Northern Hemisphere; (2) spawn in freshwater over hard bottom substrates; (3) generally do not spawn annually; (4) are benthic foragers; (5) mature relatively late and are relatively long lived; and (6) are relatively sensitive to low DO levels (Dees, 1961; Sulak and Clugston, 1999; Billard and Lecointre, 2001; Secor and Niklitschek, 2002; Pikitch *et al.*, 2005).

Atlantic sturgeon have all of the above traits. They occur along the eastern coast of North America from Hamilton Inlet, Labrador, Canada to Cape Canaveral, Florida, United States (Bigelow and Welsh, 1925; Dees, 1961; Vladykov and Greeley, 1963; NMFS and U.S. Fish and Wildlife Service (USFWS), 2007; T. Savoy, CT DEEP, pers. comm.). Atlantic sturgeon are a long-lived, late-maturing, estuarine-dependent, anadromous species with a maximum lifespan of up to 60 years, although the typical lifespan is probably much shorter (Sulak and Randall, 2002; Balazik *et al.*, 2010). Atlantic sturgeon reach lengths up to 14 ft (4.27 m), and weigh over 800 pounds (363 kilograms (kg)). Many datasets demonstrate clinal variation in vital parameters of Atlantic sturgeon populations, with faster growth and earlier age at maturation in more southern systems. Atlantic sturgeon mature between the ages of 5 and 19 years in South Carolina (Smith *et al.*, 1982), between 11 and 21 years in the Hudson River (Young *et al.*, 1988), and between 22 and 34 years in the St. Lawrence River (Scott and Crossman, 1973). Atlantic sturgeon generally do not spawn every year. Multiple studies have shown that spawning intervals range from 1 to 5 years for males (Smith, 1985; Collins *et al.*, 2000; Caron *et al.*, 2002) and 2 to 5 years for females (Vladykov and Greeley, 1963; Van Eenennaam *et al.*, 1996; Stevenson and Secor, 1999). Fecundity of Atlantic sturgeon has been correlated with age and body size, with egg production ranging from 400,000 to 8 million eggs per year (Smith *et al.*, 1982; Van Eenennaam and Doroshov, 1998; Dadswell, 2006). The average age at which 50 percent of maximum lifetime egg production is achieved is estimated to be 29 years, approximately 3 to 10 times longer than for other bony fish species examined (Boreman, 1997).

Analysis of stomach contents for adults, subadults (*i.e.*, sexually immature Atlantic sturgeon that have emigrated from the natal estuary to the marine environment), and juveniles (*i.e.*, sexually immature Atlantic sturgeon that have not yet emigrated from the natal estuary) confirms that Atlantic sturgeon are benthic foragers

(Ryder, 1888; Bigelow and Schroeder, 1953; Johnson *et al.*, 1997; Secor *et al.*, 2000; ASSRT, 2007; Guilbard *et al.*, 2007; Hatin *et al.*, 2007; Savoy, 2007; Dzaugis, 2013; McLean *et al.*, 2013).

An anadromous species, Atlantic sturgeon spawns in freshwater of rivers that flow into a coastal estuary. Spawning adults migrate upriver in the spring, typically during February and March in southern systems, April and May in mid-Atlantic systems, and May and July in Canadian systems (Murawski and Pacheco, 1977; Smith, 1985; Bain, 1997; Smith and Clugston, 1997; Caron *et al.*, 2002). A fall spawning migration has been hypothesized for many years (Rogers and Weber, 1995; Weber and Jennings, 1996; Moser *et al.*, 1998) and was recently verified in the Roanoke River, North Carolina, and the Altamaha River, Georgia (Smith *et al.*, 2015; Ingram and Peterson 2016). There is also a growing body of evidence that some Atlantic sturgeon river populations have two spawning seasons comprised of different spawning adults (Balazik and Musick, 2015; Farrae *et al.*, 2017). Since the listings, additional evidence of fall as well as spring spawning has been obtained for the Chesapeake Bay DPS of Atlantic sturgeon (Balazik *et al.*, 2012; Hager *et al.*, 2014; Kahn *et al.*, 2014).

Spawning typically occurs in flowing water upriver of the salt front of estuaries and below the fall line of large rivers (Borodin, 1925; Leland, 1968; Scott and Crossman, 1973; Crance, 1987; Bain *et al.*, 2000). The fall line is the boundary between an upland region of continental bedrock and an alluvial coastal plain, sometimes characterized by waterfalls or rapids. Spawning sites are well-oxygenated areas with flowing water ranging in temperature from 13 °C (55 °F) to 26 °C (79 °F), and hard bottom substrate such as cobble, hard clay, and bedrock (Ryder, 1888; Dees, 1961; Vladykov and Greeley, 1963; Scott and Crossman, 1973; Gilbert, 1989; Smith and Clugston, 1997; Bain *et al.*, 2000; Collins *et al.*, 2000; Balazik *et al.*, 2012; Hager *et al.*, 2014). Depth at which fish spawn and water depth leading to spawning sites may be highly variable. Atlantic sturgeon in spawning condition have been tracked and captured at depths up to 27 m (Borodin 1925; Dees 1961; Hatin *et al.*, 2002; Balazik *et al.*, 2012; Hager *et al.*, 2014).

Within minutes of being fertilized, the eggs become sticky and adhere to the substrate for the relatively short and temperature-dependent period of larval development (Ryder, 1888; Vladykov and Greeley, 1963; Murawski and Pacheco, 1977; Smith *et al.*, 1980; Van den Avyle, 1984; Mohler, 2003).

Hatching occurs approximately 94 to 140 hours after egg deposition at temperatures of 68.0 to 64.4 °F (20 to 18 °C), respectively. The newly emerged larvae assume a demersal existence (Smith *et al.*, 1980). The yolk sac larval stage is completed in about 8 to 12 days, during which time the larvae move downstream to rearing grounds (Kynard and Horgan, 2002). During the first half of their migration downstream, movement occurs only at night. During the day, larvae use benthic structure (*e.g.*, gravel matrix) as refuge (Kynard and Horgan, 2002). During the latter half of migration, when larvae are more fully developed, movement to rearing grounds occurs during both the day and night.

Larval Atlantic sturgeon (*i.e.*, less than 4 weeks old, with total lengths (TL) less than 30 mm; Van Eenennaam *et al.*, 1996) are assumed to inhabit the same areas where they were spawned and live at or near the bottom (Ryder, 1888; Smith *et al.*, 1980; Bain *et al.*, 2000; Kynard and Horgan, 2002; Greene *et al.*, 2009). The best scientific information available for behavior of larval Atlantic sturgeon is described from hatchery studies. Upon hatching, larvae are nourished by the yolk sac, are mostly pelagic (*e.g.*, exhibit a “swim-up and drift-down” behavior in hatchery tanks; Mohler, 2003), and move away from light (*i.e.*, negative photo-taxis; Kynard and Horgan, 2002; Mohler, 2003). Within days, larvae exhibit more benthic behavior until the yolk sac is absorbed at about 8 to 10 days post-hatching (Kynard and Horgan, 2002; Mohler, 2003). Post-yolk sac larvae occur in the water column but feed at the bottom of the water column (Mohler, 2003; Richardson *et al.*, 2007).

The next phase of development, referred to as the juvenile stage, lasts months to years in brackish waters of the natal estuary (Holland and Yelverton, 1973; Dovel and Berggen, 1983; Waldman *et al.*, 1996; Shirey *et al.*, 1997; Collins *et al.*, 2000; Secor *et al.*, 2000; Dadswell, 2006; Hatin *et al.*, 2007; ASSRT, 2007; Calvo *et al.*, 2010; Schueller and Peterson, 2010). Juvenile rearing habitat is that habitat necessary for juveniles to grow, develop, and emigrate to the marine environment where they begin the subadult life stage, eventually maturing into adults. Juveniles occur in oligohaline waters (salinity of 0.5 to 5 ppt) and mesohaline waters (salinity of 5 to 18 ppt) of the natal estuary during growth and development. They will eventually move into polyhaline waters (salinity of 18–30 ppt), if available in the natal river estuary, before emigrating from the natal river estuary. Larger, presumably older,

juveniles occur across a broader salinity range than smaller, presumably younger, juveniles (Bain, 1997; Shirey *et al.*, 1997; Haley, 1999; Bain *et al.*, 2000; Collins *et al.*, 2000; Secor *et al.*, 2000; Hatin *et al.*, 2007; McCord *et al.*, 2007; Munro *et al.*, 2007; Sweka *et al.*, 2007; Calvo *et al.*, 2010).

The distribution of Atlantic sturgeon juveniles in the natal estuary is a function of physiological development and habitat selection based on water quality factors of temperature, salinity, and DO, which are inter-related environmental variables. In laboratory studies with salinities of 8 to 15 ppt and temperatures of 12 and 20 °C (53.6 and 68 °F), juveniles less than a year old (also known as young-of-year [YOY]) had reduced growth at 40 percent DO saturation, grew best at 70 percent DO saturation, and selected conditions that supported growth (Niklitschek and Secor, 2009 I; Niklitschek and Secor, 2009 II). Similar results were obtained for age-1 juveniles (*i.e.*, greater than 1 year old and less than 2 years old), which have been shown to tolerate salinities of 33 ppt (*e.g.*, a salinity level associated with seawater), but grow faster in lower salinity waters (Niklitschek and Secor, 2009 I; Allen *et al.*, 2014). For the conditions tested, the best growth for both age groups occurred at DO concentrations greater than 6.5 mg/L (*e.g.*, 70 percent DO saturation with salinity of 8 to 15 ppt and temperature of 12 and 20 °C). While specific DO concentrations at temperatures considered stressful for Atlantic sturgeon are not available, instantaneous minimum DO concentrations of 4.3 mg/L protect survival of shortnose sturgeon at temperatures greater than 29 °C (84.2 °F) (EPA, 2003). However, data from Secor and Niklitschek (2001) show that shortnose sturgeon are more tolerant of higher temperatures than Atlantic sturgeon, and the “high temperature” for Atlantic sturgeon is actually considered 26 °C (78.8 °F) (Secor and Gunderson, 1998).

Once suitably developed, Atlantic sturgeon leave the natal estuary and enter marine waters (*i.e.*, waters with salinity greater than 30 ppt); this marks the beginning of the subadult life stage. In the marine environment, subadults mix with adults and subadults from other river systems (Bowen and Avise, 1990; Wirgin *et al.*, 2012; Waldman *et al.*, 2013; O’Leary *et al.*, 2014). Atlantic sturgeon travel long distances in marine waters, aggregate in both oceanic and estuarine areas at certain times of the year, and exhibit seasonal coastal movements in the spring and fall

(Vladykov and Greeley, 1963; Oliver *et al.*, 2013).

The exact spawning locations for Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPS Atlantic sturgeon are unknown but inferred based on the location of freshwater, hard substrate, water depth, tracking of adults to upriver locations and the behavior of adults at those locations, historical accounts of where the caviar fishery occurred, capture of YOY and, in limited cases, capture of larvae and eggs. Spawning sites at multiple locations within the tidal-affected river likely help to ensure successful spawning given annual changes in the location of the salt wedge.

### Public Comments and Our Responses

We requested comments on the proposed rule to designate critical habitat for the Gulf of Maine, New York Bight, Chesapeake Bay DPSs of Atlantic sturgeon (81 FR 35701; June 3, 2016) and on the proposed rule to designate critical habitat for the Carolina and South Atlantic DPSs of Atlantic sturgeon (81 FR 36077; June 3, 2016) for a 90-day period. Following requests from the public, we re-opened the public comment period for an additional 15 days (81 FR 66911; Sept. 29, 2016), for a total comment period of 105 days. Five public hearings were also held on the following dates and in the following locations:

1. Thursday, July 21, 2016, 3 to 5 p.m., Gloucester, Massachusetts.
2. Thursday, July 21, 2016, 6 to 8 p.m., Gloucester, Massachusetts.
3. Monday, June 20, 2016, 7 to 9 p.m., Brunswick, Georgia.
4. Tuesday, June 21, 2016, 7 to 9 p.m., Charleston, South Carolina.
5. Thursday, June 23, 2016, 7 to 9 p.m., Morehead City, North Carolina.

In addition to the public hearings, during which substantive comments on the proposed designations could be provided by the public, we held a public informational meeting prior to each public hearing in Massachusetts, Georgia, South Carolina, and North Carolina. We also held public informational meetings in Annapolis, Maryland on July 13, 2016, and in Portland, Maine on July 18, 2016. These informational meetings reviewed the purpose of designating critical habitat and answered procedural questions. We did not accept public comment or answer substantive questions about the areas proposed for designation at the informational meetings; rather, we provided information on the public comment process. To further facilitate public participation, the proposed rules

were made available on our regional Web pages and comments were accepted during public hearings, and via standard mail, facsimile, and through the Federal eRulemaking portal. In addition to the proposed rules, the correction notice for the proposed rule for the Carolina and South Atlantic DPSs, maps of the proposed critical habitat units, and the DIAs supporting our conclusions under section 4(b)(2) of the ESA were made publicly available.

Twenty-one people attended the public hearings for the proposed rule to designate critical habitat for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon, either in-person or via telephone, and we received 1,577 responses to the request for public comments on the proposed rule and supporting documents through *Regulations.gov* and by mail, including over 1,000 form letters. Approximately 40 people attended the public hearings for the proposed rule to designate critical habitat for the Carolina and South Atlantic DPSs of Atlantic sturgeon, and 354 public comments were received on the proposed rule and supporting documents.

We reviewed all comments received for substantive issues relevant to the proposed critical habitat rules. Some comments resulted in changes between the proposed and final designation. Changes between the proposed designations and final designation are highlighted in the “Summary of Changes From the Proposed Rules” section of this rule. The relevant public comments received, both written and oral, are addressed below. We have responded to the comments received on the proposed rule for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon separately from our responses to the comments received on the proposed rule for the Carolina and South Atlantic DPSs of Atlantic sturgeon because it would be difficult for a commenter to identify his or her individual comment and our response if we merged the comment responses. However, we have assigned comments to major issue categories and, where appropriate, have combined similar comments from multiple members of the public or referenced the response to identical comments received on both proposed rules. We received some comments related to the listing and DPS delineation and comments critical of our final rule Implementing Changes to the Regulations for Designating Critical Habitat (81 FR 7414; February 11, 2016); those comments are not relevant to this

critical habitat designation and are not addressed below.

*Comments on the Gulf of Maine, New York Bight, and Chesapeake Bay DPS Proposed Critical Habitat Designations (81 FR 35701; June 3, 2016)*

#### Comments on Geographical Area Occupied

*Comment 1:* A commenter stated that we have not provided any evidence that Atlantic sturgeon occupied the Susquehanna River at the time the species was listed, or at any time in recent history. They stated that the most recent sighting of Atlantic sturgeon occurred in 1987, nearly 25 years before the species was listed in 2012, and that sighting occurred near the mouth of the Susquehanna River rather than in the Susquehanna River. The commenter noted that Exelon monitored the Susquehanna River for sonic transmitter tagged sturgeons from other river systems (Delaware River, Potomac River) during 2010 and 2011 with fixed station acoustic telemetry receivers, and no tagged Atlantic sturgeon were recorded in the Susquehanna River in either year. In addition, they stated that Atlantic sturgeon have not been caught in the Conowingo Dam fish lift in 44 years of fish lift operations, there have been no reports of anglers catching Atlantic sturgeon or observations of breaching Atlantic sturgeon in the Susquehanna River, and there are no records for Atlantic sturgeon in the Susquehanna River in the USFWS tagging database or the Maryland Department of Natural Resources reward program database.

*Our Response:* Our regulations at 50 CFR 424.02 define “geographical area occupied by the species” as “An area that may generally be delineated around species’ occurrences, as determined by the Secretary (*i.e.*, range). Such areas may include those areas used throughout all or part of the species’ life cycle, even if not used on a regular basis (*e.g.*, migratory corridors, seasonal habitats, and habitats used periodically, but not solely, by vagrant individuals).” The range of each DPS is informed by numerous lines of evidence including the life history of Atlantic sturgeon, tagging, tracking, and genetic analyses. Often at the time of designating critical habitat, we do not have detailed information or the same level of detail for every part of the species’ range. However, the absence of collection or sighting of Atlantic sturgeon in any part of their range does not equate to absence of Atlantic sturgeon. Atlantic sturgeon can be difficult to detect when present in marine and estuarine waters because

they are benthic fish, spending most of their lives well below the water surface, they do not school, they move within the estuary, and subadults and adults spend only part of the year in estuarine waters.

There has been very little effort to detect the presence of Atlantic sturgeon in the Susquehanna River in recent times. Receivers were placed in the Susquehanna River to detect acoustically tagged Atlantic sturgeon in 2010 and 2011 but, at that time, we made it clear that an absence of detections was not confirmation of absence of the species in the river, given the low number of Atlantic sturgeon that were acoustically tagged and the limited number of receivers placed in the river below Conowingo Dam.

Fish behavior rather than fish abundance influences whether a sturgeon enters a fish lift that was designed for a different fish species. Therefore, absence of Atlantic sturgeon in the fish lift also does not equate to absence of Atlantic sturgeon in the river below a dam. Many of the rivers for which we have more abundant documentation of Atlantic sturgeon presence also have dams with fish lifts (*e.g.*, Connecticut, Penobscot, and Saco Rivers), and only one Atlantic sturgeon has been observed and documented in a fish lift (at the Holyoke Dam in the Connecticut River (ASSRT 2007)).

The Maryland Reward Program relied upon reports of Atlantic sturgeon incidentally caught in fishing gear. The Program operated when directed fishing for, and incidental capture of, Atlantic sturgeon was prohibited and when abundance of Atlantic sturgeon was unknown and estimated to be low (thus later necessitating listing under the ESA). The lack of reported captures of Atlantic sturgeon in the Susquehanna can be explained by any number of factors including whether: Fishing was occurring in the Susquehanna when Atlantic sturgeon were present, the gear type fished was conducive to catching Atlantic sturgeon, or the fisherman reported the capture. Similarly, to assess whether the absence of USFWS tagging database records for Atlantic sturgeon captures in the Susquehanna reflects absence of Atlantic sturgeon in the Susquehanna River, a measure of the amount of effort to search for, capture, and tag Atlantic sturgeon in the Susquehanna River must be provided. Based on the best scientific information available, there was no directed effort to search for, capture, and tag Atlantic sturgeon in the Susquehanna River. Therefore, the absence of records in the USFWS tagging database does not

inform the presence or absence of Atlantic sturgeon in the river.

The lack of evidence for Atlantic sturgeon presence in the Susquehanna based on the scientific studies or recreational fishing in the river is more likely the result of methods and gear that do not effectively capture sturgeon. Sturgeon tend to sink rather than float when exposed to electroshocking (Moser *et al.*, 2000). Electroshocking conducted to retrieve other fish species often does not result in detection of Atlantic sturgeon because the electric current may only penetrate a few feet from the surface of the water and not reach the bottom where sturgeon are most likely to occur. Although some sturgeon have been detected during electrofishing for other species, electroshocking is not an effective means for detecting sturgeon presence. Gillnet gear is only effective when selective for the size of sturgeon present, and sturgeon can get snagged on recreational hook gear but do not typically take a hook. Therefore, creel surveys of recreational fisheries are unlikely to provide evidence of sturgeon presence, particularly when the recreational fisheries are targeting fish species dissimilar to sturgeons (*e.g.*, in size, feeding characteristics).

Since the listing of the Chesapeake Bay DPS in 2012, increased effort to detect Atlantic sturgeon in the Pamunkey, Nanticoke, and Rappahannock Rivers has led to the discovery of Atlantic sturgeon spawning populations and sturgeon presence that were undetected before the listing. These include a spawning population in the Pamunkey River (Hager *et al.*, 2014; Kahn *et al.*, 2014), a likely spawning population in the Nanticoke River, and detection of Atlantic sturgeon in the Rappahannock River.

*Comment 2:* An industry trade group stated we inappropriately delineated the “geographical area occupied” by the species as the entire “aquatic habitat (*e.g.*, below the high tide line)” of inland freshwater areas that are currently accessible to the Atlantic sturgeon. These commenters stated that we inappropriately included not just areas where the species has actually been located, but instead we also included wider areas around the species’ occurrences and areas that may be used only temporarily or periodically by the species. They stated that “areas identified as occupied include vast areas where there is no evidence the species even occurs, much less occupies.” The commenter states that the Services’ Consultation Handbook provides that occupied critical habitat is “critical habitat that contains

individuals of the species at the time of the project analysis.”

*Our Response:* Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species’ occurrences (*i.e.*, range), and this may include those areas used throughout all or part of the species’ life cycle, even if they are not used on a regular basis (*e.g.*, migratory corridors, seasonal habitats, and or habitats used periodically, but not solely by vagrant individuals). This is consistent with past critical habitat designations (*e.g.*, Final Rule Designating Critical Habitat for Threatened Elkhorn and Staghorn Corals (73 FR 72210; November 26, 2008): “We have long interpreted ‘geographical area occupied’ in the definition of critical habitat to mean the range of the species at the time of listing (45 FR 13011; February 27, 1980)”). The geographical area occupied as specified in this designation meets the regulatory definition, and our application of the term “geographical area occupied” to Atlantic sturgeon is appropriate. As the court in *Arizona Cattle Growers Ass’n v. Salazar* (606 F.3d 1160, 1164 (9th Cir. 2010)) held, “[d]etermining whether a species uses an area with sufficient regularity that it is ‘occupied’ is a highly contextual and fact-dependent inquiry. Cf. *Cape Hatteras Access Pres. Alliance v. United States DOI*, 344 F. Supp. 2d 108, 119–20 (D.D.C. 2004). Relevant factors may include how often the area is used, how the species uses the area, the necessity of the area for the species’ conservation, species characteristics such as degree of mobility or migration, and any other factors that may bear on the inquiry.” In claiming that the 1998 Consultation Handbook provides that occupied critical habitat is that which is occupied by individuals of the species at the time of a project analysis, the commenter did not include the entire discussion about occupied critical habitat. As we explained more fully in our Handbook, “[a] species does not have to occupy critical habitat throughout the year for the habitat to be considered occupied (*e.g.* migratory birds).” The court in *Arizona Cattle Growers* cited this language as appropriately recognizing that “a species need not be present continuously for habitat to be considered “occupied.” 606 F.3d at 1165. The court rejected a narrow interpretation of “occupied” based solely on documented “residence” of individual animals, holding that “[w]here data are inconclusive or where habitat is used on a sporadic basis, allowing the FWS to designate as

‘occupied’ habitat where the species is likely to be found promotes the ESA’s conservation goals and comports with the ESA’s policy of “institutionalized caution” (*Id.* at 1166–1167), and that “[t]he fact that a member of the species is not present in an area at a given instant does not mean the area is suitable only for future occupancy if the species regularly uses the area” (*Id.* at 1167).

For Atlantic sturgeon, we identified the geographical area occupied based on the species’ well-known anadromous life history, including returning to natal rivers to spawn, spawning behaviors, and habitat common to sturgeon species and verified for Atlantic sturgeon, as well as the need to protect spawning and reproductive habitat for population growth and conservation of the species, among other factors. Some portion of each river population returns to its natal river to spawn every year, and if spawning occurs and is successful, young sturgeon use the natal river to forage, develop and mature every year.

*Comment 3:* A state agency stated there may be habitat features conducive for Atlantic sturgeon reproduction and recruitment in the Piscataqua, Salmon Falls, and Cocheco Rivers, but there was no evidence that Atlantic sturgeon have used New Hampshire estuaries and coastal rivers as spawning and nursery habitat from at least 35 years of surveys, studies, etc. The commenter stated that recent evidence from acoustical tagging (Micah Kieffer, USGS, personal communication, as cited in the comment) leads to the conclusion that sturgeons spend only brief periods in the Piscataqua River/Great Bay system during longer movements between the Merrimack and Kennebec Rivers. A fisherman similarly stated that in all of his fishing trips in the Piscataqua River over the course of 20-plus years, he had never encountered Atlantic sturgeon in the Piscataqua River, and he does not believe that Atlantic sturgeon spawning or juvenile rearing occurs in the Piscataqua, Salmon Falls, and Cocheco Rivers.

*Our Response:* We disagree with these commenters’ assertions that Atlantic sturgeon do not occur in these waterbodies. The Piscataqua River as well as the Cocheco and Salmon Falls Rivers downriver of their respective lowermost dams are part of the geographical area occupied by Atlantic sturgeon. Recent evidence of their presence includes detection of tagged Atlantic sturgeon (M.Kieffer, USGS, pers. comm.). Because the number of tagged Atlantic sturgeon represents only a fraction of the total number of sturgeon, and receivers for detecting

tags are not in the rivers throughout the year, the number of Atlantic sturgeon detected in the Piscataqua is very likely less than the total number of Atlantic sturgeon that actually occur in the Piscataqua and as far upriver as the lowermost dams of the Cocheco and Salmon Falls Rivers.

We identified the Piscataqua River and portions of the Salmon Falls and Cocheco Rivers as a potential critical habitat area for the Gulf of Maine DPS because the physical features are present. We considered whether the identified area was essential to the conservation of the Gulf of Maine DPS and concluded that it was, given the capture of a large female Atlantic sturgeon with eggs, at the head-of-tide in the Salmon Falls River in South Berwick, Maine on June 18, 1990, thus demonstrating behavior consistent with spawning was occurring in the system. We also took into consideration the limited number of other rivers with spawning and rearing habitat in the Gulf of Maine DPS, the continuing threats to the DPS, the threats to the features of critical habitat, and the uncertainty for how much spawning and rearing habitat is necessary to recover the Gulf of Maine DPS. Together, this information supports our conclusion that the Piscataqua River, and portions of the Salmon Falls and Cocheco Rivers, are part of the geographical area occupied by the Gulf of Maine DPS and these areas are essential to the conservation of the Gulf of Maine DPS.

We are not surprised that there have been very few incidental captures of Atlantic sturgeon in fisheries or research surveys and studies conducted in the Piscataqua River. We know from other river systems that capture of any of the Atlantic sturgeon life stages can be difficult even when the proper gear for capturing Atlantic sturgeon is used, and used at the time and in the area where Atlantic sturgeon are likely to occur. Atlantic sturgeon populations in a number of rivers were considered extirpated at one point, only later to find that genetically unique populations were present (*e.g.*, the James River and York River systems, the Connecticut River, the Nanticoke River, and Marshyhope Creek).

*Comment 4:* A representative for a power operation on the Hudson River stated that atypical passage or straying is not enough to constitute critical habitat, and critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

*Our Response:* We agree that it is inappropriate to designate the entire area occupied by a DPS as critical

habitat. However, we have not done that for any of the Atlantic sturgeon DPSs. The geographical area occupied by the New York Bight DPS of Atlantic sturgeon is a broad area that includes the Hudson River as far upriver as the Federal Dam near Albany, NY. The New York Bight DPS consists of all Atlantic sturgeon spawned in the watersheds that drain into coastal waters, including Long Island Sound, the New York Bight, and Delaware Bay, from Chatham, Massachusetts to the Delaware-Maryland border on Fenwick Island. The range of the DPS in marine waters extends from Labrador, Canada to Cape Canaveral, Florida, United States. The area of the Hudson River that we are designating as critical habitat is, therefore, a specific area within the much broader geographical area occupied by the DPS.

#### Comments on Physical or Biological Features (PBFs)

*Comment 5:* A commenter stated the critical habitat designation for Atlantic sturgeon fails to identify any in-river habitats that are important aggregation areas for Atlantic sturgeon. They also stated that we designated in-river habitats where sturgeon congregate, presumably for resting and energy conservation, for both the southern DPS of green sturgeon, and for Gulf sturgeon, and it is likely that Atlantic sturgeon have a similar habitat requirement.

*Our Response:* While there are similarities between all sturgeon species, there are also differences. The proposed rule and the Impacts Analysis and Biological Information Source Document summarized the literature describing spawning behavior for male and female Atlantic sturgeon. Briefly, male Atlantic sturgeon in spawning condition have been observed to stage in more saline waters of the coastal estuary before moving upriver once the water temperature reaches approximately 6 °C (43 °F). They may spend weeks moving upstream and downstream of the presumed spawning area(s) before moving back downriver to the lower estuary and residing there until outmigration in the fall (Smith *et al.*, 1982; Dovel and Berggren, 1983; Smith, 1985; Bain, 1997; Bain *et al.*, 2000; Collins *et al.*, 2000; Hatin *et al.*, 2002; Greene *et al.*, 2009; Balazik *et al.*, 2012; Breece *et al.*, 2013). In contrast, spawning females move upriver when temperatures are closer to 12 to 13 °C (54 to 55 °F), return downriver relatively quickly, and may leave the estuary and travel to other coastal estuaries until outmigration to marine waters in the fall (Smith *et al.*, 1982; Dovel and Berggren, 1983; Smith, 1985; Bain, 1997; Bain *et*

*al.*, 2000; Collins *et al.*, 2000; Greene *et al.*, 2009; Balazik *et al.*, 2012; Breece *et al.*, 2013).

The use of telemetry tags for Atlantic sturgeon and more widespread use of receiver arrays has provided new information on Atlantic sturgeon spawning behavior and whether or when staging occurs. In the James River, some males moved straight to the hypothesized spawning ground without any apparent staging period while others occurred downriver in brackish water during the summer before moving upstream in August or early September; still others occurred farther upriver for a period of time before the spawning period (Balazik and Musick, 2015). Given the various movement patterns, it is not clear to what extent staging occurs or, for those fish that do appear to stage, whether it is essential for successful reproduction. Therefore, we have not included specific staging areas as a physical or biological feature of Atlantic sturgeon critical habitat. However, we recognize new research may lead to better identification regarding whether, where, and when Atlantic sturgeon stage. Therefore, the feature addressing access includes open passage between the river mouth and spawning sites to support life history needs associated with reproduction such as staging, resting, or holding of spawning condition adults.

*Comment 6:* Two commenters provided information on the presence of Atlantic sturgeon in the Hudson River and in Delaware Bay in proximity to sand waves, postulating that sand wave habitat provides the same function as deep holes provide for green and Gulf sturgeon, allowing Atlantic sturgeon to rest and feed during the spawning season. According to the commenters, in the Hudson River, sand waves were found in proximity to the Atlantic sturgeon spawning areas. Side scan sonar showed a high density of spawning size Atlantic sturgeon in sand wave habitat and no sturgeon in sand habitat without waves. A gill net set in proximity to the sand wave habitat had high catch rates of Atlantic sturgeon. Similarly, in the Delaware Bay, telemetry tagged Atlantic sturgeon were detected in high density in a relatively small area (18.8 acres) within, and bordering sand wave habitat. The commenters point out that habitat that provides for rest or cover has been identified as an essential feature for other fish species.

*Our Response:* The commenters provide new, intriguing information for a possible association between Atlantic sturgeon and sand wave habitat. When designating critical habitat, we do not

have to know exactly why the listed species occurs in an area. We do, however, need to identify physical or biological features that support the life history needs of the species. The commenters postulate that the sand waves provide resting and feeding areas for Atlantic sturgeon during spawning and feeding in the lower estuary. However, no information was provided to support this theory and the literature does not point toward evidence of feeding or resting during spawning. On the contrary, available references suggest female Atlantic sturgeon make rapid upriver and downriver movements during spawning and can completely leave the spawning estuary and travel to other estuarine environments, presumably for foraging. Males move upriver and downriver of the spawning area during the spawning season, and then move downriver at the end of the spawning season presumably to rest and forage before leaving the spawning estuary in the fall. At this time, we do not have sufficient information to determine what life history needs sand waves may support.

Sand waves are a common feature of the Hudson River and Delaware Bay as well as other rivers and bays (*e.g.*, see information for the Delaware Bay Benthic Mapping Project at <http://www.dnrec.delaware.gov/coastal/dnerr/documents/benthic4plet.pdf>, and Levin *et al.*, 1992). The mapping images provided by the commenter for the Hudson River depict dynamic wave habitat and approximate spawning area for Atlantic sturgeon. Wave habitat is depicted as occurring in a number of areas. Some of these are in proximity to spawning areas and some are not. Similarly, the information provided by the commenter for Delaware Bay depicts sand wave habitat in proximity to an observed aggregation of Atlantic sturgeon. However, no information is provided for Atlantic sturgeon presence in other areas of the Bay where sand wave habitat also occurs and does not occur. Therefore, the information provided and the other available information (*i.e.*, published literature) do not support the commenter's position that sand waves in the Hudson River and Delaware Bay support the life history needs of the New York Bight DPS, and we have not included sand waves as a physical or biological feature of critical habitat for the New York Bight DPS of Atlantic sturgeon.

*Comment 7:* A commenter stated that while the proposed designation includes soft-bottom habitats for juvenile foraging and development, it fails to expressly recognize the need to protect soft-bottom areas that serve as

resting and feeding habitats for spawning adults. The commenter called upon us to designate soft-bottom areas of the Hudson River for resting and feeding habitats for spawning adults, particularly the areas with sand waves, as critical habitat.

*Our Response:* Soft-bottom areas of the Hudson River are part of the Hudson River critical habitat unit based on the best available scientific information that soft bottom substrates and the transitional salinity zone are needed for juvenile rearing. We are not aware of any information that indicates Atlantic sturgeon spawning adults feed or rest in spawning areas, and the commenters did not provide any such information. Available references indicate spawning female Atlantic sturgeon make rapid upriver movements to spawning areas and quickly depart spawning areas while males move upriver and downriver of the spawning area during the spawning season. If new information on the use of soft substrate by spawning adults becomes available, it will be considered by Federal agencies assessing the effects of proposed actions on the Hudson River critical habitat, and by us as the consulting agency in ESA section 7 consultations. More details of our consideration of sand wave habitat as a physical or biological feature is provided in our response to Comment 6. As noted there, the best scientific information available does not currently support sand waves as a physical or biological feature for Atlantic sturgeon critical habitat.

*Comment 8:* An industry trade group asserted that we must revise our proposed designation to explain how each specific critical habitat unit to be designated contains the PBFs essential to the conservation of the species, suggesting that our approach should be the same as that taken in the designation of critical habitat for the Southern DPS of green sturgeon (74 FR 52300; October 9, 2009). They also suggested our proposed designation is overly broad, improperly used “ephemeral reference points,” and is unsupported by facts or science. The commenters suggested we identified and proposed to designate sweeping areas of occupied habitat that undoubtedly capture many areas that do not have, and likely never will have, physical or biological characteristics essential for the conservation of the species, noting that the designations cover manmade areas that they state are not important to the species, such as “manmade features” below the mean high water mark that cannot or would not be accessed by the species (e.g., outfalls, enclosures, quays) and industrialized areas used by ocean-going

vessels. One commenter suggested it appeared we had merely designated entire rivers from the confluence of the Atlantic Ocean back to either some major tributary or some large impoundment or impassable boundary upstream. Several commenters suggested that areas should not be designated as critical habitat because environmental conditions in certain stretches of rivers are poor and would not support the PBFs. Similarly, other commenters stated we had failed to limit the mapped areas in our proposed designation to areas where we believe the PBFs occur.

*Our Response:* We disagree. As we explained in our final rule, Implementing Changes to the Regulations for Designating Critical Habitat (81 FR 7414; February 11, 2016), in each designation we will identify specific areas of critical habitat “at a scale determined by the Secretary to be appropriate.” We are not required to make determinations at an infinitely fine scale, and we need not determine that each square inch, square yard, acre, or even square mile independently meets the definition of critical habitat. We have discretion to determine the appropriate scale for the analysis, which is informed by, among other things, the life history of the species, the scales at which data are available, and biological or geophysical boundaries (such as watersheds). Our regulations at 50 CFR 424.02 also indicate that PBFs may be ephemeral or dynamic, and we may designate areas with ephemeral or dynamic PBFs if the other applicable requirements of critical habitat designations are met, and if there are documented occurrences that a particular habitat type is in the area and there is a reasonable expectation of that habitat occurring again (81 FR 7414; February 11, 2016). As we acknowledged in the proposed rule, there are large areas of most rivers where data are still lacking. The available data also represent a snapshot in time, and the exact location of a PBF may change over time (e.g., water depth fluctuates seasonally, as well as annually, and even hard substrate may shift position). Although the PBFs may vary even at the same location, if any of the available data regarding a particular PBF fell within the suitable range (e.g., salinity of 0–0.5 ppt or hard substrate [gravel, cobble, etc.]), we considered that the essential PBF is present in the area. When data were not available for certain rivers or portions of occupied rivers, we used our general knowledge of Atlantic sturgeon spawning and applied river-specific information to

determine the location of PBFs essential to spawning. Smaller specific areas within each unit could not be identified because the submerged nature of the essential PBF, the limits of available information on the distribution of the PBFs, the varying distribution of the PBFs from time to time, and limits on mapping methodologies make it infeasible to define the specific areas containing the PBFs more finely than described in this rule. The presence of manmade structures that do not provide the PBFs within a specific area being designated as critical habitat does not render the boundaries of the specific area invalid; we have explained that the PBFs must be in a project area for it to function as critical habitat. While we agree that manmade structures themselves (e.g., an outfall pipe, dock, pier, navigational buoy) cannot and do not contain the PBFs and therefore are not part of the critical habitat designation, the mere presence of such a manmade structure in an area does not mean that the area does not contain one or more PBFs or that these areas are not important to the species. We have clarified the point in regulatory text that manmade features that do not provide the PBFs are not essential to the species and are not included in critical habitat. We believe our designation is consistent with our regulations and based on the best scientific information available for Atlantic sturgeon DPSs.

*Comment 9:* Two commenters stated we failed to consider in a complete and meaningful way, the role certain aspects of aquatic chemistry play on determining whether a river has suitable spawning habitat. The commenters suggested we should have considered pH and levels of calcium and magnesium ions. They suggest these chemical characteristics can determine whether Atlantic sturgeon will spawn in a particular reach of river, and thus, it is crucial that these features are given special management consideration in future section 7 consultations and, if need be, protected accordingly.

*Our Response:* The literature on Atlantic sturgeon has not typically reported pH, calcium, and magnesium levels for rivers where Atlantic sturgeon spawn. For example, in their review of essential Atlantic sturgeon spawning habitat in Virginia, Bushnoe *et al.* (2005) reported pH for waters of the James, York, Pamunkey, Mattaponi, and Rappahannock Rivers where they anticipated Atlantic sturgeon spawning could occur. However, with respect to other water parameters, they noted available water quality data for the James River measured calcium carbonate concentration, not calcium

concentration, as an indicator of hardness. Therefore, they could not directly compare the measured calcium carbonate concentrations with reported calcium concentrations measured in other rivers where Atlantic sturgeon spawn. Conductivity was measured in the Rappahannock River, but neither hardness or conductivity measurements were available for the Pamunkey River or Mattaponi River. Recent publications regarding Atlantic sturgeon spawning for the Chesapeake Bay DPS of Atlantic sturgeon (e.g., Balazik *et al.*, 2012; Hager *et al.*, 2014) do not include measures of water pH, calcium, or magnesium in spawning areas.

We considered the information provided by the commenters in the report they provided with their comments and references cited within that report. Unfortunately, the report itself does not provide any new information regarding pH and levels of calcium and magnesium ions. The report mentions a 1976 study that indicated spawning of the European Atlantic sturgeon had been successful in the Rione River of the Russian Caucasus when the pH ranged from 7.4–7.6. The report also states that a pH level of 6.8–7.7 is acceptable to various species of sturgeon (Holcik *et al.*, 1989), but continues to state there is no specific research on pH levels appropriate for Atlantic sturgeon. Beyond this, no further conclusions regarding pH and Atlantic sturgeon were made. The provided report also briefly mentioned calcium and magnesium ions. It states: “Salinity was 0.4 psu, which is on the high side of Ca[alcium] and M[magnesium] ion levels present in rivers where Gulf Sturgeon spawn successfully (Ken Sulak, pers. comm. to B. Kynard, 15 Aug 2016). Specific acceptable levels of salinity for gametes and eggs of Atlantic sturgeon are not known and are not discussed by the Atlantic Sturgeon Status Review Team (ASSRT 2007) or in the preamble to NMFS’ proposed designation. However, based on Gulf Sturgeon tolerance and Cherr and Clark (1985), the levels of Ca[alcium] and M[magnesium] ions in the Ocklawaha River should not be a problem for egg fertilization or egg rearing of sturgeons.” Beyond this discussion of calcium and magnesium, no further information is provided regarding the relationship of these ions to successful spawning of Atlantic sturgeon. The report provided by the commenters also cited additional literature that may discuss these water quality parameters. However, we attempted to acquire these references and were unable to because they were

not readily available to the public. Thus, we determined there was not enough information for us to include the specific water quality parameters mentioned by the commenter as essential PBFs for any DPS of Atlantic sturgeon.

*Comment 10:* An association of municipal wastewater agencies stated that the preamble of the proposed rule for the Gulf of Maine, New York Bight, and Chesapeake Bay DPS properly explains that “specific oxygen concentration and temperature values are provided as examples and guidance” but the proposed rule omits this key language from the regulatory text. The commenter believes the regulatory text should include this explanation or, alternatively, the examples of the water feature characteristics should be removed from the final rule or be made more specific to the spawning and subsequent stages of development of the Atlantic sturgeon in the specific habitats described in the proposed rule.

*Our Response:* We do not provide explanations of the regulations in the regulatory text. The use of “e.g.” in the regulatory text informs the reader that the DO level and water temperature are provided only as guidance, and these are not the only values for either DO or temperature that are suitable for all Atlantic sturgeon age classes addressed by the PBFs.

*Comment 11:* A commenter stated the proposed rule for the Carolina and South Atlantic DPSs also frames the features as “optimal” and “suboptimal” and recommended that we “revise Part (a)(4)(iii) of the proposed rule for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs” to frame the features as optimal and suboptimal.

*Our Response:* Upon reading the comment, we realized that framing the example of dissolved oxygen and temperature values as “optimal” and “suboptimal” can be misinterpreted as establishing specific, exclusive values. Since these values were meant to be examples of the numerous possible combinations of dissolved oxygen, water temperature, and salinity essential to Atlantic sturgeon conservation, we did not revise the language for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon to frame the features as “optimal” and “suboptimal.” This is because there is not one single DO level or temperature range that is best for Atlantic sturgeon in terms of habitat avoidance. We did revise the language for the Carolina and South Atlantic DPSs of Atlantic sturgeon by replacing the terms “optimal” and “suboptimal.” The new phrases convey that the

examples provide context, but do not establish static, exclusive values for the essential physical feature.

The dissolved oxygen levels and water temperature values set forth in the proposed rules for the Atlantic Sturgeon DPSs were examples based on the best available information for conditions in different rivers occupied by Atlantic sturgeon and observed responses of sturgeon to these variables. Water quality factors of temperature, salinity and dissolved oxygen are inter-related environmental variables. Dissolved oxygen concentrations in water can fluctuate given a number of factors including water temperature (e.g., cold water holds more oxygen than warm water) and salinity (e.g., the amount of oxygen that can dissolve in water decreases as salinity increases). This means that, for example, the dissolved oxygen levels that support growth and development will be different at different combinations of water temperature and salinity. Similarly, the dissolved oxygen levels that we would expect Atlantic sturgeon to avoid would also vary depending on the particular water temperature and salinity. As dissolved oxygen tolerance changes with age, the conditions that support growth and development and likewise, the dissolved oxygen levels that would be avoided, change. This combination of factors makes it such that we cannot identify a single set of dissolved oxygen, water temperature and/or salinity conditions as optimal or suboptimal for any of the DPSs.

Like salinity and dissolved oxygen, water temperature fluctuates in the dynamic rivers and estuaries used by Atlantic sturgeon. The scientific literature for Atlantic sturgeon does not always include the water temperature where Atlantic sturgeon are detected or captured. There may also be differences in temperature tolerance of Atlantic sturgeon that originate from different rivers, and differences in temperature tolerance within the same river depending on the life stage. Therefore, while we generally know the ranges of water temperature and dissolved oxygen in which Atlantic sturgeon occur, we cannot identify a single “best” water temperature or dissolved oxygen level for all Atlantic sturgeon, in all rivers, under all circumstances.

We stated in the preamble of the proposed rule for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs that, “Specific areas designated as critical habitat based on the four features are not expected to have water with oxygen concentration of 6 mg/L and the specific water temperatures at all times and within all parts of the

area.” We similarly stated for the example in the proposed rule for the Carolina and South Atlantic DPSs of Atlantic sturgeon that, “Appropriate temperature and oxygen values will vary interdependently, and depending on salinity in a particular habitat.” Thus, we believe the terms “optimal” and “suboptimal” inadvertently conveyed a different meaning.

*Comment 12:* A commenter recommended that we revise the guidance for DO concentrations and temperature values provided in the proposed rule to be consistent with existing U.S. Environmental Protection Agency Clean Water Act water quality criteria applicable to the Chesapeake Bay Watershed. The commenter further stated the proposed regulatory language establishing a DO concentration of 6 mg/L and a maximum temperature of 30 °C for juvenile rearing habitat is inconsistent with existing water quality criteria. The commenter also stated that the proposed rule should evaluate and address existing conditions in the waters for the features which will dictate where to designate critical habitat. This framework will provide a necessary reference for both the agency and commenters from which the true implications of the proposed habitat components can be evaluated. For example, the proposed rule provides that temperature between 13 °C to 26 °C is optimal for spawning habitat, but there is no indication of how that temperature range compares to the ambient temperature of the waters themselves. In other words, does the proposed critical habitat meet the habitat component for temperature most of the time, some of the time, etc. Second, the proposed rule must include a natural condition provision to reflect natural instream temperature and DO levels which are outside of the temperature and DO features in the proposed rule. Where ambient temperature and/or DO is outside of these levels, the natural condition must control. Any regulatory requirements must be targeted toward the natural condition and not critical temperature/dissolved oxygen elements that are not naturally present.

*Our Response:* The water quality features are a physical feature essential to the corresponding Atlantic sturgeon DPSs. As discussed in our response to Comment 11, because DO and temperature vary interdependently based on local environmental conditions, the DO and temperature values provided in the proposed rules are provided as examples only. For example, the earliest life stages are the most sensitive to DO levels. Therefore, earlier life stages (e.g.,

juveniles) may avoid areas based on one DO level while older life stages (e.g., subadults or adults) may avoid areas based on a different DO level. The example provided in the regulatory text in the proposed rule for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon is just one example. We have not included a framework for each critical habitat area or a natural condition provision. However, we agree that these should be considered when Federal agencies are determining whether a proposed Federal agency action may affect designated critical habitat for the Atlantic sturgeon DPSs, and considered by us when we are consulting on Federal agency actions. See our responses to Comments 83, 84 and 85 for more information on the water quality feature for the Carolina and South Atlantic DPSs of Atlantic sturgeon.

#### Comments on Special Management Considerations or Protection

*Comment 13:* A commenter stated the proposal does not specify what “special management considerations or protections” are appropriate or necessary for the conservation of Atlantic sturgeon in all and/or each specific DPS. Given the areal extent of the proposed designation and the potential for consultation on numerous and varied actions (water use, wastewater discharges, dredging, etc.), the final rule needs to be more specific regarding the special management considerations or protections that may be required for all or specific DPSs.

*Our Response:* Special management considerations or protections are the methods or procedures useful in protecting the PBFs essential to conservation of listed species. We provided information in the proposed rule for why the PBFs essential to the conservation of each DPS may require special management or protection. This provision of a designation does not establish measures that may be recommended or required during section 7 consultation, such as RPMs and terms and conditions. Our impacts analyses and 4(b)(2) report describe the types of measures that might be required to address adverse impacts to the PBFs for federal actions expected to require consultation.

*Comment 14:* An industry trade group believes we failed to provide any assessment of current management or protections in place and whether those are adequate for the conservation of the Atlantic sturgeon. The commenters claim we must consider whether any of the proposed critical habitat units are

presently under special management or protection for Atlantic sturgeon. The commenters acknowledge we have identified a number of initiatives that could protect Atlantic sturgeon but believe we must actually assess these initiatives to determine whether they are sufficient and determine what further management actions may benefit from critical habitat designation. The commenters go on to state we should consider each feature and specific area proposed and assess current management measures in place to make an actual determination as to whether special management may be needed in the reasonably foreseeable future, and if so, what that management would be, and how the critical habitat designation would further that management. The commenters conclude that our discussion of special management considerations is limited to general discussion regarding how barriers, water withdrawals, and dredging can generally affect water flow, quality, and depth and/or alter hard substrate, and that we have made non-specific assertions that special management for the essential PBFs may be required “as a result of global climate change.”

*Our Response:* We disagree. When determining whether PBFs may require special management considerations or protection, we do not base our decisions on whether management is currently in place or whether that management is adequate (81 FR 7414; February 11, 2016). In *Center for Biological Diversity v. Norton*, 240 F.Supp. 2d 1090, 1096–1100 (D. AZ, 2003), the court rejected reading the ESA to mean that if adequate management or protections are already in place, then an area cannot meet the definition of critical habitat because special management considerations or protections are not required (“Defendant’s construction of ‘critical habitat’ also adds the term ‘additional’ to the statute. As Defendant stated in its final rule, ‘Additional special management is not required if adequate management or protection is already in place. . . .’ There is absolutely nothing in § 1532, or its implementing regulations, to support Defendant’s inclusion of ‘additional.’ As such, Defendant’s construction of the ‘critical habitat’ definition is impermissible and contrary to law.”) Additionally, we are not required to determine if a PBF currently requires special management considerations, or to determine what that management would be, and how critical habitat designation would further that management. We are only required to make a determination that a PBF may require special management



considerations or protection (81 FR 7414; February 11, 2016). Consequently, we assessed the need for special management considerations for each PBF in the proposed rule and identified numerous actions or natural factors that could adversely impact each PBF, as is required by the ESA (“Because the emphasis in the requirement is on the word ‘may,’ the evidence shown by the Service supports the reasonable conclusion that *some* special management considerations or protection may be needed in the future to protect the sea ice habitat PCE [primary constituent element]. However, neither the Service nor the ESA have to be the vehicles by which the procedures or actions involved in the considerations or protection are accomplished. The Service has shown that someday, not necessarily at this time, such considerations or protection *may* be required. In other words, the Service has shown that it is within the realm of possibility that such considerations or protection may be needed now or in the future. Furthermore, the Service does not have to identify the source of such considerations or protection, merely that the considerations or protection may be necessary in the future. For example, the evidence in the record showing that sea ice is melting and that it will continue to melt in the future, perhaps at an accelerated rate, is more than enough proof that protection *may* be needed at some point” (*Alaska Oil and Gas Ass’n v. Salazar*, 916 F. Supp. 2d 974, 990–992 (D. AK 2013), (Reversed on other grounds and remanded by *Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544 (9th Cir. 2016))).

We also disagree with the commenters’ characterization that we made non-specific assertions regarding the special management needs of the PBFs that may be necessary as a result of global climate change. The proposed rule specifically identifies the impact from global climate change’s impacts to water temperature and DO, as potential threats to the survival and recovery of Atlantic sturgeon in the southeastern United States.

*Comment 15:* A commenter asked if the objective of the special management considerations or protections is to create optimal habitat, specifically, to create the physical features described in § 226.225(a)(1) of the proposed rule, even if those features do not currently exist.

*Our Response:* The answer to this question is no. Critical habitat is based on the presence of PBFs essential to the conservation of the listed species and which may require special management

or protection. We only designate critical habitat when the PBFs essential to conservation of the listed species may require special management considerations or protections. If we identify PBFs essential to the listed species but those features do not require special management or protection, then we do not designate critical habitat based on those PBFs.

The purpose of designating critical habitat is to prevent the destruction or adverse modification of the habitat as a result of Federal activities. Section 7(a)(1) of the ESA requires Federal agencies to use their authorities in furtherance of the purposes of the ESA (*i.e.*, aid in the conservation of listed species). However, there is not a requirement that Federal agency actions improve or create habitat for ESA-listed species.

*Comment 16:* Commenters requested that we include language to address known, significant, and growing uses that will adversely impact Atlantic sturgeon habitat in the Hudson River.

*Our Response:* For critical habitat designations we identify activities that may necessitate special management or protection of the PBFs. We have provided this information for the PBFs identified for the critical habitat for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs. We cannot foresee every activity that would necessitate special management or protection of the PBFs. However, we believe the list of activities provided by us is comprehensive enough to provide adequate notice on which activities may affect critical habitat. The impact of Federal agency actions on the critical habitat features are assessed through ESA section 7 consultation.

*Comment 17:* One commenter requested that we include “clear guidance for considering the effects of a changing climate on critical habitat designation for species recovery in the final rule.” They requested we consider “projected changes to salinity, temperature and DO, including changes in sea level rise.” They further requested that we document the extent that climate change was considered when assessing the need for the inclusion of currently unoccupied habitat in the final rule.

*Our Response:* We acknowledge climate change is likely a factor contributing to the possible need for special management considerations or protection for the PBFs, and we recognize that climate change may affect the availability of some PBFs to sturgeon in some areas. As discussed in the response to comments for our regulations, Implementing Changes to

the Regulations for Designating Critical Habitat (81 FR 7414; 7426; February 11, 2016), in those circumstances where the best scientific data available indicate that a species may be shifting habitats or habitat use, we may include specific areas accommodating these changes in a designation, provided we can explain why the areas meet the definition of critical habitat. No information is currently available, and none was provided by the commenter, that indicates any of the Atlantic sturgeon DPSs may be shifting habitats or habitat use in response to the effects of climate change. For example, Breece *et al.* (2016) projected how habitat use by adult Atlantic sturgeon of the Delaware River could shift in response to climate change, but did not provide evidence that Atlantic sturgeon are, or may be, shifting habitats or habitat use in the Delaware River as a result of climate change. We are not aware of other publications that indicate that any DPS of Atlantic sturgeon is shifting habitats or habitat use in response to the effects of climate change.

The commenter did not include any riverine-specific information regarding the areal influence of changes to salinity, temperature and DO, or sea level rise. We are designating as critical habitat the river areas that capture the varying distribution of the PBFs and that are appropriate to encompass the habitat essential for the conservation of the species. The designation includes all habitat required for reproduction and recruitment essential for the recovery of the DPSs, and reflects consideration of in-river changes that may result from climate change (*e.g.*, temperature, salt-water intrusion, etc.). We did consider the presence of the PBFs in each river, and the variability in the salt wedge seasonally and annually that influences where the Atlantic sturgeon life stages occur in the estuary, and we accommodated for these shifts in the critical habitat designation.

We considered whether any designations of unoccupied habitat were essential for the conservation of the Gulf of Maine, New York Bight or Chesapeake Bay DPSs because of the function they are likely to serve as climate changes, and we determined there were no such areas. We will continue to review Atlantic sturgeon habitat needs as new information about potential effects from climate change becomes available. Consistent with NMFS guidance in the context of individual section 7 consultations, we will consider how climate change interacts with a proposed action’s effects on the PBFs in assessing an action’s impacts on the critical habitat’s

ability to support the species' recovery. These analyses will necessarily be case-by-case and dependent on the action, environmental conditions at the time in the affected river (including projected changes from climate change, if relevant), and the status of the species.

*Comment 18:* An industry trade group indicated we failed to map potential threats to Atlantic sturgeon (e.g., manmade structures, dredging areas). This industry trade group also noted that we did not include an exception from critical habitat for manmade structures in the regulatory language for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs.

*Our Response:* Threats to the species were identified in both the Listing Rules (77 FR 5880; February 6, 2012 and 77 FR 5914; February 6, 2012) and the Status Review (ASSRT, 2007). There is no requirement to map the existence of threats to the species in a critical habitat designation. Information on activities that may affect critical habitat is properly characterized in the impact analyses. We appreciate the comment noting that we did not include an exception from critical habitat for manmade structures that do not provide the PBFs for northeastern DPSs. This was an oversight, as we did include the exception for the Carolina and South Atlantic DPSs. We have now included and clarified this exception for all five DPSs.

#### Comments on Designation of Unoccupied Critical Habitat

*Comment 19:* A commenter asked that the final rules expand on the documentation for upstream and downstream critical habitat boundaries of the critical habitat units and identify unoccupied habitat essential to the conservation of a particular DPS. The commenter noted that many of the upstream critical habitat boundaries are defined by dams or locks, and that presence of a barrier, in and of itself, should not constitute the upstream extent of critical habitat. As one of the objectives of the rule is to "increase the abundance of each DPS by facilitating increased successful reproduction and recruitment to the marine environment," the commenter suggested revisiting consideration of these reaches as essential, but currently unoccupied habitat.

*Our Response:* Section 3(5)(A) of the ESA allows for consideration and inclusion of unoccupied habitat in a critical habitat designation if such habitat is essential for conservation of the species. The 1998 and 2007 status reviews for Atlantic sturgeon, ASMFC's 2009 review of Atlantic coast

diadromous fish habitat, and the 2012 listing rule for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs (77 FR 5880; February 6, 2012) of Atlantic sturgeon reviewed historical and current use of rivers within the range of each DPS. We have considered the life history, status, and conservation needs information in these reviews, the cited literature, and new literature for each DPS (e.g., Wippelhauser and Squiers, 2015 for the Gulf of Maine DPS; Breece *et al.*, 2013 for the New York Bight DPS; Hager *et al.*, 2014 for the Chesapeake Bay DPS). We have concluded that unoccupied habitat is not essential to the recovery of the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs because Atlantic sturgeon reproduction and rearing habitat for each DPS is available downriver of dams or in rivers that are not dammed, and the boundaries of the critical habitat areas take into consideration the seasonal and annual variations in the location of the salt wedge that influences where Atlantic sturgeon life stages occur within the estuary as well as any potential shifts that may occur as a result of climate change. Therefore, we are not designating unoccupied habitat for these DPSs.

We agree that presence of a barrier does not necessarily constitute the upstream extent of critical habitat; however, in the case of the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon, the barriers included to denote the upstream limit of the designation are the same designators as the upstream limit of the area occupied and therefore are appropriate in this case. We recognize that the upstream limits of the area occupied at the time of listing is not necessarily the historical upstream limit (e.g., there is historical reference to the presence of sturgeon below Mohawk Falls which is upstream of the modern-day upstream limit of Atlantic sturgeon in the Hudson River); however, we have determined that currently unoccupied habitat is not essential for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs. Additionally, barriers that occur at a critical habitat boundary provide an easily recognizable landmark for where critical habitat begins or ends. Non-ephemeral reference points (e.g., dams, bridges) can be used in a textual description of the boundaries of critical habitat.

#### Comments Designating Specific River Units or River Areas

*Comment 20:* Several environmental organizations stated that we incorrectly claimed that we could not designate

estuarine or marine areas as critical habitat due to insufficient data and that the best available scientific information supports identification of PBFs in estuarine and marine environments that are essential to Atlantic sturgeon conservation. These commenters said that a growing body of research has identified critical feeding and seasonal aggregation sites, and that the sites identified to date should be designated as critical habitat. The commenters stated there is a scientific consensus that Atlantic sturgeon use marine waters of particular depths as migration corridors; the commenters asserted that available information supports the contention that all five DPSs use the same narrow migration corridor and known aggregation sites. The commenters stated that water depth, available prey, substrates, temperature, salinity and seascapes are factors correlated with, and that influence, Atlantic sturgeon use of specific estuarine and marine habitats as feeding or seasonal (winter, summer) aggregations, and migratory corridors, and that these features may require special management considerations or protection. The commenters stated that our regulations, Implementing Changes to the Regulations for Designating Critical Habitat, (81 FR 7414; February 11, 2016) support the use of generally-defined PBFs or an ecosystem approach. Finally, the commenters discussed our previous critical habitat designations for green and Gulf sturgeon as valid models for designating estuarine and marine areas as critical habitat for Atlantic sturgeon.

*Our Response:* We reconsidered the information available, but reached the same conclusion that we cannot identify critical habitat for adults or subadults of any of the five Atlantic sturgeon DPSs in marine or nearshore estuarine waters at this time. We agree that the regulatory definition of PBFs is intentionally broad because we cannot predict what species will be listed in the future, and what features that support the life history needs of those species will be necessary for designating their critical habitats. However, as described in the response to comments for our regulations, Implementing Changes to the Regulations for Designating Critical Habitat (81 FR 7414; February 11, 2016), "we need to clearly articulate in our proposed and final rules designating critical habitat for each species how the essential features relate to the life-history and conservation needs of the species. This type of specificity will be in the individual proposed and final rules designating critical habitat for

each species.” Thus, while prior designations for other species may provide important background, critical habitat designations are specific to particular species, their life history traits, habitat and resource uses, and information available for that species.

Some of the literature available for Atlantic sturgeon uses the term “critical habitat” in reference to areas where Atlantic sturgeon occur. However, the literature is not applying the term “critical habitat” as it is defined in the ESA. Similarly, the word “essential” has been used in the literature, but it is not used in the same context as it is in the critical habitat regulations. The Background of our regulations (81 FR 7414; February 11, 2016) explains that “[t]he purpose of critical habitat is to identify the areas that are essential to the species’ recovery.” The explanation makes clear that critical habitat is the specific area(s) essential to species recovery.

We reviewed the critical habitat designations for the Southern DPS of green sturgeon and for Gulf sturgeon in the event there were similarities in the life history of sturgeon species that could inform the essential PBFs for the Atlantic sturgeon DPSs. Marine waters were designated for Gulf sturgeon and the Southern DPS of green sturgeon based on information that certain marine waters were a migratory/connectivity corridor for subadult and adult sturgeon between estuaries and marine foraging areas. However, unlike the Southern DPS of green sturgeon and Gulf sturgeon, the available information for Atlantic sturgeon foraging in marine waters (Johnson *et al.*, 1997; Dunton, 2014) is inconclusive regarding whether any particular marine waters are essential foraging areas for Atlantic sturgeon, and thus there are no identifiable migratory corridors between specific foraging areas. Furthermore, those sources do not provide the necessary information to allow us to identify what the PBFs associated with potential marine foraging for Atlantic sturgeon might be.

The scientific information available on Atlantic sturgeon forage items does not provide the specificity we need in identifying PBFs that are essential to the DPSs. The available information indicates that Atlantic sturgeon are opportunistic, benthic-cruisers that consume benthic prey over soft (unconsolidated) substrates. Other than being benthic prey, the specific Atlantic sturgeon prey items identified in the literature were common and vary between sites. Therefore, it is not possible to determine if gravel-sand and sand substrate types are essential habitat

features for Atlantic sturgeon prey or, because Atlantic sturgeon are opportunistic foragers, the sturgeon happen to be feeding over these substrate types because they are ubiquitous, and we lack information to define prey, substrates or feeding areas more specifically for Atlantic sturgeon.

We cited in the preamble of the proposed rules the literature that identifies Atlantic sturgeon aggregation areas. The term “aggregation” as it is used in the literature for Atlantic sturgeon is not defined by any particular quantitative measure. The number of areas described in the literature as an “Atlantic sturgeon aggregation area” demonstrates the ubiquitous nature of Atlantic sturgeon in the marine range as well as the liberal use of the term for characterizing the presence of Atlantic sturgeon in an area. For example, the commenters referred to literature identifying Atlantic sturgeon feeding areas in the Bay of Fundy and Long Island Sound. Our background information cited to literature describing other Atlantic sturgeon foraging areas, including areas with mud bottom, gravelly-sand substrate, and sand substrate. Stein *et al.* (2004) noted that sturgeon were most often incidentally captured over gravelly-sand and sand substrate and suggested that their presence was associated with foraging. However, Stein *et al.* (2004) also reflected that the gravel-sand and sand substrate types were the dominant substrate types along the coastline, so it was uncertain if Atlantic sturgeon presence was correlated to the substrate type or if Atlantic sturgeon presence was coincidental to the substrate type.

The commenters referred to Laney *et al.* (2007) as demonstrating that “shallow, nearshore waters off North Carolina are an important winter habitat for Atlantic sturgeon.” The commenters did not provide information for why these particular shallow, nearshore waters are essential to one or more of the Atlantic sturgeon DPSs compared to all shallow, nearshore waters that are accessible to the DPSs. We need to have information to be able to make the connection between species’ presence and presence of one or more PBFs that are essential to the conservation of the species and may require special management or protection. The commenters did not provide, and we could not find, information to distinguish these shallow, nearshore waters from other shallow, nearshore waters, or information that identifies more specific features of these waters. Tagging work by Erickson *et al.* (2011) showed that adult Atlantic sturgeon from the Hudson River move about

within the Mid-Atlantic Bight, occurring as far south as Delaware for the late fall to early winter and then as far south as the area off Chesapeake Bay for the latter part of the winter. The data do not suggest movement from the river to a specific overwintering area where the fish reside throughout the winter. The available information for where Atlantic sturgeon occur in the winter also includes evidence of sturgeon in marine waters off estuaries where they were detected in the fall, sturgeon making long migrations along the coast to southern coastal waters, sturgeon possibly overwintering in an estuary, and at least one sturgeon moving in and out of a Gulf of Maine estuary during the winter (Laney *et al.*, 2007; Dunton *et al.*, 2010; Oliver *et al.*, 2013; Dunton *et al.* 2015; Taylor *et al.* 2016; C. Hager, Chesapeake Scientific, pers. comm.; T. Savoy, CT DEEP, pers. comm.; G. Zydlewski, Univ. of Maine, pers. comm.). Because this information is conflicting, we could not determine whether or where overwintering areas are essential to one or more of the Atlantic sturgeon DPSs.

We cannot designate critical habitat based on the presence of the species alone. Therefore, while we acknowledge there is literature that identifies aggregation areas where Atlantic sturgeon are generally found, it does not provide specificity as to the purpose of the aggregations or the features that support those purposes. Therefore, we do not believe it provides the information we need to meet the statutory and regulatory requirements to designate critical habitat.

The commenters stated that the Atlantic sturgeon DPSs use a narrow migratory corridor within marine waters and we should designate this narrow corridor as critical habitat. The commenters’ characterization of these waters as a “narrow corridor” is subjective. As we described in the preamble for the proposed rules, Atlantic sturgeon generally occur within the 50 m depth contour. However, the literature is not consistent for the depth contour where Atlantic sturgeon occur in the marine environment. Based on fisheries-dependent data for incidental captures of Atlantic sturgeon, Stein *et al.* (2004) described that “peak sturgeon captures along the coast were approximately bracketed by isobaths ranging from 10 to 50 m” while Dunton *et al.*, (2010), using both fisheries-dependent and fisheries-independent data of incidental Atlantic sturgeon captures, concluded that “Atlantic

sturgeon were largely confined to water depths less than 20 meters.” Erickson *et al.* (2011), using location data of tagged Atlantic sturgeon, described the mean range of marine waters where Atlantic sturgeon occurred as 9.9 to 24.4 m depth depending on time of year. Erickson *et al.* also noted differences between fish, with some sturgeon using more shallow waters (5–15 m) and some using deeper waters (35–70 m) compared to the other tagged Atlantic sturgeon. Given these inconsistencies, we could not identify the PBFs that facilitate migration for any of the five DPSs.

The commenters also pointed to the findings of Breece *et al.* (2016) as research that could inform our designation of critical habitat in marine waters, nearshore bays, and sounds. Noting that Atlantic sturgeons’ seasonal coastal migrations are difficult to predict, Breece *et al.* (2016) used ocean color and sea surface temperature recorded during the spring to partition waters of the Delaware Bay and ocean waters off Delaware Bay into six “seascapes,” and tested the hypothesis that these seascapes are predictors of the occurrence of Atlantic sturgeon during their spring migration in the mid-Atlantic. The commenters stated that Seascape E is a physical feature of marine waters that is essential to the Atlantic sturgeon DPSs (*e.g.*, for migrating between estuaries and marine waters and for where Atlantic sturgeon spend most of their life in marine waters) and asked us to designate marine waters as critical habitat for the Atlantic sturgeon DPSs. We considered and cited the Breece *et al.* (2016) study for the information that it provides for Atlantic sturgeon marine distribution. However, we did not conclude that Seascape E was an essential PBF because: (1) The equipment to detect sturgeon was primarily placed in or occurred within Seascape E, and the information was not provided on the presence of Seascape E in other parts of the marine range; and (2) because a clear correlation between what specific PBF(s) is essential to the conservation of the species could not be determined.

The Breece *et al.* (2016) study was temporally and geographically limited in scope relative to the range of the DPSs. Detection data were collected by fixed receivers and by receivers fixed to a glider for the months of April through June, the period of peak Atlantic sturgeon abundance during spring migration (Breece *et al.*, 2016). More than half of the fixed receivers were located in Delaware Bay. The remaining receivers were placed within approximately 20 km of the shoreline along the coast from approximately 30

km (*i.e.*, off New Jersey) and south (*i.e.*, off Maryland) of the mouth of the Bay. The glider mission covered a greater area; within approximately 25 km of the shoreline along a 120 km stretch of coastline between Bethany Beach, Delaware (south of the mouth of the Bay), and Chincoteague, Virginia. While the geographic area covered is large and the time period is when we would expect many Atlantic sturgeon to occur in the areas, this is a small geographic area, relatively mid-range, of the expansive Atlantic sturgeon DPSs’ marine range from Canada to Florida, United States. Breece *et al.* (2016) noted that the variables used to define the seascapes were so dynamic, that the results of the study were presented with respect to an 8-day average of ocean color and sea surface temperature for each seascape. Based on the average, Seascape E was the most prevalent seascape class in the study area, and the equipment to detect the presence of Atlantic sturgeon occurred primarily within Seascape E. Additionally, Breece *et al.* (2016) were unable to determine why Atlantic sturgeon were associated with Seascape E. The authors state: “[f]ull understanding of the processes driving the association of Atlantic Sturgeon to Seascape E is not yet known; however, it appears we can use this global product to estimate spatial occurrence without requiring direct observation of individuals to inform coastal ocean users during spring migration.” Therefore, while potentially useful to resource managers for identifying potential areas of high sturgeon abundance in the Mid-Atlantic Bight region, the information still does not help us understand what, if any, PBFs exist in the area that may be essential to the conservation of the species.

Finally, the commenters stated that Atlantic sturgeon aggregation areas in marine and nearshore estuarine waters should be designated as critical habitat because these require special management and protection as a result of vessel strikes of Atlantic sturgeon from ships using the marine corridors, strikes from turbine blades in tidal estuaries, impingement and entrainment in water intakes, fisheries bycatch, and other threats to the fish including dredging, sand mining, pipeline and other construction, wind farm development, and impaired water quality. However, special management considerations or protection in the context of critical habitat designations are the methods or procedures useful in protecting the PBFs essential to the conservation of the listed species. The

threats described by the commenters are threats to individual Atlantic sturgeon and not their habitat.

*Comment 21:* Several additional environmental organizations, including one that established an online form letter submission from which we received over 1,000 form letters, as well as a representative for New York State Department of Environmental Conservation, and academics, also pointed to the publications by Dunton *et al.* (2015) and Breece *et al.* (2016) and stated that we should designate critical habitat for the Atlantic sturgeon DPSs in marine waters, bays, and sounds.

*Our Response:* Some bays are part of the critical habitat designations. These include Merrymeeting Bay of the Kennebec River critical habitat unit, and Haverstraw Bay of the Hudson River critical habitat unit. Bays that occur between the mouth of the river and the Atlantic Ocean, such as Chesapeake Bay, are not part of the designated critical habitat because we do not have information that these areas contain PBFs that are essential to reproduction and recruitment of the offspring. The available information describes spawning adults as moving into the rivers and either staging in the river for a period of time or immediately moving upriver to spawning areas and, similarly, after spawning, moving downriver and either remaining in the river until outmigration in the fall or leaving immediately to move to other estuarine systems (Savoy and Pacileo, 2003; ASSRT, 2007; Greene *et al.*, 2009; Simpson, 2008; Austin, 2012; Balazik *et al.*, 2012; Breece *et al.*, 2013; Hager *et al.*, 2014; Kahn *et al.*, 2014). Juveniles spend months to years in the natal estuary, moving upriver and downriver with seasonal and annual changes in the salt front to access rearing habitat (*e.g.*, within their preferred salinity range). There is no information that natal juveniles are moving as far downriver as a bay or sound between the river mouth and the ocean, and returning to the natal river without continuing the outmigration to the ocean. Available information from tracking suggests they move downriver through the river estuary, into and through any adjoining bay or sound upon their first outmigration to the ocean. Thus, while soft substrate between the river mouth and spawning sites is essential for successful recruitment, we do not have information that soft substrate in these bays and sounds is essential to recruitment of the offspring to the marine environment. The comments did not provide new information for juvenile use of bays and sounds between the natal river and the ocean.

See also our response to Comment 20, and the biological information for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs in the Impacts Analysis and Biological Information Source Document.

*Comment 22:* A commenter stated that further spatial delineation of the Delaware River critical habitat areas is essential, given the multiple and vital uses of this waterway, which include but are not limited to: 94 discharges regulated under a Total Maximum Daily Load for polychlorinated biphenyls (PCBs) under the Clean Water Act; multiple water withdrawals serving regional populations; and significant commercial navigation. In addition, given the varying requirements of the different life stages of the Atlantic sturgeon, temporal delineation of critical habitat should also be considered for the final designation.

*Our Response:* The PBFs that support reproduction and recruitment and that are essential to the conservation of the New York Bight DPS are all of those that we have identified in the proposed critical habitat designation. These may require special management considerations or protection as a result of certain kinds of activities, including activities listed by the commenter. We are, therefore, required to designate these areas as critical habitat for the New York Bight DPS. The boundaries of each critical habitat area, including the Delaware River critical habitat area, encompass no more and no less than the area containing the PBFs essential to the conservation of the DPS and which may require special management considerations or protection.

It appears that the commenter is requesting that we identify the specific areas within the Delaware River where each of the features occurs; however, this goes beyond the scope of what is required in a critical habitat designation. (see *Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 616 F.3d 983 (9th Cir., 2010)). We have provided references in the rule, and in the Impacts Analysis and Biological Information Source Document that support our determination that the PBFs are present in the area designated and can provide guidance to Federal agencies when they need to request ESA section 7 consultation and consider the effects of their actions on critical habitat.

We do not use temporal designations for critical habitat because the PBFs are either present year round or will be present at some expected time during the year that cannot be predicted with precision (e.g., the location of the salt front moves throughout the year, but

given the multitude of factors that influence the exact location, we could not predict with any reasonable certainty the timing of any particular location). The timing of a proposed Federal action and the effects it would have on the critical habitat are considered during ESA section 7 consultation. For example, the effects of an activity that will impact hard substrate in freshwater reaches of the Delaware River may be different during the spawning season than during the winter.

*Comment 23:* The Navy raised concern that freshwater suitable for Atlantic sturgeon spawning was not available to Atlantic sturgeon in the Piscataqua River system below the lowermost dams of the Salmon Falls and Cochecho Rivers.

*Our Response:* Freshwater is available below the lowermost dams of the Salmon Falls and Cochecho Rivers. The salinity changes within the river estuary seasonally and daily depending on freshwater flow and tidal changes. See our response to Comment 3 for additional information on the Piscataqua River.

*Comment 24:* A commenter stated that nearshore shallow water areas of the Potomac River from Key Bridge to at least Marshall Hall should not be considered critical habitat because substrate from at least Marshall Hall to Key Bridge is deeply silty, and near shore salinity is closer to fresh than to 0.5 ppt salinity. The commenter stated that the feature is substrate with salinity greater than 0.5 ppt. Therefore, this area should not be designated critical habitat.

*Our Response:* We are not required to determine that every segment of the critical habitat contains all of the PBFs essential to conservation of the species, but rather, we demonstrate overall that the designated unit contains the PBFs essential to conservation of the species. We have provided references in the rule, and in the Impacts Analysis and Biological Information Source Document that support our determination that the PBFs are present in the area designated as critical habitat in the Potomac River. Briefly, the Potomac River estuary extends approximately 187 river kilometers (rkm) from the Chain Bridge to the mouth of the river. The river is tidal freshwater from Chain Bridge to Quantico, VA; the mixing zone of transitional salinity occurs from Quantico, VA, to the crossing of the U.S. Highway 301 Bridge, MD, and the remainder of the river estuary, from the U.S. Highway 301 Bridge crossing to the Chesapeake Bay, has a wide channel

with gradually sloping, shallow flats near shore (USGS, 1984).

*Comment 25:* The Virginia Institute of Marine Science provided new information, based on their data collections, that adult Atlantic sturgeon occur upriver of the Route 360 bridges on both the Pamunkey and Mattaponi Rivers.

In 2015, a receiver placed at rkm 144 of the Pamunkey River, 5 km above the Route 360 Bridge, regularly detected 18 acoustically-tagged, adult sturgeon during the summer and early fall. The commenter believes that the occurrence of the adults in freshwater of the Pamunkey River during the spawning period (Hager *et al.*, 2014; Kahn *et al.*, 2014) and the detected movements of the adults support that the geographical area occupied includes the waters at least 5 km upriver of the Route 360 Bridge crossing, and suggests that this part of the Pamunkey River has the essential PBFs of critical habitat based on patches of sand from bank erosion. The commenter recommends that we extend critical habitat above the Route 360 bridge in the Pamunkey River approximately 14 rkm up to Nelson's Bridge Road Route 615 crossing on the Pamunkey.

The commenter also recommended extending the upriver boundary of the Mattaponi critical habitat unit by 10 rkm above the Route 360 bridge to rkm 122. In the summer and early fall of 2015, one tagged adult female Atlantic sturgeon ascended the Mattaponi River and was detected at the uppermost receiver located near the Route 360 bridge crossing. This is during the time and in an area where spawning would be expected to occur. Based on the time series of detections at this receiver, the commenter believes this individual moved past the receiver upstream, then moved back down again.

*Our Response:* We considered the information provided and agree that the detected presence of at least 18 adult Atlantic sturgeon in the Pamunkey River above the Route 360 Bridge crossing provides evidence that the geographical area occupied by the DPS in the Pamunkey is above the Bridge crossing, and the area is used by adults during the fall spawning period for the Chesapeake Bay DPS. We did not agree with the commenter that sand from bank erosion is evidence that hard substrate occurs in the area. However, the literature cited in the comments (e.g., Bushnoe *et al.*, 2005) provides additional information for hard substrate (gravel) in the area. We, therefore, revised the boundary of the York River critical habitat unit by extending critical habitat by

approximately 14 rkm to the Nelson's Bridge Road Route 615 crossing on the Pamunkey River.

We did not revise the upriver boundary of the critical habitat designation on the Mattaponi River. We have considered the information provided by VIMS. While their data analysis suggests to them that the fish moved further upriver, there is no evidence that it moved upriver and, even if it did, these are the movements of just one fish. We cannot determine whether the movements of this fish are representative of all Atlantic sturgeon that occur in the Mattaponi or are movements of a vagrant fish. Additionally, critical habitat is based on the presence of the essential PBFs. VIMS did not provide information that the PBFs of critical habitat occur in the Mattaponi River upriver of the Route 360 Bridge crossing. Therefore, we are not changing the upriver boundary for the York River critical habitat unit in the Mattaponi River.

*Comment 26:* Maryland Department of Natural Resources (MD DNR) requested amendment of the critical habitat designation for the Chesapeake DPS to include: Marshyhope Creek; Broad Creek; Deep Creek; and, areas of the Nanticoke River above its confluence with the Marshyhope Creek and the lower Nanticoke River down to Chapter Point, MD. The MD DNR provided the 2016 project report for riverbed mapping of the Broad Creek, Marshyhope Creek, and Nanticoke River (Bruce *et al.*, 2016), information on the detection of an adult Atlantic sturgeon in spawning condition, and salinity, water temperature, and DO in Marshyhope Creek, Broad Creek, and the Nanticoke River.

*Our Response:* The substrate information for Marshyhope Creek and the Nanticoke River was not received in time for us to consider it for inclusion in the proposed rule. However, we were aware that a final report was imminent and alerted the public in the Impacts Analysis and Biological Information Source Document to the proposed rule that the presence of adult sturgeon in spawning condition and at the time when the Chesapeake Bay DPS spawns suggests that the PBFs essential to Atlantic sturgeon reproduction and recruitment are present in Marshyhope Creek. We also alerted the public that after receiving the report, we would assess whether to expand critical habitat to include this area. The final project report was submitted to us by the MD DNR during the public comment period. We reviewed the information as well as other available information for the Nanticoke River, including the MD DNR

final report, "Assessment of Critical Habitats for Recovering the Chesapeake Bay Atlantic Sturgeon Distinct Population Segment," funded by the NOAA Species Recovery Grants to States (ESA Section 6 Program). The benthic mapping report does provide information to confirm the presence of hard substrate in low salinity waters of Marshyhope Creek and the Nanticoke River. In addition, the MD DNR Section 6 report provides evidence that the area is likely being used for spawning. This information along with information related to the presence of suitable spawning substrate (Bruce *et al.*, 2016) indicates that there is the potential for spawning and recruitment to occur in the Nanticoke River and Marshyhope Creek.

Our review of this best available information confirmed that critical habitat for the Chesapeake Bay DPS occurs in the Nanticoke River and its tributary, Marshyhope Creek. Designation of the area is a natural outgrowth of the proposed rule given that we stated in the proposed rule that we suspected spawning was occurring in Marshyhope Creek, a tributary of the Nanticoke, and we stated in the Impacts Analysis and Biological Information Source Document that we were awaiting receipt of substrate information and would consider designating critical habitat in the River if we received additional information that confirmed that the PBFs are present. The PBFs may require special management considerations or protection as a result of activities, such as dredging and construction projects (*e.g.*, docks, piers), that may affect the PBFs. Therefore, we are designating critical habitat in the Nanticoke River and Marshyhope Creek for the Chesapeake Bay DPS.

We are not, however, designating critical habitat in the Nanticoke River and Marshyhope Creek as two separate areas as recommended by MD DNR, and we are not designating critical habitat in Broad Creek or Deep Creek. Critical habitat that is designated within the geographical area occupied by the species is based on the presence of the PBFs. While information on salinity and water quality is generally available, information on hard substrate (*e.g.*, gravel, cobble) in low salinity waters is not available for Broad Creek or Deep Creek. The substrate study did indicate the presence of gravel-sand, and sand-gravel in Broad Creek, but hard substrate such as gravel and cobble that provides interstitial spaces for the offspring after hatching is essential for spawning. We will reconsider Broad Creek and Deep Creek as new information becomes available on hard

substrate and information to show that these areas could be used by Atlantic sturgeon for spawning (*e.g.*, evidence of spawning adult presence in the area, evidence for the presence of natal offspring).

Based on the PBFs essential to the conservation of the Chesapeake Bay DPS, the Nanticoke River system critical habitat unit consists of the waters of the Nanticoke River from the Maryland State Route 313 Bridge crossing near Sharptown, MD, to where the main stem discharges at its mouth into the Chesapeake Bay as well as Marshyhope Creek from its confluence with the Nanticoke River and upriver to the Maryland State Route 318 Bridge crossing near Federalsburg, MD, for a total of 60 rkm of aquatic habitat.

*Comment 27:* One commenter requested consideration of additional literature and datasets for determining whether to include the Eastern River, Abagadasset River, Muddy River, Sheepscot River up to Head Tide Dam, Dyer River up to Boynton Trask Dam, Saco River from Cataract Dam downstream to its mouth, Mousam River below the confluence with Fernald Brook, tributaries of Great Bay (Spruce Creek, Berrys Brook, Sagamore Creek, Lubberland Creek, Crommet Creek, Bellamy River, Sturgeon Creek), and Penobscot Bay as critical habitat for the Gulf of Maine DPS. The commenter also indicated that the Taunton River, MA, up to the confluence with the Nemasket River should be included in the critical habitat designation for the New York Bight DPS.

*Our Response:* We have reviewed the additional information and datasets referenced by the commenter. We are not adding these additional areas to the critical habitat designations. We discussed in our response to Comment 20 why the critical habitat designations for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs do not include bays and sounds that occur between the river mouth and the ocean, such as Penobscot Bay. No information was provided by the commenter that allowed us to identify PBFs in Penobscot Bay.

As described in our regulations at 50 CFR 424.12(b)(1) and the proposed rule, critical habitat must contain the PBFs essential to the conservation of the DPS, and that may require special management or protection. The Cataract Dam is located downriver of freshwater, and Atlantic sturgeon do not pass upriver of the dam. The dam is at the location of a natural falls that would be impassable to Atlantic sturgeon even if the dam was not present. As a result, hard bottom substrate (*e.g.*, rock, cobble,

gravel, limestone, boulder, etc.) in low salinity waters (*i.e.*, 0.0–0.5 ppt range) for settlement of fertilized eggs, refuge, growth, and development of early life stages is not available to Atlantic sturgeon in the Saco River. Therefore, we are not designating critical habitat in the Saco River since the area of the river within the geographical area occupied by the Gulf of Maine DPS does not contain the PBFs essential to successful reproduction and recruitment.

For the other waterways named by the commenter, we do not have information on whether Atlantic sturgeon spawn or spawned in that particular waterway. Atlantic sturgeon can be identified to their river of origin based on genetic analysis, likely due to their strong affinity for natal homing (*i.e.*, adults spawn in the river in which they were spawned). Some straying occurs and recolonization of rivers within a DPS is possible. However, we have no way to determine the likelihood that a particular river will be recolonized or the timespan over which recolonization would occur. Therefore, just as we considered the Union River as described in the Impacts Analysis and Biological Information Source Document, we investigated whether there is any evidence that sturgeon are now using, or have ever used, a particular river or river segment for spawning. The 2007 Status Review for Atlantic Sturgeon (ASSRT, 2007) indicated Atlantic sturgeon historically spawned in the Taunton River, Massachusetts (Table 1 in that document). However, the Status Review report does not provide the reference for this conclusion and we could not locate information to support the conclusion. There is no recent evidence of spawning for the Taunton River. Similarly, the 2007 Status Review report indicated Atlantic sturgeon historically spawned in the Sheepscot River and possibly spawn presently in the Sheepscot River. However, a study of the Kennebec Estuary, including the Sheepscot River, spanning the time period 1977–2001 did not find any evidence of Atlantic sturgeon spawning in the Sheepscot River (Wippelhauser and Squiers, 2015). Based on the best scientific information available, we cannot determine that the Taunton River and Sheepscot River are essential to reproduction or recruitment of the New York Bight and Gulf of Maine DPSs, respectively. Similarly, we do not have evidence that Atlantic sturgeon historically spawned or presently spawn in the other waterways named by the commenter. Based on the best scientific information available, these waterways are not essential to the conservation of

the DPSs. Therefore, we cannot designate critical habitat in the Eastern River, Abagadasset River, Muddy River, Dyer River up to Boynton Trask Dam, Mousam River below the confluence with Fernald Brook, or tributaries of Great Bay (Spruce Creek, Berrys Brook, Sagamore Creek, Lubberland Creek, Crommet Creek, Bellamy River, Sturgeon Creek).

*Comment 28:* A commenter was concerned that the critical habitat designations for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs do not include all of the rivers listed in Table 1 of the 2007 Status Review labeled as historically or presently supporting Atlantic sturgeon spawning, or having Atlantic sturgeon nursery habitat.

*Our Response:* The regulations for identifying critical habitat differ from the approach used by the Atlantic Sturgeon Status Review Team to label rivers as historically or presently supporting Atlantic sturgeon spawning, or having Atlantic sturgeon nursery habitat. For example, the Status Review Team considered nursery habitat as any habitat used by immature Atlantic sturgeon, including non-natal estuaries used by subadult Atlantic sturgeon. For this critical habitat designation, we consider nursery habitat to be habitat within the natal estuary used by natal juveniles. Therefore, in our approach, a river would only be labeled as having nursery habitat if there was also evidence that it historically or presently supported Atlantic sturgeon spawning. As described in the response to Comment 27, we considered the evidence that the 2007 Status Review cited for whether a river historically supported or presently supports an Atlantic sturgeon spawning population. This information helped to inform whether an area contained the PBFs essential to the conservation of the particular DPS and that may require special management considerations or protection.

*Comment 29:* A commenter stated tributaries are vital components of the estuarine habitat that Atlantic sturgeon need to reproduce and develop, and conditions in tributaries affect the Hudson River. Therefore, the commenter recommended that we designate critical habitat for the entire length of, or the segment downstream of a dam or impassable rapids, in: Lents Cove, Annsville Creek, Popolopen Creek, Constitution Marsh and Foundry Cove, Moodna Creek below Route 9W, Wappinger Creek below the rapids, Roundout Creek below the dam, Esopus Creek below the dam, Jansen Kill below Route 9G, Ramshorn Creek, Catskill

Creek below the rapids, Stockport Creek below the dam, Cocksackie Creek, Schodack Creek, Moordener Kill, Normans Kill, and the Mohawk River below the locks.

*Our Response:* The commenter did not provide and we do not have information that suggests Atlantic sturgeon spawn or spawned in the waterways, all tributaries of the Hudson River, named by the commenter. Additionally, the commenter did not provide and we do not have information indicating that the features are present in these waterways. Based on information provided in the Atlantic Sturgeon Status Review (ASSRT, 2007) and the Atlantic Sturgeon Stock Assessment, these areas are not essential to the conservation of the DPS, and we cannot designate the areas as critical habitat. However, we do recognize the connection of tributaries to the main stem Hudson River, the importance of a healthy ecosystem to Atlantic sturgeon.

*Comment 30:* A commenter stated that the frequency and timing of use suggests that PBFs, including foraging areas and cover from predation, may occur within certain bays, estuaries and near-shore marine areas. The commenter acknowledged that PBFs must be defined under the ESA, and that these data are not currently available for the entire range, but should be considered for the areas available. The commenter recommended that we: Consider the DPS-specific references (Calvo *et al.*, 2010; Erickson *et al.*, 2011; and Breece *et al.*, 2016) in the Final Rule; continue to consider this information gap to be a research priority; and, develop a schedule for designating bay and near-shore critical habitats essential to support the successful development, growth and migration of sub-adult and adult Atlantic sturgeon.

*Our Response:* Our consideration of the best available information to identify potential PBFs for the Atlantic sturgeon DPSs in marine waters, bays, and sounds is described in the proposed rule, Impacts Analysis and Biological Information Source Document, and in our response to Comment 20. This information included research findings described in Calvo *et al.*, 2010, Erickson *et al.*, 2011, and Breece *et al.*, 2016. Based on the best scientific information available for each DPS, and information for Atlantic sturgeon in general, we were not able to identify any PBFs for marine waters, sounds, or bays, other than for those bays that contain the PBFs essential for reproduction and recruitment of the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs and that are included as part of the designated critical habitat.

Critical habitat designations are based on the best available scientific information. We cannot commit to a schedule for designating additional critical habitat for the Gulf of Maine, New York Bight, or Chesapeake Bay DPS because we cannot predict when information will be available to inform any potential future modification of this critical habitat designation or any new designation.

*Comment 31:* A conservation group pointed to a recent report by Moberg and DeLucia (2016) that recommended minimum values of DO, water temperature, and salinity values to support habitat suitable for successful recruitment of Atlantic sturgeon in the Delaware River. These values are instantaneous DO greater than or equal to 5.0 mg/L, and temperature less than 28 °C when salinity is less than 0.5 ppt. The commenter noted that estuaries are naturally dynamic habitats and the areas that support habitat suitable for successful recruitment could change with migration of the salt front. The commenter recommended that designated critical habitat include river segments that may serve as reproduction and recruitment habitats that accommodate changes in migration of the salt front, DO, and temperature conditions.

*Our Response:* We agree that estuaries are naturally dynamic habitats. In the Background section of the proposed rule we described that multiple spawning sites have been identified within many of the rivers used for Atlantic sturgeon spawning (Dovel and Berggren, 1983; Van Eenennaam *et al.*, 1996; Kahnle *et al.*, 1998; Bain *et al.*, 2000; Sommerfield and Madsen, 2003; Bushnoe *et al.*, 2005; Simpson, 2008; Hager, 2011; Austin, 2012; Balazik *et al.*, 2012; Breece *et al.*, 2013), and spawning sites at different locations within the tidal-affected river would help to ensure successful spawning, given annual changes in the location of the salt wedge. For example, Breece *et al.* (2016) reported a difference of 30 km in the average location of the Delaware River salt front during adult Atlantic sturgeon occupancy in 2011 compared to 2009 and 2012.

Designating critical habitat that includes multiple potential spawning areas helps to ensure Atlantic sturgeon can select the best spawning site, given the natural annual variations in environmental conditions within the river estuary. When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat (50 CFR 424.12(d)). Therefore, within the geographical area

occupied by the DPS in each river, we considered all areas that contained the PBFs that are essential to the particular DPS and identified the boundaries, accordingly. As described in the response to a previous comment, we concluded for purposes of the critical habitat designations that unoccupied habitat was not essential to the conservation of the Gulf of Maine, New York Bight, or Chesapeake Bay DPS.

We are aware of the report by Moberg and DeLucia (2016) that focused on DO levels for survival of Delaware River natal juveniles in low salinity waters. However, the water quality feature for critical habitat is the interrelated variables of salinity, DO, and water temperature that are necessary for use of the habitat rather than fish survival. Fish avoid, when possible, habitats that would result in their death, and studies have shown that fish avoidance of habitat occurs before the DO levels of the habitat have dropped so low as to be deadly (Breitburg 2002; EPA, 2003). Studies have also shown that the DO concentration at which the fish will begin to avoid habitat is approximately equal to the DO concentration that reduces their growth rate. Therefore, identifying the temperature, DO, and salinity values that result in reduced Atlantic sturgeon growth can serve as a proxy for identifying the temperature, DO, and salinity values that result in Atlantic sturgeon habitat avoidance.

We considered the available information on Atlantic sturgeon growth, and temperature, DO, and salinity (Breitburg, 2002; EPA, 2003; Niklitschek and Secor 2009; Niklitschek and Secor 2010; Allen *et al.*, 2014) when we developed the examples provided in the proposed rule. Our intent was to provide an example in the proposed rule of a set of conditions that we expect to correlate to Atlantic sturgeon use of an area; it was not our intent to provide an example of the DO levels that are necessary for the survival of any particular age class of Atlantic sturgeon.

*Comment 32:* A commenter stated that our decision to not designate any estuarine areas as critical habitat is arbitrary and capricious, noting that natal estuaries are attached to a natal river, which makes these estuaries critical and, therefore, they should be designated. The commenter also stated that we should also designate estuaries that it knows are important (e.g., the mouth of the Merrimack and the Saco River).

*Our Response:* The critical habitat designated for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs includes estuarine waters of the named

river. It is a common misconception that all rivers are all freshwater and only bays or sounds are the estuarine waters. We are designating critical habitat in the Merrimack River, downstream of the Essex Dam to the mouth of the Merrimack River. We are not designating critical habitat in the Saco River because the area of the river within the geographical area occupied by the Gulf of Maine DPS does not contain the PBFs essential to the conservation of the DPS. Our response to Comment 20 addresses the best available information for identifying other PBFs in bays and sounds that are essential to the conservation of the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs.

*Comment 33:* The commenter believes that areas proposed to be designated as critical habitat in the James River exceed what is necessary to protect Atlantic sturgeon and will accomplish little habitat restoration in the Chesapeake Bay DPS. The commenter states that considering the breadth of available information on biological and habitat data, critical habitat in the James River could be more specifically defined.

*Our Response:* The boundaries of the critical habitat areas are based on the presence of the PBFs essential to the conservation of the Chesapeake Bay DPS, and which may require special management considerations or protection. The PBFs are based on substrate, water quality, open passage, and the transitional salinity zone necessary for Atlantic sturgeon adults to reproduce and juveniles to rear in the natal estuary prior to emigration to the marine environment.

The best available information supports the conclusion that there are two spawning groups of Atlantic sturgeon returning to the James River, one in the spring and one in the fall. Spawning occurs in different areas of the river for each group. Such a difference is not unexpected given changes in the location of an estuary's salt wedge from spring to fall. Even in rivers where only one spawning season is currently known, spawning Atlantic sturgeon may select for the best spawning site in the river estuary, given the environmental conditions at the time (e.g., flow and salinity), which vary depending on weather and other conditions (e.g., more freshwater inflow due to a rainy spring or high snowpack can result in the salt front being farther downstream). Designating critical habitat that includes multiple spawning areas helps to ensure successful spawning, given the natural variations in environmental conditions within the



river estuary. Similarly, critical habitat that encompasses the complete habitat needs of Atlantic sturgeon juveniles is necessary because Atlantic sturgeon offspring select for the habitat with the combined variables of DO, water temperature, and salinity that best support their growth and development. Because estuaries are also dynamic environments with daily and seasonal changes in salinity, Atlantic sturgeon juveniles must be able to move within the natal estuary to remain in or access the salinity zone most suitable for the stage of development. As such, limiting the designation in the James River would not allow for inclusion of all of the PBFs that are essential to the conservation of the DPS.

*Comment 34:* A commenter stated that we must identify, with specificity and substantial evidence, those areas of the Susquehanna River that we believe exhibit the PBFs essential to the conservation of Atlantic sturgeon. Further, to meet our obligations under the Administrative Procedure Act, we must then provide stakeholders with an additional opportunity to comment on the justifications for the determinations.

*Our Response:* The ESA and the regulations implementing the critical habitat provision of the ESA (50 CFR part 424) do not require that we provide "substantial evidence" or articulate a particular level of specificity as to where exactly the PBFs may be found in a particular unit. The proposed rule did specify that the area containing the PBFs of critical habitat in the Susquehanna River is the 16 km of the Susquehanna River main stem from the Conowingo Dam to where the river drains at its mouth into the Chesapeake Bay. These are the lowermost 16 km of the river's overall 714 km length.

Upon reexamination of the information for the PBFs, we determined that PBF 2 (*i.e.*, aquatic habitat with a gradual downstream salinity gradient of 0.5 to as high as 30 ppt and soft substrate (*e.g.*, sand, mud) between the river mouth and spawning sites for juvenile foraging and physiological development) is not present in the lowermost 16 rkm of the Susquehanna River that we proposed to designate as critical habitat. In addition, these waters are likely to remain freshwater because saltwater from the ocean generally does not push into the upper Chesapeake Bay, and there is a large volume of freshwater flowing into the upper Bay from the Susquehanna and other rivers (Chesapeake Bay Program, 1987).

The proposed 16 rkm of the Susquehanna River does not have a salinity gradient and is unlikely to have

a salinity gradient in the future. Because this PBF is not present in the lowermost 16 rkm of the Susquehanna River, and we determined that the coexistence of all four PBFs is required for successful reproduction and recruitment of the Chesapeake Bay DPS, the lowermost 16 rkm of the Susquehanna River are not included in critical habitat for the Chesapeake Bay DPS. Further information on the salinity, substrate, and water quality below the Conowingo Dam is available at <http://www.exeloncorp.com/locations/ferc-license-renewals/Conowingo/Pages/Documents.aspx>.

*Comment 35:* A number of commenters, including a coalition, objected to the proposed designations and stated that we provided no data or analysis in support of our conclusions that the essential PBFs we have identified are actually present throughout the expansive areas we have proposed for designation, nor any discussion of the location of essential PBFs within the areas.

*Our Response:* We are not required to conduct new analyses for critical habitat designations. We are required to use the best available information. The proposed rule, the biological information in the Impacts Analysis and Biological Information Source Document, and our administrative record for the critical habitat designations provide the sources of information for where the PBFs occur within each designated critical habitat area. We balanced the desire to provide detail on each critical habitat designation against the need to provide transparent and concise information. An excessively lengthy document can be perceived as burdensome to read and comment upon. We provided a level of detail that we believe was necessary and desired by the general public. In all cases, we have cited the sources of information for the presence of the PBFs in the specific critical habitat areas.

We also took into account the dynamic environment in which the PBFs occur. Some of the PBFs occur in more than one location or occur in a location at certain times of the year. For example, hard bottom substrate in low salinity waters (0.0 to 0.5 ppt) may be available farther downriver in the spring than in the fall, depending on seasonal changes in freshwater input, or may be available farther downriver in one year compared to another, depending on the freshwater input to the estuary in that particular year. Likewise, the exact boundaries of the transitional salinity zone will fluctuate with seasonal changes in flow, annual changes in flow, and even tide cycles. The

boundaries of the critical habitat areas account for these cyclical changes that are reasonably expected to occur based on the best available information for the particular river within which we are designating critical habitat.

*Comment 36:* A representative for a power operation stated that the area of the Hudson River in the vicinity of the facility should be excluded from the critical habitat designation because: this part of the Hudson River does not possess characteristics of value to Atlantic sturgeon at any life stage, and it is inconceivable that any federally-approved action within the vicinity of Indian Point would ever rise to the level of destruction or adverse modification of critical habitat as the Services have defined it.

*Our Response:* We are not required to determine that every segment of the critical habitat contains all of the PBFs essential to the conservation of the species, but rather, we demonstrate overall that the designated unit contains the PBFs essential to conservation of the species (See *Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 988–989 (9th Cir., 2010)). We recognize in the rule that the location of some PBFs may shift daily, seasonally, or annually. We disagree that the area noted in the comment does not contain the essential PBFs of critical habitat; the area contains soft substrate and is within the salinity gradient necessary for the development of juveniles. It is also an area of the Hudson River where barrier-free passage is necessary for the upstream and downstream movement of adults.

The commenter's determination that activities associated with the Indian Point nuclear facility would not destroy or adversely modify the critical habitat is not a comment on the designation, but rather a conclusion of the effects of the activities that would be considered in an ESA section 7 consultation. Even if we agreed with that conclusion, there is no means to exclude an area based on the potential impacts of the operations of one facility. We also note that the critical habitat designated in the vicinity of Indian Point could be affected by other Federal actions independent of Indian Point (*e.g.*, dredging, water quality regulations, etc.).

We considered impacts of designating critical habitat for the New York Bight DPS, and concluded there was no basis to exclude any particular area from the proposed critical habitat because of the conservation benefits of the critical habitat designations to the species and to society. While we cannot quantify nor monetize these benefits, we believe they

are not negligible and are an incremental effect of the designations. See our response to Comments 51, 52 and 53 for further information on the Impacts Analysis for the Gulf of Maine, Chesapeake Bay and New York Bight DPSs.

*Comment 37:* A commenter stated that scientifically demonstrated identification of known PBFs needed for physiological development have not been specifically determined for the Atlantic sturgeon, and designating critical habitat in the Delaware River may be premature. The commenter goes on to state that the length and breadth limits of the critical habitat area alone apply assumptions that are not well documented in science, and, in the case of the downstream limit on the Delaware River, arbitrary landmarks were used to identify the beginning and end of the designated critical habitat. The commenter also states that the down-river boundary is demarcated by a land-based, manmade monument that possesses no inherent biological or physiological value indicating that sturgeon reproduction, early growth, and population maintenance begins or ends here.

*Our Response:* The critical habitat designations are not premature. The ESA requires that we designate critical habitat at the time a species is listed unless designating critical habitat is not prudent for the species (this rarely occurs) or is not determinable. If critical habitat is not determinable at the time of listing, we are allowed one additional year. At the end of that year, we must designate critical habitat based on the best available information.

We concluded that critical habitat was not determinable when the Atlantic sturgeon DPSs were listed as endangered and threatened in 2012. We failed to meet the one-year timeframe for designating critical habitat. We proposed critical habitat in June 2016. We have used the best available information to determine the essential PBFs that may require special management considerations or protection and identify where those PBFs occur to develop the critical habitat designation. While we agree that more information on the exact location of Atlantic sturgeon spawning would be generally informative and could allow us to better manage the species, the absence of this more specific information did not impair our ability to develop the critical habitat designation. This is in part because our critical habitat designation was not designed to include only spawning habitat.

The proposed rule described the PBFs and provided an explanation, in the

context of Atlantic sturgeon life history, of why the PBFs are essential to the conservation of the Atlantic sturgeon DPSs. We provided the same background as well as the list of cited literature in the Impacts Analysis and Biological Information Source Document.

All of the PBFs are necessary for successful Atlantic sturgeon spawning and recruitment of offspring to the marine environment. Adults need habitat suitable for spawning, for traveling to and from spawning sites, and for staging, resting, and holding before and after spawning. The offspring need habitats in the natal estuary suitable for rearing. The habitat needed by juvenile Atlantic sturgeon changes as they grow and develop in the natal estuary. All juvenile habitat types in the natal estuary are needed for successful rearing of the offspring. Laboratory studies have shown differences in Atlantic sturgeon growth with different combinations of the combined variables of DO, water temperature, and salinity. Captures of Atlantic sturgeon juveniles in the natal estuary, likewise, reveal differences in the distribution of larger, older Atlantic sturgeon juveniles compared to smaller, younger Atlantic sturgeon juveniles. Therefore, we identified the boundaries of each critical habitat area that encompassed the PBFs essential to the conservation of each Atlantic sturgeon DPS and that may require special management considerations or protection. When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat (50 CFR 424.12(d)).

The boundaries of each critical habitat unit are consistent with how we have designated critical habitat for other species in rivers (e.g., the southern DPS of green sturgeon, Gulf of Maine DPS of Atlantic salmon). One or more of the PBFs occur throughout the identified critical habitat areas. Riverbanks are the lateral boundaries. The downriver boundary is the mouth of the river because that is the downstream limit of the most extensive feature (the transitional salinity zone). The upriver boundary is the beginning of the named river, a manmade structure that is impassable by sturgeon, a natural feature that is impassable by sturgeon, or the upriver extent of tidal influence because, depending on the particular river, that is the upstream extent of the presence of the PBFs that are essential to the conservation of the DPS and that may require special management

considerations or protection, or the upstream limit of the occupied area.

We cannot use ephemeral reference points (e.g., trees, sand bars) to clarify or refine the boundaries of critical habitat. We can use physical structures that occur at the boundary of the area containing the PBFs in our regulatory description of the critical habitat areas. Doing so better informs Federal agencies of the area within which they should consider effects of their proposed actions to determine whether they are required to consult with us under section 7 of the ESA.

The Delaware River critical habitat unit extends from the upstream point of tidal influence (identified by a bridge that crosses the river at that boundary) downriver to where the river enters the Delaware Bay. A mouth of a river is often considered to be rkm 0 of that river. However, in this case, New Jersey regulations count the mouth of the Delaware Bay (i.e., where it drains into the Atlantic Ocean) as rkm 0. To avoid confusion, we described the downriver boundary of the critical habitat unit based on the pre-established points and markers that demarcate the Delaware River and the Delaware Bay.

Comments on Impacts Analysis, Exclusions, and INRMPs

*Comment 38:* Many commenters, including those representing maritime associations, tug and barge operator associations, pilot associations, shipbuilders, and Federal and state agencies, stated we should exclude the Federal navigation channels and dredge disposal sites from the critical habitat designations (e.g., in the Penobscot, Hudson, Delaware, York, and James Rivers). They believe including them will prevent or delay dredging of Federal navigation channels, resulting in impacts to navigation safety, less commerce, and harm to the environment (e.g., by increasing the risk of vessel damage that could cause fuel spills). They also stated that including the Federal navigation channels and dredge disposal sites does not contribute to protecting the Atlantic sturgeon DPSs or their existing habitat.

*Our Response:* We disagree. The Federal navigation channels and dredge disposal sites are part of the areas that we have identified as critical habitat based on the presence of the PBFs essential to the conservation of the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs, and because those essential PBFs may require special management considerations or protection. There are conservation benefits of the critical habitat designations, both to the species and to

society. While we cannot quantify or monetize these benefits, we believe they are not negligible and are an incremental effect of the designations.

The purpose of designating critical habitat is to contribute to species' conservation (*i.e.*, facilitate recovery of the ESA-listed species for which critical habitat is designated). Because the Federal navigation channels and dredge disposal sites within the critical habitat areas are part of the area containing the essential PBFs, we are not excluding the Federal navigation channels and areas used for dredge disposal.

Critical habitat designations do not stop or prevent Federal agency actions. The sole ESA requirement with respect to designated critical habitat is that Federal agencies consult with us (or the USFWS for species under their jurisdiction) on any Federal agency action (*i.e.*, any action that agency intends to fund, authorize or carry out) that may affect critical habitat. The purpose of the consultation is to ensure that actions taken by Federal agencies are not likely to result in the destruction or adverse modification of critical habitat. ESA section 7 consultation is not required if there is no Federal agency action. For example, section 7 consultation is not required when a private citizen will engage in an activity on private land that does not require any authorization from a Federal agency, and does not include any Federal funds to carry out the activity.

For those activities conducted by private citizens that include a Federal agency action (*e.g.*, the citizen receives funding from a Federal agency or is required to obtain a permit from a Federal agency), the Federal agency taking the action is required to consult with us if the agency determines the proposed action may affect any Atlantic sturgeon DPS, its designated critical habitat, any other ESA-listed species under our jurisdiction, or its designated critical habitat.

Federal agency actions that are necessary to maintain safe navigation (*e.g.*, maintenance dredging) and support commerce are expected to continue to occur following the critical habitat designation. ESA section 7 consultations considering effects to the Atlantic sturgeon DPSs have occurred since the DPSs were listed in 2012. Because Atlantic sturgeon are generally present in the critical habitat areas, designating critical habitat is unlikely to increase the number of ESA section 7 consultations because Federal agencies are already required to consult with us under section 7 for actions that may affect the listed species.

*Comment 39:* Commenters expressed concern that designating critical habitat would prevent repairs to or new construction of marine terminals, docks, and other port infrastructure, thus impacting commerce. They commented we should exclude parts of the critical habitat areas adjacent to marine terminals, docks, and other port infrastructure to avoid such impacts.

*Our Response:* Activities such as repairs to or new construction of marine terminals, docks, and other port infrastructure can occur when such structures are within or in proximity to designated critical habitat. Section 7(a)(2) of the ESA requires Federal agencies to consult with us if the agency will fund, authorize, or carry-out an activity that may affect designated Atlantic sturgeon critical habitat. If, during consultation, we determine a Federal agency action is likely to destroy or adversely modify critical habitat, we will work with the Federal agency to identify modifications to the proposed action to remove the likelihood that the action will destroy or adversely modify critical habitat. In that case, we would document our determination in a Biological Opinion and provide one or more Reasonable and Prudent Alternatives for the Federal agency to implement. If we conclude that the proposed activity is not likely to adversely modify or destroy the critical habitat, then we will make that determination in a Biological Opinion and the action can occur as originally proposed.

*Comment 40:* A representative of Bath Iron Works, a shipbuilder for the Navy, and a representative of Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (collectively, "Entergy"), an energy company that owns a power plant, had similar concerns for the critical habitat designations in the Kennebec River for the Gulf of Maine DPS, and in the Hudson River for the New York Bight DPS. Both commenters expressed concern that the critical habitat designations would increase operational costs, adversely affect the ability to operate, or otherwise impact national security, and requested that we not designate critical habitat in the vicinity of Bath Iron Works on the Kennebec River or in the vicinity of Indian Point Nuclear Power Plant on the Hudson River.

*Our Response:* We disagree, and appreciate the opportunity to correct some common misconceptions about critical habitat. The first misconception is what is required or prohibited when critical habitat is designated. Critical

habitat designations do not create refuges or preserves where activities cannot occur. Critical habitat designations do require Federal agencies to consult with us if they are funding, authorizing or carrying out an action that may affect designated critical habitat for ESA-listed species under our jurisdiction. A Federal action can occur as proposed if we agree with a Federal agency's determination that a proposed action may affect designated critical habitat, and that all of the anticipated effects are insignificant, discountable, or wholly beneficial. A Federal action can also occur as proposed if we agree with a Federal agency's determination that a proposed action is likely to adversely affect critical habitat, but will not destroy or adversely modify critical habitat. A Federal action is required to be modified if we conclude that the proposed action is likely to destroy or adversely modify critical habitat. In that circumstance, we work with the Federal agency to identify modifications to the proposed action that allow the proposed action to occur without destruction or adverse modification of critical habitat. We do not consult on proposed Federal agency actions that will have no effect on critical habitat, and we do not consult on activities that do not include a Federal agency action (*e.g.*, no Federal funding for the action and no required Federal authorization for the action).

There are also misconceptions about what we can exclude and what we must not include in critical habitat designations. We must not include as part of a critical habitat designation any lands or other geographical areas owned or controlled by the Department of Defense (DOD) or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act, if we determine that such plan provides a conservation benefit to the species, and its habitat, for which critical habitat is proposed for designation. We also do not designate critical habitat within foreign countries or in other areas outside of United States jurisdiction (50 CFR 424.12(h)). We can exclude an area from a critical habitat designation based on economic, national security, or other relevant impacts if the benefits of exclusion outweigh those of inclusion, so long as the exclusion will not result in the extinction of the species concerned. However, we are not required to exclude particular areas from a critical habitat designation based on any of these impacts.

As required, we did consider the economic impacts, impacts to national security, and other relevant impacts of the critical habitat designations, including the conservation benefits of

the designation, both to the species and to society. We concluded that economic impacts of designating critical habitat for each DPS would be low. Our conclusion is based on two determinations. First, the primary source of economic impacts as a result of designating critical habitat for the Atlantic sturgeon DPSs are the administrative costs of conducting ESA section 7 consultations. Second, because Atlantic sturgeon occur throughout the critical habitat areas designated for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs, Federal actions that may affect critical habitat are also likely to affect the fish. Therefore, a single section 7 consultation would consider both the effects to the DPS and to its critical habitat. Our analysis of the economic impacts of designating critical habitat also considered whether modifications were likely to occur. Based on the best available information, including responses from Federal agencies that we are likely to consult with, we concluded that modifications to Federal actions are unlikely to occur as a result of section 7 consultations on effects of the actions to designated Atlantic sturgeon critical habitat.

We considered at the proposed rule stage, the concerns expressed by the Navy that designating critical habitat in the Kennebec River critical habitat unit adjacent to Bath Iron Works, a private shipbuilder for the Navy, would affect the Navy's ability to build and test current and future classes of surface ships, resulting in a risk to military readiness and national security. The Navy described the activities likely to occur as: Flooding and dewatering dry docks, updating and maintaining pier structures, including pile driving, and dredging activities to maintain proper channel and berthing depths. The essential PBFs of critical habitat in the area are salinity suitable for older juveniles, open passage for juveniles suitably developed to leave the natal river, open passage for adults traveling through the area to and from spawning areas, open passage for subadults traveling through the area, and soft substrate. Maintaining and/or updating pier structures may affect open passage and substrate (e.g., placing more pier structures in the area, altering the substrate to make it more suitable for the pier structure). Similarly, dredging to maintain proper channel and berthing depths may affect (e.g., remove) the substrate that supports juvenile foraging, and change the depth affecting the salinity (e.g., as a result of changes to mixing in the estuarine river or the extent of saltwater intrusion). However,

the activities also may affect Atlantic sturgeon. For example, construction to maintain or update piers can produce sounds that disrupt normal behaviors such as sturgeon foraging, staging, and spawning. Dredging may injure or kill sturgeon that come into contact with the gear (e.g., older juveniles passing through as they leave the natal river, adults traveling through the area to and from spawning areas, subadults traveling through the area). Because the Navy's activities may also affect the Gulf of Maine DPS of Atlantic sturgeon and sturgeon from other DPSs that can occur in the area, we do not anticipate any ESA section 7 consultations to arise strictly for the purpose of assessing the effects of Navy funded, authorized, or conducted activities on designated critical habitat in the Kennebec River. In addition, based on the best available information, we do not anticipate any ESA section 7 consultations for Navy activities in the Kennebec River will require modifications to avoid destruction or adverse modification of critical habitat based on the past consultation history and the nature of the identified categories of activities in the area. We considered all of the impacts arising from the critical habitat designation for the Gulf of Maine DPS, and determined the impacts would be coextensive with the impacts from listing the DPS. We will continue to work with the Navy to address any concerns about the ESA section 7 consultation process. Finally, should it be necessary, the regulations implementing section 7 of the ESA allow for informal consultation where emergency circumstances mandate the need to consult in an expedited manner, for situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.

The commenter did not establish how the critical habitat designation would impact security zones around private facilities, including the Indian Point nuclear facility in the Hudson River referenced by the commenter, that are meant to keep unauthorized vessel traffic at a distance from a facility. We do not foresee that the existence of the security zone and measures in place to maintain that security zone will affect the PBFs of critical habitat. For example, maintaining the security zone does not alter the substrate or the water temperature, nor does it block passage of Atlantic sturgeon moving through the area. Given that, we do not anticipate any impacts of the critical habitat designation on national security related to the security zone at the nuclear facility on the Hudson River. Given the

lack of any impact to national security, and the benefit of designating critical habitat for the New York Bight DPS, we are using our discretion to not exclude the security zone area from the critical habitat designation in the Hudson River.

*Comment 41:* One commenter stated we should allow for exclusion of designated critical habitat areas following a facility's submission of reports complying with 40 CFR 122.21(r) (i.e., National Pollution Discharge Elimination System (NPDES) Program Requirements for facilities with cooling water intake structures).

*Our Response:* The ESA does not provide any mechanism or authority to us for establishing criteria that would automatically exclude parts of a critical habitat designation after critical habitat has been designated. We can change a critical habitat designation based on new information regarding the listed species and its habitat. Such changes must be made through rulemaking, in accordance with the same regulations used to initially designate critical habitat for a species, and must include an opportunity for public comment.

*Comment 42:* The Navy commented that Naval Weapons Station Earle, Naval Support Facility Indian Head, Naval Support Facility Carderock, and Joint Base Anacostia Bolling were described in previous correspondence to us, but were not addressed in the proposed rule. The Navy asked us to confirm that these facilities do not overlap with any of the proposed critical habitat units.

*Our Response:* We confirm that Naval Weapons Station Earle, Naval Support Facility Indian Head, Naval Support Facility Carderock, and Joint Base Anacostia Bolling do not overlap with any of the proposed critical habitat units. In February 2014, we requested the Department of the Navy identify to us facilities that occurred within areas that we were considering for proposed critical habitat. After sending the letter, we changed the boundaries of the critical habitat areas to better identify the in-water habitat in which the PBFs that may require special management considerations or protection occur. As a result of the change to the boundaries, Naval Weapons Station Earle, Naval Support Facility Indian Head, Naval Support Facility Carderock, and Joint Base Anacostia Bolling do not occur within the critical habitat for the New York Bight or Chesapeake Bay DPSs. Our October 12, 2016, letter to the Deputy Assistant Secretary of the Navy for Environment provided our determinations for these facilities. A copy of that letter is provided in Appendix C of the Impacts Analysis and

Biological Information Source Document.

*Comment 43:* The Navy also commented on our conclusion regarding the INRMP for Naval Weapons Station Yorktown, a complex of three facilities located on Virginia's Lower Peninsula between the York and James Rivers, and asked for confirmation that Restricted Area 33 CFR 334.260 and Restricted Area 33 CFR 334.270 are included in the 4(a)(3)(B) exemption for the York River critical habitat unit.

*Our Response:* Yes. As described in section 1.2 of the INRMP for Naval Weapons Station Yorktown, the INRMP's scope comprises all lands, ranges, nearshore areas, and leased areas: Owned by the United States and administered by the Navy; used by the Navy via license, permit, or lease for which the Navy has been assigned management responsibility; or withdrawn from the public domain for use by the Navy for which the Navy has been assigned management responsibility (Navy, 2006).

The regulations at 33 CFR 334.260 describe three areas of the York River associated with Naval Weapons Station Yorktown. Public access is prohibited or restricted in some manner (e.g., vessels may pass through but not anchor, no trawling or net fishing) for each area, and the regulations are enforced by the Commander, Naval Weapons Station Yorktown, Virginia, and such agencies as he/she may designate.

The regulations at 33 CFR 334.270 for waters of the York River adjacent to Cheatham Annex Depot of Naval Weapons Station Yorktown restrict access by the public. No loitering is permitted within the area, and oystermen may work their own leaseholds or public bottom within the area, provided they obtain special permission from the Officer in Charge, Cheatham Annex Depot, Naval Supply Center, Williamsburg, Virginia. The Officer in Charge, Cheatham Annex Depot, is responsible for enforcing the regulations at 33 CFR 334.270.

Based on the information provided in the regulations of Title 33, the areas described by sections 334.260 and 334.270 are controlled by the DOD and are within the scope of the INRMP for Naval Weapons Station Yorktown. We determined that the INRMP provides a conservation benefit to the Chesapeake Bay DPS of Atlantic sturgeon and its habitat, for which critical habitat is proposed for designation. Therefore, critical habitat for the Chesapeake Bay DPS will not include the specific lands or other geographic areas of Naval Weapons Station Yorktown, including the Restricted Areas described in

sections 334.260 and 334.270.

Consultation under section 7(a)(2) of the ESA is not required for any Federal agency action that may affect the features of Atlantic sturgeon critical habitat occurring within the areas described at 33 CFR 334.260 and 33 CFR 334.270. However, consultation under section 7(a)(2) of the ESA is required for Federal agency actions if the proposed action may affect any ESA-listed species.

*Comment 44:* The Navy requested that we consider exclusion of Naval Station Norfolk and Portsmouth Naval Shipyard once INRMPs for these facilities are complete and we have reviewed the INRMPs.

*Our Response:* We cannot designate as critical habitat any lands or other geographical areas owned or controlled by the DOD or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if we determine in writing that such plan provides a conservation benefit to the species, and its habitat, for which critical habitat is proposed for designation. Therefore, once any new INRMPs are complete, we will review the documents. If we conclude that the INRMP provides a conservation benefit to the particular Atlantic sturgeon DPS, we will initiate a rulemaking to remove the area from the critical habitat designation.

*Comment 45:* The Navy disagrees with our determination that consultations for effects of dredging on critical habitat will be fully coextensive with consultations to address impacts to Atlantic sturgeon. The Navy believes that critical habitat can or will result in an additional commitment of resources, and will require modification of proposed actions to prevent adverse effects to critical habitat.

*Our Response:* We acknowledge that dredging occurring within designated critical habitat may require consultation to ensure Federal actions are not likely to destroy or adversely modify critical habitat. However, since all of the critical habitat areas for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs are occupied habitat, nearly all those additional consultations will be coextensive to consultations that would also occur to consider the impact to the sturgeon that occur in those areas. As described in our response to *Comment 38*, ESA section 7 consultations considering effects to the Atlantic sturgeon DPSs have occurred since the DPSs were listed in 2012. While some existing consultations may need to be reinitiated to consider effects to critical habitat, Atlantic sturgeon are generally present in the critical habitat areas, so

designating critical habitat is unlikely to increase the number of ESA section 7 consultations.

*Comment 46:* The Navy is also concerned that we did not fully consider impacts to national security resulting from the designation of critical habitat in areas that overlap with naval bases and areas owned by naval contractors. A list of areas and additional information was provided, including information that identified areas designated as Restricted Areas and Surface Danger Zones by the U.S. Army Corps of Engineers (USACE) pursuant to 33 CFR part 334. As described by the Navy, Restricted Areas generally provide security for Government property and/or protection to the public from the risks of damage or injury arising from the Government's use of that area, and access is by permission only. Surface Danger Zones may be closed to public access on a full time or intermittent basis.

*Our Response:* We carefully considered the information provided by the Navy. For the Chesapeake Bay DPS, the Navy provided information on some facilities and training areas that are not part of the James River critical habitat unit. The Lower James River Boat Training Area overlapping with Restricted Areas 33 CFR 334.290, 334.293, and 334.300; Lower James River Precision Anchorage and Buoy Mooring Training Areas that overlap Restricted Area 33 CFR 334.300; and, portions of the Underwater Light Salvage Operations Dive Training Areas (e.g., that overlap with Restricted Areas 33 CFR 334.310, 334.320, 334.350, 334.360, and Danger Zone in § 334.340) do not occur within the James River critical habitat unit. The James River critical habitat unit is that part of the James River from Boshers Dam and downstream to where the main stem river discharges at its mouth. The extent of the critical habitat unit may have been unclear, however, because the regulatory text of the proposed rule correctly described the boundaries of the critical habitat unit, but the map incorrectly depicted the James River critical habitat unit as including Hampton Roads. We have corrected the map.

The remaining part of the Lower James River Boat Training Area (i.e., overlaps with Restricted Area 33 CFR 334.280) and the remaining part of the Underwater Light Salvage Operations Dive Training Area (i.e., overlaps with Restricted Area 33 CFR 334.280) occur within the James River critical habitat unit. In addition, portions of the Underwater Light Salvage Operations Dive Training Area occur within the

York River critical habitat unit (e.g., Restricted Areas 33 CFR 334.260 and 334.270) of the Chesapeake Bay DPS. The Navy also provided information for and requested exclusion of the in-water parts of the Philadelphia Navy Yard Annex Reserve Basin and Piers that occur in the Delaware River critical habitat unit of the New York Bight DPS, and of the Portsmouth Naval Shipyard that occurs in the Piscataqua River critical habitat unit of the Gulf of Maine DPS. We are not excluding any of these from the critical habitat designations.

In their comments, the Navy states that designating critical habitat: could shut down, limit or delay operations as a result of the need to consult under section 7 of the ESA; could increase the frequency and scope of consultation requirements; and would likely result in project delays and additional mitigation requirements or modifications not considered during planning. Our ESA section 7 consultation history with the Navy does not support the Navy's speculation. The consultation history demonstrates that Navy activities, including training, pier maintenance, and dredging, have occurred since the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs were listed under the ESA in 2012. As described above, we expect any consultation necessary to consider the effects of Navy actions on designated critical habitat for these DPSs will be coextensive with consultations on the effects of the proposed action on the sturgeon. Further, the GARFO ESA Section 7 Team has developed methods and tools to help action agencies requesting consultation, and to help expedite the consultation process.

Finally, as described in our response to Comment 38, there are conservation benefits of the critical habitat designations, both to the species and to society. While we cannot quantify or monetize these benefits, we believe they are not negligible. Once we exclude an area from a critical habitat designation, we lose the ability to consider the effects of Federal agency actions that could adversely modify or destroy designated critical habitat. This could allow for actions to proceed that would result in the loss of habitat containing the PBFs essential to the conservation of a DPS, hindering or even preventing recovery of the particular DPS. Therefore, given the benefits of designation, we did not exclude any particular area from the critical habitat units.

*Comment 47:* The Navy provided an illustration of the upper, middle, and lower danger zones associated with the Potomac River Test Range (PRTR)

Complex and explained that the map in the INRMP for Naval Support Facility Dahlgren (NSF Dahlgren) does not show the entire extent of the danger zones. The Navy further commented that we previously determined that the NSF Dahlgren INRMP provides a benefit to Atlantic sturgeon and its habitat and, in accordance with section 4(a)(3)(B) of the ESA, the particular areas of the facility covered under the INRMP will not be part of the designated critical habitat.

*Our Response:* We thank the Navy for the information. Our consideration of the PRTR was based on the description of the danger zone provided in the regulations at 33 CFR 334.230 and the Water Range Sustainability Environmental Program Assessment for the Potomac River Test Range (May 2013) and the NSF Dahlgren INRMP.

Section 4(a)(3)(B) of the ESA prohibits designating as critical habitat any lands or other geographical areas owned or controlled by the DOD or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a conservation benefit to the species, and its habitat, for which critical habitat is proposed for designation. We determined that the INRMP for NSF Dahlgren provides a benefit to the Chesapeake Bay DPS and its habitat. However, the PRTR is outside of the scope of that INRMP. The scope of the INRMP for NSF Dahlgren is described as natural resources management on those lands and near-shore areas at Naval Support Facility Dahlgren that are: Owned by the United States and administered by the Navy; used by the Navy via license, permit, or lease for which the Navy has been assigned management responsibility; withdrawn from the public domain for use by the Navy for which the Navy has been assigned management responsibility; and, leased lands on the installation and areas occupied by non-DOD entities. Specifically, the INRMP describes the NSF Dahlgren as divided "into two land masses by Upper Machodoc Creek. Mainside encompasses 2,678 acres on the northern side of Upper Machodoc Creek and is used for operational and support activities and military housing. Pumpkin Neck, located to the south of Upper Machodoc Creek, is 1,641 acres and supports two large testing areas and scattered testing facilities." In addition, the INRMP states that NSF Dahlgren maintains real estate transactions to "18 small range stations located along the Potomac River Test Range (PRTR) to support [its] primary tenant's, Naval Surface Warfare Center, Dahlgren

Division (NSWCDD), over water testing activities." The INRMP describes the PRTR Complex which is five land based firing ranges and one water range, the PRTR. However, both the INRMP and the Water Range Sustainability Environmental Program Assessment describe the PRTR as the responsibility of the NSWCDD. The regulations at 33 CFR 334.230 also identify the PRTR as controlled by the NSWCDD, including for closing one or more of the three danger zones on a full-time or intermittent basis in the interest of public safety during hazardous operations.

The Navy, in their comment, described the PRTR as associated with NSF Dahlgren. The INRMP description of the land and nearshore areas for NSF Dahlgren supports use of "associated with" rather than "part of." For example, with the exception of Figure 2-4 depicting the five land based firing ranges and the PRTR, the illustrations in the INRMP do not include the PRTR as part of NSF Dahlgren. Throughout the INRMP, the Potomac River is described as being adjacent to NSF Dahlgren whereas certain Potomac River tidal tributaries are described as within the installation, and NSF Dahlgren is described as having only approximately 6.4 km (4 miles) of Potomac River shoreline.

The INRMP explains that management of the Dahlgren base previously transferred from the NSWCDD to Naval District Washington (NDW), which was re-designated as NDW West Area and, in 2005, became NSF Dahlgren. The Water Range Sustainability Environmental Program Assessment explains that NSF Dahlgren is responsible for oversight and maintenance of the land and all structures assigned and constructed on or in the land, and the NSWCDD controls the PRTR during hazardous operations, in the interest of public safety. Both the INRMP and the Water Range Sustainability Environmental Program Assessment state the Potomac River is under the jurisdiction of the State of Maryland. In August 2016, we contacted the Navy and received confirmation that the Navy does not manage the lands or waters of the Potomac River that are the PRTR.

We agree that the PRTR is designated for use by the Navy. However, based on the INRMP, the regulations, and the Water Range Sustainability Environmental Program Assessment, the PRTR is not part of those lands or near shore areas at NSF Dahlgren that are "owned by the U.S. and administered by the Navy; used by the Navy via license, permit, or lease for which the

Navy has been assigned management responsibility; withdrawn from the public domain for use by the Navy for which the Navy has been assigned management responsibility; or leased lands on the installation and areas occupied by non-DoD entities.” We, therefore, concluded that the lands and waters of the PRTR are not subject to the NSF Dahlgren INRMP, and do not meet the requirements of 50 CFR 424.12(h) that would prohibit us from including them as critical habitat.

In revisiting our determination, we considered whether the NSF Dahlgren INRMP provides a conservation benefit to the Chesapeake Bay DPS of Atlantic sturgeon if the lands and waters of the PRTR were subject to the INRMP. We concluded that the INRMP does not because the management practices in the INRMP offer limited protection to the habitat within the PRTR, and the PRTR covers most of the area that we are designating as the Potomac River critical habitat unit. Designating this area as critical habitat provides a benefit to the Chesapeake Bay DPS, and the PBFs in this area are essential to the conservation of the DPS. Therefore, management practices in the INRMP would have to provide a similar conservation benefit, either directly or indirectly addressing the PBFs that may require special management considerations or protection.

*Comment 48:* Newport News Shipbuilding expressed concern that designating critical habitat in the lower James River would have economic impacts and impacts to national security. The commenter proposed that we make appropriate exclusions for industries that demonstrate insignificant and discountable impact to and/or appropriate mitigations for the Atlantic sturgeon.

*Our Response:* We considered whether to use our discretion to exclude areas from the critical habitat designations. We declined to exercise our discretion and did not exclude any areas. Critical habitat is the specific areas on which are found the PBFs essential to the conservation of the species and which may require special management considerations or protection. It is the presence of the PBFs and the PBFs’ potential need for special management considerations or protection that dictates the designation, not the effect a particular industry at a given point in time may have on the PBFs.

We considered the economic impacts of designating critical habitat in the James River, impacts to national security, and the expected impact to species recovery resulting from the

designation. While we have used the best available information and an approach designed to avoid underestimating impacts, many of the potential impacts are speculative and may not occur in the future.

Our conservative identification of potential incremental economic impacts indicates that any such impacts, if they were to occur, would be very small and likely to consist solely of the administrative costs of consultation. We recognize the potential that ESA section 7 consultation stemming from these designations may, sometime in the future, result in project modifications and associated costs. However, discussions with Federal action agencies identified no instances of past project modifications that would have been necessary as a result of Atlantic sturgeon critical habitat having been designated, and these discussions and correspondence with Federal agencies yielded no suggestions that project modifications are likely to result from this designation in the future. Further, even if modifications were to be required to avoid destruction or adverse modification of critical habitat, it is extremely unlikely that modifications that would be required to avoid destruction or adverse modification of critical habitat would not also be required to avoid jeopardizing the species. Therefore, project modification costs resulting solely from these critical habitat designations are likely to be small, if they were to occur.

*Comment 49:* An industry trade group pointed to our determinations that the majority of the section 7 consultation costs would already be incurred based on the listing of the Atlantic sturgeon itself and that “[i]t is extremely unlikely that [project] modifications that would be required to avoid destruction or adverse modification of critical habitat would not also be required because of adverse effects to the species.” They wondered, if there are no categories of permits or other Federal activities that would be impacted solely or even primarily by consultation over impacts to designated critical habitat (rather than impacts to the listed species), what is the purpose of designating critical habitat? They went on to state that if designation of critical habitat is “not prudent,” we should not make such a designation.

*Our Response:* We are required by section 4(a)(3) of the ESA to designate critical habitat when we list a species as endangered or threatened. We may decline to designate critical habitat for a species, if doing so is “not prudent.” Our regulations (50 CFR 424.12) explain that designation of critical habitat is not

prudent if: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or if designation would not be beneficial to the species. The life history of Atlantic sturgeon is fairly well described, so designating critical habitat will not increase the degree of threat to the species from taking or other human activity. In determining whether a designation would not be beneficial, the factors we may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species’ habitat or range is not a threat to the species, or whether any areas meet the definition of “critical habitat.” For Atlantic sturgeon, the present or threatened destruction, modification, or curtailment of a species’ habitat or range has been identified as a threat, and the areas we have proposed for designation meet the definition of critical habitat, and, therefore, designation is clearly prudent. In addition, while we have determined that the majority of section 7 consultation costs would already be incurred based on the listing of the species, we determined there will be additional benefits when impacts to critical habitat are assessed during consultations. Designating critical habitat identifies areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the ESA. It also helps focus the conservation efforts of other conservation partners, such as State and local governmental organizations, and individuals. In addition, we found that there will be numerous conservation benefits to Atlantic sturgeon, its ecosystem, and to the public, resulting from the designation. Therefore, we believe that designation of critical habitat for Atlantic sturgeon is beneficial to the species.

*Comment 50:* An industry trade group suggested we had failed to perform the requisite analysis of whether certain areas should be excluded. They believe that to comply with our statutory mandate to consider whether the benefits of excluding areas from the critical habitat designation outweigh the benefits of designation, we must provide some specific analysis of the conservation benefits derived from designating specific areas compared to the economic costs of designating those areas. They indicated we made no attempt to carve out less valuable areas based on economic, national security, or other relevant impacts. They claimed

our analysis is cursory and grossly inadequate, because we do not evaluate whether the benefits of exclusion outweigh the economic costs of designation for particular areas that will be designated (aside from areas of concern to the Navy).

*Our Response:* The commenters' argument misstates the requirements of the ESA. Section 4(b)(2) of the ESA contains two distinct elements: An initial mandatory consideration of impacts of a designation, and a separate discretionary exclusion provision. The ESA does not require use of any particular methodology in the consideration of impacts, let alone require comparing the benefits of designation to the benefits of excluding certain areas as part of this portion of section 4(b)(2) (see, e.g., *Building Industry Association of the Bay Area v. U.S. Department of Commerce*, 792 F.3d 1027 (9th Cir. 2015)). Similarly, the ESA does not require that we carve out "less valuable" areas of critical habitat.

In our proposed rule, we explained our preliminary determination that we would not exercise our discretion to consider exclusions. However, based on input received during the public review process raising concerns about the impacts and uncertainties associated with unoccupied critical habitat, and questions raised about the nature of the conservation values these unoccupied units provide, we determined that conducting a discretionary exclusion analysis for areas of unoccupied critical habitat areas in the Carolina and South Atlantic DPS was warranted. Given that occupied units are currently used by Atlantic sturgeon for reproduction and recruitment, and due to the severely depressed levels of all river populations in all 5 DPSSs, occupied units are far too valuable to both the conservation and the continuing survival of Atlantic sturgeon to be considered for exclusion.

Section 4(b)(2) of the ESA provides that the Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. This is true unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned. The legislative history regarding section 4(b)(2) exclusion analyses suggests that the consideration and weight given to impacts is within the Secretary's discretion (H.R. 95–1625), and the Secretary is not required to give economic or any other 'relevant impact' predominant consideration in his specification of critical habitat.

Based on that analysis, we have elected to exclude the Santee-Cooper river system (CU1) and Savannah River (SAU1) unoccupied units of critical habitat, because the benefits of exclusion (that is, avoiding some or all of the impacts that would result from designation) outweigh the benefits of designation.

*Comment 51:* A commenter stated the economic analysis discussed in the preamble and supplementary information is focused exclusively on the administrative costs to the Federal agencies of ESA section 7 consultations, and these costs are not inconsequential. They go on to state that, for the New York Bight DPS, the projected medium and high costs are estimated to equal approximately \$2.83 and \$5.57 million, respectively. The preamble states that "[a]ny incremental economic impacts will consist solely of the administrative costs of consultation; no project modifications are projected to be required to address impacts solely from the proposed critical habitat." The commenter claims that no estimates are presented of costs to applicants for projects funded, authorized or carried out by Federal agencies (for example, projects subject to Clean Water Act actions for which ESA consultations are likely), including analyses of the impacts of a project, the time needed for consultation, and any specific requirements deemed necessary for the project. The commenter also states that the estimated administrative costs, the large number of activities entailing Federal action, and the complexity of the essential PBFs identified and potentially requiring consideration dictate that the final rule should address these additional economic costs.

*Our Response:* The designation of critical habitat requires Federal agencies to consult with us under section 7 of the ESA if their proposed action may affect critical habitat. Designating critical habitat does not affect the activities of private individuals conducting activities on private land unless those activities are federally-funded or require federal authorization. Therefore, in terms of the economic impacts of a critical habitat designation, the costs are those associated with conducting informal or formal ESA section 7 consultations, including preparation of consultation documents. Preparation of a license application is not a cost of ESA section 7 consultation because the license application is required separate from any critical habitat designation.

The economist who drafted the economic analysis contacted Federal agencies for input on the number and type of modifications that may occur as

a result of critical habitat designations. The Federal agencies did not identify any modifications. We used a 10-year history of ESA section 7 consultations to inform the number and type of ESA section 7 consultations likely to occur in the future. To address uncertainty, the economist provided three different scenarios that affected the overall estimated costs associated with the critical habitat designations. Despite receiving information from Federal agencies that no modifications were anticipated, the economist also presented information for modification costs based on consultations for Federal agency actions that may affect ESA-listed salmon species, as salmon were considered a reasonable proxy for Atlantic sturgeon for this analysis. For example, project modifications might include date restrictions, use of silt fences, upland disposal of excavated material, maintenance of all heavy equipment to minimize pollutant release, use of a bubble curtain to minimize sound effects, and pollution and erosion control.

We consider the incremental impacts of critical habitat designations (*i.e.*, the impacts that would occur in the absence of any other action (78 FR 53058; August 28, 2013)). The costs of the critical habitat designations are the costs of conducting ESA section 7 consultations (*i.e.*, the administrative costs of section 7 consultation, which include the projected costs to NMFS, the Federal agency taking the action, and the third party (e.g., applicant), and the cost of completing a biological assessment). Because the Federal agencies would most likely have to consult with us anyway given presence of Atlantic sturgeon and, in many cases, other ESA-listed species within the critical habitat areas, the incremental cost of the critical habitat designations will be low. Therefore, the medium and high cost estimates are not likely representative of the costs of the critical habitat designations. Even the low cost estimates likely overestimate the economic impact of the critical habitat designations for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSSs because the critical habitat designations are unlikely to result in more ESA section 7 consultations then would have occurred in the absence of critical habitat.

*Comment 52:* An industry trade group suggested we had significantly underestimated the true costs to a permittee, because we had not included potential costs associated with employing biologists, other consultants, or legal support they believe may be necessary to navigate the consultation



process. They went on to state that consultation could cause project modifications, additional avoidance measures, or require additional mitigation above what was required by the action agency. The commenters reported Sundig (2003) estimated the direct, out-of-pocket costs of section 7 consultation for a single-family housing project to be several thousand dollars per house. Beyond the consultation process itself, the commenters suggested requirements to avoid or mitigate impacts to critical habitat could result in economic losses of millions of dollars. The commenters concluded that by severely underestimating the number of consultations that will be triggered by the proposed designations and the costs of those consultations, we failed to provide a meaningful analysis of section 7 consultation costs.

*Our Response:* We disagree. In our impacts analyses we did not assert that no project modifications would be required to address impacts to critical habitat. Rather, we concluded that the same project modifications would most likely address any adverse impacts to both sturgeon and to critical habitat, and as such, these costs are not solely attributable to the critical habitat designation. Our impacts analyses discuss the types of project modifications that might be required to address adverse effects to critical habitat for all the Federal activities projected to require consultation over the next 10 years. The commenters stated we did not include potential costs associated with employing biologists, other consultants, or legal support that they believe may be necessary to navigate the consultation process. As noted previously, we anticipate that in nearly all cases, section 7 consultations would likely have been required to consider potential adverse effects to Atlantic and/or shortnose sturgeon for any action potentially affecting Atlantic sturgeon critical habitat. These costs would be incurred even without the designation. However, we also projected that every future consultation will involve additional administrative costs, including costs to third parties such as permittees or applicants, related to the additional analyses added to a consultation to address critical habitat. These costs would depend on the complexity of the consultation and whether the permittee is required to produce a biological assessment (see Economic Analysis for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs, (Table 3–6) and Impacts Analysis of Critical Habitat Designation for the Carolina and South

Atlantic DPSs of Atlantic Sturgeon (Industrial Economics, 2014)). In criticizing our impacts analyses, the commenter cites Sundig (2003) and its conclusion that costs of consultation for a single-family housing project are estimated to be several thousand dollars per house. While we find Sundig (2003) to be too hypothetical and generalized to warrant changes in our analysis, as discussed above, our analysis does include estimated permittee costs of consultation not obviously dissimilar to Sundig's (2003) 'several thousand dollars' per permittee. In addition, it does not appear that Sundig (2003) took into account that at least some and possibly most of the impacts and costs described are co-extensive with the listing of the species, and not attributable solely to critical habitat designation. We see no basis to change our impacts analysis based on this comment.

*Comment 53:* A commenter representing two agency groups stated that the sweeping critical habitat designations would impede critical economic growth, including activities that are necessary to sustain the U.S. economy, without commensurate benefits to the Atlantic sturgeon.

*Our Response:* We disagree. The economic analysis for designating critical habitat for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon provides information on the economic impacts of the critical habitat designations, and addresses uncertainty by presenting costs for scenarios that are not likely to occur. The draft economic analysis was peer-reviewed by three experts before it was released for public comment at the same time as the proposed rule. Our review of the likely economic impacts of the critical habitat designations is provided in the proposed rule and Impacts Analysis and Biological Information Source Document. As described, the best available information supports that incremental economic impacts as a result of the critical habitat designations for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs will be low.

There are conservation benefits of the critical habitat designations, both to the species and to society. While we cannot quantify nor monetize these benefits, we believe they are not negligible and are an incremental effect of the designations.

*Comment 54:* A commenter stated that many project impacts are minimal (e.g., placing a pole on an islet or bar to allow an aerial electric line to cross a river) and would not be likely to impact the Atlantic sturgeon, but would trigger

time-consuming and costly ESA section 7 consultation requirements if they intersect and may affect areas designated as critical habitat. They stated that consultation with NMFS often results in modification, delay, or other changes to projects, with potentially significant adverse impacts on their customers' access to reliable and secure energy supplies at a reasonable cost, and without commensurate (if any) demonstrated benefit to the listed species.

*Our Response:* The ESA requires consultation when a Federal agency action may affect a listed species or critical habitat. We agree that many projects have impacts that are minimal. If a project will have no effect on critical habitat, there would be no section 7 consultation on effects to critical habitat. If effects are insignificant or discountable, consultation is completed informally via a letter exchange between the Federal agency and NMFS. We do not expect consultations on small projects to be time consuming or costly for Federal agencies or applicants. The commenter did not provide specific information regarding any consultation that had the potential to significantly impact access to reliable and secure energy supplies at a reasonable cost and we are not sure what consultations the comment refers to, on what types of projects or listed species. The commenter did not provide context or specific examples supporting the comment that consultations with us often result in modification, delay, or other changes to projects and we disagree with this claim. The contracted economist contacted Federal agencies for information on any consultations with us that resulted in project modifications that might be required again in the future due to critical habitat designation. None of the Federal agencies identified any such consultations. In fact, the majority of ESA section 7 consultations with us are concluded informally and never rise to the level of a formal consultation with a biological opinion issued by us, and thus would not involve modifications or delays that result in significant economic impacts.

We disagree with the commenter's claim that consultation with NMFS does not result in demonstrated benefits to listed species. Informal consultation (i.e., concurrence with a not likely to adversely affect determination) is a simple process that confirms that effects of an action will be wholly beneficial, insignificant or discountable. Formal consultation, resulting in a Biological Opinion, allows proposed Federal actions to move forward and even result

in adverse effects to listed species, but requires implementation of measures that minimize the effects of take of listed species. For critical habitat, benefits of consultation include ensuring that critical habitat is not likely to be destroyed or adversely modified, or identifying minor changes to projects that can avoid or minimize adverse effects. The benefits of designating critical habitat as well as the requirement to designate critical habitat are described in the proposed rules for these Atlantic sturgeon critical habitat designations. Recovery of ESA-listed species is often a lengthy process. Progress towards meeting recovery goals of down-listing and de-listing are anticipated benefits of all of the actions taken to recover ESA-listed species, including designating critical habitat.

#### Comments on ESA Section 7 Consultation

*Comment 55:* A commenter sought confirmation that the statement, “we determined that any resulting consultations will likely be coextensive” means that there will not be an increased consultation burden for updating or maintaining pier structures (including pile driving), or for new, currently unpermitted dredging, fill, or discharge activities in the Kennebec River, and an Atlantic sturgeon critical habitat designation for the Kennebec River will not provide a basis to reopen existing dredging permits to require additional consultation.

*Our Response:* For clarification, the requirement to consult under ESA section 7 is for Federal agencies if the agency anticipates taking an action that may affect ESA-listed species or designated critical habitat. Private citizens do not consult with us under ESA section 7 but, as applicants for Federal agency actions (e.g., permits) or potential recipients of Federal funding, private citizens may engage with the action agency (i.e., the Federal agency funding, authorizing, or carrying out an action) during the ESA section 7 consultation with us.

We, as the consulting agency, cannot foresee every circumstance that might require ESA section 7 consultation. However, based on the best available information for the presence of Atlantic sturgeon and other ESA-listed species in the Kennebec River critical habitat unit, information from Federal agencies regarding anticipated agency actions and past modifications to projects as a result of ESA section 7 consultation, and the past 10-year consultation history, we determined the most likely scenario is that agency actions that may affect critical habitat, and thus require

ESA section 7 consultation, may also affect listed species, including Atlantic sturgeon. Therefore, designating critical habitat is unlikely to result in an increase in the number of ESA section 7 consultations. Consultation that has been completed may need to be reinitiated if the reinitiation triggers have been met. Reinitiation is required when a new species is listed or critical habitat designated that may be affected by the identified action. We anticipate that consultations will need to be reinitiated once the final rule is effective. However, this does not necessarily mean that permits will be reopened or that actions will need to be modified. Modifications to ongoing activities would only be required where a Federal agency has ongoing discretionary control and when the action is likely to result in the destruction or adverse modification of critical habitat and we issue a biological opinion that includes reasonable and prudent alternatives. It is important to note that in nearly all existing section 7 consultations on Atlantic sturgeon, we have included an analysis of effects to habitat.

We have been working closely with action agencies during the rulemaking process and have provided information on the triggers for reinitiation as well as when conference under section 7(a)(4) of the ESA is necessary. Further information about ESA section 7 consultation is available at <https://www.greateratlantic.fisheries.noaa.gov/protected/section7/index.html>.

*Comment 56:* The Atlantic States Marine Fisheries Commission stated that we should consider the stock assessment needs and management impacts from ESA section 7 consultations, and conduct ESA section 7 consultations expeditiously to avoid delays in fisheries research or sampling.

*Our Response:* We acknowledge the concern for the length of time that is sometimes necessary to complete ESA section 7 consultations. We have taken several steps in the past year to address these concerns, including additional online resources for technical assistance, an Expedited Consultation Program, and programmatic approaches to consultations where possible.

Currently, there are two biological opinions for federally funded, authorized, or implemented actions to support fisheries research and sampling in Federal and state waters from Virginia through Maine. These are programmatic consultations for (1) the Northeast Fisheries Science Center’s (NEFSC) fisheries and ecosystem research, and (2) surveys undertaken under the USFWS issuance of funds

from the Wildlife and Sport Fish Restoration Program to 11 Northeast states and the District of Columbia. Neither of these biological opinions considers effects of the action(s) to proposed critical habitat for any Atlantic sturgeon DPS because the biological opinions were completed before the proposed critical habitat designations.

In a memo to the Greater Atlantic Regional Fisheries Office, the NEFSC determined, following publication of the critical habitat proposed rule, that the actions described in our biological opinion that considered their NEFSC’s fisheries and ecosystem research program are not likely to result in the destruction or adverse modification of proposed critical habitat. We concurred with the determination. Therefore, because we do not anticipate any changed circumstances, we do not anticipate the need to reinitiate the NEFSC programmatic consultation at this time. We will continue to work with the NEFSC and the USFWS to expeditiously complete ESA section 7 consultations necessary for fisheries research and fisheries monitoring.

*Comment 57:* A few commenters, including an industry trade group, expressed concern about potential delays for projects already undergoing consultation that would now have to include an analysis of adverse modification for Atlantic sturgeon critical habitat, as well as previous consultations that may need to be reinitiated based on the new critical habitat designation.

*Our Response:* We acknowledge delays are possible. We recommend that Federal action agencies work with us to provide the appropriate information as identified at 50 CFR 402.14(c)(1)–(6) to assess impacts to critical habitat as soon as possible to limit delays. We also note that Federal actions undergoing consultation that may affect Atlantic or shortnose sturgeon would already be required to analyze impacts to those species’ habitats, whether they are designated as critical habitat or not. Thus, any delays due solely to this rule should not be significant.

*Comment 58:* The USACE expressed concern that we may be relying on historical (1870s) data that may not reflect current day conditions or documented scientific data, and cautioned that until detailed scientific data are provided that clearly documents the existence of a fall spawning season in the Hudson River upstream of Kingston, New York, no further restriction to the current dredging window is warranted.

*Our Response:* We do not issue restrictions on the timing of dredging in the Hudson River Federal Navigation Channel. We have worked with the USACE to recommend time of year “windows” in which dredging is least likely to interact with listed species, including Atlantic sturgeon.

The features of Atlantic sturgeon critical habitat are expected to be present year-round. Therefore, “dredge windows” are more effective for avoiding effects to ESA-listed species than for avoiding effects to Atlantic sturgeon critical habitat. Regardless, we would ensure that any recommendations to the USACE or any other party are based on the best available information.

We included mention of the 1870s era data as part of our review of information for the critical habitat designations, and evidence of fall spawning in rivers where Atlantic sturgeon spawn. However, as we stated in the Background section of the proposed rule, spring is the only currently known spawning period for the New York Bight DPS. There is no information that fall spawning currently occurs in the Hudson River.

*Comment 59:* A commenter asked if consultation is required even if the Federal action does not destroy or adversely modify current habitat. The commenter further directed us to address whether actions that improve the essential PBFs, such as those for improving water quality, are subject to the consultation provisions of section 7(a)(2) of the ESA, and to identify the earliest stage in the regulatory process that such consultation may be initiated.

*Our Response:* Current habitat is not the same as designated critical habitat. The ESA and the regulations implementing section 4 of the ESA emphasize that, except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species. Once critical habitat is designated, section 7(a)(2) of the ESA requires that a Federal agency, in consultation with us (or with the USFWS for ESA-listed species under their jurisdiction), insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat.

The Greater Atlantic Region, Protected Resources Division provides information on the ESA section 7 consultation process, including technical assistance, and the Expedited

Consultation Program on our Web site. For further information, see [www.greateratlantic.fisheries.noaa.gov/protected/section7/index.html](http://www.greateratlantic.fisheries.noaa.gov/protected/section7/index.html). Additional information, including links to policies, guidance, and regulations associated with ESA section 7 is available at [www.nmfs.noaa.gov/pr/consultation/](http://www.nmfs.noaa.gov/pr/consultation/). Briefly, a Federal agency must consult with us if the agency is authorizing, funding or carrying out an action that may affect listed species or critical habitat. An action that results in wholly beneficial effects is not exempt from the requirements of ESA section 7 consultation.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between us and the Federal agency to assist the Federal agency in determining whether formal consultation is required. Informal consultation can be initiated as early as the effects of a proposed Federal action can be identified. We provide information at the web addresses listed above to help Federal agencies determine, at the earliest opportunity, whether and when to initiate consultation with us. We also provide technical assistance to Federal agencies related to questions of whether and where species and designated critical habitat occur to help action agencies determine whether their actions may affect listed species or critical habitat. The ESA section 7 implementing regulations (50 CFR 402.11) address “early consultation” as a preliminary consultation requested by a Federal agency on behalf of a prospective permit or license application prior to the filing of an application for a Federal permit or license. The ESA and its implementing regulations do not identify the earliest opportunity for consultation; however, in practice, the earliest opportunity for entering into formal consultation is when there is a proposed action that is far enough along in development that the effects can be predicted and are reasonably certain to occur.

*Comment 60:* Two commenters requested we engage with the Virginia Department of Environmental Quality (VADEQ) concerning Dominion’s Chesterfield Power Station, which they identified as directly adjacent to Atlantic sturgeon spawning habitat on the James River. They commented that the NPDES Permit (issued by VADEQ) would authorize activities at Chesterfield Power Station that are likely to take endangered species and/or significantly degrade or destroy Atlantic sturgeon critical habitat, and these activities resulted in the entrainment of two Atlantic sturgeon larvae at Chesterfield Power Station in October

2015. The commenters also requested that we require Virginia Power and Electric Company (“Dominion”) to submit a habitat conservation plan as soon as possible once the critical habitat designations have been finalized, and that we finalize the proposed rule as soon as practicable.

*Our Response:* Information posted by the VADEQ provides the background for our response (for the complete text go to [www.deq.virginia.gov/Programs/Water/PermittingCompliance/PollutionDischargeElimination.aspx](http://www.deq.virginia.gov/Programs/Water/PermittingCompliance/PollutionDischargeElimination.aspx)). Section 402 of the Clean Water Act established the NPDES program to limit pollutant discharges into streams, rivers, and bays. The U.S. Environmental Protection Agency (EPA) delegates the authority to implement the NPDES program to states where certain conditions have been met. Virginia received authorization from EPA to administer the NPDES base program on March 31, 1975; for Federal facilities on February 9, 1982; for pretreatment on April 14, 1989; and for general permits on May 20, 1991. The VADEQ administers the program as the Virginia Pollutant Discharge Elimination System (VPDES), and issues VPDES permits for all point source discharges to surface waters, to dischargers of stormwater from Municipal Separate Storm Sewer Systems, and to dischargers of storm water from industrial activities. Further, the VADEQ issues Virginia Stormwater Management Program (VSMP) permits to dischargers of stormwater from Construction Activities. The EPA maintains authority to review applications and permits for “major” dischargers, a distinction based on discharge quantity and content.

The VADEQ issued a VPDES permit to Dominion Chesterfield Power Station on September 23, 2016. For further information on this permit, go to <http://www.deq.virginia.gov/Programs/Water/PermittingCompliance/VPDESPermitActions.aspx#Chesterfield>. Because issuance of the permit was a state agency action, not a Federal agency action, there is no requirement for ESA section 7 consultation on issuance of the VPDES permit. A non-Federal entity can apply for an ESA section 10(a)(1)(B) Incidental Take Permit to cover otherwise lawful actions that may result in takes of an ESA-listed species.

A representative of Virginia Power and Electric Company notified us of the incidental entrainment of the two Atlantic sturgeon larvae following their identification. We began discussions with their staff regarding application for an ESA section 10(a)(1)(B) Incidental Take Permit, including submission of a Habitat Conservation Plan (HCP), in

June 2015. While a draft HCP has been submitted to us, we cannot predict when the HCP will be finalized or when an Incidental Take Permit will be issued. We will publish a notice in the **Federal Register** and provide an opportunity for public comment when we determine the application is sufficient.

*Other Comments on the Process for Designating Critical Habitat and Comments Outside the Scope of This Rulemaking*

*Comment 61:* A commenter stated the driving force behind the proposed critical habitat designations has been the pressure and deadlines of litigation, not the underlying science or an urgent need to designate critical habitat to protect the Atlantic sturgeon. The commenter concluded that NMFS has not taken sufficient time to make careful critical habitat determinations, nor has it afforded the public a sufficient opportunity for meaningful participation.

*Our Response:* As described in our response to Comment 37, the ESA requires that we designate critical habitat at the time a species is listed or, if not determinable at that time, within 1 year of listing. The only other exception is if designating critical habitat is not prudent for the species. However, this circumstance rarely occurs. We failed to meet this 1-year deadline and are currently subject to a statutory deadline and a court-order to complete the designation. While we agree that litigation has influenced our timeline, we disagree that we have not made careful determinations or provided the public with opportunities for meaningful participation.

The critical habitat designations for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon were proposed more than 4 years after the DPSs were listed as endangered or threatened. We began the process of designating critical habitat in 2012. We initially provided a comment period of 90 days, 30 days longer than typical for critical habitat designations. In response to requests for extension, we reopened the comment period for an additional 15 days of comment, making the total comment period 105 days.

We must hold a public hearing on a proposed critical habitat designation at the request of the public. Despite receiving no such requests, we chose to hold two public hearings and announced those in the proposed rule and on our Web page, in emails sent to our distribution lists, and a newspaper with regional readership. We made the public hearings available by telephone

as well as in person to increase opportunities for the interested public that would otherwise have had to travel to the hearing location. We did not receive any public comments during the public hearings, and we did not receive any requests for additional public hearings. We also held four informational meetings during which we provided an overview of the proposed rule as a slide presentation, answered procedural questions to help the public formulate their comments, and clarified the instructions for submitting comments. Additionally, we posted information on our Web page, including the slide deck presented at the public information meetings and public hearings, and held an informational webinar for Federal agencies. We used our discretion to go beyond the requirements of the ESA and its implementing regulations and provided multiple means for public participation.

*Comment 62:* A commenter stated there is no substantial value to designating critical habitat which requires additional regulatory burden with limited value to increasing population levels of the species. The commenter stated that each Federal action in the Delaware River associated with permitting considers the presence of shortnose and Atlantic sturgeon, and considers how each aspect of a project will affect the species. The commenter notes that consultation is initiated when appropriate and that the opportunity for any additional benefits associated with critical habitat designation would be limited.

*Our Response:* The ESA requires that we designate critical habitat for each species (including subspecies and DPSs) that we list under the ESA unless designation is not prudent for the listed species. A determination that critical habitat is not prudent is rare and is made only when the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or when designation of critical habitat would not be beneficial to the species.

The designation of critical habitat provides a significant regulatory protection—the requirement that Federal agencies ensure, in consultation with the Services under section 7(a)(2) of the ESA, that their actions are not likely to destroy or adversely modify critical habitat. The Federal Government, through its role in water management, flood control, regulation of resource extraction and other industries, Federal land management, and the funding, authorization, and

implementation of myriad other activities, may propose actions that may affect critical habitat. The designation of critical habitat ensures that the Federal Government considers the effects of its actions on habitat important to species' conservation and avoids or modifies those actions that are likely to destroy or adversely modify critical habitat. There are conservation benefits of the critical habitat designations, both to the species and to society. While we cannot quantify or monetize these benefits, we believe they are not negligible and are an incremental effect of the designations.

*Comment 63:* The commenter acknowledged that spawning occurs for shortnose sturgeon in the upper Delaware River and believes that Atlantic sturgeon possibly spawn in the upper Delaware River but stated actual spawning of Atlantic sturgeon has never been directly documented.

*Our Response:* Atlantic sturgeon are spawning in the Delaware River. There are several lines of evidence demonstrating spawning occurs. First, Atlantic sturgeon less than 1-to 2-years old are captured in the Delaware River. Atlantic sturgeon this young do not have the salinity tolerance to leave the natal estuary and travel through full saline waters to other lower salinity, estuarine waters that are necessary for rearing. Therefore, presence of Atlantic sturgeon less than 2 years old in the Delaware River is evidence that Atlantic sturgeon are spawning in the Delaware.

Genetic analyses have shown that Atlantic sturgeon natal to the Delaware River have a unique genetic structure. Such uniqueness arises when adults characteristically return to spawn in the river in which they were spawned and mixing with other populations is limited.

Year after year, male and female Atlantic sturgeon in spawning condition occur in the Delaware River in areas and at times when spawning would occur. In addition, the reporting and retrieval of dead large, adult Atlantic sturgeon in the Delaware River, sometimes with evidence of spawning condition such as ripe eggs or milt, occurs more frequently in the spring; the time period when we expect Atlantic sturgeon spawn in the Delaware River.

The opportunity to witness sturgeon spawning is difficult given the environment in which they spawn, and human observation of spawning sturgeon is potentially harmful to sturgeon (e.g., as a result of disrupting spawning). Sturgeon researchers are required to minimize harm to Atlantic sturgeon, including minimizing disruptions of spawning behavior, and

the public is cautioned to not approach areas where spawning may be occurring (e.g., as evidenced by breaching sturgeon). The available information is sufficient to establish that spawning occurs in the Delaware River, despite spawning activity, eggs, or larvae, not being observed in the River.

*Comment 64:* An industry trade group indicated we made no attempt to establish any connection between the threats to Atlantic sturgeon described in the listing rule and critical habitat. They suggested we have not evaluated or explained how designation of critical habitat will benefit the species, or help address injury/death resulting from inshore trawling or overfishing. Additionally, they indicated we have not explained how the designation of “these vast areas would provide new or additional minimization of habitat alteration or destruction.”

*Our Response:* The ESA does not require that critical habitat address the specific threats that led to the listing of the species or avoid injury or death from particular activities. However, in the case of Atlantic sturgeon, designation of critical habitat will help address the present or threatened destruction, modification, or curtailment of the species’ habitat or range, which was identified as a threat contributing to the threatened or endangered status for these DPSs. Critical habitat designations identify habitat features and areas essential to the conservation, and thus recovery, of the species. In terms of benefits of critical habitat in providing protection from habitat alteration or destruction, designation of critical habitat also provides significant regulatory protection—the requirement that Federal agencies ensure, during section 7 consultation, that their actions are not likely to destroy or adversely modify critical habitat. Designating critical habitat also identifies areas where Federal agencies can focus their conservation programs and use their authorities under ESA section 7(a)(1) to further the purposes of the ESA by carrying out programs for the conservation of listed species. It also helps focus the conservation efforts of other conservation partners, such as State and local governmental organizations, and individuals. Therefore, we believe that designation of critical habitat for Atlantic sturgeon is beneficial to the species and will directly address habitat alteration and destruction issues.

*Comment 65:* A commenter stated that even in advance of a final rule, EPA has signaled potential changes to requirements under the Clean Water Act based upon a critical habitat designation

that could have a significant effect, along with related costs, on non-Federal government entities, including small governments (municipalities) and private parties. The commenter asked if this will result in unfunded mandates.

*Our Response:* We are unaware of any changes to the Clean Water Act as a result of a critical habitat designation. We encourage the commenter to discuss their concerns with the EPA.

*Comment 66:* A commenter stated that development and industrial practices have hindered recovery of Atlantic sturgeon. They stated that there is an immediate need to lower pollution in all tributaries and to eliminate all unnecessary killing of larvae and young sturgeon, and the invertebrates they feed upon and that all facilities that currently draw water from our rivers or bays for cooling purposes should change over to closed-loop operations. In addition, the commenter stated that pollution could be lowered, and DO improved, using natural vegetation in a manner that does not infringe on navigation.

*Our Response:* We appreciate the information for addressing water quality for Atlantic sturgeon. This comment is beyond the scope of this critical habitat designation. However, once critical habitat is designated, we will work with action agencies if a proposed or ongoing Federal action may affect that habitat. Finally, there are other laws that address water quality, including the Clean Water Act, in areas where Atlantic sturgeon critical habitat occurs. Section 316(b) of the Clean Water Act requires EPA to issue regulations on the design and operation of cooling water intake structures, in order to minimize adverse impacts. Further information can be found on the EPA Web site at <https://www.epa.gov/cooling-water-intakes>.

*Comment 67:* A commenter stated the Department of Interior must address present-day impacts in Delaware such as beach fill projects, the Delaware River Deepening project, maintenance dredging of the Delaware River for the next 50 years, the proposed ocean outfall off Rehoboth Beach, as well as the impacts of past and present industrial sites which contributed to the decline in water quality. They stated that deepening of the Delaware Bay (2015) and the new USACE sand borrow site Area B (2016) in Delaware have compromised and will undoubtedly continue to compromise the health of the benthic food chain for the sturgeon. The commenter stated that a strong and applicable critical habitat designation and subsequent modification or elimination of the non-Federal project is an essential requirement for

preservation and conservation of the species in question.

*Our Response:* We have been delegated authority from the Secretary of Commerce to carry out the requirements of the ESA for species under our jurisdiction, including the five Atlantic sturgeon DPSs. The consultation process, as described in section 7(a)(2) of the ESA, provides opportunity for us to work with Federal agencies to address impacts of agency actions on the species. If we determine a Federal agency action is likely to jeopardize the continued existence of a listed species (a “jeopardy biological opinion”) or result in the destruction or adverse modification of critical habitat (a “destruction or adverse modification” biological opinion), the biological opinion will include reasonable and prudent alternatives to modify the action to avoid the likelihood that the action will jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.

*Comment 68:* A commenter stated that the Final Environmental Impact Statement for the City of Rehoboth Beach proposed ocean outfall incorrectly concludes the outfall will not have an impact on the diversity and density of the benthic region. The commenter stated that establishment of sturgeon critical habitat in this important area should disavow this conclusion, and protect and conserve the benthos.

*Our Response:* We are not designating critical habitat in marine waters, including marine waters off Rehoboth Beach, Delaware. The marine waters off Rehoboth Beach are part of the geographical area occupied by each of the five Atlantic sturgeon DPSs. To designate critical habitat for one or more of the Atlantic sturgeon DPSs in the marine environment, we must first identify the PBFs essential to the DPSs, and which may require special management considerations or protections. See our response to Comment 20.

*Comment 69:* A commenter requested that as soon as levels are sustainable, a limited catch and release fishery for Atlantic sturgeon should be established, with a special permit, for once a year use and a high fee, \$500 to \$1,000, and the fee should be used to enhance that fishery.

*Our Response:* Consideration of any new Atlantic sturgeon fishery is beyond the scope of this critical habitat designation.

*Comment 70:* One commenter asked us to ensure that the Salem Nuclear Power Plant, Mercer Generating Station,

and the Delaware City Refinery, which processes 200,000 barrels of petroleum per day, install cooling towers and at the latter refinery, remove intake screens that kill millions of fish and entrains millions more small fish, eggs, and larvae that circulate through the refinery's cooling system pipes and get boiled to death.

*Our Response:* This comment is beyond the scope of this critical habitat designation. Section 316(b) of the Clean Water Act requires EPA to issue regulations on the design and operation of cooling water intake structures, in order to minimize adverse impacts. Further information can be found on the EPA Web site at <https://www.epa.gov/cooling-water-intakes>.

*Comment 71:* A commenter representing the interests of two industries provided numerous comments on the recently revised joint Service regulations for designating critical habitat (81 FR 7414; February 11, 2016) and asserted that these critical habitat designations for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon were flawed as a result of relying upon the revised regulations.

*Our Response:* There was a lengthy public comment period for the revised joint Service regulations. The comments and the Service's responses to the comments were provided with the final rule. It is not within the scope of these critical habitat designations for the Atlantic sturgeon DPSs to revisit the response to comments or recommend changes to the joint Service regulations. All critical habitat designations proposed after March 14, 2016, are required to follow the revised joint Service regulations, and we have done so for the Gulf of Maine, New York Bight, and Chesapeake Bay DPS critical habitat designations.

*Comment 72:* The U.S. Coast Guard provided comment assuring us that they will consult with us in accordance with section 7 of the ESA for establishing new anchorage grounds on the Hudson River because establishing anchorage grounds may impact Atlantic sturgeon, its habitat, or its critical habitat.

*Our Response:* We appreciate the U.S. Coast Guard's commitment to ESA section 7 consultation for activities that may affect Atlantic sturgeon and Atlantic sturgeon critical habitat.

*Comment 73:* A representative of the Rhode Island Department of Environmental Management agreed there are not specific areas within Rhode Island state waters that meet the requirements for designation as critical habitat for Atlantic sturgeon, and concurred with the proposal not to

designate any critical habit areas in Rhode Island state waters.

*Our Response:* We appreciate the input and concurrence from the Department of Environmental Management.

*Comments on the Carolina and South Atlantic DPS Critical Habitat Designations (81 FR 36077, June 3, 2016; 81 FR 41926, June 28, 2016)*

Comments on Geographical Area Occupied

*Comment 74:* A few commenters asserted that our designation is inconsistent with section 3(5)(C) of the ESA, which provides that "except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species."

*Our Response:* The areas being designated do not include the entire geographical area which can be occupied, and include only a portion of the ranges of the two DPSs. These areas do not include rivers that do not support spawning but which may be used for foraging, marine habitats, or estuarine habitats below rkm 0 in each designated river.

*Comment 75:* An industry trade group believed we inappropriately delineated the "geographical area occupied" by the species as the entire "aquatic habitat (e.g., below the high tide line)" of inland freshwater areas that are currently accessible to the Atlantic sturgeon. These commenters stated that we inappropriately included not just areas where the species has actually been located, but instead we also included wider areas around the species' occurrences and areas that may be used only temporarily or periodically by the species. They stated that "areas identified as occupied include vast areas where there is no evidence the species even occurs, much less occupies."

*Our Response:* See response to Comment 2.

Comments on the Physical or Biological Features (PBFs)

*Comment 76:* One commenter asserted that the broad nature of the PBFs fails to provide notice to the regulated public whether the PBFs are present in an area without asking NMFS for case-by-case determinations. The commenters further asserted that the broadness of the PBFs renders them not actually essential to the species and provided the example that for the Biological Opinion for Continued Operations of the Indian Point

Generating Station, Units 2 and 3, NER 2012-2252 at 42 (Jan. 30, 2013), NMFS characterized one spawning area for Atlantic sturgeon in the Hudson River as being "freshwater year round with bedrock, silt and clay substrates and water depths of 12-24 m," and another area as having "clay, silt, and sand substrates and water depth of approximately 21-27 meters deep."

*Our Response:* As we explained in our final rule, Implementing Changes to the Regulations for Designating Critical Habitat (81 FR 7414; February 11, 2016), broadly-defined PBFs are not necessarily inappropriate. The level of specificity in our description of the PBFs is primarily determined by the state of the best scientific information available for the species at issue. As held by the court in *Arizona Cattle Growers v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 (D. AZ 2008), so long as we have used the best available information and endeavored to provide as much notice as is practicable to the public as to the nature of the PBFs, specification of some quantitative aspects of the PBFs may be deferred to the consultation process. The commenter did not point to any available information that we should have considered to provide additional specificity in the definition of the PBFs, or why the PBFs as defined by us are not actually essential. Moreover, the commenter overlooked important details in the PBFs that make them readily discernible. For example, the commenter stated that hard bottom substrate in low salinity waters, aquatic habitat with a gradual downstream salinity gradient of 0.5 to 30 ppt and soft substrate downstream of spawning sites, water of appropriate depth and absent physical barriers to passage, and water with the temperature, salinity, and oxygen values that, combined, support spawning, survival, growth, development, and recruitment, are too broad. But our description of the PBFs is more detailed than that. Hard bottom is described as *rock, cobble, gravel, limestone, boulder, etc.* This hard-bottom substrate must be in low salinity waters specified as *0.0-0.5 ppt*, and the substrate must be of a type that can facilitate settlement of fertilized eggs, and refuge, growth and development of early life stages. Transitional salinity zones with a *gradual* downstream gradient of *0.5-30 ppt*, and sand or mud soft substrate between river mouths and spawning sites is designated for juvenile foraging and physiological development (this final rule clarifies the gradient is from 0.5 up to 30 ppt). Water must be of an appropriate depth and lack barriers to passage. Appropriate depths

and lack of barriers are those that allow *unimpeded movement of adults to and from spawning sites, seasonal and physiologically-dependent movement of juveniles to appropriate salinity zones within the river estuary, and staging, resting, or holding of subadults or spawning condition adults*. Appropriate depths are explained as *at least 1.2 m*, to facilitate all life stages of sturgeon including effective adult migration and spawning behavior. Barriers that would eliminate or degrade this feature were described in the proposed rule as, *locks, dams, reservoirs, gear*, and are clarified in this final rule to include thermal plumes, sound, and turbidity. Essential water quality is qualified as temperature and DO, especially in the bottom meter of the water column, and illustrative examples of how variations in these parameters can adversely affect sturgeon are provided. The essential PBFs are all common attributes of aquatic habitat that are easy to understand and readily measurable; the various parameters—depth, temperature, DO, salinity, etc., are typically included in assessments of proposed projects' impacts on the environment. Proponents of future projects within Atlantic sturgeon critical habitat will know without consulting us whether their project has the capacity to affect salinity, hard or soft substrate, water depth, openness of river channels, temperature, and DO. Most, if not all, project proponents will be able to determine whether the PBFs exist in their project area, and what their baseline conditions are, without first consulting us. Thus, we believe the PBFs of Atlantic sturgeon critical habitat have been described with appropriate specificity, based on the best scientific information available.

With respect to the example provided by the commenter, the commenter mischaracterized our use of the language cited from the Indian Point Biological Opinion. We provided the text in the biological opinion and cited the source of the information as part of the review of available literature for Atlantic sturgeon in the Hudson River. The best available information that we used to describe the PBFs of Atlantic sturgeon critical habitat is cited in the Background of this rule and in the Impacts Analysis and Biological Source Document for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs.

*Comment 77:* An industry trade group asserted that we must revise our proposed designation to explain how each specific critical habitat unit to be designated contains the PBFs essential to the conservation of the species, suggesting that our approach should be the same as that taken in the designation

of critical habitat for the Southern DPS of green sturgeon (74 FR 52300; October 9, 2009). They also suggested our proposed designation is overly broad, improperly used “ephemeral reference points,” and unsupported by facts or science. The commenters suggested we identified and proposed to designate sweeping areas of occupied habitat that undoubtedly capture many areas that do not have, and likely never will have, physical or biological characteristics essential for the conservation of the species. One commenter suggested it appeared we had merely designated entire rivers from the confluence of the Atlantic Ocean back to either some major tributary or some large impoundment or impassable boundary upstream. Several commenters suggested that areas should not be designated as critical habitat because environmental conditions in certain stretches of rivers are poor and would not support the PBFs. Similarly, other commenters stated we had failed to limit the mapped areas in our proposed designation to areas where we believe the PBFs occur.

*Our Response:* See response to Comment 8.

*Comment 78:* The North Carolina Water Quality Association (NCWQA) and the South Carolina Water Quality Association (SCWQA) stated that we must include a natural condition provision to reflect natural instream temperature and DO levels that are outside of the temperature and DO critical elements in the proposed rule. They charged that any regulatory requirements must consider the natural condition and not critical temperature/DO elements that are not naturally present. They also suggested that we should have provided more context regarding whether the proposed PBFs for temperature and DO exist in an area most of the time, some of the time, etc.

*Our Response:* As we discussed in the proposed rule, values of temperature and DO that provide critical habitat functions to sturgeon will vary interdependently, and vary with changes in salinity. Because we are designating known spawning rivers, we are confident the PBFs are present in each unit at a temporal scale necessary to support sturgeon in their reproductive and developmental activities. We agree that the occurrence of the PBFs will fluctuate across, and even within, rivers, and over time, and can be affected by natural and manmade factors. But these fluctuations and the ephemeral nature of the PBFs make it impractical to describe them as static in condition and location. We agree that consideration of the natural conditions

and underlying environmental parameters at a given project location will be important in evaluating the impact, if any, of future projects on critical habitat. In this regard, we believe a meaningful evaluation of the natural baseline condition of project area is best done during the site-specific ESA section 7 consultation and not in this final rule.

*Comment 79:* The NCWQA and SCWQA suggested that we insert information included in the preamble of the GARFO proposed rule to designate critical habitat for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon (81 FR 35701; June 3, 2016) that makes it clear that the “specific oxygen concentration and temperature values are provided as examples and guidance” and that “areas designated as critical habitat based on the 4 features are not expected” to have these oxygen concentrations and temperature values “at all times and within all parts of the area.”

*Our Response:* We believe our regulatory text for the Carolina DPS and South Atlantic DPS makes it clear that the oxygen concentration and temperature values described are examples, and that the presence of PBFs within a river system may vary temporally. Additionally, the preamble to the proposed rule for the Carolina DPS and South Atlantic DPS discussed the variable and ephemeral nature of these environmental features. However, we have added additional text to the preamble of this rule to clarify that the identified values of the PBFs are not required in all parts of designated areas, at all times.

*Comment 80:* A few commenters noted that environmental conditions (*i.e.*, levels of DO, salinity, and temperature) as well as the location of spawning habitat may be affected by climatic conditions, which could influence the actual location of suitable habitat from week to week or from year to year. Additionally, a few commenters indicated critical habitat should include suspected spawning grounds and nurseries for Atlantic sturgeon. They also believe that because Atlantic, as well as shortnose, sturgeon are excellent colonizers of available habitat, we should more expansively designate spawning habitat. A report cited by these commenters (Kynard, 2016) states that, “Given the typical low subpopulation abundance of the species throughout its range, a poor biological understanding of most subpopulations, a lack of identification of rivers with subpopulations, and increasing threats to successful spawning and rearing in rivers, recovery could likely depend on

many rivers with habitat for all life stages being colonized by non-natal adults.” On this basis, Kynard (2016) states that NMFS should include three types of rivers in the critical habitat designation: (1) All rivers with a subpopulation that has freshwater spawning and nursery habitats and estuarine nursery (natal) habitat; (2) all rivers without a current subpopulation but with a documented historical subpopulation, and having freshwater spawning and nursery habitats, and estuarine nursery habitats that can be colonized by non-natal adults; and (3) rivers with no evidence of current or historical populations, but which have freshwater spawning and nursery habitats, as well as estuarine nursery habitats that can be colonized by non-natal adults. Ultimately, the commenters requested we designate critical habitat as widely as possible, and not limit it to just rivers with spawning and rearing habitat, but for all areas “that may serve as these habitats with migration of the salt front, DO, and temperature conditions.”

*Our Response:* As noted in the proposed rule, our conservation objective is to “increase the abundance of each DPS by facilitating increased survival of all life stages . . . by facilitating adult reproduction and juvenile and subadult recruitment into the adult population.” Based on the best scientific information available, the biological needs and tolerances of Atlantic sturgeon, and environmental conditions in southeast rivers, we believe we have identified suspected spawning grounds and nursery areas for Atlantic sturgeon; in other words, we do not have reason to suspect Atlantic sturgeon may be spawning and rearing in other rivers. We agree that the conditions and combinations of the PBFs will vary temporally, over short and long timescales. That variation will affect the sturgeon’s use of the within-river habitat, including spawning locations, as mentioned by the commenters. Our approach to the designation considered this variation and has included the areas where we anticipate the PBFs occur and will occur. Also, we determined that some areas outside the area occupied by the species are essential to their conservation. We therefore designated unoccupied critical habitats in areas where the spawning portion of the river is limited by dams. We believe we have included rivers in the first two categories Kynard (2016) states should be included in a designation, based on identification of PBFs essential to the species’ conservation. We do not

believe, however, that inclusion of additional rivers that have no current or historical evidence of supporting spawning is warranted, based on the fidelity of sturgeon to their natal rivers for spawning and because many of the omitted rivers are largely located in the coastal plains and do not provide the range of habitat types known to be used for spawning and juvenile development. Therefore, we are not including additional rivers on the basis of possible future colonization.

*Comment 81:* Several commenters stated we should designate critical habitat only in areas upriver to a point where flows, eddies, and spawning substrate are available, and we should not designate migratory corridors because they are less critical. One commenter remarked that there is no identified range of water velocity necessary for the conservation of the species, only the need for continuous flow. This commenter asserted that entire stretches of river up to the fall line are not needed to meet the conservation objectives, and that features essential for conservation of the species exist in adequate quantity well downstream of the fall line of some of the rivers.

*Our Response:* We identified the need to increase the abundance of each DPS by facilitating increased survival of all life stages and facilitating adult reproduction and juvenile and subadult recruitment into the adult population as the conservation objectives for critical habitat. To achieve that objective, we must not only protect upriver spawning sites, but also the in-river habitats that allow adult Atlantic sturgeon to move safely and efficiently to and from those spawning habitats. Additionally, for larval and juvenile Atlantic sturgeon to survive to adulthood and become spawners themselves, habitats downstream from the spawning areas require protection so those life stages can successfully develop. We disagree that we were over-inclusive by setting the unit boundaries to include the fall line (the boundary between an upland region of continental bedrock and an alluvial coastal plain) of the spawning rivers, where applicable, and we realize we were somewhat unclear as to the basis for upstream boundaries on every unit and how that relates to the fall line on each river, so we are clarifying that in this final rule. As we stated in the proposed rule, given the need to maximize the potential for increasing spawning and population sizes, and the fact that Atlantic sturgeon are known to spawn between the salt front and the fall line of large rivers, we endeavored to include the farthest upstream extent

of spawning habitat within unit boundaries. The physical characteristics of the fall line provide the conditions that promote successful sturgeon spawning, e.g., well-oxygenated water flowing over hard substrates. Given the severely depressed populations of Atlantic sturgeon, and our conservation objective of facilitating increases in these populations, we believe including all potential spawning areas, up to the fall line as applicable, is appropriate. Finally, we determined that specifying the need for continuous flowing water was more appropriate than attempting to specify water velocities. Water velocity is one specific aspect of flowing water. However, continuous flowing water also influences temperature, oxygen concentrations, turbidity, etc., which are also important features to Atlantic sturgeon. Therefore, given the lack of data on particular velocities that may be needed by Atlantic sturgeon, and the fact that flow regimes vary widely between spawning rivers in the southeast, we believe our focus on continuous flowing water is appropriate.

*Comment 82:* The North Carolina Department of Transportation (NCDOT) stated that our method for determining areas of critical habitat was flawed because we included areas as critical habitat if any of the PBFs were present, but they believe all PBFs must be present in contiguous segments of rivers for an area to adequately support the life history needs of the species and, thus, be critical to the conservation of the species. They acknowledged there may be specific areas that contain the PBFs essential to conservation of the species, but claim these areas are not specifically identified.

*Our Response:* All PBFs do not need to be present in a stretch of river for that stretch to be designated as critical habitat. As noted elsewhere, we determined the identified PBFs are essential to the conservation of the DPSs, they may require special management considerations or protection, and they are located on specific areas within the geographical area occupied by the DPSs. There is no requirement that all PBFs occur in a single location or at the same time. Indeed, because our goal was to support all life stages of Atlantic sturgeon, some of our PBFs are mutually exclusive. For example, by definition, the PBF of hard bottom substrate in low salinity (0.0–0.5 ppt) water, can never occur simultaneously with the PBF for transitional salinity zones, inclusive of waters with a gradual downstream gradient of 0.5–up to 30 ppt and soft substrate (e.g., sand, mud) between the



river mouths and spawning sites for juvenile foraging and physiological development. The available scientific evidence on Atlantic sturgeon spawning and spawning behaviors in the designated rivers, and information on habitat characteristics in the rivers, indicates that the PBFs are present in each of the units.

*Comment 83:* The NCWQA and SCWQA recommended that if we choose to maintain our instantaneous minimum DO levels needed to protect Atlantic sturgeon at 4.3 mg/L, we should revise the temperature trigger for those instantaneous minimum levels from 26 °C to 29 °C. The commenters indicated we justified our selection of 26 °C based on the EPA's 2003 Guidance and two studies cited therein, stating "shortnose sturgeon are more tolerant of higher temperatures than Atlantic sturgeon and the 'high temperature' for Atlantic sturgeon is actually considered 26 °C[.]" The commenters indicated that one of the studies we used to support our decision (Secor and Gunderson, 1998) considered the exposure of YOY Atlantic sturgeon to DO concentrations ranging between 2.8 and 3.3 mg/L over a period of 10 days at 26 °C. The commenters believe that because this "long-term exposure" occurred at DO concentrations far below and less optimal than those required by North and South Carolina regulations, our benchmarks are overly conservative. The commenters believe additional support for their contention that our 26 °C threshold may be too conservative can be found in the EPA's 2003 Guidance, which explains that the difference in temperature sensitivities between the Atlantic and shortnose sturgeons "could be because the shortnose sturgeon were from Savannah River progeny and were held at higher temperatures than the Atlantic sturgeon, which came from Hudson River progeny" (EPA, 2003). The commenters requested that if we choose to maintain an instantaneous DO value (rather than a range of 4.0–4.3 mg/L), we should establish a 29 °C threshold consistent with EPA's 2003 Guidance.

*Our Response:* We agree with the commenter that Secor and Gunderson (1998) exposed YOY Atlantic sturgeon to DO concentrations ranging between 2.8 and 3.3 mg/L over a period of 10 days at 26 °C. In fact, the experiment actually consisted of two treatments, one in a completely sealed tank and another with access to air at the surface of the tank. Of the 32 YOY exposed to concentrations between 2.8 and 3.3 mg/L over a period of 10 days at 26 °C in the unsealed tanks, only four (12.5 percent) actually survived the entire 10-

day trial; 14 (43.8 percent) were dead by Day 4 and 20 (62.5 percent) of the animals were dead by Day 5. Of the 16 YOY exposed to those concentrations in the completely sealed tanks, 15 (93.8 percent) died by the end of Day 1 and all were dead by Day 2. Thus, while the treatments were 10-days, we believe the high mortality rates over the shorter time periods indicate how sensitive small Atlantic sturgeon are to DO. This led to our decision to identify the more conservative value for this endangered species. Similarly, because these mortality rates occurred at the 26 °C temperature threshold, and we have acknowledged that DO and water temperature need to be interdependently assessed, we conclude the PBF as written correctly identifies the environmental conditions necessary to protect this critical life stage.

*Comment 84:* The NCWQA and SCWQA recommended that if we choose to maintain our instantaneous minimum DO levels needed to protect Atlantic sturgeon at 4.3 mg/L, it should be characterized as an exposure level over a short-term period of several hours, rather than an instantaneous threshold. The commenter indicates the EPA's 2003 Guidance suggests DO levels of greater than 4.3 mg/L for a period of 2 hours at stressful temperatures was found to be protective.

*Our Response:* First, it must be understood that critical habitat PBFs are essential to the conservation of a species, not just its survival, and a metric that is "protective" in a broad, water quality context may still lead to injury and even mortality of individual organisms, and thus may not be the best metric to foster conservation. We agree that exposure time is a critical consideration. We clarify the information provided in EPA (2003) was based primarily on Campbell and Goodman (2003), who evaluated, among other things, the DO concentrations causing mortality in 50 percent or more of shortnose sturgeon (called "LC<sub>50</sub>") held under stressful (29 °C) and non-stressful temperatures (22 to 26 °C). Secor and Niklitschek (2001) report shortnose sturgeon are more tolerant of higher temperatures than Atlantic sturgeon. Campbell and Goodman (2003) considered 29 °C a stressful temperature for shortnose sturgeon. Conversely, Secor and Gunderson (1998) report Atlantic sturgeon becoming stressed at a lower temperature of 26 °C. Based on the information provided in Secor and Gunderson (1998), we consider the stressful temperature for Atlantic sturgeon to be 26 °C. The EPA (2003) calculated DO concentrations they

believed would be protective of sturgeon exposed to both non-stressful and stressful temperatures based on findings reported in Campbell and Goodman (2003). They estimated a DO concentration of 4.3 mg/L should be protective under stressful temperatures. The EPA (2003) recognized that the LC<sub>50</sub> DO concentrations reported in Campbell and Goodman (2003) were not instantaneous but occurred within the first 2 to 4 hours of the tests. However, they concluded using their estimated value of 4.3 mg/L as an instantaneous value would be more protective for the species. Additionally, because the EPA estimates produced thresholds that still led to some level of injury or death, we believe more conservative values are appropriate to promote conservation of Atlantic sturgeon.

*Comment 85:* The NCWQA and SCWQA recommended we change our PBF associated with the instantaneous minimum DO levels needed to protect Atlantic sturgeon in North and South Carolina from 4.3 mg/L to a range of 4.0–4.3 mg/L because it matches the water quality standards in those states. They claimed this recommended range is appropriate because the North and South Carolina water quality standards for DO are a daily average of 5.0 mg/L and instantaneous minimum of 4.0 mg/L, and that the daily average requirement of 5.0 mg/L is more protective than the 30-day average of 5.0 mg/L in the proposed rule. Because there is significantly less potential daily stress to the sturgeon from the daily average DO criterion, the commenters stated that establishing a short-term instantaneous range of 4.0–4.3 mg/L is appropriate and should be fully protective. The commenters indicated this approach would be even more protective if we changed our temperature threshold to 26 °C rather than 29 °C.

*Our Response:* The values for water temperature and DO, as part of the water quality PBF, are based on the best available scientific information. As discussed in the previous response, we believe that the 4.3 mg/L value for DO is the best interpretation of the presently available scientific information and best supports the conservation of Atlantic sturgeon. DO requirements are dependent on the associated water temperature, the sturgeon's life stage and physiological condition, and the duration of exposure, and the values included in the PBF are examples of appropriate levels and combinations. We recognize that information on all of these combinations is limited, and additional information is likely to refine our understanding of the different

combinations of required values. While we decline to change the DO values presented in the PBF, we are not necessarily saying that DO values in other combinations with temperature, salinity, water flow, exposure duration, and animal age and condition would be unacceptable, depending on the particular circumstances of a proposed project. Additionally, the rule does link the 4.3 mg/L DO value to a temperature threshold of 26 °C rather than 29 °C.

*Comment 86:* Two commenters stated we failed to consider in a complete and meaningful way, the role certain aspects of aquatic chemistry play on determining whether a river has suitable spawning habitat. The commenters suggested we should have considered pH and levels of calcium (Ca) and magnesium (Mg) ions. They suggested these chemical characteristics can determine whether Atlantic sturgeon will spawn in a particular reach of river, and thus, it is crucial that these features are given special management consideration in future section 7 consultations and, if need be, protected accordingly.

*Our Response:* See response to Comment 9.

#### *Comments on Special Management Considerations or Protection*

*Comment 87:* An industry trade group believed we failed to provide any assessment of current management or protections in place and whether those are adequate for the conservation of the Atlantic sturgeon. The commenters claimed we must consider whether any of the proposed critical habitat units are presently under special management or protection for Atlantic sturgeon. The commenters acknowledged we have identified a number of initiatives that could protect Atlantic sturgeon, but they believed we must actually assess these initiatives to determine whether they are sufficient and determine what further management actions may benefit from critical habitat designation. The commenters went on to state we should consider each feature and specific area proposed and assess current management measures in place to make an actual determination as to whether special management may be needed in the reasonably foreseeable future, and if so, what that management would be, and how the critical habitat designation would further that management. The commenters concluded that our discussion of special management considerations is limited to general discussion regarding how barriers, water withdrawals, and dredging can generally affect water flow, quality, and depth and/or alter hard substrate, and

that we have made non-specific assertions that special management for the essential PBFs may be required “as a result of global climate change.”

*Our Response:* See response to Comment 14.

*Comment 88:* One commenter requested that we include “clear guidance for considering the effects of a changing climate on critical habitat designation for species recovery in the final rule.” The commenter requested we consider “projected changes to salinity, temperature and DO, including changes in sea level rise” and further requested that we document the extent that climate change was considered when assessing the need for the inclusion of currently unoccupied habitat in the final rule.

*Our Response:* See Response to Comment 17.

#### *Comments on Decision Not To Designate Critical Habitat in Estuarine or Marine Environments*

*Comment 89:* One commenter agreed with our decision not to designate any critical habitat in the marine ecosystem; however, other commenters disagreed. Two commenters indicated we should designate estuarine habitat that not only encompasses natal estuaries, but also certain estuaries that are not natal for a subpopulation, because coastally migrating juveniles use estuaries for foraging, including estuaries with and without spawning subpopulations. They asserted we were waiting for “perfect” information and being overly restrictive, and that the amount of scientific information currently available is enough to determine PBFs in these areas. They also indicated that all estuaries have human activity that requires special management to preserve the estuarine habitat for sturgeon foraging (*i.e.*, management to avoid impacts from dredging, boat strikes, benthic habitat destruction, sediment contamination, cooling water intakes, etc.).

*Our Response:* We agree with the commenters that estuaries and nearshore marine waters along the Atlantic Coast are important habitat of Atlantic sturgeon; we specifically discussed them in the proposed rule. However, as we described in the proposed rule, we lack sufficient data to identify the specific features in the marine/estuarine environment Atlantic sturgeon are using. We agree that there is scientific information describing environmental correlates with locations of Atlantic sturgeon; however, we do not believe that it is sufficiently informative of the features being used by sturgeon, or the conservation

function they serve. More information is provided in the response to comment 20.

*Comment 90:* Two municipalities commented that our proposed rule suggests erroneously that offshore data are unavailable to determine essential conservation needs. They noted we failed to mention information gathered from the annual offshore striped bass tagging cruises that have tagged numerous adult sturgeon coincident to the fishing grounds of large offshore trawlers, gillnets, and longline fisheries.

*Our Response:* We are aware of the offshore striped bass tagging cruises. We carefully examined the information available from this study, which included parameters such as location of capture, size of fish, weight of fish, etc. Unfortunately, that information was insufficient to identify PBFs that are essential to the conservation of the species.

*Comment 91:* One commenter stated that while the “Large Coastal Rivers that Lack Essential Features” section of the proposed rule states: “. . . short coastal plain rivers . . . most likely do not contain suitable habitat for Atlantic sturgeon,” these systems may provide foraging habitat for subadult and adult Atlantic sturgeon. The commenter continued by stating that although relatively large numbers of Atlantic sturgeon have been acoustically tagged and their movements recorded in recent years, their numbers are highly depleted relative to historical levels of abundance, and acoustic receiver coverage is relatively sparse. The commenter stated the use of these systems as foraging habitat by subadult and adult fish should not be discounted, once populations are fully restored and population density is higher.

*Our Response:* We agree that foraging habitat is extremely important. However, as described in the proposed rule, due to the paucity of data on specific habitat or resource utilization, we could not identify any PBFs essential for the conservation of the Carolina and South Atlantic DPSs that support adult and subadult foraging in estuarine or marine environments (see also the response to Comment 20). We did include PBFs related to juvenile foraging and developmental habitat in spawning rivers, downstream of spawning sites, but, as the commenters noted, the non-designated short coastal plain rivers do not support spawning and therefore would not support downstream-migrating, developing juveniles. The limited availability of Atlantic sturgeon tracking data from short coastal plain rivers was not a

factor in our decision not to include those areas in the designation.

*Comment 92:* Several environmental organizations stated that we incorrectly claimed that we could not designate estuarine or marine areas as critical habitat due to insufficient data and that the best available scientific information supports identification of PBFs in estuarine and marine environments that are essential to Atlantic sturgeon conservation. These commenters said that a growing body of research has identified critical feeding and seasonal aggregation sites, and that the sites identified to date should be designated as critical habitat. The commenters stated there is a scientific consensus that Atlantic sturgeon use marine waters of particular depths as migration corridors; the commenters asserted that available information supports the contention that all 5 DPSs use the same narrow migration corridor and known aggregation sites. The commenters stated that water depth, available prey, substrates, temperature, salinity and seascapes are factors correlated with, and that influence, Atlantic sturgeon use of specific estuarine and marine habitats as feeding or seasonal (winter, summer) aggregations, and migratory corridors, and that these features may require special management considerations or protection. The commenters stated that our regulations, Implementing Changes to the Regulations for Designating Critical Habitat (81 FR 7413, 7414; February 11, 2016), support the use of generally-defined PBFs or an ecosystem approach. Finally, the commenters discussed our previous critical habitat designations for green and Gulf sturgeon as valid models for designating estuarine and marine areas as critical habitat for Atlantic sturgeon.

*Our Response:* See response to Comment 20.

*Comments on Data and Approaches Used in the Proposed Designation, Generally*

*Comment 93:* NCDOT suggested areas of rivers were determined to be critical habitat based on “knowledge” instead of documented data.

*Our Response:* We considered the best available scientific information, including the 2007 Atlantic sturgeon status review (ASSRT, 2007), the ESA listing rule (77 FR 5914; February 6, 2012), scientific research reports, information and data gathered during the peer-review process, and a database developed by the U.S. Geological Survey that mapped environmental parameters within East Coast rivers to identify sturgeon habitat. We also

considered information on the location of sturgeon spawning activity from scientific reports, as active spawning or spawning activity in an area would indicate that the PBF(s) necessary for spawning are likely present. Even in places where information is available, those data may represent a snapshot in time and the exact location of a habitat feature may change over time (e.g., water depth fluctuates seasonally, as well as annually, and even hard substrate may shift position). While the best available information was, at many times, location specific, we worked pursuant to our regulations and identified specific areas at the appropriate scale for critical habitat (i.e., specific rivers), taking into consideration the life history of the species, as described in the preamble of the proposed rule.

*Comment 94:* An industry trade group indicated we made no attempt to establish any connection between the threats to Atlantic sturgeon described in the listing rule and critical habitat. They suggested we have not evaluated or explained how designation of critical habitat will benefit the species, or help address injury/death resulting from inshore trawling or overfishing. Additionally, they indicated we have not explained how the designation of “these vast areas would provide new or additional minimization of habitat alteration or destruction.”

*Our Response:* See response to Comment 64.

*Comment 95:* One commenter asked us to explain more clearly in the final rule, why we stopped the upstream extent of some critical habitat units at locks or dams. The commenter acknowledged that in some cases, manmade barriers occur at a natural barrier (impassable falls), and therefore they would not expect the historical species ranges to extend above the location of those barriers. However, the commenter continued by stating the presence of a barrier, in and of itself, should not constitute the upstream extent of critical habitat. The commenter argued that dams could be removed, which would open up those habitats. The commenter requested we reconsider these reaches as essential, but currently unoccupied habitat.

*Our Response:* Our approach to establishing the upper boundaries of the units was in the first instance to identify and evaluate the upstream extent of available essential spawning habitat features. We evaluated available information on the nature and distribution of likely spawning habitat up to the first impassable barrier, natural or manmade. We also evaluated

available information on historical Atlantic sturgeon spawning or occurrence, and current estimated extent of spawning and estimated population status in each river. Thus, the upstream unit boundaries are fact-specific to each river system. We agree that the presence of a barrier does not necessarily correspond with the historical species ranges. However, the barriers denoting the upstream limit of the designation are the same designators as the upstream limit of the occupied areas and barriers that occur at a critical habitat boundary need to provide an easily recognizable landmark for where critical habitat begins or ends. Non-ephemeral reference points (e.g., dams, bridges) can be used in a textual description of the boundaries of critical habitat, thus we believe it is appropriate to use currently impassable dams as the terminus for occupied critical habitat.

*Comment 96:* An industry trade group indicated we also failed to map potential threats to the Atlantic sturgeon (e.g., manmade structures, dredging areas).

*Our Response:* See response to Comment 18.

*Comments on Designation of Unoccupied Critical Habitat, Generally*

*Comment 97:* Several commenters, including South Carolina Department of Transportation (SCDOT) and South Carolina Department of Natural Resources (SCDNR), asserted that unoccupied critical habitat should not be designated at this time. Some questioned how we could consider these areas critical if animals are not even using them currently. Others suggested it was premature to designate these areas because passage of animals into unoccupied habitats was uncertain or unproven in some areas. Still others suggested we wait to designate these areas as critical habitat until data show Atlantic sturgeon were successfully being passed up to and were using these areas.

*Our Response:* ESA section 3(5)(A)(ii) defines critical habitat to include specific areas outside the geographical area occupied if the areas are determined to be essential to the conservation of the species. As described in the proposed rule, we determined that there is insufficient spawning and developmental habitat in *occupied* stretches of three river systems: The Cape Fear, Santee-Cooper, and Savannah, and on this basis determined these areas are essential to the species’ conservation. However, based on concerns raised about the impacts and uncertainties associated with these unoccupied units, and

questions the commenters raise about the nature of the conservation value these units provide to sturgeon, we determined that conducting a discretionary exclusion analysis on these units was warranted. As a result of that analysis, we have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude unoccupied units of critical habitat, including the unoccupied Santee-Cooper unit. We determined the benefits of exclusion (that is, avoiding some or all of the impacts that would result from designation) outweigh the benefits of designation.

*Comment 98:* North Carolina Wildlife Resources Commission (NCWRC) suggested that until we clarify how we will evaluate projects in the unoccupied critical habitat, we should not designate critical habitat in those areas. SCDNR insisted that we remove all unoccupied habitat areas from consideration.

However, they requested that if we still intended to designate unoccupied habitat areas, we should clarify how unoccupied versus occupied critical habitat designations will be handled in regards to section 7 consultations for projects.

*Our Response:* As stated previously, we have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude the unoccupied units of critical habitat. Therefore, section 7 consultations will not be required based on impacts solely to these unoccupied areas. Section 7 consultation will still be required to assess potential impacts to shortnose sturgeon and its habitats in the area proposed as the unoccupied Santee-Cooper unit, and consultation will be required if effects of actions in the areas previously proposed as unoccupied have effects to sturgeon or their habitats downstream, in occupied areas.

#### *Comments on Designating Specific River Units or River Areas*

##### Carolina Unit Rivers

*Comment 99:* NCDOT indicated they do not believe that “sparse spawning data justifies an extensive proposed area of critical habitat.” They indicated that literature searches they conducted found that spawning in specific areas in the Southeast is rare. The commenter also stated that the proposed rule says, “[t]here are large areas of most rivers where data is still lacking” and “substrate types can change from year to year.” Further, the commenter stated in relation to extending “historical habitat” into the “critical area,” they should not be required to comply with moratoria and limited construction

times, based on habitat that may be critical at some future point in time.

*Our Response:* We agree that site-specific information describing spawning location in the Southeast is relatively rare. We could not compare our information to that referenced by the commenter as they did not provide their search results. We are designating critical habitat by describing PBFs essential to the conservation of the species. The areas we are including in the final rule have one or more of the PBFs present that are essential to the conservation of the species and which may require special management considerations or protection. Additionally, our regulations at 50 CFR 424.02 support the designation of areas that contain PBFs that may be ephemeral or dynamic. We believe the proposed rule clearly outlines our step-wise approach for how we identified each PBF and the rivers in which they are located. Regarding moratoria or construction restrictions, we reiterate that the critical habitat designation does not create any moratoria, refuges, or closed areas.

*Comment 100:* One commenter suggested we had not used the best scientific information available, and they believed that the positions taken by SCDNR in their public comments support their conclusion. Specifically, the commenter stated: “[t]he proposed rule was apparently developed with little or no input from [SCDNR] and the scientific data it has collected. SCDNR finds the critical habitat designations to be presumptuous and impertinent. In fact, SCDNR insists that all currently labeled unoccupied habitat be removed.”

*Our Response:* We disagree that we have not used the best scientific information available in this designation. We believe the commenter mischaracterized SCDNR’s statements. The SCDNR suggested critical habitat designations were “presumptuous” and “impertinent” until further genetic analyses verify the DPS classification of Atlantic sturgeon. SCDNR commented that “the Carolina DPS is based upon a limited sample of individuals with no representation from the Great Pee Dee, Santee and Cooper Rivers in South Carolina. The samples used to genetically characterize the Carolina DPS were obtained from Albemarle Sound, an area where sturgeon from multiple river basins are known to occur. The limited data input used to define the boundaries of the Carolina DPS causes concern and warrants further genetic sampling to truly define the Carolina DPS. SCDNR finds the critical habitat designations

presumptuous and impertinent and advocates that these designations be deferred until further genetic analyses occur to verify the DPS classification of Atlantic sturgeon . . .” The SCDNR is essentially commenting on the determination of DPS identities and boundaries in the 2012 final rule listing the Carolina DPS. A critical habitat designation is not the vehicle to revisit a species listing determination, and so long as a species has been listed, we have a statutory duty to designate critical habitat for the species. Moreover, we believe the DPS listing determinations continue to represent the best scientific information available on the identity and boundaries of the DPSs.

The commenter seems to believe that because our determinations differ from SCDNR’s on certain aspects of the designation, for example the use of shortnose sturgeon as a proxy for Atlantic sturgeon or how to interpret the lack of data regarding Atlantic sturgeon presence in certain stretches of a river, our rule did not use the best scientific information available. Our determinations were based on the 2007 Atlantic sturgeon status review (ASSRT, 2007), the ESA listing rules (77 FR 5914; February 6, 2012), scientific research reports, information and data gathered during the peer-review process, a database developed by the U.S. Geological Survey for mapping environmental parameters within East Coast rivers to identify sturgeon habitat, as well as information on the location of sturgeon spawning activity from scientific reports. We also reviewed reports from a NMFS-funded multi-year, multi-state grant on movement and migration of Atlantic sturgeon that included information collected by the SCDNR. Finally, the SCDNR provided a peer-reviewer to evaluate the biological information that went into the proposed rule. The reviewer provided critiques which were incorporated into the proposed rule. Thus, while the SCDNR may disagree with our approach in certain cases (e.g., critical habitat should not be designated without confirmed sturgeon presence), we disagree with the assertion that we did not use the best scientific information available when developing the rule.

*Comment 101:* Multiple commenters said they believe the inclusion of extensive river reaches, including “unoccupied” areas and reservoirs, for the Carolina DPS of Atlantic sturgeon would result in a poor allocation of conservation resources. They suggested we focus on estuarine environments, spawning aggregations, and fisheries bycatch because it would result in

greater benefits for the conservation of the species.

*Our Response:* The ESA requires that we designate critical habitat for listed species. As described in the proposed rule, we know Atlantic sturgeon use estuaries for foraging, growth, and movement. We also know subadults and non-spawning adults use estuaries seasonally, likely for foraging. However, the lack of data on specific habitat or resource use by Atlantic sturgeon in the estuaries meant we could not identify any specific PBFs essential for the conservation of the species in these areas. Also, we believe we are protecting the habitat of spawning aggregations with these designations. Because Atlantic sturgeon spawn far upstream on hard bottom substrates in low salinity waters (PBF #1), designating critical habitat protects these habitats. Impacts from fisheries bycatch are direct impacts on the species, not habitat-related effects, and are beyond the scope of critical habitat designation.

As stated previously, we have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude unoccupied units of critical habitat, including the reservoirs of Lake Moultrie and Lake Marion.

*Comment 102:* One commenter stated they supported our designation of occupied and unoccupied critical habitat. However, they requested we consider regional datasets and literature sources not cited in the proposed rule that they believe support the inclusion of the Ashepoo River, South Carolina, up to the confluence of Doctors Creek (Route 64 Bridge).

*Our Response:* We appreciate the commenter bringing these datasets to our attention. We considered designation of the Ashepoo River, South Carolina, as critical habitat. As stated in the proposed rule, our review of the best scientific information available for the Ashepoo (Post *et al.*, 2014) determined it is a short, coastal plain river that most likely does not contain the PBFs suitable to support spawning and juvenile recruitment of Atlantic sturgeon. Although the commenter did not identify which element we failed to fully consider, we evaluated the regional datasets and literature sources suggested by the commenter. Those data sources may show species occurrence in the Ashepoo, but not necessarily sturgeon spawning. We do not disagree that Atlantic sturgeon could use the Ashepoo River; rather we do not believe it contains the necessary PBFs that support our conservation objective for designating critical habitat.

*Comment 103:* Two municipalities asserted we failed to consider the best

available information in the overall analysis because data was only as recent as 2006, and proceeding with critical habitat designations in unconfirmed areas without the benefit of updated and better data is inappropriate. They note that North Carolina has had a gillnet Incidental Take Permit (ITP) for Atlantic sturgeon since around 2012-2013. The commenters stated the Neuse River in North Carolina, described as Area C in the ITP, is allowed very few Atlantic sturgeon interactions prior to closure of the gillnet fishery because of how rare they are in this river system. The commenters state additional information indicated (1) sturgeon abundance, particularly for the Carolina DPS, is far greater than originally believed in areas that have actual, documented spawning aggregations; (2) discard mortality of juveniles taken in traditional fishing gear is very low; and (3) estuarine interactions with adult sturgeon are exceedingly rare as they are not retained in traditional gillnet fishing gear. The commenters concluded that extensive data associated with the ITP were not mentioned in the proposed rule but confirmed there is low Atlantic sturgeon abundance in the Neuse River. Additionally, the commenters concluded that changes in fishing behavior and seasonality have dramatically reduced the potential for bycatch in North Carolina, but this information is also not considered in the proposed rule.

*Our Response:* When designating critical habitat we are to identify PBFs that are essential to conservation of the species that may require special management considerations or protections, and then identify specific areas in which those PBFs are located. It is unclear how the information the commenter suggests we overlooked (*e.g.*, data on sturgeon abundance, fishing behavior, discard mortality, incidental takes) is in any way informative regarding our PBFs or the areas we are designating as critical habitat. As we have noted, critical habitat designations in occupied areas are based on the presence of PBFs that are essential to a species' conservation, and which may require special management considerations or protections. Specific areas containing these PBFs are then identified, and the impacts of including the specific areas in the designation are considered. Whether sturgeon abundance or interactions with fisheries have changed over time would not affect how we made our critical habitat designations.

*Comment 104:* Two municipalities stated we provided no evidence of spawning or the presence of Atlantic

sturgeon YOY in the Neuse River, North Carolina. They suggested the size of the juveniles collected to date prove nothing in terms of spawning origin as those fish could, and likely did, migrate from other rivers where spawning adult sturgeon have been observed and captured (*e.g.*, Roanoke River, North Carolina). Further, the commenters stated we provided no direct evidence that the Neuse River was used by the Carolina DPS of Atlantic sturgeon when we listed the DPS in 2012, and they suggested there has been no evidence of Atlantic sturgeon in freshwater portions of the river for decades.

*Our Response:* Following receipt of this comment we had extensive contact with the USFWS staff, as well as with state natural resource managers. They suggested there was additional evidence of YOY occurring in the Neuse River. Specimens available from North Carolina State University indicated three YOY (less than 350 mm) were captured in the Neuse River in 1974 (J. Hightower, NCSU, to A. Herndon, NMFS, pers. comm. March 2017). An additional record of a YOY captured in the Neuse River in 1974, was also provided by the North Carolina Museum of Natural Sciences (G. Hogue, NCMNS, to A. Herndon, NMFS, pers. comm. March 2017). Also, Bain (1997) reports that "early juveniles" (20–440 mm FL) remain in their natal rivers until they become "intermediate juveniles" (450–630 mm FL) and begin gradually emigrating from the river during periods of rapid growth. Hoff (1980) reports sturgeon studies in the Neuse and Pamlico Rivers and Pamlico Sound captured low numbers of small (400–600 mm TL) sturgeon. The North Carolina Division of Marine Fisheries (NCDMF) also provided information collected via observers and during their Independent Gill Net Survey. From 2001–2012, those sources reported 13 Atlantic sturgeon captured in the Neuse that were less than 440 mm FL size range (M. Loeffler, NCDMF, to A. Herndon, NMFS, pers. comm. March 2017). Based on the information in Bain (1997), we believe these animals are unlikely to have strayed into the Neuse River from other river systems, leading us to conclude they were likely born there. Additionally, the final listing rule (77 FR 5914; February 6, 2012) indicates the Neuse River was used by the Carolina DPS at the time of listing and that spawning may be occurring in the river. Moreover, "occupied at the time of listing" in the statute refers to the geographical range, which we have defined to include all marine and freshwaters available to be used by

Atlantic sturgeon, for any life function. Finally, regardless of whether animals have been documented in the freshwater portions of the river, our critical habitat determinations are based on areas where PBF(s) essential to conservation of the species occur; it is not specifically tied to animal presence. Therefore, we believe including the Neuse River in the designation of critical habitat is appropriate.

*Comment 105:* Two municipalities objected to the designation of proposed critical habitat upstream of rkm 75 on the Neuse River, North Carolina. The commenters stated “the most westward location of a sturgeon [on the Neuse River, North Carolina] was at rkm 75” and, in their opinion, Atlantic sturgeon do not use areas upstream of rkm 75 and critical habitat designation would impose an unnecessary administrative burden on municipalities at or above rkm 75.

*Our Response:* We considered the information presented by the commenters, and we believe our upstream boundary is appropriate. We have identified critical habitat based on areas where PBF(s) essential to conservation of the species are located, not necessarily where individual animals have been documented. Moreover, our data include an observed Atlantic sturgeon around rkm 80 on the Neuse River and likely suitable spawning substrate at the base of the Milburnie Dam. Additionally, the commenter provided no information suggesting the PBFs are absent above rkm 75. For these reasons, we believe our upstream boundary for the Neuse River is correct.

*Comment 106:* Two municipalities questioned our decision to consider the Neuse River, North Carolina, as spawning habitat for Atlantic sturgeon. They suggested that substantial water quality concerns call into question the notion that the Neuse River could support the spawning of Atlantic sturgeon. They cited our statement that “hard bottom in fresh water on spawning grounds and sufficient DO are critical needs for spawning success.” The commenters stated that without any evidence of spawning activity in the Neuse, it is unknown whether the hard bottom criteria are met. They concluded the required physical spawning conditions have not been shown to exist in the Neuse River because no spawning locations have been identified and the water quality conditions are unlikely to favor the survival of larvae and early juveniles. However, they acknowledged that the upper reaches of the Neuse River at the Milburnie Dam do have areas of suitable substrate, but stated

that it is far from the salt wedge around New Bern and any measureable salinity for many river miles under normal conditions. On this point, they concluded that any supposition about the availability of suitable substrate with no knowledge of actual spawning location is erroneous. The commenters stated that flow regimes, critical for spawning success, are significantly manipulated in the Neuse River. They acknowledged that while flow regimes of Milburnie Dam have been increased on occasion to simulate natural conditions on the Neuse River, these flow regimes are not permanently established and could change. They suggested unnatural, manipulated flows are unlikely to change in a measureable way in the future, and thus, establishing the Neuse River as critical habitat for Atlantic sturgeon is not supported by the data. The commenters also suggested the proposed rule does not identify how we determined the water of appropriate depth and absent physical barriers to passage between the mouth and spawning sites and water quality conditions that support spawning and recruitment for larval, juvenile and subadult growth PBFs occur in the Neuse. Finally, they stated that to spawn in the Neuse River, the Atlantic sturgeon must pass through the heavily impaired waters of the lower Neuse River and the Neuse Estuary. They also suggested that the newly hatched sturgeon fry must pass through the same waters on their journey to reach estuarine waters immediately after being hatched. They believed both the Neuse and Pamlico portions of the estuary have been subject to seasonal episodes of anoxia that significantly affect the quality of Atlantic sturgeon nursery habitat.

*Our Response:* We disagree. As noted in the proposed rule and explained in our response to Comment 104, we believe there is evidence that Atlantic sturgeon spawning has occurred in the Neuse River. The commenter supported our determination that the PBF of substrate to support spawning does exist in the Neuse at the Milburnie Dam. The commenters’ confirmation that hard bottom substrate in low salinity waters far from the salt wedge exists in the Neuse River validates our determination that PBF # 2 (transitional salinity zones inclusive of waters with a gradual downstream gradient of 0.5-up to 30 ppt and soft substrate) is present. The commenter also expressed concern over the water quality of the Neuse River and estuary, calling into question its suitability as spawning habitat. However, the information provided by

the commenters regarding water quality is not specific to DO or temperature; it discusses nitrogen and phosphorus. The information provided gives no indication of how these nutrients may be affecting DO or temperature in the river, or how these nutrients prevent the PBFs from occurring or becoming established in the future. Similarly, the commenters expressed concerns about water flows on the Neuse River, but did not provide any information regarding how past and future flow manipulations of the Neuse River would affect the PBFs. With respect to our approach to determining that the PBFs occur in the Neuse River, we acknowledged in the proposed rule that there are large areas of most rivers where data are still lacking. The available data also may represent a snapshot in time, and the exact location of a habitat feature may change over time (e.g., water depth fluctuates seasonally and annually, and even hard substrate may shift position). As we described, although habitat features may vary even at the same location, if any of the available data regarding a particular feature fell within the suitable range (e.g., salinity of 0–0.5 ppt or hard substrate [gravel, cobble, etc.]), we considered that the essential PBF is present in the area. When data were not available for certain rivers or portions of occupied rivers, we used our general knowledge of Atlantic sturgeon spawning and applied river-specific information to determine the location of PBFs essential to spawning. For these reasons, we believe designation of the Neuse River as critical habitat is appropriate and supported by the available data.

*Comment 107:* NCDOT said there are no confirmed data to support designating the Cape Fear River, North Carolina, above Lock and Dam # 1, if there is sufficient spawning habitat below this point. If the habitat is not accessible at the time of listing it is not critical to the survival of the species.

*Our Response:* The proposed rule describes the information we used to designate occupied areas on the Cape Fear River Lock and Dam #1 includes a newly constructed fish passage feature, and there have been reports of Atlantic sturgeon above the lock and dam. We therefore included the area between Lock and Dam #1 and Lock and Dam #2 as occupied habitat in our proposed designation (Carolina Unit 4). We had proposed to designate the area between Lock and Dam #2 and Lock and Dam #3 as unoccupied critical habitat because we believed it may provide additional spawning habitat that was essential to the conservation of the species. However, further conversations with

USFWS and state resource managers made us uncertain about the conservation value for this specific stretch of the Cape Fear River between Lock and Dam #2 and Lock and Dam #3. Therefore, while we continue to believe that this habitat is important to Atlantic sturgeon, we do not believe the area between Lock and Dam #2 and Lock and Dam #3 is essential to the conservation of the species based on our current understanding of what habitat is likely there. Additional information would be necessary resolve the uncertainty surrounding what portion, if any, of the Cape Fear River above Lock and Dam #2 is essential for the conservation of the species. Therefore, we are not designating unoccupied critical habitat on the Cape Fear River at this time.

*Comment 108:* The USFWS recommended changing the upstream terminus of Carolina Unoccupied Unit 1—Cape Fear River, North Carolina, by extending the boundary to Duke Energy's Buckhorn Dam, North Carolina, rather than ending at Huske Lock and Dam (Lock and Dam #3) as proposed. The commenter referenced the recent notice by the National Fish and Wildlife Foundation (NFWF) (reference NFWF Agreement #5406) to Bladen County, North Carolina. The notice indicates Bladen County has been awarded funds through the NFWF-Duke Energy Settlement for the Lock and Dams #2 and #3 Project. The project would conduct an extensive alternative analysis and advanced hydraulic modeling, design a weir wall, support continued tagging/telemetry work by the North Carolina Division of Marine Fisheries, conduct anadromous fish egg sampling at all three Locks and Dams, and support a USACE Rivers and Harbors Act section 408 review and coordination. Based on this, the commenter believed upstream passage is reasonably foreseeable. The commenter believed this reach of the Cape Fear River would, when re-opened, provide suitable spawning and migratory habitats needed to facilitate sturgeon reproduction and recruitment. Thus, they believed it is appropriate to extend this unoccupied unit upstream to the next currently impassable barrier.

*Our Response:* We appreciate the commenter bringing this development to our attention. We were not aware that passage above Lock and Dam #3 may occur in the reasonably foreseeable future. Following receipt of this comment we had extensive contact with USFWS staff, as well as with state natural resource managers. They reiterated input we received during the development of the rule from a state sturgeon expert who stated the type of

river bottom and currents most suitable for Atlantic sturgeon spawning would be found above Lock and Dam #3. They also provided information from historical fishing records that report Atlantic sturgeon had been captured far upstream from Lock and Dam #3. We believe the most likely explanation for why Atlantic sturgeon were captured that far upstream historically is because they were attempting to spawn. The indication that suitable spawning habitat exists above Lock and Dam #3, and the historical evidence suggesting Atlantic sturgeon moved that far upstream, suggests to us that spawning likely occurred there in the past and may again in the future, once the animals have access to the area. This information suggests to us that this stretch of the Cape Fear River may be of high conservation value. However, moving the upstream boundary to Buckhorn Dam would be an increase of 115 rkms. We believe this is a significant change that the public was not aware of and on which it did not have an opportunity to provide comment. Therefore, we are not making the change recommended by the commenter at this time.

*Comment 109:* One commenter questioned our conclusion regarding Atlantic sturgeon spawning migration in the Cape Fear River, North Carolina, specifically our statement that fish passage present at the dam is successful or that fish pass through the lock at Lock and Dam #1. The commenter indicated that unless the policy has changed very recently, locking for fish passage is not conducted at Lock and Dam #1 and tracking of sonic-tagged Atlantic sturgeon has not shown any upstream movement past Lock and Dam #1. The commenter continued, stating upstream passage at the rock arch ramp at Lock and Dam #1 has been good for American shad but poor for striped bass and while neither species is a perfect proxy for Atlantic sturgeon, the results are mixed regarding effectiveness of this rock arch ramp. The commenter added that intensive gillnet sampling did not detect any Atlantic sturgeon above Lock and Dam #1 in 1996–1997 (Moser *et al.*, 1998). The commenter stated the most likely conclusion is that the locks and dams have long hindered or prevented upstream passage of Atlantic sturgeon in the Cape Fear River (and may have increased the importance of the unobstructed Northeast Cape Fear River).

*Our Response:* We agree that the locks and dams typically provide limited opportunities for passage of Atlantic sturgeon. However, the best scientific information available indicates that

sturgeon are passing above Lock and Dam #1 on the Cape Fear River, even as recently as September 2016, and that would have been either through the lock, or over the rock ramp. Additionally, modifications to the rock ramp at Lock and Dam #1 will be completed by 2019, which is anticipated to increase the efficiency of sturgeon passage above the Lock and Dam #1. Thus, we believe our statement about successful passage is correct.

*Comment 110:* Two utility companies suggested the best scientific data available do not support designation of the area in the vicinity of the Blewett Falls Dam tailrace on the Pee Dee River because this area has previously been disturbed as a result of necessary hydropower operations and maintenance. As a result, this area does not contain the prescribed PBFs for the key habitat-based conservation objectives for spawning and juvenile development habitat. These commenters stated the biological opinion issued for FERC's issuance of the Yadkin-Pee Dee (YPD) hydropower license requires a spawning and incubation habitat characterization assessment for an 88-mile-long reach of the Pee Dee River, downstream from Blewett Falls Dam. The assessment seeks to determine the amount of suitable sturgeon spawning and incubation habitat created as a result of the spring minimum flow requirements and the actual flows provided by YPD under the new license. The commenters believe the assessment should provide scientific data that can be used to pinpoint areas for designation as critical habitat. Until the initial 10-year phase of this assessment is completed, the commenters requested we refrain from designating the area downstream of Blewett Falls Dam within the YPD project area boundary as critical habitat.

*Our Response:* The commenters suggest we omit areas within the YPD project boundary from critical habitat, but it is not clear what the YPD project boundary is. We believe that the scale and boundaries of the specific areas that we are including in the critical habitat designation are appropriate. For the Pee Dee River unit, aerial imagery suggests spawning habitat does exist immediately downstream from Blewett Falls Dam. Further, we are required to define each critical habitat unit using easily recognized reference points. We agree that the spawning and incubation habitat characterization assessment is likely to provide additional scientific data that will be useful in determining more precisely the location, timing, etc., of the PBFs, though the studies will only be another snapshot in time and

will not account for temporal variability in location of PBFs. Further, when designating critical habitat, our regulations state that we shall designate, at a scale that we determine to be appropriate, the areas that contain the PBFs essential for the conservation of the species. The areas do not need to be limited to only the precise locations where the PBFs have been specifically determined to exist. We believe that we have appropriately used the best scientific information available at this time and have selected an appropriate scale for these designations. The ESA does not allow us to identify areas containing the PBFs and then decline to designate them until better data become available. In identifying and designating the areas containing the PBFs that are essential to the conservation of the Atlantic sturgeon, we are meeting our statutory and regulatory requirements. For these reasons, we have included as critical habitat on the Pee Dee River the area up to the Blewett Falls Dam.

*Comment 111:* Two utility companies also suggested that the areas around the intakes for two “steam-electric plants” located on the Neuse River, North Carolina, within “Carolina Unit 3 Neuse Unit” and one “steam-electric plant” located on the Cape Fear River, North Carolina, within “Carolina Unit 4 (Cape Fear Unit),” are previously disturbed areas that require dredging in order to maintain the operation of the steam-electric plants, and these areas do not include “ideal habitat” for the Carolina DPS of Atlantic sturgeon; in another part of their letter the commenters stated that the intake areas do not provide spawning habitat. The commenters asserted that the areas around the intakes at the steam-electric plants on the Neuse and Cape Fear Rivers should be excluded from critical habitat in order to minimize the potential burden they expect will result from additional and unnecessary regulatory reviews.

*Our Response:* We disagree that foregoing designation would alleviate additional cost, complexity, and administrative burden of carrying out activities at these plants. As noted previously, we anticipate that designation of critical habitat will impose only minimal administrative burdens and costs that will be added to ESA consultations that would be required to address impacts to the species even in the absence of critical habitat. The commenters requested that we omit discrete areas around the intakes for three plants on the Cape Fear and Neuse River, but they were not specific regarding the location or sizes of the areas that should be excluded.

The commenters also were not specific about their statement that the areas are not ideal habitat for Atlantic sturgeon, other than to say the areas do not provide spawning habitat. However, the commenters did not state that all of the other PBFs are absent from these areas. The commenters suggested that dredging would make the areas less than ideal habitat for sturgeon. But based on our experience with the effects of dredging on aquatic habitat, we do not believe dredging would permanently remove the PBFs such that the areas would not provide conservation value to sturgeon in the periods between dredging events. We believe that we have appropriately used the best scientific information available at this time and have selected an appropriate scale for these designations.

*Comment 112:* SCDNR said that while telemetry data were not available above Pine Tree Landing on the Black River, South Carolina (Carolina Unit 6), they believed the river is extremely braided in this area and likely provides limited ideal habitat for Atlantic sturgeon. They recommended the upstream limit of designated critical habitat in the Black River should stop at June Burn Road, South Carolina.

*Our Response:* The comment was unclear as to whether telemetry data were not available because no receivers capable of detecting acoustically tagged sturgeon had been deployed above Pine Tree Landing or if receivers were there, but they just had not ever detected a sturgeon. A review of Post *et al.* (2014) confirms the former. Regardless, we reviewed the geospatial information available around June Burn Road, South Carolina, and agree that the main stem of the Black River becomes increasingly difficult to identify in this area. We were able to consistently identify the main stem of the river up to approximately Interstate 95, upstream of which the main stem is no longer discernable. As a result we have modified the upstream boundary of the Black River (Carolina Unit 6) to be the Interstate 95 Bridge, approximately eight miles southwest of Turbeville, South Carolina. This results in a decrease of 50 rkm for this unit. Aerial imagery does not indicate that any hard bottom substrate is being excluded from the unit by changing this upstream boundary, thus the unit will still provide sturgeon access to the maximum upstream extent of spawning habitat, and the change will not affect the conservation value of the unit in facilitating increased survival of all life stages and facilitating adult reproduction and juvenile and subadult recruitment into the adult population.

We are not projecting a decrease in impacts in this unit associated with the decrease in length, given the actions predicted to occur here and require consultation are not location-specific and could still occur within the modified unit boundaries.

*Comment 113:* Two utility companies suggested we had not used the best available information when we determined there is a spawning run or spawning patterns of movement for the Carolina DPS of Atlantic sturgeon in the Santee River below Wilson Dam (or anywhere in the Santee) in South Carolina. They said there is no evidence of spawning in the Santee River, and very little evidence of YOY Atlantic sturgeon using the river, and those specimens that have been captured were thought to be pushed in from Winyah Bay, South Carolina, via the Intracoastal Waterway. The commenters acknowledged the Santee River downstream of Wilson Dam may be used for feeding and refuge, but they reported Post *et al.* (2014) do not support the conclusion that the Santee River supports a spawning run or a pattern of movement for Atlantic sturgeon, and thus does not support the inclusion of the Santee River as critical habitat. SCDNR questioned our assumption that an Atlantic sturgeon captured at the St. Stephen Fish Lift on the Santee River, South Carolina (Carolina Unit 7), had presumably been making a spawning run. They indicated the direction of travel of this individual animal is unknown. SCDNR said that the exit channel of the fish lift is monitored via three video cameras, two of which are underwater and one that captures images through a viewing window of the exit channel in the lift. They concluded that a review of the video footage could not determine whether the sturgeon entered the lift downstream of the dam or if the sturgeon entered the fish lift via the exit channel in Lake Moultrie.

*Our Response:* We disagree. Sturgeon movement upstream in the Santee River has clearly been restricted due to the Santee-Cooper Navigation and Hydro-Electric Project, and the operational impacts of the St. Stephen hydropower dam have restricted sturgeon access to or ability to use the Santee River below Wilson Dam. But there is evidence of spawning migration as far as fish can move until they are deterred by impacts of the projects. Further, we do not find the unknown direction of travel of the Atlantic sturgeon captured in the St. Stephen fish lift to undermine our assessment that the fish was moving between the upstream freshwater and the downstream estuarine waters.



Whether the animal was trying to get above the St. Stephen Dam or had been above the dam and was moving downstream, either direction suggests spawning movement.

Prior to the construction of the Santee-Cooper Project, the Santee River system supported a significant spawning population of Atlantic sturgeon. As described in the final listing rule (77 FR 5880; February 6, 2012), based on Secor (2002), the Santee-Cooper system had some of the highest historical landings of Atlantic sturgeon in the Southeast. From 1970–1995, 151 subadult Atlantic sturgeon, including age-1 juveniles, were collected from the Santee River (Collins and Smith, 1997). In 2004, 15 subadult Atlantic sturgeon were captured in surveys targeting shortnose sturgeon in the Santee River estuary with a juvenile Atlantic YOY captured the year prior in the Santee River (77 FR 5880; February 6, 2012). These data, considered the best scientific information available, provide evidence of an existing spawning population in the Santee River. The best scientific information available also indicates the PBFs essential to the conservation and recovery of the species occur in the Santee River, including potential spawning habitat in the reach of the river below Wilson Dam. Fish passage that is a requirement of the new hydropower license to the South Carolina Public Service Authority (SCPSA) will provide access to historical spawning grounds once passage is implemented. Thus, an occupied critical habitat designation is appropriate to protect the PBFs existing below the dams.

*Comment 114:* Two utility companies suggested the designation of the entirety of the 165,000 acres of lakes within the Santee-Cooper system, South Carolina (Lake Moultrie and Lake Marion, along with the 5-mile-long Diversion Canal that joins the reservoirs), is excessive and unnecessary, and this entire area is unlikely to be used by Atlantic sturgeon. They suggested limiting any critical habitat designation in the reservoirs, once occupied, to a corridor for passage, rather than including 165,000 acres of inferior habitat as “critical habitat,” would alleviate many of the burdens on these commenters. The commenters also said we had relied on the collection of a single juvenile in the reservoirs to “verify” that Lake Moultrie and Lake Marion in South Carolina can support successful recruitment of juvenile shortnose sturgeon.

*Our Response:* We acknowledge, as the commenter suggests, that portions of these areas may not be used at all times, and possibly not at all. However, the

collection of three Atlantic sturgeon carcasses from Lake Moultrie during the 1990s confirms that Atlantic sturgeon use the lakes at least for migration (77 FR 5880; February 6, 2012). More recently, an Atlantic sturgeon was documented in Lake Marion in December 2016; it passed from the Cooper River into Lake Marion via the Pinopolis Dam Lock then presumably made its way into Lake Marion via Lake Moultrie and the Diversion Canal (SCDNR pers com., 2017). Additionally, we believe the persistence of a dam-locked population of shortnose sturgeon, a congeneric, in these reservoirs (Collins *et al.*, 2003), indicates appropriate habitat for Atlantic sturgeon is present. However, as stated previously, we have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude the unoccupied units of critical habitat including Lake Moultrie and Lake Marion.

*Comment 115:* Two utility companies stated that we should consider whether designating Lake Moultrie and Lake Marion in South Carolina as “unoccupied” critical habitat would preclude any options for fish passage and protection at the Santee-Cooper Project.

*Our Response:* As part of the re-licensing process for the Santee-Cooper Project, we prescribed fish passage at both the Wilson and Pinopolis Dams. The Federal Power Act (FPA) requires FERC to make fish passage prescriptions mandatory conditions of licenses. We are currently in section 7 consultation with FERC regarding the re-licensing of the Santee-Cooper Project, and that consultation must treat the fish passage prescription as part of the proposed action. Thus, nothing about this rulemaking will affect the fish passage prescription. Regardless, as we stated previously, we have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude the unoccupied units of critical habitat including Lake Moultrie and Lake Marion.

*Comment 116:* Several commenters questioned our conclusion that there is “a good deal of data” on sturgeon spawning in the Broad, Congaree, and Wateree Rivers in South Carolina. Other commenters, including SCDNR, questioned our decision to use shortnose sturgeon behavior or likely habitat preferences as a proxy for Atlantic sturgeon when designating critical habitat. We also received comments from SCDNR indicating the only documented shortnose sturgeon spawning was in the Congaree River and none has been documented in the Wateree or Broad Rivers. The

commenters stated the evidence we used to support designating unoccupied habitat above the Wilson and Pinopolis Dams in South Carolina as suitable spawning habitat and juvenile habitat for Atlantic sturgeon was based on extremely limited evidence and conjecture. Specifically, they felt we overemphasized the value of the Wateree River as spawning habitat, and inappropriately used information related to shortnose sturgeon spawning in the Congaree River, South Carolina, to assume that the conditions in the Wateree River support spawning of Atlantic sturgeon.

*Our Response:* We used the best scientific information available (*e.g.*, Collins *et al.*, 2003; Cooke and Leach, 2003; Leach and Cooke, 2006; Shortnose Sturgeon Status Review Team, 2010; conversations with South Carolina state biologists) on habitat preferences and spawning behaviors of shortnose sturgeon to inform our conclusions regarding available spawning habitat and activity in the Broad, Congaree, and Wateree Rivers in South Carolina. We did not mean to suggest there is a good deal of information on spawning *per se*, but we included spawning type activity and behavior in our assessment. Additionally, because the likely spawning habitats for shortnose sturgeon (Dadswell, 1979; Squires *et al.*, 1993; Kieffer and Kynard, 2011) and Atlantic sturgeon are the same or highly similar (Gilbert, 1989; Smith and Clugston, 1997), we believe it is appropriate to use information available from the shortnose sturgeon to identify Atlantic sturgeon habitat. We acknowledge there is limited information on actual spawning by Atlantic and shortnose sturgeon in the Broad, Congaree, and Wateree Rivers. We also acknowledge the exact location of spawning sites on many rivers in the Southeast is not known and even when known generally, may change from time to time as water depth and substrate availability changes. However, aerial imagery confirms the presence of hard bottom habitat in the Wateree River, and in our biological opinion for the relicensing of the Catawba-Wateree project (NMFS, 2013), we concluded that given the fish passage requirements at the Santee-Cooper project, Atlantic and shortnose sturgeon presence in the Wateree River below the Wateree Dam is reasonably certain to occur. Suitable spawning habitat has been documented in several locations below the Wateree Dam. The flow releases required under the new license were specifically based, in part, on providing more extensive and better quality spawning habitat for

sturgeon. Duke Energy is required to quantify and map spawning habitat available to sturgeon below the Wateree Dam, with implementation of the new flows, as a term and condition of the biological opinion.

Additionally, in March 2011, SCDNR captured 19 adult shortnose sturgeon in the tailrace of the Pinopolis Dam and tagged 18 with acoustic telemetry tags and released them; the other fish had been tagged previously. Two of the tagged shortnose sturgeon moved through Pinopolis Lock, through Lakes Marion and Moultrie, and both fish entered the Wateree River. One shortnose sturgeon was recorded on the receiver at the Wateree Tailrace (approximately ¼ mile [0.4 km] downstream from the Wateree Dam) on both March 16 and 18, 2011, and spent 8 days in the Wateree River. The other was recorded within 4 miles (6.4 km) of the Wateree Dam, and spent 14 days in the Wateree River (NMFS, 2013). This movement is indicative of attempted spawning behavior. Because we have evidence that shortnose sturgeon released near the Pinopolis Dam have moved up to this spawning habitat below the Wateree Dam, we believe Atlantic sturgeon in the future will also use that existing spawning habitat.

There is little information on sturgeon movement in the Congaree River and Broad River. However, biological information was available for us to prescribe sturgeon passage when relicensing the Columbia Hydropower Project in 2002 given: (1) The 1,758 acres (7,115 square meters) of shoal habitats that exist above the project, and (2) the Broad River was likely an important spawning habitat for sturgeons (DOC, 2002).

However, as stated previously, we have decided to exercise our discretion under section 4(b)(2) of the ESA and exclude these unoccupied areas from the designation.

*Comment 117:* One commenter stated that, based on the assumption that Atlantic sturgeon spawning habitat requirements are likely similar to shortnose sturgeon and because shortnose sturgeon are known to spawn in the Congaree River, South Carolina, downstream of the Interstate 77 bridge, Atlantic sturgeon would likely use spawning habitat in the Congaree River below Interstate 77 as well. Thus, the commenter suggested there is sufficient spawning habitat in the Congaree already, and the Broad River above the Columbia Dam should not be considered essential to the conservation of the species.

*Our Response:* As stated previously, we have chosen to exercise our

discretion under section 4(b)(2) of the ESA and exclude the unoccupied units of critical habitat. Therefore, the areas on the Congaree and Broad rivers are not included in the designation.

*Comment 118:* One commenter noted that the biological opinion for the Catawba-Wateree Hydroelectric Project requires Duke Energy Carolinas (NMFS, 2013) to quantify and map potential spawning habitat under the new flow regime approved in the project license from the Wateree Dam to the confluence with the Congaree River. The commenter suggested we delay designating critical habitat in this reach until Atlantic sturgeon are present and the information required by the biological opinion has been developed.

*Our Response:* We agree that the information collected during this study will likely provide additional scientific data that will be useful in determining more precisely the location, timing, etc., of the spawning habitat. Also, as stated previously, we have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude these unoccupied areas from the critical habitat designation.

*Comment 119:* Several commenters asserted that we should not designate the Broad River in South Carolina upstream of the Columbia Dam as unoccupied critical habitat because the dam is at the fall line and we said animals do not go above the fall line.

*Our Response:* The commenter is correct, generally, in that we do believe Atlantic sturgeon cannot pass dams or natural features such as waterfalls and rapids found at the fall line of rivers. However, the geology of the southeastern United States is such that in some cases the fall line is not as pronounced as other areas within the range of the species. We clarified in this final rule where these conditions led to an upstream boundary above the fall line. On the Broad River, we believe the fall line likely did not act as an impediment to sturgeon migration historically. Rather, only manmade features (e.g., dams) are likely blocking access to the historical spawning grounds on this river. However, as stated previously, we have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude the unoccupied units of critical habitat.

*Comment 120:* Two utility companies asserted the information in the proposed rule was insufficient to conclude that the failure to designate the “unoccupied” reaches of the Santee and Wateree Rivers in South Carolina as critical habitat will result in the extinction of the species. Similarly, another commenter said not only had

we “failed to demonstrate why the proposed unoccupied critical habitat areas are essential to the conservation of the species,” but we also “failed to demonstrate why the proposed occupied habitat is inadequate to ensure the conservation of the species.”

*Our Response:* These commenters have applied the wrong standards for unoccupied critical habitat: That unoccupied critical habitat can only be designated if omitting the area will result in the extinction of the species, and that designating unoccupied critical habitat may only occur after first determining that occupied habitat is inadequate to support conservation. ESA section 3(5)(A) defines critical habitat as: The specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and any specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. The ESA imposes no requirement that we must determine the species will go extinct without unoccupied critical habitat. Similarly, there is no step-wise requirement that we first determine occupied critical habitat is somehow insufficient before designating unoccupied critical habitat. Admittedly, our previous regulations had incorporated such an approach. However, NMFS and the USFWS (the Services) concluded that a rigid step-wise approach does not necessarily serve the best conservation strategy for species. Regardless, we have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude the unoccupied units of critical habitat.

*Comment 121:* The Department of the Navy stated that the Final Joint Base Charleston (JBC) INRMP demonstrates a conservation benefit to Atlantic sturgeon and requested critical habitat not be designated in those areas of the Cooper River, South Carolina (Carolina Unit 7), adjacent to JBC properties pursuant to ESA section 4(a)(3)(B).

*Our Response:* We appreciate the Navy developing an INRMP that includes benefits to Atlantic and shortnose sturgeon. We reviewed the information provided during the comment period and agree the INRMP demonstrates an applicable conservation benefit, as defined in our regulations at 50 CFR 424.12(h). Section 4(a)(3)(B)(i) of the ESA states that we may not designate as critical habitat any

lands or other geographical areas owned or controlled by the DOD, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. The ESA further states that this provision does not affect the requirement to consult under section 7(a)(2), nor does it affect the obligation of the DOD to comply with section 9. We have provided our detailed evaluation of the JBC INRMP and how it meets our regulatory requirements in the Application of ESA Section 4(a)(3)(B)(i) (Military Lands) section of this final rule.

*Comment 122:* The Navy stated that designation of critical habitat in Carolina Unit 3 would affect its ability to conduct training exercises at the Lower Neuse River Small Boat Training Area in North Carolina, forcing units to travel to Norfolk, Virginia, or Camp Lejeune, North Carolina, which increases costs and reduces time for training. They stated this would ultimately cause adverse impacts to national security.

*Our Response:* Based on the information provided by the Navy, we could not determine the route of effect (*i.e.*, the aspect of the action that could cause direct or indirect impacts on critical habitat) the training exercises would have on any of the PBFs. Therefore, we do not believe that the designation of critical habitat will require consultation under the ESA, and thus, there will be no impact to this training or to national security from this designation.

#### South Atlantic Unit Rivers

*Comment 123:* SCDNR and another commenter stated the upstream limits of the Edisto River (South Atlantic Unit 1) should be moved downstream to U.S. Hwy 301. They believed this is appropriate based on telemetry data from 2010–2016 that showed 84 Atlantic sturgeon tagged in the Edisto River did not pass above this area. Similarly, SCDNR said the upstream limits of the Combahee-Salkehatchie River unit (South Atlantic Unit 2) should be moved downstream to U.S. Hwy 21, because they believed the telemetry data from 2010–2014 showed five Atlantic sturgeon tagged in the Combahee River did not pass above this area.

*Our Response:* It is quite possible no acoustically tagged Atlantic sturgeon have been detected above U.S. Hwy 301. An illustration of acoustic receivers on the Edisto River in Post *et al.* (2014)

shows no receivers even reach to U.S. Hwy 301 on the North Fork of the Edisto River. The same illustration does show four receivers at or above U.S. Hwy 301 on the South Fork of the Edisto River. Based on this information, we do not believe a lack of detections on the Edisto above U.S. Hwy 301 is entirely surprising, nor indicative that our upstream boundary is incorrect. Moreover, we determine critical habitat boundaries based on areas where PBF(s) essential to conservation of the species are located, not necessarily where individual animals have been documented. Our data indicate historical spawning likely occurred upstream of U.S. Hwy 301 and suitable spawning substrate likely exists near the fall line in both the North and South Forks of the Edisto River. The commenter provided no information suggesting the PBFs are absent above U.S. Hwy 301. For these reasons, we believe our upstream boundary for the Edisto River is appropriate.

For similar reasons, we believe our upstream boundary on the Combahee-Salkehatchie River is correct. Post *et al.* (2014) reports there are no acoustic receivers above Interstate 95, approximately two miles (3.2 km) (upstream from U.S. Hwy 21). Given the lack of receivers farther upstream, it is not possible to validate the commenter's assertion that sturgeon do not pass U.S. Hwy 21. Additionally, the commenter provided no information contradicting our determination that the PBFs extend above U.S. Hwy 21. For these reasons, we believe our upstream boundary for the Combahee-Salkehatchie River is appropriate.

*Comment 124:* SCDNR suggested that while it was possible two individual Atlantic sturgeon successfully passed through the NSBL&D on the Savannah River at the Georgia/South Carolina border in 2011, they believed these incidental successes are rare and inconsistent with the fishway description in section 18 of the FPA and the ruling found in section 1701(b) of the National Energy Policy Act that indicate a fishway should be safe, timely, and effective for all life stages of such fish. As a result, the commenter recommended that the upper extent of the critical habitat designation on the Savannah River should be limited to "occupied" habitat ending at the NSBL&D. Additionally, one commenter suggested the area upstream of the NSBL&D should not be considered essential to the conservation of the species because they believed Atlantic sturgeon spawn downstream of NSBL&D between rkm 213 and rkm 301 (Post *et al.*, 2014; Collins and Smith, 1997). This

commenter concluded that if Atlantic sturgeon are able to spawn and produce larvae downstream of NSBL&D, then habitat upstream of the dam should not be considered essential to the conservation of the species.

*Our Response:* As we discussed in the proposed rule, sturgeon are currently frequently seen at the base of the NSBL&D during spawning season, indicating either crowding below the dam or individual motivation to spawn farther upriver, or both. Regardless, as stated previously, we have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude the unoccupied units of critical habitat.

*Comment 125:* One commenter pointed out that the proposed rule states Atlantic sturgeon typically cannot pass dams or natural features such as waterfalls and rapids found at the fall line of rivers. Based on this statement, they asserted that if any area upstream of NSBL&D becomes accessible to Atlantic sturgeon, then the fall line near the Interstate 20 Bridge should be considered the upstream limit of Atlantic sturgeon spawning habitat. The commenter concluded that unless the best available information indicates that some other landmark should be used, the fall line should be considered the upper limit of spawning habitat.

*Our Response:* As we explained in the proposed rule, our objective was to include the farthest upstream extent of spawning habitat essential features within critical habitat unit boundaries. Generally, Atlantic sturgeon cannot pass dams or natural features such as waterfalls and rapids found at the fall line of rivers. However, the geology of the southeastern United States is such that in some cases the fall line is not as pronounced as in other areas within the range of the species and suitable spawning habitat for sturgeon is present above this zone, and we have clarified this reasoning in this final rule. On the Savannah River, we believe the fall line is not likely to act as an impediment to sturgeon migration. Rather, only manmade features (*e.g.*, dams) are likely blocking access to historical spawning grounds. We believe once above NSBL&D, Atlantic sturgeon will be able to continue upstream until the next manmade impediment (*i.e.*, Augusta Diversion Dam). Aerial imagery confirms there are large areas of hard bottom substrate above the Interstate 20 Bridge and at the base of the Augusta Diversion Dam. Once sturgeon gain access to this area in the future, it will likely provide spawning habitat. However, as stated previously, we do not believe the benefits of designating this area as unoccupied critical habitat

at this time will outweigh the benefits of excluding this area from the designation. Thus, we have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude this area of unoccupied critical habitat.

*Comment 126:* The Georgia Department of Natural Resources (GADNR) had objections to our upstream boundary on the Ogeechee River, Georgia. They said that the river becomes very shallow and impassable by boats during droughts and low flow periods, and it is possible that sturgeon move upstream of Louisville, Georgia, but only during high flow years. Further, they said they had documented some limited rocky habitat upstream of the U.S. 1 Bridge in Louisville. The commenter also reported two potential physical impediments to sturgeon passage, upstream of State Road 88, at a steep shoal at Shoals, Georgia, (33.253671 degrees lat., -82.756736 degrees long.) where flows do not create 1.2 m depths at any point in the channel and at Mayfield Mill Dam, which is not passable by sturgeon (33.364799 degrees lat., -82.805872 degrees long.). They requested we consider revising the upstream boundary to the crossing at State Road 88 near Davisboro, Georgia.

*Our Response:* After reviewing the information provided by the commenter, we agree that our upstream boundary should be adjusted downstream by 28 rkm for South Atlantic Unit 4 (Ogeechee River) to the base of the Mayfield Mill Dam (33.364799 degrees lat., -82.805872 degrees long.), north of Mayfield, Georgia. We confirmed the dam is likely to be an impediment to upstream movement of Atlantic sturgeon and fish passage at the dam is not foreseeable. The commenter suggested the shoals at Shoals, Georgia, could act as an impediment to Atlantic sturgeon passage under certain flow conditions; these shoals are located at the fall line. While potentially an impediment, we believe passage could occur during higher flow conditions. Conversely, the Mayfield Mill Dam is impassable and likely represents the extent of upstream spawning habitat on the Ogeechee River. For these reasons, we do not believe Atlantic sturgeon can access habitat above the dam now, or in the foreseeable future. Moreover, the fall line and associated spawning habitat is about 20 rkm downstream of the Mayfield Mill Dam and thus, excluding areas above the dam from critical habitat will not affect our conservation objective for this unit. The commenter suggested we move our upstream boundary to the crossing at State Road 88 near Davisboro, Georgia. However,

we could not clearly identify what information they based that suggestion upon. In the absence of clear information suggesting that would be the appropriate boundary, we chose the Mayfield Mill Dam as our revised upstream boundary. Based on this information, we have modified the location of the upstream extent of South Atlantic Unit 4 (Ogeechee River). We are not projecting a decrease in impacts in this unit associated with decreasing the length of the unit; given that the activities we predict will occur and require consultation are not location-specific, they could still occur within the modified unit boundaries.

*Comment 127:* The GADNR also suggested including the lower Canoochee River, Georgia, up to the confluence of Canoochee Creek at Fort Stewart, Georgia, as critical habitat. The commenter suggested this area because of its large size ("medium-main stem river"), because adult Atlantic sturgeon have been observed in the Canoochee River, and juvenile Atlantic sturgeon have been observed downstream in the Ogeechee River. They stated they believe the Canoochee River has sufficient depth for movement of adult Atlantic sturgeon.

*Our Response:* We reviewed the information provided by the commenter. We also conferred with state resource agency staff and academic researchers to evaluate the addition of the Canoochee River as critical habitat. We followed the same process in assessing the designation of the Canoochee River as we did with other rivers. To be considered critical habitat, the Canoochee River needed to have information supporting one or more of the following: (1) Capture location and/or tracking locations of Atlantic sturgeon identified to its DPS by genetic analysis; (2) capture location and/or tracking locations of adult Atlantic sturgeon identified to its DPS based on the presence of a tag that was applied when the sturgeon was captured as a juvenile in its natal estuary; (3) capture or detection location of adults in spawning condition (*i.e.*, extruding eggs or milt) or post-spawning condition (*e.g.*, concave abdomen for females); (4) capture or detection of YOY and other juvenile age classes; and (5) collection of eggs or larvae. While the information reviewed and opinions expressed by experts suggested that Atlantic sturgeon may use the Canoochee River, none of these necessary criteria were met for the Canoochee River. Thus, we did not consider it as having met our criteria for a spawning river or for designation as critical habitat.

*Comment 128:* The GADNR suggested the upstream extents of the Ogeechee, Satilla, and St. Marys Rivers proposed for designation in Georgia were inappropriate because they likely do not contain hard bottom substrate and/or water of appropriate depth that is free of barriers. They referred to a river classification framework developed by the Southeast Aquatic Resources Partnership that classified rivers (from smallest to largest) based on upstream drainage and/or mean annual flow as: Headwaters, Creeks, Small Rivers, Medium Tributary Rivers, Medium Mainstem Rivers, Large Rivers and Great Rivers (<http://southeastaquatics.net/sarps-programs/sifn/instream-flow-resources/river-classification-framework-2>). GADNR stated waterbody size is correlated with river depths and can help approximate the distribution of potential spawning habitat, which occurs "below the fall line of large rivers" as described in the proposed rule. They added that the smallest water body size that Atlantic sturgeon are known to spawn in and migrate through in Georgia is the "medium-main stem river" category in the upper Oconee and Ocmulgee Rivers in Georgia. The commenter indicated some of the upstream reaches we proposed for designation in the Ogeechee and Satilla Rivers in Georgia, and St. Marys Rivers, Florida, are categorized as "small rivers," which is two categories smaller than "medium-main stem river." The commenter suggested the appropriate boundary for the St. Marys River, Florida, should be the confluence with Boone Creek, approximately 5 miles (8 km) north-northeast of St. George, Georgia. The commenter recommended we change the upstream boundary of the Satilla River, Georgia, to the confluence with Hog Creek, approximately 1 mile (1.6 km) east of Talmo, Georgia.

*Our Response:* Our use of "large" rivers in the proposed rule was not intended to imply a specific classification system. It was meant more colloquially as a way to differentiate the main stem of significant coastal rivers from their smaller tributaries. Our determinations are based on the likelihood that one or more PBFs are present, not on a specific river classification system. GADNR did not provide any site-specific information that the PBFs are not present in these areas, and therefore we are not changing the upstream boundaries on these rivers.

*Comment 129:* One commenter supported our designation of occupied and unoccupied critical habitat. However, they requested we consider regional datasets including the: Southeastern Aquatic Connectivity

Assessment Project, the National Fish Habitat Partnership (NFHAP) database (Crawford *et al.*, 2016), the Multistate Aquatic Resources Information System (MARIS <http://www.marisdata.org/>), and the North Carolina Museum Collection data (<http://collections.naturalsciences.org/>). They also asked us to consider additional literature sources including Martin *et al.* (2014), ASMFC (2004), and Esselman *et al.* (2013), which they believe support the inclusion of the Satilla River, Georgia, up to its headwater above Route 32 in Georgia.

*Our Response:* We evaluated the regional datasets and literature sources suggested by the commenter. While the commenter suggested we review ASMFC (2004) and Esselman *et al.* (2013), they did not provide the citation for these references; thus, we could not review those documents. Generally, we found the regional datasets the commenter suggested either referred to species occurrence information (*i.e.*, North Carolina Museum Collection) or wide-ranging subject matter (*i.e.*, MARIS). Both NFHP and Martin *et al.* (2014) provided information focusing on disturbances such as urban land use, dams, crop land use, and impervious surface cover, but neither discuss the proposed PBFs specifically. None of the references provided information indicating the PBFs occur anywhere outside our current designation. The best available information from U.S. Geological Survey (<http://viewer.nationalmap.gov/viewer/>) shows the main stem of the Satilla River runs out well before the fall line. Thus, we believe the upstream extent of spawning habitat in the river is at the confluence of the Satilla and Wiggins Creeks approximately 2 miles (3.2 km) north of the State Route 158 in Georgia, and that the proposed boundaries for critical habitat on the Satilla River are appropriate.

*Comment 130:* Two commenters suggested our decision not to designate inaccessible parts of the St. Johns River, Florida, is inconsistent with our treatment of other rivers that we designated based on the existence of historical spawning habitat being temporarily blocked by dams, including on the Cape Fear River, North Carolina, the Broad and Wateree Rivers in South Carolina, and the Savannah River at the Georgia/South Carolina border.

In requesting that we designate the St. Johns River, Florida as critical habitat, the commenters contend: (1) The St. Johns River may have historically had a subpopulation of Atlantic sturgeon; (2) freshwater spawning and rearing habitats are available in the Ocklawaha

River, a tributary to the St. Johns River; and (3) spawning habitat exists above the Kirkpatrick Dam on the St. Johns River, which would become accessible if the dam were breached or removed. To this latter point, the commenters provided a letter from the U.S. Forest Service indicating the removal of the dam infrastructure and restoration of the Ocklawaha River would result in substantial downstream and upstream benefits. The commenters indicated that while they could not predict exactly when the Ocklawaha River would be accessible to Atlantic sturgeon, the U.S. Forest Service's support for the removal of the dam and restoration of the river creates a reasonable assumption that the Kirkpatrick Dam will be "passable in the future." Further, they suggested designating the area as critical habitat may hasten the restoration of the river to its natural course.

The same commenters also stated the South Atlantic DPS is endangered with only nine rivers listed to produce juveniles over the entire DPS range but listing a tenth (the St. Johns) river would add another river with the potential to produce juveniles in the DPS. They also suggest colonizing juveniles (and adults) are available from the Altamaha River, which is within easy swimming range (about 200 miles; 321 km) from the St. Johns River. Finally, they indicated that fish in the southernmost rivers in the species' range will likely have adaptations important for the entire range of subpopulations in the DPS during the future period of climate warming. They stated, "Subpopulations in the South Atlantic can share genetic adaptations within their DPS and with more northerly DPS during spawning to more quickly adapt the species to a changing environment."

*Our Response:* Based on available information, the St. Johns River does not meet the criteria we established for inclusion of rivers in this critical habitat designation, outlined in our response to Comment 127. We found historical and/or current information indicating Atlantic sturgeon are using the Cape Fear River, North Carolina, the Santee-Cooper System in South Carolina, and the Savannah River at the Georgia/South Carolina border to spawn. In contrast, we could find no such information for the St. Johns River, Florida, and the commenters did not provide any new information. Thus, the St. Johns River does not meet the criteria to be considered critical habitat for Atlantic sturgeon.

#### *Comments on Impacts Analysis*

*Comment 131:* An industry trade group pointed to our determinations that the majority of the section 7 consultation costs would already be incurred based on the listing of the Atlantic sturgeon itself and that "[i]t is extremely unlikely that [project] modifications that would be required to avoid destruction or adverse modification of critical habitat would not also be required because of adverse effects to the species." They wondered, if there are no categories of permits or other Federal activities that would be impacted solely or even primarily by consultation over impacts to designated critical habitat (rather than impacts to the listed species), what is the purpose of designating critical habitat? They went on to state that if designation of critical habitat is "not prudent," we should not make such a designation.

*Our Response:* See response to Comment 49.

*Comment 132:* An industry trade group suggested we had failed to perform the requisite analysis of whether certain areas should be excluded. They believe that to comply with our statutory mandate to consider whether the benefits of excluding areas from the critical habitat designation outweigh the benefits of designation, we must provide some specific analysis of the conservation benefits derived from designating specific areas compared to the economic costs of designating those areas. They indicated we made no attempt to carve out less valuable areas based on economic, national security, or other relevant impacts. They claimed our analysis is cursory and grossly inadequate because we do not evaluate whether the benefits of exclusion outweigh the economic costs of designation for particular areas that will be designated (aside from areas of concern to the Navy).

*Our Response:* The commenters' argument misstates the requirements of the ESA. The ESA does not require the use of any particular methodology in the consideration of impacts. The ESA also does not require that we carve out "less valuable" areas of critical habitat. However, section 4(b)(2) of the ESA provides that the Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. This is true unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned. The legislative

history regarding section 4(b)(2) exclusion analyses suggests that the consideration and weight given to impacts is within the Secretary's discretion (H.R. 95-1625) and the Secretary is not required to give economic or any other 'relevant impact' predominant consideration in his specification of critical habitat. In our proposed rule, we explained our preliminary determination that we would not exercise our discretion to consider exclusions. However, based on input received during the public review process, we determined that conducting a discretionary exclusion analysis for areas of unoccupied habitat within the range of the Carolina and South Atlantic DPS was warranted (given that occupied units are currently used by Atlantic sturgeon for reproduction and recruitment, and due to the severely depressed levels of all river populations, occupied units are far too valuable to both the conservation and the continuing survival of Atlantic sturgeon to be considered for exclusion).

Based on that analysis, we have elected to exclude the Santee-Cooper river system (CU1) and Savannah River (SAU1) unoccupied units of critical habitat. We determined the benefits of exclusion (that is, avoiding some or all of the impacts that would result from designation) outweigh the benefits of designation.

*Comment 133:* Several commenters suggested our DIA was incomplete and largely ignored the costs to permittees associated with ESA consultation. They also believed the DIA underestimated the costs associated with implementing and maintaining changes to facilities and operations required to prevent destruction or degradation of critical habitat. The commenters suggested instead that the DIA focused on the administrative costs to NMFS created by the designation while underestimating the costs incurred by the regulated community and by responsible state agencies. Specifically, one commenter estimated additional costs of \$10,000 to \$70,000 (related to preparing for and holding stakeholder meetings, developing and executing field studies, etc.) would be incurred during the hydropower relicensing process if the proposed designation were adopted without changes.

*Our Response:* We do not believe the DIA underestimated the potential costs to state agencies, permittees, or other members of the regulated communities. Economic impacts of the critical habitat designation result through implementation of section 7 of the ESA in consultations with Federal agencies to ensure their proposed actions are not

likely to destroy or adversely modify critical habitat. These economic impacts may include both administrative and project modification costs. As stated previously, we examined the ESA section 7 consultation record over the last 10 years to identify the types of Federal activities that may adversely affect proposed Atlantic sturgeon critical habitat. In addition, we contacted Federal agencies that conduct, permit or fund activities in the areas covered by critical habitat and asked them whether our assessment of the types and numbers of activities likely to require consultation over the next 10 years appeared accurate. The only agency that identified specific actions that we should add to our analysis was EPA, and we have added consultations on approval of state water quality standards to the Impacts Analysis.

In terms of costs to permittees, we took a conservative approach in estimating that each type of Federal action that could involve a third-party permittee, would actually involve a permittee in the future, and included estimated administrative costs for those entities in our analysis (see IA, Section 3.3.1).

Our review determined no category of future Federal action would have routes of effects solely to the PBF(s) of critical habitat and not also have potential routes of adverse effects to Atlantic and/or shortnose sturgeon. However, in the case of USACE issuance of permits under section 404 of the CWA or section 10 of the Rivers and Harbors Act (RHA), we conservatively estimated that every one of these future actions would result in incremental impacts because these types of actions could in theory be implemented while migratory sturgeon are not present in a project's action area. Regarding the specific types of costs mentioned by the commenter, it is not clear that these costs would be attributable incrementally to the ESA, and would not instead be a baseline requirement of the FPA that governs the re-licensing process. If the types of activities are identified by FERC as required to comply with the ESA, it is likely that these studies and meetings would address potential impacts to both sturgeon and critical habitat, and as such these costs are part of the baseline requirement to consult to evaluate potential impacts to these species. Thus, we do not agree that designation of critical habitat would create the additional, incremental costs suggested by the commenter.

*Comment 134:* Two utility companies believed we grossly underestimated both the economic cost and the administrative burden that will be

caused by designation of the unoccupied reaches of the Santee River, Lake Moultrie, Lake Marion and, to a lesser extent, the Wateree River in South Carolina. The commenters stated Santee Cooper and Duke Energy Carolinas are responsible for administering FERC licenses for their respective projects. They indicated all FERC licenses include a standard land use article that allows licensees to authorize certain types of use and occupancy of project lands and waters. This standard land use article also allows licensees to grant easements, rights-of-way, or leases of project lands and waters for a number of activities. The standard land use article also allows for more significant types of use and occupancy on project lands or waters if 60-day prior notice is provided to FERC. The commenters stated the proposed rule is unclear on whether FERC and the licensee are protected by any incidental take statement included in the licensee's biological opinion issued for the relicensing of the projects or whether section 7 consultation under the ESA is required for each discrete activity. The commenter suggested that if the latter is the case, then licensees and their designees will be required to prepare the equivalent of a biological assessment to submit a 60-day prior notice to FERC for each of the prior notice activities contemplated by the standard land use article that could affect critical habitat, and FERC will be required to assess the impacts and determine if consultation with us is warranted within this time period. The commenters indicated they believe this could include hundreds of activities over a license term. At a minimum, the commenters request that we clarify that an incidental take statement, issued as part of the FERC licensing process, covers all activities authorized or required pursuant to the FERC license, including activities conducted pursuant to the standard land use article, maintenance activities, and installation of required fish passage. Otherwise, the commenters suggested we must analyze the burden on licensees and agencies in our DIA.

*Our Response:* Incidental take statements included in biological opinions issued at the conclusion of a formal ESA section 7 consultation pertain to the incidental taking of threatened or endangered species, not for impacts to critical habitat. In any event, when we consult on FERC's proposed issuance of a hydropower license, the incidental take contemplated should include any take associated with the activities the commenter describes, if FERC or the

applicant have identified those types of activities as part of the scope of the action being consulted on. FERC will need to determine whether reinitiation of consultation is required for any biological opinions we have issued, based on determining whether the ongoing action may affect newly-designated critical habitat. Because consultations on a listed species must also evaluate impacts to their habitat, whether designated as critical habitat or not, most or all biological opinions issued may evaluate impacts to habitat features now being included in the critical habitat designation. To be conservative, in our Impacts Analysis we assumed reinitiation would be required on FERC actions. During any reinitiated consultation that they request, FERC should include the standard land use article that allows licensees to authorize certain types of use and occupancy of project lands and waters as part of the Federal action, in which case any impacts from activities under the article over the term of the license would be analyzed under the associated biological opinion and would not require separate consultation. However, as stated previously, we have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude the unoccupied reaches of the Santee River, Lake Moultrie, Lake Marion and the Wateree River from the designation.

*Comment 135:* Two commenters suggested the benefits we describe as likely to occur with the proposed designation of “Carolina Unoccupied Unit 2” as critical habitat (e.g., conservation benefit of species recovery, ecosystem health benefits, ecosystem service benefits, use benefits such as commercial and recreational fishing of sturgeon and tourism) are “illusory or likely will not accrue for some time into the future” because Atlantic sturgeon are not currently present in the “unoccupied” reaches of the Wateree and Santee Rivers in South Carolina, and the reservoirs. They further stated many of the ecosystem health and service benefits we identified are already being provided as a result of the requirements of other Federal licenses or state/Federal permit authorizations. They claimed designation would impose considerable economic, administrative, and other burdens on industry and resource agencies. Thus, they believed we should determine that the benefits of excluding “Carolina Unoccupied Unit 2” far outweigh any minor, incremental benefits associated with designation of these areas.

*Our Response:* When we designate critical habitat we must evaluate the impacts of that designation, both

positive (benefits) and negative (costs), whether or not the benefits are immediately realized. We are not required to determine that benefits, or positive impacts, of designation will be significant or accrue over any particular timeframe; however, if we determine it is appropriate to conduct an exclusion analysis on some or all areas of a designation, it is our general practice to exclude areas under section 4(b)(2) when the benefits of exclusion outweigh the benefits of inclusion. Following our consideration of the costs and benefits of designating unoccupied critical habitat, we have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude those areas, which includes Carolina Unoccupied Unit 2.

*Comment 136:* The USACE suggested our DIA does not adequately address the potential increase in informal consultations. They said the DIA concluded most of the projects considered under General Permits (Nationwide/Regional/Programmatic) issued by the USACE are very small-scale, and the impacts to listed species and designated critical habitat from these types of projects have already been considered under programmatic biological opinions. As a result, future projects will generally not require individual section 7 consultation. The commenter stated that this assumption is not true for every USACE District; not all Districts have programmatic biological opinions in place. They stated the USACE makes effects determinations based on the effect the activity would have on the species and/or critical habitat, not on the type of authorization. Thus, they seemed to indicate some future projects in proposed critical habitat would not have required consultation for potential effects to Atlantic sturgeon, but would now require consultation to consider potential effects to Atlantic sturgeon critical habitat. They suggested our estimate of 20 CWA section 404/RHA section 10 projects permitting construction or dredge and fill in proposed Atlantic sturgeon critical habitat in the DIA is an underestimate. They claimed their information suggests the new designation would lead to at least 20 additional consultations per year in the USACE’s Savannah District and at least 17 in the Wilmington, North Carolina, and Charleston, South Carolina Districts per year, or 370 new consultations over a 10-year period across those 3 districts.

*Our Response:* We used the best scientific information available when determining the likely future section 7 consultations for Federal actions in critical habitat. As noted previously, we

queried PCTS, going back 10 years, to identify relevant consultations that occurred in each of the proposed critical habitat areas or units that, if implemented in the future, could affect one or more of the proposed PBF(s), or could affect both the critical habitat and Atlantic sturgeon. We also requested that Federal action agencies, including the USACE, provide us with information on future consultations if we omitted any future actions likely to affect the proposed critical habitat. The USACE’s comment enumerates numbers of consultations by USACE district, but not whether those numbers include actions that may occur solely in marine and estuarine environments. It is also unclear from the information provided by the commenter whether the actions they referenced have been ongoing and would affect both the species and critical habitat in the future, but were simply not consulted on for effects to the species. It is also unclear whether these projects were not consulted on because the action agency determined there would be no effect to Atlantic or shortnose sturgeon. The USACE has not provided us tangible information with which to modify our Impacts Analysis. Simply stating that more consultations are expected is not sufficient. As a result, we believe our final Impacts Analysis still accurately reflects the likely number of future consultations.

*Comment 137:* The NCWQA and SCWQA stated the DIA does not discuss the impacts of the proposed designation on NPDES permit programs, state water quality standards, or Total Maximum Daily Load (TMDL) determinations. They pointed out that these potential impacts were discussed in GARFO’s proposed rule to designate critical habitat for the Gulf of Maine, New York Bight and Chesapeake Bay DPSS of Atlantic sturgeon (81 FR 35701; June 3, 2016), and because we did not mention them in our DIA we must republish the “North Carolina proposal.”

*Our Response:* We disagree. Our query of the PCTS database returned no TMDL or NPDES consultations in the southeast within the last 10 years. There are differences between GARFO’s and SERO’s impacts analyses regarding the potential impacts of critical habitat designation on NPDES permit programs, state water quality standards, or TMDL determinations. Those differences are appropriate due to differences in whether the EPA has delegated authority to particular states to administer programs under the CWA. In the Southeast, the EPA has delegated the authority to administer NPDES programs to the States of Florida, Georgia, South Carolina, and North

Carolina. Upon authorization to states, those NPDES activities are no longer Federal actions. Similarly, the TMDL programs are largely implemented by states, meaning they too are not Federal actions that require consultation. Our DIA determined the primary source of impacts of critical habitat designation is the cost of section 7 consultations. Because ESA section 7 consultations are only required for Federal actions, non-Federal activities are not affected, and were not considered in our DIA or final Impacts Analysis. Additionally, we also contacted the EPA to determine if we had missed any categories of activities likely to occur in the next 10 years that were not reflected in results of PCTS query. The EPA indicated they were not aware of any NPDES permit program or TMDL consultations that should be included in our analysis for southeast rivers. However, they did anticipate 9 nationwide pesticide consultations and an additional 12 consultations over the next 10 years to address state water quality standards; the final Impacts Analysis reflects these consultations. The commenter did not provide any information on potential NPDES permit actions or TMDL approvals that may require consultation in the southeast critical habitat units.

*Comment 138:* A utility company suggested we failed to mention the additional analysis that may be required to consider critical habitat when they seek to obtain an NPDES permit for the intake and discharge of water by the Cross station into and from Lake Moultrie pursuant to section 316 of the CWA. It was concerned that if “unoccupied” critical habitat is designated near the station, it may be required to prepare an unnecessary biological assessment to ensure that this unoccupied critical habitat is not affected by the activities authorized in the NPDES permit. A separate utility company expressed similar concerns. It suggested we had not identified the power plants described in Comment 111 in our DIA and had not discussed the permitting associated with the plants and the anticipated increase in consultation and delay costs associated with permits issued pursuant to section 316 of the CWA concerning intakes and thermal discharges from power plants through the state NPDES programs. Similarly, two utility companies indicated there can be a lengthy process for review by NMFS with additional time potentially required to find a compromise if the state agency issuing the section 316 permit disagrees with our recommendations. They expressed concern that because a section 7

consultation may include measures to minimize take, but the section 316/ NPDES permit does not authorize incidental take, the owners/operators of these plants may also need to obtain a section 10 permit under the ESA authorizing such incidental take if there is any doubt as to whether power plant intakes or discharges may be adversely modifying critical habitat.

*Our Response:* As noted previously, our DIA and final Impacts Analysis do not consider NPDES activities because they are not Federal actions, thus there would be no consultations and no impacts resulting from this designation associated with NPDES activities.

Section 316(b) of the CWA requires cooling water intake structures (CWIS) to reflect the best technology available (BTA) for minimizing adverse environmental impacts. Adverse environmental impacts include, but are not limited to, impingement and entrainment of organisms at CWIS, and changes in flow regime, caused by the withdrawal of water. Under section 316(b), the EPA is required to issue regulations on the design and operation of intake structures to minimize adverse impacts. The EPA issued its Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities on August 15, 2014 (79 FR 48300). The following is a summary of EPA’s description of the main components of the rule as follows. First, existing facilities that withdraw at least 25 percent of their water from an adjacent waterbody exclusively for cooling purposes and have a design intake flow of greater than 2 million gallons (7.6 million liters) per day (MGD) are required to reduce fish impingement under the final regulations. To ensure flexibility, the owner or operator of the facility will be able to choose one of seven options for meeting best technology available requirements for reducing impingement. Second, existing facilities that withdraw very large amounts of water—at least 125 MGD (473 million liters per day)—are required to conduct studies to help their permitting authority determine whether and what site-specific controls, if any, would be required to reduce the number of aquatic organisms entrained by cooling water systems. This decision process would include public input. Third, new units that add electrical generation capacity at an existing facility are required to add technology that achieves one of two alternatives under the national BTA standards for entrainment for new units at existing facilities. Under the first alternative new

unit entrainment standard, the owner or operator of a facility must reduce actual intake flow (AIF) at the new unit, at a minimum, to a level commensurate with that which can be attained by the use of a closed-cycle recirculating system. Under the second alternative new units entrainment standard, the owner or operator of a facility must demonstrate to the permit issuer (*e.g.*, a state) that it has installed, and will operate and maintain, technological or other control measures for each intake at the new unit that achieves a prescribed reduction in entrainment mortality of all stages of fish and shellfish that pass through a sieve with a maximum opening dimension of 0.56 inches.

The commenters did not provide information for us to determine whether and to what extent they are affected by EPA’s section 316(b) regulations. Nonetheless, we do not believe this critical habitat designation will increase any impacts to commenters related to section 316(b), for the following reasons. The Services consulted with EPA on the impacts of its nationwide application of the section 316(b) rule and issued a biological opinion concluding the rule would not jeopardize any listed species or destroy or adversely modify any critical habitat under the Services’ jurisdictions (USFWS and NMFS, 2014). No additional consultations are required under the biological opinion and EPA’s rule; instead, the Services are engaged by permit issuers (EPA, or state or Tribal governments) in a 60-day review of permits under consideration, prior to the permits being published for public comment. A provision of EPA’s rule requires affected permit applicants to include threatened or endangered species or critical habitat that may be in the action area of their facilities in the assessments required for their permit applications. The Services may provide recommendations on measures to protect listed species, including measures that would minimize any incidental take of listed species, and/or avoid likely jeopardy to a listed species or destruction or adverse modification of critical habitat. If we reviewed a 316(b) permit application for a CWIS in Atlantic sturgeon critical habitat, we would first evaluate whether there are any routes of adverse effects to listed species or to the critical habitat. Conceivably, CWIS could affect the water quality essential features of water depth, temperature, DO and salinity values, depending on the amount and timing of the water withdrawals/ discharges. However, any such effects would also affect listed species including Atlantic and shortnose



sturgeon, and any measures we would recommend to avoid such effects would not be incremental impacts, including delay, attributable to the critical habitat designation. Therefore, any future ESA section 7 or section 10 requirements related to CWA section 316 or NPDES consultation requests for critical habitat would be coextensive to consultations for the listed species; thus, we do not believe there would be any significant delay or costs incurred for the consultations assessing impacts to critical habitat. The commenters' concern about the lack of authorization of incidental take of listed species through the 316/NPDES permit is not a critical habitat issue, and thus there are no impacts attributable to this rule.

*Comment 139:* A farm-industry trade group expressed concern that the DIA did not comprehensively evaluate the potential economic impacts to private landowners, particularly farmers. They were specifically concerned farmers would bear the burden of additional permit review and regulatory requirements under the ESA, including EPA prohibitions of certain crop protection products, permits for minor impacts to wetlands, and potentially even curtailment of water withdrawals.

*Our Response:* The requirements to consider potential adverse effects to critical habitat in section 7 consultations only apply to activities funded, carried out, or authorized by Federal agencies. Because these requirements only apply to activities with a "Federal nexus," we do not anticipate the designation of critical habitat to result in additional costs or burden to strictly private or state activities. The commenter is correct that some additional review may be required during Federal permitting to consider the potential effects of a Federal action on designated critical habitat. However, as noted previously, we anticipate any Federal action potentially affecting Atlantic sturgeon critical habitat would have already required ESA section 7 consultation to consider the potential impacts to Atlantic or shortnose sturgeon, and thus any added burden due solely to this rule will be minimal. Our analysis includes a conservative estimate of the consultation impacts due to EPA's authorization of pesticides over the next 10 years, noting these are national consultations that will require evaluating impacts on all NMFS listed species and designated critical habitat. Our conservative estimate is that these consultations would result in \$1,474.84 per unit attributable to Atlantic sturgeon critical habitat over 10 years, for Federal agencies and permittees combined. The commenter did not provide information

on any particular water withdrawals of concern and whether those would have a Federal nexus to potentially trigger consultation requirements. Similarly, no information on minor impacts to wetlands that may affect Atlantic sturgeon critical habitat and require consultation was provided. If projects with a Federal nexus that impacted wetlands occurred in the past in areas being included in the critical habitat units and required consultation, it would be included in our database and would be included in this analysis, likely under the USACE CWA section 404/RHA section 10 permitting—dredge, fill, construction category. We conservatively assumed these actions could result in fully incremental informal consultations in the future, and assigned them a cost of \$7,200 per consultation. Of this, a permittee could incur \$1,500-\$3,000, depending on whether a biological assessment is required and is prepared by the permittee (see, Impacts Analysis Table 3–19).

*Comment 140:* Two commenters stated that the area immediately downstream from Blewett Falls Dam on the Pee Dee River at the North Carolina/South Carolina border (Carolina Unit 5) should be excluded from designation as critical habitat. The commenters asserted this area does not offer suitable spawning habitat, and exclusion would alleviate the additional cost, complexity, and administrative burden of carrying out activities authorized or required by the YPD license, including fish passage activities.

*Our Response:* We disagree. As discussed in our response to Comment 110 above, potential spawning habitat does exist immediately downstream from Blewett Falls Dam, and it was appropriate to set the upstream boundary of the unit at the dam. We also disagree that foregoing designation would alleviate additional cost, complexity, and administrative burden of carrying out activities authorized or required by the YPD license. As noted previously, we do not anticipate the designation of critical habitat will impose additional administrative burdens or costs that would not have already been associated with ESA section 7 consultations to address impacts to Atlantic and shortnose sturgeon.

*Comment 141:* An industry trade group suggested we had significantly underestimated the true costs to a permittee, because we had not included potential costs associated with employing biologists, other consultants, or legal support they believe may be necessary to navigate the consultation

process. They went on to state that consultation could cause project modifications, impose additional avoidance measures, or require additional mitigation above what was required by the action agency. The commenters reported Sundig (2003) estimated the direct, out-of-pocket costs of section 7 consultation for a single-family housing project to be several thousand dollars per house. Beyond the consultation process itself, the commenters suggested requirements to avoid or mitigate impacts to critical habitat could result in economic losses of millions of dollars. The commenters concluded that by severely underestimating the number of consultations that will be triggered by the proposed designations and the costs of those consultations, we failed to provide a meaningful analysis of section 7 consultation costs.

*Our Response:* We disagree. As explained in our responses to comments 52, 133, 135 and 136 above, we believe our estimate of the numbers of future consultations is correct, and commenters provided no information to the contrary.

*Comment 142:* Several commenters, including GADNR, SCDNR, and NCDOT, expressed concern that requirements to consult under section 7 of the ESA would increase administrative costs/burdens and cause long delays potentially affecting project costs, timelines, and fisheries management activities.

*Our Response:* As outlined in the Impacts Analysis and described previously, our review of all Federal actions that may adversely affect designated Atlantic sturgeon critical habitat indicates that none of those types of actions would solely affect the PBFs of critical habitat and not also have potential routes of adverse effects to Atlantic and/or shortnose sturgeon. We acknowledge that actions occurring within designated critical habitat will require an analysis and additional administrative cost to ensure Federal actions are not destroying or adversely modifying critical habitat. Yet, those additional analyses will be added to consultations that would occur anyway to consider potential impacts to sturgeon. Therefore, the designation of critical habitat is not anticipated to cause the significant additional costs or delays suggested by the commenter.

*Comment 143:* The Navy also expressed concern about potential delays and administrative costs/burdens associated with the designation. The Navy also questioned our determination that impacts of dredging are coextensive with the listing rather than incremental

impacts of this rule, and they identified some areas on the Neuse River that they believe will lead to impacts to national security due to impacts of the designation on training conducted in those areas.

*Our Response:* See our response to Comment 142 above regarding costs and delays generally. As we discussed in the proposed rule, dredging to maintain navigation channels may affect several of the essential PBFs of Atlantic sturgeon critical habitat. Dredging to deepen or widen navigation channels may involve removing rock, gravel, or soft substrate that is providing adult sturgeon spawning habitat or juvenile foraging habitat. Extensive dredging for harbor expansion may allow saltwater to intrude farther up a river, and adversely impact the area containing the salinity range necessary for young sturgeon. Other potential effects of dredging projects on the essential PBFs of Atlantic sturgeon critical habitat are increased siltation on spawning substrate, and the blockage of migratory pathways through channels and inlets.

At the same time, dredging may adversely affect Atlantic and shortnose sturgeon. The types of adverse effects are not likely to be temporary and limited to periods of sturgeon absence, and they are likely to be implemented in lower parts of the units where sturgeon can be expected to be present year-round. Thus, adverse effects of navigation maintenance dredging activities are likely to involve coextensive formal consultations to address impacts to both the species and the essential PBFs. Removal or covering of spawning substrate could interfere with the services this PBF is designed to provide—settlement of fertilized eggs and refuge, growth and development of early life stages. These effects to the essential PBF would also be adverse effects to sturgeon eggs, larvae and early life stages that were not able to settle, grow, develop or seek refuge. Project modifications to address both these impacts to the PBF and the sturgeon could involve limiting the amount or location of substrate removed, or turbidity controls to prevent sediment deposition on hard substrate. Similarly, adverse effects of dredging in removing the soft substrate PBF that would interfere with provision of juvenile foraging services, could also injure or kill juveniles seeking to use that foraging habitat. Coextensive project modifications might be similar to those mentioned for impacts to the hard substrate feature. Changing the salinity regime by deepening harbors and parts of rivers would remove portions of the transitional salinity zone feature that is

being designated to provide foraging and developmental habitat services to juveniles; loss of portions of this habitat could impede development of juveniles using the remaining habitat, or prevent the habitat from supporting some juveniles. Coextensive project modifications that might be required to prevent or lessen these impacts could involve changes in the depth of deepening a harbor, port, or river. The deepening of harbors and ports may also create hypoxic zones which would impact the water quality PBF that is designed to ensure survival of sturgeon. Coextensive project modifications that might be required to prevent hypoxic zones could include limiting the amount of deepening or requiring the use of aeration systems. Thus, we did not assert there would be no project modifications to avoid adverse effects to critical habitat, but as described above, project modifications would address adverse impacts to both critical habitat and sturgeon, thus the costs of such modifications would not be incremental impacts of this rule.

The Navy described training activities that occur on the lower Neuse River as including small boat launch and recovery, high-speed boat tactics training, small boat defense drills, and small arms fire. We do not see a route of potential effects from these activities to the PBFs of critical habitat, and thus there would be no additional consultation burdens beyond any requirements to address impacts to the species. Thus, the designation would not impact military training related to national security in these areas.

*Comment 144:* Several commenters, including SCDNR, asserted that designation of critical habitat (both unoccupied and occupied) means projects that previously would have qualified for USACE Nationwide Permits or General Permits would no longer qualify, resulting in individual project review/analysis/certification.

*Our Response:* Whether a project is permitted by the USACE under a Nationwide or General Permit or another permitting mechanism, the USACE must assess the effects of the project on listed species and critical habitat and consult with us if listed species and/or designated critical habitat may be affected. As previously stated, our review of all previously consulted-on Federal actions that may adversely affect designated Atlantic sturgeon critical habitat determined that none of those types of actions would solely affect the PBFs of critical habitat and not also have potential routes of adverse effects to Atlantic and/or shortnose sturgeon. We acknowledge

that actions occurring within designated critical habitat will require an analysis to ensure Federal actions are not likely to destroy or adversely modify critical habitat. Yet, those additional analyses will be added to consultations that would be required anyway, to consider potential impacts to sturgeon.

*Comment 145:* NCWRC and SCDOT requested that we develop programmatic ESA section 7 consultations or allocate additional resources to reduce the time associated with addressing new consultations.

*Our Response:* We cannot require a Federal action agency to consult on a programmatic basis, as it is up to the action agency to define the scope of a programmatic activity. However, we are committed to continue working with our Federal partners as we have in the past to identify opportunities for streamlining consultations or ways to increase efficiencies in the consultation process. Within SERO, we are already fully committing the available resources to ESA section 7 consultations, and we agree that investigating the possibility for programmatic consultations is a valuable tool.

*Comment 146:* A few commenters, including an industry trade group, expressed concern about potential delays for projects already undergoing consultation that would now have to include an analysis of adverse modification for Atlantic sturgeon critical habitat, as well as previous consultations that may need to be reinitiated based on the new critical habitat designation.

*Our Response:* See response to Comment 57.

*Comment 147:* One commenter worried that important research projects funded through time-limited Federal grants, occurring within proposed critical habitat units, may be delayed. The commenter expressed concern over the length of time required to complete section 7 consultations. The commenter expressed the belief that the timely completion of section 7 consultations will help to ensure these projects can provide data under the grant deadlines.

*Our Response:* We agree with the commenter that delays of important research projects within proposed critical habitat units should be avoided if possible. We are committed to working with action agencies to complete section 7 consultations as a quickly as possible.

*Comment 148:* SCDNR requested that we develop guidance and Best Management Practices for how in-water work should be conducted in critical habitat.

*Our Response:* We appreciate the recommendation.

*Comment 149:* SCDNR recommended we establish a list of activities authorized by the USACE Nationwide Permits that would not affect this species or its critical habitat and thus not require the section 7 consultation.

*Our Response:* It is the responsibility of the USACE, as the Federal action agency for the Nationwide Permits, to make determinations about their actions and request consultation if species and/or critical habitat may be affected. We are available to provide technical assistance and consultation, if requested by the USACE or other action agencies. We have information readily available on our Web sites for all Federal action agencies, and the public, providing guidance on effects determinations. Additionally, SERO and GARFO are jointly drafting a consultation framework specific to analyzing impacts to Atlantic sturgeon critical habitat to assist USACE and other agencies with consultations.

*Comment 150:* NCDMF and North Carolina Division of Coastal Management (NCDCM) suggested that even minor modifications to trawl sampling designs can affect the comparability of survey results across time series, which may span multiple decades. They requested we consider the importance of maintaining consistency across sampling programs if any new consultations are required due to the proposed critical habitat designations. The commenter also expressed concern that other bottom disturbing activities such as cultch planting and artificial reef and oyster reef construction could be impacted by our habitat designation. They concluded that while the critical habitat designations may not impact these activities, additional consultations for critical habitat (either formal or informal) will be required.

*Our Response:* We agree that there is great value in consistency across sampling programs and do not seek to change them without cause. However, if we determine through section 7 consultation that a sampling program funded or permitted by a Federal agency may adversely affect sturgeon or their habitats, including critical habitat, the Federal agency is required to ensure the action is not likely to jeopardize listed species or destroy or adversely modify critical habitat. In the extreme case that a sampling program is found to be likely to destroy or adversely modify critical habitat, we would be required to work with the parties involved to develop a reasonable and prudent alternative to that program, that would still achieve

the sampling program's objectives but avoid destruction or adverse modification of the critical habitat.

With respect to the consultation requirements for the bottom disturbing activities identified, as outlined in the IA, our review of all Federal actions that may adversely affect designated Atlantic sturgeon critical habitat determined none of those types of actions, including federally-permitted fishery research, would solely affect the PBFs of critical habitat and not also have potential routes of adverse effects to Atlantic and/or shortnose sturgeon. We acknowledge that actions occurring within designated critical habitat will require an analysis and additional administrative cost to ensure Federal actions are not likely to destroy or adversely modify critical habitat. Yet, those additional analyses will be added to consultations that would occur anyway, to consider potential impacts to sturgeon. Therefore, the designation of critical habitat is not anticipated to cause the significant additional costs or delays suggested by the commenter.

*Comment 151:* One commenter expressed concern that the proposed designation could prevent in-water construction, dredging and bridge work needed to: (1) Maintain safety margins for large, ocean-going vessels navigating into and out of port, (2) transit near or under bridges, and (3) moor/unmoor safely at marine terminals, from receiving Federal funding. The commenter stated that section 7(a)(2) of the ESA requires Federal agencies to ensure actions they fund, authorize, or carry out are not likely to destroy or adversely modify that habitat, and pointed out we have determined a wide variety of activities may affect critical habitat. The commenter seems to imply that because we have indicated one or more of the activities above may have effects to critical habitat, we could impose a blanket moratorium on any such activity and/or block those activities from gaining Federal funding in the future. They believed stopping these projects would not only have a dramatic economic impact, but would also have a severe negative impact on navigation safety. The commenter requested we explicitly state in the final rule that all "federally-improved dredged channels" and areas adjacent to marine terminals are excluded from critical habitat.

*Our Response:* We agree that the proper maintenance of bridges, shipping channels, and marinas is not only important to ensure the flow of commerce, but also to ensure safety. The commenter is also correct that the ESA requires Federal agencies to ensure that

actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. However, section 7 of the ESA is written to ensure that federally-funded projects go forward, so long as they do not destroy or adversely modify critical habitat. Even if a proposed action is likely to destroy or adversely modify critical habitat, the section 7 consultation process is specifically designed so that a reasonable and prudent alternative, consistent with intended scope of proposed action, could be identified that would allow the action to proceed but without the same degree of impact to critical habitat. Thus, we do not believe it is necessary to exclude all "federally-improved dredged channels" and areas adjacent to marine terminals from critical habitat on the basis that such actions may be prevented from being implemented in the future.

*Comment 152:* The EPA stated we underestimated the number of section 7 consultations, and associated costs, likely to occur by failing to include their triennial state water quality standard reviews.

*Our Response:* After reviewing the information provided by the EPA regarding future water quality standard consultations, per their request we added three consultations for each of the states covered by this designation to the impacts analysis.

*Comment 153:* An electric cooperative requested that we confirm that the proposed rule does not contemplate any change in flow regime for the USACE's projects on the Roanoke River, North Carolina, and the Savannah River at the South Carolina/Georgia Border. They stated that any changes to the flow regimes would require an update or revision to the Water Control Manuals, which in turn would require an analysis of the environmental impact of the proposed rule under the National Environmental Policy Act (NEPA). They asked for this confirmation because they believe our DIA makes a number of references to the relation of river flows to critical habitat needs without providing any details on whether the rule specifically contemplates changes to flow regimes.

*Our Response:* The designation of critical habitat would impose no direct regulatory requirements and would not, in and of itself, have any effect on existing flow patterns. It is possible that flows may need to be altered to address adverse effects to critical habitat if such effects were identified during ESA section 7 consultation on a new or ongoing Federal action that affects water flows in a way that also affects the PBFs of critical habitat. Additionally,

environmental analysis under NEPA is not required for critical habitat designations (see, *Markle Interests, L.L.C. v. U.S. Fish and Wildlife Serv.*, 827 F.3d 452 (5th Cir. 2016); *Bldg. Indus. Ass'n of the Bay Area v. U.S. Dept. of Commerce*, 792 F.3d 1027 (9th Cir. 2015); *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996)).

*Comment 154:* One commenter suggested the proposed rule was unclear regarding whether hydropower projects occurring outside, but upstream, of proposed critical habitat units may need to be altered to facilitate the objective of the critical habitat designation. The commenter asserted that if we intended to require alterations to existing flow patterns in the geographical units currently under consideration for designation as critical habitat, then our analysis in the proposal was deficient. They requested that we clarify our intentions on this point.

*Our Response:* Dams and regulation of water releases upstream of occupied critical habitat could affect the PBFs downstream, even if the dams themselves are not located within the critical habitat area. However, these downstream impacts occurring within occupied critical habitat units will also affect sturgeon, and consultation would be required even without the designation. In all of our past consultations on dams immediately above habitat used by sturgeon, we found that only the structure operated or authorized by the action agency at hand and undergoing consultation would have adverse effects on sturgeon and their habitats. Thus, but for additional administrative costs, the majority of the costs of these consultations are not incremental impacts of this rule. It is possible that flow regimes may need to be altered if current regimes are adversely affecting sturgeon and the essential PBFs of critical habitat, if such effects are identified during ESA section 7 consultation.

We evaluated all existing dams and other structures that are upstream of the proposed upper boundaries of all of the critical habitat units. We found that for the specific existing facilities at issue, dams outside of critical habitat and upstream from a dam that forms the boundary of critical habitat are not expected to have adverse effects to either unoccupied or occupied critical habitat and would not require consultation. This is due to large distances between upstream dams and the dams that form the boundary of critical habitat, and the presence of intervening structures, dams, or water

bodies that dilute the effects of upstream dams relative to the effects of dams on the border of critical habitat.

*Comment 155:* The Navy expressed concern over our determination that consultations for effects of dredging on critical habitat will be fully coextensive with consultations to address impacts to Atlantic sturgeon. They believe designation of critical habitat can or will result in an additional commitment of resources and expected requirements to modify proposed actions to prevent adverse effects to critical habitat.

*Our Response:* We believe dredging may affect critical habitat, but we believe consultations to consider those effects on critical habitat will be fully-coextensive with consultations to address impacts to sturgeon (both shortnose and Atlantic). The effects of dredging on the PBF(s) would also result in injury or death to individual sturgeon, and thus constitute take. Removal or covering of spawning substrate could prevent effective spawning or result in death of eggs or larvae that are spawned. Changing the salinity regime by deepening harbors and parts of rivers could result in permanent decreases of available foraging and developmental habitat for juveniles. These types of adverse effects are not likely to be temporary and limited to periods of sturgeon absence. Thus, adverse effects of dredging activities identified by the Navy would be likely to be coextensive in formal consultations to address impacts to both the species and the PBF(s), and thus no new requirements or project modifications are anticipated as a result of the critical habitat designation.

In our long history of past and ongoing consultations, we have considered the effects that in-river activities (including dredging) would have on both Atlantic and shortnose sturgeon and their shared habitats, where applicable. A main focus of all our past consultations on Federal actions in rivers (e.g., dredging, hydropower permitting) has been on expected impacts to these species' habitats. Adverse effects to habitat, including critical habitat, that will result in either injury or mortality of individual sturgeon of any life stage constitute take of the species. We have regularly determined that projects with adverse effects to sturgeon habitat will result in take of the species. It is this consultation history and experience that leads us to project that if actions in areas occupied by Atlantic and/or shortnose sturgeon affect their habitats, those actions would have the same effects on Atlantic sturgeon critical

habitat, and the consultations and impacts would be largely coextensive.

Comments on Our Coastal Zone Management Act Determinations

*Comment 156:* NCDMF–NCDCM suggested our consistency determination regarding designating critical habitat is incomplete and does not meet the requirements of the Coastal Zone Management Act, 16 U.S.C. 1451, *et seq.* (CZMA) and its implementing regulations. They maintained that we submitted an incomplete negative determination, because we had not provided an evaluation of the North Carolina coastal program's enforceable policies.

*Our Response:* We disagree. While we recognize the State's goals of coastal resource protection and economic development, we determined that any effects of the proposed action on North Carolina's coastal uses and resources are not reasonably foreseeable at this time. As indicated in our negative determination, this designation of critical habitat will not restrict any coastal uses, affect land ownership, or establish a refuge or other conservation area; rather, the designation only affects the ESA section 7 consultation process for Federal actions. Through the ESA consultation process, we will receive information on proposed Federal actions and their effects on listed species and this critical habitat upon which we base our biological opinions. It will then be up to the Federal action agencies to decide how to comply with the ESA in light of our opinion, as well as to ensure that their actions comply with the CZMA's Federal consistency requirement.

Comments on Executive Order 13211—Statement of Energy Effects

*Comment 157:* One commenter indicated we failed to meet the requirements of Executive Order 13211 to prepare a Statement of Energy Effects. The commenter indicated changes in utility facilities and operations required by Federal ESA section 7 consultations, as a result of this critical habitat designation, have the potential to adversely affect in a material way the productivity and prices in the energy sector within the region.

*Our Response:* We disagree. The commenter provided no information, aside from the conclusion that the designation has the potential to adversely affect in a material way, productivity and prices in the energy sector within the region, on which we can base changes in our impacts analysis. The only Federal actions on which we may consult that have

material effects on energy are FERC hydropower licensing actions. These actions have the potential to adversely affect sturgeon as well as critical habitat, and thus most of the impacts of these consultations will result from the ESA listing of the Atlantic sturgeon rather than incremental impacts of the designation. Moreover, the FPA, which FERC implements in issuing hydropower licenses, has independent requirements to avoid adverse effects on fisheries resources and habitats, and thus modifications to hydropower facilities to avoid impacts to critical habitat may also be coextensive with the FPA, rather than from incremental impacts of the designation.

#### *General Support or Disapproval of the Proposed Designation*

*Comment 158:* We received five comments from the general public that were generally unresponsive of protecting sturgeon, their habitats, or their ecosystem.

*Our Response:* We appreciate the time these commenters took to provide input to us.

*Comment 159:* We received approximately 300 comments from the general public that were generally supportive of protecting sturgeon, their habitats, or their ecosystem. We received an additional two comments of general support from non-governmental organizations.

*Our Response:* We appreciate the supportive feedback received from these commenters.

#### *Necessary Editorial Changes*

*Comment 160:* One commenter pointed out that we cited Flowers and Hightower (2015) but that reference was not included in the list of references.

*Our Response:* We agree with the commenter. We erroneously omitted that reference from our list of references. We have updated the list of references to include this citation.

*Comment 161:* One commenter pointed out that we cited Smith *et al.* (2014) in several locations, but the reference did not appear in the list of references; however, Smith *et al.* (2015) does. The commenter suggested we may have erroneously referred to Smith *et al.* (2014) as Smith *et al.* (2015), in which case the citation needed to be updated, or the former is missing from the list of references and should be added.

*Our Response:* We appreciate the commenter bringing this discrepancy to our attention. While cited differently, both citations actually refer to the same document. This final rule has been updated to reflect the proper citation as Smith *et al.* (2015). As a result of this

comment, we reviewed the final rule to ensure the literature cited section was accurate and complete, and made changes when necessary.

*Comment 162:* One commenter pointed out that we had erroneously cited them as a source of information in a personal communication, when the source was someone else.

*Our Response:* We agree with the commenter and apologize. We erroneously cited the commenter as the source for information indicating that Atlantic sturgeon had passed above Lock and Dam #1 on the Cape Fear River, North Carolina, and we have corrected that error in this final rule.

*Comment 163:* SCDNR and another commenter pointed out that we stated: "The capture of 151 subadults, including age-one fish in 1997 indicates a population exists in the Santee River (Collins and Smith, 1997)." They indicated that the Collins and Smith's 1997 publication was a synthesis of all historical and recent records of both Atlantic and shortnose sturgeons in South Carolina waters from 1970–1995. Thus, the number reported, 151, was not collected in a single year, 1997, but instead was a sum of all Atlantic sturgeon records from 1970–1995.

*Our Response:* We agree with the commenters. We erroneously characterized the capture of 151 subadults, including age-1 fish, as occurring in a single year when those captures actually occurred from 1970–1995 and we have corrected this error.

*Comment 164:* SCDNR noted the difference between the Columbia Dam and the Columbia Canal Diversion Dam, indicating the names are not interchangeable and both are part of the Columbia Hydroelectric Project. They stated "the Columbia Dam has a constructed fishway that allows for the passage of American shad, blueback herring and American eel; although 'sturgeon-friendly' features were incorporated in its design, to date, no sturgeon have been documented utilizing this fishway nor have sturgeon been documented in surveys above the Columbia Dam."

*Our Response:* We appreciate the commenter bringing this to our attention. We believe we properly referred to the Columbia Dam and associated fish passage in the proposed rule.

*Comment 165:* SCDNR pointed out that the proposed rule erroneously stated the St. Stephen Powerhouse was on the Santee River, South Carolina, when it is actually located on the Rediversion Canal.

*Our Response:* We appreciate the commenter bringing this discrepancy to

our attention. We have updated the final rule to reflect this correction.

#### *Summary of Changes From the Proposed Rules*

Based on the comments received for the proposed rule, Designation of Critical Habitat for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic Sturgeon (81 FR 35701; June 3, 2016), we have made several changes in the final rule:

1. The boundary for the upstream extent of the Pamunkey River, has been moved upstream by 14 rkm. This change was based on a comment we received from the Virginia Institute of Marine Science that, based on new data, the area with suitable hard bottom substrate and used by spawning Atlantic sturgeon in the York River System extends farther upstream on the Pamunkey River than what we proposed. This supplements the existing data we relied upon for the proposed rule. We determined that the additional 14 km of Pamunkey River habitat was essential to the conservation of the Chesapeake Bay DPS and should be part of the designated critical habitat for the York River System. The York River System critical habitat unit now includes 206 rkm instead of 192 rkm.

2. The 16 rkm of the proposed Susquehanna River Critical Habitat Unit are not designated as critical habitat. We received comments requesting removal of the Susquehanna River critical habitat unit and comments requesting inclusion of the upper Chesapeake Bay. Upon review, we determined that PBF number 2 (a salinity gradient to support juvenile growth and physiological development) is not present in the Susquehanna River unit, and is not likely to be present in the future. Therefore, because we determined that the coexistence of all four features is essential to reproduction and recruitment, based on the information available, the lowermost 16 rkm of the Susquehanna River do not contain the PBFs essential to the reproduction or recruitment of the Chesapeake Bay DPS and we are not designating this area as Chesapeake Bay DPS critical habitat.

3. The 60 rkm of the Nanticoke River from the Maryland State Route 313 Bridge crossing near Sharptown, MD, to where the main stem discharges at its mouth into the Chesapeake Bay as well as Marshyhope Creek from its confluence with the Nanticoke River and upriver to the Maryland State Route 318 Bridge crossing near Federalsburg, MD, are designated as critical habitat for the Chesapeake Bay DPS, and it will be called the Nanticoke River critical habitat unit. We announced in the supplementary document for the

proposed rule that we did not have substrate information for the Nanticoke River and Marshyhope Creek, MD, but that a study was ongoing to obtain that information. We received the information through public comment from the MD DNR. Based on the new information and existing information discussed in the proposed rule related to the presence of Atlantic surgeon in spawning condition at a time spawning would occur, we determined that portions of the Nanticoke River and Marshyhope Creek are essential to the conservation of the Chesapeake Bay DPS and should be designated as critical habitat.

4. We corrected the map for the James River critical habitat unit. The map used in the proposed rule incorrectly placed the downriver boundary of critical habitat in the area of Hampton Roads. The textual description of the James River critical habitat in the proposed rule was correct.

5. The table describing the states and counties in which critical habitat is being designated has been updated. It now includes Dorchester and Wicomico Counties on the Nanticoke River.

6. The description of PBF number 2 includes two changes. The phrase “between the river mouths and spawning sites” replaces “downstream of spawning sites.” As previously written, we were concerned the public might construe “downstream of spawning sites” to include bays or sounds below rkm 0; this was not our intent. We believe the change more accurately reflects the boundaries of critical habitat. Additionally, the words “up to as high as” were added after 0.5 and before 30 to clarify acceptable salinity ranges. Because the freshwater inputs vary from year to year, and river to river, it is possible that during a high freshwater flow year, the salinity levels within a unit may never reach 30 ppt. As previously written, the wording suggested that the gradual downstream gradient would have to encompass the entire 0.5–30 ppt salinity range; this was not our intent. This change is meant to acknowledge that the entire salinity range is not required.

7. In PBF number 3, the examples of what may constitute barriers were expanded, and the phrase “at least 1.2 m” replaces “≥1.2 m” for clarity.

8. The phrase “between the river mouths and spawning sites” was inserted in the language of PBF number 4. This change clarifies the areas designated as critical habitat as described under PBF number 2. Additionally, for clarity of the example, the phrase “6 mg/L DO or greater” replaces “6 mg/L dissolved oxygen.”

9. We have included and clarified in regulatory provisions for all five DPSs that manmade structures that do not provide the essential PBFs are not included in critical habitat.

Based on the comments received for the proposed rule, Critical Habitat for the Endangered Carolina and South Atlantic DPSs of Atlantic Sturgeon (81 FR 36077; June 3 2016), we have made several changes in the final rule:

10. The boundary for the upstream extent of the Ogeechee River has been moved downstream by 28 rkm, from the confluence of North Fork and South Fork Ogeechee Rivers to Mayfield Mill Dam; the Unit now includes 420 rkm instead of 448 rkm.

11. The boundary for the upstream extent of the Black River, South Carolina, has been moved downstream by 50 rkm from Interstate Highway 20 to Interstate Highway 95; the Unit now includes 203 rkm instead of 253 rkm.

12. The description of South Atlantic Unit 3 has been updated to include a number of significant branches of the Savannah River that we intended to be considered critical habitat, and were included in the maps of the critical habitat unit, but were not specifically mentioned in the regulatory text. The unit description now includes: The Back River, Middle River, Front River, Little Back River, South River, Steamboat River, and McCoy’s Cut.

13. Carolina Unoccupied Unit 1 has been removed due to uncertainty regarding whether that stretch of the Cape Fear River contains spawning habitat that would make it essential to the conservation of the species.

14. We have chosen to exercise our discretion under section 4(b)(2) of the ESA and exclude Carolina Unoccupied Unit 2 and South Atlantic Unoccupied 1,

15. The table describing the states and counties in which critical habitat is being designated has been updated. It now includes Monroe and Wilcox counties on the Ocmulgee River, Treutlen County on the Oconee River, and Warren County on the Ogeechee River. All four counties occur in Georgia and were inadvertently omitted from the table. Additionally, we changed the upstream boundary of the Black River, South Carolina, and the Ogeechee River, Georgia, and removed all three unoccupied critical habitat units entirely. As a result of these changes, Calhoun, Fairfield, Kershaw, Lee, Lexington, New Berry, Sumter, Orangeburg, and Richland counties, South Carolina; Columbia, Edgefield and Taliaferro counties, Georgia; and Bladen County, North Carolina, will no longer be affected; those counties have

been removed from the table. We also removed Irwin and Jasper counties, Georgia, from the list because they are not affected by any critical habitat unit.

16. The description of PBF number 1 initially referred to “suitable hard bottom substrate (e.g., rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (i.e., 0.0–0.5 parts per thousand [ppt] range) . . .” The word “suitable” was dropped because the term suggests there may be hard bottom that is unsuitable for spawning, which is not the case.

17. The description of PBF number 2 includes three changes. Initially it said “[t]ransitional salinity zones inclusive of waters with a gradual downstream gradient of 0.5–30 ppt and soft substrate (e.g., sand, mud) downstream of spawning sites for juvenile foraging and physiological development.” The phrase “aquatic habitat” replaces the phrase “transitional salinity zone” because the latter was redundant with “gradual downstream gradient,” and we believe the revision better illustrates the river areas we intended to include.

Additionally, the phrase “between the river mouths and spawning sites” replaces “downstream of spawning sites.” As previously written, we were concerned the public might construe “downstream of spawning sites” to include bays or sounds below rkm 0; this was not our intent. We believe the change more accurately reflects the boundaries of critical habitat. Finally, the words “up to as high as” were added after 0.5 and before 30 to clarify acceptable salinity ranges. Because the freshwater inputs vary from year to year, and river to river, it is possible that during a high freshwater flow year, the salinity levels within a unit may never reach 30 ppt. As previously written, the wording suggested that the gradual downstream gradient would have to encompass the entire 0.5–30 ppt salinity range; this was not our intent. This change is meant to acknowledge that the entire salinity range is not required.

18. In PBF number 3, we were concerned the term “physical” might be confusing to the public with regards to the full suite of potential barriers that can impede sturgeon movement. As a result, we provided additional examples of physical barriers, including thermal plumes, turbidity, and sound.

19. The phrase “between the river mouths and spawning sites” replaces “downstream of spawning sites” in the language of PBF number 4. This change clarifies the areas designated as critical habitat as described under PBF number 2.

20. For the Carolina and South Atlantic DPSs, paragraph (iii) of PBF

number 4 initially used the terms “optimal” and “suboptimal” when discussing DO and temperature range examples. We were concerned the use of those terms may be misinterpreted as establishing specific, exclusive values. Because there is no single DO level or temperature range that is best for Atlantic sturgeon in terms of habitat avoidance or use, we replaced those terms. The example now states “For example, 6.0 mg/L DO or greater likely supports juvenile rearing habitat, whereas DO less than 5.0 mg/L for longer than 30 days is less likely to support rearing when water temperature is greater than 25 °C.” Our example language for temperature ranges has also been updated to state: “Temperatures of 13 to 26 °C likely support spawning habitat.”

Additionally, an example used in paragraph (iii) of PBF number 4 referenced a single value of DO that was likely to support juvenile rearing habitat (*i.e.*, “For example, 6.0 mg/L DO for juvenile rearing habitat . . .”). The modifier “or greater” has been added to “6.0 mg/L DO” because without it, the current language suggests only a single value of DO is likely to support juvenile rearing habitat, whereas anything above 6.0 mg/L would also be beneficial for the species as discussed in the preamble of the proposed rule.

21. Seven rkms of the Cooper River, South Carolina, are no longer being designated as critical habitat pursuant to section 4(a)(3)(B) of the ESA. Our analysis determined the Joint Base Charleston base has an INRMP that provides an applicable benefit to the species that would have been otherwise afforded by critical habitat, and therefore the area of the Cooper River is not eligible for designation as critical habitat for Atlantic sturgeon.

22. We have clarified our reasoning for determining the upstream extent of each unit in the descriptions of each river.

### Critical Habitat Identification and Designation

We used the same approach to identify and designate critical habitat for the five DPSs of Atlantic sturgeon. However, our approach for designating critical habitat for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon was described in the supplemental information to the Impacts Analysis, whereas our approach for designating critical habitat for the Carolina and South Atlantic DPSs of Atlantic Sturgeon was described in the proposed rule (81 FR 36077; June 3, 2016). Therefore, much of the information in the Impacts Analysis and

proposed rule is repeated in this final rule that designates critical habitat for the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs of Atlantic sturgeon to show that we used the same approach for all five DPSs.

Critical habitat represents the habitat that contains the PBFs that are essential to the conservation of the listed species and that may require special management considerations or protection (78 FR 53058; August 28, 2013). For example, specifying the geographical location of critical habitat facilitates implementation of section 7(a)(1) of the ESA by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the ESA by carrying out programs for the conservation of listed species. Designating critical habitat also provides a significant regulatory protection by ensuring that the Federal Government considers the effects of its actions in accordance with section 7(a)(2) of the ESA and avoids or modifies those actions that are likely to destroy or adversely modify critical habitat. This requirement is in addition to the section 7 requirement that Federal agencies ensure that their actions are not likely to jeopardize the continued existence of ESA-listed species. Critical habitat requirements do not apply to citizens engaged in activities on private land that do not involve a Federal agency. However, designating critical habitat can help focus the efforts of other conservation partners (*e.g.*, State and local governments, individuals and nongovernmental organizations).

Critical habitat is defined by section 3 of the ESA as (1) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)(A)). Conservation is defined in section 3 of the ESA as “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary” (16 U.S.C. 1532(3)). Therefore, critical habitat includes specific areas within the occupied geographical area of the species at the time of listing that

contains the features essential for the species’ recovery. Critical habitat may also include unoccupied areas determined to be essential to species’ conservation and recovery. However, section 3(5)(C) of the ESA clarifies that except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

To identify and designate critical habitat, we considered information on the distribution of Atlantic sturgeon, the major life stages, habitat requirements of those life stages, and conservation objectives that can be supported by identifiable PBFs. In the final rule listing the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon (77 FR 5880; February 6, 2012), destruction, modification or curtailment of habitat, overutilization, lack of regulatory mechanisms for protecting the fish, and other natural or manmade factors (*e.g.*, vessel strikes) were found to be the threats contributing to the threatened status of the Gulf of Maine DPS, and the endangered status of the New York Bight and Chesapeake Bay DPS. In the final rule listing the Carolina and South Atlantic DPSs of Atlantic sturgeon (77 FR 5978; February 6, 2012), habitat curtailment and alteration, bycatch in commercial fisheries, and inadequacy of existing regulatory mechanisms were found to be the threats contributing to the endangered status of both DPSs. The Carolina and South Atlantic DPSs were found to be at 3 percent and 6 percent of their historical abundances, respectively, due to these threats. Therefore, we evaluated PBFs of the marine, estuarine, and riverine habitats of Atlantic sturgeon to determine what PBFs are essential to the conservation of each DPS.

Accordingly, our step-wise approach for identifying potential critical habitat areas for the five Atlantic sturgeon DPSs was to determine: The geographical area occupied by each DPS at the time of listing; the PBFs essential to the conservation of the DPSs; whether those PBFs may require special management considerations or protection; the specific areas of the occupied geographical area where these PBFs occur; and, whether any unoccupied areas are essential to the conservation of any DPS.

### Geographical Area Occupied by the Species

“Geographical area occupied by the species” in the definition of critical habitat is interpreted to mean the entire

range of the species at the time it was listed, inclusive of all areas they use and move through seasonally (81 FR 7413; February 11, 2016). The marine ranges of the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs of Atlantic sturgeon extend from the Hamilton Inlet, Labrador, Canada, to Cape Canaveral, Florida, USA (77 FR 5880 and 77 FR 5978; February 6, 2012). We did not consider geographical areas within Canadian jurisdiction (*e.g.*, Minas Basin, Bay of Fundy), because we cannot designate critical habitat areas outside of U.S. jurisdiction (50 CFR 424.12(g)).

The listing rules identified the known spawning rivers for each of the Atlantic sturgeon DPSs but did not describe the in-river ranges for the DPSs. The river ranges of each DPS consist of all areas downstream of the first obstacle to upstream migration (*e.g.*, the lowest dam without fish passage for sturgeon or significant waterfalls at the fall line) on each river within the range of the DPS. We identified the Gulf of Maine DPS in-river range as occurring in the watersheds from the Maine/Canadian border and extending southward to include all associated watersheds draining into the Gulf of Maine as far south as Chatham, Massachusetts. We identified the New York Bight DPS in-river range as occurring in the watersheds that drain into coastal waters, including Long Island Sound, the New York Bight, and Delaware Bay, from Chatham, Massachusetts to the Delaware-Maryland border on Fenwick Island. We identified the Chesapeake Bay DPS in-river range as occurring in the watersheds that drain into the Chesapeake Bay and into coastal waters from the Delaware-Maryland border on Fenwick Island to Cape Henry, Virginia. We identified the Carolina DPS in-river range as occurring in the watersheds (including all the rivers and tributaries) from Albemarle Sound, North Carolina, to Charleston Harbor, South Carolina. We identified the South Atlantic DPS in-river range as occurring in the watersheds (including all the rivers and tributaries) from the Ashepoo-Combahee-Edisto (ACE) Basin in South Carolina to the St. Johns River, Florida.

#### **Physical or Biological Features Essential for Conservation That May Require Special Management Considerations or Protection**

Within the geographical area occupied by the species, critical habitat consists of specific areas on which are found those PBFs essential to the conservation of the species and that may require special management considerations or protection. PBFs are

defined as the features that support the life-history needs of the species, including water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity (50 CFR 424.02).

The ability of subadults to find and access food is necessary for continued survival, growth, and physiological development to the adult life stage. Likewise, given that Atlantic sturgeon mature late and do not necessarily spawn annually, increased adult survival would improve the chances that adult Atlantic sturgeon spawn more than once. We determined that facilitating increased survival of all Atlantic sturgeon life stages as well as successful adult reproduction, and juvenile and subadult recruitment into the adult population, would likely increase the abundance of each DPS. We considered these conservation objectives to help us identify the physical or biological features of the critical habitat designations when we reviewed the literature describing the various types of habitat used by the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs of Atlantic sturgeon for the various life functions.

Within the area occupied by Atlantic sturgeon, we considered the various types of habitat used by the DPSs for various life functions. Atlantic sturgeon spend the majority of their adult lives in offshore marine waters. They are known to travel extensively up and down the East Coast. As summarized in a number of summary documents, including the Atlantic Sturgeon Status Review (ASSRT, 2007) and the ASMFC's review of Atlantic coast diadromous fish habitat (Green *et al.*, 2009), Atlantic sturgeon are benthic foragers and prey upon a variety of species in marine and estuarine environments (Bigelow and Schroeder, 1953; Scott and Crossman, 1973; Johnson *et al.*, 1997; Guilbard *et al.*, 2007; Savoy, 2007; Dzaugis, 2013; McLean *et al.*, 2013). In the ocean, Atlantic sturgeon typically occur in waters less than 50 m deep, travel long distances, exhibit seasonal coastal movements, and aggregate in estuarine and ocean waters at certain times of the year (Vladykov and Greeley, 1963; Holland and Yelverton 1973; Dovel and

Berggren, 1983; Dadswell *et al.*, 1984; Gilbert, 1989; Johnson *et al.*, 1997; Rochard *et al.*, 1997; Kynard *et al.*, 2000; Savoy and Pacileo, 2003; Eyler *et al.*, 2004; Stein *et al.*, 2004; Dadswell, 2006; Eyler, 2006; Laney *et al.*, 2007; ASSRT, 2007; Dunton *et al.*, 2010; Erickson *et al.*, 2011; Dunton *et al.*, 2012; Oliver *et al.*, 2013; Wirgin *et al.*, 2015). Several winter congregations of Atlantic sturgeon in the marine environment are known to occur, though the exact location and importance of those areas in the southeast is not known, nor whether Atlantic sturgeon are drawn to particular areas based on PBFs of the habitat. While we can identify general movement patterns and behavior in the marine environment (*e.g.*, aggregating behavior), due to the paucity of data on the DPSs' offshore needs and specific habitat utilization, we could not at this time identify PBFs essential to conservation in the marine environment for any of the DPSs.

Atlantic sturgeon use estuarine areas for foraging, growth, and movement. Atlantic sturgeon subadults and adults in non-spawning condition use estuarine waters seasonally, presumably for foraging opportunities, although evidence in the form of stomach content collection and analysis is limited (Savoy and Pacileo, 2003; Dzaugis, 2013). We considered all studies that have collected Atlantic sturgeon stomach contents. All of the prey species identified are indicative of benthic foraging, but different types of prey were consumed and different substrates were identified for the areas where Atlantic sturgeon were foraging (Bigelow and Schroeder, 1953; Johnson *et al.*, 1997; ASSRT, 2007; Guilbard *et al.*, 2007; Savoy, 2007; Dzaugis, 2013; McLean *et al.*, 2013). Adding to our uncertainty of the PBF(s) that support successful foraging for growth and survival of subadults and adults, Atlantic sturgeon move between estuarine environments in the spring through fall and can occur in estuarine environments during the winter as well (Collins *et al.*, 2000; Savoy and Pacileo, 2003; Simpson, 2008; Balazik *et al.*, 2012). Subadult Atlantic sturgeon spawned in one riverine system may use multiple estuaries for foraging and growth, including those not directly connected to their natal river. The benthic invertebrates that comprise the diet of Atlantic sturgeon are found in soft substrates that are common and widespread in most estuaries. Limited data are available to differentiate areas of preferred prey items or higher prey abundance within or across estuaries. Due to the paucity of data on specific



habitat or resource utilization, we could not at this time identify any specific PBFs essential for the conservation of any of the DPSs that support adult and subadult foraging in estuarine or marine environments.

Atlantic sturgeon spawning behavior and early life history have been extensively studied and are fairly well understood, though the exact location of spawning sites on many rivers (particularly in the Southeast) is not known or can change from time to time as water depth and substrate availability changes. However, there is substantial information in the scientific literature indicating the physical characteristics of Atlantic sturgeon spawning and early life history habitat. Therefore, to evaluate potential critical habitat, we focused on identifying the PBFs that support Atlantic sturgeon reproduction and survival of early life stages.

The scientific literature indicates that Atlantic sturgeon spawning occurs well upstream, at or near the fall line of rivers, over hard substrate consisting of rock, pebbles, gravel, cobble, limestone, or boulders (Gilbert, 1989; Smith and Clugston, 1997). Hard substrate is required so that highly adhesive Atlantic sturgeon eggs have a surface to adhere to during their initial development and young fry can use the interstitial spaces between rocks, pebbles, cobble, etc., to hide from predators during downstream movement and maturation (Gilbert, 1989; Smith and Clugston, 1997).

Very low salinity (*i.e.*, 0.0–0.5 ppt) is another important feature of Atlantic sturgeon spawning habitat. Exposure to even low levels of salinity can kill Atlantic sturgeon during their first few weeks of life; thus, their downstream movement is limited until they can endure brackish waters (Bain *et al.*, 2000). Shortnose sturgeon tend to spawn 200–300 km upriver, preventing the youngest life stages from salt exposure too early in their development (Parker and Kynard, 2005; Kynard, 1997). Parker and Kynard (2005) also noted that long larval/early juvenile downstream movement is common in both shortnose sturgeon from the Savannah River and Gulf sturgeon (a sub-species of Atlantic sturgeon), and that this may be a widespread adaptation of sturgeon inhabiting river systems in the southern United States. Due to their similar life history, Atlantic sturgeon most likely adapted a similar spawning strategy. Therefore, it is essential that the spawning area has low salinity, and that the spawning location is far enough upstream to allow newly-spawned Atlantic sturgeon to develop and mature during their downstream

movement before encountering saline water. During their downstream movement, it is important for developing fish to forage in areas of soft substrate and to encounter transitional salinity zones to allow physiological adaptations to higher salinity waters.

Minimum water depths for Atlantic sturgeon spawning are necessary to: (1) Allow adult fish to access spawning substrate, (2) adequately hydrate and aerate newly deposited eggs, and (3) facilitate successful development and downstream movement of newly spawned Atlantic sturgeon. However, water depth at these important spawning areas in the Southeast can be dynamic and portions of rivers may be dry or have little water at times due to natural seasonal river fluctuations, temporary drought conditions, and/or regulation by manmade structures such as dams; thus, these sites require protection to provide consistent services for sturgeon. The scientific literature indicates that Atlantic sturgeon spawn in water depths from 3–27 m (9.8–88.6 ft) (Borodin, 1925; Leland, 1968; Scott and Crossman, 1973; Crance, 1987; Bain *et al.*, 2000). However, much of this information is derived from studies of Atlantic sturgeon in northern United States and Canadian river systems. Atlantic sturgeon in the Southeast are likely spawning in much shallower water depths based on repeated observations by biologists of sturgeon with lacerations on their undersides from moving into extremely shallow water to spawn on hard substrate. Based on the available information, and the body depth and spawning behavior of Atlantic sturgeon, water depths of at least 1.2 m (4 ft) are deep enough to accommodate Atlantic sturgeon spawning.

We considered fluid dynamic features as another potential essential feature of Atlantic sturgeon spawning critical habitat. The scientific literature provides information on the importance of appropriate water velocity within Atlantic sturgeon spawning habitat and provides optimal flows for some rivers. Atlantic sturgeon spawn directly on top of gravel in fast flowing sections often containing eddies or other current breaks. Eddies promote position holding between spawning individuals, trap gametes facilitating fertilization, and diminish the probability of egg dislocation by currents—facilitating immediate adhesion of eggs to the gravel substrate (Sulak and Clugston, 1999). However, velocity data are lacking for many rivers, and where data are available, the wide fluctuations in velocity rates on a daily, monthly, seasonal, and annual basis make it

difficult to identify a range of water velocity necessary for the conservation of the species. However, we do know that water flow must be continuous.

Adult Atlantic sturgeon must be able to safely and efficiently move from downstream areas into upstream spawning habitats in order to successfully spawn. In addition, larvae and juvenile Atlantic sturgeon must be able to safely and efficiently travel from the upstream spawning areas downstream to nursery and foraging habitat. Therefore, an essential PBF for Atlantic sturgeon spawning is unobstructed migratory pathways for safe movement of adults to and from upstream spawning areas as well as safe movement for the larvae and juveniles moving downstream. An unobstructed migratory pathway means an unobstructed river or a dammed river that still allows for passage.

Water quality can be a critically limiting factor to Atlantic sturgeon in the shallow, warm, poorly oxygenated rivers of the southeast United States. Conditions in these river systems can change rapidly, particularly in rivers managed for hydropower production, and conditions can quickly become suboptimal or lethal for sturgeon. We considered essential water quality PBFs that support movement and spawning of adults and growth and development of juvenile Atlantic sturgeon. The distribution of Atlantic sturgeon juveniles in the natal estuary is a function of physiological development and habitat selection based on water quality factors of temperature, salinity, and DO, which are inter-related environmental variables. In laboratory studies with salinities of 8 to 15 ppt and temperatures of 12 and 20 °C, juveniles less than a year old had reduced growth at 40 percent DO saturation, grew best at 70 percent DO saturation, and selected conditions that supported growth (Niklitschek and Secor, 2009 I; Niklitschek and Secor, 2009 II). Results obtained for age-1 juveniles (*i.e.*, greater than 1 year old and less than 2 years old) indicated that they can tolerate salinities of 33 ppt (*i.e.*, a salinity level associated with seawater), but grow faster in lower salinity waters (Niklitschek and Secor, 2009 I; Allen *et al.*, 2014). The best growth for both age groups occurred at DO concentrations greater than 6.5 mg/L. While specific DO concentrations at temperatures considered stressful for Atlantic sturgeon are not available, instantaneous minimum concentrations of 4.3 mg/L protect survival of shortnose sturgeon at temperatures greater than 29 °C (EPA, 2003). Secor and Niklitschek (2001) report shortnose sturgeon are

more tolerant of higher temperatures than Atlantic sturgeon. This is why Campbell and Goodman (2003) considered 29 °C a stressful temperature for shortnose sturgeon, while Secor and Gunderson (1998) report Atlantic sturgeon becoming stressed at a lower threshold of 26 °C.

In summary, within the area occupied by Atlantic sturgeon, we considered the various types of habitat used by the species for various life functions. We determined that Atlantic sturgeon spend the majority of their adult lives in offshore marine waters where they are known to travel extensively up and down the East Coast. However, we could not identify any PBFs in marine waters essential to the conservation of the species. We also determined Atlantic sturgeon subadults and adults use estuarine areas for foraging, growth, and movement. The ability of subadults to find and access food is necessary for continued survival, growth, and physiological development to the adult life stage. Likewise, given that Atlantic sturgeon mature late and do not necessarily spawn annually, increased adult survival would improve the chances that adult Atlantic sturgeon spawn more than once. Therefore, we determined a conservation objective for the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs is to increase the abundance of each DPS by facilitating increased survival of all life stages. After examining the information available on spawning and early life history behavior and habitat, we also concluded that facilitating adult reproduction and juvenile and subadult recruitment into the adult population are other conservation objectives for the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs of Atlantic sturgeon. We could not identify any specific PBFs essential to the conservation of the species that support adult and subadult foraging in estuarine or marine environments. We determined that protecting spawning areas, juvenile development habitat, the in-river habitats that allow adults to reach the spawning areas and newly spawned sturgeon to make a safe downstream migration, and water quality to support all life stages, will facilitate meeting the conservation objectives discussed above.

Given the biological needs and tolerances, and environmental conditions for Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon as summarized previously, and the habitat-based conservation objectives, we identified the following PBFs essential to their

conservation. As we have discussed, these PBFs may be ephemeral or vary spatially across time. Thus, areas designated as critical habitat are not required to have the indicated values at all times and within all parts of the area:

- Hard bottom substrate (*e.g.*, rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (*i.e.*, 0.0–0.5 ppt range) for settlement of fertilized eggs, refuge, growth, and development of early life stages;
- Aquatic habitat with a gradual downstream salinity gradient of 0.5 up to as high as 30 ppt and soft substrate (*e.g.*, sand, mud) between the river mouth and spawning sites for juvenile foraging and physiological development;
- Water of appropriate depth and absent physical barriers to passage (*e.g.*, locks, dams, thermal plumes, turbidity, sound, reservoirs, gear, etc.) between the river mouth and spawning sites necessary to support: Unimpeded movements of adults to and from spawning sites; seasonal and physiologically dependent movement of juvenile Atlantic sturgeon to appropriate salinity zones within the river estuary, and; staging, resting, or holding of subadults or Spawning condition adults. Water depths in main river channels must also be deep enough (*e.g.*, at least 1.2 m) to ensure continuous flow in the main channel at all times when any sturgeon life stage would be in the river, and
- Water, between the river mouth and spawning sites, especially in the bottom meter of the water column, with the temperature, salinity, and oxygen values that, combined, support: Spawning; annual and interannual adult, subadult, larval, and juvenile survival; and larval, juvenile, and subadult growth, development, and recruitment (*e.g.*, 13 °C to 26 °C for spawning habitat and no more than 30 °C for juvenile rearing habitat, and 6 mg/L or greater DO for juvenile rearing habitat).

Given the biological needs and tolerances, and environmental conditions for Atlantic sturgeon in rivers of the Southeast as summarized previously, and the habitat-based conservation objectives, we identified the following PBFs essential to Atlantic sturgeon conservation. As we have discussed, these PBFs may be ephemeral or vary spatially across time. Thus, areas designated as critical habitat are not required to have the indicated values at all times and within all parts of the area:

- Hard bottom substrate (*e.g.*, rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (*i.e.*, 0.0–0.5 ppt range) for settlement of fertilized eggs

and refuge, growth, and development of early life stages;

- Aquatic habitat inclusive of waters with a gradual downstream gradient of 0.5 up to as high as 30 ppt and soft substrate (*e.g.*, sand, mud) between the river mouths and spawning sites for juvenile foraging and physiological development;
- Water of appropriate depth and absent physical barriers to passage (*e.g.*, locks, dams, thermal plumes, turbidity, sound, reservoirs, gear, etc.) between the river mouth and spawning sites necessary to support: (1) Unimpeded movement of adults to and from spawning sites; (2) seasonal and physiologically dependent movement of juvenile Atlantic sturgeon to appropriate salinity zones within the river estuary; and (3) staging, resting, or holding of subadults and spawning condition adults. Water depths in main river channels must also be deep enough (at least 1.2 m) to ensure continuous flow in the main channel at all times when any sturgeon life stage would be in the river.

- Water quality conditions, especially in the bottom meter of the water column, between the river mouths and spawning sites with temperature and oxygen values that support: (1) Spawning; (2) annual and inter-annual adult, subadult, larval, and juvenile survival; and (3) larval, juvenile, and subadult growth, development, and recruitment. Appropriate temperature and oxygen values will vary interdependently, and depending on salinity in a particular habitat. For example, 6.0 mg/L DO or greater likely supports juvenile rearing habitat, whereas DO less than 5.0 mg/L for longer than 30 days is less likely to support rearing when water temperature is greater than 25 °C. In temperatures greater than 26 °C, DO greater than 4.3 mg/L is needed to protect survival and growth. Temperatures of 13 to 26 °C likely support spawning habitat.

#### **Specific Areas Containing the Essential Features Within the Geographical Area Occupied by the Species**

The definition of critical habitat instructs us to identify specific areas on which the PBFs essential to the species' conservation are found. Our regulations state that critical habitat will be defined by specific limits using reference points and lines on standard topographic maps of the area, and referencing each area by the state, county, or other local governmental unit in which it is located (50 CFR 424.12(c)). To identify where the PBF(s) occur within areas occupied by Atlantic sturgeon, we reviewed the best scientific information available,

including the 2007 Atlantic sturgeon status review (ASSRT, 2007), the ESA listing rules (77 FR 5880 and 77 FR 5914; February 6, 2012), scientific research reports, information and data gathered during the peer-review process, and a database developed by the U.S. Geological Survey for mapping environmental parameters within East Coast rivers to identify sturgeon habitat. We also considered information on the location of sturgeon spawning activity from scientific reports, as active spawning in an area would indicate that the PBF(s) necessary for spawning are likely present. As noted previously, while we used the same approach for designating critical habitat for the five DPSs, the Impacts Analysis and Biological Source Document for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs describes that approach for those DPSs and therefore is not repeated here. Because the critical habitat designation approach and information on specific rivers within the range of the Carolina and South Atlantic DPSs was described in the proposed rule, and not in a separate document, it is provided here for reference.

Information on documented spawning in specific areas in the Southeast is rare, but some does exist. For example, large sections of the Altamaha River have been found to support Atlantic sturgeon spawning activities for many years (Peterson *et al.*, 2006; Peterson *et al.*, 2008). We reviewed reports from a NMFS-funded multi-year, multi-state research project on movement and migration of Atlantic sturgeon (Species Recovery Grant number NA10NMF4720036, Post *et al.*, 2014). In these reports, researchers determined which portions of Southeastern rivers support spawning activities by looking at the upriver extent of sturgeon movements during spawning season.

There are large areas of most rivers where data are still lacking. The available data also may represent a snapshot in time, while the exact location of a habitat feature may change over time (*e.g.*, water depth fluctuates seasonally, as well as annually, and even hard substrate may shift position). For example, some data indicate a change in substrate type within a given location from year to year (*e.g.*, from sand to gravel). It is not always clear whether such changes are due to an actual shift in substrate sediments or if the substrate sample was collected in a slightly different location between samplings. Although the habitat features may vary even at the same location, if any of the available data regarding a particular feature fell within the suitable range (*e.g.*, salinity of 0–0.5 ppt or hard

substrate [gravel, cobble, etc.]), we considered that the essential PBF is present in the area.

For Southeast rivers, when data were not available for certain rivers or portions of occupied rivers, we used our general knowledge of Atlantic sturgeon spawning and applied river-specific information to determine the location of PBFs essential to spawning. We considered salinity tolerance during the earliest life stages to determine appropriate habitat for larvae to develop as they mature. Available telemetry data suggest that most Atlantic sturgeon spawning activity in the Savannah and Altamaha Rivers starts around rkm 100 (Post *et al.*, 2014). Similar evidence from the Edisto, Neuse, and Tar-Pamlico Rivers indicates spawning activity starts around rkm 80. Peer review comments on the Draft Economic and Biological Information to Inform Atlantic Sturgeon Critical Habitat Designation (for the Carolina and Southeast DPSs) indicated that Atlantic sturgeon spawn below the fall line, unlike shortnose sturgeon that may spawn well above the fall line.

To encompass all areas important for Atlantic sturgeon spawning, reproduction, and recruitment within rivers where spawning is believed to occur or may occur, we identified specific areas of critical habitat from the mouth (rkm 0) of each spawning river to the upstream extent of the spawning habitat. For rivers that are not dammed and do not reach the fall line, an easily identifiable landmark (*e.g.*, a dam or a bridge) was located to serve as the upstream boundary of the units. Similarly, the ordinary high water mark on the banks of the rivers encompasses all areas that are expected to contain one or more of the PBFs and provides an easily identifiable lateral boundary for the units.

To identify specific habitats used by an Atlantic sturgeon DPS in occupied rivers, we considered the best scientific information available that described: (1) Capture location and/or tracking locations of Atlantic sturgeon identified to its DPS by genetic analysis; (2) capture location and/or tracking locations of adult Atlantic sturgeon identified to its DPS based on the presence of a tag that was applied when the sturgeon was captured as a juvenile in its natal estuary; (3) capture or detection location of adults in spawning condition (*i.e.*, extruding eggs or milt) or post-spawning condition (*e.g.*, concave abdomen for females); (4) capture or detection of YOY and other juvenile age classes; and (5) collection of eggs or larvae.

Several large coastal rivers within the geographical area occupied by the

Carolina and South Atlantic DPSs of Atlantic sturgeon do not appear to support spawning and juvenile recruitment or to contain suitable habitat features to support spawning. These rivers are the Chowan and New Rivers in North Carolina; the Waccamaw (above its confluence with Bull Creek which links it to the Pee Dee River), Sampit, Ashley, Ashpoo, and Broad-Coosawhatchie Rivers in South Carolina; and the St. Johns River in Florida. We have no information, current or historical, of Atlantic sturgeon using the Chowan and New Rivers in North Carolina. Recent telemetry work by Post *et al.* (2014) indicates that Atlantic sturgeon do not use the Sampit, Ashley, Ashpoo, and Broad-Coosawhatchie Rivers in South Carolina. These rivers are short, coastal plains rivers that most likely do not contain suitable habitat for Atlantic sturgeon. Post *et al.* (2014) also found Atlantic sturgeon only use the portion of the Waccamaw River downstream of Bull Creek. Due to manmade structures and alterations, spawning areas in the St. Johns River are not accessible and therefore do not support a reproducing population. For these reasons, we are not designating these coastal rivers, or portions of the rivers, as critical habitat. For rivers we are proposing to designate as critical habitat, we have historical or current information that they support spawning and juvenile recruitment as described below.

#### Roanoke River

The Roanoke River was identified as a spawning river for Atlantic sturgeon based on the capture of juveniles, the collection of eggs, and the tracking location of adults. Further, there was information indicating the historical use of the Roanoke River by Atlantic sturgeon.

Atlantic sturgeon were historically abundant in the Roanoke River and Albemarle Sound, but declined dramatically in response to intense fishing effort in the late 1800s (Armstrong and Hightower, 2002). There is still a population present in the Albemarle Sound and Roanoke River (Armstrong and Hightower, 2002; Smith *et al.*, 2015). DNA analyses of juveniles captured in Albemarle Sound indicate that these fish are genetically distinct from Atlantic sturgeon collected in other systems (Wirgin *et al.*, 2000; King *et al.*, 2001).

Historical records and recent research provide accounts of Atlantic sturgeon spawning within the fall zone (rkm 204–242) of the Roanoke River (Yarrow, 1874; Worth, 1904; Armstrong and Hightower, 2002; Smith *et al.*, 2015).

Atlantic sturgeon remains from archaeological sites on the Roanoke River have been found as far upstream as rkm 261, approximately 19 miles (30.5 km) above the upper end of the fall zone (VanDerwarker, 2001; Armstrong and Hightower, 2002); however, that was prior to the construction of dams now located throughout the river. The farthest downstream dam, the Roanoke Rapids Dam, is located near the fall line at rkm 221. No fish passage exists at this dam, so all Atlantic sturgeon are restricted to the lower 17 rkm of fall zone habitat, which extends from the Roanoke Rapids Dam to Weldon, North Carolina at rkm 204 (Armstrong and Hightower, 2002; Smith *et al.*, 2015).

Historical and current data indicate that spawning occurs in the Roanoke River, where both adults and small juveniles have been captured. Since 1990, the NCDMF has conducted the Albemarle Sound Independent Gill Net Survey (IGNS). From 1990 to 2006, 842 sturgeon were captured ranging from 15.3 to 100 cm fork length (FL), averaging 47.2 cm FL. One hundred and thirty-three (16 percent) of the 842 sturgeon captured were classified as YOY (41 cm total length (TL), 35 cm FL); the others were subadults (ASSRT, 2007). A recent study by Smith *et al.* (2015), using acoustic telemetry data and egg collection during the fall of 2013, identified a spawning location near Weldon, North Carolina (rkm 204). The location contains the first shoals encountered by Atlantic sturgeon as they move upstream to spawn (Smith *et al.*, 2015). The channel in this area is approximately 100 m wide and the substrate is primarily bedrock, along with fine gravel and coarse sediments in low-flow areas (Smith *et al.*, 2015). During the study, 38 eggs were collected during 21 days that spawning pads were deployed (Smith *et al.*, 2015).

A scientific survey also shows the presence of adult Atlantic sturgeon in the Roanoke River. Using side-scan sonar, Flowers and Hightower (2015) conducted surveys near the freshwater-saltwater interface with repeated surveys performed over 3 days. The surveys detected 4 Atlantic sturgeon greater than 1 m TL. Based on these detections, an abundance estimate for riverine Atlantic sturgeon of 10.9 (95 percent confidence interval 3–36) fish greater than 1 m was calculated for the Roanoke River. This estimate does not account for fish less than 1 m TL, occurring in riverine reaches not surveyed, or in marine waters.

#### *Tar-Pamlico River*

The Tar-Pamlico River was identified as a spawning river for Atlantic sturgeon

based on the evidence of spawning and the capture of juveniles. The Tar-Pamlico River, one of two major tributaries to Pamlico Sound, is dammed. However, all riverine spawning habitat is accessible to Atlantic sturgeon in the Tar-Pamlico River, because the lower-most dam, the Rocky Mount Mill Pond Dam (rkm 199), is located at the fall line.

Evidence of spawning was reported by Hoff (1980), after the capture of very young juveniles in the Tar River. Two juveniles were observed dead on the bank of Banjo Creek, a tributary to the Pamlico System (ASSRT, 2007). A sampling program similar to the Albemarle Sound IGNS collected 14 Atlantic sturgeon in 2004. These fish ranged in size from 460 to 802 mm FL and averaged 575 mm FL. The NCDMF Observer Program reported the capture of 12 Atlantic sturgeon in the Pamlico Sound from April 2004 to December 2005; these fish averaged 600 mm TL (ASSRT, 2007).

#### *Neuse River*

The Neuse River was identified as a spawning river for Atlantic sturgeon based on the capture of small juveniles. Bain (1997) reports that “early juveniles” (20–440 mm FL) remain in their natal rivers until they become “intermediate juveniles” (450–630 mm FL) and begin gradually emigrating from the river during periods of rapid growth. Hoff (1980) reports sturgeon studies in the Neuse and Pamlico Rivers and Pamlico Sound captured low numbers of small (400–600 mm TL) sturgeon. The NCDMF Observer Program and an independent gill net survey report the captures of Atlantic sturgeon in the Neuse River were low during the period 2001–2003, ranging from zero to one fish/year. However, in 2004, this survey collected 5 Atlantic sturgeon ranging from 470–802 mm FL; none could be classified as early juveniles and 3 could be classified as intermediate juveniles. In 2005, 23 Atlantic sturgeon were captured ranging from 365–650 mm FL; 9 could be classified as early juveniles and 14 could be classified as intermediate juveniles. From 2006–2013, another nine Atlantic sturgeon were captured ranging in size from 480–2,300 mm FL; the most caught in any given year during that period was four (2004). Of those nine animals, none would be classified as early juveniles but four could be classified as intermediate juveniles. One 720 mm TL Atlantic sturgeon was captured in 2014. Seventeen Atlantic sturgeon were caught in 2015 ranging in size from 365–1,435 mm FL; four could be classified as early juveniles and eight

could be classified as intermediate juveniles. In 2016, three Atlantic sturgeon were captured ranging in size from 464–656 mm FL; none could be classified as early juveniles and two could be classified as intermediate juveniles (M. Loeffler, NCDMF, to A. Herndon, NMFS, pers. comm. March 2017). From 2002–2003, four Atlantic sturgeon (561–992 mm FL) were captured by North Carolina State University personnel sampling in the Neuse River (Oakley, 2003). Similarly, the NCDMF Observer Program documented the capture of 12 Atlantic sturgeon in the Pamlico Sound from April 2004 to December 2005; none of these were YOY or spawning adults, averaging approximately 600 mm TL (ASSRT, 2007). Three additional specimens of YOY captured in the Neuse River in 1974 were found in a collection at North Carolina State University (J. Hightower, NCSU, to A. Herndon, NMFS, pers. comm. March 2017). An additional record of a YOY captured in the Neuse River in 1974, was provided by the North Carolina Museum of Natural Sciences (G. Hogue, NCMNS, to A. Herndon, NMFS, pers. comm. March 2017). Because sturgeon cannot pass above the Milburnie Dam, we believe that dam is likely the farthest upstream extent of spawning habitat accessible to Atlantic sturgeon.

#### *Cape Fear River System*

The Cape Fear and Northeast Cape Fear Rivers were identified as spawning rivers for Atlantic sturgeon based on the capture of juveniles, the capture of adults in spawning condition, and the tracking location of adults, and information indicating the historical use by Atlantic sturgeon. In the late 1800s, the Cape Fear River had the largest landings of sturgeon in the southeastern United States (Moser and Ross, 1995). While species identification (*i.e.*, shortnose or Atlantic sturgeon) is not possible, these landings suggest large populations of both species. The Cape Fear River is tidally influenced by diurnal tides up to at least rkm 96, and is also dredged extensively to maintain a depth of 12 m up to rkm 49 and then a depth of 4 m up to Lock and Dam #1. There are numerous deep holes (>10 m) throughout this extent.

A gill net survey for adult shortnose and juvenile Atlantic sturgeon was conducted in the Cape Fear River drainage from 1990 to 1992, and replicated from 1997 to 2005. Each sampling period included two overnight sets. The 1990–1992 survey captured 100 Atlantic sturgeon below Lock and Dam #1 (rkm 95). In 1997, 16 Atlantic sturgeon were captured below Lock and

Dam #1, an additional 60 Atlantic sturgeon were caught in the Brunswick (a tributary of the Cape Fear River), and 12 were caught in the Northeast Cape Fear River (Moser *et al.* 1998). Additionally, Ross *et al.* (1988 in Moser and Ross, 1995) reported the capture of a gravid female in the Cape Fear River.

Recent telemetry work conducted in the Cape Fear and Northeast Cape Fear Rivers showed that subadult Atlantic sturgeon movement and distribution followed seasonal patterns (Loeffler and Collier in Post *et al.*, 2014). During summer months, Atlantic sturgeon distribution was shifted upriver with limited large-scale movements; during the coldest time of year, subadult fish were absent from the rivers and had migrated to the estuary or ocean (Loeffler and Collier in Post *et al.*, 2014). The high inter-annual return rates of tagged fish to the system demonstrate that Atlantic sturgeon have fidelity to these rivers; this implies that the Cape Fear River system may be the natal system for these fish (Loeffler and Collier in Post *et al.*, 2014).

Further evidence of the importance of this system is demonstrated by the movement patterns of one of five adult Atlantic sturgeon tagged during the study that has shown site fidelity. This individual fish was in ripe and running condition at the time of tagging. This fish subsequently returned to the Cape Fear River system each of the following years (2013 and 2014) and has been detected farther upstream in both the Cape Fear (rkm 95) and Northeast Cape Fear (rkm 132) rivers than any tagged subadult fish during this study. This fish did not use the fish passage rock arch ramp at Lock and Dam #1; however, at the time when it was present at the base of the dam, the rock arch ramp structure was only partially complete. In all years of the study this fish had movement patterns that are consistent with spawning behavior, and this demonstrates that both the Northeast Cape Fear and Cape Fear Rivers may be important spawning areas. While telemetry data have not indicated Atlantic sturgeon presence above Lock and Dam #1, we believe the fish passage present at the dam is successful or that fish pass through the lock. We base this determination on reports of Atlantic sturgeon above Lock and Dam #1 (F. Rohde, NMFS, pers. comm. to J. Rueter, NMFS, July 14, 2015). Because sturgeon cannot currently pass above the Lock and Dam #2, we believe that dam is likely the farthest upstream extent of spawning habitat currently accessible to Atlantic sturgeon in the occupied unit of the river. The Northeast Cape River is not

dammed and does not extend all the way to the fall line. For these reasons we used an easily identifiable landmark (*e.g.*, upstream side of Rones Chapel Road Bridge) to serve as the upstream boundary.

#### *Pee Dee River System*

The Pee Dee River System was identified as providing spawning habitat used by Atlantic sturgeon based on the capture of juveniles, the capture of adults in spawning condition, and the tracking location of adults. Captures of age-1 juveniles from the Waccamaw River during the early 1980s suggest that a reproducing population of Atlantic sturgeon existed in that river, although the fish could have been from the nearby Pee Dee River (Collins and Smith 1997). Additionally, telemetry data from tagged adult Atlantic sturgeon appear to show individuals making spawning runs into the Pee Dee River by traveling up the Waccamaw River, through Bull Creek, and into the Pee Dee River. (B. Post, SCDNR, pers. comm. to J. Rueter, NMFS, July 9, 2015).

Based on preliminary analyses of sturgeon detections during their study, Post *et al.* (2014) concluded the Pee Dee River system appears to be used by Atlantic sturgeon for summer/winter seasonal habitat as well as for spawning. From 2011 to 2014, 41 sturgeon were detected in upstream areas of the Pee Dee River that were considered to be spawning areas. All 10 Atlantic sturgeon that were originally implanted with transmitters in the Pee Dee System were later detected displaying upstream and downstream movement. Distinct movement patterns were evident for these fish as similar patterns were observed each year of the study period. Two of the 10 fish originally tagged in the Pee Dee System and many tagged fish from other systems made spawning runs in the Pee Dee River (Post *et al.*, 2014). The fall line is located approximately 35 rkm below Blewett Falls Dam, which is impassable to sturgeon. Thus, we believe the dam represents the upstream extent of spawning habitat accessible to Atlantic sturgeon on the Pee Dee River system.

#### *Black River, South Carolina*

The Black River was identified as a spawning river for Atlantic sturgeon based on the capture of juveniles and the tracking location of adults. During a telemetry study from 2011 to 2014, Post *et al.* (2014) detected 10 juveniles and 10 adults using the Black River. An adult male was detected at the last receiver station in the river one year (rkm 70.4) and the next to last receiver station in a subsequent year. While the

receiver stations were not at the fall line, they were very far upriver, and it is likely that the only reason this fish traveled so far upriver was to spawn (B. Post, SCDNR, pers. comm. to J. Rueter, NMFS PRD, July 9, 2015). Juveniles were located as far upstream as rkm 42.1, suggesting the Black River is also an important foraging/refuge habitat. The main stem of the Black River becomes braided before reaching the fall line and is no longer identifiable above Interstate Highway 95. Thus, setting the boundary at that highway includes the upstream extent of spawning habitat within the unit.

#### *Santee and Cooper Rivers*

The Santee-Cooper River system was identified as a spawning river system for Atlantic sturgeon based on the capture of YOY. The Santee River basin is the second largest watershed on the Atlantic Coast of the United States; however, with the completion of Wilson Dam in the 1940s, upstream fish migrations were restricted to the lowermost 145 rkms of the Santee River. Following construction of the Wilson and Pinopolis Dams, the connectivity between the coastal plain and piedmont was lost. In the 1980s, a fish passage facility at the St. Stephen powerhouse, designed to pass American shad and blueback herring, was completed that attempted to restore connectivity throughout the system. The passage facility has not been successful for Atlantic sturgeon (Post *et al.*, 2014). However, in 2007 an Atlantic sturgeon entered the fish passage facility at the fishway to the lift, presumably in an attempt to migrate upstream to spawn, and was subsequently physically removed and then released downstream into the Santee River (A. Crosby, SCDNR, pers. comm.).

Historically, the Cooper River was a small coastal plain river that fed into Charleston Harbor. The completion of the Santee Cooper hydropower project in the 1940s dramatically changed river discharge in the Cooper River. From the 1940s into the 1980s, nearly all river discharge of the Santee River was diverted through the Santee Cooper project, run through the hydroelectric units in Pinopolis Dam, and discharged down the Tailrace Canal and into the Cooper River. In the 1980s, the Rediversion Project redirected part of the system's discharge back to the Santee River; however, a significant discharge of freshwater still flows into the Cooper River. The Cooper River provides the dominant freshwater input for the Charleston Harbor and provides 77 rkm of riverine habitat (Post *et al.*, 2014).

The capture of 151 subadults, including age-1 fish, from 1970–1995 indicates a population exists in the Santee River (Collins and Smith, 1997). Four juvenile Atlantic sturgeon, including YOY, were captured in the winter of 2003, one in the Santee and three in the Cooper Rivers (McCord, 2004). These data support the existence of a spawning population, but SCDNR biologists working in the Santee-Cooper system believe the smaller fish are pushed into the system from the Pee Dee and/or Waccamaw Rivers during flooding conditions (McCord, 2004). This hypothesis is based on the lack of access to suitable spawning habitat due to the locations of the Wilson Dam on the Santee River, the St. Stephen Powerhouse on the Rediversion Canal, and the Pinopolis Dam on the Cooper River. Nonetheless, the Santee-Cooper River system appears to be important foraging and refuge habitat and could serve as important spawning habitat once access to historical spawning grounds is restored through a fishway prescription under the FPA (NMFS, 2007). In addition, hard substrate that could be used for spawning exists in the reach of the Santee River below the Wilson Dam, but has been rendered inaccessible by inadequate flow regimes below the dam. We anticipate this will be addressed in the new hydropower license for the Santee-Cooper project.

In a recent telemetry study by Post *et al.* (2014), four Atlantic sturgeon were tagged in the Santee River from 2011 to 2014. Of these four, one was detected in the river, one was detected at the mouth of the river, and the other two have not been detected in the Santee River system since being tagged. There was no detectable spawning run or pattern of movement for the tagged fish that remained in the Santee River (Post *et al.*, 2014). There were no Atlantic sturgeon captured in the Cooper River during the Post *et al.* (2014) study. There were seven Atlantic sturgeon detected in the Cooper River that had been tagged in other systems. The Atlantic sturgeon that were detected in the Cooper River were more commonly detected in the saltwater tidal zone, with the exception of one that made a presumed spawning run to Pinopolis Dam in the fall of 2013 (Post *et al.*, 2014). The upstream extents of potential spawning habitat available to Atlantic sturgeon in the occupied portions of the Santee and Cooper Rivers are at the Wilson and Pinopolis Dams, respectively.

#### *Edisto River*

The Edisto is the largest river in the Ashepoo, Combahee, Edisto (ACE) Basin. It begins in the transition zone

between piedmont and coastal plain and is unimpeded for its entire length. It is the longest free flowing blackwater river in South Carolina. During excessive rainy seasons it will inundate lowlands and swamps, and the flow basin increases to a mile (1.6 km) wide or more. The Edisto River was identified as a spawning river for Atlantic sturgeon based on the capture of an adult in spawning condition and capture location and tracking of adults.

Spawning adults (39 in 1998) and YOY (1,331 from 1994–2001) have been captured in the ACE basin (Collins and Smith, 1997; ASSRT, 2007). One gravid female was captured in the Edisto River during sampling efforts in 1997 (ASSRT, 2007). Seventy-six Atlantic sturgeon were tagged in the Edisto River during a 2011 to 2014 telemetry study (Post *et al.*, 2014). After tagging, 58 of the 76 Atlantic sturgeon tagged were detected again in the Edisto River during the study. Distinct movement patterns of Atlantic sturgeon were evident. Fish entered the river between April and June and were detected in the saltwater tidal zone until water temperature decreased below 25 °C. They then moved into the freshwater tidal area, and some fish made presumed spawning migrations in the fall around September–October. Spawning migrations were thought to be occurring based on fish movements upstream to the presumed spawning zone between rkm 78 and 210. Fish stayed in these presumed spawning zones for an average of 22 days. The tagged Atlantic sturgeon left the river system by November. A number of tagged individuals were detected making such movements during multiple years of the study. Only those fish that were tagged in the Edisto River were detected upstream near presumed spawning grounds, while fish detected in the Edisto River, but tagged elsewhere, were not detected near the presumed spawning areas. In the winter and spring, Atlantic sturgeon were generally absent from the system except for a few fish that remained in the saltwater tidal zone (Post *et al.*, 2014). The North and South Forks of the Edisto River represent the upstream boundary for the Edisto River. Both forks occur at or very near the fall line, and likely represent the upstream extent of spawning habitat accessible to Atlantic sturgeon on the Edisto River.

#### *Combahee-Salkehatchie River*

The Combahee-Salkehatchie River was identified as a spawning river for Atlantic sturgeon based on capture location and tracking locations of adults and the spawning condition of an adult.

Spawning adults (39 in 1998) and YOY (1,331 from 1994–2001) have been captured in the ACE basin (Collins and Smith, 1997; ASSRT, 2007). One running ripe male was captured in the Combahee River during a sampling program in 1997 (ASSRT, 2007). Seven Atlantic sturgeon were captured and five were tagged during a 2010 and 2011 telemetry study (Post *et al.*, 2014). Atlantic sturgeon that were tagged in the Combahee River were absent from the system for the majority of the study period. An Atlantic sturgeon that was tagged in June of 2011 left the system in the fall of 2011, returned in July 2012 and left the system again in the fall of 2012. This fish was detected the farthest upstream of any tagged Atlantic sturgeon in the Combahee River (rkm 56). Another individual was identified as a running ripe male at capture in the Combahee River in March 2011, was detected again exhibiting spawning behavior in the North East Cape Fear River, North Carolina, in March 2012, and in 2014 was detected from February–April in the Pee Dee System. The main stem of the Combahee-Salkehatchie River runs out well before the fall line. Thus, we believe the upstream extent of spawning habitat in the rivers is at the confluence of the Buck and Rosemary Creeks, which also marks the upstream boundary for the Combahee-Salkehatchie River.

#### *Savannah River*

The Savannah River was identified as a spawning river for Atlantic sturgeon based on capture location and tracking locations of adults and the collection of larvae. Forty-three Atlantic sturgeon larvae were collected in upstream locations (rkm 113–283) near presumed spawning locations (Collins and Smith, 1997). Seven Atlantic sturgeon were also tagged from 2011 to 2014 and distinct movement patterns were evident (Post *et al.*, 2014). In 2011, one individual was detected travelling upstream in mid-April and remained at a presumed spawning area (rkm 200–301) through mid-September. Two Atlantic sturgeon migrated into the system and upstream to presumed spawning grounds in 2012. The first entered the system in mid-August and returned downriver in mid-September; the other entered the system in mid-September and returned downriver in mid-October. Four Atlantic sturgeon entered the Savannah River and migrated upstream during the late summer and fall months in 2013. Two Atlantic sturgeon previously tagged in the Savannah River made upstream spawning movements; this was the second year (2011) one of these fish was

detected making similar upstream movements. These two fish were also detected immediately upstream of the NSBL&D (rkm 301). It is unknown if they passed through the lock or swam over the dam during high flows. There is a strong possibility that one fish may have been detected by the receiver directly upstream while still remaining downstream of the dam and while flow control gates were in a full open position. Atlantic sturgeon in the Savannah River were documented displaying similar behavior 3 years in a row—migrating upstream during the fall and then being absent from the system during spring and summer. Because sturgeon cannot currently pass above the NSBL&D, we believe that dam is the farthest upstream extent of spawning habitat accessible to Atlantic sturgeon in the occupied reaches of the river.

#### Ogeechee River

The Ogeechee River was identified as a spawning river for Atlantic sturgeon based on tracking of adults and YOY. Seventeen Atlantic sturgeon (each measuring less than 30 cm TL) considered to be YOY were collected in 2003 by the Army's Environmental and Natural Resources Division (AENRD) at Fort Stewart, Georgia. An additional 137 fish were captured by the AENRD in 2004. Nine of these fish measured less than 41 cm TL and were considered YOY. During a telemetry study from 2011 to 2014, there were no capture or tagging efforts conducted in the Ogeechee River; however, 40 Atlantic sturgeon were detected in the Ogeechee River (Ingram and Peterson, 2016). A rock shoal exists at the fall line on the Ogeechee River. However, it is possible that during certain high flow periods Atlantic sturgeon could pass above those shoals. Instead, the impassable Mayfield Mill Dam likely represents the extent of upstream spawning habitat accessible to Atlantic sturgeon on the Ogeechee River.

#### Altamaha River

The Altamaha River and its major tributaries, the Oconee and Ocmulgee Rivers, were identified as spawning rivers for Atlantic sturgeon based on capture location and tracking of adults and the capture of adults in spawning condition. The Altamaha River supports one of the healthiest Atlantic sturgeon subpopulations in the Southeast, with over 2,000 subadults captured in trammel nets in a 2003–2005 study, 800 of which were nominally age-1 as indicated by size (ASSRT, 2007). A survey targeting Atlantic sturgeon was initiated in 2003 by the University of Georgia. By October 2005, 1,022

Atlantic sturgeon had been captured using trammel and large gill nets. Two hundred and sixty-seven of these fish were collected during the spring spawning run in 2004 (74 adults) and 2005 (139 adults). From these captures, 308 (2004) and 378 (2005) adults were estimated to have participated in the spring spawning run, representing 1.5 percent of Georgia's historical spawning stock (females) as estimated from U.S. Fish Commission landing records (Schueller and Peterson, 2006; Secor 2002).

In a telemetry study by Peterson *et al.* (2006), most tagged adult Atlantic sturgeon were found between rkm 215 and 420 in October and November when water temperatures were appropriate for spawning. There are swift currents and rocky substrates throughout this stretch of river (Peterson *et al.*, 2006). Two hundred thirteen adults in spawning condition were captured in the Altamaha system in 2004–2005 (Peterson *et al.*, 2006).

Forty-five adult Atlantic sturgeon were captured and tagged from 2011 to 2013 (Ingram and Peterson, 2016). Telemetry data from the tagged individuals indicated that the fish were present in the system from April through December. Twenty-six fish made significant (>160 rkm) migrations upstream with eight fish making the migration in at least two of the years and four making the migration in all three years of the study. No site fidelity was apparent based on these data; however, an upriver site near the confluence of the Ocmulgee (rkm 340–350) was visited by multiple fish in multiple years. Fish migrated upstream into both the Ocmulgee and Oconee Rivers, but the majority entered the Ocmulgee River. The maximum extent of these upriver migrations was rkm 408 in the Ocmulgee River and rkm 356 in the Oconee River (Ingram and Peterson, 2016).

Two general migration patterns were observed for fish in this system. Early upriver migrations that began in April–May typically occurred in two steps, with fish remaining at mid-river locations during the summer months before continuing upstream in the fall. The late-year migrations, however, were typically initiated in August or September and were generally non-stop. Regardless of which migration pattern was used during upstream migration, all fish exhibited a one-step pattern of migrating downstream in December and early January (Ingram and Peterson, 2016). Sinclair Dam is approximately 15 rkm above the fall line on the Oconee River and represents the upstream boundary of critical habitat on the river.

The Juliette Dam on the Ocmulgee River is approximately 40 rkm above the fall line and represents the upstream boundary of critical habitat on the river.

#### Satilla River

The Satilla River was identified as a spawning river for Atlantic sturgeon based on the capture of adults in spawning condition. Ong *et al.* (1996) captured four reproductively mature Atlantic sturgeon on spawning grounds during the spawning season in the Satilla River. The main stem of the Satilla River runs out well before the fall line. Thus, we believe the upstream extent of spawning habitat in the river is at the confluence of the Satilla and Wiggins Creeks.

#### St. Marys River

The St. Marys River was identified as a spawning river for Atlantic sturgeon based on the capture of YOY Atlantic sturgeon. Atlantic sturgeon were once thought to be extirpated in the St. Marys River. However, nine Atlantic sturgeon were captured in sampling efforts between May 19 and June 9, 2014. Captured fish ranged in size from 293 mm (YOY) to 932 mm (subadult). This is a possible indication of a slow and protracted recovery in the St. Marys (D. Peterson, UGA, pers. comm. to J. Rueter, NMFS PRD, July 8, 2015). The main stem of the St. Marys River runs out well before the fall line. Thus, we believe the upstream extent of spawning habitat in the river is at the confluence of the Middle Prong St. Marys and St. Marys Rivers.

Using this information, we identified 14 areas within the geographical area occupied by the Carolina and South Atlantic DPSs, at the time of listing, that contain the PBFs essential to conservation of the species. Our descriptions of the critical habitat units and PBFs for the Carolina and South Atlantic DPSs use both the terms “river mouth” and “rkm 0.” Those terms are interchangeable and we use them as such.

The ordinary high water mark on each bank of the river and shorelines is the lateral extent of the following occupied critical habitat units:

*Carolina Unit 1* includes the Roanoke River main stem from the Roanoke Rapids Dam downstream to rkm 0;

*Carolina Unit 2* includes the Tar-Pamlico River main stem from the Rocky Mount Millpond Dam downstream to rkm 0;

*Carolina Unit 3* includes the Neuse River main stem from the Milburnie Dam downstream to rkm 0;

*Carolina Unit 4* includes the Cape Fear River main stem from Lock and

Dam #2 downstream to rkm 0 and the Northeast Cape Fear River from the upstream side of Rones Chapel Road Bridge downstream to the confluence with the Cape Fear River;

*Carolina Unit 5* includes the Pee Dee River main stem from Blewett Falls Dam downstream to rkm 0, the Waccamaw River from Bull Creek downstream to rkm 0, and Bull Creek from the Pee Dee River to the confluence with the Waccamaw River;

*Carolina Unit 6* includes the Black River main stem from Interstate Highway 95 downstream to rkm 0;

*Carolina Unit 7* includes the Santee River main stem from the Wilson Dam downstream to the fork of the North Santee River and South Santee River distributaries, the Rediversion Canal from the St. Stephen Powerhouse downstream to the confluence with the Santee River, the North Santee River from the fork of the Santee River and South Santee River downstream to rkm 0, the South Santee River from the fork of the Santee River and North Santee River downstream to rkm 0, the Tailrace Canal from Pinopolis Dam downstream to the West Branch Cooper River, the West Branch Cooper River from the Tailrace Canal downstream to the confluence with the East Branch Cooper River, and the Cooper River from the confluence of the West Branch Cooper River and East Branch Cooper River tributaries downstream to rkm 0;

*South Atlantic Unit 1* includes the North Fork Edisto River from Cones Pond downstream to the confluence with the South Fork Edisto River, the South Fork Edisto River from Highway 121 downstream to the confluence with the North Fork Edisto River, the Edisto River main stem from the confluence of the North Fork Edisto River and South Fork Edisto River tributaries downstream to the fork at the North Edisto River and South Edisto River distributaries, the North Edisto River from the Edisto River downstream to rkm 0, and the South Edisto River from the Edisto River downstream to rkm 0;

*South Atlantic Unit 2* includes the main stem Combahee—Salkehatchie River from the confluence of Buck and Rosemary Creeks with the Salkehatchie River downstream to the Combahee River, and the Combahee River from the Salkehatchie River downstream to rkm 0;

*South Atlantic Unit 3* includes the main stem Savannah River from the New Savannah Bluff Lock and Dam downstream to rkm 0;

*South Atlantic Unit 4* includes the main stem Ogeechee River from the Mayfield Mill Dam downstream to rkm 0;

*South Atlantic Unit 5* includes the main stem Oconee River from Sinclair Dam downstream to the confluence with the Ocmulgee River, the main stem Ocmulgee River from Juliette Dam downstream to the confluence with the Oconee River, and the main stem Altamaha River from the confluence of the Oconee River and Ocmulgee River downstream to rkm 0;

*South Atlantic Unit 6* includes the main stem Satilla River from the confluence of Satilla and Wiggins Creeks downstream to rkm 0; and

*South Atlantic Unit 7* includes the main stem St. Marys River from the confluence of Middle Prong St. Marys and the St. Marys Rivers downstream to rkm 0.

#### **Need for Special Management Considerations or Protection**

We concluded that each of the PBFs defined above for the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs of Atlantic sturgeon may require special management considerations or protection. Barriers (e.g., dams, tidal turbines) to generate power or control water flow in rivers used by Atlantic sturgeon can damage or destroy bottom habitat needed for spawning and rearing of juveniles, restrict movement of adults to and from spawning grounds, prevent juveniles from accessing the full range of salinity in the natal estuary, and alter water quality parameters, including water depth, temperature and DO, to the detriment of sturgeon reproduction, growth, and survival. Water withdrawals can similarly adversely impact water quality for Atlantic sturgeon spawning, recruitment, and development. Land development and commercial and recreational activities on a river can contribute to sediment deposition that affects water quality necessary for successful spawning and recruitment. A build-up of fine sediments may, for example, reduce the suitability of hard spawning substrate for Atlantic sturgeon egg adherence and reduce the interstitial spaces used by larvae for refuge from predators. Dredging to remove sediment build-up, to deepen harbors and facilitate vessel traffic, or to mine construction materials may remove or alter hard substrate that is necessary for egg adherence and that serves as refuge for larvae or soft substrate needed for juvenile foraging, and may change the water depth, resulting in shifts in the salt wedge within the estuary, or change other characteristics of the water quality (e.g., temperature, DO) necessary for the developing eggs, larvae, and juveniles.

The PBFs essential for successful Atlantic sturgeon reproduction and recruitment may also require special management considerations or protection as a result of global climate change. Conditions in the rivers of the Southeast used by sturgeon already threaten the species' survival and recovery due to exceedances of temperature tolerances and the sensitivity of sturgeon to low DO levels; these impacts will worsen as a result of global climate change and predicted warming of the U.S. Atlantic Coast. Many communities and commercial facilities withdraw water from the rivers containing the PBFs essential to Atlantic sturgeon reproduction. Water withdrawals during drought events can affect flows, depths, and the position of the salt wedge, further impacting the water flow necessary for successful sturgeon reproduction, and they can also affect DO levels. Attempts to control water during floods (e.g., spilling water from dams upriver of Atlantic sturgeon spawning and rearing habitat) can similarly alter flows to the point of dislodging fertilized eggs, washing early life stages downstream into more saline habitat before being developmentally ready, and creating barriers (e.g., from debris) to upstream and downstream passage of adults and juveniles. We therefore conclude that the PBFs essential to the conservation of the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs may require special management considerations or protections.

#### **Unoccupied Areas**

ESA section 3(5)(A)(ii) defines critical habitat to include specific areas outside the geographical area occupied if the areas are determined by the Secretary to be essential for the conservation of the species. Our regulations at 50 CFR 424.12(g) also state: "The Secretary will not designate critical habitat within foreign countries or in other areas outside of the jurisdiction of the United States."

There are riverine areas outside of the geographical area occupied by the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs as a result of dams and natural falls. We considered whether these unoccupied areas were essential to the conservation of the respective DPSs and concluded that they were not essential because nearly all known historical habitat is accessible to the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs (ASSRT, 2007; 77 FR 5880; February 6, 2012) and, because additional unoccupied habitat is not necessary in light of any



anticipated impacts of climate change. Therefore, we are not designating critical habitat within any unoccupied areas for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs.

For the Carolina and South Atlantic DPS, we had proposed to designate areas of unoccupied critical habitat. However, based on input received during the public review process, we reconsidered those proposals. After

discussion with USFWS and state resource managers, we are uncertain whether the Cape Fear River unoccupied unit (*i.e.*, the area between Lock and Dam #2 and Lock and Dam #3) contains spawning habitat that would make it essential for the conservation of species. In addition, following the conclusion of our discretionary exclusion analysis we have elected to exercise our discretion under section

4(b)(2) of the ESA and exclude the Santee-Cooper river system and Savannah River unoccupied units of critical habitat. We determined the benefits of exclusion (that is, avoiding some or all of the impacts that would result from designation) outweigh the benefits of designation.

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Critical Habitat Unit Name	DPS Nomenclature	Water Body	State	Upper extent	Total River kilometers	Total River miles
Roanoke	Carolina Unit 1 (C1)	Roanoke River	North Carolina	Roanoke Rapids Dam	213	132
Tar - Pamlico	Carolina Unit 2 (C2)	Tar - Pamlico River	North Carolina	Rocky Mount Mill Pond Dam	199	124
Neuse	Carolina Unit 3 (C3)	Neuse River	North Carolina	Milburnie Dam	345	214
Cape Fear	Carolina Unit 4 (C4)	Cape Fear River	North Carolina	Lock and Dam #2	151	94
		Northeast Cape Fear River	North Carolina	Upstream side of Rones Chapel Road Bridge	218	136
Pee Dee	Carolina Unit 5 (C5)	Pee Dee River	North Carolina/South Carolina	Blewett Falls Dam	310	192
		Waccamaw River	South Carolina	Bull Creek (a.k.a. Big Bull Creek)	35	22
		Bull Creek (a.k.a. Big Bull Creek)	South Carolina	Pee Dee River	17	11
Black	Carolina Unit 6 (C6)	Black River	South Carolina	Interstate Highway 95	203	126
Santee - Cooper	Carolina Unit 7 (C7)	Santee River	South Carolina	Wilson Dam	114	71
		Rediversion Canal	South Carolina	St. Stephens Dam	8	5
		North Santee River	South Carolina	Confluence of Santee River	29	18
		South Santee River	South Carolina	Confluence of Santee River	27	17
		Tailrace Canal - West Branch Cooper River	South Carolina	Pinopolis Dam	29	18
		Cooper River	South Carolina	Confluence of the West Branch Cooper and East Branch Cooper Rivers	41	25
Edisto	South Atlantic Unit 1 (SA1)	North Fork Edisto River	South Carolina	Cones Pond just north of I-20 (Approximately 33.8035 N, 80.4702 W)	155	96
		South Fork Edisto River	South Carolina	State Hwy 121	175	109
		Edisto River	South Carolina	Confluence of the North Fork Edisto and South Fork Edisto Rivers	163	101
		North Edisto River	South Carolina	Edisto River	29	18
		South Edisto River	South Carolina	Edisto River	31	19
Combahee - Salkehatchie	South Atlantic Unit 2 (SA2)	Combahee - Salkehatchie River	South Carolina	Confluence of Buck and Rosemary Creeks with (Approximately 33.2906 N, 81.4326 W)	185	115
Savannah	South Atlantic Unit 3 (SA3)	Savannah River	South Carolina/Georgia	New Savannah Bluff Lock and Dam	338	210
Ogeechee	South Atlantic Unit 4 (SA4)	Ogeechee River	Georgia	Mayfield Mill Dam (Approximately 33.364799 N, 82.805872 W)	420	261
Altamaha	South Atlantic Unit 5 (SA5)	Oconee River	Georgia	Sinclair Dam	227	141
		Ocmulgee River	Georgia	Juliette Dam	363	226
		Altamaha River	Georgia	Confluence of Oconee and Ocmulgee Rivers	216	134
Satilla	South Atlantic Unit 6 (SA6)	Satilla River	Georgia	Confluence of Satilla and Wiggins Creeks (Approximately 31.5041 N, 83.0818 W)	378	235
St. Marys	South Atlantic Unit 7 (SA7)	St. Marys River	Georgia/Florida	Confluence of Middle Prong St. Marys and St. Marys Rivers (Approximately 30.4233 N, 82.2094 W)	203	126

#### Application of ESA Section 4(a)(3)(B)(i) (Military Lands)

Section 4(a)(3)(B)(i) of the ESA prohibits designating as critical habitat any lands or other geographical areas owned or controlled by the DOD, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. The legislative history to this provision explains:

The conferees would expect the [Secretary] to assess an INRMP's potential contribution to species conservation, giving due regard to those habitat protection, maintenance, and improvement projects and other related activities specified in the plan that address the particular conservation and protection needs of the species for which critical habitat would otherwise be proposed. Consistent with current practice, the Secretary would establish criteria that would be used to determine if an INRMP benefits the listed species for which critical habitat would be proposed. (Conference Committee report, 149 Cong. Rec. H. 10563 (November 6, 2003)).

Our regulations at 50 CFR 424.12(h) provide that in determining whether an applicable benefit is provided, we must consider:

- (1) The extent of the area and features present;
- (2) The type and frequency of use of the area by the species;
- (3) The relevant elements of the INRMP in terms of management objectives, activities covered, and best management practices, and the certainty that the relevant elements will be implemented; and
- (4) The degree to which the relevant elements of the INRMP will protect the habitat from the types of effects that would be addressed through a destruction-or-adverse-modification analysis.

In accordance with section 4(a)(3)(B)(i) of the ESA, the particular areas of the U.S. Military Academy—West Point, New York, Joint Base Langley—Eustis, Virginia, Marine Corps Base Quantico, Virginia, Naval Support Facility Dahlgren, and Naval Weapons Station Yorktown, that overlap with a New York Bight DPS or Chesapeake Bay DPS critical habitat unit are not part of the designated critical habitat unit because the INRMP for each facility provides a benefit to the respective Atlantic sturgeon DPS and its habitat. A copy of the letter providing our determination for each facility is provided in Appendix C of the Impacts Analysis and Biological Source Document for the Gulf of Maine, New

York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon. That Appendix also includes our analysis supporting the conclusion that the relevant INRMPs provide the types of benefits to Atlantic sturgeon described in our regulations (50 CFR 424.12(h)); therefore, that analysis is not repeated here.

#### *Consideration of Whether the Joint Base Charleston INRMP Provides a Conservation Benefit to the Carolina DPS*

Joint Base Charleston (JBC) in South Carolina is the only installation controlled by the DOD which coincides with any area under consideration for critical habitat for the Carolina DPS. Prior to development of the proposed rule, we asked JBC to determine if they owned or controlled any lands that should not be designated as critical habitat pursuant to section 4(a)(3)(B)(i) of the ESA. They responded stating they did not believe they owned or controlled any lands eligible for section 4(a)(3)(B)(i) non-inclusion. However, during the public comment period, the Navy requested in writing that the restricted area on the Cooper River, South Carolina (defined at 33 CFR 334.460), not be designated as critical habitat, citing that it is covered by the 2015 INRMP for JBC and should not be included pursuant to ESA section 4(a)(3)(B)(i).

The regulations at 33 CFR 334.460 identify 16 specific areas, including some far from JBC. We determined the areas described in those regulations fall into three categories: (1) Areas outside the boundaries of critical habitat and therefore ineligible for non-designation consideration under section 4(a)(3)(B)(i) and not included in critical habitat (no need to request that these areas not be included); (2) areas within the boundaries of critical habitat, but not subject to an INRMP, and thus ineligible for non-designation consideration; and (3) areas within critical habitat, subject to an INRMP, which are eligible for non-designation consideration.

Of the 16 areas identified in 33 CFR 334.460, we determined seven entire areas (33 CFR 334.460 (a)(2), (3), (7), (8)(i), (11)–(13)), and a portion of another (33 CFR 334.460 (a)(1)—Noisette Creek), did not meet the definition of critical habitat and were ineligible for non-designation consideration. We determined four additional areas (33 CFR 334.460 (a)(1), (4)–(6)) were in the second category and also ineligible for non-designation consideration.

However, we did conclude the five remaining areas (33 CFR 334.460 (a)(8)(ii)–(iv), (9), (10)) fell under the

JBC INRMP and were eligible for non-designation consideration. The JBC INRMP covers the lands encompassed by JB CHS Air (formerly Joint Base Charleston Air Force Base) in Charleston County and lands encompassed by JB CHS Weapons (formerly Naval Weapons Station Charleston) in Charleston and Berkeley Counties. JB CHS Air also includes North Auxiliary Airfield in Orangeburg County. Within the area covered by the INRMP, three of the four PBF(s) could be present (all but the spawning substrate). Atlantic sturgeon are expected to use the features in this area in the same way that they would all other areas of designated critical habitat; in other words, there is nothing unique or limiting about the critical habitat in this area.

The INRMP for JBC acknowledges that the estuarine waters of the Cooper River in the vicinity of JBC Weapons provide foraging and migratory habitat for Atlantic sturgeon. The INRMP notes that water pollution at JBC Weapons is a concern due to the large amount of essential fish habitat on and around the installation. The INRMP discusses that there are 26 water quality monitoring stations in the vicinity of JBC that are on the Clean Water Act section 303(d) list of impaired waterbodies, that these stations are located in a designated TMDL watershed, and that 16 of the stations are located within the Cooper River drainage surrounding JBC Weapons. While none of the monitoring stations have a TMDL, in 2013 the State of South Carolina revised their TMDL for DO for Charleston Harbor, and the Cooper, Ashley, and Wando Rivers (SCDHEC, 2013). In the revised TMDL, the South Carolina Department of Health and Environmental Control (SCDHEC) notes that a number of monitoring stations in the covered area, including the Cooper River, are designated as not supporting aquatic life use due to low DO. SCDHEC also notes that available data and modeling indicate that regulated and unregulated stormwater and nonpoint sources are not contributing to allowable DO depression on main stem segments in Charleston Harbor, or the Cooper, Ashley, and Wando Rivers. JBC Weapons has three NPDES permits—one industrial and two stormwater. JBC is implementing a Stormwater Management Plan that addresses water quality for the entire storm sewer collection system.

Section 7.4 of the INRMP addresses management of threatened and endangered species, species of concern, and their habitats. In the subsection for Atlantic sturgeon, the INRMP

appropriately acknowledges that the Atlantic sturgeon requires access to expansive areas of high quality freshwater habitats and that the waters of the Cooper River in the vicinity of JBC Weapons provide foraging and migratory habitat for the species. The INRMP describes a number of management activities that benefit Atlantic sturgeon and its habitat. The INRMP summarizes the benefits of this suite of activities as follows:

“Management activities would improve water quality by identifying, correcting, or preventing pollution or sediment discharges; limiting substrate disturbance; maintaining DO content by reducing nutrients entering the water that result in an increased biological oxygen demand from organisms processing the nutrients; and maintaining or improving water clarity by reducing erosion and limiting sediment in runoff.” These objectives are directly relevant to protection of the transitional salinity, soft substrate, and water quality facets of the PBFs of Atlantic sturgeon critical habitat. We identified several management activities discussed in the INRMP that we believe can help accomplish these objectives, including:

- (1) Repairing/revitalizing stormwater drainage systems;
- (2) Updating the Stormwater Pollution Prevention Plan and the Stormwater Management Plan;
- (3) Repairing forestry roads and culverts;
- (4) Including performance-based goals in grounds maintenance to help minimize erosion and sediment transport to the Cooper River;
- (5) Implementing BMPs to improve water quality discharged to the Cooper River, including training, identifying and correcting illicit discharges, enforcing erosion and sedimentation controls;
- (6) Limiting dredge operations in the Nuclear Power Training Unit ship channel and other shipping/receiving facilities to the minimum extent required;
- (7) Maintaining and/or developing protective buffer strips where feasible around wetlands along streams; and
- (8) Practicing ecologically-sound forest management.

These activities provide a benefit to the PBFs identified in the critical habitat designations, particularly the transitional salinity zone/soft substrate and water quality PBFs, by reducing sediment and nutrient discharges into nearshore waters, which addresses some of the conservation and protection needs that critical habitat would afford. These activities are similar to those that

we describe below as project modifications for avoiding or reducing adverse effects to the critical habitat. Therefore, were we to consult with the DOD on the activities in the INRMP that may affect the critical habitat, we would likely not require any project modifications based on the best management practices in the INRMP. Further, the INRMP includes provisions for monitoring and evaluating conservation effectiveness, which will ensure continued benefits to the species. The INRMP must be reviewed by participating Federal and state resource management agencies on a regular basis, but not less often than every five years. JB CHS will also provide us an opportunity to review the INRMP, as protected species under our jurisdiction (*i.e.*, Atlantic and shortnose sturgeon) may be affected by measures in the INRMP. We believe the JBC INRMP provides the types of benefits to Atlantic sturgeon described in our regulations (50 CFR 424.12(h)) and, thus, the restricted areas in the Cooper River covered by the INRMP should not be included in designated critical habitat.

#### Application of ESA Section 4(b)(2)

Section 4(b)(2) of the ESA requires that we consider the economic impact, impact on national security, and any other relevant impact, of designating any particular area as critical habitat. Additionally, the Secretary has the discretion to consider excluding any area from critical habitat if [s]he determines, based upon the best scientific and commercial data available, the benefits of exclusion (that is, avoiding some or all of the impacts that would result from designation) outweigh the benefits of designation. The regulations at 50 CFR 424.19(h) provide the framework for how we intend to implement section 4(b)(2) of the ESA. These regulations were revised in 2016 (81 FR 7413; February 11, 2016). In particular, Congress has authorized the Secretary to “exclude any area from critical habitat if [s]he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned” (ESA section 4(b)(2)). Because the authority to exclude is discretionary, exclusion is not required for any particular area, under any circumstances; however, under the final policy (81 FR 7226; February 11, 2016), if NMFS determines it is appropriate to conduct an exclusion analysis on some or all areas of a

designation, it is our general practice to exclude an area when the benefits of exclusion outweigh the benefits of inclusion.

The ESA provides the Services with broad discretion in how to consider impacts. See, H.R. Rep. No. 95–1625, at 17, reprinted in 1978 U.S.C.C.A.N. 9453, 9467 (1978) (“Economics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species. The Secretary is not required to give economics or any other ‘relevant impact’ predominant consideration in his specification of critical habitat . . . . The consideration and weight given to any particular impact is completely within the Secretary’s discretion.”). Courts have noted the ESA does not contain requirements for any particular methods or approaches. See, *e.g.*, *Bldg. Indus. Ass’n of the Bay Area et al. v. U.S. Dep’t. of Commerce et al.*, No. 13–15132, 9th Cir., July 7, 2015 (upholding district court’s ruling that the ESA does not require the agency to follow a specific methodology when designating critical habitat under section 4(b)(2)). For this final rule, we followed the same approach to describing and evaluating impacts as we have for other recent critical habitat rulemakings.

The following discussion of impacts summarizes the analysis contained in our final Impacts Analysis and Biological Source Document for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon. The administrative cost of conducting ESA section 7 consultations was determined to be the primary source of economic impacts as a result of designating critical habitat for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs. The number of incremental consultations over the next 10 years will likely be relatively small, because Atlantic sturgeon of a given life stage are likely to be either directly or indirectly affected by the Federal activities projected to occur within the proposed critical habitat. Since nearly all, if not all, the ESA section 7 consultations we anticipate to occur over the next 10 years will need to evaluate potential effects to both the Atlantic sturgeon DPS(s) present in the area and the critical habitat, the impacts will be coextensive. Therefore, the low administrative cost estimates are the most realistic cost estimates. The projected low administrative costs of designating all of the Gulf of Maine DPS critical habitat units total \$816,574.20 over the next 10 years. The projected low administrative costs for the New York Bight DPS critical habitat units total \$1,418,299.30 over the next 10

years. The projected low administrative costs of designating all of the Chesapeake Bay DPS critical habitat units total \$501,774.20 over the next 10 years. Currently, there is no information indicating that any of the ESA section 7 consultations expected to result from the critical habitat designations will result in project modifications. However, because we cannot predict every Federal action that will be proposed in the future or what the impacts of those actions will be on critical habitat, we recognize that there may be some future costs associated with project modifications. The timing of the ESA section 7 consultation process, which is designed to occur as early as possible in the action planning process and before there have been any irreversible or irretrievable commitment of resources, minimizes the potential for the outcome of a consultation to be costly project modifications.

We considered information provided by the Navy for impacts to national security the Navy expects to result from critical habitat designation for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs. We determined that any resulting ESA section 7 consultations for Navy activities within the critical habitat areas will likely be coextensive and that based on this, as well as the types of activities the Navy will undertake in the critical habitat, there will be no impacts to national security resulting from the designation of critical habitat for the Gulf of Maine, New York Bight or Chesapeake Bay DPS.

There are a number of potential beneficial impacts of designating critical habitat that extend beyond the conservation benefits to Atlantic sturgeon. Because it is often difficult to quantify the benefits of designating critical habitat, Executive Order (EO) 12866, Regulatory Planning and Review, provides guidance on assessing costs and benefits. The EO directs Federal agencies to assess all costs and benefits of available regulatory alternatives, and to select those approaches that maximize net benefits.

The designation of critical habitat will provide conservation benefits such as improved education and outreach by informing the public about areas and features important to the conservation of the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs. Specifying the geographical location of critical habitat facilitates implementation of section 7(a)(1) of the ESA by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the ESA. Designating critical habitat can

also help focus the efforts of other conservation partners (*e.g.*, State and local governments, individuals and nongovernmental organizations), and could be beneficial to the ecosystem by protecting features that are also necessary for the conservation of other species.

Based on our consideration of impacts, we are not excluding any areas from the critical habitat designations for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon based on economic, national security, or other relevant impacts. The designation of critical habitat will provide conservation benefits such as improved education and outreach by informing the public about areas and features important to the conservation of the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs. There are also a number of potential beneficial impacts of designating critical habitat that extend beyond the conservation benefits to Atlantic sturgeon. For example, protecting essential PBFs of sturgeon habitat, including preserving water quality and natural flow regimes, will benefit other organisms that are co-located in these areas. While we cannot quantify nor monetize the benefits, we believe they are not negligible and would be an incremental benefit of this designation. Therefore, we have declined to exercise our discretion to exclude any particular area from the proposed critical habitat units for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon.

The Impacts Analysis and Biological Source Document for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs provides specific information on the Economic, National Security and Other Relevant Impacts considered for the critical habitat designations for these DPSs and therefore is not repeated here. Specific information for these impacts as well as the determination for Discretionary Exclusions under section 4(b)(2) for the critical habitat designations for the Carolina and South Atlantic DPSs is provided below.

The following discussion of impacts summarizes the analysis contained in our final "Impacts Analysis of Critical Habitat Designation for the Carolina and South Atlantic Distinct Population Segments of Atlantic Sturgeon (*Acipenser oxyrinchus oxyrinchus*)" (IA), which identifies the economic, national security, and other relevant impacts that we projected would result from including each of the 14 occupied and 2 unoccupied specific areas in the critical habitat designation. We considered these impacts when

deciding whether to exercise our discretion to propose excluding particular areas from the designation. Both positive and negative impacts were identified and considered (these terms are used interchangeably with benefits and costs, respectively). Impacts were evaluated in quantitative terms where feasible, but qualitative appraisals were used where that is more appropriate to particular impacts. The final Impacts Analysis is available on our Web site at [http://sero.nmfs.noaa.gov/protected\\_resources/sturgeon/index.html](http://sero.nmfs.noaa.gov/protected_resources/sturgeon/index.html).

The primary impacts of a critical habitat designation result from the ESA section 7(a)(2) requirement that Federal agencies ensure their actions are not likely to result in the destruction or adverse modification of critical habitat, and that they consult with us in fulfilling this requirement. Determining these impacts is complicated by the fact that section 7(a)(2) also requires that Federal agencies ensure their actions are not likely to jeopardize the species' continued existence. One incremental impact of designation is the extent to which Federal agencies modify their proposed actions to ensure they are not likely to destroy or adversely modify the critical habitat beyond any modifications they would make because of listing and the results of a jeopardy analysis. When the same modification would be required due to impacts to both the species and critical habitat, the impact of the designation is coextensive with the ESA listing of the species (*i.e.*, attributable to both the listing of the species and the designation critical habitat). Relevant, existing regulatory protections are referred to as the "baseline" and are also discussed in the Impacts Analysis. In this case, notable baseline protections include the ESA listings of not only Atlantic sturgeon, but the co-occurring endangered shortnose sturgeon.

The Impacts Analysis describes the projected future Federal activities that would trigger section 7 consultation requirements because they may affect the PBF(s), and consequently may result in economic costs or negative impacts. The report also identifies the potential national security and other relevant impacts that may arise due to the critical habitat designation, such as positive impacts that may arise from conservation of the species and its habitat, state and local protections that may be triggered as a result of designation, and education of the public to the importance of an area for species conservation.

*Economic Impacts of Designating Critical Habitat for the Carolina and South Atlantic DPSs*

Economic impacts of the critical habitat designation result through implementation of section 7 of the ESA in consultations with Federal agencies to ensure their proposed actions are not likely to destroy or adversely modify critical habitat. These economic impacts may include both administrative and project modification costs; economic impacts that may be associated with the conservation benefits of the designation are described later.

When identifying costs, we examined the ESA section 7 consultation record over the last 10 years, as compiled in our PCTS database, to identify the types of Federal activities that may adversely affect Atlantic sturgeon critical habitat. We also requested that Federal action agencies provide us with information on future consultations if we omitted any future actions likely to affect the proposed critical habitat. No new categories of activities were identified through this process. Of the types of past consultations that “may affect” some or all of the PBF(s) in any unit of critical habitat, we determined that no activities would solely affect the PBFs essential for conservation. That is, all categories of the activities we identified that could impact the PBFs also had the potential of “take” resulting from the listing of the species.

In the proposed rule we identified 15 categories of activities implemented by 10 different Federal entities as likely to recur in the future and have the potential to affect the PBF(s). Based on comments from EPA, we added a category for EPA for the triennial approval of state water quality standards. Listed below is the agency, description of the activity, and total number of projected consultations anticipated over the next 10 years indicated in parentheses:

1. USACE—Navigation maintenance dredging, harbor expansion (14);
2. USACE—Water Resources Development Act (WRDA) flood control, ecosystem restoration studies (6);
3. USACE—WRDA dam operations, repair, fishway construction (3);
4. USACE—Clean Water Act (CWA) section 404/Rivers and Harbors Act (RHA) section 10 permitting—dredge, fill, construction (20);
5. Federal Highway Administration (FHWA)—Bridge repair, replacement (67);
6. U.S. Coast Guard (USCG)—Bridge repair, replacement permitting (3);
7. FERC—Hydropower licensing (5);
8. FERC—Liquefied Natural Gas (LNG) facilities, pipelines authorization (5);
9. Nuclear Regulatory Commission (NRC)—Nuclear power plant construction/operation licensing (8);

10. NMFS—ESA research and incidental take permitting (section 10) (46);

11. USFWS—Fishery management grants (11);

12. EPA—Nationwide pesticide authorizations (9);

13. EPA—State water quality standard reviews (12);

14. Federal Emergency Management Agency (FEMA)—Disaster assistance/preparation grants (5); and

15. Department of Energy (DOE)—Nuclear fuel management (3).

In total, we estimated that 217 activities would require section 7 consultation over the next 10 years to consider impacts to Atlantic sturgeon critical habitat for the Carolina and South Atlantic DPSs. As discussed in more detail in our final IA, all the activities identified as having the potential to adversely affect one or more of the PBF(s) also have the potential to take Atlantic sturgeon. For most, if not all, of the projected future activities, if the effects to critical habitat will be adverse and require formal consultation, those effects would also constitute adverse effects to the species, either directly when they are in the project area, or indirectly due to the effects on their critical habitat. This is due to the ecological functions of these PBFs. For example, water quality is being identified as an essential PBF to facilitate successful spawning, annual and inter-annual adult, larval, and juvenile survival, and larval, juvenile and subadult growth, development, and recruitment. Effects to the water quality PBF that impede that conservation objective could injure or kill individual Atlantic sturgeon, for example, by preventing adult reproduction, or rendering reproduction ineffective or resulting in reduced growth or mortality of larvae, juveniles or subadults. In these circumstances, the same project modifications would be required to address effects to both the species and effects to the critical habitat. Thus, projects that adversely affect the PBF(s) are likely to always also take the species and the project impacts would not be incremental.

For some of the projected activities, it may be feasible to conduct the action when sturgeon are out of the action area. If effects to critical habitat are temporary such that the PBF(s) return to their pre-project condition by the time the sturgeon return and rely on the PBFs, there might not be any adverse effects to either the species or the critical habitat. In these circumstances, consultations would be fully incremental consultations only on critical habitat, and the consultations would be informal (*i.e.*, impacts to critical habitat would not be permanent and would not be

significant). This would likely only apply to actions that affect spawning habitat in the upper parts of the rivers, as sturgeon of various ages are present year-round in the lower reaches of the rivers and the estuaries. The costs of fully incremental, informal consultations are higher than the marginal costs of adding critical habitat analyses to coextensive, formal consultations. Thus, to be conservative and avoid underestimating incremental impacts of this designation, and based on the activities we identified, we assumed that two categories of activities could result in incremental, informal consultations. Those activities, both implemented by the USACE, are CWA section 404/Rivers and Harbors Act permitting and WRDA dam operations/repair. Administrative costs include the cost of time spent in meetings, preparing letters, and in some cases, developing a biological assessment and biological opinion, identifying and designing reasonable and prudent measures (RPMs), and so forth. For this impacts report, we estimated per-project administrative costs based on critical habitat economic analyses by Industrial Economics, Inc. (IEC) (2014). This impacts report estimates administrative costs for different categories of consultations as follows: (1) New consultations resulting entirely from critical habitat designation; (2) new consultations considering only adverse modification (unoccupied habitat); (3) reinitiation of consultation to address adverse modification; and (4) additional consultation effort to address adverse modification in a new consultation. Most of the projected future consultations we project to result from this final rulemaking will be coextensive formal consultations on new actions that would be evaluating impacts to sturgeon as well as impacts to critical habitat, and the administrative costs for these 194 consultations would be in category 4 above. The remaining 23 actions are projected to involve incremental informal consultation due to impacts to critical habitat alone. Based on the IEC reports (2014), we project that each formal consultation will result in the following additional costs to address critical habitat impacts: \$1,400 in costs to us; \$1,600 in action agency costs; \$880 in third party (*e.g.*, permittee) costs, if applicable; and \$1,200 in costs to the action agency or third party to prepare a biological assessment. Costs for the incremental informal consultations would be as follows: \$1,900 in costs to us; \$2,300 in action agency costs; \$1,500 in third party (*e.g.*,

permittee) costs, if applicable; and \$1,500 in costs to the action agency or third party to prepare a BA.

Costs of the nine EPA nationwide pesticide consultations were treated differently. These consultations will involve all listed species and all designated critical habitat under our jurisdiction, and thus costs attributable solely to this final rule designating critical habitat for Atlantic sturgeon are expected to be only a very small part of that cost. To be conservative, we added nine consultations to each critical habitat unit for all five DPSs. We spread the costs of these 9 consultations (\$5,080 each) evenly across all 31 critical habitat units. This resulted in a total cost of \$1,474.84 per unit over 10 years.

The 12 consultations on EPA approval of state water quality standards were also treated differently. EPA expects to conduct three statewide consultations regarding their approval of state water quality standards in each of the four states covered by the designation of critical habitat for the Carolina and South Atlantic DPSs. For these two DPSs, we have split the incremental administrative costs of 3 statewide consultations (\$15,240) equally across all the units within each state, added these costs to the 10-year totals, and derived the annual totals from these figures, because these are not annual actions. We added the costs projected across two states to units that occur in two states. Total costs for these consultations are \$3,048 per unit in North Carolina, \$2,540 per unit in Georgia, and \$2,177.14 in South Carolina. Costs for units bordering 2 states are \$5,225.14 in the Pee Dee River unit, \$4,717.14 in the Savannah River unit, and \$17,780 in the St. Marys unit (the costs of the 3 statewide water quality standards (WQS) consultations in Florida are attributed wholly to this single unit in the state, added to the costs of Georgia WQS consultations). We have added three consultations to the number expected in each unit, but the total number of consultations for each DPS consists of three consultations per each state with units in that DPS. This approach avoids underestimating the costs in any unit but would overestimate the total costs expected.

In our impacts analysis, we concluded that none of the projected future activities are likely to require project modifications to avoid adverse effects to critical habitat PBFs that would be different from modifications required to avoid adverse effects to sturgeon. In other words, we projected no incremental costs for actions in a critical habitat unit other than the

administrative costs of section 7 consultations. While there may be serious adverse impacts to critical habitat from projected future projects that require project modifications to avoid destroying or adversely modifying critical habitat, impacts of these magnitudes to the PBF(s) as defined would also result in adverse effects to Atlantic sturgeon, either directly when they are in the project area, or indirectly as harm, resulting from impacts to their habitat that result in injury or death. The same project modifications would be required to avoid destroying or adversely modifying critical habitat and avoiding jeopardy, or minimizing take of Atlantic sturgeon caused by impacts to its habitat.

Based on our final Impacts Analysis for the Carolina and South Atlantic DPSs, we project that the costs that will result from the designation of critical habitat will total \$1,154,475 over the next 10 years. The total incremental cost resulting from the designation for the Carolina DPS is \$526,447, and the total incremental cost resulting from the designation for the South Atlantic DPS is \$628,027, over 10 years. The annual cost per-unit ranges widely from \$873 (Carolina Unit 6—Black River, Carolina DPS) to \$23,523 (South Atlantic Unit 3—Occupied Savannah River, South Atlantic DPS).

#### *National Security Impacts of Designating Critical Habitat for the Carolina and South Atlantic DPSs*

Previous critical habitat designations have recognized that impacts to national security result if a designation would trigger future ESA section 7 consultations because a proposed military activity “may affect” the PBFs essential to the listed species’ conservation. Anticipated interference with mission-essential training or testing or unit readiness, through the additional commitment of resources to an adverse modification analysis and expected requirements to modify the action to prevent adverse modification of critical habitat, has been identified as a negative impact of critical habitat designations. (See, e.g., Proposed Designation of Critical Habitat for Southern Resident Killer Whales; 69 FR 75608, Dec. 17, 2004, at 75633.)

On February 14, 2014, and again in October 7, 2015, we sent letters to the DOD and the Department of Homeland Security requesting information on national security impacts of the proposed critical habitat designations, and we received responses from the Navy, Air Force, Army, and USCG. We discuss the information contained within the responses thoroughly in the

Impacts Analysis, and we summarize the information below.

The Navy’s first submission provided information on its facilities and operations. However, the Navy was not able to make a full assessment of whether there would be any national security impacts. The Navy indicated that as we define our PBF(s) and areas more precisely, they would be able to provide a more detailed response to our requests and would update their INRMPs as necessary for the protection of Atlantic sturgeon and its critical habitat. The Navy’s second submission noted that Naval Submarine Base Kings Bay was adjacent to the South Atlantic DPS critical habitat unit in the St. Marys River. The Navy stated it did not own or control any land or waters within the St. Marys channel, but that the TRIDENT-class submarines used 4.9 km of the waterway transiting to and from the Atlantic Ocean. The Navy stated that any operational or dredging restrictions that would impede maintenance of the channel from the Intracoastal Waterway and St. Marys channel intersection, downstream, could pose a national security risk. Typically we consult with the USACE for dredging actions, and in this case the Navy would be the permit applicant. We determined that dredging has the potential to affect critical habitat, but we also concluded that consultations for effects of dredging on critical habitat will be fully-coextensive with consultations to address impacts to sturgeon (both shortnose and Atlantic). The effects of dredging on PBF(s) would also result in injury or death to individual sturgeon, and thus constitute take. Removal or covering of spawning substrate could prevent effective spawning or result in death of eggs or larvae that are spawned. Changing the salinity regime by deepening harbors and parts of rivers could result in permanent decreases of available foraging and developmental habitat for juveniles. These types of adverse effects are not likely to be temporary and limited to periods of sturgeon absence. Thus, adverse effects of dredging activities identified by the Navy would be likely to be coextensive in formal consultations to address impacts to both the species and the PBF(s), and thus no new requirements or project modifications are anticipated as a result of the critical habitat designation. Therefore, after considering the action identified by the Navy at Kings Bay, we find there will be no impact on national security as a consequence of the critical habitat designation for these actions.

Both the Navy and Air Force expressed concern that designating the Cooper River, including the riverine

area on the west bank adjacent to the Joint Base Charleston Naval Weapons Station, could have significant impacts on the Navy's ability to adequately support mission-essential military operations, thereby impacting national security. The Navy and Air Force were concerned that designation of critical habitat could affect training facilities and the maintenance of their facilities. Additional concerns were expressed regarding shipping and receiving operations from two waterfront facilities. Because no specifics were given on how designation of critical habitat could affect these activities, and because we determined there are no routes of effects to PBF(s) from these activities based on the information provided, we concluded that designation of critical habitat will have no impact on these activities and thus will not result in impacts to national security. Upon further discussion with the Navy, we determined the area was covered by the 2015 INRMP and should not be included as critical habitat pursuant to ESA section 4(a)(3)(B)(i) (see *Consideration of Whether the Joint Base Charleston INRMP Provides a Conservation Benefit to the Carolina DPS* above).

The Army noted that Military Ocean Terminal-Sunny Point was located on the Cape Fear River, North Carolina, and Fort Stewart was located on the Ogeechee River, Georgia. The Army was not able to make a full assessment whether there would be any national security impacts and concluded that technical assessments to occur between the installations and NMFS at the regional level would identify any specific impacts.

The USCG provided information on its facilities and operations. The USCG was not able to make a full assessment whether there would be any national security impacts. The USCG indicated that as we develop our PBF(s) and areas more precisely in the final rule, they would be able to provide a more detailed response to our requests. Our PCTS database indicated the USCG consulted with us three times on authorizations for bridge repairs or replacements. In developing this final rule we determined if those actions were conducted in the future, the activities may affect critical habitat PBFs, but the effects would be fully coextensive with effects to the listed sturgeons. Based on this information regarding potential future USCG action in Atlantic sturgeon critical habitat, we do not expect any national security impacts as a consequence of the critical habitat designation.

Based on a review of our PCTS database, and the information provided by the Navy, Air Force, Army, and USCG on their activities conducted within the specific areas being designated as Atlantic sturgeon critical habitat, we determined that only one military action identified as a potential area of national security impact has routes of potential adverse effects to PBF(s)—river channel dredging. As discussed, this activity will require consultation due to potential impacts to listed Atlantic and shortnose sturgeon, and any project modifications needed to address impacts to these species would also address impacts to critical habitat. Thus, no incremental project modification impacts are expected due to this designation. On this basis, we conclude there will be no national security impacts associated with the critical habitat designation for the Carolina and South Atlantic DPSs of Atlantic sturgeon.

#### *Other Relevant Impacts*

Other relevant impacts of critical habitat designations can include conservation benefits to the species and to society, and impacts to governmental and private entities. The Impacts Analysis for the designation of critical habitat for the Carolina and South Atlantic DPSs discusses conservation benefits of designating the 14 occupied and 2 unoccupied areas, and the benefits of conserving the Carolina and South Atlantic sturgeon DPSs to society, in both ecological and economic metrics.

As discussed in the Impacts Analysis for the Carolina and South Atlantic DPSs and summarized here, Atlantic sturgeon currently provide a range of benefits to society. Given the positive benefits of protecting the PBFs essential to the conservation of these DPSs, this protection will in turn contribute to an increase in the benefits of this species to society in the future as the species recovers. While we cannot quantify nor monetize these benefits, we believe they are not negligible and would be an incremental benefit of this designation. However, although the PBFs are essential to the conservation of Atlantic sturgeon DPSs, critical habitat designation alone will not bring about the recovery of the species. The benefits of conserving Atlantic sturgeon are, and will continue to be, the result of several laws and regulations.

The Impacts Analysis identifies both consumptive (e.g., commercial and recreational fishing) and non-consumptive (e.g., wildlife viewing) activities that occur in the areas being designated as critical habitat.

Commercial and recreational fishing are components of the economy related to the ecosystem services provided by the resources within Atlantic sturgeon critical habitat areas. The PBF(s) contribute to fish species diversity.

Education and awareness benefits stem from the critical habitat designation when non-Federal government entities or members of the general public responsible for, or interested in, Atlantic sturgeon conservation change their behavior or activities when they become aware of the designation and the importance of the critical habitat areas and features. Designation of critical habitat raises the public's awareness that there are special considerations that may need to be taken within the area. Similarly, state and local governments may be prompted to carry out programs to complement the critical habitat designation and benefit the Carolina and South Atlantic DPSs of Atlantic sturgeon. Those programs would likely result in additional impacts of the designation. However, it is impossible to quantify the beneficial effects of the awareness gained or the secondary impacts from state and local programs resulting from the critical habitat designation.

#### *Discretionary Exclusions Under Section 4(b)(2) for the Carolina and South Atlantic DPSs*

In our proposed rule, we described our preliminary determination that we would not perform a discretionary exclusion analysis. Input received during the public comment period resulted in our determination that an exclusion analysis for the unoccupied Santee-Cooper and Savannah River units was warranted. On the other hand, given that occupied units are currently used by Atlantic sturgeon for reproduction and recruitment, and due to the severely depressed levels of all river populations, occupied units are far too valuable to both the conservation and the continuing survival of Atlantic sturgeon to be considered for exclusion.

Based on the analysis included in our IA, the likely benefits of excluding the unoccupied Santee-Cooper and Savannah river units include avoiding consultation costs of \$23,972 and \$11,272 over ten years, respectively. In addition, there may be ancillary benefits of exclusion to Federal agencies that would conduct activities in these areas, and to their project applicants.

Our qualitative analysis of the benefits derived from designation include benefits associated with section 7 consultations (e.g., proactive coordination with other federal agencies



to avoid impacts to critical habitat); increased likelihood of specifically protecting habitat necessary for Atlantic sturgeon recovery; and opportunities for federal agency conservation programs under section 7(a)(1) of the ESA. These benefits would be limited in the unoccupied Santee-Cooper and Savannah River units, given the low number of unique federal agency actions projected to require consultation over the next ten years (4 and 1 action, respectively). Other benefits of designation include ancillary benefits to other commercially-important aquatic species associated with Atlantic sturgeon habitat; non-use values for sturgeon and their habitats; and increased state, local and public awareness of the importance of these areas, that could generate non-federal conservation efforts and benefits. As we discuss in the IA, given the particular facts and circumstances for these DPSs and this critical habitat designation, it is likely that many or most of these benefits will result from baseline protections for sturgeon and their habitats, even if the unoccupied areas are excluded from the designation. As such, we do not conclude that conservation and recovery of the Carolina and South Atlantic DPSs would be impaired by excluding these areas from the designation.

We determined the potential economic impacts of the designation of unoccupied critical habitat are relatively small. We determined there are significant conservation benefits associated with designation of unoccupied critical habitat, but we could not conclude that these benefits are incremental impacts of including the unoccupied units in the designation. Therefore, it is our judgment that the benefits of excluding the unoccupied Santee-Cooper and Savannah River units outweigh the benefits of including these units in the designation.

Exclusion of these unoccupied units will not result in the extinction of the Carolina or South Atlantic DPS of Atlantic sturgeon. Atlantic sturgeon will need the additional spawning habitat in these units to increase their reproductive success and population growth in order to recover, and thus if these habitats were lost to sturgeon they would not recover. However, based on the Federal actions expected to occur in these areas over the next ten years, and because the areas are protected through a number of baseline requirements including the listing of shortnose sturgeon, we do not expect impacts to these areas would prevent them from supporting Atlantic sturgeon

conservation once fish passage to these areas is established in the near future.

We also note that FERC and USACE submitted some significant new information late during the interagency review process on the final rule, outside of the public comment period. One agency suggested exclusion of unoccupied critical habitat was needed to prevent third party litigation seeking fish passage or removal of dams the agency owns and operates on the Cape Fear River to allow migration of sturgeon. That agency estimated the average cost to provide fish passage would range from \$8 million and \$15 million. The other agency submitted hypothetical costs that might result if consultation were required solely to protect unoccupied critical habitat from the effects of numerous facilities they regulate in the watersheds extending hundreds of miles above the proposed unoccupied units. Cost estimates provided by that agency ranged from \$0 to over \$1.7 million annually for the range of facilities identified. Those estimates were projected based on past environmental compliance costs for similar facilities. We decided to remove the unoccupied Cape Fear unit because it is not essential to sturgeon conservation. Because we decided to exclude the unoccupied Santee-Cooper and Savannah River units based on the impacts identified in our proposed impacts assessment, and because the public was not afforded an opportunity to review and comment on the new cost information and assumptions, consideration of this late input was not necessary and did not play a role in our determinations. If the types of impacts identified by these agencies would be potential impacts of including the unoccupied units in the designation, it would bolster our conclusion that the benefits of exclusion outweigh the benefits of inclusion.

#### Final Determinations and Critical Habitat Designation

We conclude that specific areas meet the definition of critical habitat for the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs of Atlantic sturgeon, that a critical habitat designation is prudent, and that critical habitat is determinable.

We found approximately 244 km (152 miles) of aquatic habitat within the Penobscot, Kennebec, Androscoggin, Piscataqua, Cocheco, Salmon Falls, and Merrimack Rivers are critical habitat for the Gulf of Maine DPS of Atlantic sturgeon. We found approximately 547 km (340 miles) of aquatic habitat within the Connecticut, Housatonic, Hudson, and Delaware Rivers are critical habitat

for the New York Bight DPS of Atlantic sturgeon. We found approximately 773 km (480 miles) of aquatic habitat within the Potomac, Rappahannock, York, Pamunkey, Mattaponi, James, Nanticoke Rivers and Marshyhope Creek are critical habitat for the Chesapeake Bay DPS of Atlantic sturgeon.

We found approximately 1,939 km (1,205 miles) of aquatic habitat within the Roanoke, Tar-Pamlico, Neuse, Cape Fear, Northeast Cape Fear, Waccamaw, Pee Dee, Black, Santee, North Santee, South Santee, and Cooper Rivers and Bull Creek are critical habitat for the Carolina DPS of Atlantic sturgeon.

Likewise, we found approximately 2,883 km (1,791 miles) of aquatic habitat within the Edisto, Combahee-Salkehatchie, Savannah, Ogeechee, Altamaha, Ocmulgee, Oconee, Satilla, and St. Marys Rivers are critical habitat for the South Atlantic DPS of Atlantic sturgeon.

#### Activities That May Be Affected

Section 4(b)(8) of the ESA requires that to the maximum extent practicable, we describe briefly and evaluate, in any proposed or final regulation to designate critical habitat, those activities that may destroy or adversely modify such habitat or that may be affected by such designation. As described in our Impacts Analysis and Biological Source Document for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon, and in our final Impacts Analysis for the Carolina and South Atlantic DPSs of Atlantic sturgeon, a wide variety of activities may affect critical habitat and, when carried out, funded, or authorized by a Federal agency, will require an ESA section 7 consultation because they may affect one or more of the PBFs of critical habitat. Such activities include in-water construction for a variety of Federal actions, dredging for navigation, harbor expansion or sand and gravel mining, flood control projects, bridge repair and replacement, hydropower licensing, natural gas facility and pipeline construction, ESA research and incidental take permits or fishery research grants, and CWA TMDL program management. Private entities may also be affected by these critical habitat designations if they are a proponent of a project that requires a Federal permit, Federal funding is received, or the entity is involved in or receives benefits from a Federal project. Future activities will need to be evaluated with respect to their potential to destroy or adversely modify critical habitat. For example, activities may adversely modify the substrate essential PBF by removing or altering the

substrate. The open passage PBF may be adversely modified by the placement of structures such as dams and tidal turbines, research nets, or altering the water depth so that fish cannot swim. The salinity PBF may be adversely modified by activities that impact fresh water input such as operation of water control structures and water withdrawals, and impacts to water depth such as dredging. The water quality PBF may be adversely modified by land development as well as commercial and recreational activities on rivers that contribute to nutrient loading that could result in decreased DO levels and increased water temperature, and increased sediment deposition that reduces Atlantic sturgeon egg adherence on hard spawning substrate and reduces the interstitial spaces used by larvae for refuge from predators. Dredging to remove sediment build-up or to facilitate vessel traffic may remove or alter hard substrate that is necessary for egg adherence and as refuge for larvae, and may change the water depth resulting in shifts in the salt wedge within the estuary or change other characteristics of the water quality (e.g., temperature, DO) necessary for the developing eggs, larvae, and juveniles. These activities would require ESA section 7 consultation when they are implemented, funded, or carried out by a Federal agency.

We believe this critical habitat designation provides Federal agencies, private entities, and the public with clear notification of critical habitat for the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs of Atlantic sturgeon, the PBF(s), and the boundaries of those habitats. These designations allow Federal agencies and others to evaluate the potential effects of their activities on critical habitat to determine if ESA section 7 consultation with us is needed, given the specific definition of each PBF.

#### Information Quality Act and Peer Review

On December 16, 2004, the Office of Management and Budget (OMB) issued its Final Information Quality Bulletin for Peer Review (Bulletin), establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Pub. L. 106–554), is intended to enhance the quality and credibility of the Federal Government's scientific information and applies to influential scientific

information or highly influential scientific assessments disseminated on or after June 16, 2005. The biological information describing the Atlantic sturgeon DPSs, and the information in the draft economic impacts analyses supporting the critical habitat designation for the five DPSs is considered influential scientific information and subject to peer review. To satisfy our requirements under the OMB Bulletin, we obtained independent peer review of the biological information and the information used to draft the impacts analyses. We incorporated the peer review comments into the proposed rules prior to dissemination. Comments received from peer reviewers were summarized and are available on the web at: [http://www.cio.noaa.gov/services\\_programs/prplans/ID294.html](http://www.cio.noaa.gov/services_programs/prplans/ID294.html) and [http://www.cio.noaa.gov/services\\_programs/prplans/ID336.html](http://www.cio.noaa.gov/services_programs/prplans/ID336.html).

#### Classification

##### *National Environmental Policy Act*

We have determined that an environmental analysis as provided for under the National Environmental Policy Act of 1969 for critical habitat designations made pursuant to the ESA is not required. See *Markle Interests, L.L.C. v. U.S. Fish and Wildlife Serv.*, 827 F.3d 452 (5th Cir. 2016); *Bldg. Indus. Ass'n of the Bay Area v. U.S. Dept. of Commerce*, 792 F.3d 1027 (9th Cir. 2015); *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996).

##### *Regulatory Flexibility Act Determinations*

The ESA does not require use of any particular methodology in the consideration of impacts pursuant to section 4(b)(2) (see, e.g., *Building Industry Association of the Bay Area v. U.S. Department of Commerce*, 792 F.3d 1027 (9th Cir. 2015)). In preparing the rules proposing critical habitat for the Atlantic sturgeon DPSs, we used different methodologies to conduct the respective impacts analyses. While those differences in analyses are reflected below, we note the conclusions are the same, i.e., that designation of critical habitat for the five DPSs of Atlantic sturgeon will not have significant economic impacts on small entities. The Final Regulatory Flexibility Analyses (FRFA) were prepared pursuant to section 604 of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.). A FRFA includes: A statement of the need for, and objectives of, the rule; a statement of the significant issues raised by the public comments in

response to the initial regulatory flexibility analysis (IRFA), a statement of the assessment by the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments; a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available; a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and, a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected. We received no comments specifically on the IRFAs from the public or from the Chief Counsel for Advocacy of the SBA. The FRFA for the Regulatory Flexibility Act determinations for the Gulf of Maine, New York Bight and Chesapeake Bay DPSs and the FRFA for the Regulatory Flexibility Act determinations for the Carolina and South Atlantic DPSs of Atlantic sturgeon analyze the impacts of this rule on small entities, are included as Appendix A of the respective Impacts Analysis, and are available upon request (see ADDRESSES). A summary of each analysis follows.

##### *Regulatory Flexibility Act Determinations for the Gulf of Maine, New York Bight and Chesapeake Bay DPSs (5 U.S.C. 601 et seq.)*

As explained in the FRFA for the Gulf of Maine, New York Bight and Chesapeake Bay DPSs, the economic analysis described and estimated the number of small entities to which this rule may apply. These estimates are based on the best available information and take into account uncertainty. Using the number of employees as the criteria for determining whether or not an establishment is a small business, on average, 99 percent of businesses in the counties and cities in which the

proposed Atlantic sturgeon critical habitat units occur are considered small businesses. For purposes of projecting the impacts of administrative ESA section 7 costs on small businesses in each critical habitat unit, it was assumed that the percentage of private entities that are involved in those consultations that are small businesses is the same as the percentage of businesses that are small businesses in counties that include critical habitat units.

To address uncertainty, costs were estimated as low, medium, and high. However, this approach likely overestimates the costs because the majority of consultations have been informal and, thus, have lower costs than formal consultations. In addition, this analysis was based on the critical habitat areas as defined by hydrographic unit codes. We subsequently revised and narrowed how we define the boundaries of the critical habitat units. As a result, fewer small businesses are likely to be affected by the critical habitat designations than were projected based on the information available to the economist at that time. Finally, because Atlantic sturgeon are present in the areas that we are designating as critical habitat, consultation is likely to have occurred even if critical habitat was not designated. Therefore, the section 7 consultation costs attributed to the designation of critical habitat, alone, are likely to be very small.

We considered the effect to small businesses throughout our analysis and, as stated above, there will be no significant economic impact to small businesses; therefore, it was unnecessary to make any changes from the proposed rule with the goal of minimizing any significant economic impacts on small entities. It is unlikely that the rule will significantly reduce profits or revenue for small businesses. The administrative costs of ESA section 7 consultation are likely to be small given, in the absence of critical habitat designation, nearly the same number and type of consultations would have occurred to consider the effects of Federal actions on the Atlantic sturgeon DPSs.

In the IRFA, we considered the alternative of not proposing critical habitat for the Gulf of Maine, New York Bight, or Chesapeake Bay DPS. We rejected this alternative because we determined the PBFs forming the basis for the critical habitat designations are essential to the conservation of the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs. The lack of protection of the critical habitat PBFs from adverse modification and/or

destruction could result in continued declines in abundance of these Atlantic sturgeon DPSs, would not provide for the conservation of the DPSs, and would not meet the legal requirements of the ESA.

We also analyzed designating a subset of the identified critical habitat areas. We rejected this alternative because designating only some of the areas containing the PBFs that are essential to the conservation of each DPS would not provide for the conservation of the DPSs and, thus, this alternative does not meet the legal requirements of the ESA.

Finally, we analyzed designating all critical habitat areas identified for the DPS. We analyzed the economic, national security, and other relevant impacts of designating critical habitat. Our conservative identification of potential, incremental, economic impacts indicates that any such impacts, if they were to occur, would be very small. Any incremental economic impacts will consist solely of the administrative costs of consultation; no project modifications are projected to be required to address impacts solely to the proposed critical habitat. There are conservation benefits of the critical habitat designations, both to the species and to society. While we cannot quantify nor monetize these benefits, we believe they are not negligible and are an incremental effect of the designations.

This final rule does not introduce any new reporting, record-keeping requirements, or other compliance requirements.

#### *Regulatory Flexibility Act Determinations for the Carolina and Southeast DPSs*

As explained in the FRFA for the Carolina and Southeast DPSs, this final rule is needed to comply with the ESA's requirement to designate critical habitat to the maximum extent prudent and determinable when species are listed as threatened or endangered. The objective of this rule is to identify Atlantic sturgeon habitat areas and features, the protection of which will support the conservation of these endangered DPSs.

The FRFA estimates the number of small entities to which the rule may apply, based on the information in the Impacts Report. The SBA has established size standards for all for-profit economic activities or industries in the North American Industry Classification System (13 CFR 121.201; 78 FR 37398; June 20, 2013; 78 FR 77343, December 23, 2013; 79 FR 33467, June 12, 2014) ([https://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf)).

Businesses in North American Industry Classification System (NAICS) Subsector 325320, Pesticide and Other Agricultural Chemical Manufacturing, could be involved in 5 projected nationwide pesticide authorization consultations. A small business in this subsector is defined by the SBA as having 1,000 employees. Businesses in NAICS Sector 22 (Utilities) could be involved in 14 consultations projected to occur for hydropower licensing, LNG facility or pipelines authorization, or nuclear power plant construction/operation licensing. For hydropower generation and natural gas distribution enterprises, a small business is defined by the SBA as one having a total of 500 employees. For nuclear power generation, a small business is defined by the SBA as one having a total of 750 employees. Businesses in NAICS Sector 54 could be involved as contractors assisting with ESA section 7 consultation in any of the 155 projected future Federal actions that could involve third parties. Relevant subsectors could include 541370, Surveying and Mapping, 541620, Environmental Consulting Services, or 541690, Other Scientific and Technical Consulting Services. A small business in any of these subsectors is defined by the SBA as one having average annual receipts of \$15 million.

Businesses in NAICS Sector 23, Construction, could be involved in a number of categories of projected future actions, where they could incur administrative costs of construction. These could include businesses from the subsector 237120, Oil and Gas Pipeline and Related Structures Construction, or subsector 237310, Highway, Street, and Bridge Construction. A small business in subsector 237120 has average annual receipts of \$36.5 million, and a small business in subsector 237310 has average annual receipts of \$36.5 million. Businesses in subsector 238, Other Specialty Trade Contractors, could be involved as construction contractors in 20 future USACE section 404/RHA permitting actions and 5 FEMA disaster assistance actions. Small businesses in this subsector have average annual receipts of \$15 million.

Cities could be involved in many of the 70 projected bridge repair or replacement projects, and some proportion of the 20 projected section 404/RHA permitting actions. The SBA defines a small governmental jurisdiction as cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.

Our consultation database does not track the identity of past third parties involved in consultations, or whether the third parties were small entities; therefore we have no basis to determine the percentage of the 155 third parties that may potentially be involved in future consultations due to impacts to critical habitat that may be small businesses, small nonprofits or small government jurisdictions.

There is no indication in the data evaluated in the Impacts Analysis Report, which serves as the basis for this FRFA, that the designation would place small entities at a competitive disadvantage compared to large entities. Incremental economic impacts due to the designation for the Carolina and South Atlantic DPSs will be minimal overall. These costs will result from participation in the Section 7 consultation process, and will be spread over 14 critical habitat units totaling over 2,996 river miles (4,822 rkm) in 4 states. Federal agencies will bear the majority of the costs (59 percent to 83 percent), which will be limited to administrative costs of consultation for all parties involved. There are no apparent concentrations of costs. For most if not all of the Federal activities predicted to occur in the next 10 years, if the effects to critical habitat will be adverse and require formal consultation, those effects would also constitute adverse effects to Atlantic sturgeon or shortnose sturgeon, either directly when they are in the project area, or indirectly due to the effects on their habitat, and these consultations would be coextensive formal consultations. Assuming a third party would be involved and incur costs for each of the 179 projects in all of the categories of Federal activity that involved third parties in the past, the costs to third parties that could be involved in the projected future consultations other than those with EPA would be between \$880 and \$2,080 for each action for coextensive formal consultations, and between \$1,500 and \$3,000 for each of the 23 fully incremental informal consultations we conservatively estimated could be required due to the rule. The total costs over the next 10 years to all third parties for these 2 classes of actions would be between \$30,000 and \$60,000 for the incremental informal consultations and between \$136,400 and \$322,400 for the coextensive formal consultations. The total costs over the next 10 years to third parties involved in the EPA pesticides consultations are conservatively estimated to be \$25,072 across all units.

There are no record-keeping or reporting requirements associated with

the rule. Third parties would only be required to keep records or submit reports pursuant to ESA section 7 consultations on future proposed projects that may affect critical habitat. Similarly, there are no other compliance requirements in the rule. There are no professional skills necessary for preparation of any report or record.

We considered the effect to small businesses throughout our analysis and, as stated above, there will be no significant economic impact to small businesses. Changes from the proposed rule that would minimize significant economic impacts on small entities were therefore unnecessary.

In the IRFA, we considered the alternative of not proposing new critical habitat for the Carolina and South Atlantic DPSs of Atlantic sturgeon. We rejected this alternative because we determined designating critical habitat for Atlantic sturgeon is prudent and determinable, and the ESA requires critical habitat designation in that circumstance. In the IRFA, we also analyzed the alternative of including all large coastal rivers from the North Carolina/Virginia border southward to the St Johns River, Florida, in the designation, instead of just documented spawning rivers. This alternative would likely have involved many more consultations on Federal actions each year, potentially impacting many more small entities. Several large coastal rivers within the geographical area occupied by the Carolina and South Atlantic DPSs of Atlantic sturgeon do not appear to support spawning and juvenile recruitment or to contain suitable habitat features to support spawning and we determined it would not promote Atlantic sturgeon conservation by including those rivers in the rule.

#### *Consultation and Coordination With Indian Tribal Governments (Executive Order 13175)*

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, outlines the responsibilities of the Federal Government in matters affecting tribal interests. If NMFS issues a regulation with tribal implications (defined as having a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes), we must consult with those governments or the Federal Government must provide funds necessary to pay direct compliance costs incurred by tribal governments. The critical habitat designations for Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs do not have tribal implications because designated critical habitat will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### *Takings (Executive Order 12630)*

Under E.O. 12630, Federal agencies must consider the effects of their actions on constitutionally protected private property rights and avoid unnecessary takings of property. A taking of property includes actions that result in physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use. In accordance with E.O. 12630, this rule would not have significant takings implications. The designation of critical habitat for the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs of Atlantic sturgeon will not impose additional burdens on land use or affect property values. Therefore, a takings implication assessment is not required.

#### *Environmental Justice (Executive Order 12898)*

The designation of critical habitat is not expected to have a disproportionately high effect on minority populations or low-income populations.

#### *Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

This final rule will not produce a Federal mandate. The designation of critical habitat does not impose a legally-binding duty on non-Federal government entities or private parties. The only regulatory effect is that Federal agencies must ensure that their actions

do not destroy or adversely modify critical habitat under section 7 of the ESA. Non-Federal entities which receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, but the Federal agency has the legally binding duty to avoid destruction or adverse modification of critical habitat.

This rule will not significantly or uniquely affect small governments. Therefore, a Small Government Action Plan is not required.

*Regulatory Planning and Review (Executive Orders 12866 and 13771)*

The OMB determined that this final rule is significant under Executive Order 12866 because it may create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Final Economic and Regulatory Impact Review Analyses and 4(b)(2) analyses as set forth and referenced herein have been prepared to support the exclusion process under section 4(b)(2) of the ESA. To review these documents see **ADDRESSES** section above.

In addition, as explained above, OMB classified this rule as significant under E.O. 12866. Therefore, this final rule is considered an E.O. 13771 regulatory action. This rule is not subject to the requirements of E.O. 13771 because this rule results in no more than *de minimis* costs.

*Federalism (Executive Order 13132)*

Pursuant to the Executive Order on Federalism, E.O. 13132, we determined that this final rule does not have significant federalism effects and that a federalism assessment is not required. However, in keeping with Department of Commerce policies and consistent with ESA regulations at 50 CFR 424.16(c)(1)(ii), we requested information from, and coordinated this critical habitat designation with, appropriate state resource agencies in Maine, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, the District of Columbia, North Carolina, South Carolina, Georgia, and Florida.

*Coastal Zone Management Act*

Under section 307(c)(1)(A) of the Coastal Zone Management Act (CZMA) (16 U.S.C. 1456(c)(1)(A)) and its implementing regulations, each Federal activity within or outside the coastal zone that has reasonably foreseeable effects on any land or water use or natural resource of the coastal zone

shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State coastal management programs. We have determined that any effects of this designation of critical habitat on coastal uses and resources in Maine, New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida are not reasonably foreseeable at this time. However, the State of North Carolina suggested SERO's consistency determination regarding designating critical habitat was incomplete and did not meet the requirements of the CZMA and its implementing regulations. The State maintained SERO submitted an incomplete negative determination, because it had not provided an evaluation of the North Carolina coastal program's enforceable policies; SERO disagrees. While SERO recognizes the State's goals of coastal resource protection and economic development, it determined that any effects of the proposed action on North Carolina's coastal uses and resources are not reasonably foreseeable at this time. As indicated in SERO's negative determination, this designation of critical habitat will not restrict any coastal uses, affect land ownership, or establish a refuge or other conservation area; rather, the designation affects only the ESA section 7 consultation process for Federal actions. These consultations will consider effects of Federal actions on coastal uses and resources to the extent they overlap with critical habitat. We considered the range of Federal actions that this designation may affect (*e.g.*, dredging, bridge construction/repair, water withdrawals) and which may affect coastal uses and resources in the affected States. However, we do not have sufficient information on the specifics of any future activities (*e.g.*, when, where and how they will be carried out) to characterize any of these as reasonably foreseeable. Therefore, because the effects are not reasonably foreseeable, we cannot make a determination as to whether the Federal activities will be consistent with any enforceable policies of approved State coastal management programs. Through the consultation process, we will receive information on proposed Federal actions and their effects on listed species and the designated critical habitat. Any related biological opinions will analyze this information. It will then be up to the Federal action agencies to decide how to comply with the ESA in light of our biological

opinion, as well as to ensure that their actions comply with the CZMA's Federal consistency requirement. At this time, we do not anticipate that this designation is likely to result in any additional management measures by other Federal agencies.

*Energy Supply, Distribution, and Use (Executive Order 13211)*

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking an action expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under E.O. 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. OMB Guidance on Implementing E.O. 13211 (July 13, 2001) states that significant adverse effects could include any of the following outcomes compared to a world without the regulatory action under consideration: (1) Reductions in crude oil supply in excess of 10,000 barrels per day; (2) reductions in fuel production in excess of 4,000 barrels per day; (3) reductions in coal production in excess of 5 million tons per year; (4) reductions in natural gas production in excess of 25 million cubic feet per year; (5) reductions in electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 megawatts of installed capacity; (6) increases in energy use required by the regulatory action that exceed any of the thresholds above; (7) increases in the cost of energy production in excess of one percent; (8) increases in the cost of energy distribution in excess of one percent; or (9) other similarly adverse outcomes. A regulatory action could also have significant adverse effects if it: (1) Adversely affects in a material way the productivity, competition, or prices in the energy sector; (2) adversely affects in a material way productivity, competition or prices within a region; (3) creates a serious inconsistency or otherwise interferes with an action taken or planned by another agency regarding energy; or (4) raises novel legal or policy issues adversely affecting the supply, distribution or use of energy arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866 and 13211. We do not believe this rule will have a significant adverse effect on the supply, distribution, or use of energy. The only Federal actions we may consult on that may have material effects on energy are FERC hydropower licensing and Nuclear Regulatory Commission actions. These actions have the potential to adversely affect sturgeon as well as its

critical habitat, and thus most of the impacts of these consultations will not be incremental impacts of this rule. Moreover, the FPA, which FERC implements in issuing hydropower licenses, has independent requirements to avoid adverse effects on fisheries resources and habitats, and thus modifications to hydropower facilities to avoid impacts to critical habitat may also be coextensive with the FPA, and not incremental impacts of the designation. Therefore, we have not prepared a Statement of Energy Effects.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This final rule does not contain any new or revised collection of information. This rule, if adopted, would not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations.

#### References Cited

A complete list of all references cited in this rulemaking can be found on our Web sites at [http://sero.nmfs.noaa.gov/protected\\_resources/sturgeon/index.html](http://sero.nmfs.noaa.gov/protected_resources/sturgeon/index.html) and <https://www.greateratlantic.fisheries.noaa.gov/protected/atlsturgeon/> and is available upon request from the NMFS SERO and GARFO offices (see **ADDRESSES**).

#### List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: August 10, 2017.

#### Samuel D Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, we amend 50 CFR part 226 as follows:

#### PART 226—DESIGNATED CRITICAL HABITAT

- 1. The authority citation for part 226 continues to read as follows:

**Authority:** 16 U.S.C. 1533.

- 2. Add § 226.225 to read as follows:

**§ 226.225 Critical habitat for the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic distinct population segments (DPSs) of Atlantic Sturgeon.**

Critical habitat is designated for the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs of Atlantic sturgeon as described in paragraphs (a) through (h) of this section. The maps, clarified by the textual descriptions in paragraphs (d) through (h) of this section, are the

definitive source for determining the critical habitat boundaries.

(a) *Critical habitat for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon.* The physical features essential for the conservation of Atlantic sturgeon belonging to the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs are those habitat components that support successful reproduction and recruitment. These are:

(1) Hard bottom substrate (*e.g.*, rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (*i.e.*, 0.0–0.5 parts per thousand range) for settlement of fertilized eggs, refuge, growth, and development of early life stages;

(2) Aquatic habitat with a gradual downstream salinity gradient of 0.5 up to as high as 30 parts per thousand and soft substrate (*e.g.*, sand, mud) between the river mouth and spawning sites for juvenile foraging and physiological development;

(3) Water of appropriate depth and absent physical barriers to passage (*e.g.*, locks, dams, thermal plumes, turbidity, sound, reservoirs, gear, etc.) between the river mouth and spawning sites necessary to support:

(i) Unimpeded movement of adults to and from spawning sites;

(ii) Seasonal and physiologically dependent movement of juvenile Atlantic sturgeon to appropriate salinity zones within the river estuary; and

(iii) Staging, resting, or holding of subadults or spawning condition adults. Water depths in main river channels must also be deep enough (*e.g.*, at least 1.2 meters) to ensure continuous flow in the main channel at all times when any sturgeon life stage would be in the river;

(4) Water, between the river mouth and spawning sites, especially in the bottom meter of the water column, with the temperature, salinity, and oxygen values that, combined, support:

(i) Spawning;

(ii) Annual and interannual adult, subadult, larval, and juvenile survival; and

(iii) Larval, juvenile, and subadult growth, development, and recruitment (*e.g.*, 13 to 26 °C for spawning habitat and no more than 30 °C for juvenile rearing habitat, and 6 milligrams per liter (mg/L) or greater dissolved oxygen for juvenile rearing habitat).

(5) Pursuant to ESA section 4(a)(3)(B)(i), critical habitat for the New York Bight and Chesapeake Bay DPSs of Atlantic sturgeon does not include the following areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resource management plan prepared under

section 101 of the Sikes Act (16 U.S.C. 670a), and for which we have determined that such plan provides a conservation benefit to the species, and its habitat, for which critical habitat is designated.

(i) The Department of the Army, U.S. Military Academy—West Point, NY;

(ii) The Department of the Air Force, Joint Base Langley—Eustis, VA;

(iii) The Department of the Navy, Marine Corps Base Quantico, VA;

(iv) The Department of the Navy, Naval Weapons Station Yorktown, VA; and,

(v) The Department of the Navy, Naval Support Facility Dahlgren, VA.

(6) Pursuant to ESA section 3(5)(A)(i), critical habitat for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs of Atlantic sturgeon does not include existing (already constructed), as of September 18, 2017, manmade structures that do not provide the physical features such as aids-to-navigation (ATONs), artificial reefs, boat ramps, docks, or pilings within the legal boundaries of designated critical habitat.

(b) *Critical habitat for the Carolina and South Atlantic DPSs of Atlantic sturgeon.* The physical features essential for the conservation of Atlantic sturgeon belonging to the Carolina and South Atlantic DPSs are those habitat components that support successful reproduction and recruitment. These are:

(1) Hard bottom substrate (*e.g.*, rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (*i.e.*, 0.0–0.5 parts per thousand range) for settlement of fertilized eggs and refuge, growth, and development of early life stages;

(2) Aquatic habitat inclusive of waters with a gradual downstream gradient of 0.5 up to as high as 30 parts per thousand and soft substrate (*e.g.*, sand, mud) between the river mouth and spawning sites for juvenile foraging and physiological development;

(3) Water of appropriate depth and absent physical barriers to passage (*e.g.*, locks, dams, thermal plumes, turbidity, sound, reservoirs, gear, etc.) between the river mouth and spawning sites necessary to support:

(i) Unimpeded movement of adults to and from spawning sites;

(ii) Seasonal and physiologically dependent movement of juvenile Atlantic sturgeon to appropriate salinity zones within the river estuary; and

(iii) Staging, resting, or holding of subadults or spawning condition adults. Water depths in main river channels must also be deep enough (at least 1.2 meters) to ensure continuous flow in the

main channel at all times when any sturgeon life stage would be in the river;

(4) Water quality conditions, especially in the bottom meter of the water column, with temperature and oxygen values that support:

- (i) Spawning;
- (ii) Annual and inter-annual adult, subadult, larval, and juvenile survival; and
- (iii) Larval, juvenile, and subadult growth, development, and recruitment. Appropriate temperature and oxygen values will vary interdependently, and depending on salinity in a particular habitat. For example, 6.0 mg/L dissolved oxygen or greater likely supports juvenile rearing habitat,

whereas dissolved oxygen less than 5.0 mg/L for longer than 30 days is less likely to support rearing when water temperature is greater than 25 °C. In temperatures greater than 26 °C, dissolved oxygen greater than 4.3 mg/L is needed to protect survival and growth. Temperatures of 13 to 26 °C likely support spawning habitat.

(5) Pursuant to ESA section 4(a)(3)(B)(i), critical habitat for the Carolina DPS of Atlantic sturgeon does not include certain waters of the Cooper River, South Carolina, adjacent to Joint Base Charleston. These areas are described in 33 CFR 334.460(a)(8)(ii)–(iv), 33 CFR 334.460(a)(9), and 33 CFR 334.460(a)(10).

(6) Pursuant to ESA section 3(5)(A)(i), critical habitat for the Carolina and the South Atlantic DPSs of Atlantic sturgeon does not include existing (already constructed), as of September 18, 2017, manmade structures that do not provide the physical features such as aids-to-navigation (ATONs), artificial reefs, boat ramps, docks, or pilings within the legal boundaries of designated critical habitat.

(c) *States and counties affected by this critical habitat designation.* Critical habitat is designated for the following DPSs in the following states and counties:

DPS	State—Counties
Gulf of Maine .....	ME—Androscoggin, Cumberland, Kennebec, Lincoln, Penobscot, Sagadahoc, Somerset, Waldo, and York. NH—Rockingham and Stafford. MA—Essex.
New York Bight .....	CT—Fairfield, Hartford, Litchfield, Middlesex, New Haven, New London, and Tolland. NJ—Bergen, Burlington, Camden, Cape May, Cumberland, Gloucester, Hudson, Mercer, Monmouth, and Salem. NY—Albany, Bronx, Columbia, Dutchess, Greene, Kings, New York, Orange, Putnam, Queens, Rensselaer, Richmond, Rockland, Saratoga, Ulster, and Westchester. DE—Kent, New Castle, and Sussex. PA—Bucks, Delaware, and Philadelphia.
Chesapeake Bay .....	DC—District of Columbia. MD—Charles, Dorchester, Montgomery, Prince George's, St. Mary's, and Wicomico. VA—Arlington, Caroline, Charles City, Chesterfield, Dinwiddie, Essex, Fairfax, Gloucester, Hanover, Henrico, Isle of Wight, King George, James City, King and Queen, King William, Lancaster, Loudoun, Middlesex, New Kent, Northumberland, Prince George, Prince William, Richmond, Spotsylvania, Stafford, Surry, Westmoreland, and York.
Carolina .....	NC—Anson, Bertie, Beaufort, Brunswick, Carteret, Columbus, Craven, Duplin, Edgecombe, Halifax, Hyde, Johnston, Lenoir, Martin, Nash, New Hanover, Northampton, Pamlico, Pender, Pitt, Richmond, Wake, Washington, and Wayne. SC—Berkeley, Charleston, Chesterfield, Clarendon, Darlington, Dillon, Florence, Georgetown, Horry, Marion, Marlboro, and Williamsburg.
South Atlantic .....	SC—Aiken, Allendale, Bamberg, Barnwell, Beaufort, Charleston, Colleton, Dorchester, Edgefield, Hampton, and Jasper. GA—Appling, Atkinson, Baldwin, Ben Hill, Bibb, Bleckley, Brantley, Bryan, Bulloch, Burke, Camden, Charlton, Chatham, Coffee, Dodge, Effingham, Emanuel, Glascock, Glynn, Hancock, Houston, Jeff Davis, Jefferson, Jenkins, Johnson, Jones, Laurens, Long, McIntosh, Monroe, Montgomery, Pierce, Pulaski, Richmond, Screven, Tattnall, Telfair, Toombs, Treutlen, Twiggs, Ware, Warren, Washington, Wayne, Wheeler, Wilcox, and Wilkinson. FL—Baker and Nassau.

(d) *Critical habitat boundaries for the Gulf of Maine DPS.* Critical habitat for the Gulf of Maine DPS of Atlantic sturgeon is the waters of:

- (1) Penobscot River main stem from the Milford Dam downstream to where the main stem river drainage discharges at its mouth into Penobscot Bay;
- (2) Kennebec River main stem from the Ticonic Falls/Lockwood Dam downstream to where the main stem river discharges at its mouth into the Atlantic Ocean;

(3) Androscoggin River main stem from the Brunswick Dam downstream to where the main stem river drainage discharges into Merrymeeting Bay;

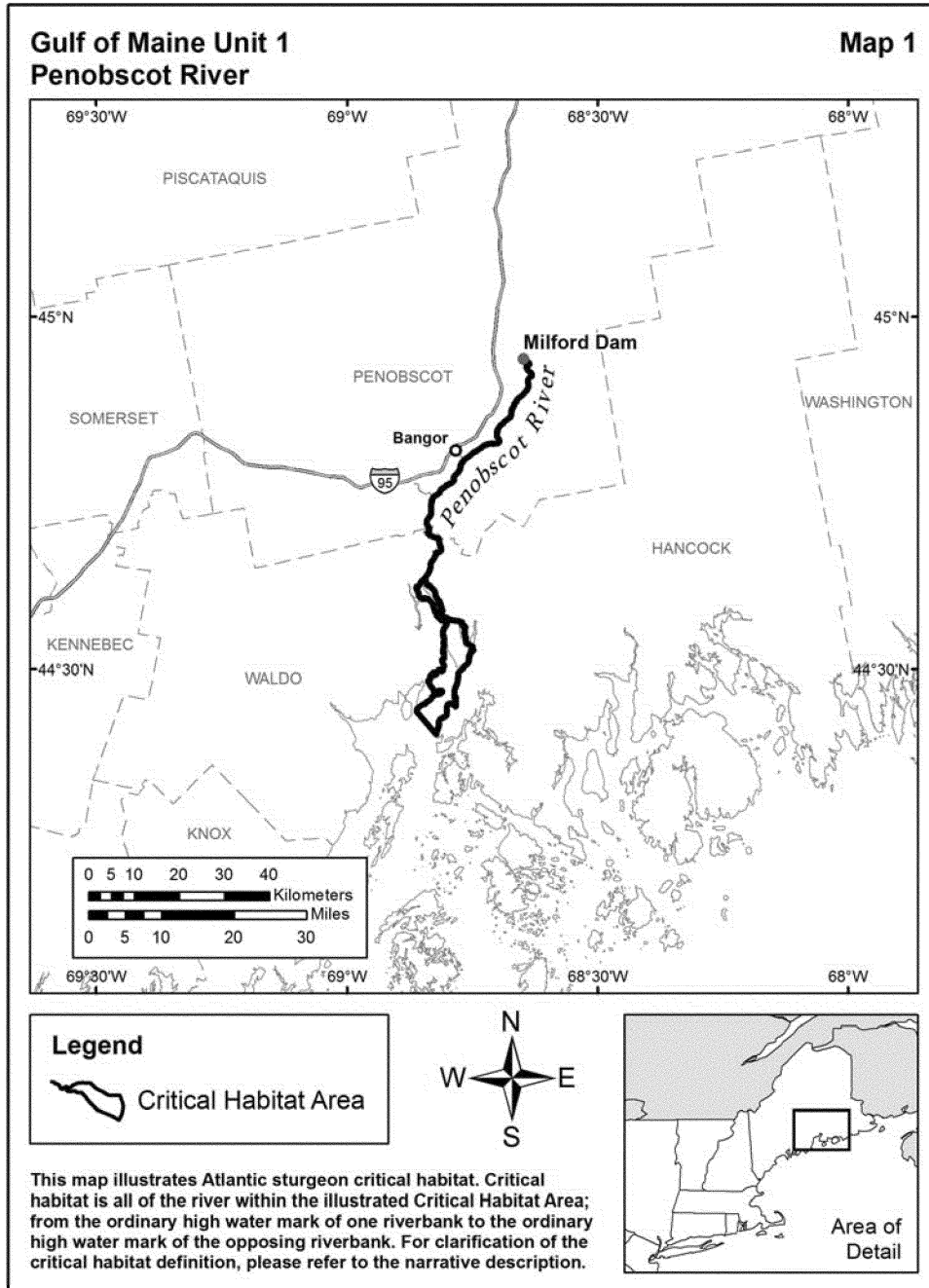
(4) Piscataqua River from its confluence with the Salmon Falls and Cocheco rivers downstream to where the main stem river discharges at its mouth into the Atlantic Ocean as well as the waters of the Cocheco River from its confluence with the Piscataqua River and upstream to the Cocheco Falls Dam, and waters of the Salmon Falls River

from its confluence with the Piscataqua River and upstream to the Route 4 Dam; and

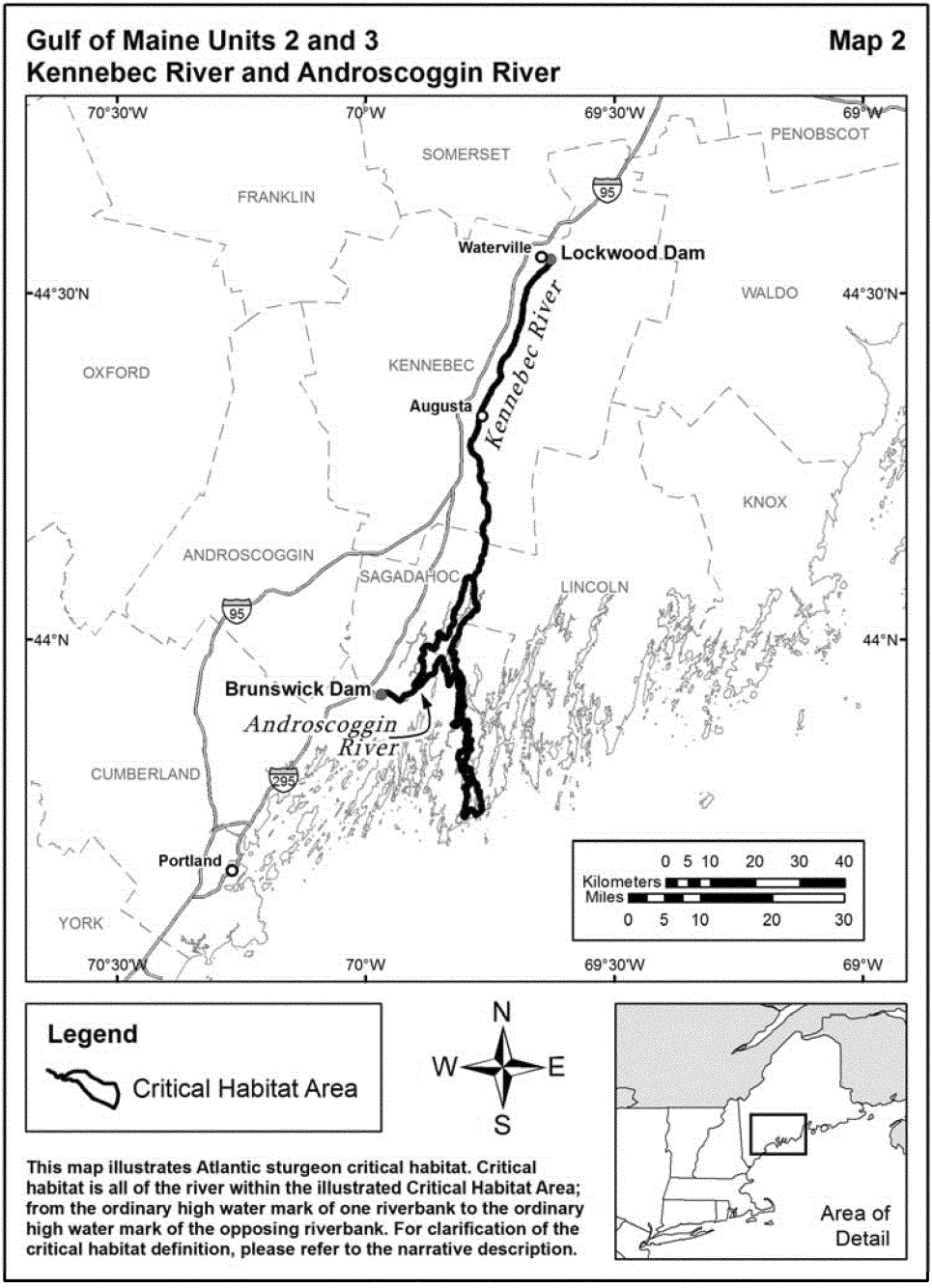
(5) Merrimack River from the Essex Dam (also known as the Lawrence Dam) downstream to where the main stem river discharges at its mouth into the Atlantic Ocean.

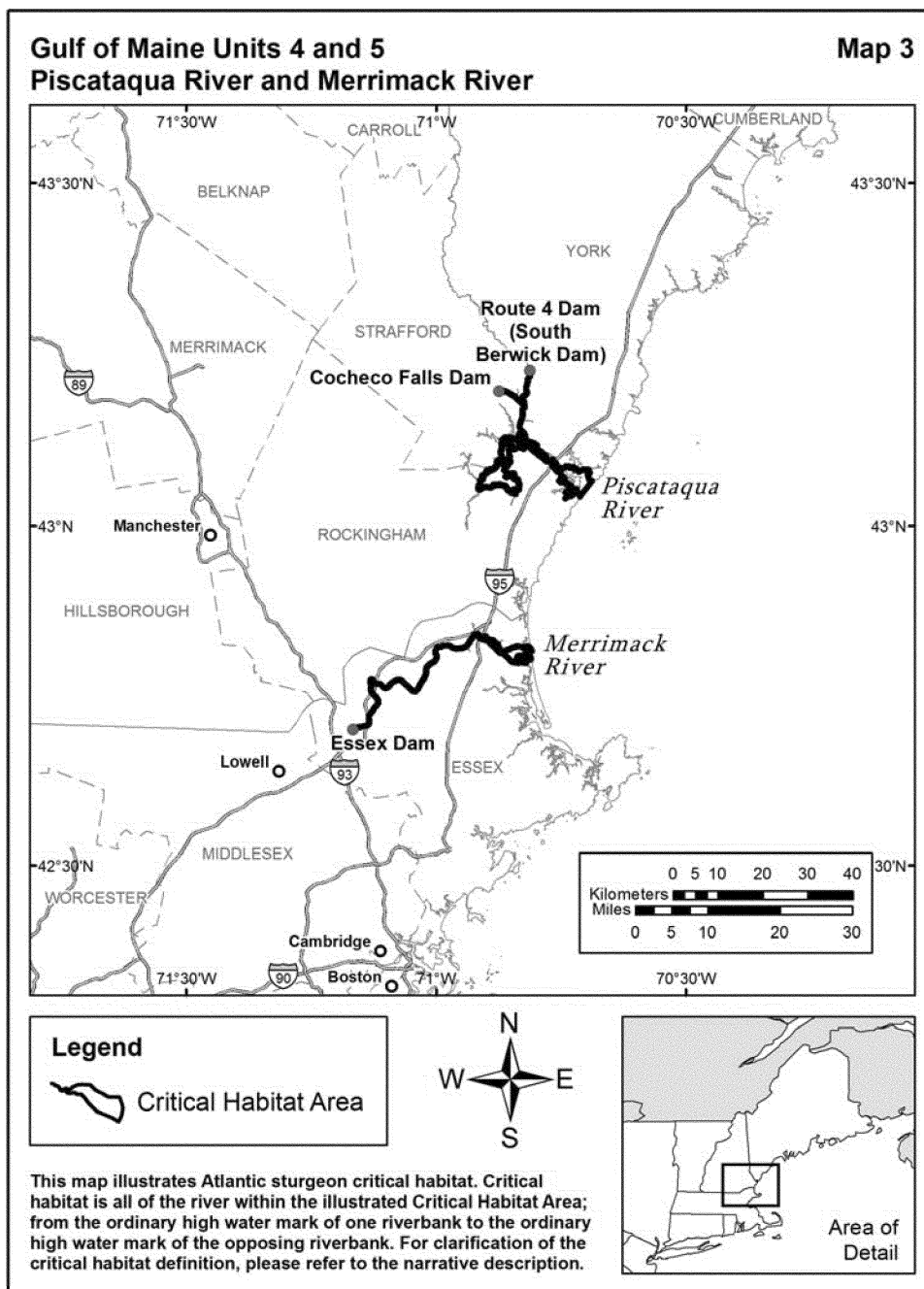
**BILLING CODE 3510-22-P**

(6) Maps of the Gulf of Maine DPS follow:









(e) *Critical habitat boundaries of the New York Bight DPS.* Critical habitat for the New York Bight DPS of Atlantic sturgeon is the waters of:

(1) Connecticut River from the Holyoke Dam downstream to where the main stem river discharges at its mouth into Long Island Sound;

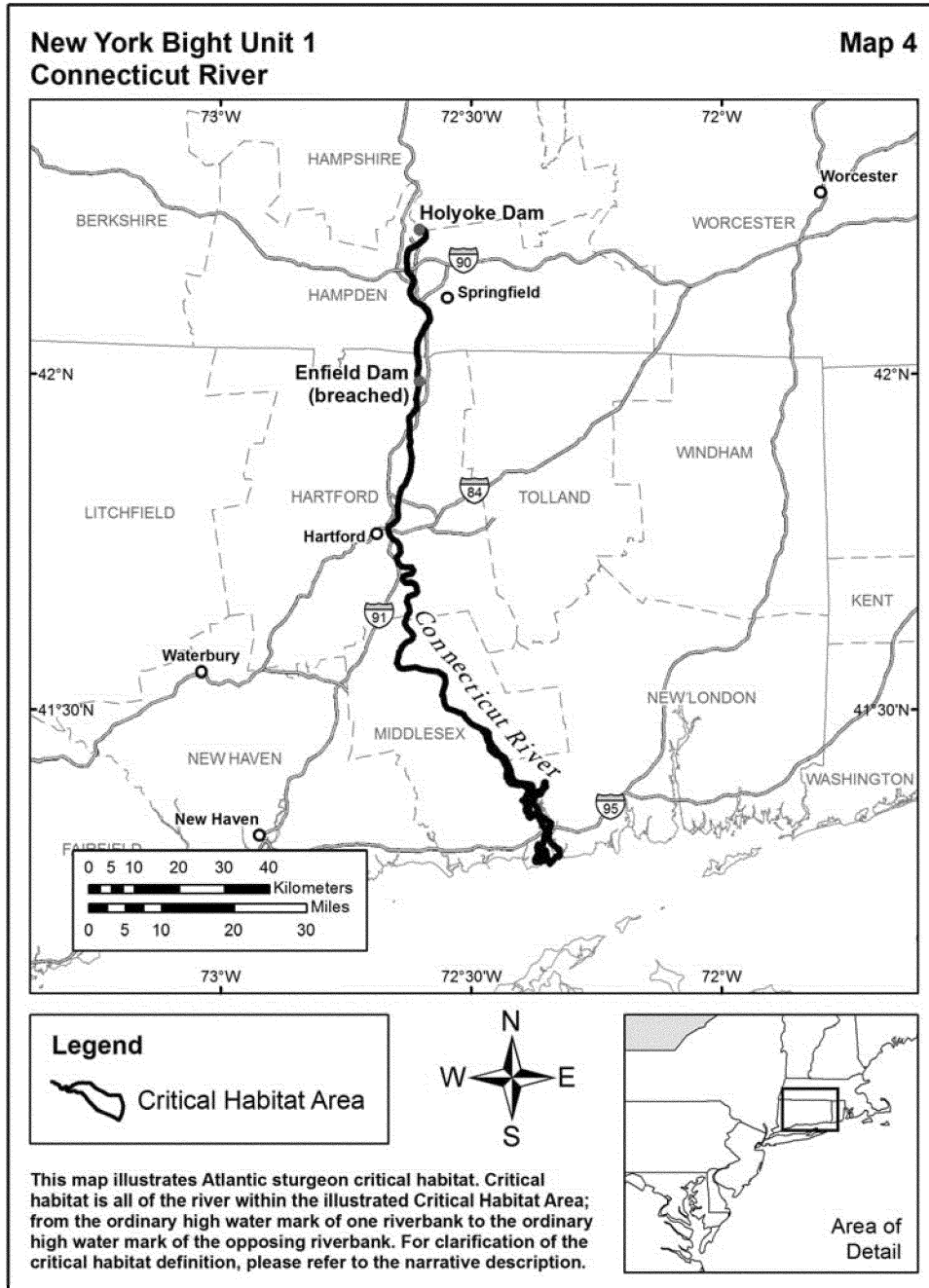
(2) Housatonic River from the Derby Dam downstream to where the main stem discharges at its mouth into Long Island Sound;

(3) Hudson River from the Troy Lock and Dam (also known as the Federal Dam) downstream to where the main

stem river discharges at its mouth into New York City Harbor; and

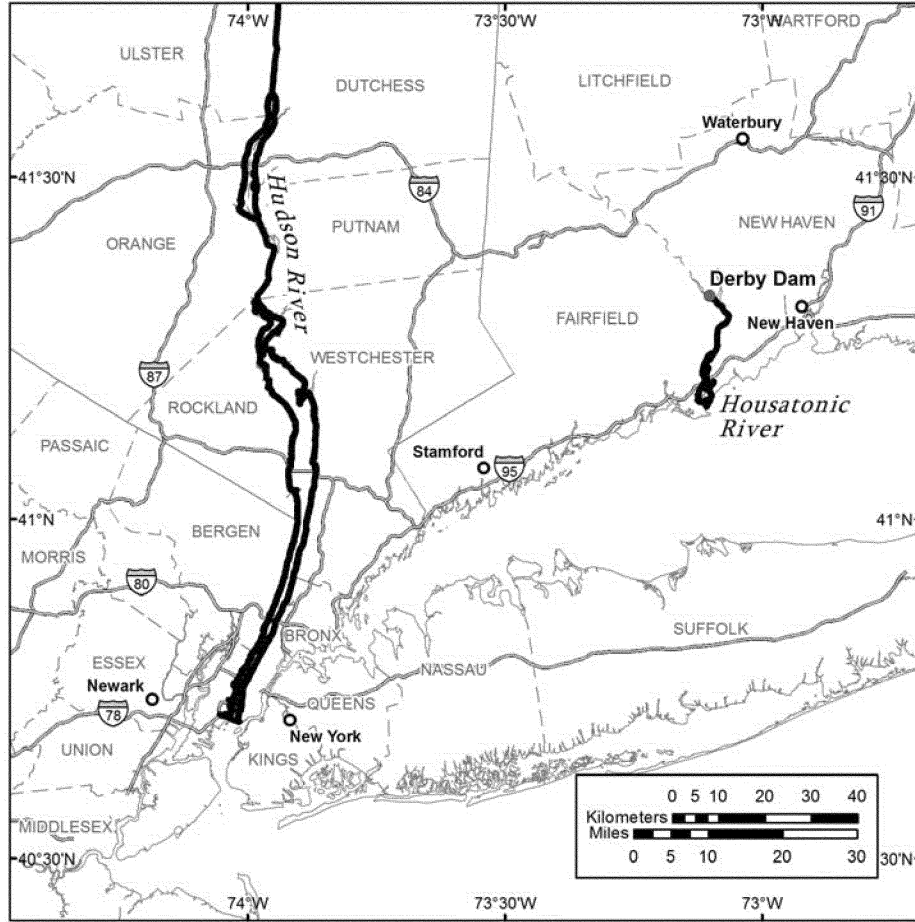
(4) Delaware River at the crossing of the Trenton-Morrisville Route 1 Toll Bridge, downstream to where the main stem river discharges at its mouth into Delaware Bay.

(5) Maps of the New York Bight DPS follow:



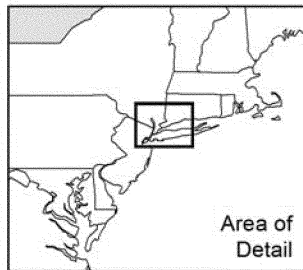
**New York Bight Units 2 and 3  
Housatonic River and Hudson River (Part A)**

**Map 5**

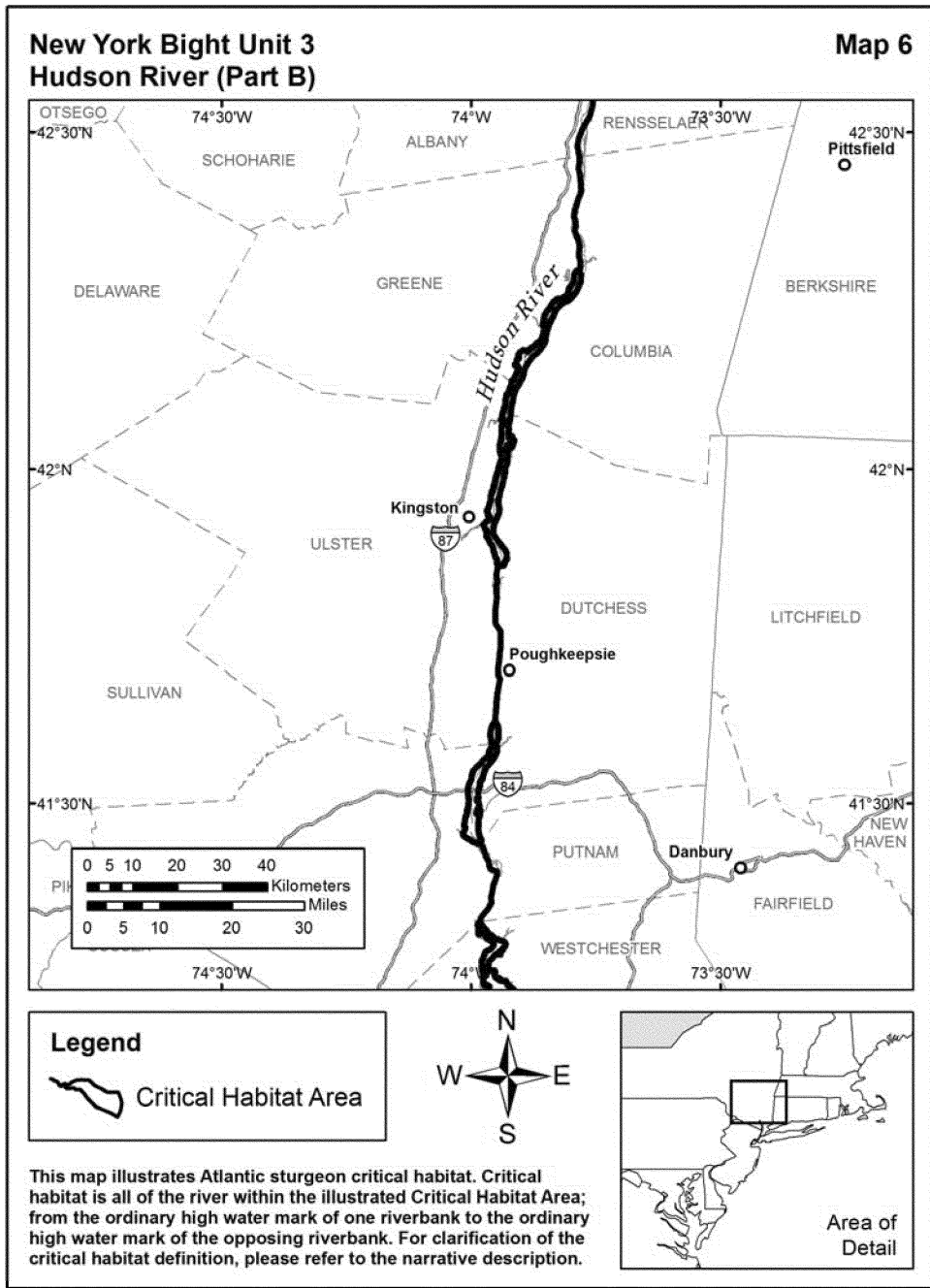


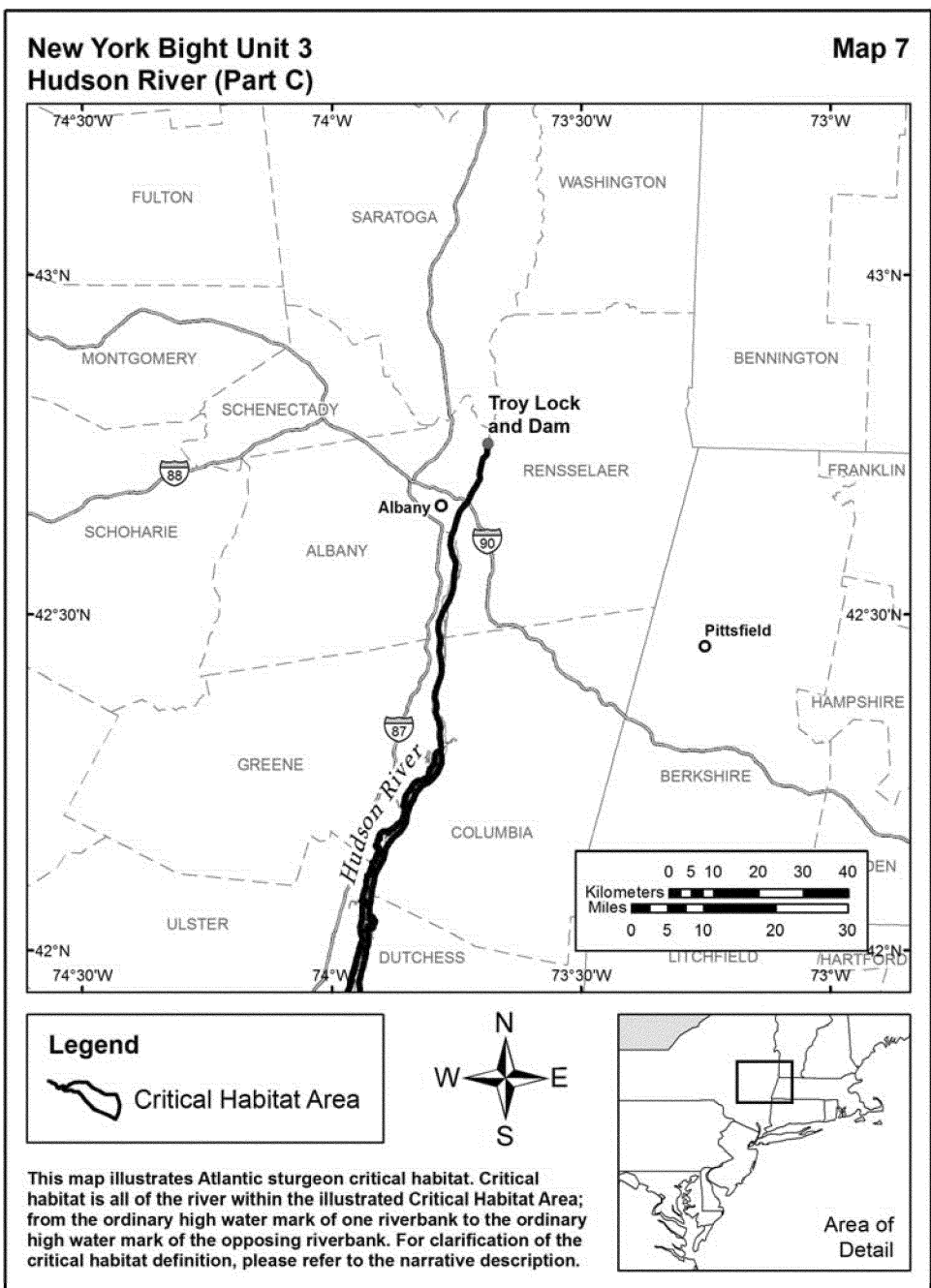
**Legend**

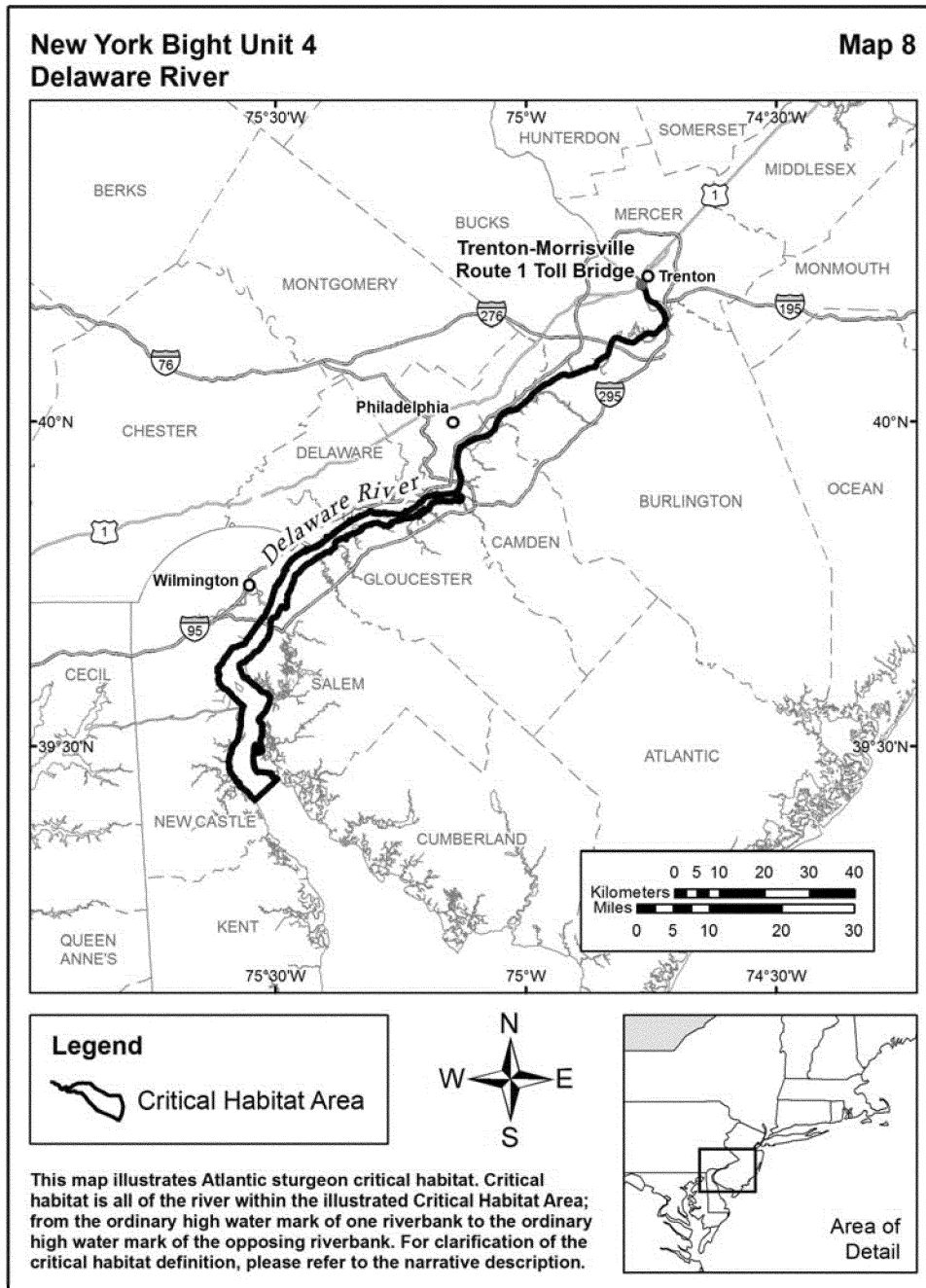
Critical Habitat Area



This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area; from the ordinary high water mark of one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.







(f) *Critical habitat boundaries of the Chesapeake Bay DPS.* Critical habitat for the Chesapeake Bay DPS of Atlantic sturgeon is the waters of:

(1) Potomac River from the Little Falls Dam downstream to where the main stem river discharges at its mouth into the Chesapeake Bay;

(2) Rappahannock River from the U.S. Highway 1 Bridge, downstream to where the river discharges at its mouth into the Chesapeake Bay;

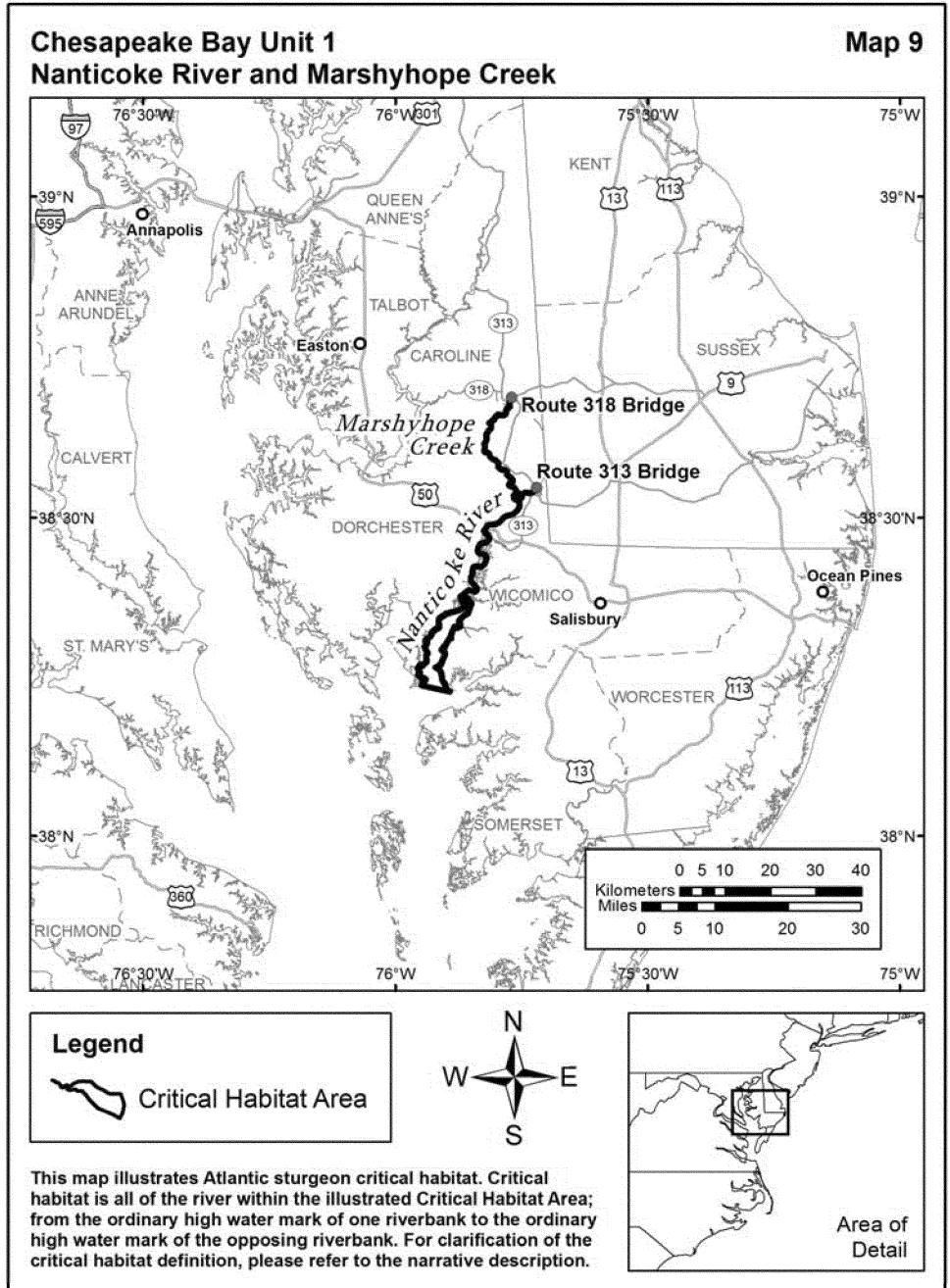
(3) York River from its confluence with the Mattaponi and Pamunkey

river downstream to where the main stem river discharges at its mouth into the Chesapeake Bay as well as the waters of the Mattaponi River from its confluence with the York River and upstream to the Virginia State Route 360 Bridge of the Mattaponi River, and waters of the Pamunkey River from its confluence with the York River and upstream to the Nelson's Bridge Road Route 615 crossing of the Pamunkey River;

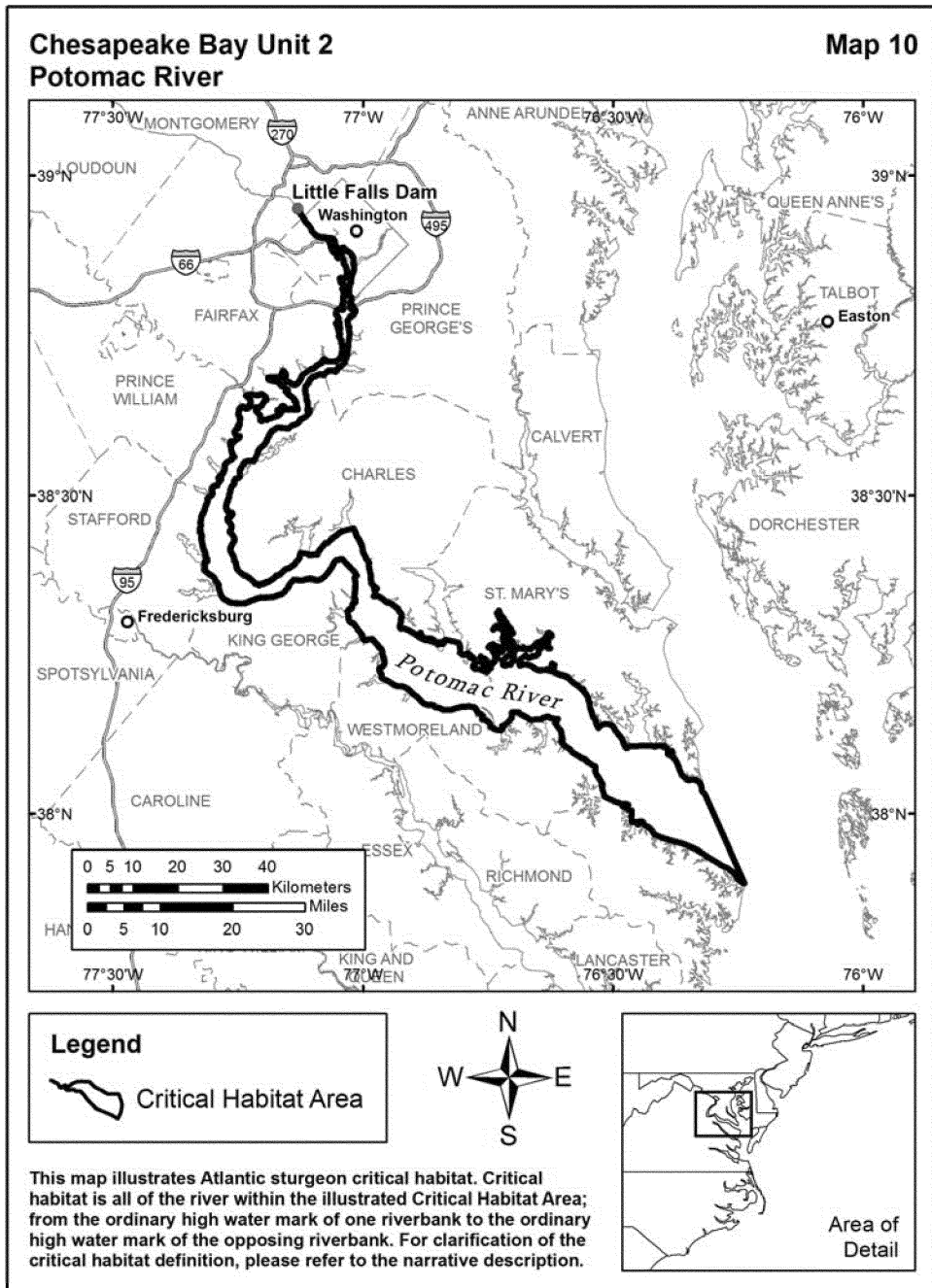
(4) James River from Boshers Dam downstream to where the main stem river discharges at its mouth into the Chesapeake Bay at Hampton Roads; and

(5) Nanticoke River from the Maryland State Route 313 Bridge crossing near Sharptown, MD to where the main stem discharges at its mouth into the Chesapeake Bay as well as Marshyhope Creek from its confluence with the Nanticoke River and upriver to the Maryland State Route 318 Bridge crossing near Federalsburg, MD.

(6) Maps of the Chesapeake Bay DPS follow:

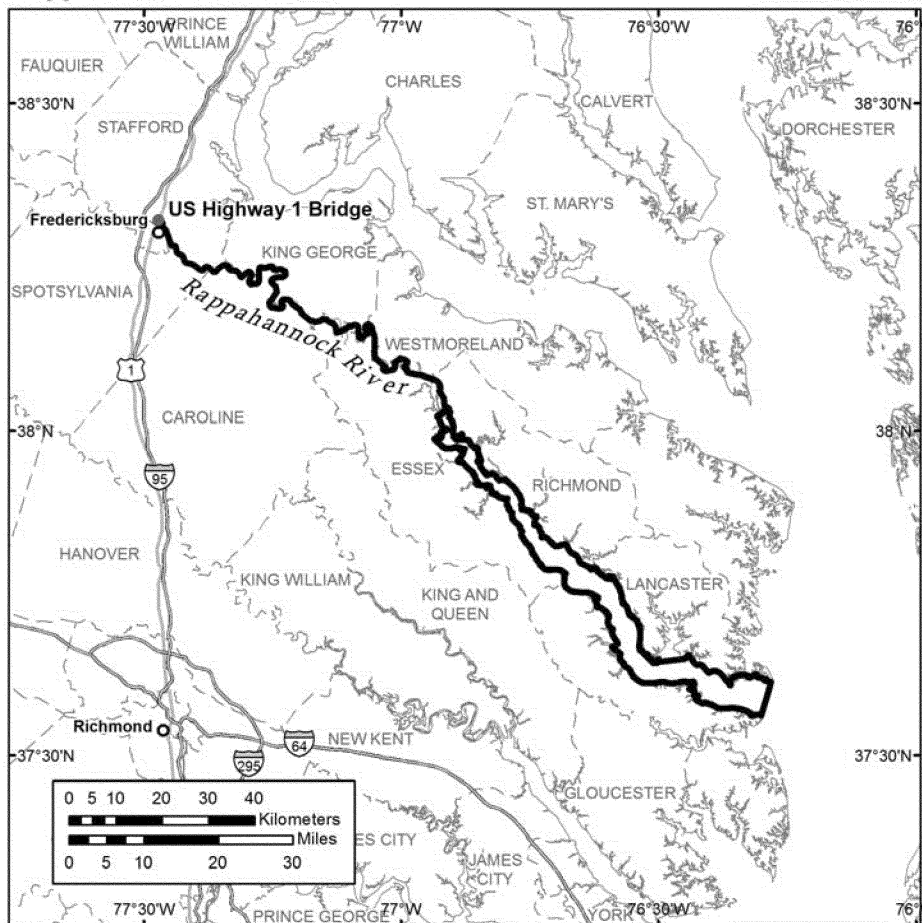






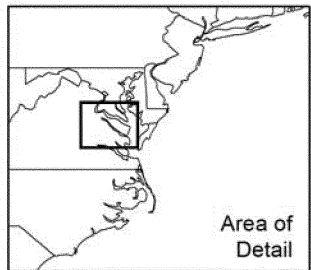
**Chesapeake Bay Unit 3  
Rappahannock River**

**Map 11**

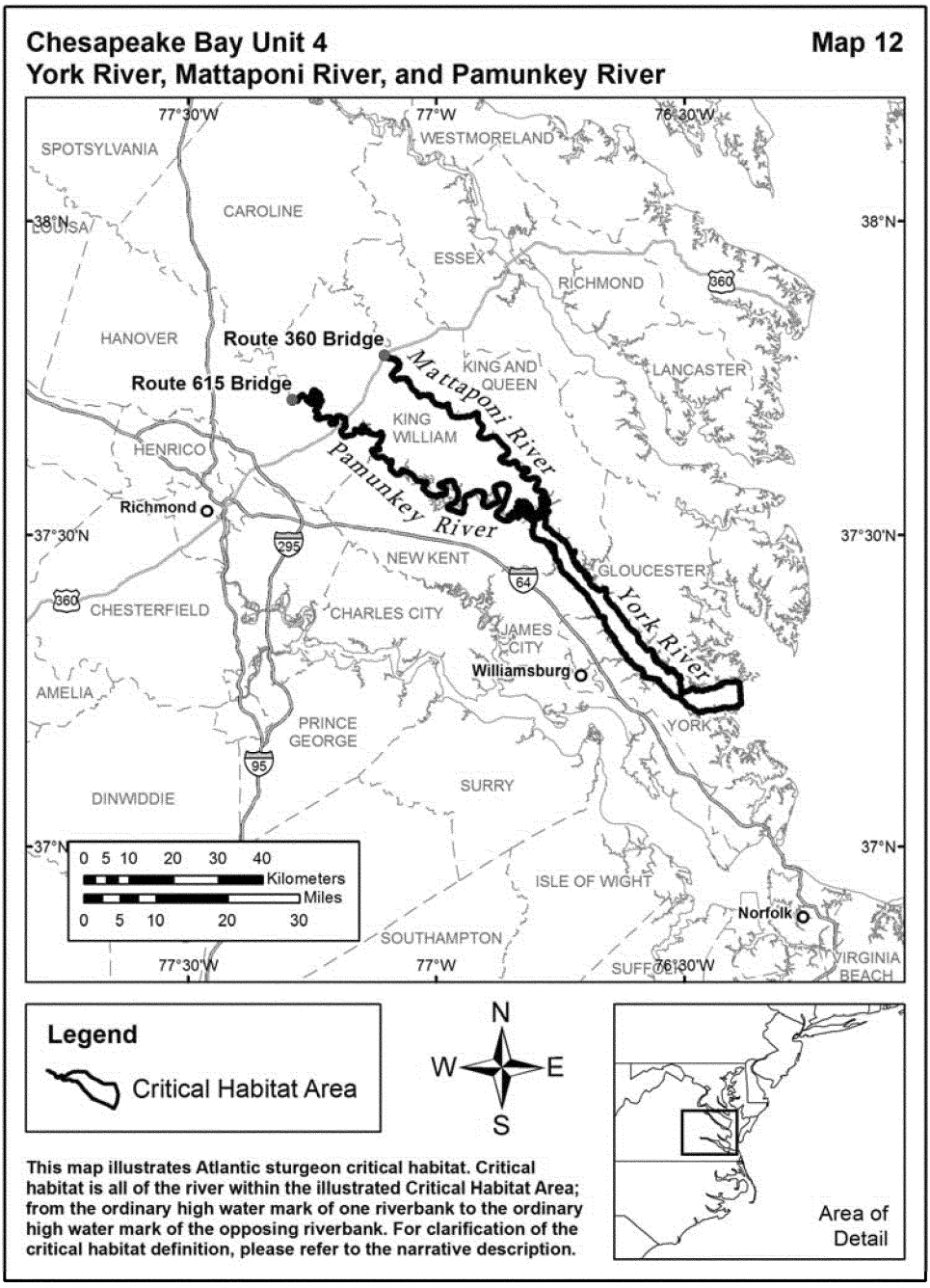


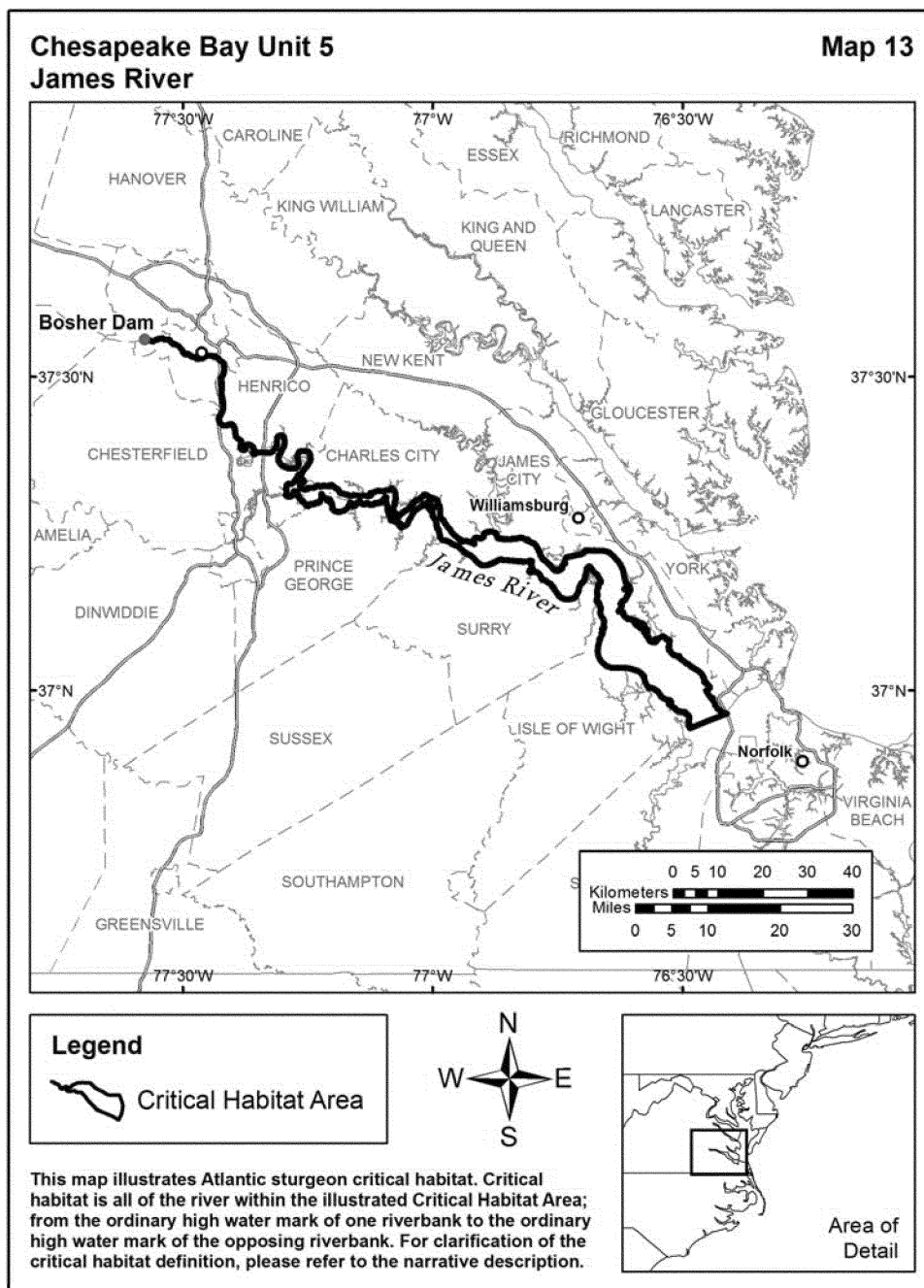
**Legend**

Critical Habitat Area



This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area; from the ordinary high water mark of one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.





(g) *Critical habitat boundaries of the Carolina DPS.* The lateral extent for all critical habitat units for the Carolina DPS of Atlantic sturgeon is the ordinary high water mark on each bank of the river and shorelines. Critical habitat for the Carolina DPS of Atlantic sturgeon is:

(1) Carolina Unit 1 includes the Roanoke River main stem from the Roanoke Rapids Dam downstream to rkm 0;

(2) Carolina Unit 2 includes the Tar-Pamlico River main stem from the Rocky Mount Millpond Dam downstream to rkm 0;

(3) Carolina Unit 3 includes the Neuse River main stem from the Milburnie Dam downstream to rkm 0;

(4) Carolina Unit 4 includes the Cape Fear River main stem from Lock and Dam #2 downstream to rkm 0 and the Northeast Cape Fear River from the upstream side of Rones Chapel Road Bridge downstream to the confluence with the Cape Fear River;

(5) Carolina Unit 5 includes the Pee Dee River main stem from Blewett Falls Dam downstream to rkm 0, the Waccamaw River from Bull Creek downstream to rkm 0, and Bull Creek

from the Pee Dee River to the confluence with the Waccamaw River;

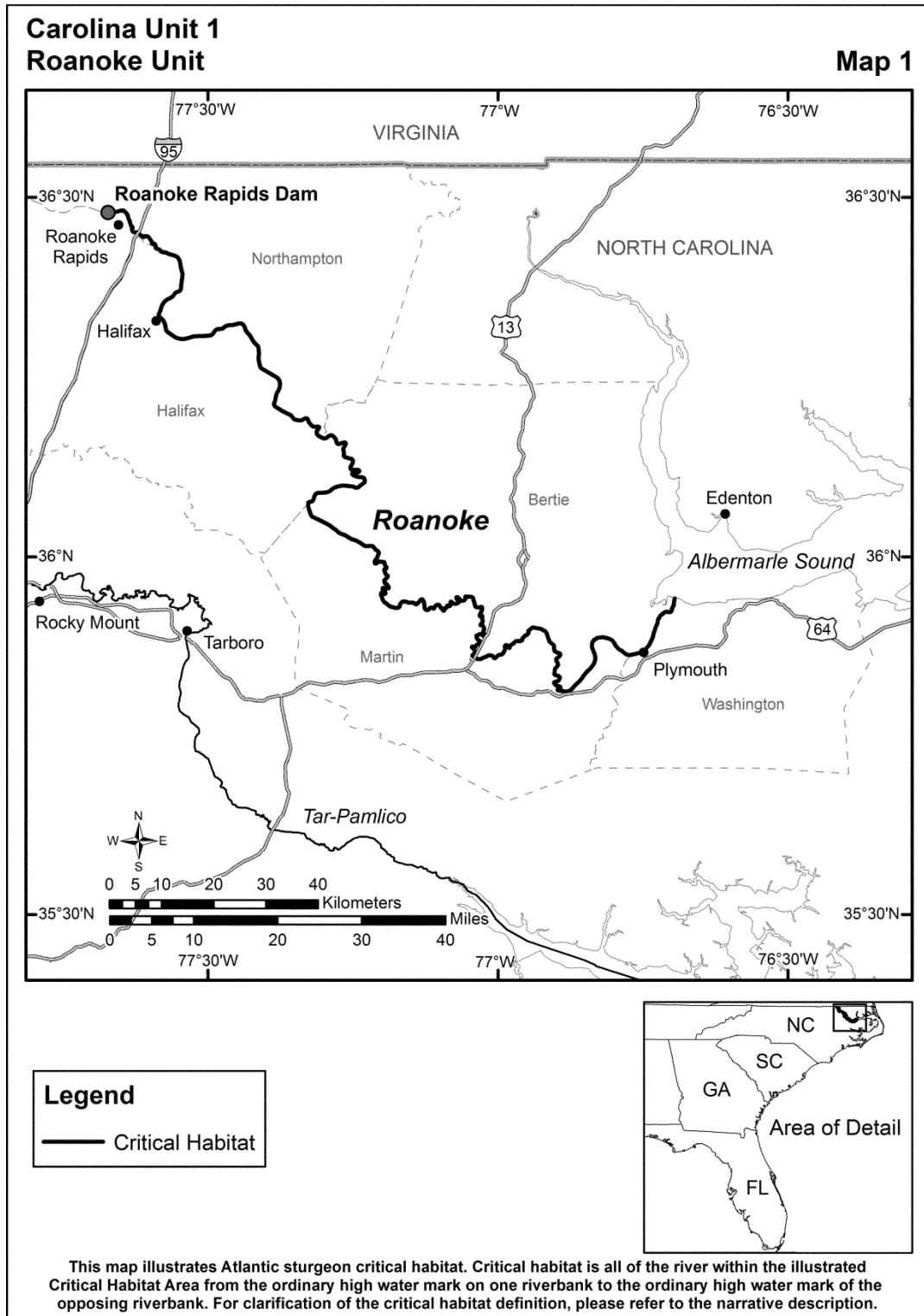
(6) Carolina Unit 6 includes the Black River main stem from Interstate Highway 95 downstream to rkm 0 (the confluence with the Pee Dee River); and

(7) Carolina Unit 7 includes the Santee River main stem from the Wilson Dam downstream to the fork of the North Santee River and South Santee River distributaries, the Rediversion Canal from the St. Stephen Powerhouse downstream to the confluence with the Santee River, the North Santee River from the fork of the Santee River and South Santee River downstream to rkm

0, the South Santee River from the fork of the Santee River and North Santee River downstream to rkm 0, the Tailrace Canal from Pinopolis Dam downstream to the West Branch Cooper River, the

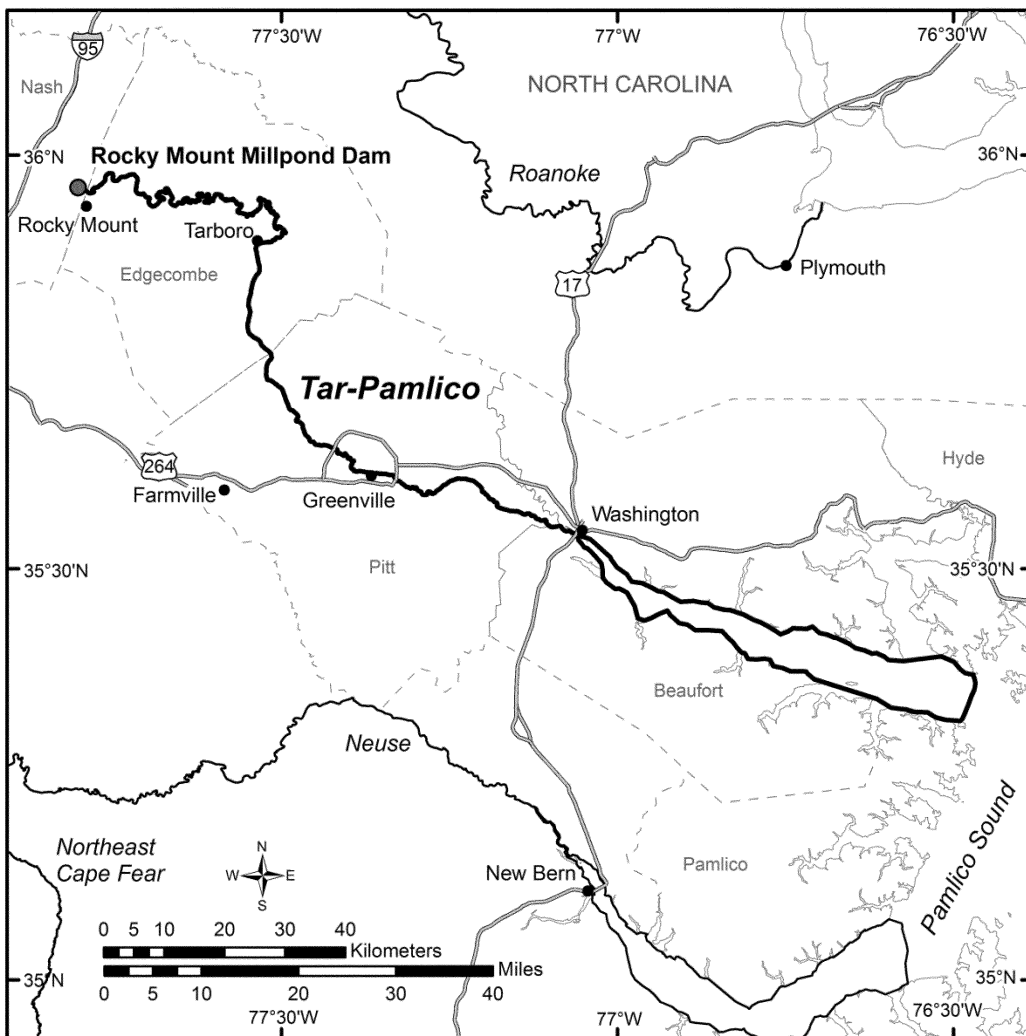
West Branch Cooper River from the Tailrace Canal downstream to the confluence with the East Branch Cooper River, and the Cooper River from confluence of the West Branch Cooper

River and East Branch Cooper River tributaries downstream to rkm 0, not including the area described in paragraph (b)(5) of this section.  
(8) Maps of the Carolina DPS follow:




**Carolina Unit 2  
Tar-Pamlico Unit**

**Map 2**



**Legend**

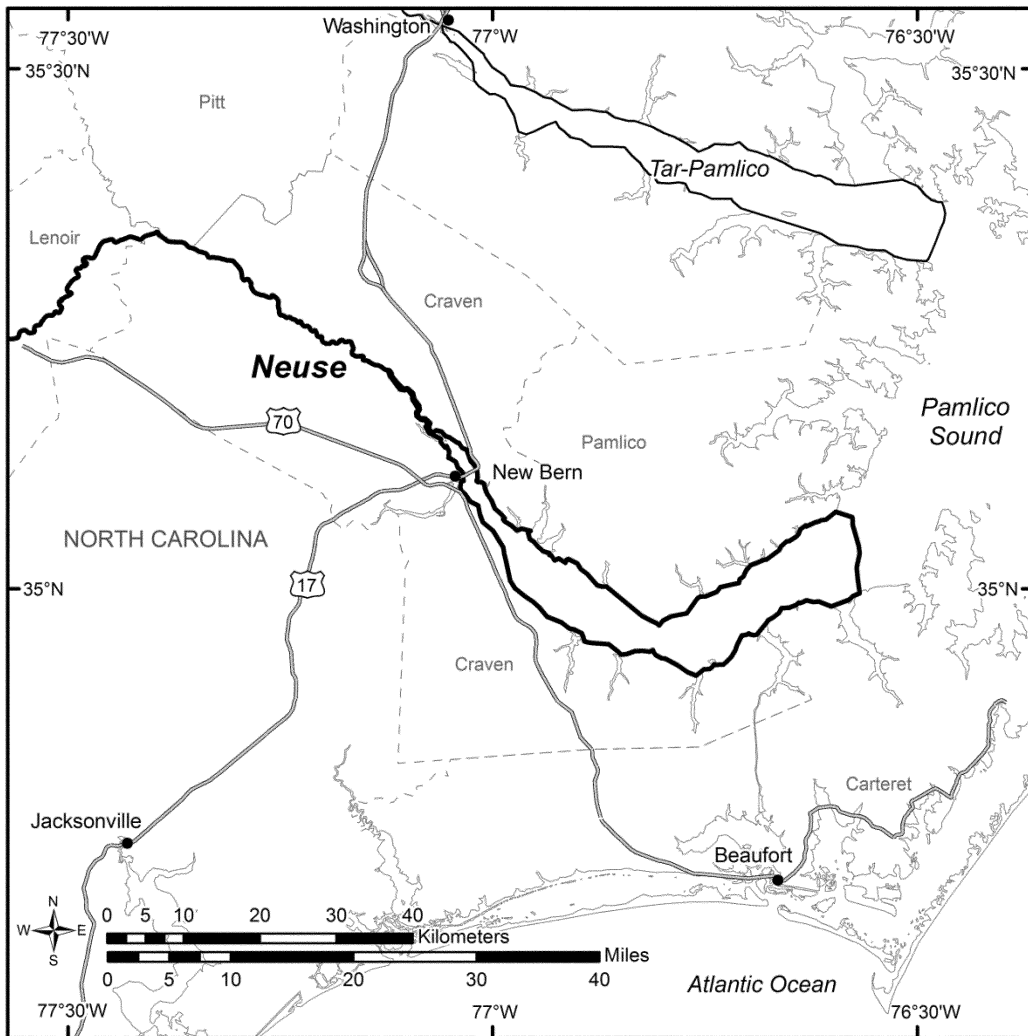
 Critical Habitat Area




This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

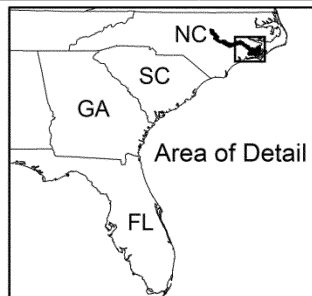
### Carolina Unit 3 Neuse Unit

Map 3.1



**Legend**

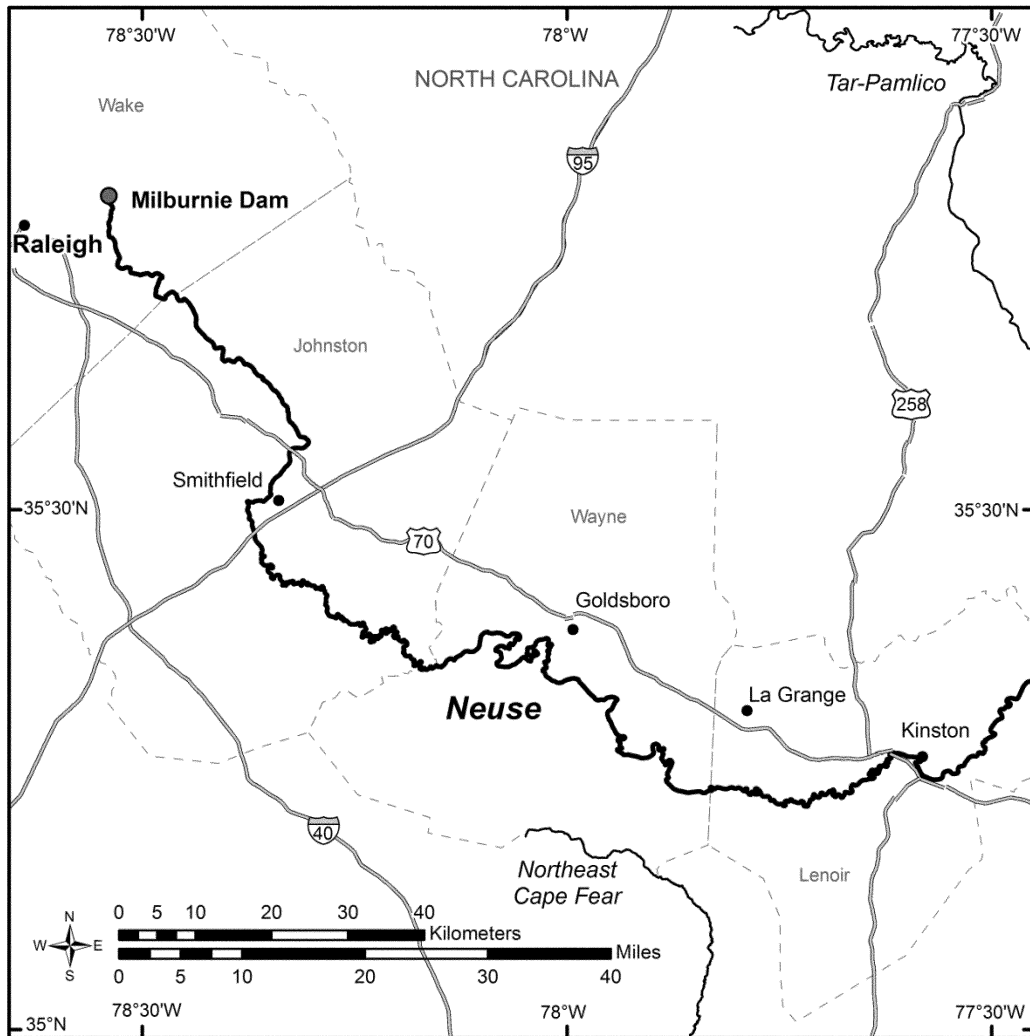
 Critical Habitat Area




This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

**Carolina Unit 3  
Neuse Unit**

**Map 3.2**



**Legend**  
 Critical Habitat

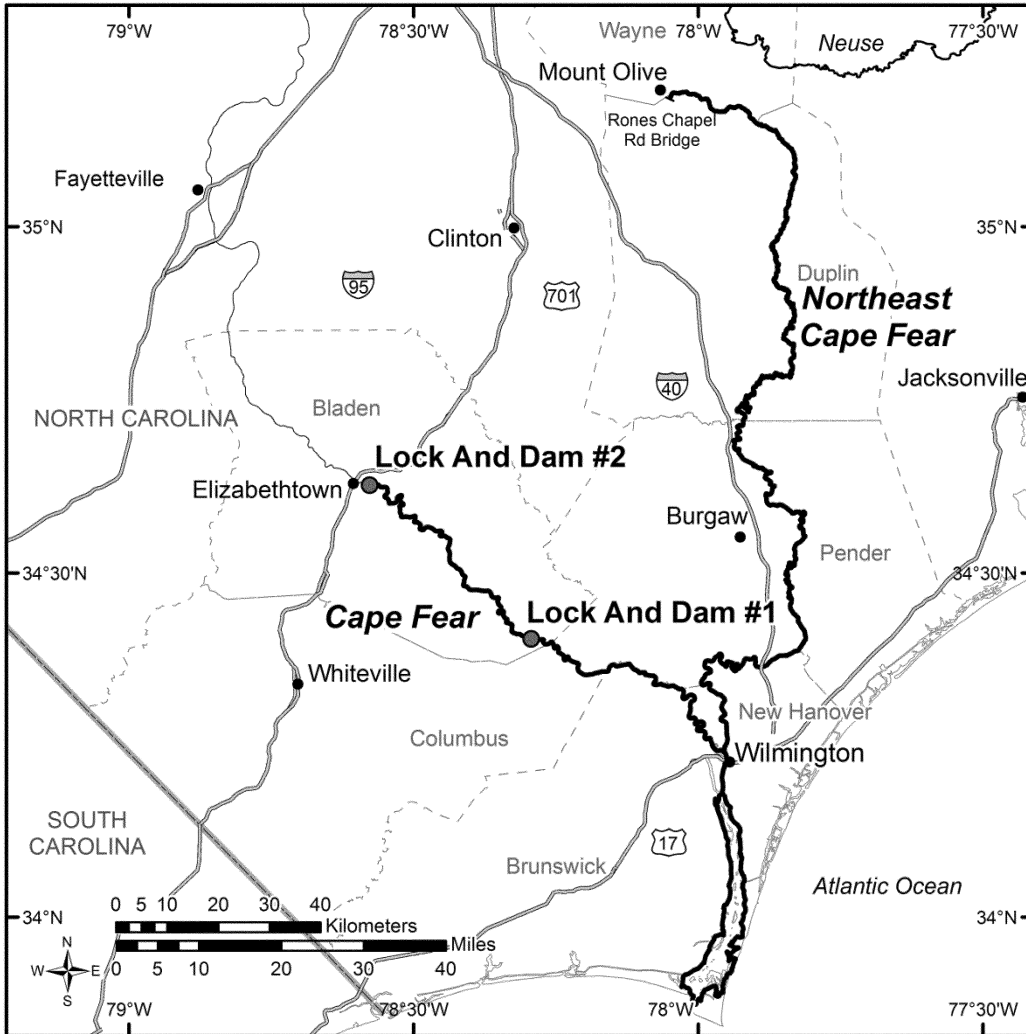


This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.




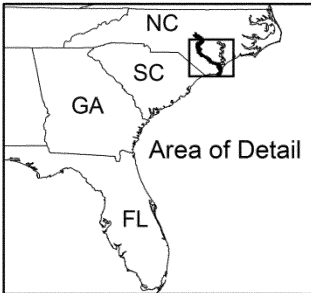
**Carolina Unit 4  
Cape Fear Unit**

**Map 4**



**Legend**

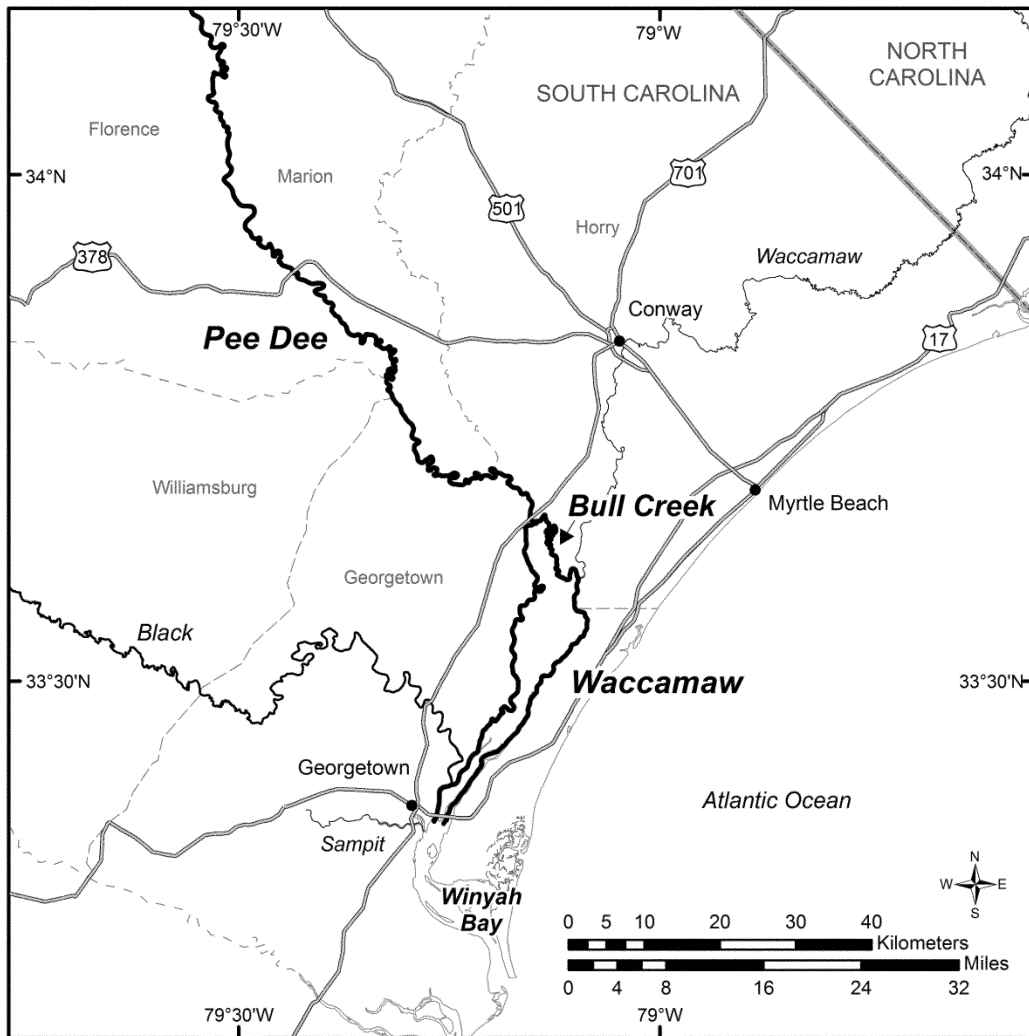
 Critical Habitat Area



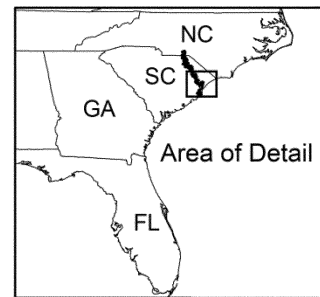
This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

**Carolina Unit 5  
Pee Dee Unit**

**Map 5.1**



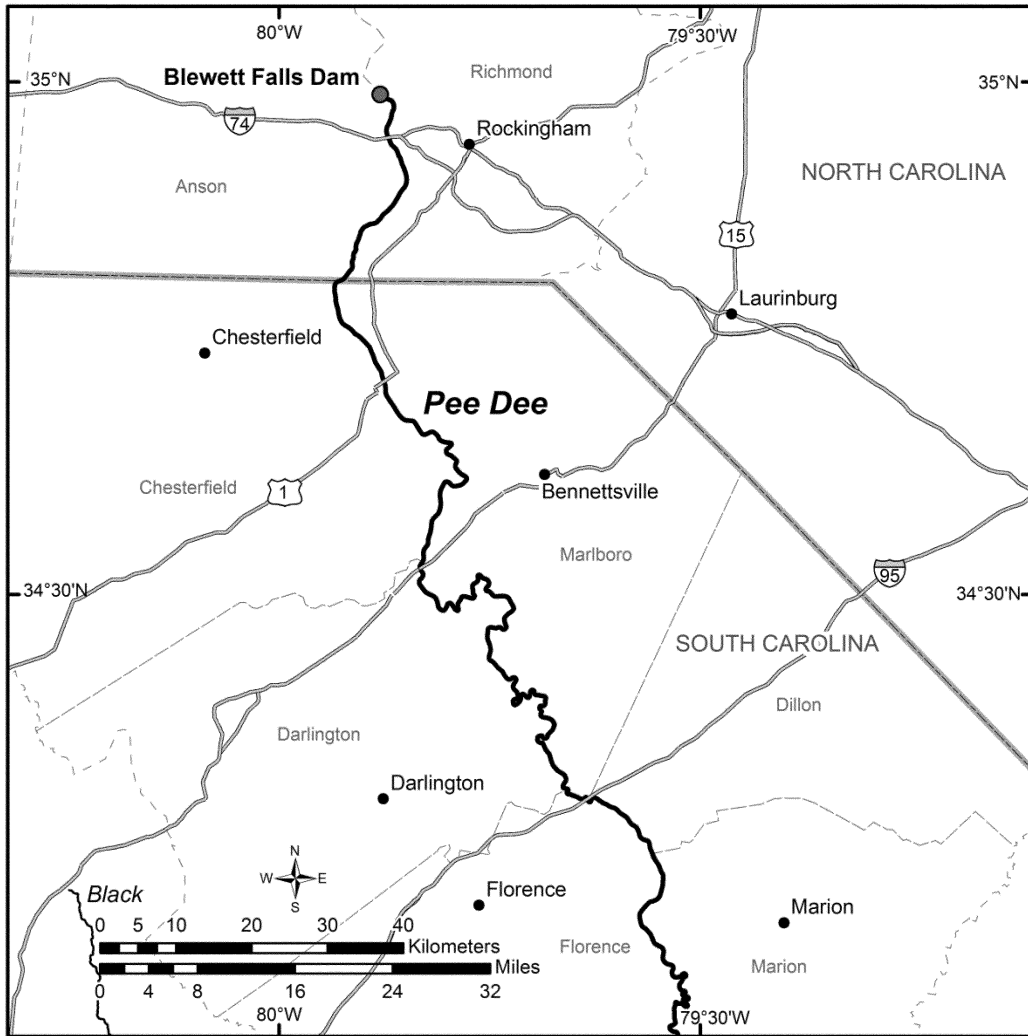
**Legend**  
 — Critical Habitat



This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

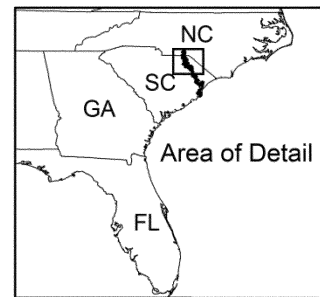
**Carolina Unit 5  
Pee Dee Unit**

**Map 5.2**



**Legend**

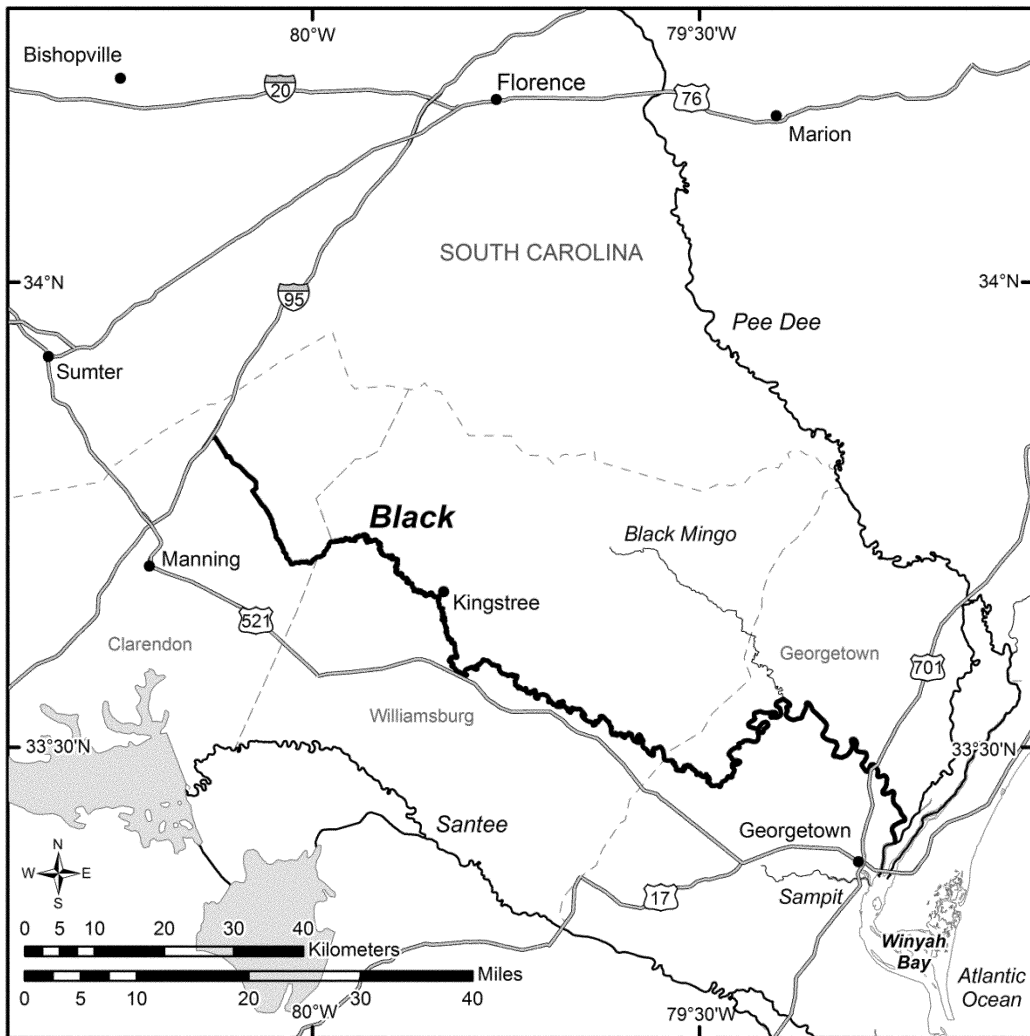
— Critical Habitat



This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

**Carolina Unit 6  
Black Unit**

**Map 6**



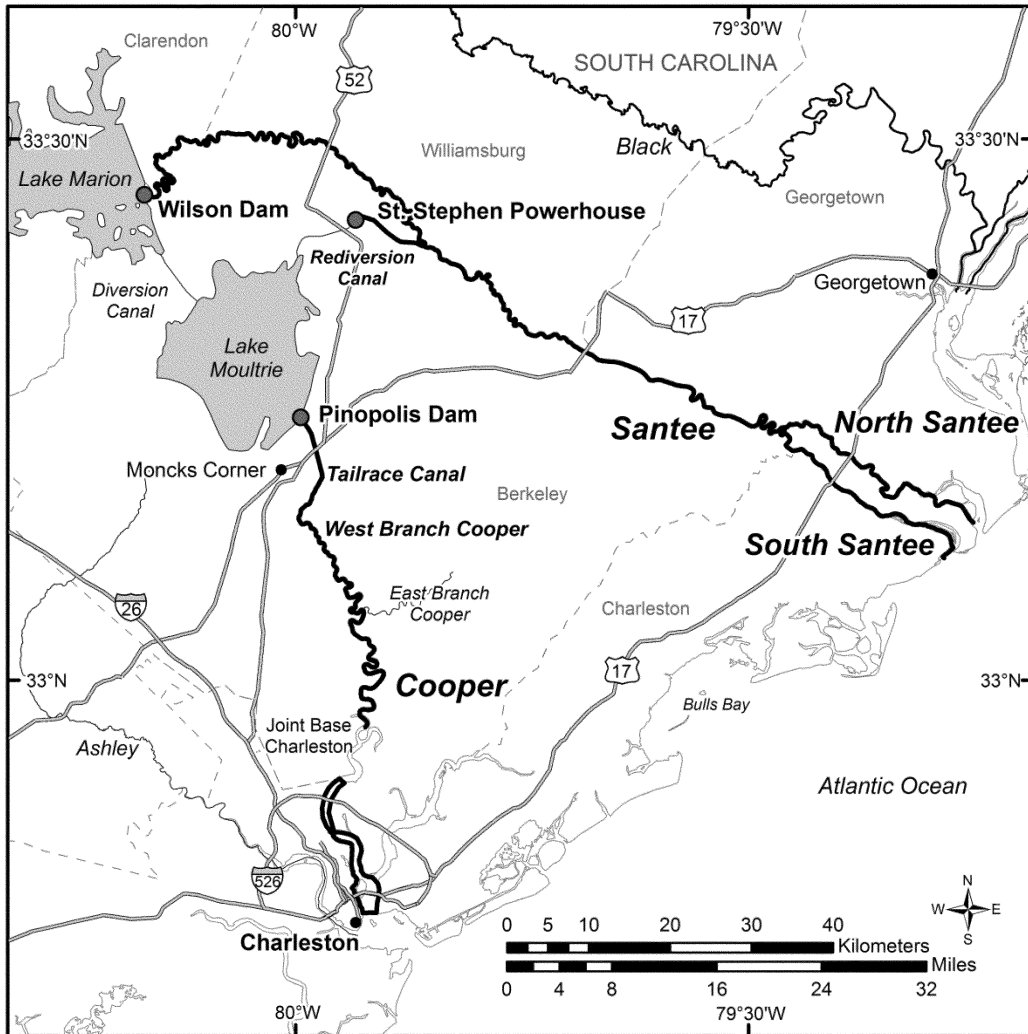
**Legend**  
 — Critical Habitat




This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

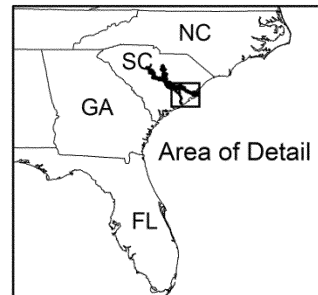
### Carolina Unit 7 Santee - Cooper Unit

Map 7



**Legend**

 Critical Habitat Area



This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank, with the exception of U.S. Department of Defense sites determine to be ineligible for designation. For clarification of the critical habitat definition, please refer to the narrative description.

(h) *Critical habitat boundaries of the South Atlantic DPS.* The lateral extent for all critical habitat units for the South Atlantic DPS of Atlantic sturgeon is the ordinary high water mark on each bank of the river and shorelines. Critical habitat for the South Atlantic DPS of Atlantic sturgeon is:

(1) South Atlantic Unit 1 includes the North Fork Edisto River from Cones Pond downstream to the confluence with the South Fork Edisto River, the South Fork Edisto River from Highway 121 downstream to the confluence with the North Fork Edisto River, the Edisto River main stem from the confluence of the North Fork Edisto River and South Fork Edisto River tributaries downstream to the fork at the North Edisto River and South Edisto River distributaries, the North Edisto River

from the Edisto River downstream to rkm 0, and the South Edisto River from the Edisto River downstream to rkm 0;

(2) South Atlantic Unit 2 includes the main stem Combahee–Salkehatchie River from the confluence of Buck and Rosemary Creeks with the Salkehatchie River downstream to the Combahee River, the Combahee River from the Salkehatchie River downstream to rkm 0;

(3) South Atlantic Unit 3 includes the main stem Savannah River (including the Back River, Middle River, Front River, Little Back River, South River, Steamboat River, and McCoy's Cut) from the New Savannah Bluff Lock and Dam downstream to rkm 0;

(4) South Atlantic Unit 4 includes the main stem Ogeechee River from the

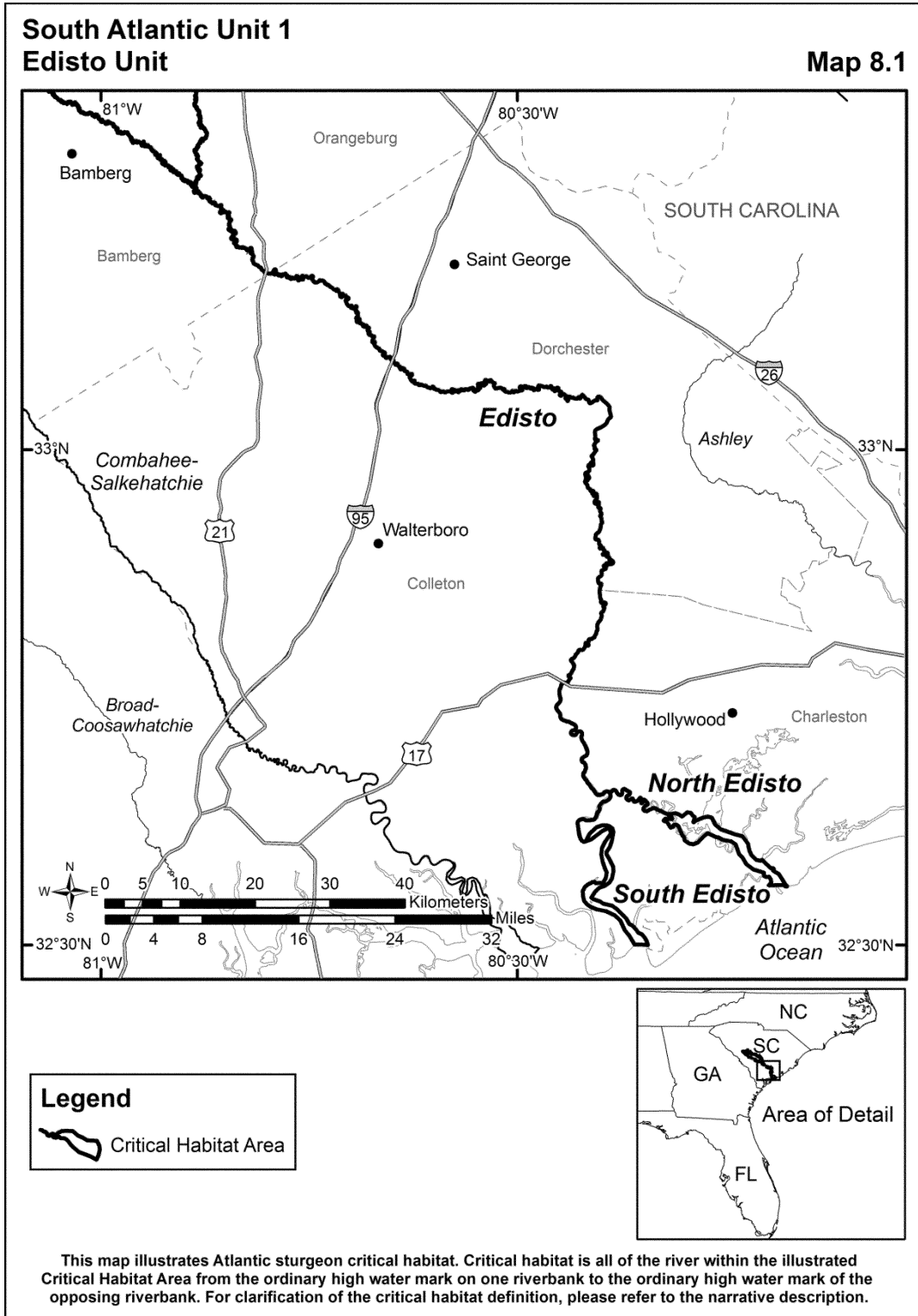
Mayfield Mill Dam downstream to rkm 0;

(5) South Atlantic Unit 5 includes the main stem Oconee River from Sinclair Dam downstream to the confluence with the Ocmulgee River, the main stem Ocmulgee River from Juliette Dam downstream to the confluence with the Oconee River, and the main stem Altamaha River from the confluence of the Oconee River and Ocmulgee River downstream to rkm 0;

(6) South Atlantic Unit 6 includes the main stem Satilla River from the confluence of Satilla and Wiggins Creeks downstream to rkm 0; and

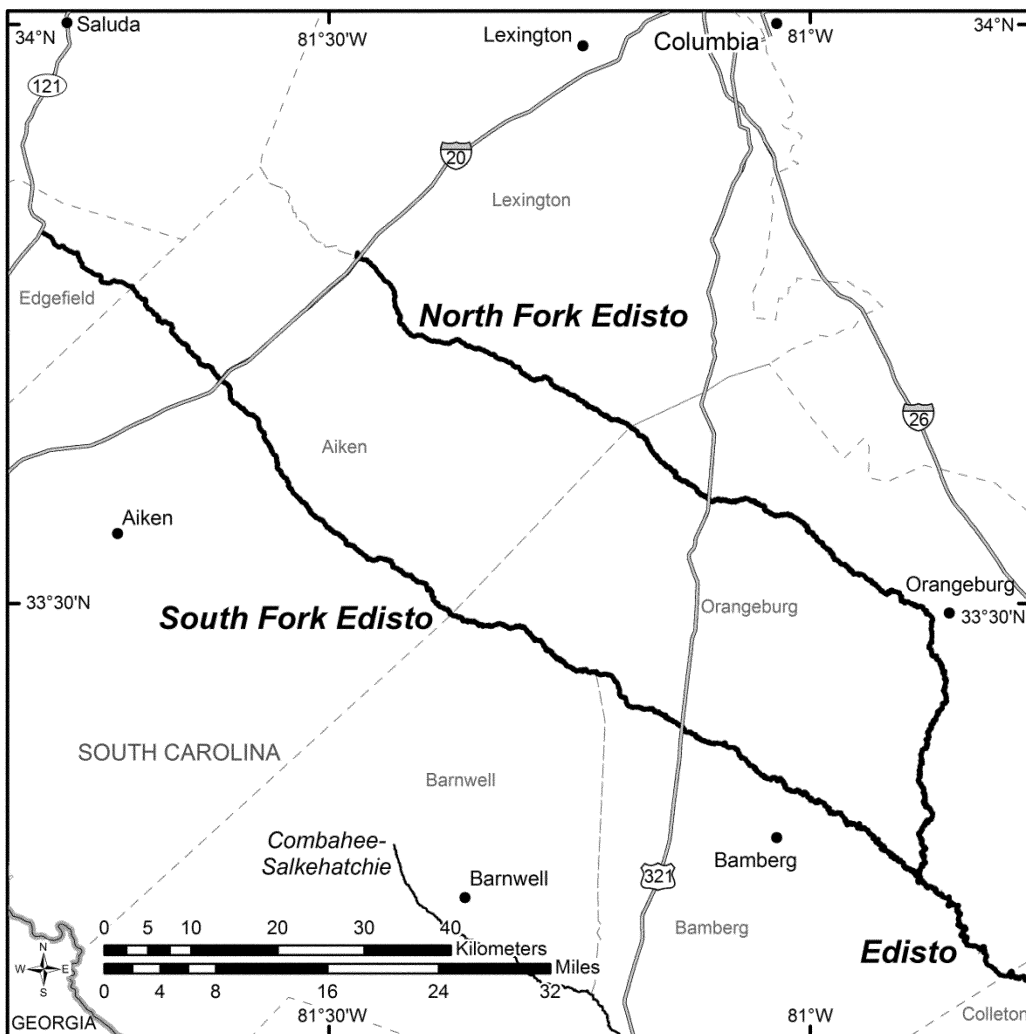
(7) South Atlantic Unit 7 includes the main stem St. Marys River from the confluence of Middle Prong St. Marys and the St. Marys Rivers downstream to rkm 0.

(8) Maps of the South Atlantic DPS follow:



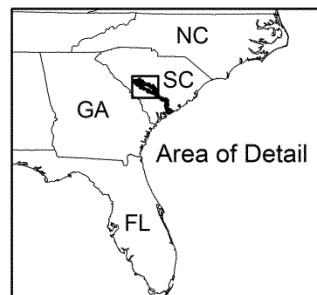
**South Atlantic Unit 1  
Edisto Unit**

**Map 8.2**



**Legend**

— Critical Habitat

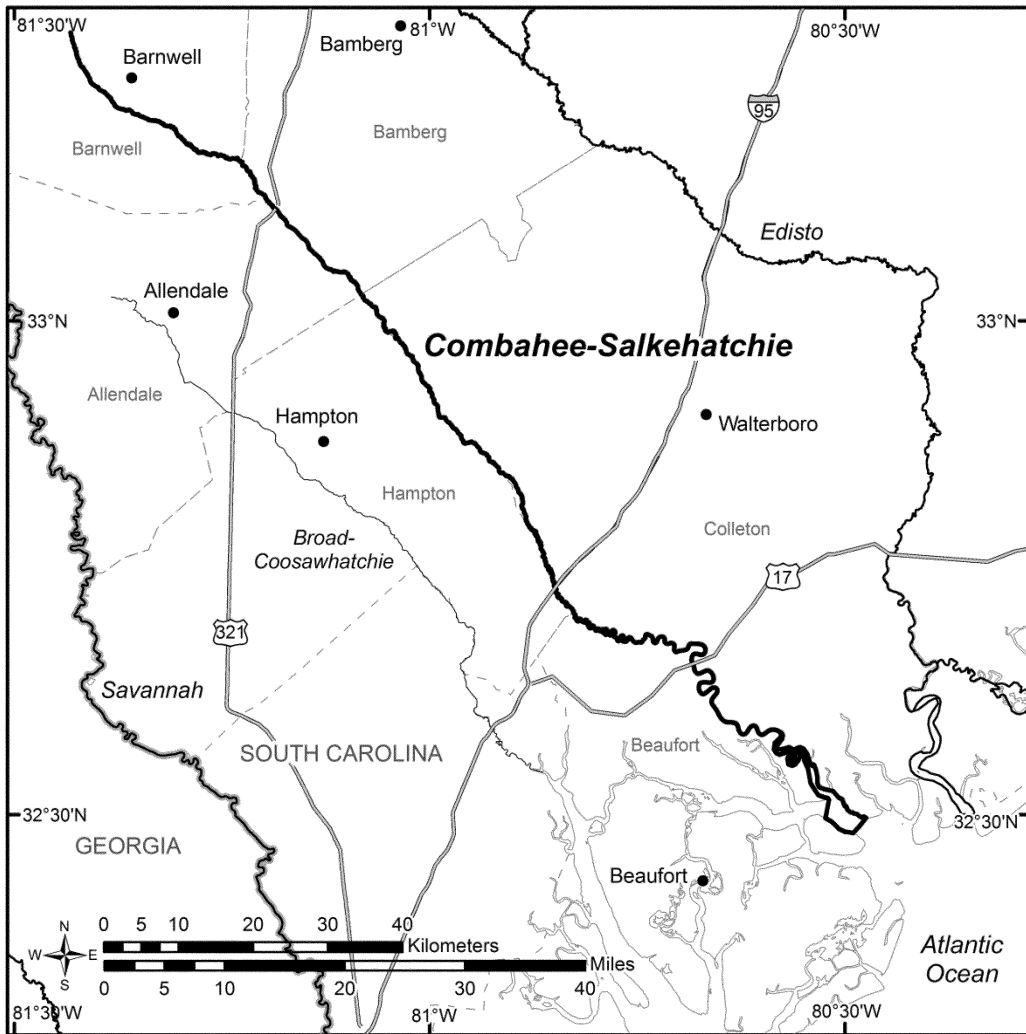


This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.




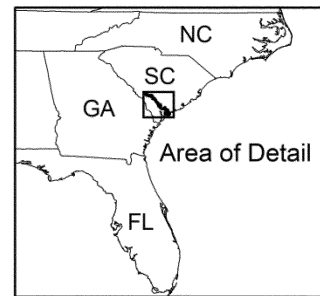
### South Atlantic Unit 2 Combahee - Salkehatchie Unit

Map 9



**Legend**

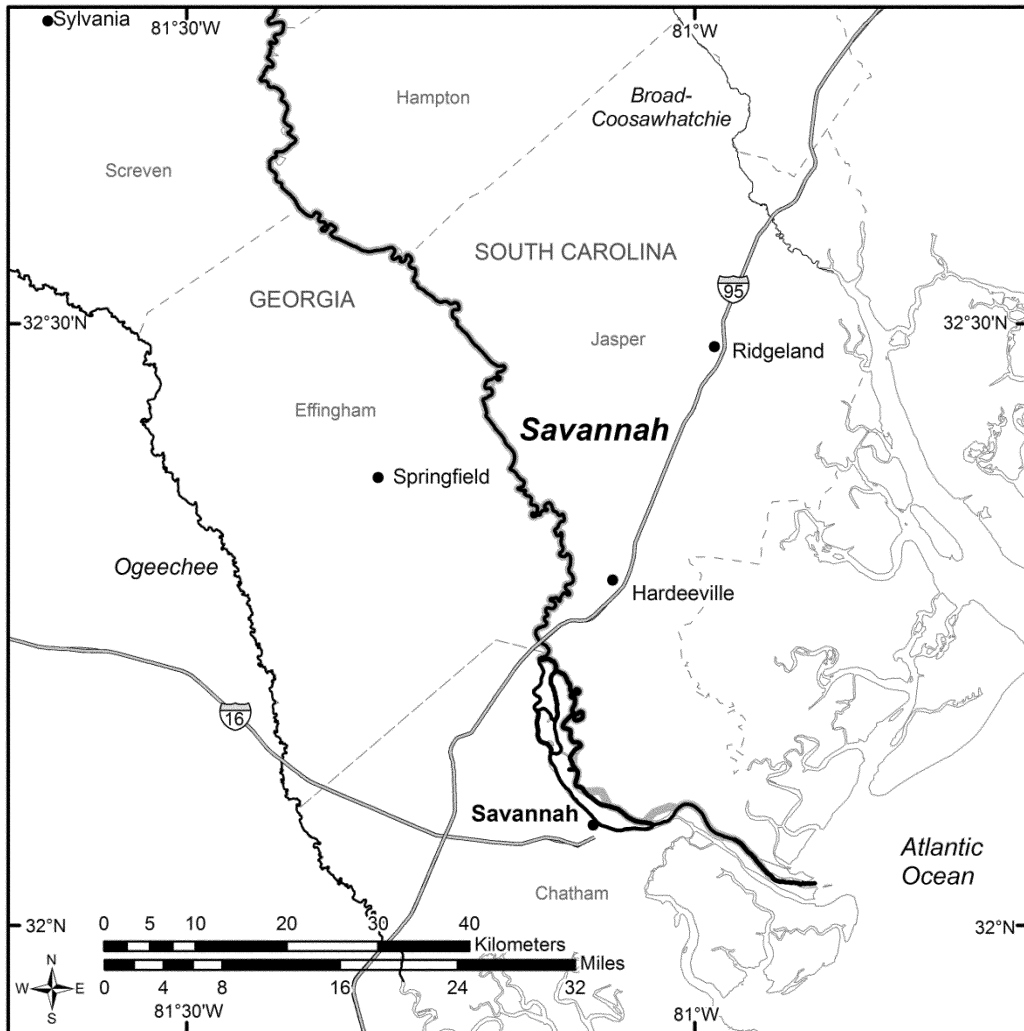
 Critical Habitat Area





This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

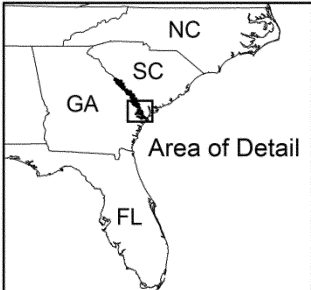
**South Atlantic Unit 3  
Savannah Unit**

**Map 10.1**



**Legend**

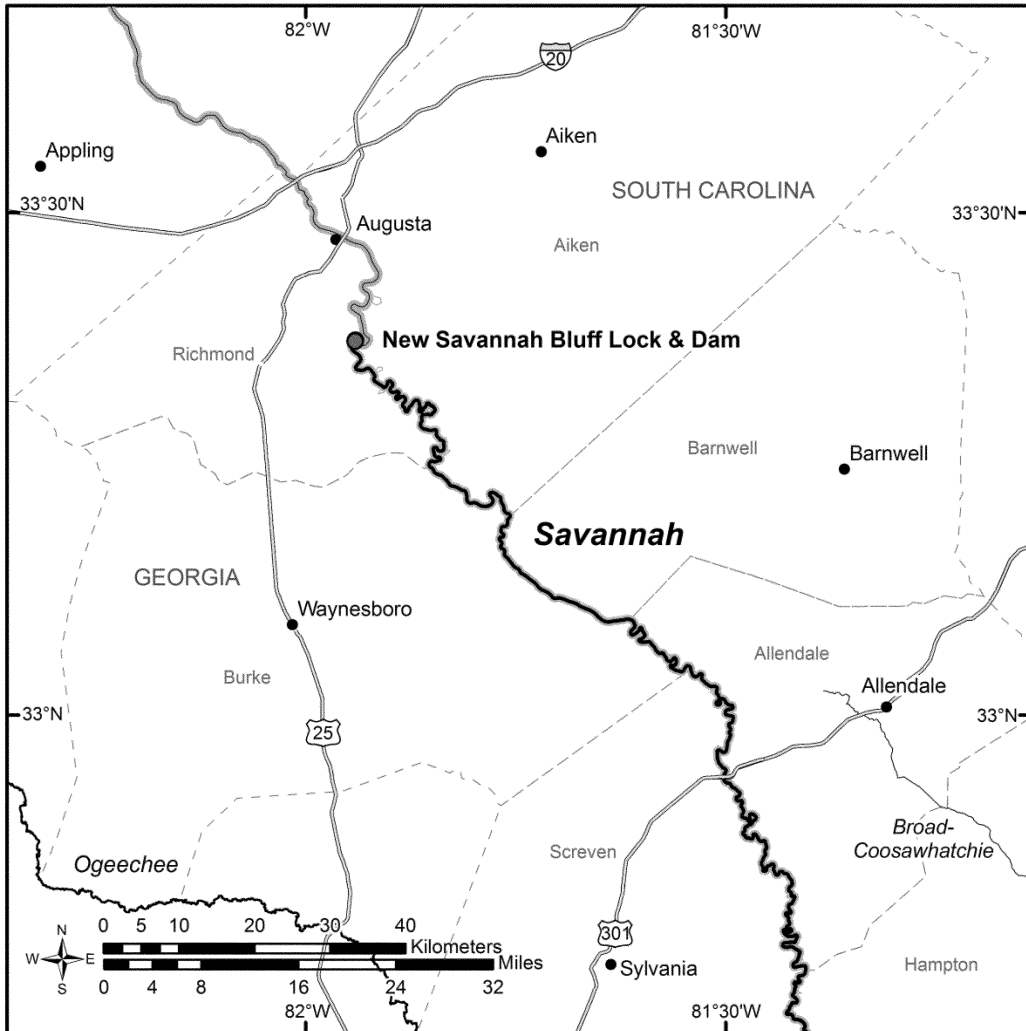
-  Critical Habitat
-  SC/GA State Line



This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

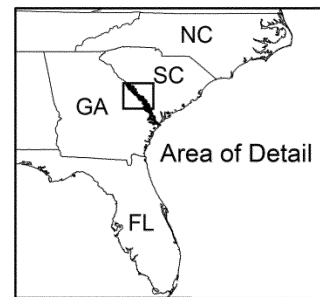
**South Atlantic Unit 3  
Savannah Unit**

**Map 10.2**



**Legend**

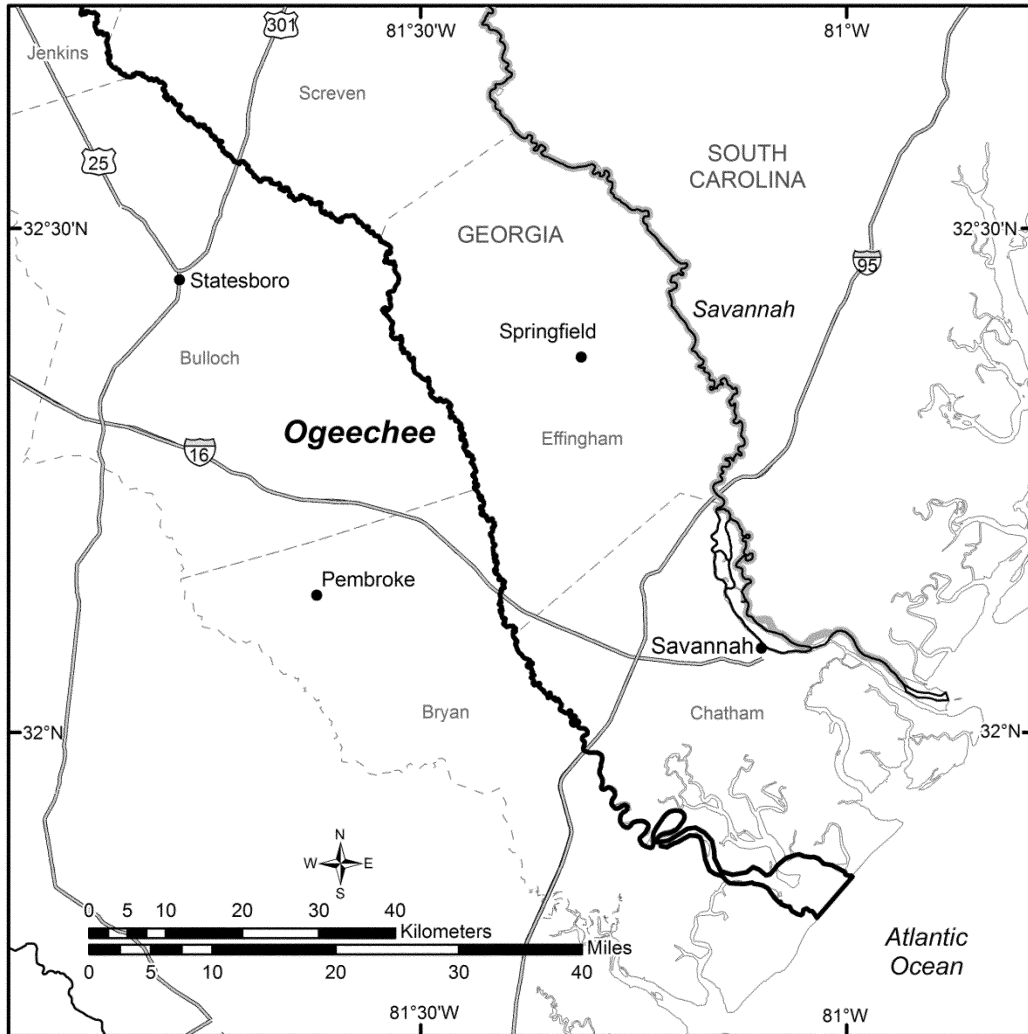
- Critical Habitat
- SC/GA State Line




This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

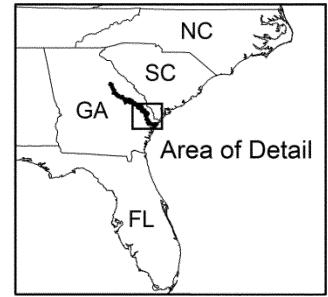
### South Atlantic Unit 4 Ogeechee Unit

Map 11.1



**Legend**

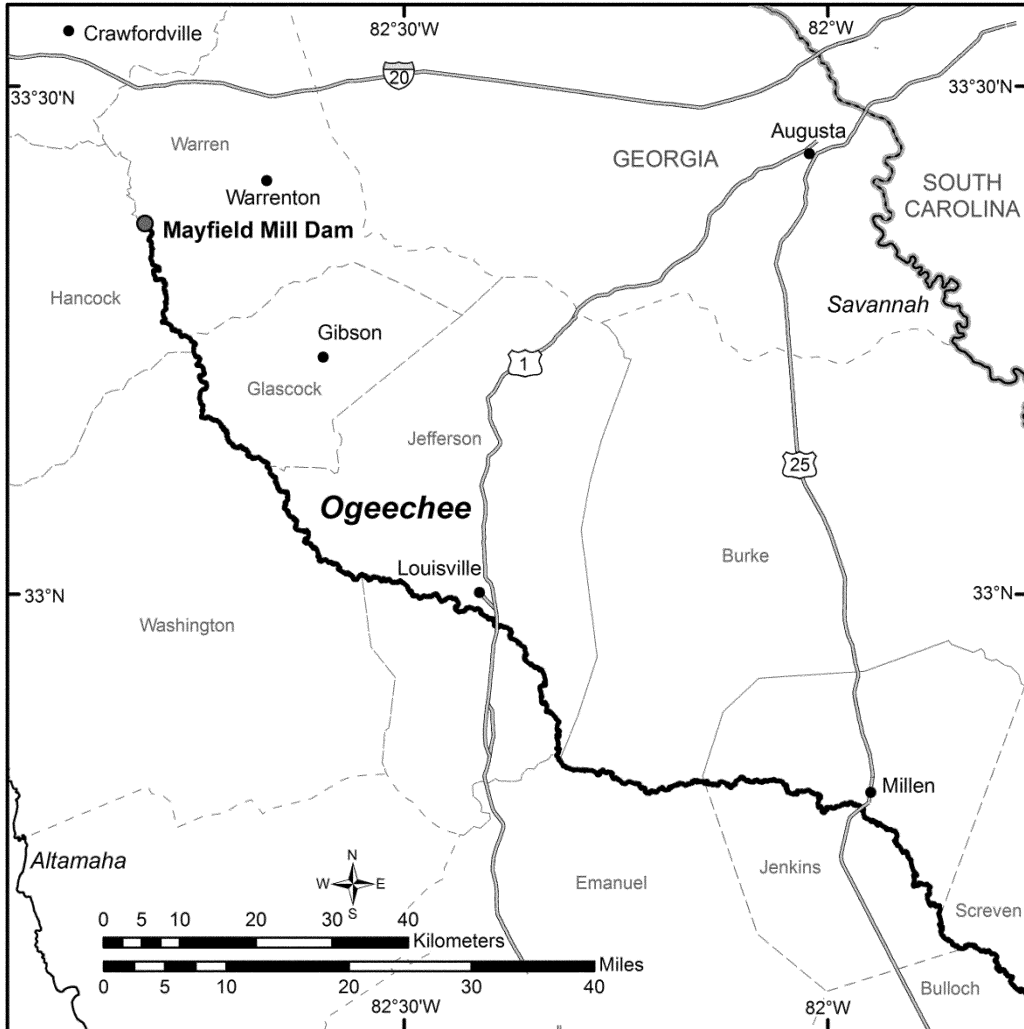
 Critical Habitat Area



This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

### South Atlantic Unit 4 Ogeechee Unit

Map 11.2



**Legend**

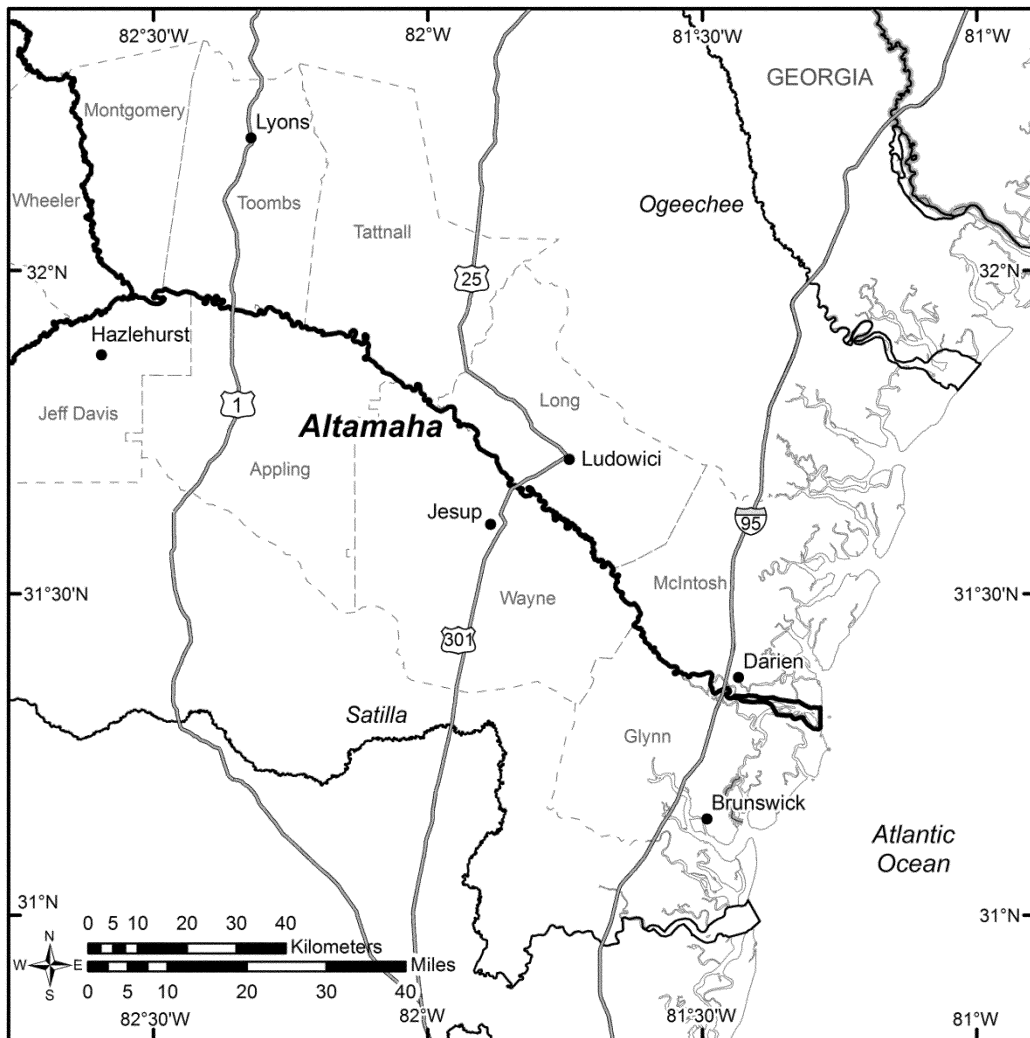
— Critical Habitat




This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

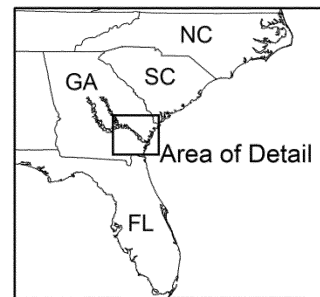
**South Atlantic Unit 5  
Altamaha Unit**

**Map 12.1**



**Legend**

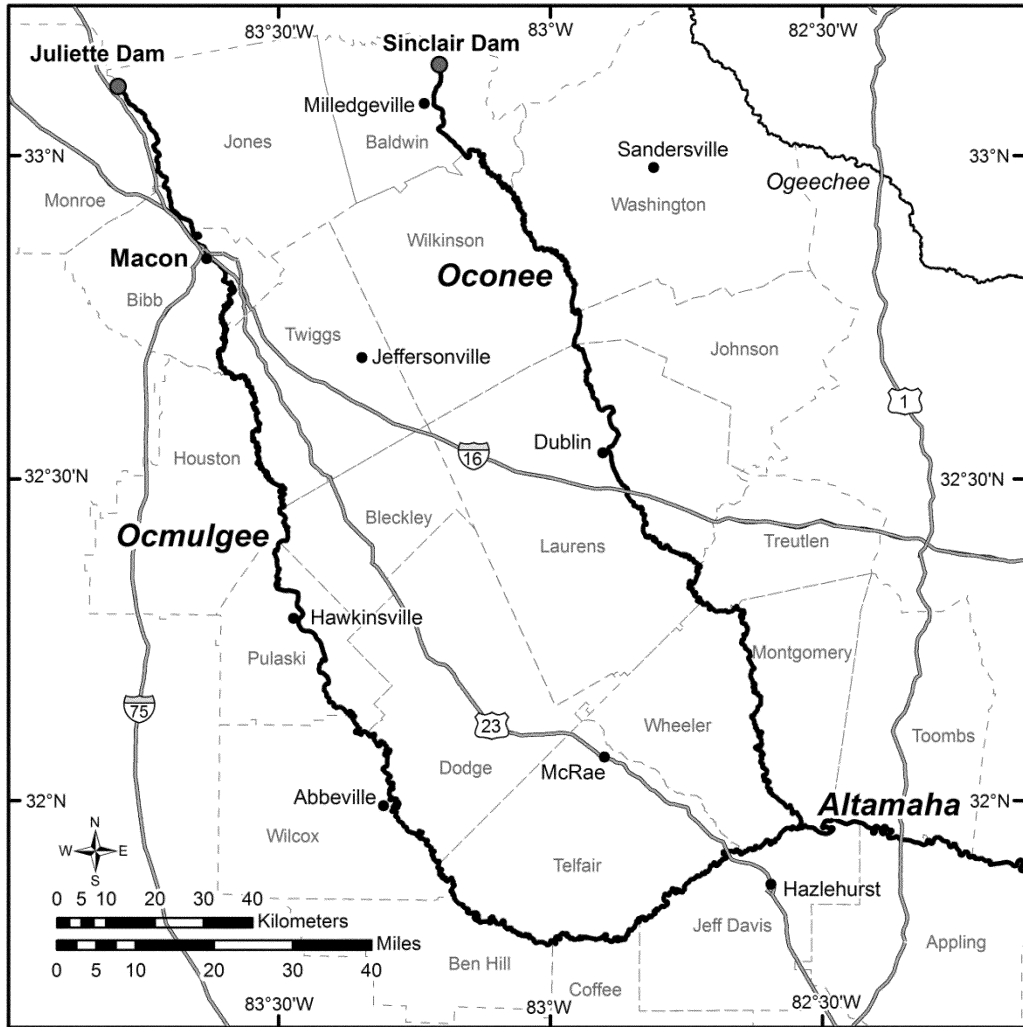
 Critical Habitat Area



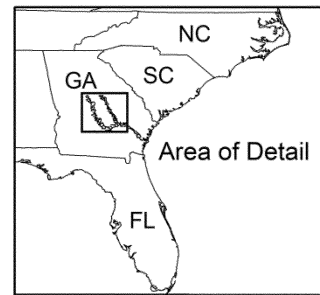
This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

**South Atlantic Unit 5  
Altamaha Unit**

**Map 12.2**



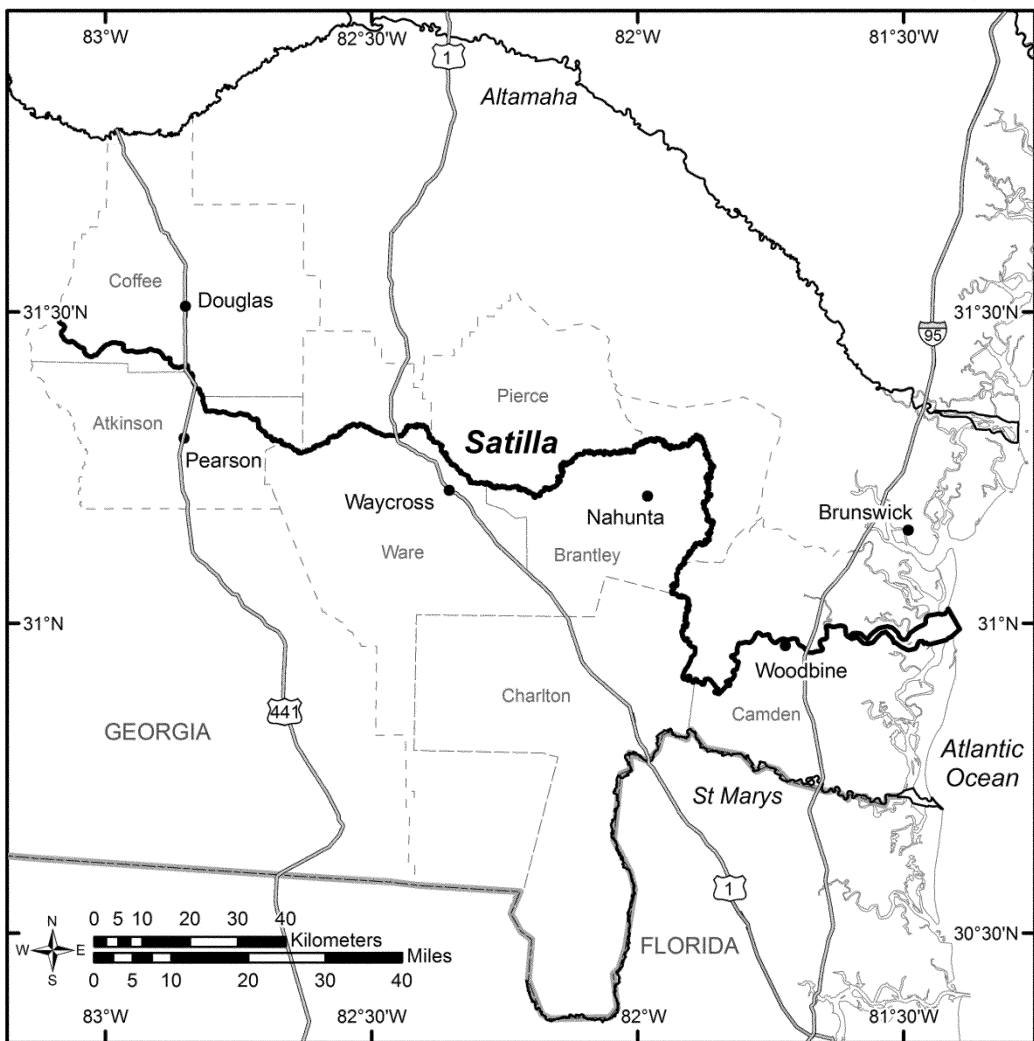
**Legend**  
 — Critical Habitat




This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.

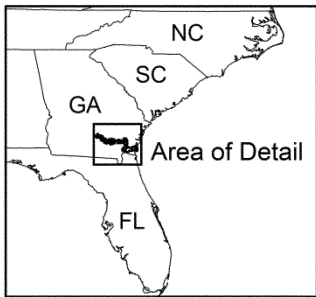
**South Atlantic Unit 6  
Satilla Unit**

**Map 13**



**Legend**

 Critical Habitat Area

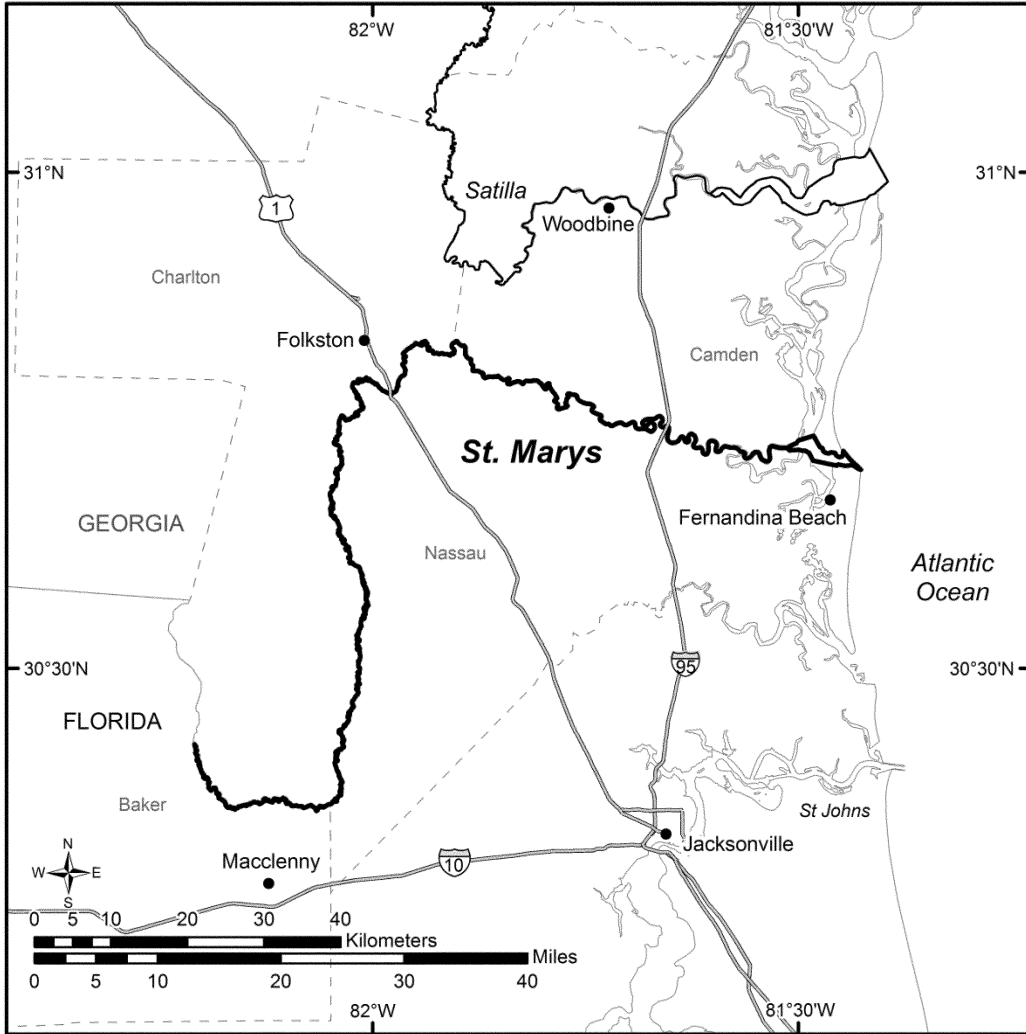


This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.



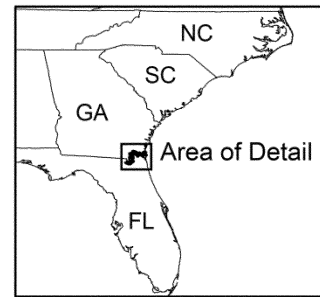
**South Atlantic Unit 7  
St. Marys Unit**

**Map 14**



**Legend**

Critical Habitat Area



This map illustrates Atlantic sturgeon critical habitat. Critical habitat is all of the river within the illustrated Critical Habitat Area from the ordinary high water mark on one riverbank to the ordinary high water mark of the opposing riverbank. For clarification of the critical habitat definition, please refer to the narrative description.



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Part III

## Department of Commerce

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National Oceanic and Atmospheric Administration

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to a Low-Energy Geophysical Survey in the Northeastern Pacific Ocean; Notice

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration**

RIN 0648–XF329

**Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to a Low-Energy Geophysical Survey in the Northeastern Pacific Ocean**

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

**ACTION:** Notice; proposed incidental harassment authorization; request for comments.

**SUMMARY:** NMFS has received a request from the Scripps Institution of Oceanography (SIO) for authorization to take marine mammals incidental to a low-energy marine geophysical survey in the northeastern Pacific Ocean. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization and agency responses will be summarized in the final notice of our decision.

**DATES:** Comments and information must be received no later than September 18, 2017.

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to [ITP.Carduner@noaa.gov](mailto:ITP.Carduner@noaa.gov).

**Instructions:** NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at [www.nmfs.noaa.gov/pr/permits/incidental/research.htm](http://www.nmfs.noaa.gov/pr/permits/incidental/research.htm) without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter

may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Jordan Carduner, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: [www.nmfs.noaa.gov/pr/permits/incidental/research.htm](http://www.nmfs.noaa.gov/pr/permits/incidental/research.htm). In case of problems accessing these documents, please call the contact listed above.

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

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

**National Environmental Policy Act**

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.*, the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment. Accordingly, NMFS is preparing an Environmental Assessment (EA) to consider the environmental impacts associated with the issuance of the proposed IHA. NMFS’ EA is available at [www.nmfs.noaa.gov/pr/permits/incidental/research.htm](http://www.nmfs.noaa.gov/pr/permits/incidental/research.htm). We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

**Summary of Request**

On March 20, 2017, NMFS received a request from SIO for an IHA to take marine mammals incidental to conducting a low-energy marine geophysical survey in the northeastern Pacific Ocean. On July 5, 2017, we deemed SIO’s application for authorization to be adequate and complete. SIO’s request is for take of a small number of 27 species of marine mammals by Level B harassment and Level A harassment. Neither SIO nor NMFS expects mortality to result from this activity, and, therefore, an IHA is appropriate. The planned activity is not expected to exceed one year, hence, we do not expect subsequent MMPA incidental harassment authorizations would be issued for this particular activity.

**Description of Proposed Activity***Overview*

SIO proposes to conduct a low-energy marine seismic survey offshore Oregon and Washington in the northeastern Pacific Ocean over the course of five days in September 2017. The proposed survey would occur off the Oregon continental margin out to 127.5° W. and between ~43 and 46.5° N. (See Figure 1 in IHA application). Water depths in the survey area are ~130–2600 m. The proposed survey would involve one source vessel, the R/V *Roger Revelle*. The *Revelle* would tow a pair of 45 cubic inch (in<sup>3</sup>) airguns with a total discharge volume of ~90 in<sup>3</sup> as an energy source along predetermined lines.

*Dates and Duration*

The seismic survey would be carried out for five days. The *Revelle* would likely depart from Newport, Oregon, on

or about September 22, 2017 and would return to Newport on or about September 29, 2017. Some deviation in timing could result from unforeseen events such as weather, logistical issues, or mechanical issues with the research vessel and/or equipment. Seismic activities would occur 24 hours per day during the proposed survey.

#### Specific Geographic Region

The survey would occur in the northeastern Pacific Ocean off the Oregon continental margin out to 127.5° W. and between ~43 and 46.5° N. Two potential survey areas off the Oregon continental margin have been proposed (See Figure 1 in IHA application). One potential survey area, referred to by SIO as the Astoria Fan area, is located off northern Oregon off the mouth of the Columbia River and near the Astoria Canyon. The other potential survey area, referred to as the southern Oregon area, is located off the southern Oregon margin. Both the proposed Astoria Fan and Southern Oregon survey areas are located at least 23 kilometers (km) from the U.S. west coast over water depths ~130–2600 meters (m). SIO will ultimately select one of these two potential areas for the survey (*i.e.*, both areas will not be surveyed). Representative survey track lines for both potential survey areas are shown in Figure 1 of the IHA application. The *Revelle* would depart from Newport, Oregon and return to Newport at the conclusion of the survey.

#### Detailed Description of Specific Activity

SIO plans to conduct a low-energy seismic survey off the coasts of Oregon and Washington. The proposed surveys involve an Early Career Seismic Chief Scientist Training Cruise which aims to train scientists on how to effectively plan seismic surveys, acquire data, and manage activities at sea. In addition, the survey would provide critical data to understand the sediment and crustal structure within the Cascadia continental margin. The proposed survey would take place on the active continental margin of the U.S. west coast where a variety of sedimentary and tectonic settings are available, providing many targets of geologic interest to a wide range of research cruise participants.

The procedures to be used for the seismic survey would be similar to those used during previous seismic surveys by SIO and would use conventional seismic methodology. The survey would involve one source vessel, the R/V *Roger Revelle*. The *Revelle* would deploy a pair of 45-in<sup>3</sup> GI airguns as an energy source with a total

discharge volume of ~90 in<sup>3</sup>. The receiving system would consist of one 800-m hydrophone streamer. As the airguns are towed along the survey lines, the hydrophone streamer would receive the returning acoustic signals and transfer the data to the on-board processing system.

Two potential sites off the Oregon continental margin, referred to by SIO as the Astoria Fan and southern Oregon sites, have been proposed for the survey (see Figure 1 in the IHA application). Only one of the two sites will be surveyed. Each of the proposed survey sites has several science targets. The southern Oregon survey includes the paleo objectives, a long plate transect that crosses Diebold Knoll, and a detailed survey of the megaslump segment of the Cascadia subduction zone, which has no previous seismic data. The Astoria Fan survey includes flexure, accretionary wedge mechanisms and gas hydrates as objectives; it covers a major seismic gap. The scientists on board would be responsible for modifying the survey to fit the allocated cruise length while meeting the project objectives, including choosing which survey or what portion of each survey to conduct.

The total line km for the Southern Oregon survey would be 1013 km, ~5 percent of which would be in intermediate water (100–1000 m), with the remainder in water deeper than 1000 m. The total length for the Astoria Fan survey would be 1057 km, with ~23 percent of line km in intermediate water and the remainder in water >1000 m. No effort during either survey would occur in shallow water <100 m deep. For purposes of this proposed IHA, the total track distance to be surveyed is estimated to be no greater than ~1057 km, which is the line km of the longer of the two potential surveys. There would be additional seismic operations in the survey area associated with airgun testing and repeat coverage of any areas where initial data quality is sub-standard. To account for these additional seismic operations, 25 percent has been added in the form of operational days, which is equivalent to adding 25 percent to the proposed line km to be surveyed.

In addition to the operations of the airgun array, a multibeam echosounder (MBES) and a sub-bottom profiler (SBP) would also be operated from the *Revelle* continuously throughout the seismic survey, but not during transits to and from the project area. All planned geophysical data acquisition activities would be conducted by SIO with on-board assistance by the scientists who have proposed the study. The vessel

would be self-contained, and the crew would live aboard the vessel for the entire cruise.

The *Revelle* has a length of 83 m, a beam of 16.0 m, and a maximum draft of 5.2 m. The ship is powered by two 3,000 horsepower Propulsion General Electric motors and an 1180-hp azimuthing jet bow thruster. An operation speed of 9.3 km/h (5 knots (kt)) would be used during seismic acquisition. When not towing seismic survey gear, the *Revelle* cruises at 22.2–23.1 km/h (12–12.5 kt) and has a maximum speed of 27.8 km/h (15 kt). The *Revelle* would also serve as the platform from which vessel-based protected species observers (PSOs) would watch for marine mammals during airgun operations.

During the survey, The *Revelle* would tow a pair of 45-in<sup>3</sup> GI airguns and an 800 m streamer containing hydrophones along predetermined lines. Seismic pulses would be emitted at intervals of ~8–10 seconds (s) (20–25 m). The generator chamber of each GI gun, the one responsible for introducing the sound pulse into the ocean, is 45 in<sup>3</sup>. The two 45-in<sup>3</sup> GI guns would be towed 21 m behind the *Revelle*, 2 m apart side by side, at a depth of 3 m. As the airguns are towed along the survey lines, the towed hydrophone array in the 800 m streamer would receive the reflected signals and transfer the data to the onboard processing system.

TABLE 1—SPECIFICATIONS OF THE R/V REVELLE AIRGUN ARRAY

Number of airguns .....	2.
Tow depth of energy source .....	3 m.
Dominant frequency components .....	0–188 Hz.
Total volume .....	~90 in <sup>3</sup> .
Shot interval .....	7.8 seconds.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see “Proposed Mitigation” and “Proposed Monitoring and Reporting”).

#### Description of Marine Mammals in the Area of Specified Activities

Section 4 of the application summarizes available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SAR; [www.nmfs.noaa.gov/pr/sars/](http://www.nmfs.noaa.gov/pr/sars/)), and more general information about these species (*e.g.*, physical and behavioral descriptions) may be found on NMFS'

Web site ([www.nmfs.noaa.gov/pr/species/mammals/](http://www.nmfs.noaa.gov/pr/species/mammals/)).

Table 2 lists all species with expected potential for occurrence in the northeastern Pacific Ocean and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2016). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal

stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock

abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Pacific SARs (*e.g.*, Carretta *et al.* 2017). All values presented in Table 2 are the most recent available at the time of publication and are available in the 2017 SARs (Carretta *et al.* 2017), available online at: [www.nmfs.noaa.gov/pr/sars](http://www.nmfs.noaa.gov/pr/sars), except where noted otherwise.

TABLE 2—MARINE MAMMALS THAT COULD OCCUR IN THE PROJECT AREA

Species	Stock	ESA/MMPA status; strategic (Y/N) <sup>1</sup>	Stock abundance <sup>2</sup> (CV, N <sub>min</sub> , most recent abundance survey) <sup>3</sup>	PBR <sup>4</sup>	Relative occurrence in project area
<b>Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)</b>					
<b>Family: Balaenopteridae</b>					
North Pacific right whale <sup>5</sup> ( <i>Eubalaena japonica</i> ).	Eastern North Pacific .....	E/D; Y	31 .....	0.1	Rare.
Gray whale <sup>5</sup> ( <i>Eschrichtius robustus</i> ).	Eastern North Pacific .....	-/-; N	20,990 (0.05; 20,125; 2011).	3.1	Common in nearshore areas, rare elsewhere.
Humpback whale <sup>6</sup> ( <i>Megaptera novaeangliae</i> ).	California/Oregon/Washington.	E/T/D; N	1,918 (0.03; 1,876; 2014) ..	11	Common in nearshore areas, rare elsewhere.
Minke whale ( <i>Balaenoptera acutorostrata</i> ).	California/Oregon/Washington.	-/-; N	636 (0.72; 369; 2014) .....	3.5	Rare.
Sei whale ( <i>Balaenoptera borealis</i> ).	Eastern N Pacific .....	E/D; Y	519 (0.4; 374; 2014) .....	0.75	Rare.
Fin whale ( <i>Balaenoptera physalus</i> ).	California/Oregon/Washington.	E/D; Y	9,029 (0.12; 8,127; 2014) ..	81	Common.
Blue whale ( <i>Balaenoptera musculus</i> ).	Eastern N Pacific .....	E/D; Y	1,647 (0.07; 1,551; 2011) ..	2.3	Rare.
<b>Order Cetartiodactyla—Cetacea—Superfamily Odontoceti (toothed whales, dolphins, and porpoises)</b>					
<b>Family: Physeteridae</b>					
Sperm whale ( <i>Physeter macrocephalus</i> ).	California/Oregon/Washington.	E/D; Y	2,106 (0.58; 1,332; 2014).	2.7	Common.
<b>Order Cetartiodactyla—Cetacea—Superfamily Odontoceti (toothed whales, dolphins, and porpoises)</b>					
<b>Family: Kogiidae</b>					
Pygmy sperm whale ( <i>Kogia breviceps</i> ).	California/Oregon/Washington.	-/-; N	4,111 (1.12; 1,924; 2014) ..	19	Rare.
Dwarf sperm whale ( <i>Kogia sima</i> ).	California/Oregon/Washington.	-/-; N	unknown (unknown; unknown; 2014).	Undet	Rare.
<b>Order Cetartiodactyla—Cetacea—Superfamily Odontoceti (toothed whales, dolphins, and porpoises)</b>					
<b>Family delphinidae</b>					
Killer whale ( <i>Orcinus orca</i> )	West coast transient .....	-/-; N	243 (n/a; 243; 2009) .....	2.4	Rare.
	Eastern North Pacific off-shore.	-/-; N	240 (0.49; 162; 2014) .....	1.6	Rare.
False killer whale <sup>7</sup> ( <i>Pseudorca crassidens</i> ).	Hawaii Pelagic .....	-/-; N	1,540 (0.66; 928; 2010) .....	9.3	Rare.
Short-finned pilot whale ( <i>Globicephala macrorhynchus</i> ).	California/Oregon/Washington.	-/-; N	836 (0.79; 466; 2014) .....	4.5	Rare.
Harbor porpoise ( <i>Phocoena phocoena</i> ).	Northern Oregon/Washington Coast.	-/-; N	21,487 (0.44; 15,123; 2011).	151	Abundant.
	Northern California/Southern Oregon.	-/-; N	35,769 (0.52; 23,749; 2011).	475	Abundant.

TABLE 2—MARINE MAMMALS THAT COULD OCCUR IN THE PROJECT AREA—Continued

Species	Stock	ESA/MMPA status; strategic (Y/N) <sup>1</sup>	Stock abundance <sup>2</sup> (CV, N <sub>min</sub> , most recent abundance survey) <sup>3</sup>	PBR <sup>4</sup>	Relative occurrence in project area
Dall's porpoise ( <i>Phocoena dalli</i> ).	California/Oregon/Washington.	-/-; N	25,750 (0.45; 17,954; 2014).	172	Abundant.
Bottlenose dolphin ( <i>Tursiops truncatus</i> ).	California/Oregon/Washington Offshore.	-/-; N	1,924 (0.54; 1,255; 2014) ..	11	Rare.
Striped dolphin ( <i>Stenella coeruleoala</i> ).	California/Oregon/Washington.	-/-; N	29,211 (0.2; 24,782; 2014)	238	Rare.
Risso's dolphin ( <i>Grampus griseus</i> ).	California/Oregon/Washington.	-/-; N	6,336 (0.32; 4,817; 2014) ..	46	Common.
Short-beaked common dolphin ( <i>Delphinus delphis</i> ).	California/Oregon/Washington.	-; N	969,861 (0.17; 839,325; 2014).	8,393	Common.
Pacific white-sided dolphin (Lagenorhynchus obliquidens).	California/Oregon/Washington.	-; N	26,814 (0.28; 21,195; 2014).	191	Abundant.
Northern right whale dolphin ( <i>Lissodelphis borealis</i> ).	California/Oregon/Washington.	-; N	26,556 (0.44; 18,608; 2014).	179	Common.

**Order Cetartiodactyla—Cetacea—Superfamily Odontoceti (toothed whales, dolphins, and porpoises)**

**Family: Ziphiidae**

Cuvier's beaked whale ( <i>Ziphius cavirostris</i> ).	California/Oregon/Washington.	-/-; N	6,590 (0.55; 4,481; 2008) ..	45	Common.
Baird's beaked whale ( <i>Berardius bairdii</i> ).	California/Oregon/Washington.	-; N	847 (0.81; 466; 2008) .....	4.7	Common.
Mesoplodont beaked whales <sup>8</sup> .	California/Oregon/Washington.	-/-; N	694 (0.65; 389; 2008) .....	3.9	Rare.

**Order Carnivora—Superfamily Pinnipedia**

**Family Otariidae (eared seals and sea lions)**

California sea lion ( <i>Zalophus californianus</i> ).	U.S. ....	-; N	296,750 (n/a; 153,337; 2011).	9,200	Rare.
Steller sea lion ( <i>Eumetopias jubatus</i> ).	Eastern U.S. ....	-; N	41,638 (n/a; 41,638; 2015)	2,498	Common in nearshore areas, rare elsewhere.

**Family Phocidae (earless seals)**

Harbor seal <sup>9</sup> ( <i>Phoca vitulina</i> ).	Oregon/Washington Coast	-; N	24,732 (unk; unk; n/a) .....	Unknown	Common in nearshore areas, rare elsewhere.
Northern elephant seal ( <i>Mirounga angustirostris</i> ).	California breeding .....	-; N	179,000 (n/a; 81,368; 2010).	4,882	Common in nearshore areas, rare elsewhere.
Northern fur seal ( <i>Callorhinus ursinus</i> ).	California .....	-; N	14,050 (n/a; 7,524; 2013) ..	451	Common in nearshore areas, rare elsewhere.

<sup>1</sup> Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR (see footnote 3) or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

<sup>2</sup> Abundance estimates from Carretta *et al.* (2017) unless otherwise noted.

<sup>3</sup> CV is coefficient of variation; N<sub>min</sub> is the minimum estimate of stock abundance. In some cases, CV is not applicable. For certain stocks, abundance estimates are actual counts of animals and there is no associated CV. The most recent abundance survey that is reflected in the abundance estimate is presented; there may be more recent surveys that have not yet been incorporated into the estimate.

<sup>4</sup> Potential biological removal (PBR), defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population size (OSP).

<sup>5</sup> Values for gray whale and North Pacific right whale are from Muto *et al.* 2016.

<sup>6</sup> Humpback whales in the survey area could originate from either the ESA threatened Mexico DPS or from the ESA endangered Central America DPS.

<sup>7</sup> NMFS does not have a defined stock for false killer whales off the West Coast of the U.S. as they are considered uncommon visitors to the area; any false killer whales observed off the West Coast of the U.S. would likely be part of the eastern North Pacific population. Of the stocks defined by NMFS, the Hawaii Pelagic stock is the most likely to include individuals in the eastern North Pacific population.

<sup>8</sup> Includes the following species: Blainville's beaked whale (*M. densirostris*), Perrin's beaked whale (*M. perrini*), Lesser beaked whale (*M. peruvianus*), Stejneger's beaked whale (*M. stejnegeri*), Ginkgo-toothed beaked whale (*M. ginkgodens*), and Hubbs' beaked whale (*M. carlhubbsi*).

<sup>9</sup> The most recent abundance estimate is from 1999. This is the best available information, but because this abundance estimate is >8 years old, there is no current estimate of abundance available for this stock.

All species that could potentially occur in the proposed survey area are included in Table 2. However, as of the North Pacific right whale and dwarf sperm whale are such that take is described below, the spatial occurrence

not expected to occur for these species. The North Pacific right whale is one of the most endangered species of whale in the world (Carretta *et al.* 2017). Only 82 sightings of right whales in the entire eastern North Pacific were reported from 1962 to 1999, with the majority of these occurring in the Bering Sea and adjacent areas of the Aleutian Islands (Brownell *et al.* 2001). Most sightings in the past 20 years have occurred in the southeastern Bering Sea, with a few in the Gulf of Alaska (Wade *et al.* 2011). Despite many miles of systematic aerial and ship-based surveys for marine mammals off the coasts of Washington, Oregon and California over several years, only seven documented sightings of right whales were made from 1990 to 2000 (Waite *et al.* 2003). Because of the small population size and the fact that North Pacific right whales spend the summer feeding in high latitudes, the likelihood that the proposed survey would encounter a North Pacific right whale is discountable. Along the U.S. west coast, no at-sea sightings of dwarf sperm whales have ever been reported despite numerous vessel surveys of this region (Barlow 1995; Barlow and Gerrodette 1996; Barlow and Forney 2007; Forney 2007; Barlow 2010, Barlow 2016). Therefore, based on the best available information, we believe the likelihood of the survey encountering a dwarf sperm whale is discountable. SIO requested authorization for the incidental take of dwarf sperm whales (the request was for a combined two takes of pygmy and/or dwarf sperm whales). However as we have determined the likelihood of take of dwarf sperm whales is discountable, we do not propose to authorize take of dwarf sperm whales. Thus, the North Pacific right whale and dwarf sperm whale are not discussed further in this document.

We have reviewed SIO's species descriptions, including life history information, distribution, regional distribution, diving behavior, and acoustics and hearing, for accuracy and completeness. We refer the reader to Section 4 of SIO's IHA application, rather than reprinting the information here. Below, for the 27 species that are likely to be taken by the activities described, we offer a brief introduction to the species and relevant stock(s) as well as available information regarding population trends and threats, and describe any information regarding local occurrence.

#### *Humpback Whale*

Humpback whales are found worldwide in all ocean basins. In winter, most humpback whales occur in

the subtropical and tropical waters of the Northern and Southern Hemispheres (Muto *et al.*, 2015). These wintering grounds are used for mating, giving birth, and nursing new calves. Humpback whales migrate nearly 3,000 mi (4,830 km) from their winter breeding grounds to their summer foraging grounds in Alaska. The humpback whale is the most common species of large cetacean reported off the coasts of Oregon and Washington from May to November (Green *et al.* 1992; Calambokidis *et al.* 2004).

There are five stocks of humpback whales, one of which occurs along the U.S. west coast: The California/Oregon/Washington Stock, which includes animals that appear to be part of two separate feeding groups, a California and Oregon feeding group and a northern Washington and southern British Columbia feeding group (Calambokidis *et al.* 2008, Barlow *et al.* 2011). Very few photographic matches between these feeding groups have been documented (Calambokidis *et al.* 2008). Humpbacks from both groups have been photographically matched to breeding areas off Central America, mainland Mexico, and Baja California, but whales from the northern Washington and southern British Columbia feeding group also winter near the Hawaiian Islands and the Revillagigedo Islands off Mexico (Barlow *et al.* 2011).

Humpback whales were listed as endangered under the Endangered Species Conservation Act (ESCA) in June 1970. In 1973, the ESA replaced the ESCA, and humpbacks continued to be listed as endangered. NMFS recently evaluated the status of the species, and on September 8, 2016, NMFS divided the species into 14 distinct population segments (DPS), removed the current species-level listing, and in its place listed four DPSs as endangered and one DPS as threatened (81 FR 62259; September 8, 2016). The remaining nine DPSs were not listed. The Mexico DPS and the Central America DPS are the only DPSs that are expected to occur in the survey area. The Mexico DPS is listed as threatened and the Central America DPS is listed as endangered under the ESA (81 FR 62259; September 8, 2016). The California/Oregon/Washington stock is considered a depleted and strategic stock under the MMPA.

#### *Blue Whale*

The blue whale has a cosmopolitan distribution and tends to be pelagic, only coming nearshore to feed and possibly to breed (Jefferson *et al.* 2008). Blue whale migration is less well defined than for some other rorquals,

and their movements tend to be more closely linked to areas of high primary productivity, and hence prey, to meet their high energetic demands (Branch *et al.* 2007). Generally, blue whales are seasonal migrants between high latitudes in the summer, where they feed, and low latitudes in the winter, where they mate and give birth (Lockyer and Brown 1981). Some individuals may stay in low or high latitudes throughout the year (Reilly and Thayer 1990; Watkins *et al.* 2000). North Pacific blue whales were once thought to belong to as many as five separate populations (Reeves *et al.* 1998), but acoustic evidence suggests only two populations, in the eastern and western North Pacific, respectively (Stafford *et al.* 2001, Stafford 2003, McDonald *et al.* 2006, Monnahan *et al.* 2014). Only the Eastern North Pacific stock of blue whale occurs in the proposed survey area.

Blue whale densities along the U.S. west coast including Oregon are believed to be highest in shelf waters, with lower densities in deeper offshore areas (Becker *et al.* 2012; Calambokidis *et al.* 2015). Based on the absolute dynamic topography of the region, blue whales could occur in relatively high densities off Oregon during July–December (Pardo *et al.* 2015).

Five blue whale sightings were reported in the proposed project area off Oregon/Washington during 1991–2008; one sighting occurred within the nearshore portion of the proposed Astoria Fan survey area, and four sightings occurred nearshore, east of the Southern Oregon survey area (Carretta *et al.* 2017). Hazen *et al.* (2016) examined blue whale tag data from 182 individuals along the western U.S. during 1993–2008; multiple tag data tracks were within the proposed project area, particularly between August and November. Blue whales are listed as endangered under the ESA, and the Eastern North Pacific stock of blue whales is considered a depleted and strategic stock under the MMPA.

#### *Fin Whale*

Fin whales are found throughout all oceans from tropical to polar latitudes. The species occurs most commonly offshore but can also be found in coastal areas (Aguilar 2009). Most populations migrate seasonally between temperate waters where mating and calving occur in winter, and polar waters where feeding occurs in summer (Aguilar 2009). However, recent evidence suggests that some animals may remain at high latitudes in winter or low latitudes in summer (Edwards *et al.* 2015).

The North Pacific population summers from the Chukchi Sea to California and winters from California southwards (Gambell 1985). Aggregations of fin whales are found year-round off southern and central California (Dohl *et al.* 1980, 1983; Forney *et al.* 1995; Barlow 1997) and in the summer off Oregon (Green *et al.* 1992; Edwards *et al.* 2015). Vocalizations from fin whales have also been detected year-round off northern California, Oregon, and Washington (Moore *et al.* 1998, 2006; Watkins *et al.* 2000a; Stafford *et al.* 2007, 2009). Fin whales are listed as endangered under the ESA, and the California/Oregon/Washington stock of fin whales is considered depleted and strategic under the MMPA.

#### *Sei Whale*

The sei whale occurs in all ocean basins (Horwood 2009) but appears to prefer mid-latitude temperate waters (Jefferson *et al.* 2008). It undertakes seasonal migrations to feed in subpolar latitudes during summer and returns to lower latitudes during winter to calve (Horwood 2009). The sei whale is pelagic and generally not found in coastal waters (Harwood and Wilson 2001). It occurs in deeper waters characteristic of the continental shelf edge region (Hain *et al.* 1985) and in other regions of steep bathymetric relief such as seamounts and canyons (Kenney and Winn 1987; Gregr and Trites 2001).

Sei whales are rare in the waters off California, Oregon, and Washington (Brueggeman *et al.* 1990; Green *et al.* 1992; Barlow 1994, 1997). Only nine confirmed sightings were reported for California, Oregon, and Washington during extensive surveys from 1991–2008, including two within or near the westernmost portion of the Southern Oregon survey area (Green *et al.* 1992, 1993; Hill and Barlow 1992; Carretta and Forney 1993; Mangels and Gerrodette 1994; Von Saunder and Barlow 1999; Barlow 2003; Forney 2007; Barlow 2010; Carretta *et al.* 2016a). Two sightings of four individuals were made from the *Langseth* seismic vessel off Washington/Oregon during June–July 2012 (RPS 2012), including within the proposed project area. Sei whales are listed as endangered under the ESA, and the Eastern North Pacific stock of sei whales is considered a depleted and strategic stock under the MMPA.

#### *Minke Whale*

The minke whale has a cosmopolitan distribution ranging from the tropics and subtropics to the ice edge in both hemispheres (Jefferson *et al.* 2008). The

California/Oregon/Washington stock of minke whale is the only stock that occurs in the proposed survey area. Minke whale sightings have been made off Oregon and Washington in shelf and deeper waters (Green *et al.* 1992; Adams *et al.* 2014; Carretta *et al.* 2017). A single minke whale was observed off the outer Washington coast (~47° N.) during small boat surveys from August 2004 through September 2008, 14 km from shore with a bottom depth of 38 m (Oleson *et al.* 2009). One sighting was made near the Astoria Fan survey area at the 200-m isopleth off the mouth of the Columbia River in July 2012 (Adams *et al.* 2014). Minke whale strandings have been reported in all seasons in Washington; most strandings (52 percent) occurred in spring (Norman *et al.* 2004). The minke whale is not listed as threatened or endangered under the ESA, and the California/Oregon/Washington stock is not listed as depleted or strategic under the MMPA.

#### *Gray Whale*

Gray whales occur along the eastern and western margins of the North Pacific. During summer and fall, most whales in the Eastern North Pacific stock feed in the Chukchi, Beaufort and northwestern Bering Seas, with the exception of a relatively small number of whales (approximately 200) that summer and feed along the Pacific coast between Kodiak Island, Alaska and northern California (Carretta *et al.* 2017). Three primary wintering lagoons in Baja California, Mexico are utilized, and some females are known to make repeated returns to specific lagoons (Jones 1990).

According to predictive density distribution maps, low densities of gray whales could be encountered throughout the Astoria Fan and Southern Oregon survey areas (Menza *et al.* 2016). During aerial surveys over the shelf and slope off Oregon and Washington, gray whales were seen during the months of January, June–July, and September; one sighting was made within the Astoria Fan survey area in water >200 m during June 2011 (Adams *et al.* 2014). The proposed surveys would occur during the summer feeding season for gray whales in the Washington/Oregon region. Thus, gray whales could be encountered in the eastern portion of the proposed project area where the water is shallower. The Eastern North Pacific gray whale is not listed as threatened or endangered under the ESA nor is it classified as a depleted or strategic stock under the MMPA.

#### *Sperm Whale*

Sperm whales are widely distributed across the entire North Pacific and into the southern Bering Sea in summer, but the majority are thought to be south of 40° N. in winter (Rice 1974, 1989; Goshko *et al.* 1984; Miyashita *et al.* 1995). They are generally distributed over large areas that have high secondary productivity and steep underwater topography, in waters at least 1000 m deep (Jaquet and Whitehead 1996; Whitehead 2009). Sperm whales are seen off Washington and Oregon in every season except winter (Green *et al.* 1992). Estimates of sperm whale abundance in California, Oregon, and Washington waters out to 300 nautical miles ranged between 2,000 and 3,000 animals for the 1991–2008 time series (Moore and Barlow 2014). At least five sightings during these surveys were within or adjacent to the Southern Oregon survey area, and one sighting was within the Astoria Fan survey area (Carretta *et al.* 2017). Sperm whales are listed as endangered under the ESA, and the California/Oregon/Washington stock is considered depleted and strategic under the MMPA.

#### *Pygmy Sperm Whale*

Pygmy sperm whales are found in tropical and warm-temperate waters throughout the world (Ross and Leatherwood 1994) and prefer deeper waters with observations of this species in greater than 4,000 m depth (Baird *et al.*, 2013). Along the U.S. west coast, sightings of this species, and of animals identified only as *Kogia* spp., have been rare. However, this probably reflects their pelagic distribution, small body size and cryptic behavior, rather than a measure of rarity. Barlow (2010) used data collected in 1991–2008 to estimate an abundance of 229 *Kogia* spp. off Oregon and Washington. However, no *Kogia* spp. were sighted during surveys off Oregon and Washington in 2014 (Barlow 2016). Pygmy sperm whales are not listed as endangered or threatened under the ESA, and the California/Oregon/Washington stock is not considered strategic or designated as depleted under the MMPA.

#### *Killer Whale*

Killer whales have been observed in all oceans and seas of the world (Leatherwood and Dahlheim 1978). Although reported from tropical and offshore waters (Heyning and Dahlheim 1988), killer whales prefer the colder waters of both hemispheres, with greatest abundances found within 800 km of major continents (Mitchell 1975). Along the west coast of North America, killer whales occur along the entire



Alaskan coast, in British Columbia and Washington inland waterways, and along the outer coasts of Washington, Oregon and California (Carretta *et al.* 2017). Based on aspects of morphology, ecology, genetics and behavior killer whale stocks off the U.S. west coast are classified as either resident, transient or offshore (Ford and Fisher 1982; Baird and Stacey 1988; Baird *et al.* 1992, Hoelzel *et al.* 1998). The offshore stocks apparently do not mix with the transient and resident killer whale stocks found in these regions (Ford *et al.* 1994, Black *et al.* 1997).

Eight killer whale stocks are recognized within the Pacific U.S. Exclusive Economic Zone. Of these, two stocks occur in the proposed project area: the West Coast Transient stock which occurs from Alaska through California, and the Eastern North Pacific Offshore stock which occurs from Southeast Alaska through California. Killer whales are not listed as endangered or threatened under the ESA (with the exception of the endangered Southern Resident DPS which does not occur in the survey area), and the West Coast Transient stock and Eastern North Pacific Offshore stock are not designated as depleted or strategic under the MMPA.

#### *False Killer Whale*

False killer whales are found worldwide in tropical and warm-temperate waters (Stacey *et al.* 1994). In the North Pacific, this species occurs throughout the waters of southern Japan, Hawaii, and the eastern tropical Pacific. The species generally inhabits deep, offshore waters, but sometimes is found over the continental shelf and occasionally moves into very shallow water (Jefferson *et al.* 2008; Baird 2009). False killer whales are typically only observed off the U.S. west coast during warm-water periods. Several sightings were made off California during 2014–2016 when waters were unusually warm (pers. comm. K. Forney, NMFS Southwest Fisheries Science Center, to J. Carduner, NMFS, July 27, 2017). False killer whales observed in the survey area would be expected to originate from the eastern North Pacific population that is primarily found south of U.S. waters (pers. comm. K. Forney, NMFS Southwest Fisheries Science Center, to J. Carduner, NMFS, July 27, 2017). NMFS does not have a defined stock for false killer whales off the U.S. west coast as they are considered uncommon visitors to the area; any false killer whales observed off the U.S. west coast would likely be part of the broader eastern North Pacific population. Of the stocks defined by NMFS, the Hawaii

Pelagic stock is the most likely to include individuals in the eastern North Pacific population. False killer whales are not listed as endangered or threatened under the ESA (with the exception of the endangered Main Hawaiian Islands insular DPS which does not occur in the survey area), and the Hawaii pelagic stock is not designated as depleted or strategic under the MMPA.

#### *Short-Finned Pilot Whale*

Short-finned pilot whales are found in all oceans, primarily in tropical and warm-temperate waters (Carretta *et al.*, 2016). The species prefers deeper waters, ranging from 324 m to 4,400 m, with most sightings between 500 m and 3,000 m (Baird 2016). The California/Oregon/Washington Stock of short-finned pilot whales are largely confined to the California Current and eastern tropical Pacific. After a strong El Niño event in 1982–83, short-finned pilot whales virtually disappeared from this region, and despite increased survey effort along the entire U.S. west coast, sightings and fishery takes are rare and have primarily occurred during warm-water years (Julian and Beeson 1998, Carretta *et al.* 2004, Barlow 2016). No short-finned pilot whales were seen during surveys off Oregon and Washington in 1989–1990, 1992, 1996, and 2001 (Barlow 2003). A few sightings were made off California during surveys in 1991–2008 (Barlow 2010). Carretta *et al.* (2017) reported two sightings off Oregon during 1991–2008, both near the southern portion of the Astoria Fan survey area. Short-finned pilot whales are not listed as endangered or threatened under the ESA, and the California/Oregon/Washington stock is not considered a depleted or strategic stock under the MMPA.

#### *Harbor Porpoise*

In the eastern North Pacific Ocean, harbor porpoise are found in coastal and inland waters from Point Barrow, along the Alaskan coast, and down the west coast of North America to Point Conception, California (Gaskin 1984). Harbor porpoise are known to occur year-round in the inland transboundary waters of Washington and British Columbia, Canada (Osborne *et al.* 1988) and along the Oregon/Washington coast (Barlow 1988, Barlow *et al.* 1988, Green *et al.* 1992). Based on recent genetic evidence (Chivers *et al.* 2002, 2007) there are three separate stocks of North Pacific harbor porpoise that occur in Oregon/Washington waters: a Northern California/Southern Oregon stock (Point Arena, CA, to Lincoln City, OR), a Northern Oregon/Washington Coast

stock (Lincoln City, OR, to Cape Flattery, WA), and the Washington Inland Waters stock (in waters east of Cape Flattery). Only the Northern California/Southern Oregon stock and Northern Oregon/Washington Coast stock occur in the proposed survey area.

Harbor porpoises inhabit coastal Oregon and Washington waters year-round, although there appear to be distinct seasonal changes in abundance there (Barlow 1988; Green *et al.* 1992). Green *et al.* (1992) reported that encounter rates were high during fall and winter, intermediate during spring, and low during summer. Encounter rates were highest along the Oregon/Washington coast in the area from Cape Blanco (~43° N.), east of the proposed Southern Oregon survey area, to California, from fall through spring. During summer, the reported encounter rates decreased notably from inner shelf to offshore waters. Nearly 100 sightings were reported within or east of the proposed project area during aerial surveys in 2007–2012 (Forney *et al.* 2014). Two sightings of nine individuals were made from the *Langseth* seismic vessel off the southern coast of Washington during July 2012 (RPS 2012); all sightings occurred nearshore and to the east of the Astoria Fan survey area. The harbor porpoise is not listed as endangered or threatened under the ESA and the Northern California/Southern Oregon stock and Northern Oregon/Washington Coast stock are not considered depleted or strategic stocks under the MMPA.

#### *Dall's Porpoise*

The Dall's porpoise is distributed throughout temperate to subantarctic waters of the North Pacific and adjacent seas (Jefferson *et al.* 2015). Off the U.S. west coast, they are generally found along shelf, slope and offshore waters (Morejohn 1979). Dall's porpoise is likely the most abundant small cetacean in the North Pacific Ocean, and its abundance changes seasonally, likely in relation to water temperature (Becker 2007). Becker *et al.* (2014) projected high densities off southern Oregon throughout the year, with moderate densities to the north. According to predictive density distribution maps, the highest densities off southern Washington and Oregon occur along the 500 m isobath (Menza *et al.* 2016). Dall's porpoise was the most abundant species sighted off Oregon/Washington during 1996, 2001, 2005, and 2008 shipboard surveys up to ~550 km from shore (Barlow 2003, 2010) with numerous other sightings within and near the Astoria Fan and Southern Oregon survey areas during the summer and fall

(Becker *et al.* 2014; Carretta *et al.* 2016a). Dall's porpoise is not listed as threatened or endangered under the ESA and the California/Oregon/Washington stock is not classified as a depleted or strategic stock under the MMPA.

#### *Bottlenose Dolphin*

Bottlenose dolphins are widely distributed throughout the world in tropical and warm-temperate waters (Perrin *et al.* 2009). Generally, there are two distinct bottlenose dolphin ecotypes: one mainly found in coastal waters and one mainly found in oceanic waters (Duffield *et al.* 1983; Hoelzel *et al.* 1998; Walker *et al.* 1999). As well as inhabiting different areas, these ecotypes differ in their diving abilities (Klatsky 2004) and prey types (Mead and Potter 1995). Bottlenose dolphins occur frequently off the coast of California, and sightings have been made as far north as 41° N., but few records exist offshore Oregon and Washington (Carretta *et al.* 2017). Adams *et al.* (2014) made one sighting in Washington, to the north of the Astoria Fan survey area, during September 2012. Bottlenose dolphins are not listed as endangered or threatened under the ESA, and the California/Oregon/Washington pelagic stock is not considered a depleted or strategic stock under the MMPA.

#### *Striped Dolphin*

Striped dolphins are found in tropical to warm-temperate waters throughout the world (Carretta *et al.*, 2016). However, in the eastern North Pacific, its distribution extends as far north as Washington (Jefferson *et al.* 2015). Striped dolphins are a deep water species, preferring depths greater than 3,500 m (Baird 2016), but have been observed approaching shore where there is deep water close to the coast (Jefferson *et al.* 2008). The abundance of striped dolphins off the U.S. west coast appears to be variable among years and could be affected by oceanographic conditions (Carretta *et al.* 2016a).

Striped dolphins regularly occur off California (Becker *et al.* 2012), where they are seen 185–556 km from the coast (Carretta *et al.* 2017), though very few sightings have been made off Oregon (Barlow 2016), and no sightings have been reported for Washington. However, strandings have occurred along the coasts of Oregon and Washington (Carretta *et al.* 2017). During surveys off the U.S. west coast in 2014, striped dolphins were seen as far north as 44° N. Striped dolphins are not listed as endangered or threatened under the ESA, and the California/Oregon/

Washington stock is not considered a depleted or strategic stock under the MMPA.

#### *Short-Beaked Common Dolphin*

The short-beaked common dolphin is found in tropical and warm temperate oceans around the world (Perrin 2009). Short-beaked common dolphins are the most abundant cetacean off California, and are widely distributed between the coast and at least 300 nautical miles from shore. It ranges as far south as 40° S. in the Pacific Ocean, is common in coastal waters 200–300 m deep, and is also associated with prominent underwater topography, such as sea mounts (Evans 1994).

Few sightings of short-beaked common dolphins have been made off Oregon, and no sightings exist for Washington waters (Carretta *et al.* 2017). During surveys in 1991–2008, one sighting was made within the Astoria Fan survey area, and several records exist southwest of the Southern Oregon survey area (Carretta *et al.* 2017). During surveys off the west coast in 2014, sightings were made as far north as 44° N. (Barlow 2014). Short-beaked common dolphins are not listed as endangered or threatened under the ESA, and the California/Oregon/Washington stock is not considered a depleted or strategic stock under the MMPA.

#### *Pacific White-Sided Dolphin*

Pacific white-sided dolphins are endemic to temperate waters of the North Pacific Ocean, and common both on the high seas and along the continental margins (Brownell *et al.* 1999). In the eastern North Pacific Ocean, including waters off Oregon, the Pacific white-sided dolphin is one of the most common cetacean species, occurring primarily in shelf and slope waters (Green *et al.* 1993; Barlow 2003, 2010). It is known to occur close to shore in certain regions, including seasonally off southern California (Brownell *et al.* 1999).

Based on year-round aerial surveys off Oregon/Washington, the Pacific white-sided dolphin was the most abundant cetacean species (Green *et al.* 1992, 1993). Adams *et al.* (2014) also reported numerous offshore sightings off Oregon during summer, fall, and winter surveys in 2011 and 2012, including in the Southern Oregon survey area during September. Pacific white-sided dolphins are not listed as endangered or threatened under the ESA, and the California/Oregon/Washington stock is not considered a depleted or strategic stock under the MMPA.

#### *Northern Right Whale Dolphin*

Northern right-whale dolphins are endemic to temperate waters of the North Pacific Ocean. Off the U.S. west coast, they have been seen primarily in shelf and slope waters, with seasonal movements into the Southern California Bight (Leatherwood and Walker 1979; Dohl *et al.* 1980; 1983). Becker *et al.* (2014) predicted relatively high densities off southern Oregon, and moderate densities off northern Oregon and Washington. Barlow (2003, 2010) also found that the northern right whale dolphin was one of the most abundant marine mammal species off Oregon/Washington during 1996, 2001, 2005, and 2008 shipboard surveys. Several sightings were within and near the Astoria Fan and Southern Oregon survey areas during the summer and fall during surveys off California, Oregon and Washington (Forney 2007; Barlow 2010; Becker *et al.* 2012; Carretta *et al.* 2017). Northern right-whale dolphins are not listed as endangered or threatened under the ESA, and the California/Oregon/Washington stock is not considered a depleted or strategic stock under the MMPA.

#### *Risso's Dolphin*

Risso's dolphins are found in tropical to warm-temperate waters (Carretta *et al.*, 2016). The species occurs from coastal to deep water but is most often found in depths greater than 3,000 m with the highest sighting rate in depths greater than 4,500 m (Baird 2016). It primarily occurs between 60°N and 60°S where surface water temperatures are at least 10°C (Kruse *et al.* 1999). The distribution and abundance of Risso's dolphin is highly variable from California to Washington, presumably in response to changing oceanographic conditions on both annual and seasonal time scales (Forney and Barlow 1998; Buchanan *et al.* 2001). The highest densities were predicted along the coasts of Washington, Oregon, and central and southern California (Becker *et al.* 2012). Off Oregon and Washington, Risso's dolphins are most abundant over continental slope and shelf waters during spring and summer, less so during fall, and rare during winter (Green *et al.* 1992, 1993). Risso's dolphins were sighted off Oregon, including near the Astoria Fan and Southern Oregon survey areas, in June and October 2011 (Adams *et al.* 2014). Risso's dolphins are not listed as endangered or threatened under the ESA, and the California/Oregon/Washington stock is not considered a depleted or strategic stock under the MMPA.

### *Cuvier's Beaked Whale*

Cuvier's beaked whale is the most widespread of the beaked whales occurring in almost all temperate, subtropical, and tropical waters and even some sub-polar and polar waters (MacLeod *et al.* 2006). It is found in deep water over and near the continental slope (Jefferson *et al.* 2008). Cuvier's beaked whale abundance for waters off Oregon and Washington in 2014 was estimated at 432 (Barlow 2016). One Cuvier's beaked whale sighting was made west of the proposed Southern Oregon survey area during the 1991–2008 surveys (Carretta *et al.* 2017). One sighting of three individuals was recorded in June 2006 during surveys off Washington during August 2004 through September 2008, north of the Astoria Fan survey area (Oleson *et al.* 2009). Cuvier's beaked whales are not listed as endangered or threatened under the ESA, and the California/Oregon/Washington stock is not considered a depleted or strategic stock under the MMPA.

### *Baird's Beaked Whale*

Baird's beaked whales are distributed throughout deep waters and along the continental slopes of the North Pacific Ocean (Balcomb 1989, Macleod *et al.* 2006). It is sometimes seen close to shore where deep water approaches the coast, but its primary habitat is over or near the continental slope and oceanic seamounts (Jefferson *et al.* 2015). Along the U.S. west coast, Baird's beaked whales have been sighted primarily along the continental slope (Green *et al.* 1992; Becker *et al.* 2012; Carretta *et al.* 2016a) from late spring to early fall (Green *et al.* 1992). During 1991–2008 surveys, several sightings were reported to the south and west of the Southern Oregon survey area, to the west of the Astoria Fan survey area, and within the eastern portion of the Astoria Fan survey area (Carretta *et al.* 2016a). Predicted density modeling showed higher densities in slope waters off northern Oregon, near the Astoria Fan survey area, compared with southern Oregon (Becker *et al.* 2012). Baird's beaked whales are not listed as endangered or threatened under the ESA, and the California/Oregon/Washington stock is not considered a depleted or strategic stock under the MMPA.

### *Mesoplodont Beaked Whales*

Mesoplodont beaked whales are distributed throughout deep waters and along the continental slopes of the North Pacific Ocean. The six species known to occur in this region are:

Blainville's beaked whale (*M. densirostris*), Perrin's beaked whale (*M. perrini*), Lesser beaked whale (*M. peruvianus*), Stejneger's beaked whale (*M. stejnegeri*), Ginkgo-toothed beaked whale (*M. ginkgodens*), and Hubbs' beaked whale (*M. carlhubbsi*) (Mead 1989, Henshaw *et al.* 1997, Dalebout *et al.* 2002, MacLeod *et al.* 2006). Based on bycatch and stranding records in this region, it appears that Hubbs' beaked whale is most commonly encountered (Carretta *et al.* 2008, Moore and Barlow 2013). Insufficient sighting records exist off the U.S. west coast to determine any possible spatial or seasonal patterns in the distribution of mesoplodont beaked whales. Until methods of distinguishing these six species at-sea are developed, the management unit must be defined to include all *Mesoplodon* stocks in this region. Although mesoplodont beaked whales have been sighted along the U.S. west coast on several line transect surveys utilizing both aerial and shipboard platforms, the rarity of sightings has historically precluded reliable population estimates. Mesoplodont beaked are not listed as endangered or threatened under the ESA, and the California, Oregon and Washington stock is not considered a depleted or strategic stock under the MMPA.

### *California Sea Lion*

The primary range of the California sea lion includes the coastal areas and offshore islands of the eastern North Pacific Ocean from British Columbia, Canada, to central Mexico, including the Gulf of California (Jefferson *et al.* 2015). However, its distribution is expanding (Jefferson *et al.* 2015), and its secondary range extends into the Gulf of Alaska where it is occasionally recorded (Maniscalco *et al.* 2004) and southern Mexico (Gallo-Reynoso and Solórzano-Velasco 1991). California sea lion breeding areas are on islands located in southern California, in western Baja California (Mexico), and the Gulf of California. During the breeding season, most California sea lions inhabit southern California and Mexico. In California and Baja California, births occur on land from mid-May to late June.

California sea lions are coastal animals that often haul out on shore throughout the year. Off Oregon and Washington, peak numbers occur during the fall. During aerial surveys off the coasts of Oregon and Washington during 1989–1990, California sea lions were sighted at sea during the fall and winter, but no sightings were made during June–August (Bonnell *et al.* 1992). Numbers off Oregon decrease during

winter, as animals travel further north (Mate 1975 in Bonnell *et al.* 1992). California sea lions are not listed as threatened or endangered under the ESA, and the U.S. stock is not considered a depleted or strategic stock under the MMPA.

### *Steller Sea Lion*

Steller sea lions range along the North Pacific Rim from northern Japan to California (Loughlin *et al.* 1984), with centers of abundance and distribution in the Gulf of Alaska and Aleutian Islands. They typically inhabit waters from the coast to the outer continental shelf and slope throughout their range and are not considered migratory, although foraging animals can travel long distances (Loughlin *et al.* 2003; Raum-Suryan *et al.* 2002).

During surveys off the coasts of Oregon and Washington, Bonnell *et al.* (1992) noted that 89 percent of sea lions occurred over the shelf at a mean distance of 21 km from the coast and near or in waters <200 m deep; the farthest sighting occurred ~40 km from shore, and the deepest sighting location was 1,611 m deep. Sightings were made along the 200 m depth contour within and near the proposed Astoria Fan and Southern Oregon survey sites throughout the year (Bonnell *et al.* 1992). The Eastern DPS of Steller sea lions is not listed as endangered or threatened under the ESA and the Eastern U.S. stock is not considered a depleted or strategic stock under the MMPA.

### *Harbor Seal*

Harbor seals inhabit coastal and estuarine waters off Baja California, north along the western coasts of the continental U.S., British Columbia, and Southeast Alaska, west through the Gulf of Alaska and Aleutian Islands, and in the Bering Sea north to Cape Newenham and the Pribilof Islands. They haul out on rocks, reefs, beaches, and drifting glacial ice and feed in marine, estuarine, and occasionally fresh waters. Harbor seals generally are non-migratory, with local movements associated with tides, weather, season, food availability, and reproduction (Scheffer and Slipp 1944; Fisher 1952; Bigg 1969, 1981).

Jeffries *et al.* (2000) documented several harbor seal rookeries and haulouts along the Washington coastline; it is the only pinniped species that breeds in Washington. During surveys off the Oregon and Washington coasts, 88 percent of at-sea harbor seals occurred over shelf waters <200 m deep, with a few sightings near the 2000 m contour, and only one sighting over deeper water (Bonnell *et al.* 1992). Most

(68 percent) at-sea sightings were recorded in September and November (Bonnell *et al.* 1992). Harbor seals are not listed as endangered or threatened under the ESA and the Oregon/Washington coast stock is not considered a depleted or strategic stock under the MMPA.

#### *Northern Elephant Seal*

Northern elephant seals gather at breeding areas, located primarily on offshore islands of Baja California and California, from approximately December to March before dispersing for feeding. Males feed near the eastern Aleutian Islands and in the Gulf of Alaska, while females feed at sea south of 45° N. (Stewart and Huber, 1993; Le Boeuf *et al.*, 1993). Although movement and genetic exchange continues between rookeries, most elephant seals return to their natal rookeries when they start breeding (Huber *et al.*, 1991). The California breeding population is now demographically isolated from the Baja California population and is considered to be a separate stock. Only the California breeding population is expected to occur in the proposed survey area. Off Washington, most elephant seal sightings at sea were during June, July, and September; off Oregon, sightings were recorded from November through May (Bonnell *et al.* 1992). Several seals were seen off Oregon during summer, fall, and winter surveys in 2011 and 2012, including one near the Southern Oregon survey area during October 2011 (Adams *et al.* 2014). Northern elephant seals are not listed as threatened or endangered under the ESA and the California breeding population is not considered a depleted or strategic stock under the MMPA.

#### *Northern Fur Seal*

Northern fur seals occur from southern California north to the Bering Sea and west to the Okhotsk Sea and Honshu Island, Japan. Two stocks of northern fur seals are recognized in U.S. waters: an eastern Pacific stock and a California stock (formerly referred to as the San Miguel Island stock). Only the California stock is expected to occur in the proposed survey area. Due to differing requirements during the annual reproductive season, adult males and females typically occur ashore at different, though overlapping, times. Adult males occur ashore and defend reproductive territories during a 3-month period from June through August while adult females are found ashore for as long as 6 months (June–November). The northern fur seals spends ~90 percent of its time at sea, typically in

areas of upwelling along the continental slopes and over seamounts (Gentry 1981). The remainder of its life is spent on or near rookery islands or haulouts.

Bonnell *et al.* (1992) noted the presence of northern fur seals year-round off Oregon/Washington, with the greatest numbers (87 percent) occurring in January–May. Northern fur seals were seen as far out from the coast as 185 km, and numbers increased with distance from land; they were 5–6 times more abundant in offshore waters than over the shelf or slope (Bonnell *et al.* 1992). The highest densities were seen in the Columbia River plume (~46° N.) and in deep offshore waters (≤2000 m) off central and southern Oregon (Bonnell *et al.* 1992). The waters off Washington are a known foraging area for adult females, and concentrations of fur seals were also reported to occur near Cape Blanco, Oregon, at ~42.8° N. (Pelland *et al.* 2014). Northern fur seals are not listed as threatened or endangered under the ESA listed and the California stock is not considered a depleted or strategic stock under the MMPA.

#### **Potential Effects of Specified Activities on Marine Mammals and Their Habitat**

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The “Estimated Take by Incidental Harassment” section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The “Negligible Impact Analysis and Determination” section considers the content of this section, the “Estimated Take by Incidental Harassment” section, and the “Proposed Mitigation” section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

#### *Description of Active Acoustic Sound Sources*

This section contains a brief technical background on sound, the characteristics of certain sound types, and on metrics used in this proposal inasmuch as the information is relevant to the specified activity and to a discussion of the potential effects of the specified activity on marine mammals found later in this document.

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per

unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks or corresponding points of a sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly, except in certain cases in shallower water. Amplitude is the height of the sound pressure wave or the “loudness” of a sound and is typically described using the relative unit of the decibel (dB). A sound pressure level (SPL) in dB is described as the ratio between a measured pressure and a reference pressure (for underwater sound, this is 1 microPascal (μPa)) and is a logarithmic unit that accounts for large variations in amplitude; therefore, a relatively small change in dB corresponds to large changes in sound pressure. The source level (SL) represents the SPL referenced at a distance of 1 m from the source (referenced to 1 μPa) while the received level is the SPL at the listener’s position (referenced to 1 μPa).

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Root mean square is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urlick, 1983). Root mean square accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

Sound exposure level (SEL; represented as dB re 1 μPa<sup>2</sup>-s) represents the total energy contained within a pulse and considers both intensity and duration of exposure. Peak sound pressure (also referred to as zero-to-peak sound pressure or 0-p) is the maximum instantaneous sound pressure measurable in the water at a specified distance from the source and is represented in the same units as the rms sound pressure. Another common metric is peak-to-peak sound pressure (pk-pk), which is the algebraic difference between the peak positive and peak negative sound pressures. Peak-to-peak pressure is typically approximately 6 dB higher than peak pressure (Southall *et al.*, 2007).

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as

the sound wave travels. Underwater sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam or beams or may radiate in all directions (omnidirectional sources), as is the case for pulses produced by the airgun arrays considered here. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound. Ambient sound is defined as environmental background sound levels lacking a single source or point (Richardson *et al.*, 1995), and the sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.*, wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.*, sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.*, vessels, dredging, construction) sound. A number of sources contribute to ambient sound, including the following (Richardson *et al.*, 1995):

- *Wind and waves:* The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring ambient sound for frequencies between 200 Hz and 50 kilohertz (kHz) (Mitson, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Surf sound becomes important near shore, with measurements collected at a distance of 8.5 km from shore showing an increase of 10 dB in the 100 to 700 Hz band during heavy surf conditions.

- *Precipitation:* Sound from rain and hail impacting the water surface can become an important component of total sound at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times.

- *Biological:* Marine mammals can contribute significantly to ambient sound levels, as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz.

- *Anthropogenic:* Sources of ambient sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies. Vessel noise typically dominates the total ambient sound for frequencies between 20 and 300 Hz. In

general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly. Sound from identifiable anthropogenic sources other than the activity of interest (*e.g.*, a passing vessel) is sometimes termed background sound, as opposed to ambient sound.

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise “ambient” or “background” sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and human activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.*, 1995). The result is that, depending on the source type and its intensity, sound from a given activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals. Details of source types are described in the following text.

Sounds are often considered to fall into one of two general types: Pulsed and non-pulsed (defined in the following). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.*, Ward, 1997 in Southall *et al.*, 2007). Please see Southall *et al.* (2007) for an in-depth discussion of these concepts.

Pulsed sound sources (*e.g.*, airguns, explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986, 2005; Harris, 1998; NIOSH, 1998; ISO, 2003) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-pulsed sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or non-continuous (ANSI, 1995; NIOSH, 1998). Some of these non-pulsed sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.*, rapid rise time). Examples of non-pulsed sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems (such as those used by the U.S. Navy). The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

Airgun arrays produce pulsed signals with energy in a frequency range from about 10–2,000 Hz, with most energy radiated at frequencies below 200 Hz. The amplitude of the acoustic wave emitted from the source is equal in all directions (*i.e.*, omnidirectional), but airgun arrays do possess some directionality due to different phase delays between guns in different directions. Airgun arrays are typically tuned to maximize functionality for data acquisition purposes, meaning that sound transmitted in horizontal directions and at higher frequencies is minimized to the extent possible.

As described above, a MBES and a SBP would also be operated from the *Revelle* continuously throughout the survey, but not during transits to and from the project area. Due to the lower source level of the SBP relative to the *Revelle's* airgun array, the sounds from the SBP are expected to be effectively subsumed by the sounds from the airgun array. Thus, any marine mammal that was exposed to sounds from the SBP would already have been exposed to sounds from the airgun array, which are expected to propagate further in the water. As such, the SBP is not expected to result in the take of any marine mammal that has not already been taken by the sounds from the airgun array, and therefore we do not consider noise from the SBP further in this analysis. Each ping emitted by the MBES consists of four successive fan-shaped transmissions, each ensonifying a sector that extends 1° fore-aft. Given the movement and speed of the vessel, the intermittent and narrow downward-directed nature of the sounds emitted by the MBES would result in no more than one or two brief ping exposures of any individual marine mammal, if any exposure were to occur. Thus, we conclude that the likelihood of marine mammal take resulting from MBES exposure is discountable and therefore

we do not consider noise from the MBES further in this analysis

*Acoustic Effects*

Here, we first provide background information on marine mammal hearing before discussing the potential effects of the use of active acoustic sources on marine mammals.

*Marine Mammal Hearing*—Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (e.g., Richardson *et al.*, 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct

measurements of hearing ability have been successfully completed for mysticetes (i.e., low-frequency cetaceans). Subsequently, NMFS (2016) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 dB threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. The functional groups and the associated frequencies are indicated below (note that these frequency ranges correspond to the range for the composite group, with the entire range not necessarily reflecting the capabilities of every species within that group):

- Low-frequency cetaceans (mysticetes): Generalized hearing is estimated to occur between approximately 7 Hz and 35 kHz, with best hearing estimated to be from 100 Hz to 8 kHz;
- Mid-frequency cetaceans (larger toothed whales, beaked whales, and most delphinids): Generalized hearing is

estimated to occur between approximately 150 Hz and 160 kHz, with best hearing from 10 to less than 100 kHz;

- High-frequency cetaceans (porpoises, river dolphins, and members of the genera *Kogia* and *Cephalorhynchus*; including two members of the genus *Lagenorhynchus*, on the basis of recent echolocation data and genetic data): Generalized hearing is estimated to occur between approximately 275 Hz and 160 kHz.

- Pinnipeds in water; Phocidae (true seals): Generalized hearing is estimated to occur between approximately 50 Hz to 86 kHz, with best hearing between 1–50 kHz;

- Pinnipeds in water; Otariidae (eared seals): Generalized hearing is estimated to occur between 60 Hz and 39 kHz, with best hearing between 2–48 kHz.

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.*, 2006; Kastelein *et al.*, 2009; Reichmuth and Holt, 2013).

TABLE 3—MARINE FUNCTIONAL MAMMAL HEARING GROUPS AND THEIR GENERALIZED HEARING RANGES

Hearing group	Generalized hearing range*
Low frequency (LF) cetaceans (baleen whales) .....	7Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales) .....	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, <i>Kogia</i> , river dolphins, cephalorhynchid, <i>Lagenorhynchus cruciger</i> and <i>L. australis</i> ) .....	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals) .....	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals) .....	60 Hz to 39 kHz.

\* Represents the generalized hearing range for the entire group as a composite (i.e., all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.*, 2007) and PW pinniped (approximation).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2016) for a review of available information. Twenty four marine mammal species (all cetaceans) have the reasonable potential to co-occur with the proposed survey activities. Please refer to Table 2. Of the cetacean species that may be present, 6 are classified as low-frequency cetaceans (i.e., all mysticete species), 16 are classified as mid-frequency cetaceans (i.e., all delphinid and ziphiid species and the sperm whale), and 2 are classified as high-frequency cetaceans (i.e., *Kogia* spp.).

*Potential Effects of Underwater Sound*—Please refer to the information given previously (“Description of Active Acoustic Sources”) regarding sound, characteristics of sound types, and metrics used in this document. Note

that, in the following discussion, we refer in many cases to a recent review article concerning studies of noise-induced hearing loss conducted from 1996–2015 (i.e., Finneran, 2015). For study-specific citations, please see that work. Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life, from none or minor to potentially severe responses, depending on received levels, duration of exposure, behavioral context, and various other factors. The potential effects of underwater sound from active acoustic sources can potentially result in one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.*, 1995;

Gordon *et al.*, 2004; Nowacek *et al.*, 2007; Southall *et al.*, 2007; Götz *et al.*, 2009). The degree of effect is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure. In general, sudden, high level sounds can cause hearing loss, as can longer exposures to lower level sounds. Temporary or permanent loss of hearing will occur almost exclusively for noise within an animal's hearing range. We first describe specific manifestations of acoustic effects before providing discussion specific to the use of airguns.

Richardson *et al.* (1995) described zones of increasing intensity of effect that might be expected to occur, in relation to distance from a source and assuming that the signal is within an animal's hearing range. First is the area

within which the acoustic signal would be audible (potentially perceived) to the animal, but not strong enough to elicit any overt behavioral or physiological response. The next zone corresponds with the area where the signal is audible to the animal and of sufficient intensity to elicit behavioral or physiological responsiveness. Third is a zone within which, for signals of high intensity, the received level is sufficient to potentially cause discomfort or tissue damage to auditory or other systems. Overlaying these zones to a certain extent is the area within which masking (*i.e.*, when a sound interferes with or masks the ability of an animal to detect a signal of interest that is above the absolute hearing threshold) may occur; the masking zone may be highly variable in size.

We describe the more severe effects certain non-auditory physical or physiological effects only briefly as we do not expect that use of airgun arrays are reasonably likely to result in such effects (see below for further discussion). Potential effects from impulsive sound sources can range in severity from effects such as behavioral disturbance or tactile perception to physical discomfort, slight injury of the internal organs and the auditory system, or mortality (Yelverton *et al.*, 1973). Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to high level underwater sound or as a secondary effect of extreme behavioral reactions (*e.g.*, change in dive profile as a result of an avoidance reaction) caused by exposure to sound include neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.*, 2006; Southall *et al.*, 2007; Zimmer and Tyack, 2007; Tal *et al.*, 2015). The survey activities considered here do not involve the use of devices such as explosives or mid-frequency tactical sonar that are associated with these types of effects.

1. **Threshold Shift**—Marine mammals exposed to high-intensity sound, or to lower-intensity sound for prolonged periods, can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Finneran, 2015). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not fully recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.*, 2007). Repeated sound exposure that leads to TTS could cause PTS. In severe cases of PTS, there can be total or partial deafness, while in most cases the animal has an impaired

ability to hear sounds in specific frequency ranges (Kryter, 1985).

When PTS occurs, there is physical damage to the sound receptors in the ear (*i.e.*, tissue damage), whereas TTS represents primarily tissue fatigue and is reversible (Southall *et al.*, 2007). In addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.*, Ward, 1997). Therefore, NMFS does not consider TTS to constitute auditory injury.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, and there is no PTS data for cetaceans but such relationships are assumed to be similar to those in humans and other terrestrial mammals. PTS typically occurs at exposure levels at least several decibels above (a 40-dB threshold shift approximates PTS onset; *e.g.*, Kryter *et al.*, 1966; Miller, 1974) that inducing mild TTS (a 6-dB threshold shift approximates TTS onset; *e.g.*, Southall *et al.*, 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulse sounds (such as airgun pulses as received close to the source) are at least 6 dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level thresholds are 15 to 20 dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.*, 2007). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

For mid-frequency cetaceans in particular, potential protective mechanisms may help limit onset of TTS or prevent onset of PTS. Such mechanisms include dampening of hearing, auditory adaptation, or behavioral amelioration (*e.g.*, Nachtigall and Supin, 2013; Miller *et al.*, 2012; Finneran *et al.*, 2015; Popov *et al.*, 2016).

TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals.

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of

environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.*, recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that occurs during a time where ambient noise is lower and there are not as many competing sounds present.

Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts.

Finneran *et al.* (2015) measured hearing thresholds in three captive bottlenose dolphins before and after exposure to ten pulses produced by a seismic airgun in order to study TTS induced after exposure to multiple pulses. Exposures began at relatively low levels and gradually increased over a period of several months, with the highest exposures at peak SPLs from 196 to 210 dB and cumulative (unweighted) SELs from 193–195 dB. No substantial TTS was observed. In addition, behavioral reactions were observed that indicated that animals can learn behaviors that effectively mitigate noise exposures (although exposure patterns must be learned, which is less likely in wild animals than for the captive animals considered in this study). The authors note that the failure to induce more significant auditory effects likely due to the intermittent nature of exposure, the relatively low peak pressure produced by the acoustic source, and the low-frequency energy in airgun pulses as compared with the frequency range of best sensitivity for dolphins and other mid-frequency cetaceans.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale, harbor porpoise, and Yangtze finless porpoise) exposed to a limited number of sound sources (*i.e.*, mostly tones and octave-band noise) in laboratory settings (Finneran, 2015). In general, harbor porpoises have a lower TTS onset than other measured cetacean species (Finneran, 2015). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. There are no data available on noise-induced hearing loss for mysticetes.

Critical questions remain regarding the rate of TTS growth and recovery after exposure to intermittent noise and

the effects of single and multiple pulses. Data at present are also insufficient to construct generalized models for recovery and determine the time necessary to treat subsequent exposures as independent events. More information is needed on the relationship between auditory evoked potential and behavioral measures of TTS for various stimuli. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and NMFS (2016).

2. *Behavioral Effects*—Behavioral disturbance may include a variety of effects, including subtle changes in behavior (e.g., minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (e.g., species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (e.g., Richardson *et al.*, 1995; Wartzok *et al.*, 2003; Southall *et al.*, 2007; Weilgart, 2007; Archer *et al.*, 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.*, 2012), and can vary depending on characteristics associated with the sound source (e.g., whether it is moving or stationary, number of sources, distance from the source). Please see Appendices B–C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.*, 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a “progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,” rather than as, more generally, moderation in response to human disturbance (Bejder *et al.*, 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure.

As noted, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.*, 1995; NRC, 2003; Wartzok *et al.*, 2003). Controlled experiments with captive marine mammals have showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.*, 1997). Observed responses of wild marine mammals to loud pulsed sound sources (typically seismic airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; see also Richardson *et al.*, 1995; Nowacek *et al.*, 2007). However, many delphinids approach acoustic source vessels with no apparent discomfort or obvious behavioral change (e.g., Barkaszi *et al.*, 2012).

Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (e.g., Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005). However, there are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely, and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (e.g., Frankel and Clark 2000; Ng and Leung 2003; Nowacek *et al.* 2004; Goldbogen *et al.* 2013). Variations in dive behavior may reflect interruptions in biologically significant activities (e.g., foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (e.g., bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (e.g., Croll *et al.* 2001; Nowacek *et al.* 2004; Madsen *et al.* 2006; Yazvenko *et al.* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Visual tracking, passive acoustic monitoring, and movement recording tags were used to quantify sperm whale behavior prior to, during, and following exposure to airgun arrays at received levels in the range 140–160 dB at distances of 7–13 km, following a phase-in of sound intensity and full array exposures at 1–13 km (Madsen *et al.*, 2006; Miller *et al.*, 2009). Sperm whales did not exhibit horizontal avoidance behavior at the surface. However, foraging behavior may have been affected. The sperm whales exhibited 19 percent less vocal (buzz) rate during full exposure relative to post exposure, and the whale that was approached most closely had an extended resting period and did not resume foraging until the airguns had ceased firing. The remaining whales continued to execute foraging dives throughout exposure; however, swimming movements during foraging dives were six percent lower during exposure than control periods (Miller *et al.*, 2009). These data raise concerns that seismic surveys may impact foraging behavior in sperm whales, although more data are required to understand whether the differences were due to exposure or natural variation in sperm whale behavior (Miller *et al.*, 2009).

Variations in respiration naturally vary with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that



respiration rates may either be unaffected or could increase, depending on the species and signal characteristics, again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (e.g., Kastelein *et al.*, 2001, 2005, 2006; Gailey *et al.*, 2007; Gailey *et al.*, 2016).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.*, 2000; Fristrup *et al.*, 2003; Foote *et al.*, 2004), while right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.*, 2007). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.*, 1994).

Cerchio *et al.* (2014) used passive acoustic monitoring to document the presence of singing humpback whales off the coast of northern Angola and to opportunistically test for the effect of seismic survey activity on the number of singing whales. Two recording units were deployed between March and December 2008 in the offshore environment; numbers of singers were counted every hour. Generalized Additive Mixed Models were used to assess the effect of survey day (seasonality), hour (diel variation), moon phase, and received levels of noise (measured from a single pulse during each ten minute sampled period) on singer number. The number of singers significantly decreased with increasing received level of noise, suggesting that humpback whale breeding activity was disrupted to some extent by the survey activity.

Castellote *et al.* (2012) reported acoustic and behavioral changes by fin whales in response to shipping and airgun noise. Acoustic features of fin whale song notes recorded in the Mediterranean Sea and northeast Atlantic Ocean were compared for areas with different shipping noise levels and traffic intensities and during a seismic airgun survey. During the first 72 hours of the survey, a steady decrease in song

received levels and bearings to singers indicated that whales moved away from the acoustic source and out of the study area. This displacement persisted for a time period well beyond the 10-day duration of seismic airgun activity, providing evidence that fin whales may avoid an area for an extended period in the presence of increased noise. The authors hypothesize that fin whale acoustic communication is modified to compensate for increased background noise and that a sensitization process may play a role in the observed temporary displacement.

Seismic pulses at average received levels of 131 dB re 1  $\mu\text{Pa}^2\text{-s}$  caused blue whales to increase call production (Di Iorio and Clark, 2010). In contrast, McDonald *et al.* (1995) tracked a blue whale with seafloor seismometers and reported that it stopped vocalizing and changed its travel direction at a range of 10 km from the acoustic source vessel (estimated received level 143 dB pk-pk). Blackwell *et al.* (2013) found that bowhead whale call rates dropped significantly at onset of airgun use at sites with a median distance of 41–45 km from the survey. Blackwell *et al.* (2015) expanded this analysis to show that whales actually increased calling rates as soon as airgun signals were detectable before ultimately decreasing calling rates at higher received levels (i.e., 10-minute SEL<sub>cum</sub> of ~127 dB). Overall, these results suggest that bowhead whales may adjust their vocal output in an effort to compensate for noise before ceasing vocalization effort and ultimately deflecting from the acoustic source (Blackwell *et al.*, 2013, 2015). These studies demonstrate that even low levels of noise received far from the source can induce changes in vocalization and/or behavior for mysticetes.

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.*, 1995). For example, gray whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from seismic surveys (Malme *et al.*, 1984). Humpback whales showed avoidance behavior in the presence of an active seismic array during observational studies and controlled exposure experiments in western Australia (McCauley *et al.*, 2000). Avoidance may be short-term, with animals returning to the area once the noise has ceased (e.g., Bowles *et al.*, 1994; Goold, 1996; Stone *et al.*, 2000; Morton and Symonds, 2002; Gailey *et al.*,

2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (e.g., Bejder *et al.*, 2006; Teilmann *et al.*, 2006).

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (e.g., directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (Evans and England, 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (i.e., when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (e.g., Beauchamp and Livoreil 1997; Fritz *et al.* 2002; Purser and Radford 2011). In addition, chronic disturbance can cause population declines through reduction of fitness (e.g., decline in body condition) and subsequent reduction in reproductive success, survival, or both (e.g., Harrington and Veitch 1992; Daan *et al.* 1996; Bradshaw *et al.* 1998). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a five-day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent

days (Southall *et al.*, 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.*, 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

Stone (2015) reported data from at-sea observations during 1,196 seismic surveys from 1994 to 2010. When large arrays of airguns (considered to be 500 in<sup>3</sup> or more) were firing, lateral displacement, more localized avoidance, or other changes in behavior were evident for most odontocetes. However, significant responses to large arrays were found only for the minke whale and fin whale. Behavioral responses observed included changes in swimming or surfacing behavior, with indications that cetaceans remained near the water surface at these times. Cetaceans were recorded as feeding less often when large arrays were active. Behavioral observations of gray whales during a seismic survey monitored whale movements and respirations pre-, during and post-seismic survey (Gailey *et al.*, 2016). Behavioral state and water depth were the best 'natural' predictors of whale movements and respiration and, after considering natural variation, none of the response variables were significantly associated with seismic survey or vessel sounds.

3. *Stress Responses*—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.*, Seyle, 1950; Moberg 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune

competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.*, Moberg 1987; Blecha 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and "distress" is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficiently to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.*, Holberton *et al.*, 1996; Hood *et al.*, 1998; Jessop *et al.*, 2003; Krausman *et al.*, 2004; Lankford *et al.*, 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.*, 2002b) and, more rarely, studied in wild populations (*e.g.*, Romano *et al.*, 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as "distress." In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003).

4. *Auditory Masking*—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.*, those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.*, 1995;

Erbe *et al.*, 2016). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.*, snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.*, shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.*, signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.*, sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions.

Under certain circumstances, marine mammals experiencing significant masking could also be impaired from maximizing their performance fitness in survival and reproduction. Therefore, when the coincident (masking) sound is man-made, it may be considered harassment when disrupting or altering critical behaviors. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.*, Clark *et al.*, 2009) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.*, Miller *et al.* 2000; Foote *et al.* 2004; Parks *et al.* 2007; Di Iorio and Clark 2009; Holt *et al.* 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.* 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore 2014). Masking can be tested directly in captive species (*e.g.*, Erbe 2008), but in wild

populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (e.g., Branstetter *et al.* 2013).

Masking affects both senders and receivers of acoustic signals and can potentially have long-term chronic effects on marine mammals at the population level as well as at the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand 2009). All anthropogenic sound sources, but especially chronic and lower-frequency signals (e.g., from vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

#### Ship Strike

Vessel collisions with marine mammals, or ship strikes, can result in death or serious injury of the animal. Wounds resulting from ship strike may include massive trauma, hemorrhaging, broken bones, or propeller lacerations (Knowlton and Kraus 2001). An animal at the surface may be struck directly by a vessel, a surfacing animal may hit the bottom of a vessel, or an animal just below the surface may be cut by a vessel's propeller. Superficial strikes may not kill or result in the death of the animal. These interactions are typically associated with large whales (e.g., fin whales), which are occasionally found draped across the bulbous bow of large commercial ships upon arrival in port. Although smaller cetaceans are more maneuverable in relation to large vessels than are large whales, they may also be susceptible to strike. The severity of injuries typically depends on the size and speed of the vessel, with the probability of death or serious injury increasing as vessel speed increases (Knowlton and Kraus 2001; Laist *et al.* 2001; Vanderlaan and Taggart 2007; Conn and Silber 2013). Impact forces increase with speed, as does the probability of a strike at a given distance (Silber *et al.* 2010; Gende *et al.* 2011).

Pace and Silber (2005) also found that the probability of death or serious injury increased rapidly with increasing vessel speed. Specifically, the predicted probability of serious injury or death increased from 45 to 75 percent as vessel speed increased from 10 to 14 kn, and exceeded 90 percent at 17 kn. Higher speeds during collisions result in greater force of impact, but higher speeds also appear to increase the

chance of severe injuries or death through increased likelihood of collision by pulling whales toward the vessel (Clyne, 1999; Knowlton *et al.* 1995). In a separate study, Vanderlaan and Taggart (2007) analyzed the probability of lethal mortality of large whales at a given speed, showing that the greatest rate of change in the probability of a lethal injury to a large whale as a function of vessel speed occurs between 8.6 and 15 kt. The chances of a lethal injury decline from approximately 80 percent at 15 kt to approximately 20 percent at 8.6 kt. At speeds below 11.8 kt, the chances of lethal injury drop below 50 percent, while the probability asymptotically increases toward one hundred percent above 15 kt.

The *Revelle* travels at a speed of ~9.3 km/hour (5 kt) while towing seismic survey gear (LGL 2017). At this speed, both the possibility of striking a marine mammal and the possibility of a strike resulting in serious injury or mortality are discountable. At average transit speed, the probability of serious injury or mortality resulting from a strike is less than 50 percent. However, the likelihood of a strike actually happening is again discountable. Ship strikes, as analyzed in the studies cited above, generally involve commercial shipping, which is much more common in both space and time than is geophysical survey activity. Jensen and Silber (2004) summarized ship strikes of large whales worldwide from 1975–2003 and found that most collisions occurred in the open ocean and involved large vessels (e.g., commercial shipping). Commercial fishing vessels were responsible for three percent of recorded collisions, while no such incidents were reported for geophysical survey vessels during that time period.

It is possible for ship strikes to occur while traveling at slow speeds. For example, a hydrographic survey vessel traveling at low speed (5.5 kt) while conducting mapping surveys off the central California coast struck and killed a blue whale in 2009. The State of California determined that the whale had suddenly and unexpectedly surfaced beneath the hull, with the result that the propeller severed the whale's vertebrae, and that this was an unavoidable event. This strike represents the only such incident in approximately 540,000 hours of similar coastal mapping activity ( $p = 1.9 \times 10^{-6}$ ; 95% CI =  $0-5.5 \times 10^{-6}$ ; NMFS, 2013b). In addition, a research vessel reported a fatal strike in 2011 of a dolphin in the Atlantic, demonstrating that it is possible for strikes involving smaller cetaceans to occur. In that case, the

incident report indicated that an animal apparently was struck by the vessel's propeller as it was intentionally swimming near the vessel. While indicative of the type of unusual events that cannot be ruled out, neither of these instances represents a circumstance that would be considered reasonably foreseeable or that would be considered preventable.

Although the likelihood of the vessel striking a marine mammal is low, we require a robust ship strike avoidance protocol (see "Proposed Mitigation"), which we believe eliminates any foreseeable risk of ship strike. We anticipate that vessel collisions involving a seismic data acquisition vessel towing gear, while not impossible, represent unlikely, unpredictable events for which there are no preventive measures. Given the required mitigation measures, the relatively slow speed of the vessel towing gear, the presence of bridge crew watching for obstacles at all times (including marine mammals), the presence of marine mammal observers, and the short duration of the survey (5.5 days), we believe that the possibility of ship strike is discountable and, further, that were a strike of a large whale to occur, it would be unlikely to result in serious injury or mortality. No incidental take resulting from ship strike is anticipated, and this potential effect of the specified activity will not be discussed further in the following analysis.

**Stranding**—When a living or dead marine mammal swims or floats onto shore and becomes "beached" or incapable of returning to sea, the event is a "stranding" (Geraci *et al.* 1999; Perrin and Geraci 2002; Geraci and Lounsbury 2005; NMFS, 2007). The legal definition for a stranding under the MMPA is (A) a marine mammal is dead and is (i) on a beach or shore of the United States; or (ii) in waters under the jurisdiction of the United States (including any navigable waters); or (B) a marine mammal is alive and is (i) on a beach or shore of the United States and is unable to return to the water; (ii) on a beach or shore of the United States and, although able to return to the water, is in need of apparent medical attention; or (iii) in the waters under the jurisdiction of the United States (including any navigable waters), but is unable to return to its natural habitat under its own power or without assistance.

Marine mammals strand for a variety of reasons, such as infectious agents, biotoxins, starvation, fishery interaction, ship strike, unusual oceanographic or weather events, sound

exposure, or combinations of these stressors sustained concurrently or in series. However, the cause or causes of most strandings are unknown (Geraci *et al.* 1976; Eaton, 1979; Odell *et al.* 1980; Best 1982). Numerous studies suggest that the physiology, behavior, habitat relationships, age, or condition of cetaceans may cause them to strand or might pre-dispose them to strand when exposed to another phenomenon. These suggestions are consistent with the conclusions of numerous other studies that have demonstrated that combinations of dissimilar stressors commonly combine to kill an animal or dramatically reduce its fitness, even though one exposure without the other does not produce the same result (Chrousos 2000; Creel 2005; DeVries *et al.* 2003; Fair and Becker 2000; Foley *et al.* 2001; Moberg, 2000; Relyea 2005; Romero 2004; Sih *et al.* 2004).

Use of military tactical sonar has been implicated in a majority of investigated stranding events, although one stranding event was associated with the use of seismic airguns. This event occurred in the Gulf of California, coincident with seismic reflection profiling by the R/V *Maurice Ewing* operated by Lamont-Doherty Earth Observatory (LDEO) of Columbia University and involved two Cuvier's beaked whales (Hildebrand 2004). The vessel had been firing an array of 20 airguns with a total volume of 8,500 in<sup>3</sup> (Hildebrand 2004; Taylor *et al.* 2004). Most known stranding events have involved beaked whales, though a small number have involved deep-diving delphinids or sperm whales (*e.g.*, Mazzariol *et al.* 2010; Southall *et al.* 2013). In general, long duration (~1 second) and high-intensity sounds ( $\leq 235$  dB SPL) have been implicated in stranding events (Hildebrand 2004). With regard to beaked whales, mid-frequency sound is typically implicated (when causation can be determined) (Hildebrand 2004). Although seismic airguns create predominantly low-frequency energy, the signal does include a mid-frequency component. We have considered the potential for the proposed survey to result in marine mammal stranding and have concluded that, based on the best available information, stranding is not expected to occur.

**Other Potential Impacts**—Here, we briefly address the potential risks due to entanglement and contaminant spills. We are not aware of any records of marine mammal entanglement in towed arrays such as those considered here. The discharge of trash and debris is prohibited (33 CFR 151.51–77) unless it is passed through a machine that breaks

up solids such that they can pass through a 25-mm mesh screen. All other trash and debris must be returned to shore for proper disposal with municipal and solid waste. Some personal items may be accidentally lost overboard. However, U.S. Coast Guard and Environmental Protection Act regulations require operators to become proactive in avoiding accidental loss of solid waste items by developing waste management plans, posting informational placards, manifesting trash sent to shore, and using special precautions such as covering outside trash bins to prevent accidental loss of solid waste. There are no meaningful entanglement risks posed by the described activity, and entanglement risks are not discussed further in this document.

Marine mammals could be affected by accidentally spilled diesel fuel from a vessel associated with proposed survey activities. Quantities of diesel fuel on the sea surface may affect marine mammals through various pathways: surface contact of the fuel with skin and other mucous membranes, inhalation of concentrated petroleum vapors, or ingestion of the fuel (direct ingestion or by the ingestion of oiled prey) (*e.g.*, Geraci and St. Aubin, 1980, 1985, 1990). However, the likelihood of a fuel spill during any particular geophysical survey is considered to be remote, and the potential for impacts to marine mammals would depend greatly on the size and location of a spill and meteorological conditions at the time of the spill. Spilled fuel would rapidly spread to a layer of varying thickness and break up into narrow bands or windrows parallel to the wind direction. The rate at which the fuel spreads would be determined by the prevailing conditions such as temperature, water currents, tidal streams, and wind speeds. Lighter, volatile components of the fuel would evaporate to the atmosphere almost completely in a few days. Evaporation rate may increase as the fuel spreads because of the increased surface area of the slick. Rougher seas, high wind speeds, and high temperatures also tend to increase the rate of evaporation and the proportion of fuel lost by this process (Scholz *et al.*, 1999). We do not anticipate potentially meaningful effects to marine mammals as a result of any contaminant spill resulting from the proposed survey activities, and contaminant spills are not discussed further in this document.

#### *Anticipated Effects on Marine Mammal Habitat*

**Effects to Prey**—Marine mammal prey varies by species, season, and location and, for some, is not well documented. Fish react to sounds which are especially strong and/or intermittent low-frequency sounds. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pulsed sound on fish, although several are based on studies in support of construction projects (*e.g.*, Scholik and Yan 2001, 2002; Popper and Hastings 2009). Sound pulses at received levels of 160 dB may cause subtle changes in fish behavior. SPLs of 180 dB may cause noticeable changes in behavior (Pearson *et al.* 1992; Skalski *et al.* 1992). SPLs of sufficient strength have been known to cause injury to fish and fish mortality. The most likely impact to fish from survey activities at the project area would be temporary avoidance of the area. The duration of fish avoidance of a given area after survey effort stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated.

Information on seismic airgun impacts to zooplankton, which represent an important prey type for mysticetes, is limited. However, McCauley *et al.* (2017) reported that experimental exposure to a pulse from a 150 in<sup>3</sup> airgun decreased zooplankton abundance when compared with controls, as measured by sonar and net tows, and caused a two- to threefold increase in dead adult and larval zooplankton. Although no adult krill were present, the study found that all larval krill were killed after air gun passage. Impacts were observed out to the maximum 1.2 km range sampled.

In general, impacts to marine mammal prey are expected to be limited due to the relatively small temporal and spatial overlap between the proposed survey and any areas used by marine mammal prey species. The proposed survey would occur over a relatively short time period (5.5 days) and would occur over a very small area relative to the area available as marine mammal habitat in the northeast Pacific Ocean. We do not have any information to suggest the proposed survey area represents a significant feeding area for any marine mammal, and we believe any impacts to marine mammals due to adverse effects to their prey would be insignificant due to the limited spatial and temporal

impact of the proposed survey. However, adverse impacts may occur to a few species of fish and to zooplankton.

**Acoustic Habitat**—Acoustic habitat is the soundscape—which encompasses all of the sound present in a particular location and time, as a whole—when considered from the perspective of the animals experiencing it. Animals produce sound for, or listen for sounds produced by, conspecifics (communication during feeding, mating, and other social activities), other animals (finding prey or avoiding predators), and the physical environment (finding suitable habitats, navigating). Together, sounds made by animals and the geophysical environment (e.g., produced by earthquakes, lightning, wind, rain, waves) make up the natural contributions to the total acoustics of a place. These acoustic conditions, termed acoustic habitat, are one attribute of an animal's total habitat.

Soundscapes are also defined by, and acoustic habitat influenced by, the total contribution of anthropogenic sound. This may include incidental emissions from sources such as vessel traffic, or may be intentionally introduced to the marine environment for data acquisition purposes (as in the use of airgun arrays). Anthropogenic noise varies widely in its frequency content, duration, and loudness and these characteristics greatly influence the potential habitat-mediated effects to marine mammals (please see also the previous discussion on masking under “Acoustic Effects”), which may range from local effects for brief periods of time to chronic effects over large areas and for long durations. Depending on the extent of effects to habitat, animals may alter their communications signals (thereby potentially expending additional energy) or miss acoustic cues (either conspecific or adventitious). For more detail on these concepts see, e.g., Barber *et al.*, 2010; Pijanowski *et al.* 2011; Francis and Barber 2013; Lillis *et al.* 2014.

Problems arising from a failure to detect cues are more likely to occur when noise stimuli are chronic and overlap with biologically relevant cues used for communication, orientation, and predator/prey detection (Francis and Barber 2013). Although the signals emitted by seismic airgun arrays are generally low frequency, they would also likely be of short duration and transient in any given area due to the nature of these surveys. As described previously, exploratory surveys such as these cover a large area but would be transient rather than focused in a given location over time and therefore would

not be considered chronic in any given location.

In summary, activities associated with the proposed action are not likely to have a permanent, adverse effect on any fish habitat or populations of fish species or on the quality of acoustic habitat. Thus, any impacts to marine mammal habitat are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

#### Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of whether the number of takes is “small” and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines “harassment” as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as use of the seismic airguns have the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for high frequency cetaceans and phocid pinnipeds. Auditory injury is unlikely to occur for low- and mid-frequency species given very small modeled zones of injury for those species. The proposed mitigation and monitoring measures are expected to minimize the severity of such taking to the extent practicable. As described previously, no mortality is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated.

Described in the most basic way, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and (4) and the

number of days of activities. Below, we describe these components in more detail and present the exposure estimate and associated numbers of take proposed for authorization.

#### Acoustic Thresholds

Using the best available science, NMFS has developed acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

**Level B Harassment for non-explosive sources**—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (e.g., frequency, predictability, duty cycle), the environment (e.g., bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.*, 2007, Ellison *et al.* 2011). Based on the best available science and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider to fall under Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1  $\mu$ Pa (rms) for continuous (e.g. vibratory pile-driving, drilling) and above 160 dB re 1  $\mu$ Pa (rms) for non-explosive impulsive (e.g., seismic airguns) or intermittent (e.g., scientific sonar) sources. SIO's proposed activity includes the use of impulsive seismic sources. Therefore, the 160 dB re 1  $\mu$ Pa (rms) criteria is applicable for analysis of level B harassment.

**Level A harassment for non-explosive sources**—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (NMFS 2016) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Technical Guidance identifies the received levels, or thresholds, above which individual marine mammals are predicted to experience changes in their hearing sensitivity for all underwater

anthropogenic sound sources, reflects the best available science, and better predicts the potential for auditory injury than does NMFS' historical criteria.

These thresholds were developed by compiling and synthesizing the best available science and soliciting input

multiple times from both the public and peer reviewers to inform the final product, and are provided in Table 4 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS

2016 Technical Guidance, which may be accessed at: [www.nmfs.noaa.gov/pr/acoustics/guidelines.htm](http://www.nmfs.noaa.gov/pr/acoustics/guidelines.htm). As described above, SIO's proposed activity includes the use of intermittent and impulsive seismic sources.

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT IN MARINE MAMMALS

Hearing group	PTS onset thresholds	
	Impulsive*	Non-impulsive
Low-Frequency (LF) Cetaceans	$L_{pk,flat}$ : 219 dB $L_{E,LF,24h}$ : 183 dB	$L_{E,LF,24h}$ : 199 dB.
Mid-Frequency (MF) Cetaceans	$L_{pk,flat}$ : 230 dB $L_{E,MF,24h}$ : 185 dB	$L_{E,MF,24h}$ : 198 dB.
High-Frequency (HF) Cetaceans	$L_{pk,flat}$ : 202 dB $L_{E,HF,24h}$ : 155 dB	$L_{E,HF,24h}$ : 173 dB.
Phocid Pinnipeds (PW) (Underwater)	$L_{pk,flat}$ : 218 dB $L_{E,PW,24h}$ : 185 dB	$L_{E,PW,24h}$ : 201 dB.
Otariid Pinnipeds (OW) (Underwater)	$L_{pk,flat}$ : 232 dB $L_{E,OW,24h}$ : 203 dB	$L_{E,OW,24h}$ : 219 dB.

**Note:** \*Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

**Note:** Peak sound pressure ( $L_{pk}$ ) has a reference value of 1  $\mu$ Pa, and cumulative sound exposure level (LE) has a reference value of 1  $\mu$ Pa<sup>2</sup>s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.*, varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

*Ensonified Area*

Here, we describe operational and environmental parameters of the activity that will feed into estimating the area ensonified above the acoustic thresholds.

The proposed survey would entail the use of a 2-airgun array with a total discharge of 90 in<sup>3</sup> at a tow depth of 3 m. The distance to the predicted isopleth corresponding to the threshold for Level B harassment (160 dB re 1  $\mu$ Pa) was calculated based on results of modeling performed by LDEO. Received sound levels were predicted by LDEO's model (Diebold *et al.* 2010) as a function of distance from the airgun array. The LDEO modeling approach uses ray tracing for the direct wave traveling from the array to the receiver and its associated source ghost (reflection at the air-water interface in the vicinity of the array), in a constant-velocity half-space (infinite homogeneous ocean layer unbounded by a seafloor). In addition, propagation measurements of pulses from a 36-airgun array at a tow depth of 6 m have been reported in deep water (~1,600 m), intermediate water depth on the slope (~600–1100 m), and shallow water (~50 m) in the Gulf of Mexico in 2007–2008 (Tolstoy *et al.* 2009; Diebold *et al.* 2010). The estimated distances to the Level B harassment isopleth for the

Revelle airgun array are shown in Table 5.

TABLE 5—PREDICTED RADIAL DISTANCES FROM R/V REVELLE 90 IN<sup>3</sup> SEISMIC SOURCE TO ISOPLETH CORRESPONDING TO LEVEL B HARASSMENT THRESHOLD

Water depth	Predicted distance to threshold (160 dB re 1 $\mu$ Pa)
> 1000 m	448 m
100–1000 m	672 m

For modeling of radial distances to predicted isopleths corresponding to harassment thresholds in deep water (>1,000 m), LDEO used the deep-water radii for various Sound Exposure Levels obtained from LDEO model results down to a maximum water depth of 2,000 m (see Figure 2 in the IHA application). Radial distances to predicted isopleths corresponding to harassment thresholds in intermediate water depths (100–1,000 m) were derived by LDEO from the deep-water distances by applying a correction factor (multiplication) of 1.5, such that observed levels at very near offsets fall below the corrected mitigation curve (Fig. 16 in Appendix H of NSF-USGS

2011). LDEO's modeling methodology is described in greater detail in the IHA application (LGL 2017) and we refer to the reader to that document rather than repeating it here.

Predicted distances to Level A harassment isopleths, which vary based on marine mammal functional hearing groups (Table 3), were calculated based on modeling performed by LDEO using the Nucleus software program and the NMFS User Spreadsheet, described below. The updated acoustic thresholds for impulsive sounds (such as airguns) contained in the Technical Guidance (NMFS 2016) were presented as dual metric acoustic thresholds using both SEL<sub>cum</sub> and peak sound pressure level metrics. As dual metrics, NMFS considers onset of PTS (Level A harassment) to have occurred when either one of the two metrics is exceeded (*i.e.*, metric resulting in the largest isopleth). The SEL<sub>cum</sub> metric considers both level and duration of exposure, as well as auditory weighting functions by marine mammal hearing group. In recognition of the fact that the requirement to calculate Level A harassment ensonified areas could be more technically challenging to predict due to the duration component and the use of weighting functions in the new SEL<sub>cum</sub> thresholds, NMFS developed an optional User Spreadsheet that includes

tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to facilitate the estimation of take numbers.

The values for SEL<sub>cum</sub> and peak SPL for the *Revelle* airgun array were derived from calculating the modified farfield signature (Table 6). The farfield signature is often used as a theoretical representation of the source level. To compute the farfield signature, the source level is estimated at a large distance below the array (e.g., 9 km), and this level is back projected mathematically to a notional distance of 1 m from the array’s geometrical center. However, when the source is an array of

multiple airguns separated in space, the source level from the theoretical farfield signature is not necessarily the best measurement of the source level that is physically achieved at the source (Tolstoy *et al.* 2009). Near the source (at short ranges, distances <1 km), the pulses of sound pressure from each individual airgun in the source array do not stack constructively, as they do for the theoretical farfield signature. The pulses from the different airguns spread out in time such that the source levels observed or modeled are the result of the summation of pulses from a few airguns, not the full array (Tolstoy *et al.* 2009). At larger distances, away from the source array center, sound pressure

of all the airguns in the array stack coherently, but not within one time sample, resulting in smaller source levels (a few dB) than the source level derived from the farfield signature. Because the farfield signature does not take into account the array effect near the source and is calculated as a point source, the modified farfield signature is a more appropriate measure of the sound source level for distributed sound sources, such as airgun arrays. Though the array effect is not expected to be as pronounced in the case of a 2-airgun array as it would be with a larger airgun array, the modified farfield method is considered more appropriate than use of the theoretical farfield signature.

TABLE 6—MODELED SOURCE LEVELS USING MODIFIED FARFIELD METHOD FOR R/V REVELLE 90 IN<sup>3</sup> AIRGUN ARRAY

Functional Hearing Group	Peak SPL <sub>flat</sub>	SEL <sub>cum</sub>
Low frequency cetaceans ( $L_{pk,flat}$ : 219 dB; $L_{E,LF,24h}$ : 183 dB) .....	232.805 dB ..	206.0165 dB.
Mid frequency cetaceans ( $L_{pk,flat}$ : 230 dB; $L_{E,MF,24h}$ : 185 dB) .....	229.89 dB ...	205.9638 dB.
High frequency cetaceans ( $L_{pk,flat}$ : 202 dB; $L_{E,HF,24h}$ : 155 dB) .....	232.867 dB ..	206.384 dB.
Phocid Pinnipeds (Underwater) ( $L_{pk,flat}$ : 218 dB; $L_{E,HF,24h}$ : 185 dB) .....	232.356 dB ..	205.9638 dB.
Otariid Pinnipeds (Underwater) ( $L_{pk,flat}$ : 232 dB; $L_{E,HF,24h}$ : 203 dB) .....	224.7897 dB	206.806 dB.

In order to more realistically incorporate the Technical Guidance’s weighting functions over the seismic array’s full acoustic band, unweighted spectrum data for the *Revelle*’s airgun array (modeled in 1 Hz bands) was used to make adjustments (dB) to the unweighted spectrum levels, by frequency, according to the weighting functions for each relevant marine mammal hearing group. These adjusted/weighted spectrum levels were then converted to pressures (μPa) in order to integrate them over the entire

broadband spectrum, resulting in broadband weighted source levels by hearing group that could be directly incorporated within the User Spreadsheet (*i.e.*, to override the Spreadsheet’s more simple weighting factor adjustment). Using the User Spreadsheet’s “safe distance” methodology for mobile sources (described by Sivle *et al.*, 2014) with the hearing group-specific weighted source levels, and inputs assuming spherical spreading propagation, a source velocity of 2.57 meters/second, and shot interval

of 7.78 seconds (LGL 2017), potential radial distances to auditory injury zones were then calculated for SEL<sub>cum</sub> thresholds. Inputs to the User Spreadsheet are shown in Table 6. Outputs from the User Spreadsheet in the form of estimated distances to Level A harassment isopleths are shown in Table 7. As described above, the larger distance of the dual criteria (SEL<sub>cum</sub> or Peak SPL<sub>flat</sub>) is used for estimating takes by Level A harassment. The weighting functions used are shown in Table 3 of the IHA application.

TABLE 7—MODELED RADIAL DISTANCES (M) FROM R/V REVELLE 90 IN<sup>3</sup> AIRGUN ARRAY TO ISOPLETHS CORRESPONDING TO LEVEL A HARASSMENT THRESHOLDS

Functional Hearing Group (Level A harassment thresholds)	Peak SPL <sub>flat</sub>	SEL <sub>cum</sub>
Low frequency cetaceans ( $L_{pk,flat}$ : 219 dB; $L_{E,LF,24h}$ : 183 dB) .....	4.9	7.9
Mid frequency cetaceans ( $L_{pk,flat}$ : 230 dB; $L_{E,MF,24h}$ : 185 dB) .....	0.9	0
High frequency cetaceans ( $L_{pk,flat}$ : 202 dB; $L_{E,HF,24h}$ : 155 dB) .....	34.9	0
Phocid Pinnipeds (Underwater) ( $L_{pk,flat}$ : 218 dB; $L_{E,HF,24h}$ : 185 dB) .....	5.2	0.1
Otariid Pinnipeds (Underwater) ( $L_{pk,flat}$ : 232 dB; $L_{E,HF,24h}$ : 203 dB) .....	0.4	0

Note that because of some of the assumptions included in the methods used, isopleths produced may be overestimates to some degree, which will ultimately result in some degree of overestimate of Level A take. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine

these tools and will qualitatively address the output where appropriate. For mobile sources, such as the proposed seismic survey, the User Spreadsheet predicts the closest distance at which a stationary animal would not incur PTS if the sound source traveled by the animal in a straight line at a constant speed.

*Marine Mammal Occurrence*

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations.

The best available scientific information was considered in conducting marine mammal exposure estimates (the basis for estimating take). For most cetacean species, densities calculated by Barlow (2016) were used.

These represent the most comprehensive and recent density data available for cetacean species in slope and offshore waters of Oregon and Washington and are based on data collected via NMFS Southwest Fisheries Science Center (SWFSC) ship-based surveys in 1991, 1993, 1996, 2001, 2005, 2008, and 2014. The surveys were conducted up to ~556 km from shore from June or August to November or December. The densities from NMFS SWFSC vessel-based surveys were corrected by the authors for both trackline detection probability and availability bias. Trackline detection probability bias is associated with diminishing sightability with increasing lateral distance from the trackline and is measured by  $f(0)$ . Availability bias refers to the fact that there is less than 100 percent probability of sighting an animal that is present along the survey trackline, and it is measured by  $g(0)$ . Abundance and density were not estimated for gray whales or harbor porpoises in the NMFS SWFSC surveys because their inshore habitats were inadequately covered in those studies. Gray whale density is derived from the abundance of gray whales that remain between Oregon and British Columbia in summer (updated based on abundance calculated by Calambokidis *et al.* 2014) and the area out to 43 km from shore, using the U.S. Navy (2010) method. Harbor porpoise densities are based on data from aerial line-transect surveys during 2007–2012 for the

Northern Oregon/Washington Coast stock (Forney *et al.* 2014). Systematic, offshore, at-sea survey data for pinnipeds are more limited than those for cetaceans. Densities for the Steller sea lion, California sea lion, northern elephant seal, and northern fur seal were calculated using the methods in U.S. Navy (2010) with updated abundance estimates from Carretta *et al.* (2016) and Muto *et al.* (2016), when appropriate. For the harbor seal, densities were calculated using the population estimate for the Oregon/Washington Coastal stock and the range for that stock from Carretta *et al.* (2016). There is some uncertainty related to the estimated density data and the assumptions used in their calculations, as with all density data estimates. However, the approach used is based on the best available data.

*Take Calculation and Estimation*

Here we describe how the information provided above is brought together to produce a quantitative take estimate. In order to estimate the number of marine mammals predicted to be exposed to sound levels that would result in Level B harassment or Level A harassment, radial distances to predicted isopleths corresponding to the Level A harassment and Level B harassment thresholds are calculated, as described above. We then use those distances to calculate the area(s) around the airgun array predicted to be ensonified to sound levels that exceed the Level A and Level B harassment thresholds. The

total ensonified area for the survey is then calculated, based on the areas predicted to be ensonified around the array and the trackline distance. In this case, 25 percent was added in the form of operational days, which is equivalent to adding 25 percent to the proposed line km to be surveyed, to account for potential additional seismic operations as described above. The marine mammals predicted to occur within the ensonified areas, based on estimated densities, are expected to be incidentally taken by the proposed survey.

To summarize, the estimated density of each marine mammal species within an area (animals/km<sup>2</sup>) is multiplied by the total ensonified areas (km<sup>2</sup>) that correspond to the Level A and Level B harassment thresholds for the species. The product (rounded) is the estimated number of instances of take for each species. The number of instances of take for each species is then multiplied by 1.25 to account for the 25 percent contingency, as described above. The result is an estimate of the number of instances that marine mammals are predicted to be exposed to airgun sounds above the Level B harassment threshold and the Level A harassment threshold over the duration of the proposed survey. The total area estimated to be ensonified to the Level B harassment threshold for the proposed survey is 204.2 km<sup>2</sup>. Estimated takes for all marine mammal species are shown in Table 8.

TABLE 8—NUMBERS OF POTENTIAL INCIDENTAL TAKE OF MARINE MAMMALS PROPOSED FOR AUTHORIZATION

Species	Density (#/1,000 km <sup>2</sup> )	Estimated and proposed Level A takes	Estimated Level B takes	Proposed Level B takes	Total proposed Level A and Level B takes	Total proposed Level A and Level B takes as a percentage of population
Gray whale	2.6	0	4	4	4	< 0.1
Humpback whale	2.1	0	3	3	3	0.2
Minke whale	1.3	0	2	2	2	0.3
Sei whale <sup>1</sup>	0.4	0	1	2	2	0.4
Fin whale	4.2	0	6	6	6	< 0.1
Blue whale	0.3	0	1	1	1	< 0.1
Sperm whale <sup>1</sup>	0.9	0	2	6	6	0.3
Pygmy sperm whale	1.6	0	2	2	2	< 0.1
Killer whale <sup>1</sup>	0.9	0	2	8	8	
<i>West coast transient stock</i>					3.3	
<i>Eastern No. Pacific offshore stock</i>						3.3
False killer whale <sup>1</sup>	0	0	0	5	5	0.3
Short-finned pilot whale <sup>1</sup>	0.2	0	0	1	18	2.2
Harbor porpoise	467.0	44	582	582	627	
<i>No. California/So. Oregon stock</i>						1.8
<i>Northern Oregon/Washington coast stock</i>						2.9
Dall's porpoise	54.4	5	68	68	73	0.3
Bottlenose dolphin <sup>1</sup>	0	0	0	0	13	6.8
Striped dolphin <sup>1</sup>	7.7	0	10	109	109	3.7
Risso's dolphin <sup>1</sup>	11.8	0	16	28	28	4.4
Short-beaked common dolphin <sup>1</sup>	69.2	0	89	286	286	< 0.1
Pacific white sided dolphin <sup>1</sup>	40.7	0	52	62	62	2.3



TABLE 8—NUMBERS OF POTENTIAL INCIDENTAL TAKE OF MARINE MAMMALS PROPOSED FOR AUTHORIZATION—Continued

Species	Density (#/1,000 km <sup>2</sup> )	Estimated and proposed Level A takes	Estimated Level B takes	Proposed Level B takes	Total proposed Level A and Level B takes	Total proposed Level A and Level B takes as a percentage of population
Northern right whale dolphin <sup>1</sup>	46.4	0	60	63	63	2.5
Cuvier's beaked whale	2.8	0	4	4	4	< 0.1
Baird's beaked whale	10.7	0	14	14	14	1.7
Mesoplodont beaked whales <sup>2</sup>	1.2	0	2	2	2	2.9
California sea lion	283.3	0	362	362	362	1.2
Steller sea lion	15.0	0	20	20	20	< 0.1
Harbor seal	292.3	4	367	367	371	1.5
Northern elephant seal	83.1	1	105	105	106	< 0.1
Northern fur seal	83.4	0	107	107	107	0.8

<sup>1</sup> The proposed number of authorized takes (Level B harassment only) for these species has been increased from the estimated take to mean group size (as reported in Barlow (2016)).

<sup>2</sup> May be any of the following: Blainville's beaked whale, Perrin's beaked whale, Lesser beaked whale, Stejneger's beaked whale, Ginkgo-toothed beaked whale, or Hubb's beaked whale.

*Species With Take Estimates Less Than Mean Group Size:* Using the approach described above to estimate take, the take estimates for the sei whale, sperm whale, killer whale, short-finned pilot whale, false killer whale, bottlenose dolphin, short beaked common dolphin, striped dolphin, Pacific white sided dolphin, Risso's dolphin and Northern right whale dolphin were less than the average group sizes estimated for these species (Table 8). However, information on the social structures and life histories of these species indicates it is common for these species to be encountered in groups. The results of take calculations support the likelihood that SIO's survey is expected to encounter and to incidentally take these species, and we believe it is likely that these species may be encountered in groups, therefore it is reasonable to conservatively assume that one group of each of these species will be taken during the proposed survey. We therefore propose to authorize the take of the average (mean) group size for these species and stocks to account for the possibility that SIO's survey encounters a group of any of these species or stocks (Table 8).

No density data were available for the false killer whale or the bottlenose dolphin in the proposed survey area, as these species are not typically observed in the proposed survey area (Carretta *et al.* 2017). However, we believe it is possible that these species may be encountered by SIO during the proposed survey. Though false killer whales are a tropical species that is usually found in waters warmer than those typical of the proposed survey area, they have been observed off the U.S. west coast during warm-water periods. Several sightings were made off California during 2014–2016, when

waters were unusually warm, and historically there are very rare records farther north (pers. comm. K. Forney, NMFS Southwest Fisheries Science Center, to J. Carduner, NMFS, July 27, 2017). Bottlenose dolphins have not been observed off the coast of Oregon and Washington (Carretta *et al.* 2017). However, they occur frequently off the coast of California, and they may range into Oregon and Washington waters during warm-water periods. (Carretta *et al.* 2017). Though no density data are available, we believe it is reasonable to conservatively assume that SIO's proposed survey may encounter and incidentally take false killer whales and bottlenose dolphins. We therefore propose to authorize the take of the average (mean) group size for both species (Table 8).

It should be noted that the proposed take numbers shown in Table 8 are believed to be conservative for several reasons. First, in the calculations of estimated take, 25 percent has been added in the form of operational survey days (equivalent to adding 25 percent to the proposed line km to be surveyed) to account for the possibility of additional seismic operations associated with airgun testing, and repeat coverage of any areas where initial data quality is sub-standard. Additionally, marine mammals would be expected to move away from a sound source that represents an aversive stimulus. However, the extent to which marine mammals would move away from the sound source is difficult to quantify and is therefore not accounted for in take estimates shown in Table 8.

For some marine mammal species, we propose to authorize a different number of incidental takes than the number of incidental takes requested by SIO (see Table 7 in the IHA application for

requested take numbers). For instance, for several species, SIO increased the take request from the calculated take number to 1 percent of the estimated population size. However, we do not believe it is likely that 1 percent of the estimated population size of those species will be taken by SIO's proposed survey, therefore we propose to authorize take numbers as shown in Table 8, which we believe are based on the best available information.

To calculate distances to isopleths corresponding to Level A harassment thresholds using Peak SPL<sub>flat</sub>, LDEO first ran the modeling for a single shot and then applied a high pass filter for each hearing group based on the group's generalized hearing range. A high pass filter is a type of band-pass filter, which pass frequencies within a defined range without reducing amplitude and attenuate frequencies outside that defined range (Yost 2007). LDEO ran the modeling both with and without the application of the high pass filter and SIO included information on isopleths corresponding to Level A harassment thresholds both with and without the high pass filter in their IHA application. The Technical Guidance referred to auditory weighting functions based on a generic band-pass filter (NMFS 2016). However, it is important to note that the two datasets relied upon to define peak sound pressure level thresholds, either directly or as a surrogate means to derive thresholds for groups where no data are available (*i.e.*, a beluga exposed to seismic water gun and harbor porpoise exposed to a single airgun) did not use a filter of any kind (*i.e.*, thresholds provided were flat across the entire spectrum of the sound source). Therefore, for the purposes of modeling isopleths corresponding to Level A harassment thresholds using Peak

SPL<sub>flat</sub>, NMFS believes that sound produced from the *Revelle* airgun array should be considered flat to result in no weighting/high pass filtering of any type at this time. Therefore, for the purposes of the take calculation, we rely on the distances to isopleths corresponding to Level A harassment thresholds using Peak SPL<sub>flat</sub> based on modeling performed by LDEO without the high pass filter applied. Thus, the proposed Level A take numbers shown in Table 8 for harbor porpoise, Dall's porpoise and harbor seal are higher than the Level A take numbers requested by SIO as they are the result of modeling of isopleths corresponding to Level A harassment thresholds using Peak SPL<sub>flat</sub> with no weighting/high pass filtering applied. Level A take numbers for other species are not affected.

### Proposed Mitigation

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, "and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking" for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned) the likelihood of effective implementation (probability implemented as planned), and

(2) the practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

SIO has reviewed mitigation measures employed during seismic research surveys authorized by NMFS under previous incidental harassment authorizations, as well as recommended best practices in Richardson *et al.* (1995), Pierson *et al.* (1998), Weir and Dolman (2007), Nowacek *et al.* (2013), Wright (2014), and Wright and Cosentino (2015), and has incorporated a suite of proposed mitigation measures into their project description based on the above sources.

To reduce the potential for disturbance from acoustic stimuli associated with the activities, SIO has proposed to implement the following mitigation measures for marine mammals:

- (1) Vessel-based visual mitigation monitoring;
- (2) Establishment of an exclusion zone and buffer zone;
- (3) Shutdown procedures;
- (4) Ramp-up procedures; and
- (5) Ship strike avoidance measures.

In addition to these measures, NMFS proposes the following additional mitigation measure:

- (1) Shutdown for killer whales observed at any distance.

#### *Vessel-Based Visual Mitigation Monitoring*

PSO observations would take place during all daytime airgun operations and nighttime start ups (if applicable) of the airguns. If airguns are operating throughout the night, observations would begin 30 minutes prior to sunrise. If airguns are operating after sunset, observations would continue until 30 minutes following sunset. Following a shutdown for any reason, observations would occur for at least 30 minutes prior to the planned start of airgun operations. Observations would also occur for 30 minutes after airgun operations cease for any reason. Observations would also be made during daytime periods when the *Revelle* is underway without seismic operations, such as during transits, to allow for comparison of sighting rates and behavior with and without airgun operations and between acquisition periods. Airgun operations would be suspended when marine mammals are observed within, or about to enter, the

designated Exclusion Zone (as described below).

(i) During seismic operations, three visual PSOs would be based aboard the *Revelle*. PSOs would be appointed by SIO with NMFS approval. During the majority of seismic operations, two PSOs would monitor for marine mammals around the seismic vessel. A minimum of one PSO must be on duty at all times when the array is active. PSO(s) would be on duty in shifts of duration no longer than 4 hours. Other crew would also be instructed to assist in detecting marine mammals and in implementing mitigation requirements (if practical). Before the start of the seismic survey, the crew would be given additional instruction in detecting marine mammals and implementing mitigation requirements.

The *Revelle* is a suitable platform from which PSOs would watch for marine mammals. The *Revelle* has been used for that purpose during the routine California Cooperative Oceanic Fisheries Investigations surveys. Observing stations are located at the 02 level, with the observer eye level at ~10.4 m above the waterline. At a forward-centered position on the 02 deck, the view is ~240°; an aft-centered view includes the 100-m radius area around the GI airguns. The observer eye level on the bridge is ~15 m above sea level. Standard equipment for marine mammal observers would be 7 × 50 reticule binoculars and optical range finders. At night, night-vision equipment would be available. The observers would be in communication with ship's officers on the bridge and scientists in the vessel's operations laboratory, so they can advise promptly of the need for avoidance maneuvers or seismic source shutdown.

The PSOs must have no tasks other than to conduct observational effort, record observational data, and communicate with and instruct relevant vessel crew with regard to the presence of marine mammals and mitigation requirements. PSO resumes would be provided to NMFS for approval. At least one PSO must have a minimum of 90 days at-sea experience working as PSOs during a deep penetration seismic survey, with no more than eighteen months elapsed since the conclusion of the at-sea experience. One "experienced" visual PSO would be designated as the lead for the entire protected species observation team. The lead would serve as primary point of contact for the vessel operator.

The PSOs must have successfully completed relevant training, including completion of all required coursework and passing a written and/or oral

examination developed for the training program, and must have successfully attained a bachelor's degree from an accredited college or university with a major in one of the natural sciences and a minimum of 30 semester hours or equivalent in the biological sciences and at least one undergraduate course in math or statistics. The educational requirements may be waived if the PSO has acquired the relevant skills through alternate training, including (1) secondary education and/or experience comparable to PSO duties; (2) previous work experience conducting academic, commercial, or government-sponsored marine mammal surveys; or (3) previous work experience as a PSO; the PSO should demonstrate good standing and consistently good performance of PSO duties.

#### *Exclusion Zone (EZ) and Buffer Zone*

An exclusion zone is a defined area within which occurrence of a marine mammal triggers mitigation action intended to reduce the potential for certain outcomes, *e.g.*, auditory injury, disruption of critical behaviors. The PSOs would establish a minimum exclusion zone with a 100 m radius for the airgun array. The 100 m EZ would be based on radial distance from any element of the airgun array (rather than being based on the center of the array or around the vessel itself). With certain exceptions (described below), if a marine mammal appears within, enters, or appears on a course to enter this zone, the acoustic source would be shut down (see Shut Down Procedures below).

The 100 m radial distance of the standard EZ is precautionary in the sense that it would be expected to contain sound exceeding peak pressure injury criteria for all marine mammal hearing groups (Table 7) while also providing a consistent, reasonably observable zone within which PSOs would typically be able to conduct effective observational effort. In this case, the 100 m radial distance would also be expected to contain sound that would exceed the Level A harassment threshold based on sound exposure level ( $SEL_{cum}$ ) criteria for all marine mammal hearing groups (Table 7). In the 2011 Programmatic Environmental Impact Statement for marine scientific research funded by NSF or the U.S. Geological Survey (NSF-USGS 2011), Alternative B (the Preferred Alternative) conservatively applied a 100 m EZ for all low-energy acoustic sources in water depths >100 m, with low-energy acoustic sources defined as any towed acoustic source with a single or a pair of clustered airguns with individual

volumes of  $\leq 250$  in<sup>3</sup>. Thus the 100 m EZ proposed for this survey is consistent with the PEIS.

Our intent in prescribing a standard exclusion zone distance is to (1) encompass zones within which auditory injury could occur on the basis of instantaneous exposure; (2) provide additional protection from the potential for more severe behavioral reactions (*e.g.*, panic, antipredator response) for marine mammals at relatively close range to the acoustic source; (3) provide consistency for PSOs, who need to monitor and implement the EZ; and (4) define a distance within which detection probabilities are reasonably high for most species under typical conditions.

PSOs would also establish and monitor a 200 m buffer zone. During use of the acoustic source, occurrence of marine mammals within the buffer zone (but outside the exclusion zone) would be communicated to the operator to prepare for potential shutdown of the acoustic source. The buffer zone is discussed further under *Ramp Up Procedures* below.

#### *Shutdown Procedures*

If a marine mammal is detected outside the EZ but is likely to enter the EZ, and if the vessel's speed and/or course cannot be changed to avoid having the animal enter the EZ, the airguns would be shut down before the animal is within the EZ. Likewise, if a marine mammal is already within the EZ when first detected, the airguns would be shut down immediately.

Following a shutdown, airgun activity would not resume until the marine mammal has cleared the 100 m EZ. The animal would be considered to have cleared the 100 m EZ if the following conditions have been met:

- It is visually observed to have departed the 100 m EZ, or
- it has not been seen within the 100 m EZ for 15 min in the case of small odontocetes, or
- it has not been seen within the 100 m EZ for 30 min in the case of mysticetes and large odontocetes, including sperm, pygmy sperm, and beaked whales.

This shutdown requirement would be in place for all marine mammals, with the exception of small delphinoids under certain circumstances. As defined here, the small delphinoid group is intended to encompass those members of the Family Delphinidae most likely to voluntarily approach the source vessel for purposes of interacting with the vessel and/or airgun array (*e.g.*, bow riding). This exception to the shutdown requirement would apply solely to

specific genera of small dolphins — *Tursiops*, *Stenella*, *Delphinus*, *Lagenorhynchus* and *Lissodelphis* — and would only apply if the animals were traveling, including approaching the vessel. If, for example, an animal or group of animals is stationary for some reason (*e.g.*, feeding) and the source vessel approaches the animals, the shutdown requirement applies. An animal with sufficient incentive to remain in an area rather than avoid an otherwise aversive stimulus could either incur auditory injury or disruption of important behavior. If there is uncertainty regarding identification (*i.e.*, whether the observed animal(s) belongs to the group described above) or whether the animals are traveling, the shutdown would be implemented.

We propose this small delphinoid exception because shutdown requirements for small delphinoids under all circumstances represent practicability concerns without likely commensurate benefits for the animals in question. Small delphinoids are generally the most commonly observed marine mammals in the specific geographic region and would typically be the only marine mammals likely to intentionally approach the vessel. As described below, auditory injury is extremely unlikely to occur for mid-frequency cetaceans (*e.g.*, delphinids), as this group is relatively insensitive to sound produced at the predominant frequencies in an airgun pulse while also having a relatively high threshold for the onset of auditory injury (*i.e.*, permanent threshold shift). Please see "Potential Effects of the Specified Activity on Marine Mammals" above for further discussion of sound metrics and thresholds and marine mammal hearing.

A large body of anecdotal evidence indicates that small delphinoids commonly approach vessels and/or towed arrays during active sound production for purposes of bow riding, with no apparent effect observed in those delphinoids (*e.g.*, Barkaszi *et al.*, 2012). The potential for increased shutdowns resulting from such a measure would require the *Revelle* to revisit the missed track line to reacquire data, resulting in an overall increase in the total sound energy input to the marine environment and an increase in the total duration over which the survey is active in a given area. Although other mid-frequency hearing specialists (*e.g.*, large delphinoids) are no more likely to incur auditory injury than are small delphinoids, they are much less likely to approach vessels. Therefore, retaining a shutdown requirement for large delphinoids would not have similar impacts in terms of either practicability

for the applicant or corollary increase in sound energy output and time on the water. We do anticipate some benefit for a shutdown requirement for large delphinoids in that it simplifies somewhat the total range of decision-making for PSOs and may preclude any potential for physiological effects other than to the auditory system as well as some more severe behavioral reactions for any such animals in close proximity to the source vessel.

At any distance, shutdown of the acoustic source would also be required upon observation of any of the following:

- A killer whale;
- a large whale (*i.e.*, sperm whale or any baleen whale) with a calf; or
- an aggregation of large whales of any species (*i.e.*, sperm whale or any baleen whale) that does not appear to be traveling (*e.g.*, feeding, socializing, etc.).

These would be the only three potential situations that would require shutdown of the array for marine mammals observed beyond the 100 m EZ. Southern Resident DPS killer whales are not expected to occur in the area of the proposed survey as the easternmost track lines of the proposed survey (those that approach nearest to shore) are further west than the migratory range of the Southern Resident stock off Oregon and southern Washington (pers. comm., B. Hanson, NMFS Northwest Fishery Science Center to J. Carduner, NMFS OPR, April 12, 2017). As the Eastern North Pacific Southern Resident stock would be expected to occur closer to shore than the proposed survey area, the survey is not expected to encounter any individuals from this stock. However, as the known migratory range of the Southern Resident DPS occurs near the proposed survey area, and due to the precarious conservation status of the Southern Resident killer whale DPS, NMFS believes it is reasonable to implement measures that are conservative and also practicable in order to prevent the potential for a Southern Resident killer whale to be exposed to airgun sounds. Thus the requirement to shut down the array upon observation of a killer whale at any distance is designed to avoid any potential for harassment of any Southern Resident killer whales.

#### *Ramp-Up Procedures*

Ramp-up of an acoustic source is intended to provide a gradual increase in sound levels following a shutdown, enabling animals to move away from the source if the signal is sufficiently aversive prior to its reaching full intensity. Ramp-up would be required

after the array is shut down for any reason. Ramp-up would begin with the activation of one 45 in<sup>3</sup> airgun, with the second 45 in<sup>3</sup> airgun activated after 5 minutes.

PSOs would be required to monitor during ramp-up. During ramp up, the PSOs would monitor the EZ, and if marine mammals were observed within or approaching the 100 m EZ, a shutdown would be implemented as though the full array were operational. If airguns have been shut down due to PSO detection of a marine mammal within or approaching the 100 m EZ, ramp-up would not be initiated until all marine mammals have cleared the EZ, during the day or night. Criteria for clearing the EZ would be as described above.

Thirty minutes of pre-clearance observation are required prior to ramp-up for any shutdown of longer than 30 minutes (*i.e.*, if the array were shut down during transit from one line to another). This 30 minute pre-clearance period may occur during any vessel activity (*i.e.*, transit). If a marine mammal were observed within or approaching the 100 m EZ during this pre-clearance period, ramp-up would not be initiated until all marine mammals cleared the EZ. Criteria for clearing the EZ would be as described above. If the airgun array has been shut down for reasons other than mitigation (*e.g.*, mechanical difficulty) for a period of less than 30 minutes, it may be activated again without ramp-up if PSOs have maintained constant visual observation and no detections of any marine mammal have occurred within the EZ or buffer zone. Ramp-up would be planned to occur during periods of good visibility when possible. However, ramp-up would be allowed at night and during poor visibility if the 100 m EZ and 200 m buffer zone have been monitored by visual PSOs for 30 minutes prior to ramp-up.

The operator would be required to notify a designated PSO of the planned start of ramp-up as agreed-upon with the lead PSO; the notification time should not be less than 60 minutes prior to the planned ramp-up. A designated PSO must be notified again immediately prior to initiating ramp-up procedures and the operator must receive confirmation from the PSO to proceed. The operator must provide information to PSOs documenting that appropriate procedures were followed. Following deactivation of the array for reasons other than mitigation, the operator would be required to communicate the near-term operational plan to the lead PSO with justification for any planned nighttime ramp-up.

#### *Speed or Course Alteration*

If a marine mammal is detected outside the EZ, based on its position and the relative motion, is likely to enter the EZ, the vessel's speed and/or direct course could be changed. This would be done if operationally practicable while minimizing the effect on the planned science objectives. The activities and movements of the marine mammal (relative to the seismic vessel) would then be closely monitored to determine whether the animal is approaching the EZ. If the animal appears likely to enter the EZ, a shutdown of the seismic source would occur. Typically, during seismic operations, the source vessel is unable to change speed or course and one or more alternative mitigation measures (as described above) would need to be implemented.

Based on our evaluation of the applicant's proposed measures, NMFS has preliminarily determined that the proposed mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

#### **Proposed Monitoring and Reporting**

In order to issue an IHA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth, "requirements pertaining to the monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.*, presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.*, source characterization, propagation, ambient

noise); (2) affected species (e.g., life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (e.g., age, calving or feeding areas).

- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.

- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.

- Effects on marine mammal habitat (e.g., marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat).

- Mitigation and monitoring effectiveness.

SIO submitted a marine mammal monitoring and reporting plan in section XIII of their IHA application. Monitoring that is designed specifically to facilitate mitigation measures, such as monitoring of the EZ to inform potential shutdowns of the airgun array, are described above and are not repeated here.

SIO's monitoring and reporting plan includes the following measures:

#### *Vessel-Based Visual Monitoring*

As described above, PSO observations would take place during daytime airgun operations and nighttime start ups (if applicable) of the airguns. During seismic operations, three visual PSOs would be based aboard the *Revelle*. PSOs would be appointed by SIO with NMFS approval. During the majority of seismic operations, one PSO would monitor for marine mammals around the seismic vessel. PSOs would be on duty in shifts of duration no longer than 4 hours. Other crew would also be instructed to assist in detecting marine mammals and in implementing mitigation requirements (if practical). During daytime, PSOs would scan the area around the vessel systematically with reticle binoculars (e.g., 7 × 50 Fujinon), Big-eye binoculars (25 × 150), and with the naked eye.

PSOs would record data to estimate the numbers of marine mammals exposed to various received sound levels and to document apparent disturbance reactions or lack thereof. Data would be used to estimate numbers of animals potentially 'taken' by harassment (as defined in the MMPA). They would also provide information needed to order a shutdown of the airguns when a marine mammal is

within or near the EZ. When a sighting is made, the following information about the sighting would be recorded:

1. Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the airguns or vessel (e.g., none, avoidance, approach, paralleling, etc.), and behavioral pace.

2. Time, location, heading, speed, activity of the vessel, sea state, visibility, and sun glare.

All observations and shutdowns would be recorded in a standardized format. Data would be entered into an electronic database. The accuracy of the data entry would be verified by computerized data validity checks as the data are entered and by subsequent manual checking of the database. These procedures would allow initial summaries of data to be prepared during and shortly after the field program and would facilitate transfer of the data to statistical, graphical, and other programs for further processing and archiving. The time, location, heading, speed, activity of the vessel, sea state, visibility, and sun glare would also be recorded at the start and end of each observation watch, and during a watch whenever there is a change in one or more of the variables.

Results from the vessel-based observations would provide:

1. The basis for real-time mitigation (airgun shutdown).

2. Information needed to estimate the number of marine mammals potentially taken by harassment, which must be reported to NMFS.

3. Data on the occurrence, distribution, and activities of marine mammals in the area where the seismic study is conducted.

4. Information to compare the distance and distribution of marine mammals relative to the source vessel at times with and without seismic activity.

5. Data on the behavior and movement patterns of marine mammals seen at times with and without seismic activity.

#### **Negligible Impact Analysis and Determination**

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of

recruitment or survival (i.e., population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through harassment, NMFS considers other factors, such as the likely nature of any responses (e.g., intensity, duration), the context of any responses (e.g., critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (e.g., as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, our analysis applies to all the species listed in Table 2, given that NMFS expects the anticipated effects of the proposed seismic survey to be similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, NMFS has identified species-specific factors to inform the analysis.

NMFS does not anticipate that serious injury or mortality would occur as a result of SIO's proposed seismic survey, even in the absence of proposed mitigation. Thus the proposed authorization does not authorize any mortality. As discussed in the *Potential Effects* section, non-auditory physical effects, stranding, and vessel strike are not expected to occur.

We propose to authorize a limited number of instances of Level A harassment (Table 8) for four species. However, we believe that any PTS incurred in marine mammals as a result of the proposed activity would be in the form of only a small degree of PTS and not total deafness that would not be likely to affect the fitness of any individuals, because of the constant movement of both the *Revelle* and of the marine mammals in the project area, as well as the fact that the vessel is not expected to remain in any one area in which individual marine mammals

would be expected to concentrate for an extended period of time (*i.e.*, since the duration of exposure to loud sounds will be relatively short). Also, as described above, we expect that marine mammals would be likely to move away from a sound source that represents an aversive stimulus, especially at levels that would be expected to result in PTS, given sufficient notice of the *Revelle's* approach due to the vessel's relatively low speed when conducting seismic surveys. We expect that the majority of takes would be in the form of short-term Level B behavioral harassment in the form of temporary avoidance of the area or decreased foraging (if such activity were occurring), reactions that are considered to be of low severity and with no lasting biological consequences (*e.g.*, Southall *et al.*, 2007).

Potential impacts to marine mammal habitat were discussed previously in this document (see *Potential Effects of the Specified Activity on Marine Mammals and their Habitat*). Marine mammal habitat may be impacted by elevated sound levels, but these impacts would be temporary. Feeding behavior is not likely to be significantly impacted, as marine mammals appear to be less likely to exhibit behavioral reactions or avoidance responses while engaged in feeding activities (Richardson *et al.*, 1995). Prey species are mobile and are broadly distributed throughout the project area; therefore, marine mammals that may be temporarily displaced during survey activities are expected to be able to resume foraging once they have moved away from areas with disturbing levels of underwater noise. Because of the temporary nature of the disturbance, the availability of similar habitat and resources in the surrounding area, and the lack of important or unique marine mammal habitat, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations. In addition, there are no mating or calving areas known to be biologically important to marine mammals within the proposed project area.

The activity is expected to impact a very small percentage of all marine mammal stocks that would be affected by SIO's proposed survey (less than 7 percent each for all marine mammal stocks). Additionally, the acoustic "footprint" of the proposed survey would be very small relative to the ranges of all marine mammals that would potentially be affected. Sound levels would increase in the marine environment in a relatively small area

surrounding the vessel compared to the range of the marine mammals within the proposed survey area. The seismic array would be active 24 hours per day throughout the duration of the proposed survey. However, the very brief overall duration of the proposed survey (five days) would further limit potential impacts that may occur as a result of the proposed activity.

The proposed mitigation measures are expected to reduce the number and/or severity of takes by allowing for detection of marine mammals in the vicinity of the vessel by visual and acoustic observers, and by minimizing the severity of any potential exposures via shutdowns of the airgun array. Based on previous monitoring reports for substantially similar activities that have been previously authorized by NMFS, we expect that the proposed mitigation will be effective in preventing at least some extent of potential PTS in marine mammals that may otherwise occur in the absence of the proposed mitigation.

Of the marine mammal species under our jurisdiction that are likely to occur in the project area, the following species are listed as endangered under the ESA: Humpback, blue, fin, sei, and sperm whales. Population estimates for humpback whales for the North Pacific have increased substantially from 1,200 in 1966 to approximately 18,000–20,000 whales in 2004 to 2006 (Calambokidis *et al.* 2008) indicating a growth rate of 6–7 percent (Carretta *et al.*, 2017). There are currently insufficient data to determine population trends for blue, fin, sei, and sperm whales (Carretta *et al.*, 2017); however, we are proposing to authorize very small numbers of takes for these species (Table 8), relative to their population sizes, therefore we do not expect population-level impacts to any of these species. The other marine mammal species that may be taken by harassment during SIO's seismic survey are not listed as threatened or endangered under the ESA. There is no designated critical habitat for any ESA-listed marine mammals within the project area; and of the non-listed marine mammals for which we propose to authorize take, none are considered "depleted" or "strategic" by NMFS under the MMPA.

NMFS concludes that exposures to marine mammal species and stocks due to SIO's proposed seismic survey would result in only short-term (temporary and short in duration) effects to individuals exposed, or some small degree of PTS to a very small number of individuals of four species. Animals may temporarily avoid the immediate area, but are not expected to permanently abandon the

area. Major shifts in habitat use, distribution, or foraging success are not expected. NMFS does not anticipate the proposed take estimates to impact annual rates of recruitment or survival.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the marine mammal species or stocks through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized;
- The anticipated impacts of the proposed activity on marine mammals would primarily be temporary behavioral changes due to avoidance of the area around the survey vessel. The relatively short duration of the proposed survey (5 days) would further limit the potential impacts of any temporary behavioral changes that would occur;
- The number of instances of PTS that may occur are expected to be very small in number (Table 8). Instances of PTS that are incurred in marine mammals would be of a low level, due to constant movement of the vessel and of the marine mammals in the area, and the nature of the survey design (not concentrated in areas of high marine mammal concentration);
- The availability of alternate areas of similar habitat value for marine mammals to temporarily vacate the survey area during the proposed survey to avoid exposure to sounds from the activity;
- The proposed project area does not contain areas of significance for feeding, mating or calving;
- The potential adverse effects on fish or invertebrate species that serve as prey species for marine mammals from the proposed survey would be temporary and spatially limited;
- The proposed mitigation measures, including visual and acoustic monitoring and shutdowns, are expected to minimize potential impacts to marine mammals.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

#### Small Numbers

As noted above, only small numbers of incidental take may be authorized under Section 101(a)(5)(D) of the MMPA

for specified activities other than military readiness activities. The MMPA does not define small numbers; so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities. Table 8 provides numbers of take by Level A harassment and Level B harassment proposed for authorization. These are the numbers we use for purposes of the small numbers analysis.

The numbers of marine mammals that we propose for authorization to be taken, for all species and stocks, would be considered small relative to the relevant stocks or populations (approximately 6.8 percent for bottlenose dolphins, and less than 5 percent for all other species and stocks). Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

#### Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has preliminarily determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

#### Endangered Species Act (ESA)

Section 7(a)(2) of the ESA of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the ESA Interagency Cooperation Division, whenever we propose to authorize take for endangered or threatened species.

The NMFS Permits and Conservation Division is proposing to authorize the incidental take of 5 species of marine

mammals which are listed under the ESA: The humpback whale (Mexico DPS), sei whale, fin whale, blue whale and sperm whale. We have requested initiation of Section 7 consultation with the Interagency Cooperation Division for the issuance of this IHA. NMFS will conclude the ESA section 7 consultation prior to reaching a determination regarding the proposed issuance of the authorization.

#### Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to SIO for conducting a seismic survey in the northeast Pacific Ocean in September, 2017, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. This section contains a draft of the IHA itself. The wording contained in this section is proposed for inclusion in the IHA (if issued).

1. This IHA is valid for a period of one year from the date of issuance.

2. This IHA is valid only for marine geophysical survey activity, as specified in the SIO IHA application and using an airgun array aboard the R/V *Revelle* with characteristics specified in the application, in the northeast Pacific Ocean.

3. General Conditions.

(a) A copy of this IHA must be in the possession of SIO, the vessel operator and other relevant personnel, the lead PSO, and any other relevant designees of SIO operating under the authority of this IHA.

(b) The species authorized for taking are listed in Table 8. The taking, by Level A and Level B harassment only, is limited to the species and numbers listed in Table 8. Any taking exceeding the authorized amounts listed in Table 8 is prohibited and may result in the modification, suspension, or revocation of this IHA.

(c) The taking by serious injury or death of any species of marine mammal is prohibited and may result in the modification, suspension, or revocation of this IHA.

(d) During use of the airgun(s), if marine mammal species other than those listed in Table 8 are detected by PSOs, the acoustic source must be shut down to avoid unauthorized take.

(e) SIO shall ensure that the vessel operator and other relevant vessel personnel are briefed on all responsibilities, communication procedures, marine mammal monitoring protocol, operational procedures, and IHA requirements prior to the start of survey activity, and when relevant new personnel join the survey operations.

4. Mitigation Requirements.

The holder of this Authorization is required to implement the following mitigation measures:

(b) SIO must use at least three (3) dedicated, trained, NMFS-approved PSO. The PSOs must have no tasks other than to conduct observational effort, record observational data, and communicate with and instruct relevant vessel crew with regard to the presence of marine mammals and mitigation requirements. PSO resumes shall be provided to NMFS for approval.

(c) At least one PSO must have a minimum of 90 days at-sea experience working as a PSO during a deep penetration seismic survey, with no more than eighteen months elapsed since the conclusion of the at-sea experience. One "experienced" visual PSO shall be designated as the lead for the entire protected species observation team. The lead PSO shall serve as primary point of contact for the vessel operator.

(d) Visual Observation.

(i) During survey operations (*e.g.*, any day on which use of the acoustic source is planned to occur; whenever the acoustic source is in the water, whether activated or not), typically two, and minimally one, PSO(s) must be on duty and conducting visual observations at all times during daylight hours (*i.e.*, from 30 minutes prior to sunrise through 30 minutes following sunset).

(ii) Visual monitoring must begin not less than 30 minutes prior to ramp-up, including for nighttime ramp-ups of the airgun array, and must continue until one hour after use of the acoustic source ceases or until 30 minutes past sunset.

(iii) PSOs shall coordinate to ensure 360° visual coverage around the vessel from the most appropriate observation posts and shall conduct visual observations using binoculars and the naked eye while free from distractions and in a consistent, systematic, and diligent manner.

(iv) PSOs may be on watch for a maximum of four consecutive hours followed by a break of at least one hour between watches and may conduct a maximum of 12 hours observation per 24 hour period.

(v) During good conditions (*e.g.*, daylight hours; Beaufort sea state 3 or less), visual PSOs shall conduct observations when the acoustic source is not operating for comparison of sighting rates and behavior with and without use of the acoustic source and between acquisition periods, to the maximum extent practicable.

(e) Exclusion Zone and buffer zone—PSOs shall establish and monitor a 100 m EZ and 200 m buffer zone. The zones shall be based upon radial distance from

any element of the airgun array (rather than being based on the center of the array or around the vessel itself). During use of the acoustic source, occurrence of marine mammals outside the EZ but within 200 m from any element of the airgun array shall be communicated to the operator to prepare for potential further mitigation measures as described below. During use of the acoustic source, occurrence of marine mammals within the EZ, or on a course to enter the EZ, shall trigger further mitigation measures as described below.

(i) Ramp-up—A ramp-up procedure, is required at all times as part of the activation of the acoustic source. Ramp-up would begin with one 45 in<sup>3</sup> airgun, and the second 45 in<sup>3</sup> airgun would be added after 5 minutes.

(ii) If the airgun array has been shut down due to a marine mammal detection, ramp-up shall not occur until all marine mammals have cleared the EZ. A marine mammal is considered to have cleared the EZ if:

(A) It has been visually observed to have left the EZ; or

(B) It has not been observed within the EZ, for 15 minutes (in the case of small odontocetes) or for 30 minutes (in the case of mysticetes and large odontocetes including sperm, pygmy sperm, and beaked whales).

(iii) Thirty minutes of pre-clearance observation of the 100 m EZ and 200 m buffer zone are required prior to ramp-up for any shutdown of longer than 30 minutes. This pre-clearance period may occur during any vessel activity. If any marine mammal (including delphinids) is observed within or approaching the 100 m EZ during the 30 minute pre-clearance period, ramp-up may not begin until the animal(s) has been observed exiting the EZ or until an additional time period has elapsed with no further sightings (*i.e.*, 15 minutes for small odontocetes and 30 minutes for all other species).

(iv) During ramp-up, PSOs shall monitor the 100 m EZ and 200 m buffer zone. Ramp-up may not be initiated if any marine mammal (including delphinids) is observed within or approaching the 100 m EZ. If a marine mammal is observed within or approaching the 100 m EZ during ramp-up, a shutdown shall be implemented as though the full array were operational. Ramp-up may not begin again until the animal(s) has been observed exiting the 100 m EZ or until an additional time period has elapsed with no further sightings (*i.e.*, 15 minutes for small odontocetes and 30 minutes for mysticetes and large odontocetes including sperm, pygmy sperm, and beaked whales).

(v) If the airgun array has been shut down for reasons other than mitigation (*e.g.*, mechanical difficulty) for a period of less than 30 minutes, it may be activated again without ramp-up if PSOs have maintained constant visual observation and no visual detections of any marine mammal have occurred within the buffer zone.

(vi) Ramp-up at night and at times of poor visibility shall only occur where operational planning cannot reasonably avoid such circumstances. Ramp-up may occur at night and during poor visibility if the 100 m EZ and 200 m buffer zone have been continually monitored by visual PSOs for 30 minutes prior to ramp-up with no marine mammal detections.

(vii) The vessel operator must notify a designated PSO of the planned start of ramp-up. A designated PSO must be notified again immediately prior to initiating ramp-up procedures and the operator must receive confirmation from the PSO to proceed.

(f) Shutdown requirements—An exclusion zone of 100 m shall be established and monitored by PSOs. If a marine mammal is observed within, entering, or approaching the 100 m exclusion zone all airguns shall be shut down.

(i) Any PSO on duty has the authority to call for shutdown of the airgun array. When there is certainty regarding the need for mitigation action on the basis of visual detection, the relevant PSO(s) must call for such action immediately.

(ii) The operator must establish and maintain clear lines of communication directly between PSOs on duty and crew controlling the airgun array to ensure that shutdown commands are conveyed swiftly while allowing PSOs to maintain watch.

(iii) When a shutdown is called for by a PSO, the shutdown must occur and any dispute resolved only following shutdown.

(iv) The shutdown requirement is waived for dolphins of the following genera: *Tursiops*, *Stenella*, *Delphinus*, *Lagenorhynchus* and *Lissodelphis*. The shutdown waiver only applies if animals are traveling, including approaching the vessel. If animals are stationary and the vessel approaches the animals, the shutdown requirement applies. If there is uncertainty regarding identification (*i.e.*, whether the observed animal(s) belongs to the group described above) or whether the animals are traveling, shutdown must be implemented.

(v) Upon implementation of a shutdown, the source may be reactivated under the conditions described at 4(e)(vi). Where there is no

relevant zone (*e.g.*, shutdown due to observation of a calf), a 30-minute clearance period must be observed following the last observation of the animal(s).

(vi) Shutdown of the array is required upon observation of a whale (*i.e.*, sperm whale or any baleen whale) with calf, with “calf” defined as an animal less than two-thirds the body size of an adult observed to be in close association with an adult, at any distance.

(vii) Shutdown of the array is required upon observation of an aggregation (*i.e.*, six or more animals) of large whales of any species (*i.e.*, sperm whale or any baleen whale) that does not appear to be traveling (*e.g.*, feeding, socializing, etc.) at any distance.

(viii) Shutdown of the array is required upon observation of a killer whale at any distance.

(g) Vessel Strike Avoidance—Vessel operator and crew must maintain a vigilant watch for all marine mammals and slow down or stop the vessel or alter course, as appropriate, to avoid striking any marine mammal, unless such action represents a human safety concern. A visual observer aboard the vessel must monitor a vessel strike avoidance zone around the vessel according to the parameters stated below. Visual observers monitoring the vessel strike avoidance zone can be either third-party observers or crew members, but crew members responsible for these duties must be provided sufficient training to distinguish marine mammals from other phenomena.

(i) The vessel must maintain a minimum separation distance of 100 m from large whales, unless such action represents a human safety concern. The following avoidance measures must be taken if a large whale is within 100 m of the vessel:

(A) The vessel must reduce speed and shift the engine to neutral, when feasible, and must not engage the engines until the whale has moved outside of the vessel’s path and the minimum separation distance has been established unless such action represents a human safety concern.

(B) If the vessel is stationary, the vessel must not engage engines until the whale(s) has moved out of the vessel’s path and beyond 100 m unless such action represents a human safety concern.

(ii) The vessel must maintain a minimum separation distance of 50 m from all other marine mammals, with an exception made for animals described in 4(e)(iv) that approach the vessel. If an animal is encountered during transit, the vessel shall attempt to remain



parallel to the animal's course, avoiding excessive speed or abrupt changes in course unless such action represents a human safety concern.

(iii) Vessel speeds must be reduced to 10 knots or less when mother/calf pairs, pods, or large assemblages of cetaceans are observed near the vessel unless such action represents a human safety concern.

(h) Miscellaneous Protocols.

(i) The airgun array must be deactivated when not acquiring data or preparing to acquire data, except as necessary for testing. Unnecessary use of the acoustic source shall be avoided. Operational capacity of 90 in<sup>3</sup> (not including redundant backup airguns) must not be exceeded during the survey, except where unavoidable for source testing and calibration purposes. All occasions where activated source volume exceeds notified operational capacity must be noticed to the PSO(s) on duty and fully documented. The lead PSO must be granted access to relevant instrumentation documenting acoustic source power and/or operational volume.

(ii) Testing of the acoustic source involving all elements requires normal mitigation protocols (e.g., ramp-up). Testing limited to individual source elements or strings does not require ramp-up but does require pre-clearance.

5. Monitoring Requirements.

The holder of this Authorization is required to conduct marine mammal monitoring during survey activity. Monitoring shall be conducted in accordance with the following requirements:

(a) The operator must provide a night-vision device suited for the marine environment for use during nighttime ramp-up pre-clearance, at the discretion of the PSOs. At minimum, the device should feature automatic brightness and gain control, bright light protection, infrared illumination, and optics suited for low-light situations.

(b) PSOs must also be equipped with reticle binoculars (e.g., 7 × 50) of appropriate quality (i.e., Fujinon or equivalent), GPS, digital single-lens reflex camera of appropriate quality (i.e., Canon or equivalent), compass, and any other tools necessary to adequately perform necessary tasks, including accurate determination of distance and bearing to observed marine mammals.

(c) PSO Qualifications

(i) PSOs must have successfully completed relevant training, including completion of all required coursework and passing a written and/or oral examination developed for the training program.

(ii) PSOs must have successfully attained a bachelor's degree from an accredited college or university with a major in one of the natural sciences and a minimum of 30 semester hours or equivalent in the biological sciences and at least one undergraduate course in math or statistics. The educational requirements may be waived if the PSO has acquired the relevant skills through alternate experience. Requests for such a waiver must include written justification. Alternate experience that may be considered includes, but is not limited to (1) secondary education and/or experience comparable to PSO duties; (2) previous work experience conducting academic, commercial, or government-sponsored marine mammal surveys; or (3) previous work experience as a PSO; the PSO should demonstrate good standing and consistently good performance of PSO duties.

(d) Data Collection—PSOs must use standardized data forms, whether hard copy or electronic. PSOs shall record detailed information about any implementation of mitigation requirements, including the distance of animals to the acoustic source and description of specific actions that ensued, the behavior of the animal(s), any observed changes in behavior before and after implementation of mitigation, and if shutdown was implemented, the length of time before any subsequent ramp-up of the acoustic source to resume survey. If required mitigation was not implemented, PSOs should submit a description of the circumstances. We require that, at a minimum, the following information be reported:

(i) PSO names and affiliations.

(ii) Dates of departures and returns to port with port name.

(iii) Dates and times (Greenwich Mean Time) of survey effort and times corresponding with PSO effort.

(iv) Vessel location (latitude/longitude) when survey effort begins and ends; vessel location at beginning and end of visual PSO duty shifts.

(v) Vessel heading and speed at beginning and end of visual PSO duty shifts and upon any line change.

(vi) Environmental conditions while on visual survey (at beginning and end of PSO shift and whenever conditions change significantly), including wind speed and direction, Beaufort sea state, Beaufort wind force, swell height, weather conditions, cloud cover, sun glare, and overall visibility to the horizon.

(vii) Factors that may be contributing to impaired observations during each PSO shift change or as needed as

environmental conditions change (e.g., vessel traffic, equipment malfunctions).

(viii) Survey activity information, such as acoustic source power output while in operation, number and volume of airguns operating in the array, tow depth of the array, and any other notes of significance (i.e., pre-ramp-up survey, ramp-up, shutdown, testing, shooting, ramp-up completion, end of operations, streamers, etc.).

(ix) If a marine mammal is sighted, the following information should be recorded:

(A) Watch status (sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform);

(B) PSO who sighted the animal;

(C) Time of sighting;

(D) Vessel location at time of sighting;

(E) Water depth;

(F) Direction of vessel's travel (compass direction);

(G) Direction of animal's travel relative to the vessel;

(H) Pace of the animal;

(I) Estimated distance to the animal and its heading relative to vessel at initial sighting;

(J) Identification of the animal (e.g., genus/species, lowest possible taxonomic level, or unidentified); also note the composition of the group if there is a mix of species;

(K) Estimated number of animals (high/low/best);

(L) Estimated number of animals by cohort (adults, yearlings, juveniles, calves, group composition, etc.);

(M) Description (as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics);

(N) Detailed behavior observations (e.g., number of blows, number of surfaces, breaching, spyhopping, diving, feeding, traveling; as explicit and detailed as possible; note any observed changes in behavior);

(O) Animal's closest point of approach (CPA) and/or closest distance from the center point of the acoustic source;

(P) Platform activity at time of sighting (e.g., deploying, recovering, testing, shooting, data acquisition, other); and

(Q) Description of any actions implemented in response to the sighting (e.g., delays, shutdown, ramp-up, speed or course alteration, etc.) and time and location of the action.

6. Reporting.

(a) SIO shall submit a draft comprehensive report on all activities and monitoring results within 90 days of the completion of the survey or

expiration of the IHA, whichever comes sooner. The report must describe all activities conducted and sightings of marine mammals near the activities, must provide full documentation of methods, results, and interpretation pertaining to all monitoring, and must summarize the dates and locations of survey operations and all marine mammal sightings (dates, times, locations, activities, associated survey activities). Geospatial data regarding locations where the acoustic source was used must be provided as an ESRI shapefile with all necessary files and appropriate metadata. In addition to the report, all raw observational data shall be made available to NMFS. The report must summarize the data collected as required under condition 5(d) of this IHA. The draft report must be accompanied by a certification from the lead PSO as to the accuracy of the report, and the lead PSO may submit directly to NMFS a statement concerning implementation and effectiveness of the required mitigation and monitoring. A final report must be submitted within 30 days following resolution of any comments from NMFS on the draft report.

(b) Reporting injured or dead marine mammals:

(i) In the event that the specified activity clearly causes the take of a marine mammal in a manner not prohibited by this IHA (if issued), such as serious injury or mortality, SIO shall immediately cease the specified activities and immediately report the incident to NMFS. The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the incident;

(B) Vessel's speed during and leading up to the incident;

(C) Description of the incident;

(D) Status of all sound source use in the 24 hours preceding the incident;

(E) Water depth;

(F) Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(G) Description of all marine mammal observations in the 24 hours preceding the incident;

(H) Species identification or description of the animal(s) involved;

(I) Fate of the animal(s); and

(J) Photographs or video footage of the animal(s).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with SIO to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. SIO may not resume their activities until notified by NMFS.

(ii) In the event that SIO discovers an injured or dead marine mammal, and the lead observer determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition), SIO shall immediately report the incident to NMFS. The report must include the same information identified in condition 6(b)(i) of this IHA. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with SIO to determine whether additional

mitigation measures or modifications to the activities are appropriate.

(iii) In the event that SIO discovers an injured or dead marine mammal, and the lead observer determines that the injury or death is not associated with or related to the specified activities (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), SIO shall report the incident to NMFS within 24 hours of the discovery. SIO shall provide photographs or video footage or other documentation of the sighting to NMFS.

7. This Authorization may be modified, suspended or withdrawn if the holder fails to abide by the conditions prescribed herein, or if NMFS determines the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals.

#### Request for Public Comments

We request comment on our analyses, the draft authorization, and any other aspect of this Notice of Proposed IHA for the proposed seismic survey by SIO. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: August 11, 2017.

**Donna Wieting,**

*Director, Office of Protected Resources,  
National Marine Fisheries Service.*

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Part IV

## Department of Health and Human Services

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Centers for Medicare & Medicaid Services

42 CFR Parts 510 and 512

Medicare Program; Cancellation of Advancing Care Coordination Through Episode Payment and Cardiac Rehabilitation Incentive Payment Models; Changes to Comprehensive Care for Joint Replacement Payment Model (CMS-5524-P); Proposed Rule

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Centers for Medicare & Medicaid Services****42 CFR Parts 510 and 512**

[CMS-5524-P]

RIN 0938-AT16

**Medicare Program; Cancellation of Advancing Care Coordination Through Episode Payment and Cardiac Rehabilitation Incentive Payment Models; Changes to Comprehensive Care for Joint Replacement Payment Model (CMS-5524-P)****AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule proposes to cancel the Episode Payment Models (EPMs) and Cardiac Rehabilitation (CR) incentive payment model and to rescind the regulations governing these models. It also proposes to revise certain aspects of the Comprehensive Care for Joint Replacement (CJR) model, including: Giving certain hospitals selected for participation in the CJR model a one-time option to choose whether to continue their participation in the model; technical refinements and clarifications for certain payment, reconciliation and quality provisions; and a change to increase the pool of eligible clinicians that qualify as affiliated practitioners under the Advanced Alternative Payment Model (APM) track.

**DATES:** *Comment period:* To be assured consideration, comments on this proposed rule must be received at one of the addresses provided in the **ADDRESSES** section no later than 5 p.m. EDT on October 16, 2017.

**ADDRESSES:** In commenting, please refer to file code CMS-5524-P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-5524-P, P.O. Box 8013, Baltimore, MD 21244-1850. Please allow sufficient time for mailed comments to be

received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-5524-P, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments ONLY to the following addresses prior to the close of the comment period:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445-G, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244-1850. If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786-7195 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:**

*For questions related to the CJR model:* [CJR@cms.hhs.gov](mailto:CJR@cms.hhs.gov).

*For questions related to the EPMs:* [EPMRULE@cms.hhs.gov](mailto:EPMRULE@cms.hhs.gov).

**SUPPLEMENTARY INFORMATION:**

*Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: <http://www.regulations.gov>. Follow the search

instructions on that Web site to view public comments.

Comments received prior to the submission deadline will also be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1-800-743-3951.

**Electronic Access**

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**Acronyms**

ACE Acute Care Episode Demonstration  
 ACO Accountable Care Organization  
 AMI Acute Myocardial Infarction  
 APM Alternative Payment Model  
 BPCI Bundled Payments for Care Improvement  
 CABG Coronary Artery Bypass Graft  
 CCN CMS Certification Number  
 CCSQ Center for Clinical Standards and Quality  
 CEHRT Certified Electronic Health Record Technology  
 CEO Chief Executive Officer  
 CFO Chief Financial Officer  
 CJR Comprehensive Care for Joint Replacement  
 CMS Centers for Medicare & Medicaid Services  
 CR Cardiac rehabilitation  
 CY Calendar Year  
 E/M Evaluation and Management  
 EPM Episode payment model  
 FFS Fee-for-service  
 FR Federal Register  
 HACRP Hospital-Acquired Condition Reduction Program  
 HHS U.S. Department of Health and Human Services  
 HVBP Hospital Value-Based Purchasing Program  
 ICD-CM International Classification of Diseases, Clinical Modification  
 IFC Interim Final Rule with Comment Period  
 IPPS Inpatient Prospective Payment System  
 LEJR Lower-extremity joint replacement  
 MPFS Medicare Physician Fee Schedule  
 MP Malpractice  
 MSA Metropolitan Statistical Area  
 MS-DRG Medical Severity Diagnosis-Related Group  
 NPI National Provider Identifier  
 NPRA Net Payment Reconciliation Amount  
 NQF National Quality Forum  
 OMB Office of Management and Budget  
 PE Practice Expense  
 PGP Physician Group Practice

PRO Patient-Reported Outcome  
 PY Performance year  
 QP Qualifying APM Participant  
 RFA Regulatory Flexibility Act  
 RSCR Risk-Standardized Complication Rate  
 RVU Relative Value Unit  
 SHFFT Surgical hip/femur fracture treatment  
 THA Total hip arthroplasty  
 TIN Taxpayer Identification Number  
 TKA Total knee arthroplasty  
 UMRA Unfunded Mandates Reform Act

## I. Executive Summary

### A. Purpose

The purpose of this proposed rule is to propose to cancel the Episode Payment Models (EPMs) and the Cardiac Rehabilitation (CR) incentive payment model, established by the Center for Medicare and Medicaid Innovation (Innovation Center) under the authority of section 1115A of the Social Security Act (the Act), and to rescind the regulations at 42 CFR part 512. Additionally, this proposed rule proposes to prospectively make participation voluntary for all hospitals in approximately half of the geographic areas selected for participation in the Comprehensive Care for Joint Replacement (CJR) model (that is, in 33 of the 67 Metropolitan Statistical Areas (MSAs) selected; (see 80 FR 73299 Table 4)) and for low-volume and rural hospitals in all of the geographic areas selected for participation in the CJR model. We are also proposing several technical refinements and clarifications for certain CJR model payment, reconciliation, and quality provisions, and a change to the criteria for the Affiliated Practitioner List to broaden the CJR Advanced Alternative Payment Model (APM) track to additional eligible clinicians.

We note that review and reevaluation of policies and programs, as well as revised rulemaking, are within an agency's discretion, and that discretion is often exercised after a change in administration occurs. The EPMs and the CR incentive models were designed as mandatory payment models and implemented via notice and comment rulemaking to test the effects of bundling cardiac and orthopedic care beginning in 2018 and further incentivizing higher value care. The CJR model was also designed as a mandatory payment model established via notice and comment rulemaking to test the effects of bundling on orthopedic episodes involving lower extremity joint replacements; we note that the CJR model began on April 1, 2016 and is currently in its second performance year.

While we continue to believe that cardiac and orthopedic episode models

offer opportunities to redesign care processes and improve quality and care coordination across the inpatient and post-acute care spectrum while lowering spending, after careful review, we have determined that it is appropriate to propose to rescind the regulations at 42 CFR part 512, which relate to the EPMs and CR incentive payment model, and reduce the geographic scope of the CJR model for the following reasons. First, we believe that requiring hospitals to participate in additional episode payment models at this time is not in the best interest of the agency or the affected providers. Many providers are currently engaged in voluntary initiatives with CMS, and we expect to continue to offer opportunities for providers to participate in voluntary initiatives, including episode-based payment models. We are concerned that engaging in large mandatory episode payment model efforts at this time may impede our ability to engage providers, such as hospitals, in future voluntary efforts. Similarly, we also believe that reducing the number of providers required to participate in the CJR model will allow us to continue to evaluate the effects of such a model while limiting the geographic reach of our current mandatory models. We considered altering the design of the EPMs and the CR incentive payment model to allow for voluntary participation and to take into account other feedback on the models, but as this would potentially involve restructuring the model design, payment methodologies, financial arrangement provisions and/or quality measures, we did not believe that such alterations would offer providers enough time to prepare for such changes, given the planned January 1, 2018 start date. In addition, if at a later date we decide to test these models, or similar models, on a voluntary basis, we would not expect to implement them through rulemaking, but rather would use methods of soliciting applications and securing participants' agreement to participate consistent with how we have implemented other voluntary models. Finally, we believe that canceling the EPMs and CR incentive payment model, as well as altering the scope of the CJR model, offers CMS greater flexibility to design and test other episode-based payment models, while still allowing us to test and evaluate the impact of the ongoing CJR model on enhancing the quality of care while reducing costs. Hospitals in the CJR model have been participating for more than a year and a half, and we have begun to give hospitals in the model financial and quality results from the first

performance year. In many cases, CJR hospitals have made investments in care redesign, and we want to recognize such investments and commitments to improvement while reducing the overall number of hospitals that are required to participate.

We seek public comment on the proposals contained in this proposed rule, and also on any alternatives considered.

### B. Summary of Economic Effects

We do not anticipate that our proposal to cancel the EPMs and CR incentive payment model prior to the start of those models will have any costs to providers. As shown in our impact analysis in section V. of this proposed rule, we estimate that the CJR model changes we are proposing will reduce the previously projected CJR model savings (82 FR 603) by approximately \$90 million. Therefore, we estimate that the total CJR model impact after the changes in this proposed rule will save the Medicare program \$204 million, instead of \$294 million, over the remaining 3-year performance period (2018 through 2020) of the CJR model. Our impact analysis has some degree of uncertainty and makes assumptions as discussed in section V. of this proposed rule. In addition to these estimated impacts, as with many of the Innovation Center models, the goals that participants are attempting to achieve include improving overall quality of care, enhancing participating provider infrastructure to support better care management and reducing costs. We anticipate there will continue to be a broader focus on care coordination and quality improvement through the CJR model among hospitals and other providers and suppliers within the Medicare program that may lead to better care management and improved quality of care for beneficiaries.

## II. Statutory Authority and Background

Under the authority of section 1115A of the Social Security Act (the Act), through notice-and-comment rulemaking, CMS' Center for Medicare and Medicaid Innovation (Innovation Center) established the Comprehensive Care for Joint Replacement model in a final rule titled "Medicare Program; Comprehensive Care for Joint Replacement Payment Model for Acute Care Hospitals Furnishing Lower Extremity Joint Replacement Services" published in the November 24, 2015 **Federal Register** (80 FR 73274 through 73554) (referred to in this proposed rule as the "CJR model final rule"). We established three new models for acute myocardial infarction, coronary artery

bypass graft, and surgical hip/femur fracture treatment episodes of care, which are collectively called the Episode Payment Models (EPMs), created a Cardiac Rehabilitation incentive payment model (CR incentive payment model), and revised several existing provisions for the CJR model, in a final rule titled “Advancing Care Coordination Through Episode Payment Models (EPMs); Cardiac Rehabilitation Incentive Payment Model; and Changes to the Comprehensive Care for Joint Replacement Model” published in the January 3, 2017 **Federal Register** (82 FR 180) (referred to in this proposed rule as the “EPM final rule”).

The effective date for most of the provisions of the EPM final rule was February 18, 2017, and in the EPM final rule we specified an effective date of July 1, 2017 for certain CJR model regulatory changes intended to align with a July 1, 2017 applicability, or start, date for the EPMs and CR incentive payment model. On January 20, 2017, the Assistant to the President and Chief of Staff issued a memorandum titled “Regulatory Freeze Pending Review” that instructed Federal agencies to temporarily postpone the effective date for 60 days from the date of the memorandum for regulations that had been published in the **Federal Register** but had not taken effect, for purposes of reviewing the rules and considering potentially proposing further notice-and-comment rulemaking. Accordingly, on February 17, 2017, we issued a final rule in the **Federal Register** (82 FR 10961) to delay until March 21, 2017 the effective date of any provisions of the EPM final rule that were to become effective on February 18, 2017. We subsequently issued an interim final rule with comment (IFC) period in the **Federal Register** on March 21, 2017 (referred to in this proposed rule as the “March 21, 2017 IFC”) (82 FR 14464). The March 21, 2017 IFC further delayed the effective date of the provisions that were to take effect March 21, 2017 until May 20, 2017, further delayed the applicability date of the EPMs and CR incentive payment model provisions until October 1, 2017, and further delayed the effective date of the conforming CJR model changes until October 1, 2017. In the March 21, 2017 IFC, we also solicited public comment on further delaying the applicability date for the EPMs and CR incentive payment provisions, as well as the effective date for the conforming changes to the CJR model from October 1, 2017 until January 1, 2018 to allow for additional notice-and-comment

rulemaking. Based on the public comments we received in response to the March 21, 2017 IFC, we published a final rule (referred to in this proposed rule as the “May 19, 2017 final delay rule”) on May 19, 2017 (82 FR 22895) to finalize a January 1, 2018 applicability date for the EPMs and CR incentive payment provisions, as well as to finalize a January 1, 2018 effective date for the conforming changes to the CJR model (specifically amending § 510.2; adding § 510.110; amending § 510.120; amending § 510.405; amending § 510.410; revising § 510.500; revising § 510.505; adding § 510.506; and amending § 510.515). Additional changes to the CJR model, in accordance with the March 21, 2017 IFC, took effect May 20, 2017.

As we stated in the May 19, 2017 final delay rule (82 FR 22897), we received a number of comments on the models that did not relate to the start date change comment solicitation. These additional comments suggested that we reconsider or revise various model aspects, policies and design components; in particular, many of these comments suggested that we should make participation in the models voluntary instead of mandatory. We did not respond to these comments in the May 19, 2017 final delay rule, as the comments were out of scope of that rulemaking, but we stated that we might take them into consideration in future rulemaking.

Our specific proposals are discussed in the following sections of this proposed rule.

### III. Provisions of the Proposed Regulations

#### *A. Proposed Cancellation of EPMs and Cardiac Rehabilitation Incentive Payment Model*

In the January 3, 2017 EPM final rule, we established three bundled payment models for acute myocardial infarction (AMI), coronary artery bypass graft (CABG), and surgical hip/femur fracture treatment (SHFFT) episodes, and a Cardiac Rehabilitation (CR) incentive payment model. These models are similar to other Innovation Center models and focus on more complex cases where we believe improvements in care coordination and other care redesign efforts offer the potential for improved patient outcomes and more efficient use of resources. Many stakeholders, including commenters responding to the March 21, 2017 IFC, have expressed concerns about the provider burden and challenges these new models present. As we noted in the May 19, 2017 final delay rule (82 FR 22896), which finalized a January 1,

2018 start date for the EPMs and the CR incentive payment model, we would engage in notice and comment rulemaking on these models if we believed it to be warranted. We also noted that we received 47 submissions in response to the March 21, 2017 IFC. These responses contained a mix of in- and out-of-scope comments (82 FR 22899). In the May 19, 2017 final delay rule (82 FR 22897), we noted that in addition to commenting on the change to the effective date for the EPMs and CR incentive payment model and certain provisions of the CJR model, commenters highlighted concerns with the models’ design, including but not limited to participation requirements, data, pricing, quality measures, episode length, CR and skilled nursing facility (SNF) waivers, beneficiary exclusions and notification requirements, repayment, coding, and model overlap issues. Specifically, many commenters were opposed to the mandatory participation requirements, arguing that the mandatory nature of these models would force many providers who lack familiarity, experience, or proper infrastructure to quickly support care redesign efforts for a new bundled payment system. Many commenters were concerned that the mandatory nature of these models might harm patients and providers before CMS knows how these models might affect access to care, quality or outcomes in various locations. Additionally, commenters were concerned that unrelated services would be incorporated into episode prices under the finalized price setting methodology, which bases prices on MS-DRGs and identifies excluded, unrelated services rather than included, related services based on clinical review. Commenters also expressed concern that this pricing approach would result in diagnosis codes that would be classified as included services, when in fact these services have no clinical relevance to the episode(s). Commenters were further concerned with the fact that CMS will progressively incorporate regional data into EPM target prices, where 100 percent of the EPM target price would be based on regional data by performance year 4. Commenters also took issue with the quality measures established for the SHFFT model, stating that these measures are not clinically related to the target population and are inappropriate for use in assessing the care provided to beneficiaries in the SHFFT model. In addition, commenters requested revisions to the CABG EPM to allow participants the option to use a CABG

composite score developed by the Society of Thoracic Surgeons (STS) rather than the all-cause mortality measure.

Commenters also expressed concerns about the design of the CR incentive payment model waivers. Commenters stated that current direct supervision requirements would continue to contribute to a lack of access to cardiac rehabilitation services and would inhibit providers' ability to redesign care for the CR incentive payment model. Commenters suggested broadening the CR physician supervision waiver because the current waivers would not cover non-model beneficiaries who might be obtaining services concurrently with model participants and are therefore not sufficient. Other commenters were concerned with the precedence rules for model overlap with Models 2, 3 and 4 of the Innovation Center's Bundled Payments for Care Improvement (BPCI) initiative.

In the May 19, 2017 final delay rule (82 FR 22895), we stated that we might consider these public comments in future rulemaking. Based on our additional review and consideration of this stakeholder feedback, we have concluded that certain aspects of the design of the EPMs and the CR incentive payment model should be improved and more fully developed prior to the start of the models, and that moving forward with the implementation of the EPMs and CR incentive payment model as put forth in the January 3, 2017 EPM final rule would not be in the best interest of beneficiaries or providers at this time. Based on our acknowledgment of the many concerns about the design of these models articulated by stakeholders, we are proposing to cancel the EPMs and CR incentive payment model before they begin. Accordingly, we propose to rescind 42 CFR part 512 in its entirety.

We seek public comment on our proposal to cancel the EPMs and CR incentive payment model.

We note that, if the proposal to cancel the EPMs and CR incentive payment model is finalized, providers interested in participating in bundled payment models may still have an opportunity to do so during calendar year (CY) 2018 via new voluntary bundled payment models. Building on the BPCI initiative, the Innovation Center expects to develop new voluntary bundled payment model(s) during CY 2018 that would be designed to meet the criteria to be an Advanced APM. We also note the strong evidence base and other positive stakeholder feedback that we have received regarding the CR incentive payment model. As we further

develop the Innovation Center's portfolio of models, we may revisit this model and will consider stakeholder feedback for a potential new voluntary initiative.

#### *B. Proposed Changes to the CJR Model Participation Requirements*

##### 1. Proposed Voluntary Participation Election (Opt-In) for Certain MSAs and Low-Volume and Rural Hospitals

The CJR model began on April 1, 2016. The CJR model is currently in the second performance year, which includes episodes ending on or after January 1, 2017 and on or before December 31, 2017. The third performance year, which includes all CJR episodes ending on or after January 1, 2018 and on or before December 31, 2018, would necessarily incorporate episodes beginning before January 2018. The fifth, and last, performance year would end on December 31, 2020. Currently, with limited exceptions, hospitals located in the 67 geographic areas selected for participation in the CJR model must participate in the model through December 31, 2020; that is, their participation in the CJR model is mandatory unless the hospital is an episode initiator for a lower-extremity joint replacement (LEJR) episode in the risk-bearing period of Models 2 or 4 of the BPCI initiative. Hospitals with a CCN primary address in the 67 selected geographic areas that participated in Model 1 of the BPCI initiative, which ended on December 31, 2016, began participating in the CJR model when their participation in the BPCI initiative ended.

Based on smaller, voluntary tests of episode-based payment models and demonstrations, such as the Acute Care Episode (ACE) demonstration and the BPCI initiative, that have indicated a potential to improve beneficiaries' care while reducing costs (see ACE evaluation at: <https://downloads.cms.gov/files/cmni/ace-evaluationreport-final-5-2-14.pdf> and BPCI evaluation at: <https://innovation.cms.gov/Files/reports/BPCI-EvalRpt1.pdf>), we finalized the CJR model with mandatory participation in the 67 selected geographic areas so that we could further test delivery of better care at a lower cost across a wide range of hospitals, including some hospitals that may not otherwise participate, in many locations across the country. In the CJR model final rule (80 FR 73276), we stated that we believed that by requiring the participation of a large number of hospitals with diverse characteristics, the CJR model would result in a robust data set for evaluation

of this bundled payment approach, and would stimulate the rapid development of new evidence-based knowledge. Testing the model in this manner would also allow us to learn more about patterns of inefficient utilization of health care services and how to incentivize the improvement of quality for common LEJR procedure episodes.

After further consideration of stakeholder feedback, including responses we received on the March 21, 2017 IFC, we are proposing certain revisions to the mandatory participation requirements for the CJR model to allow us to continue to evaluate the effects of the model while limiting the geographic reach of our current mandatory models. Specifically, we are proposing that the CJR model would continue on a mandatory basis in approximately half of the selected geographic areas (that is, 34 of the 67 selected geographic areas), with an exception for low-volume and rural hospitals, and continue on a voluntary basis in the other areas (that is, 33 of the 67 selected geographic areas).

The geographic areas for the CJR model are certain Metropolitan Statistical Areas (MSAs) that were selected following the requirements in § 510.105 as discussed in the CJR model final rule (80 FR 73297 through 73299). In § 510.2, an MSA is defined as a core-based statistical area associated with at least one urbanized area that has a population of at least 50,000. In selecting the 67 MSAs for inclusion in the CJR model, the 196 eligible MSAs were stratified into 8 groups based on MSA average wage adjusted historic LEJR episode payments and MSA population size (80 FR 41207). Specifically, we classified MSAs according to their average LEJR episode payment into four categories based on the 25th, 50th and 75th percentiles of the distribution of the 196 potentially selectable MSAs as determined in the exclusion rules as applied in the CJR model proposed rule (80 FR 41198). This approach ranked the MSAs relative to one another and created four equally sized groups of 49. The population distribution was divided at the median point for the MSAs eligible for potential selection, creating 8 groups. Of the 196 eligible MSAs, we chose 67 MSAs via a stratified random selection process as discussed in the CJR model final rule (80 FR 73291). In reviewing our discussion of the MSA selection and the MSA volume needed to provide adequate statistical power to evaluate the impact of the model in the CJR model final rule (80 FR 73297), we have determined that reducing the mandatory MSA volume in half by selecting the 34

MSAs with the highest average wage-adjusted historic LEJR episode payments for continued mandatory participation could still allow us to evaluate the effects of the CJR model across a wide range of providers, including some that might not otherwise participate in the model. Higher payment areas are most likely to have significant room for improvement in creating efficiencies and greater variations in practice patterns. Thus, the selection of more expensive MSAs is the most appropriate approach to fulfilling the overall priorities of the CJR model to increase efficiencies and savings for LEJR episodes while maintaining or improving the overall quality of care.

The original determination of the sample size need in the CJR model final rule was constructed to be able to observe a 2-percent reduction in wage-adjusted episode spending after 1 year. This amount was chosen based on the anticipated amount of the discount applied in the target price. In considering the degree of certainty that would be needed to generate reliable statistical estimates, we assumed a 20 percent chance of false positive and a 30 percent chance of a false negative. Using these parameters, we determined that the number of MSAs needed ranged from 50 to 150. In order to allow for some degree of flexibility, we selected 75 MSAs, which were narrowed to 67 due to final exclusion criteria.

As we reviewed the CJR model for this proposed rule, we noted that, excluding quarterly reconciliation amounts, evaluation results from BPCI Model 2 have indicated possible reductions in fee-for-service spending of approximately 3 percent on orthopedic surgery episodes for hospitals participating in the LEJR episode bundle. (<https://innovation.cms.gov/Files/reports/bpci-models2-4-yr2evalrpt.pdf>). We examined the sample size needed to detect a 3-percent reduction in CJR model episode spending after 1 year using the same methodology as described in the CJR model final rule. We determined that we would be able to meet this standard with 34 MSAs from the higher cost groups. We expect that hospitals in the higher cost MSAs will be able to achieve similar 3 percent savings given their MSA's relatively high historic episode spending and thus greater opportunities for improvements, and their experience in optimizing clinical care pathways to produce greater efficiencies over the first two performance years of the CJR model. We note that the proposed changes to the model, including the focus on higher cost MSAs and the reduced number of mandatory MSAs,

will cause changes to the nature of the evaluation.

To select the 34 MSAs that would continue to have mandatory participation (except for low-volume and rural hospitals), we took the distribution of average wage-adjusted historic LEJR episode payments for the 67 MSAs using the definition described in the CJR model final rule, ordered them sequentially by average wage-adjusted historic LEJR episode payments, and then selected the 34 MSAs with the highest average payments. Under this proposal to reduce the number of MSAs with mandatory participation, the remaining 33 MSAs would no longer be subject to the CJR model's mandatory participation requirements; that is, hospital participation would be voluntary in these 33 MSAs.

After dividing the 67 MSAs into 34 mandatory and 33 voluntary MSAs as described previously, we examined selected MSA characteristics. In order to determine whether a good balance was maintained across MSA population size, we examined the number of MSAs below and above the median population point of the 196 MSAs eligible for potential selection. We observed that a good balance of MSA population size was maintained (17 out of 34 mandatory and 17 out of 33 voluntary MSAs had a population above the median population). While the 34 MSAs that would continue to have mandatory participation have higher spending on average, these MSAs all include providers with average cost episodes in addition to providers with high cost episodes. In general, we note that hospitals located in higher cost areas have a greater potential to demonstrate significant decreases in episode spending. However, within the higher cost MSAs, there is still significant variation in characteristics and experiences of the included hospitals. We anticipate the evaluation will be able to assess the generalizability of the findings of the CJR model by examining variations of performance within the participating hospitals who represent a wide range of hospital and market characteristics. Therefore, we are proposing that the CJR model would have 34 mandatory participation MSAs (identified in Table 1) and 33 voluntary participation MSAs (identified in Table 2) for performance years 3, 4, and 5.

Specifically, we are proposing that, unless an exclusion in § 510.100(b) applies (that is, for certain hospitals that participate in the BPCI initiative), participant hospitals in the proposed 34 mandatory participation MSAs that are not low-volume or rural (as defined in

§ 510.2 and discussed in the following paragraphs) would continue to be required to participate in the CJR model. We are also proposing that hospitals in the proposed 33 voluntary participation MSAs and hospitals that are low-volume or rural (as defined in § 510.2 and discussed in the following paragraphs) would have a one-time opportunity to notify CMS, in the form and manner specified by CMS, of their election to continue their participation in the CJR model on a voluntary basis (opt-in) for performance years 3, 4, and 5. Hospitals that choose to participate in the CJR model and make a participation election that complies with proposed § 510.115 would be subject to all model requirements. Hospitals in the proposed 33 voluntary participation MSAs and low-volume and rural hospitals (as defined in § 510.2 and discussed in the following paragraphs) that do not make a participation election would be withdrawn from the CJR model as described later in this section of this proposed rule.

We are proposing to exclude and automatically withdraw low-volume hospitals in the proposed 34 mandatory participation MSAs, as identified by CMS (see Table 3), from participation in the CJR model effective February 1, 2018. Since some low-volume hospitals may want to continue their participation in the CJR model, we are proposing to allow low-volume hospitals to make a one-time, voluntary participation election that complies with the proposed § 510.115 in order for the low-volume hospital to continue its participation in the CJR model. We are proposing to define a low-volume hospital in § 510.2 as a hospital identified by CMS as having fewer than 20 LEJR episodes in total across the 3 historical years of data used to calculate the performance year 1 CJR episode target prices. Note that under this definition, all hospitals listed in Table 3 would meet the definition of a low-volume hospital, but this list would not be inclusive of all hospitals that could be identified by CMS as a low-volume hospital. For example, a new hospital (with a new CCN) that opens in a mandatory MSA during the remaining years of the CJR model would not have any LEJR episodes during the historical years of data used to calculate the performance year 1 CJR episode target prices. Under our proposal, we intend that any hospital with a new CCN that comes into existence after the proposed voluntary participation election period would not be required and/or eligible to join the CJR model. Note that our proposed policy for new hospitals



would not be applicable in the case of a reorganization event where the remaining entity is a hospital with a CCN that was participating in the CJR model prior to the reorganization event; consistent with our current policy, such hospital would continue participation in the CJR model regardless of whether all predecessor hospitals were participant hospitals prior to the reorganization event.

We are also proposing to exclude and automatically withdraw rural hospitals from participation in the CJR model effective February 1, 2018. Since some rural hospitals may want to continue their participation in the CJR model, we are proposing to allow rural hospitals to make a one-time, voluntary participation election that complies with the proposed § 510.115 in order for the rural hospital to continue its

participation in the CJR model. Specifically, we are proposing that rural hospitals (as defined in § 510.2) with a CCN primary address in the 34 mandatory participation MSAs would have a one-time opportunity to opt-in to continue its participation in the CJR model during the proposed voluntary participation election period. We are proposing that a hospital's change in rural status after the end of the voluntary participation election period would not change the hospital's CJR model participation requirements. Specifically, we are proposing that hospitals in the proposed 34 mandatory participation MSAs that are neither low-volume or rural hospitals during the proposed voluntary participation election period would be required to participate in the CJR model for performance years 3, 4, and 5, and that

these hospitals would continue to be required to participate in the CJR model even if they subsequently become a rural hospital. Similarly, we are proposing that a rural hospital that makes a voluntary participation election during the one-time opportunity would be required to continue participating in the CJR model if that hospital no longer meets the definition of rural hospital in § 510.2. We are proposing this approach so that CMS can identify the hospitals, by CCN, that would participate in the model for the remainder of performance year 3 and performance years 4 and 5 at the conclusion of the proposed voluntary participation election period and so that there would be less confusion about which hospitals are CJR model participants. We seek comment on this proposal.

TABLE 1—CJR MANDATORY PARTICIPATION MSAs

MSA	MSA name	Wage-adjusted episode payments (in \$)
10420	Akron, OH	\$28,081
11700	Asheville, NC	27,617
12420	Austin-Round Rock, TX	28,960
13140	Beaumont-Port Arthur, TX	32,544
17140	Cincinnati, OH-KY-IN	28,074
18580	Corpus Christi, TX	30,700
20020	Dothan, AL	30,710
22500	Florence, SC	27,901
23540	Gainesville, FL	29,370
24780	Greenville, NC	27,446
25420	Harrisburg-Carlisle, PA	28,360
26300	Hot Springs, AR	29,621
28660	Killeen-Temple, TX	27,355
31080	Los Angeles-Long Beach-Anaheim, CA	28,219
31180	Lubbock, TX	29,524
32820	Memphis, TN-MS-AR	28,916
33100	Miami-Fort Lauderdale-West Palm Beach, FL	33,072
33740	Monroe, LA	30,431
33860	Montgomery, AL	30,817
35300	New Haven-Milford, CT	27,529
35380	New Orleans-Metairie, LA	29,562
35620	New York-Newark-Jersey City, NY-NJ-PA	31,076
36420	Oklahoma City, OK	27,267
36740	Orlando-Kissimmee-Sanford, FL	29,259
37860	Pensacola-Ferry Pass-Brent, FL	29,485
38300	Pittsburgh, PA	30,886
38940	Port St. Lucie, FL	30,423
39340	Provo-Orem, UT	28,852
39740	Reading, PA	28,679
42680	Sebastian-Vero Beach, FL	28,015
45300	Tampa-St. Petersburg-Clearwater, FL	32,424
45780	Toledo, OH	28,658
46220	Tuscaloosa, AL	31,789
46340	Tyler, TX	30,955

TABLE 2—CJR VOLUNTARY PARTICIPATION MSAs

MSA	MSA name	Wage-adjusted episode payments (in \$)
10740	Albuquerque, NM	\$25,892
12020	Athens-Clarke County, GA	25,394

TABLE 2—CJR VOLUNTARY PARTICIPATION MSAs—Continued

MSA	MSA name	Wage-adjusted episode payments (in \$)
13900	Bismarck, ND	22,479
14500	Boulder, CO	24,115
15380	Buffalo-Cheektowaga-Niagara Falls, NY	26,037
16020	Cape Girardeau, MO-IL	24,564
16180	Carson City, NV	26,128
16740	Charlotte-Concord-Gastonia, NC-SC	26,736
17860	Columbia, MO	25,558
19500	Decatur, IL	24,846
19740	Denver-Aurora-Lakewood, CO	26,119
20500	Durham-Chapel Hill, NC	25,151
22420	Flint, MI	24,807
23580	Gainesville, GA	23,009
26900	Indianapolis-Carmel-Anderson, IN	25,841
28140	Kansas City, MO-KS	27,261
30700	Lincoln, NE	27,173
31540	Madison, WI	24,442
33340	Milwaukee-Waukesha-West Allis, WI	25,698
33700	Modesto, CA	24,819
34940	Naples-Immokalee-Marco Island, FL	27,120
34980	Nashville-Davidson-Murfreesboro-Franklin, TN	26,880
35980	Norwich-New London, CT	25,780
36260	Ogden-Clearfield, UT	25,472
38900	Portland-Vancouver-Hillsboro, OR-WA	22,604
40980	Saginaw, MI	25,488
41180	St. Louis, MO-IL	26,425
41860	San Francisco-Oakland-Hayward, CA	23,716
42660	Seattle-Tacoma-Bellevue, WA	23,669
43780	South Bend-Mishawaka, IN-MI	23,143
44420	Staunton-Waynesboro, VA	25,539
45820	Topeka, KS	24,273
48620	Wichita, KS	25,945

TABLE 3—LOW-VOLUME HOSPITALS LOCATED IN THE MANDATORY MSAs ELIGIBLE TO OPT-IN DURING VOLUNTARY ELECTION PERIOD

CCN	Hospital name	MSA	MSA Title
010034	Community Hospital, Inc	33860	Montgomery, AL.
010062	Wiregrass Medical Center	20020	Dothan, AL.
010095	Hale County Hospital	46220	Tuscaloosa, AL.
010097	Elmore Community Hospital	33860	Montgomery, AL.
010108	Prattville Baptist Hospital	33860	Montgomery, AL.
010109	Pickens County Medical Center	46220	Tuscaloosa, AL.
010149	Baptist Medical Center East	33860	Montgomery, AL.
040132	Leo N. Levi National Arthritis Hospital	26300	Hot Springs, AR.
050040	LAC-Olive View-UCLA Medical Center	31080	Los Angeles-Long Beach-Anaheim, CA.
050091	Community Hospital of Huntington Park	31080	Los Angeles-Long Beach-Anaheim, CA.
050137	Kaiser Foundation Hospital-Panorama City	31080	Los Angeles-Long Beach-Anaheim, CA.
050138	Kaiser Foundation Hospital-Los Angeles	31080	Los Angeles-Long Beach-Anaheim, CA.
050139	Kaiser Foundation Hospital-Downey	31080	Los Angeles-Long Beach-Anaheim, CA.
050158	Encino Hospital Medical Center	31080	Los Angeles-Long Beach-Anaheim, CA.
050205	Glendora Community Hospital	31080	Los Angeles-Long Beach-Anaheim, CA.
050373	LAC+USC Medical Center	31080	Los Angeles-Long Beach-Anaheim, CA.
050378	Pacific Hospital of the Valley	31080	Los Angeles-Long Beach-Anaheim, CA.
050411	Kaiser Foundation Hospital-South Bay	31080	Los Angeles-Long Beach-Anaheim, CA.
050468	Memorial Hospital of Gardena	31080	Los Angeles-Long Beach-Anaheim, CA.
050543	College Hospital Costa Mesa	31080	Los Angeles-Long Beach-Anaheim, CA.
050548	Fairview Developmental Center	31080	Los Angeles-Long Beach-Anaheim, CA.
050552	Motion Picture & Television Hospital	31080	Los Angeles-Long Beach-Anaheim, CA.
050561	Kaiser Foundation Hospital-West Los Angeles	31080	Los Angeles-Long Beach-Anaheim, CA.
050609	Kaiser Foundation Hospital-Orange County-Anaheim	31080	Los Angeles-Long Beach-Anaheim, CA.
050641	East Los Angeles Doctors Hospital	31080	Los Angeles-Long Beach-Anaheim, CA.
050677	Kaiser Foundation Hospital-Woodland Hills	31080	Los Angeles-Long Beach-Anaheim, CA.
050723	Kaiser Foundation Hospital-Baldwin Park	31080	Los Angeles-Long Beach-Anaheim, CA.
050738	Greater El Monte Community Hospital	31080	Los Angeles-Long Beach-Anaheim, CA.
050744	Anaheim Global Medical Center	31080	Los Angeles-Long Beach-Anaheim, CA.
050747	South Coast Global Medical Center	31080	Los Angeles-Long Beach-Anaheim, CA.
050751	Miracle Mile Medical Center	31080	Los Angeles-Long Beach-Anaheim, CA.

TABLE 3—LOW-VOLUME HOSPITALS LOCATED IN THE MANDATORY MSAs ELIGIBLE TO OPT-IN DURING VOLUNTARY ELECTION PERIOD—Continued

CCN	Hospital name	MSA	MSA Title
050771	Coast Plaza Hospital	31080	Los Angeles-Long Beach-Anaheim, CA.
050776	College Medical Center	31080	Los Angeles-Long Beach-Anaheim, CA.
050779	Martin Luther King Jr. Community Hospital	31080	Los Angeles-Long Beach-Anaheim, CA.
050780	Foothill Medical Center	31080	Los Angeles-Long Beach-Anaheim, CA.
050782	Casa Colina Hospital	31080	Los Angeles-Long Beach-Anaheim, CA.
070038	Connecticut Hospice Inc	35300	New Haven-Milford, CT.
070039	Masonic Home and Hospital	35300	New Haven-Milford, CT.
100048	Jay Hospital	37860	Pensacola-Ferry Pass-Brent, FL.
100130	Lakeside Medical Center	33100	Miami-Fort Lauderdale-West Palm Beach, FL.
100240	Anne Bates Leach Eye Hospital	33100	Miami-Fort Lauderdale-West Palm Beach, FL.
100277	Douglas Gardens Hospital	33100	Miami-Fort Lauderdale-West Palm Beach, FL.
100320	Poinciana Medical Center	36740	Orlando-Kissimmee-Sanford, FL.
100326	Promise Hospital of Miami	33100	Miami-Fort Lauderdale-West Palm Beach, FL.
190005	University Medical Center New Orleans	35380	New Orleans-Metairie, LA.
190011	University Health Conway	33740	Monroe, LA.
190079	St. Charles Parish Hospital	35380	New Orleans-Metairie, LA.
190245	Monroe Surgical Hospital	33740	Monroe, LA.
190300	St. Charles Surgical Hospital LLC	35380	New Orleans-Metairie, LA.
190302	Omega Hospital LLC	35380	New Orleans-Metairie, LA.
190308	St. Bernard Parish Hospital	35380	New Orleans-Metairie, LA.
190313	New Orleans East Hospital	35380	New Orleans-Metairie, LA.
250012	Alliance Healthcare System	32820	Memphis, TN-MS-AR.
250126	North Oak Regional Medical Center	32820	Memphis, TN-MS-AR.
250167	Methodist Olive Branch Hospital	32820	Memphis, TN-MS-AR.
310058	Bergen Regional Medical Center	35620	New York-Newark-Jersey City, NY-NJ-PA.
330080	Lincoln Medical & Mental Health Center	35620	New York-Newark-Jersey City, NY-NJ-PA.
330086	Montefiore Mount Vernon Hospital	35620	New York-Newark-Jersey City, NY-NJ-PA.
330100	New York Eye and Ear Infirmary	35620	New York-Newark-Jersey City, NY-NJ-PA.
330199	Metropolitan Hospital Center	35620	New York-Newark-Jersey City, NY-NJ-PA.
330231	Queens Hospital Center	35620	New York-Newark-Jersey City, NY-NJ-PA.
330233	Brookdale Hospital Medical Center	35620	New York-Newark-Jersey City, NY-NJ-PA.
330240	Harlem Hospital Center	35620	New York-Newark-Jersey City, NY-NJ-PA.
330385	North Central Bronx Hospital	35620	New York-Newark-Jersey City, NY-NJ-PA.
330396	Woodhull Medical and Mental Health Center	35620	New York-Newark-Jersey City, NY-NJ-PA.
330397	Interfaith Medical Center	35620	New York-Newark-Jersey City, NY-NJ-PA.
330399	St. Barnabas Hospital	35620	New York-Newark-Jersey City, NY-NJ-PA.
330405	Helen Hayes Hospital	35620	New York-Newark-Jersey City, NY-NJ-PA.
360241	Edwin Shaw Rehab Institute	10420	Akron, OH.
370011	Mercy Hospital El Reno Inc.	36420	Oklahoma City, OK.
370158	Purcell Municipal Hospital	36420	Oklahoma City, OK.
370199	Lakeside Women's Hospital A Member of INTEGRIS Health	36420	Oklahoma City, OK.
370206	Oklahoma Spine Hospital	36420	Oklahoma City, OK.
370215	Oklahoma Heart Hospital	36420	Oklahoma City, OK.
370234	Oklahoma Heart Hospital South	36420	Oklahoma City, OK.
390184	Highlands Hospital	38300	Pittsburgh, PA.
390217	Excelsa Health Frick Hospital	38300	Pittsburgh, PA.
420057	McLeod Medical Center-Darlington	22500	Florence, SC.
420066	Lake City Community Hospital	22500	Florence, SC.
440131	Baptist Memorial Hospital Tipton	32820	Memphis, TN-MS-AR.
450143	Seton Smithville Regional Hospital	12420	Austin-Round Rock, TX.
450605	Care Regional Medical Center	18580	Corpus Christi, TX.
450690	University of Texas Health Science Center at Tyler	46340	Tyler, TX.
450865	Seton Southwest Hospital	12420	Austin-Round Rock, TX.
460043	Orem Community Hospital	39340	Provo-Orem, UT.
670087	Baylor Scott & White Emergency Medical Center-Cedar Park.	12420	Austin-Round Rock, TX.

As stated previously in this section, we are proposing a one-time participation election period for hospitals with a CCN primary address located in the voluntary participation MSAs listed in Table 2, low-volume hospitals specified in Table 3, and rural hospitals in the mandatory participation MSAs. Based on the anticipated timing for when the final rule implementing

this proposal would be published, we propose that the voluntary participation election period would begin January 1, 2018, and would end January 31, 2018. We must receive the participation election letter no later than January 31, 2018. We are proposing that the hospital's participation election letter would serve as the model participant agreement. Voluntary participation

would begin February 1, 2018, and continue through the end of the CJR model, unless sooner terminated. Thus, participant hospitals located in the voluntary participation MSAs listed in Table 2, the low-volume hospitals specified in Table 3, and the rural hospitals in the 34 mandatory participation MSAs that elect voluntary participation would continue in the CJR

model without any disruption to episodes attributed to performance year 3, which begins January 1, 2018. Participant hospitals located in the voluntary participation MSAs listed in Table 2, the low-volume hospitals specified in Table 3, and the rural hospitals in the 34 mandatory participation MSAs that do not elect voluntary participation would be withdrawn from the model effective February 1, 2018, and all of their performance year 3 episodes up to and including that date would be canceled, so that these hospitals would not be subject to a reconciliation payment or repayment amount for performance year 3. We are proposing to implement our proposed opt-in approach in this manner as a way to balance several goals, including establishing a uniform time period for hospitals to make a voluntary participation election, avoiding disruption of episodes for hospitals that elect to continue their participation in the CJR model, and preventing confusion about whether a hospital is participating in performance year 3 of the model. Specifically, we considered whether adopting a voluntary election period that ended prior to the start of performance year 3 would be less confusing and less administratively burdensome in terms of whether a hospital is participating in performance year 3. To implement this approach, the voluntary participation election period would have to close by December 31, 2017, such that each hospital would have made its determination regarding participation in performance year 3 before the start of performance year 3 (note that episodes attributed to performance year 3 would still be canceled under this alternative approach for eligible hospitals that do not make a participation election). Because the voluntary election period under this approach would conclude in advance of the relevant CJR model performance year, this approach could simplify our administration of performance year 3 by establishing in advance of performance year 3 whether a hospital would be a participant hospital for the totality of performance year 3. However, given the timing of this proposed rulemaking, we were not confident that hospitals would have sufficient time to make a voluntary participation election by December 31, 2017. Thus, we are proposing that the voluntary participation election period would occur during the first month of performance year 3 (that is, throughout January 2018) and would apply prospectively beginning on February 1, 2018. We believe this approach will best

ensure adequate time for hospitals to make a participation election while minimizing the time period during which participation in performance year 3 remains mandatory for all eligible hospitals in the 67 selected MSAs. We note that based on timing considerations, including potential changes to the anticipated date of publication of the final rule, we may modify the dates of the voluntary participation election period and make conforming changes to the dates for voluntary participation in performance year 3. We seek comment on the proposed voluntary participation election period, including whether we should instead require the participation election to be made by December 31, 2017 (that is, prior to the start of performance year 3) or if a different or later voluntary election period may be preferable.

To specify their participation election, we are proposing that hospitals would submit a written participation election letter to CMS in a form and manner specified by CMS. We intend to provide templates that can easily be completed and submitted in order to limit the burden on hospitals seeking to opt-in. If a hospital with a CCN primary address located in the voluntary participation MSAs or a low-volume or rural hospital in the mandatory participation MSAs does not submit a written participation election letter by January 31, 2018, the hospital's participation in performance year 3 would end, all of its performance year 3 episodes would be canceled, and it would not be included in the CJR model for performance years 4 and 5.

We are proposing a number of requirements for the participation election letter and that the hospital's participation election letter would serve as the model participant agreement. First, we are proposing that the participation election letter must include all of the following:

- Hospital Name.
- Hospital Address.
- Hospital CCN.
- Hospital contact name, telephone number, and email address.
- If selecting the Advanced APM track, attestation of CEHRT use as defined in § 414.1305.

Second, we are proposing that the participation election letter must include a certification in a form and manner specific by CMS that—

- The hospital will comply with all requirements of the CJR model (that is, 42 CFR 510) and all other laws and regulations that are applicable to its participation in the CJR model; and
- Any data or information submitted to CMS will be accurate, complete and

truthful, including, but not limited to, the participation election letter and any quality data or other information that CMS uses in reconciliation processes or payment calculations or both.

We solicit feedback on this proposed certification requirement, including whether the certification should include different or additional attestations.

Finally, we are proposing that the participation election letter be signed by the hospital administrator, chief financial officer (CFO) or chief executive officer (CEO).

We are proposing that, if the hospital's participation election letter meets these criteria, we would accept the hospital's participation election. Once a participation election for the CJR model is made and is effective, the participant hospital would be required to participate in all activities related to the CJR model for the remainder of the CJR model unless the hospital's participation is terminated sooner.

We note that episodes end 90 days after discharge for the CJR model and episodes that do not start and end in the same calendar year will be attributed to the following performance year. For example, episodes that start in October 2017 and do not end on or before December 31, 2017 are attributed to performance year 3. Our methodology for attributing these episodes to the subsequent performance year would be problematic in cases where a hospital with a CCN primary address located in a voluntary participation MSA or a rural hospital or a low-volume hospital, as specified by CMS, has not elected to voluntarily continue participating in the model. Therefore, for a hospital with a CCN primary address located in a voluntary participation MSA, or a rural hospital or a low-volume hospital, as specified by CMS, that does not elect voluntary participation during the one-time voluntary participation election period, we are proposing that all episodes attributed to performance year 3 for that hospital would be canceled and would not be included in payment reconciliation. Such hospitals would have their participation in the CJR model withdrawn effective February 1, 2018. We note that this proposal is consistent with our policy for treatment of episodes that have not ended by or on the last day of performance year 5 and cannot be included in performance year 5 reconciliation due to the end of the model (see Table 8 of the CJR model final rule (80 FR 73326)).

We are proposing to define a low-volume hospital, mandatory MSA, and voluntary MSA, to change the definition of participant hospital in § 510.2, and to amend the specification of the

geographic areas in § 510.105(a) to reflect the establishment of mandatory and voluntary participation MSAs. We are proposing to codify the opt-in proposal in new § 510.115. In addition, we are proposing to post the list of mandatory participation MSAs, voluntary participation MSAs, and low-volume hospitals on the CJR model Web site.

We believe our proposed opt-in approach to allow for voluntary participation in the CJR model by certain hospitals would be less burdensome on such hospitals than a potential alternative approach of requiring hospitals to opt-out of the model. In developing the proposal to allow eligible hospitals located in the proposed 33 voluntary participation MSAs and low-volume and rural hospitals located in the 34 mandatory participation MSAs to elect voluntary participation, we considered whether to propose that hospitals would have to make an affirmative voluntary participation election (that is, an opt-in approach) or to propose that these hospitals would continue to be required to participate in the CJR model unless written notification was given to CMS to withdraw the hospital from the CJR model (that is, an opt-out approach). We believe an opt-in approach would be less burdensome on hospitals, because it would not require participation in the CJR model for hospitals located in the proposed 33 voluntary participation MSAs and for low-volume and rural hospitals located in the 34 mandatory participation MSAs unless the hospital affirmatively chose it. Further, we believe requiring an affirmative opt-in election would result in less ambiguity about a hospital's participation intentions as compared to an opt-out approach. Specifically, with an opt-in approach, a hospital's participation

election would document each hospital's choice, whereas under an opt-out approach there could be instances where hospitals fail to timely notify CMS of their desire to withdraw from participation and are thus included in the model and subject to potential repayment amounts. For these reasons, we have proposed an opt-in approach. We seek comment on this proposal and the alternative considered.

We also believe that our proposed approach to make the CJR model primarily concentrated in the higher cost MSAs where the opportunity for further efficiencies and care redesign may be more likely and allow voluntary participation in the lower cost MSAs and for low-volume and rural hospitals allows the Innovation Center to focus on areas where the opportunity for further efficiencies and care redesign may be more likely, while still allowing hospitals in the voluntary MSAs the opportunity to participate in the model. In developing this proposed rule, we considered that hospitals in the CJR model have been participating for over a year and a half as of the timing of this proposed rule, and we have begun to give hospitals in the model financial and quality results from the first performance year. In many cases, participant hospitals have made investments in care redesign, and we want to recognize such investments and commitments to improvement while reducing the overall number of hospitals that are required to participate. We also considered stakeholder feedback that suggested we make participation in the CJR model voluntary, and the model size necessary to detect at least a 3-percent reduction in LEJR episode spending. Taking these considerations into account, we considered whether revising the model to allow for voluntary participation in all, some, or

none of the 67 selected MSAs would be feasible.

As discussed in section V. of this proposed rule, the estimated impact of the changes to the CJR model proposed in this proposed rule reduces the overall estimated savings for performance years 3, 4, and 5 by \$90 million. If voluntary participation was allowed in all of the 67 selected MSAs, the overall estimated model impact would no longer show savings, and would likely result in additional costs to the Medicare program. If participation was limited to the proposed 34 mandatory participation MSAs and voluntary participation was not allowed in any MSA, the impact to the overall estimated model savings over the last three years of the model would be closer to \$30 million than the \$90 million estimate presented in section V. of this proposed rule, because our modeling, which does not include assumptions about behavioral changes that might lower fee-for-service spending, estimates that 60 to 80 hospitals will choose voluntary participation. Since we estimate that these potential voluntary participants would be expected to earn only positive reconciliation payments under the model, these positive reconciliation payments would offset some of the savings garnered from mandatory participants. However, as many current hospital participants in all of the 67 MSAs are actively invested in the CJR model, we are proposing to allow voluntary participation in the 33 MSAs that were not selected for mandatory participation and for low-volume and rural hospitals. We seek comment on our proposed approach and the alternatives considered.

A summary of the proposed changes to the CJR model participation requirements is shown in Table 4.

TABLE 4—PROPOSED PARTICIPATION REQUIREMENTS FOR HOSPITALS IN THE CJR MODEL

	Required to participate as of February 1, 2018	May elect voluntary participation	Participation election period	Election effective date
<b>Mandatory Participation MSAs</b>				
All IPPS participant hospitals, except rural and low-volume * .....	Yes .....	No .....	n/a	n/a
Rural hospitals * .....	No .....	Yes .....	1/1/2018–1/31/2018	2/1/2018
Low-volume hospitals (see Table 3) .....	No .....	Yes .....	1/1/2018–1/31/2018	2/1/2018
<b>Voluntary Participation MSAs</b>				
All IPPS participant hospitals .....	No .....	Yes .....	1/1/2018–1/31/2018	2/1/2018

\* **Note:** Participation requirements are based on the CCN status of the hospital as of January 31, 2018. A change in rural status after the voluntary election period does not affect the participation requirements.

## 2. Proposed Codification of CJR Model-Related Evaluation Participation Requirements

We note that for the CJR model evaluation, the data collection methods and key evaluation research questions under the proposed reformulated approach (that is, the proposal for voluntary opt-in elections discussed in section III.B.1 of this proposed rule) would remain similar to the approach presented in the CJR model final rule. The evaluation methodology for the CJR model would be consistent with the standard Innovation Center approaches we have taken in other voluntary models such as the Pioneer Accountable Care Organization (ACO) Model. Cooperation and participation in model-related activities by all hospitals that participate in the CJR model would continue to be extremely important to the evaluation. Therefore, with respect to model-related evaluation activities, we propose to add provisions in § 510.410(b)(1)(i)(G) to specify that CMS may take remedial action if a participant hospital, or one of its collaborator, collaboration agent, or downstream collaboration agent fails to participate in model-related evaluation activities conducted by CMS and/or its contractors for any performance year in which the hospital participates. We believe the addition of this provision would make participation and collaboration requirements for the CJR model evaluation clear to all participant hospitals and in particular to hospitals that are eligible to elect voluntary participation. We seek comment on our proposed regulatory change.

## 3. Comment Solicitation: Incentivizing Participation in the CJR Model

In this proposed rule, we are proposing to make participation in the CJR model voluntary in 33 MSAs and for low-volume and rural hospitals in the remaining 34 MSAs via the proposed opt-in election policy discussed in section III.B.1 of this proposed rule. In order to keep hospitals in all MSAs selected for participation in the CJR model actively participating in the model, we are soliciting comment on ways to further incentivize eligible hospitals to elect to continue participating in the CJR model for the remaining years of the model and to further incentivize all participant hospitals to advance care improvements, innovation, and quality for beneficiaries throughout LEJR episodes.

Additionally, we note that, under the CJR refinements established in the January 3, 2017 EPM final rule, the total

amount of gainsharing payments for a performance year paid to physicians, non-physician practitioners, physician group practices (PGPs), and non-physician practitioner group practices (NPPGPs) must not exceed 50 percent of the total Medicare approved amounts under the Physician Fee Schedule for items and services that are furnished to beneficiaries during episodes that occurred during the same performance year for which the CJR participant hospital accrued the internal cost savings or earned the reconciliation payment that comprises the gainsharing payment being made (§ 510.500(c)(4)). Similarly, distribution arrangements are limited as specified in § 510.505(b)(8), and downstream distribution arrangements are limited as specified in § 510.506(b)(8). These program integrity safeguards, which are consistent with the gainsharing caps in other Innovation Center models, were included to avoid setting an inappropriate financial incentive that may result in stinting, steering or denial of medically necessary care (80 FR 73415 and 73416). While we are not proposing in this rule any changes to the gainsharing caps for these models, we have heard various opinions from stakeholders, including the Medicare Payment Advisory Commission (MedPAC), on the relative benefit of such limitations on gainsharing and in this proposed rule we are soliciting comment on this requirement and any alternative gainsharing caps that may be appropriate to apply to physicians, non-physician practitioners, PGPs, and NPPGPs.

### C. Maintaining ICD–CM Codes for Quality Measures

In the CJR model final rule (80 FR 73474), we discussed how specific International Classification of Diseases (ICD)—Clinical Modifications (CM) procedure codes define group of procedures included in the Hospital-level risk-standardized complication rate (RSCR) following elective primary total hip arthroplasty (THA) and/or total knee arthroplasty (TKA) (NQF #1550) (Hip/Knee Complications) measure. In discussing quality measures in general, the ICD–CM codes relative to defining a measure cohort are updated annually and are subject to change. For example, in the EPM final rule (82 FR 389), we itemized specific ICD–9–CM and ICD–10–CM codes for Hip/Knee Complications measure. As quality measures are refined and maintained, the ICD–CM code values used to identify the relevant diagnosis and/or procedures included in quality measures can be updated. For example,

CMS' Center for Clinical Standards and Quality (CCSQ) has recently updated the list of ICD–10 codes used to identify procedures included in the Hip/Knee Complications measure. We did not intend for our preamble discussions of certain ICD–CM codes used, for example, to identify procedures included in the Hip/Knee Complications measures, and therefore the PRO cohorts for the CJR model, to set a policy that would define the relevant cohorts for the entirety of the CJR model. We should have also directed readers to look for the most current codes on the CMS quality Web site at <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>. To ensure that model participants are aware of periodic ICD–CM code updates to the Hip/Knee Complications measure, we are proposing to clarify that participants must use the applicable ICD–CM code set that is updated and released to the public each calendar year in April by CCSQ and posted on the Hospital Quality Initiative Measure Methodology Web site (<https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>) for purposes of reporting each of those measures. CMS relies on the National Quality Forum (NQF) measure maintenance update and review processes to update substantive aspects of measures every 3 years. Through NQF's measure maintenance process, NQF endorsed measures are sometimes updated to incorporate changes that we believe do not substantially change the nature of the measures. Examples of such changes include updated diagnosis or procedure codes, changes to patient population, definitions, or extension of the measure endorsement to apply to other settings. We believe these types of maintenance changes are distinct from more substantive changes and do not require the use of the agency's regulatory process used to update more detailed aspects of quality measures.

### D. Clarification of CJR Reconciliation Following Hospital Reorganization Event

In the CJR model final rule (80 FR 73348) rule, we discussed our method of setting target prices using all historical episodes that would represent our best estimate of historical volume and payments for participant hospitals when an acquisition, merger, divestiture, or other reorganization results in a hospital with a new CCN. When a reorganization event occurs during a performance year,

CMS updates the quality-adjusted episode target prices for the new or surviving participant hospital (§ 510.300(b)(4)). Following the end of a performance year, CMS performs annual reconciliation calculations in accordance with the provisions established in § 510.305. The annual reconciliation calculations are specific to the episodes attributable to each participant hospital entity for that performance year. The applicable quality-adjusted episode target price for such episodes is the quality-adjusted episode target price that applies to the episode type as of the anchor hospitalization admission date (§ 510.300(a)(3)). For example, if during a performance year, two participant hospitals (Hospital A and Hospital B) merge under the CCN of one of those two participant hospital's CCN (Hospital B's CCN), (assuming no other considerations apply) three initial (and three subsequent) annual reconciliation calculations for that performance year are performed: An initial (and subsequent) reconciliation for Hospital A for the episodes where the anchor hospitalization admission occurred prior to the merger (as determined by the CCN on the IPPS claim), using Hospital A's episode target price for that time period; an initial (and subsequent) reconciliation for Hospital B for the episodes where anchor hospitalization admission occurred before the merger (as determined by the CCN on the IPPS claim), using Hospital B's episode target price for that time period; and an initial (and subsequent) reconciliation for the post-merger entity (merged Hospitals A and B) for the episodes where anchor hospitalization admission occurred on or after the merger's effective date, using the episode target price that time period. Reorganization events that involve a CJR model participant hospital and a hospital that is not participating in the CJR model and result in the new organization operating under the CJR participant hospital's CCN, would not affect the reconciliation for the CJR

participant hospital for episodes that initiate before the effective date of the reorganization event. Episodes that initiate after such reorganization event would be subject to an updated quality-adjusted episode target price that is based on historical episodes for the CJR participant hospital which would include historical episode expenditures for all hospitals that are integrated under the surviving CCN. These policies have been in effect since the start of the CJR model on April 1, 2016. To further clarify this policy for the CJR model, we propose to add a provision specifying that separate reconciliation calculations are performed for episodes that occur before and after a reorganization that results in a hospital with a new CCN at § 510.305(d)(1). We believe this clarification would increase transparency and understanding of the payment reconciliation processes for the CJR model. We seek comment on this proposal.

*E. Proposed Adjustment to the Pricing Calculation for the CJR Telehealth HCPCS Codes To Include the Facility PE Values*

In the CJR model final rule (80 FR 73450), we established 9 HCPCS G-codes to report home telehealth evaluation and management (E/M) visits furnished under the CJR telehealth waiver as displayed in Table 5. These codes have been payable for CJR model beneficiaries since the CJR model began on April 1, 2016. Pricing for these 9 codes is updated each calendar year to reflect the work and malpractice (MP) relative value units (RVUs) for the comparable office and other outpatient E/M visit codes on the Medicare Physician Fee Schedule (MPFS). As we stated in the CJR model final rule (80 FR 73450), in finalizing this pricing method for these codes, we did not include the practice expense (PE) RVUs of the comparable office and other outpatient E/M visit codes in the payment rate for these unique CJR model services, based on the belief that practice expenses

incurred to furnish these services are marginal or are paid for through other MPFS services. However, since the publication of the CJR model final rule, stakeholders have expressed concern that the zero value assigned to the PE RVUs for these codes results in inaccurate pricing. Stakeholders assert that there are additional costs related to the delivery of telehealth services under the CJR model such as maintaining the telecommunications equipment, software and security and that, while these practice expense costs are not equivalent to in-person service delivery costs, they are greater than zero. In considering the pricing concerns voiced by stakeholders, we recognize that there are resource costs in practice expense for telehealth services furnished remotely, however, we do not believe the current PE methodology and data accurately account for these costs relative to the PE resource costs for other services. This belief previously led us to assign zero PE RVUs in valuing these services, but because we recognize that there are some costs that are not being accounted for by the current pricing for these CJR model codes, we believe an alternative to assigning zero PE RVUs would be to use the facility PE RVUs for the analogous in-person services. While we acknowledge that assigning the facility PE RVUs would not provide a perfect reflection of practice resource costs for remote telehealth services under the CJR model, in the absence of more specific information, we believe it is likely a better proxy for such PE costs than zero. Therefore, we are proposing to use the facility PE RVUs for the analogous services in pricing the 9 CJR HCPCS G codes shown in Table 5. Additionally, we are proposing to revise § 510.605(c)(2) to reflect the addition of the RVUs for comparable codes for the facility PE to the work and MP RVUs we are currently using for the basis for payment of the CJR telehealth waiver G codes.

TABLE 5—HCPCS CODES FOR TELEHEALTH VISITS FOR CJR MODEL BENEFICIARIES IN HOME OR PLACE OF RESIDENCE

HCPCS Code No.	Long descriptor	Short descriptor	Work and MP RVUs equal to those of the corresponding office/outpatient E/M visit CPT code for same calendar year under the PFS; PE RVUs equal to the facility values for each
G9481 .....	<p>Remote in-home visit for the evaluation and management of a new patient for use only in the Medicare-approved Comprehensive Care for Joint Replacement model, which requires these 3 key components:</p> <ul style="list-style-type: none"> <li>• A problem focused history.</li> <li>• A problem focused examination.</li> <li>• Straightforward medical decision making, furnished in real time using interactive audio and video technology.</li> </ul> <p>Counseling and coordination of care with other physicians, other qualified health care professionals or agencies are provided consistent with the nature of the problem(s) and the needs of the patient or the family or both. Usually, the presenting problem(s) are self limited or minor. Typically, 10 minutes are spent with the patient or family or both via real time, audio and video intercommunications technology.</p>	Remote E/M new pt 10 mins .....	99201
G9482 .....	<p>Remote in-home visit for the evaluation and management of a new patient for use only in the Medicare-approved Comprehensive Care for Joint Replacement model, which requires these 3 key components:</p> <ul style="list-style-type: none"> <li>• An expanded problem focused history.</li> <li>• An expanded problem focused examination.</li> <li>• Straightforward medical decision making, furnished in real time using interactive audio and video technology. Counseling and coordination of care with other physicians, other qualified health care professionals or agencies are provided consistent with the nature of the problem(s) and the needs of the patient or the family or both. Usually, the presenting problem(s) are of low to moderate severity. Typically, 20 minutes are spent with the patient or family or both via real time, audio and video intercommunications technology.</li> </ul>	Remote E/M new pt 20 mins .....	99202
G9483 .....	<p>Remote in-home visit for the evaluation and management of a new patient for use only in the Medicare-approved Comprehensive Care for Joint Replacement model, which requires these 3 key components:</p> <ul style="list-style-type: none"> <li>• A detailed history.</li> <li>• A detailed examination.</li> <li>• Medical decision making of low complexity, furnished in real time using interactive audio and video technology. Counseling and coordination of care with other physicians, other qualified health care professionals or agencies are provided consistent with the nature of the problem(s) and the needs of the patient or the family or both. Usually, the presenting problem(s) are of moderate severity. Typically, 30 minutes are spent with the patient or family or both via real time, audio and video intercommunications technology.</li> </ul>	Remote E/M new pt 30 mins .....	99203
G9484 .....	<p>Remote in-home visit for the evaluation and management of a new patient for use only in the Medicare-approved Comprehensive Care for Joint Replacement model, which requires these 3 key components:</p> <ul style="list-style-type: none"> <li>• A comprehensive history.</li> <li>• A comprehensive examination.</li> </ul>	Remote E/M new pt 45 mins .....	99204



TABLE 5—HCPCS CODES FOR TELEHEALTH VISITS FOR CJR MODEL BENEFICIARIES IN HOME OR PLACE OF RESIDENCE—Continued

HCPCS Code No.	Long descriptor	Short descriptor	Work and MP RVUs equal to those of the corresponding office/outpatient E/M visit CPT code for same calendar year under the PFS; PE RVUs equal to the facility values for each
G9485 .....	<ul style="list-style-type: none"> <li>• Medical decision making of moderate complexity, furnished in real time using interactive audio and video technology. Counseling and coordination of care with other physicians, other qualified health care professionals or agencies are provided consistent with the nature of the problem(s) and the needs of the patient or the family or both. Usually, the presenting problem(s) are of moderate to high severity. Typically, 45 minutes are spent with the patient or family or both via real time, audio and video intercommunications technology.</li> </ul> Remote in-home visit for the evaluation and management of a new patient for use only in the Medicare-approved Comprehensive Care for Joint Replacement model, which requires these 3 key components: <ul style="list-style-type: none"> <li>• A comprehensive history.</li> <li>• A comprehensive examination.</li> </ul>	Remote E/M new pt 60 mins .....	99205
G9486 .....	<ul style="list-style-type: none"> <li>• Medical decision making of high complexity, furnished in real time using interactive audio and video technology. Counseling and coordination of care with other physicians, other qualified health care professionals or agencies are provided consistent with the nature of the problem(s) and the needs of the patient or the family or both. Usually, the presenting problem(s) are of moderate to high severity. Typically, 60 minutes are spent with the patient or family or both via real time, audio and video intercommunications technology.</li> </ul> Remote in-home visit for the evaluation and management of an established patient for use only in the Medicare-approved Comprehensive Care for Joint Replacement model, which requires at least 2 of the following 3 key components: <ul style="list-style-type: none"> <li>• A problem focused history.</li> <li>• A problem focused examination.</li> <li>• Straightforward medical decision making, furnished in real time using interactive audio and video technology. Counseling and coordination of care with other physicians, other qualified health care professionals or agencies are provided consistent with the nature of the problem(s) and the needs of the patient or the family or both. Usually, the presenting problem(s) are self limited or minor. Typically, 10 minutes are spent with the patient or family or both via real time, audio and video intercommunications technology.</li> </ul>	Remote E/M est. pt 10 mins .....	99212
G9487 .....	<ul style="list-style-type: none"> <li>• Medical decision making of low complexity, furnished in real time using interactive audio and video technology. Counseling and coordination of care with other physicians, other qualified health care professionals or agencies are provided consistent with the nature of the problem(s) and the needs of the patient or the family or both. Usually, the presenting problem(s) are of low to moderate severity. Typically, 15 minutes are spent with the patient or family or both via real time, audio and video intercommunications technology.</li> </ul> Remote in-home visit for the evaluation and management of an established patient for use only in the Medicare-approved Comprehensive Care for Joint Replacement model, which requires at least 2 of the following 3 key components: <ul style="list-style-type: none"> <li>• An expanded problem focused history.</li> <li>• An expanded problem focused examination.</li> </ul>	Remote E/M est. pt 15 mins .....	99213

TABLE 5—HCPCS CODES FOR TELEHEALTH VISITS FOR CJR MODEL BENEFICIARIES IN HOME OR PLACE OF RESIDENCE—Continued

HCPCS Code No.	Long descriptor	Short descriptor	Work and MP RVUs equal to those of the corresponding office/outpatient E/M visit CPT code for same calendar year under the PFS; PE RVUs equal to the facility values for each
G9488 .....	Remote in-home visit for the evaluation and management of an established patient for use only in the Medicare-approved Comprehensive Care for Joint Replacement model, which requires at least 2 of the following 3 key components: <ul style="list-style-type: none"> <li>• A detailed history.</li> <li>• A detailed examination.</li> <li>• Medical decision making of moderate complexity, furnished in real time using interactive audio and video technology. Counseling and coordination of care with other physicians, other qualified health care professionals or agencies are provided consistent with the nature of the problem(s) and the needs of the patient or the family or both. Usually, the presenting problem(s) are of moderate to high severity. Typically, 25 minutes are spent with the patient or family or both via real time, audio and video intercommunications technology.</li> </ul>	Remote E/M est. pt 25 mins .....	99214
G9489 .....	Remote in-home visit for the evaluation and management of an established patient for use only in the Medicare-approved Comprehensive Care for Joint Replacement model, which requires at least 2 of the following 3 key components: <ul style="list-style-type: none"> <li>• A comprehensive history.</li> <li>• A comprehensive examination.</li> <li>• Medical decision making of high complexity, furnished in real time using interactive audio and video technology. Counseling and coordination of care with other physicians, other qualified health care professionals or agencies are provided consistent with the nature of the problem(s) and the needs of the patient or the family or both. Usually, the presenting problem(s) are of moderate to high severity. Typically, 40 minutes are spent with the patient or family or both via real time, audio and video intercommunications technology.</li> </ul>	Remote E/M est. pt 40 mins .....	99215

F. Clinician Engagement Lists

1. Background for Submission of Clinician Engagement Lists

Under the Quality Payment Program, the Advanced APM track of the CJR model does not include eligible clinicians on a Participation List; rather the CJR Advanced APM track currently includes eligible clinicians on an Affiliated Practitioner List as defined under § 414.1305 and described under § 414.1425(a)(2) of the agency’s Quality Payment Program regulations. As such, the Affiliated Practitioner List for the CJR model is the “CMS-maintained list” of eligible clinicians that have “a contractual relationship with the Advanced APM Entity [for CJR, the participant hospital] for the purposes of supporting the Advanced APM Entity’s quality or cost goals under the Advanced APM.” As specified in our regulations at § 414.1425(a)(2), CMS will

use this list to identify the eligible clinicians who will be assessed as Qualifying APM Participants (QPs) for the year. CMS will make QP determinations individually for these eligible clinicians as specified in §§ 414.1425(b)(2), (c)(4), and 414.1435.

In the EPM final rule, we stated that a list of physicians, nonphysician practitioners, or therapists in a sharing arrangement, distribution arrangement, or downstream distribution arrangement, as applicable, would be considered an Affiliated Practitioner List of eligible clinicians who are affiliated with and support the Advanced APM Entity in its participation in the Advanced APM for purposes of the Quality Payment Program. An in-depth discussion of how the clinician financial arrangement list is considered an Affiliated Practitioner List can be found in section V.O. of the EPM final rule (82 FR 558 through 563).

The clinician financial arrangements list (§ 510.120(b)) will be used by CMS to identify eligible clinicians for whom we would make a QP determination based on services furnished through the Advanced APM track of the CJR model.

Stakeholders have expressed a desire for model changes that would also include in the clinician financial arrangement list physicians, non-physician practitioners, and therapists without a financial arrangement under the CJR model, but who are affiliated with and support the Advanced APM Entity in its participation in the Advanced APM for purposes of the Quality Payment Program.

We agree with stakeholders that these physicians, non-physician practitioners, and therapists should have their contributions to the Advanced APM Entity’s participation in the Advanced APM recognized under the Quality Payment Program; however, since these

individuals do not have financial arrangements with the participant hospital, to also include them on the clinician financial arrangement list would be misleading, and could create confusion when CJR model participant hospitals submit lists to CMS.

## 2. Proposed Clinician Engagement List Requirements

To increase opportunities for eligible clinicians supporting CJR model participant hospitals by performing CJR model activities and who are affiliated with participant hospitals to be considered QPs, we are proposing that each physician, nonphysician practitioner, or therapist who is not a CJR collaborator during the period of the CJR model performance year specified by CMS, but who does have a contractual relationship with the participant hospital based at least in part on supporting the participant hospital's quality or cost goals under the CJR model during the period of the performance year specified by CMS, would be added to a clinician engagement list.

In addition to the clinician financial arrangement list that is considered an Affiliated Practitioner List for purposes of the Quality Payment Program, we propose the clinician engagement list would also be considered an Affiliated Practitioner List. The clinician engagement list and the clinician financial arrangement list would be considered together an Affiliated Practitioner List and would be used by CMS to identify eligible clinicians for whom we would make a QP determination based on services furnished through the Advanced APM track of the CJR model. As specified in § 414.1425, as of our regulations, adopted in the Calendar Year (CY) 2017 Quality Payment Program final rule (81 FR 77551) (hereinafter referred to as the 2017 QPP final rule), those physicians, nonphysician practitioners, or therapists who are included on the CJR model Affiliated Practitioner List as of March 31, June 30, or August 31 of a QP performance period would be assessed to determine their QP status for the year. As discussed in the 2017 QPP final rule (81 FR 77439 and 77440), for clinicians on an Affiliated Practitioner List, we determine whether clinicians meet the payment amount or patient count thresholds to be considered QPs (or Partial QPs) for a year by evaluating whether individual clinicians on an Affiliated Practitioner List have sufficient payments or patients flowing through the Advanced APM; we do not make any determination at the APM Entity level for Advanced APMs in

which eligible clinicians are not identified on a Participation List, but are identified on an Affiliated Practitioner List. CMS makes the QP determination based on Part B claims data, so clinicians need not track or report payment amount or patient count information to CMS.

This proposal would broaden the scope of eligible clinicians that are considered Affiliated Practitioners under the CJR model to include those without a financial arrangement under the CJR model but who are either directly employed by or contractually engaged with a participant hospital to perform clinical work for the participant hospital when that clinical work, at least in part, supports the cost and quality goals of the CJR model. We propose that the cost and quality goals of the additional affiliated practitioners who are identified on a clinician engagement list because they are contracted with a participant hospital must include activities related to CJR model activities, that is, activities related to promoting accountability for the quality, cost, and overall care for beneficiaries during LEJR episodes included in the CJR model, including managing and coordinating care; encouraging investment in infrastructure, enabling technologies, and redesigned care processes for high quality and efficient service delivery; the provision of items and services during a CJR episode in a manner that reduces costs and improves quality; or carrying out any other obligation or duty under the CJR model.

Like the requirements of the clinician financial arrangement lists specified at § 510.120(b), for CMS to make QP determinations for eligible clinicians based on services furnished through the CJR Advanced APM track, we would require that accurate information about each physician, nonphysician practitioner, or therapist who is not a CJR collaborator during the period of the CJR model performance year specified by CMS, but who is included on a clinician engagement list, be provided to CMS in a form and manner specified by CMS on a no more than quarterly basis. Thus, we propose that each participant hospital in the Advanced APM track of the CJR model submit to CMS a clinician engagement list in a form and manner specified by CMS on a no more than quarterly basis. We propose this list must include the following information on eligible clinicians for the period of the CJR model performance year specified by CMS:

- For each physician, nonphysician practitioner, or therapist who is not a

CJR collaborator during the period of the CJR model performance year specified by CMS but who does have a contractual relationship with a participant hospital based at least in part on supporting the participant hospital's quality or cost goals under the CJR model during the period of the CJR model performance year specified by CMS:

++ The name, TIN, and NPI of the individual.

++ The start date and, if applicable, the end date for the contractual relationship between the individual and participant hospital.

Further, we propose that if there are no individuals that meet the requirements to be reported, as specified in any of § 510.120 (b)(1) through (3) of the EPM final rule or § 510.120(c) as proposed here, the participant hospital must attest in a form and manner required by CMS that there are no individuals to report.

Given that this proposal would require submission of a clinician engagement list, or an attestation that there are no eligible clinicians to be included on such a list, to reduce burden on participant hospitals, we would collect information for the clinician engagement list and clinician financial arrangement list at the same time.

We seek comments on the proposal for submission of this information. We are especially interested in comments about approaches to information submission, including the periodicity and method of submission to CMS that would minimize the reporting burden on participant hospitals while providing CMS with sufficient information about eligible clinicians to facilitate QP determinations.

For each participant hospital in the CJR Advanced APM track, we propose that the participant hospital must maintain copies of its clinician engagement lists and supporting documentation (that is, copies of employment letters or contracts) of its clinical engagement lists submitted to CMS. Because we would use these lists to develop Affiliated Practitioner Lists used for purposes of making QP determinations, these documents would be necessary to assess the completeness and accuracy of materials submitted by a participant hospital and to facilitate monitoring and audits. For the same reason, we further propose that the participant hospital must retain and provide access to the required documentation in accordance with § 510.110.

*G. Clarification of Use of Amended Composite Quality Score Methodology During CJR Model Performance Year 1 Subsequent Reconciliation*

We conducted the initial reconciliation for performance year 1 of the CJR model in early 2017, and expect to make reconciliation payments to CJR participant hospitals by the end of September 2017 to accommodate the performance year 1 appeals process timelines. We will conduct the subsequent reconciliation calculation for performance year 1 of the CJR model beginning in the first quarter of 2018, which may result in additional amounts to be paid to participant hospitals or a reduction to the amount that was paid for performance year 1. However, the results of the performance year 1 subsequent reconciliation calculations will be combined with the performance year 2 initial reconciliation results before reconciliation payment or repayment amounts are processed for payment or collection. Changes to the CJR model established in the EPM final rule impact this process.

The improvements to the CJR model quality measures and composite quality score methodology, which were finalized in the EPM final rule (82 FR 524 through 526), were intended to be effective before the CJR model's performance year 1 initial reconciliation. However, as noted in section II. of this proposed rule, the effective date for certain EPM final rule provisions, including those amending §§ 510.305 and 510.315 to improve the quality measures and composite quality score methodology, were delayed until May 20, 2017. As a result, the CJR reconciliation reports issued in April 2017 were created in accordance with the provisions of §§ 510.305 and 510.315 in effect as of April 2017; that is, the provisions finalized in the CJR model final rule. In early 2018, we would perform the performance year 1 subsequent reconciliation calculation in accordance with the provisions §§ 510.305 and 510.315 in effect as of early 2018, that is, established in the EPM final rule. Applying the provisions established in the EPM final rule to the performance year 1 subsequent reconciliation calculation may result in significant differences between the reconciliation payments calculated during the performance year 1 initial reconciliation and the performance year 1 subsequent reconciliation. We anticipate that these differences will be greater than those that would be expected as a result of using more complete claims and programmatic data that will be available for the subsequent

reconciliation (due to the additional 12 months of time that will occur between the initial and subsequent reconciliation calculations), more accurate identification of model overlap and exclusion of episodes, as well as factoring in adjustments to account for shared savings payments, and post-episode spending, as specified in § 510.305(i). Specifically, the methodology used to determine the quality-adjusted target price for the performance year 1 subsequent reconciliation calculation will differ from the methodology used to determine the quality-adjusted target price for the performance year 1 initial reconciliation calculation as follows: The quality-adjusted target price would be recalculated to apply the amended reductions to the effective discount factors (§ 510.315(f)), which would be determined after recalculating the composite quality scores, including applying more generous criteria for earning quality improvement points (that is, a 2 decile improvement rather than 3 decile improvement as specified in amended § 510.315(d)). Using the recalculated quality-adjusted target price, the net payment reconciliation amount (NPRO) would be recalculated and will include application of post-episode spending reductions (§ 510.305(j)), as necessary, after determining the limitations on loss or gain. Thus, calculating performance year 1 reconciliation payments using these two different provisions may result in a range of upward or downward adjustments to participant hospitals' performance year 1 payment amounts. We note that a downward adjustment to the performance year 1 payment amounts would require payment recoupment, if offset against a performance year 2 initial reconciliation payment amount is not feasible, which may be burdensome for participant hospitals.

In developing this proposed rule, we also considered whether there might be benefit in further delaying the amendments to §§ 510.305 and 510.315 such that the same calculations would be used for both the performance year 1 initial reconciliation and the subsequent performance year 1 reconciliation, and the use of the amended calculations would begin with the performance year 2 initial reconciliation. We believe such an approach would impact future CJR model implementation and evaluation activities. Because determining the performance year 2 composite quality score considers the hospital's quality score improvement from its

performance year 1 score, using different methodologies across performance years would require a mechanism to account for differences in the quality score methodology, for example we would have to develop a reliable crosswalk approach. If we were to develop and use a crosswalk approach, participants and other stakeholders would need to be informed about the crosswalk methodology in order to validate data analyses across performance years and that usage of the crosswalk would be ongoing throughout the model's duration for consistency across performance years. This methodology could add substantial complexity to this time-limited model. We also considered that the composite quality score for some participant hospitals may be higher under the revised scoring methodology. Delaying use of the revised scoring methodology may disadvantage these participants if their composite quality score would be higher and result in a more favorable discount percentage or allow the hospital to qualify for a reconciliation payment. Therefore, we believe the best approach is to apply the quality specifications as established in the EPM final rule (that is, the amendments to §§ 510.305 and 510.315 that became effective May 20, 2017) to performance year 1 subsequent reconciliation calculations to ensure that reconciliation calculations for subsequent performance years will be calculated using the same methodology and to improve consistency across performance years for quality improvement measurement. Thus, for the reasons noted previously, we are not proposing to change the amendments to §§ 510.305 and 510.315 that became effective May 20, 2017. We seek comment on whether using an alternative approach, such as the quality composite score methodology from the CJR model final rule for the performance year 1 subsequent reconciliation, would ensure better consistency for analyses across CJR performance years.

*H. Clarifying and Technical Changes Regarding the Use of the CMS Price (Payment) Standardization Detailed Methodology*

Based on questions we received from participant hospitals during the performance year 1 reconciliation process, we are proposing to make two technical changes to the CJR model regulations to clarify the use of the CMS Price (Payment) Standardization Detailed Methodology, posted on the QualityNet Web site at <http://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=Qnet>

*Public%2FPage%2FQnetTier4&cid=1228772057350*, in the calculation of target prices and actual episode spending. This pricing standardization approach is the same as that used for the Hospital Value-Based Purchasing Program's (HVBP) Medicare spending per beneficiary metric. In section III.C.3.a. of the CJR model final rule (80 FR 73331 through 73333), we finalized how we would operationalize the exclusion of the various special payment provisions in calculating CJR model episode expenditures, both historical episode spending and performance year episode spending, by relying upon the CMS Price (Payment) Standardization Detailed Methodology with modifications. However, we did not clearly articulate this finalized policy in the regulations at 42 CFR part 510. Thus, we are proposing the following technical changes to bring the regulatory text into conformity with our intended policy and to reduce potential stakeholder uncertainty about how the price (payment) standardization methodology is used. We are proposing to insert "standardized" into the definition of actual episode payment in § 510.2, and insert "with certain modifications" into § 510.300(b)(6) to account for the modifications we must make to the standardization methodology to ensure all pricing calculations are consistent with our finalized policies.

#### **IV. Collection of Information Requirements**

As stated in section 1115A(d)(3) of the Act, Chapter 35 of title 44, United States Code, shall not apply to the testing and evaluation of models under section 1115A of the Act. As a result, the information collection requirements contained in this proposed rule need not be reviewed by the Office of Management and Budget. However, we have summarized the anticipated cost burden associated with the information collection requirements in the Regulatory Impact Analysis section of this proposed rule.

#### **V. Regulatory Impact Analysis**

##### *A. Introduction*

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995

(March 22, 1995; Pub. L. 104-4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any 1 year). This proposed rule proposes to cancel the EPMS and the CR incentive payment model in advance of their start date and proposes several revisions to the design of the CJR model; these proposals impact a subset of hospitals under the IPPS. Therefore, it would have a relatively small economic impact; as a result, this proposed rule does not reach the \$100 million threshold and thus is neither an "economically significant" rule under E.O. 12866, nor a "major rule" under the Congressional Review Act.

##### *B. Statement of Need*

As discussed previously, review and reevaluation of policies and programs, as well as revised rulemaking, are within an agency's discretion, especially after a change in administration occurs. After review and reevaluation of the CJR model final rule, the EPM final rule and the public comments we received in response to the March 21, 2017 IFC, in addition to other considerations, we have determined that it is necessary to propose to rescind the regulations at 42 CFR part 512 and to reduce the geographic scope of the CJR model for the following reasons. First, we believe that requiring hospitals to participate in additional episode models at this time is not in the best interest of the agency or affected providers. We are concerned that engaging in large mandatory episode payment model efforts at this time may impede our ability to pursue and engage providers, such as hospitals, in future voluntary efforts. Similarly, we also believe that reducing the number of providers required to participate in the CJR model would allow us to continue to evaluate the effects of such a model while limiting the geographic reach of our current mandatory models. Finally, we believe that canceling the EPMS and CR incentive payment model, as well as altering the scope of the CJR model,

offers CMS maximum flexibility to design alternative episode-based models and make potential improvements to these models as suggested by stakeholders, while still allowing us to test and evaluate the impact of the CJR model on the quality of care and expenditures.

This proposed rule is also necessary to propose improvements to the CJR model for performance years 3, 4, and 5. We are proposing a few technical refinements and clarifications for certain payment, reconciliation and quality provisions, and a change to the criteria for the Affiliated Practitioner List to broaden the CJR Advanced APM track to additional eligible clinicians. We believe these proposed refinements would address operational issues identified since the start of the CJR model.

##### *C. Anticipated Effects*

In section III. of the preamble to this proposed rule, we discuss our proposals to amend the regulations governing the CJR model. We present the following estimated overall impact of these proposed changes to the CJR model. Table 6 summarizes the newly calculated estimated impact for the CJR model for the last 3 years of the model.

The modeling methodology for provider performance and participation is consistent with the methodology used in modeling the CJR impacts in the EPM final rule (82 FR 596). However, we updated our analysis to include an opt-in option for hospitals in 33 of the 67 MSAs selected for participation in the CJR model (all but 4 of these MSAs are from the lower cost groups), while maintaining mandatory participation for the remaining 34 MSAs (all of which are from the higher cost groups), and allowing for the exclusion of low-volume and rural hospitals in these 34 MSAs from mandatory participation and allowing them to choose voluntary participation (opt-in). We would expect the number of mandatory participating hospitals from year 3 forward to decrease from approximately 700, which is approximately the number of current CJR participants, to approximately 393. We assumed that if a hospital would exceed its target pricing such that it would incur an obligation of repayment to CMS of 3 percent or more in a given year, that hospital would not elect voluntary participation in the model for the final three performance years. We assumed no low-volume providers would participate, noting that including them in impacts would not have any noticeable effects due to their low claims volume. For purposes of

identifying CJR rural hospitals for this impact, we used the 2017 IPPS § 412.103 rural reclassification list. We found only one provider in the 34 mandatory MSAs with an active rural reclassification and this provider was also on the low-volume hospital list and was not included in the impacts. The likelihood of voluntary participation linearly increases based on an upper bound of 3 percent bonus, but the modeling assumes that 25 percent of hospitals in the voluntary MSAs would not consider participation so that the likelihood of participation for each hospital is capped at 75 percent; we expect 60 to 80 hospitals to elect voluntary participation in the model.

We seek comment on our assumptions about the number of hospitals that would elect voluntary participation in the CJR model. Due to a lack of available data, we did not account for participant investment in the impact analysis model we used for this proposed rule.

However, we would expect that those who choose to voluntarily participate would have made investments in the CJR model that enable them to perform well and that they would anticipate earning positive reconciliation payments. For those hospitals choosing not to voluntarily participate, we would expect that the cost of any investments they may have made based on their

participation in performance years 1 and 2 of the CJR model would be outweighed by the reconciliation payment obligations they would expect to incur if they continued to participate. The 60 to 80 participants we expect to continue participating in the model through the voluntary election process are not included in our previous estimate of 393 CJR participants in the mandatory MSAs. Thus, in total we expect approximately 450 to 470 participants in the CJR model for the final three performance years. The participation parameters were chosen to reflect both the anticipated risk aversion of providers, and an expectation that many participants do not remain in an optional model or demonstration when there is an expectation that the hospital would incur an obligation of repayment to CMS. These assumptions reflect the experience with other models and demonstrations. The value of 3 percent may be somewhat larger than the level of repayment at which providers would opt-in, but the value was chosen to allow for the uncertainty of expected claims. We note that the possibility of shifting episodes from CJR model participant hospitals to low-volume or other non-participating hospitals exists and that we did not include any assumptions of this potential behavior in our financial impact modeling. We

seek comment on our model assumptions that shifting of episodes will not occur. The new calculations estimate that the CJR model would result in a net Medicare program savings of approximately \$204 million over the 3 remaining performance years (2018 through 2020). This represents a reduction in savings of approximately \$90 million from the estimated net financial impacts of the CJR model in the EPM final rule (82 FR 603).

Our previous analyses of the CJR model did not explicitly model for utilization changes, such as improvements in the efficiency of service during episodes. However, these behavioral changes would have minimal effect on the Medicare financial impacts. If the actual costs for an episode are below the discounted bundled payment amount, then CMS distributes the difference between these two amounts to the participant hospital, up to a capped amount. Similarly, if actual costs for an episode are above the discounted bundled payment amount, then the participant hospital pays CMS the difference between these amounts, up to a capped amount. Due to the uncertainty of estimating the impacts of this model, actual results could be higher or lower than this estimate.

TABLE 6—COMPARISON OF INITIAL ESTIMATE OF THE IMPACT ON THE MEDICARE PROGRAM OF THE CJR MODEL WITH REVISED ESTIMATES

[Figures are in \$ millions, negative values represent savings]

Year	2018	2019	2020	Total
Initial CJR Estimate .....	-61	-109	-125	-294
Revised CJR Estimate .....	-38	-77	-88	-204
Change .....	22	32	36	90

**Note:** The initial estimate includes the changes to the CJR model finalized in the EPM final rule (82 FR 603). The 2016 and 2017 initial estimate is not impacted by the proposed changes to the CJR model in this proposed rule. The total column reflects 2018 through 2020. Totals do not necessarily equal the sums of rounded components.

Our analysis presents the cost and transfer payment effects of this proposed rule to the best of our ability.

*D. Effects on Beneficiaries*

We believe that the proposal to cancel the EPMs and CR incentive payment model would not affect beneficiaries' freedom of choice to obtain healthcare services from any individual or organization qualified to participate in the Medicare program, including providers that are making care improvements within their communities. Although these models seek to incentivize care redesign and collaboration throughout the inpatient and post-acute care spectrum, the models have not yet begun. As the

current baseline assumes these models would become effective on January 1, 2018, and that these models would incentivize care improvements that would likely result in an increase in quality of care for beneficiaries, it is possible that the proposal to cancel these models could cause hospitals that potentially made improvements in care in anticipation of the start of these models to delay or cease these investments, which could result in a reversal of any recent quality improvements. However, we believe the concerns raised by stakeholders and the lack of time to consider design improvements for these models prior to the January 1, 2018 start date outweigh potential reversal of any recent

improvements in care potentially made by some hospitals and warrant cancellation of these models at this time while we engage with stakeholders to identify future tests for bundled payments and incentivizing high value care.

We believe that the proposed changes to the CJR model discussed in this proposed rule, specifically focusing the model on higher cost MSAs in which participation would continue to be mandatory and allowing low-volume and rural hospitals and all participant hospitals in lower cost MSAs to choose voluntary participation, would maintain the potential benefits of the CJR model for beneficiaries in many areas while providing a substantial number of

hospitals with increased flexibility to better focus on priority needs of the beneficiaries they serve. Specifically, low-volume and rural hospitals as well as other hospitals in the 33 voluntary participation MSAs (which are relatively more efficient areas) could elect to participate in the CJR model if they believe that doing so best meets their organization's strategic priorities for serving the beneficiaries in their community. Alternatively, if these hospitals do not believe continued participation in the CJR model would benefit their organizational goals and local patient care priorities, they can elect not to opt-in for the remainder of the model. We believe that beneficiaries in the service areas of the hospitals that would be allowed to choose to participate in the CJR model under our proposal may have an ongoing benefit from the care redesign investments these hospitals have already made during the first 2 years of the CJR model. Overall, we believe the refinements to the CJR model proposed in this proposed rule do not materially alter the potential effects of the model on beneficiaries. However, we acknowledge the possibility that the improved quality of care that was likely to have occurred during performance years 1 and 2 of the CJR model may be curtailed for beneficiaries that receive care at hospitals that do not elect to continue participation in the CJR model.

#### *E. Effects on Small Rural Hospitals*

The changes to the CJR model proposed in this proposed rule do not substantially alter our previous impacts of the impact on small, geographically rural hospitals specified in either the EPM final rule (82 FR 606) and the CJR model final rule (80 FR 73538) because we continue to believe that few geographically rural hospitals will be included in the CJR model. In addition, the proposal to allow all rural hospitals (as defined in § 510.2) that are not otherwise excluded the opportunity to elect to opt-in to the CJR model instead of having a mandatory participation requirement may further reduce the likelihood that rural hospitals would be included in the model. We solicit public comment on our estimates and analysis of the impact of our proposals on small rural hospitals.

#### *F. Effects on Small Entities*

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small

governmental jurisdictions. We estimate that most hospitals and most other providers and suppliers are small entities, either by virtue of their nonprofit status or by qualifying as small businesses under the Small Business Administration's size standards (revenues of less than \$7.5 to \$38.5 million in any 1 year; NAIC Sector—62 series). States and individuals are not included in the definition of a small entity. For details, see the Small Business Administration's Web site at <http://www.sba.gov/content/small-business-size-standards>.

For purposes of the RFA, we generally consider all hospitals and other providers and suppliers to be small entities. We believe that the provisions of this proposed rule relating to acute care hospitals would have some effects on a substantial number of other providers involved in these episodes of care including surgeons and other physicians, skilled nursing facilities, physical therapists, and other providers. Although we acknowledge that many of the affected entities are small entities, and the analysis discussed throughout this proposed rule discusses aspects of episode payment models that may or would affect them, we have no reason to assume that these effects would reach the threshold level of 3 percent of revenues used by HHS to identify what are likely to be "significant" impacts. We assume that all or almost all of these entities would continue to serve these patients, and to receive payments commensurate with their cost of care. Hospitals currently experience frequent changes to payment (for example, as both hospital affiliations and preferred provider networks change) that may impact revenue, and we have no reason to assume that this would change significantly under the changes proposed in this rule.

Accordingly, we have determined that this proposed rule will not have a significant impact on a substantial number of small entities. We solicit public comments on our estimates and analysis of the impact of our proposals on those small entities.

#### *G. Effects of Information Collection*

The changes proposed in this proposed rule would have a minimal additional burden of information collection for CJR model participant hospitals. The two areas which this proposed rule may increase participant burden include providing clinician engagement lists and submitting opt-in documentation (for eligible hospitals who choose to opt-in to the CJR model).

Clinician engagement list submission for the CJR model would require that

participants submit on a no more than quarterly basis a list of physicians, nonphysician practitioners, or therapists who are not a CJR model collaborator during the period of the CJR model performance year specified by CMS but who do have a contractual relationship with a CJR model participant hospital based at least in part on supporting the participant hospital's quality or cost goals under the CJR model during the period of the performance year specified by CMS.

For hospitals eligible to opt-in to the CJR model that elect to participate in the model, CMS intends to provide a template that can be completed and submitted prior to the proposed January 31, 2018 submission deadline. As stated previously, we estimate that the number of hospitals that will elect voluntary participation in CJR is 60 to 80. As stated previously, this template would be designed to minimize burden on participants, particularly since all necessary information required to effectively opt-in will be included within the template. Using wage information from the Bureau of Labor Statistics for medical and health service managers (Code 11–9111), we assumed a rate of \$105.16 per hour, including overhead and fringe benefits ([https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm)) and estimated that the time to complete the opt-in template would be, on average, approximately 30 minutes per hospital. Thus, total costs associated with completing opt-in templates for all 60 to 80 hospitals projected to elect voluntary participation is expected to range between \$3,150 (60 hospitals) and \$4,200 (80 hospitals).

We seek comment on our assumptions and information on any costs associated with this work.

#### *H. Regulatory Review Costs*

If regulations impose administrative costs on private entities, such as the time needed to read and interpret this proposed rule, we should estimate the cost associated with regulatory review. Due to the uncertainty involved with accurately quantifying the number of entities that will review the rule, we assume that the total number of unique commenters on the EPM proposed rule will be the number of reviewers of this proposed rule. We acknowledge that this assumption may understate or overstate the costs of reviewing this rule. It is possible that not all commenters reviewed the precedent rule in detail, and it is also possible that some reviewers chose not to comment on the proposed rule. For these reasons we thought that the number of past commenters on the EPM proposed rule

would be a fair estimate of the number of reviewers of this rule. We welcome any comments on the approach in estimating the number of entities that would review this proposed rule.

We also recognize that different types of entities are in many cases affected by mutually exclusive sections of this proposed rule, however for the purposes of our estimate we assume that each reviewer reads approximately 100 percent of the rule. We seek comments on this assumption.

Using the wage information from the BLS for medical and health service managers (Code 11–9111), we estimate that the cost of reviewing this rule is \$105.16 per hour, including overhead and fringe benefits [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm). Assuming an average reading speed, we estimate that it would take approximately 1.6 hours for the staff to review this proposed rule. For each entity that reviews the rule, the estimated cost is \$168.26 (1.6 hours × \$105.16). Therefore, we estimate that the total cost of reviewing this regulation is \$29,445 (\$105.16 × 175 reviewers).

#### I. Unfunded Mandates

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2017, that is approximately \$148 million. This proposed rule does not include any mandate that would result in spending by state, local or tribal governments, in the aggregate, or by the private sector in the amount of \$148 million in any 1 year.

#### J. Federalism

We do not believe that there is anything in this proposed rule that either explicitly or implicitly preempts any state law, and furthermore we do not believe that this proposed rule would have a substantial direct effect on state or local governments, preempt state law, or otherwise have a federalism implication.

#### K. Reducing Regulation and Controlling Regulatory Costs

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs (82 FR 9339), was issued on January 30, 2017. This

proposed rule, if finalized as proposed, is not expected to be subject to the requirements of E.O. 13771 because it is estimated to result in no more than *de minimis* costs.

#### L. Alternatives Considered

Throughout this proposed rule, we have identified our proposed policies and alternatives that we have considered, and provided information as to the effects of these alternatives and the rationale for each of the proposed policies. We considered but did not propose to allow voluntary participation in all of the 67 selected MSAs in the CJR model because the overall estimated CJR model impact would no longer show savings, and would likely result in costs. An entirely voluntary CJR model would likely result in costs due to the assumption that, in aggregate, hospitals that expect to receive a positive reconciliation payment from Medicare would elect to opt-in to the model while hospitals that expect to owe Medicare a reconciliation amount would not likely elect to participate in the model. We also considered but did not propose limiting participation to the proposed 34 mandatory participation MSAs and not allowing voluntary participation in any of the 67 selected MSAs. If participation was limited to the proposed 34 mandatory participation MSAs and voluntary participation was not allowed in any MSA, the impact to the overall estimated model savings over the last three years of the model would be closer to \$30 million than the \$90 million estimate presented in section V. of this proposed rule, because our modeling does not include assumptions about behavioral changes that might lower fee-for-service spending. Since our impact model estimates that 60 to 80 hospitals would choose voluntary participation and that these potential voluntary participants would be expected to earn only positive reconciliation payments under the model, these positive payments to the voluntary participants would offset some of the savings garnered from mandatory participants. However, we are proposing to allow voluntary participation in the proposed 33 voluntary participation MSAs and for low-volume and rural hospitals to permit hospitals that have made investments in care redesign and commitments to improvement to continue to participate in the model for the remaining 3 years. We believe our

proposal would benefit a greater number of beneficiaries because a greater number of hospitals would be included in the CJR model.

Instead of proposing to cancel the EPMs and CR incentive payment model, we considered altering the design of these models to allow for voluntary participation but as this would potentially involve restructuring the model design, payment methodologies, financial arrangement provisions and/or quality measures, we did not believe that such alterations would offer providers enough time to prepare for such changes, given the planned January 1, 2018 start date. In addition, if at a later date we decide to offer these models, or similar models, on a voluntary basis, we would not expect to implement them through rulemaking, but rather would establish them consistent with the manner in which we have implemented other voluntary models.

We solicit and welcome comments on our proposals, on the alternatives we have identified, and on other alternatives that we should consider, as well as on the costs, benefits, or other effects of these.

#### M. Accounting Statement and Table

As required by OMB Circular A–4 under Executive Order 12866 (available at [http://www.whitehouse.gov/omb/circulars\\_a004\\_a-4](http://www.whitehouse.gov/omb/circulars_a004_a-4)) in Table 7, we have prepared an accounting statement showing the classification of transfers associated with the provisions in this proposed rule. The accounting statement is based on estimates provided in this regulatory impact analysis. As described in Table 6, we estimate the proposed changes to the CJR model would continue to result in savings to the federal government of approximately \$204 million over the 3 remaining performance years of the model from 2018 to 2020, noting these changes do reduce the original CJR estimated savings by approximately \$90 million. In Table 7, the overall annualized change in payments (for all provisions in this proposed rule relative to the CJR model as originally finalized) based on a 7-percent and 3-percent discount rate, results in net federal monetary transfer from the federal government to participant IPPS hospitals of \$73.2 million and \$82.4 million in 2017 dollars, respectively, over the period of 2018 to 2020.



TABLE 7—ACCOUNTING STATEMENT CHANGES TO COMPREHENSIVE CARE FOR JOINT REPLACEMENT MODEL FOR PERFORMANCE YEARS 2018 TO 2020

Category	Estimates	Units		
		Year dollar	Discount rate (%)	Period covered
Costs:*				
Upfront cost of regulation (\$million) .....	0.03	2017	7	2018 upfront cost.
	0.03	2017	3	2018 upfront cost.
From Whom to Whom	Incurred by IPPS Hospitals as a result of this regulation.			
Transfers:				
Annualized/Monetized (\$million/year) .....	27.90	2017	7	2018–2020.
	29.14	2017	3	2018–2020.
From Whom To Whom	From the Federal Government to Participating IPPS Hospitals.			

\* The cost includes the regulatory familiarization and completing opt-in templates for up to 80 hospitals to join the CJR model.

**M. Conclusion**

This analysis, together with the remainder of this preamble, provides the Regulatory Impact Analysis of a rule. As a result of this proposed rule, we estimate that the financial impact of the changes to the CJR model proposed here would result in a reduction to previously estimated savings by \$90 million over the 3 remaining performance years (2018 through 2020) although we note that the CJR model would still be estimated to save the Medicare program approximately \$204 million over the remaining three performance years.

In accordance with the provisions of Executive Order 12866, this rule was reviewed by the Office of Management and Budget.

**VI. Response to Comments**

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

**List of Subjects**

*42 CFR Part 510*

Administrative Practice and Procedure, Health facilities, Health professions, Medicare, and Reporting and recordkeeping requirements.

*42 CFR Part 512*

Administrative Practice and Procedure, Health facilities, Health professions, Medicare, and Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, under the authority at section

1115A of the Social Security Act, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR Chapter IV, as follows:

**PART 510—COMPREHENSIVE CARE FOR JOINT REPLACEMENT MODEL**

■ 1. The authority citation for part 510 continues to read as follows:

**Authority:** Secs. 1102, 1115A, and 1871 of the Social Security Act (42 U.S.C. 1302, 1315(a), and 1395hh).

- 2. Section 510.2 is amended by—
- a. Revising the definition of “Actual episode payment”;
- b. Adding, in alphabetical order, definitions of “Low-volume hospital” and “mandatory MSA”.
- c. Revising the definition of “participant hospital”; and
- d. Adding the definition of “voluntary MSA”.

The revisions and additions read as follows:

**§ 510.2 Definitions.**

\* \* \* \* \*

*Actual episode payment* means the sum of standardized Medicare claims payments for the items and services that are included in the episode in accordance with § 510.200(b), excluding the items and services described in § 510.200(d).

\* \* \* \* \*

*Low-volume hospital* means a hospital identified by CMS as having fewer than 20 LEJR episodes in total across the 3 historical years of data used to calculate the performance year 1 CJR episode target prices.

\* \* \* \* \*

*Mandatory MSA* means an MSA designated by CMS as a mandatory participation MSA in accordance with § 510.105(a).

\* \* \* \* \*

*Participant hospital* means one of the following:

(1) During performance years 1 and 2 of the CJR model and the period from January 1, 2018 to January 31, 2018 of performance year 3, a hospital (other than a hospital excepted under § 510.100(b)) with a CCN primary address located in one of the geographic areas selected for participation in the CJR model in accordance with § 510.105.

(2) Beginning February 1, 2018, a hospital (other than a hospital excepted under § 510.100(b)) that is one of the following:

(i) A hospital with a CCN primary address located in a mandatory MSA as of February 1, 2018 that is not a rural hospital or a low-volume hospital on that date.

(ii) A hospital that is a rural hospital or low-volume hospital with a CCN primary address located in a mandatory MSA that makes an election to participate in the CJR model in accordance with § 510.115.

(iii) A hospital with a CCN primary address located in a voluntary MSA that makes an election to participate in the CJR model in accordance with § 510.115.

\* \* \* \* \*

*Voluntary MSA* means an MSA designated by CMS as a voluntary participation MSA in accordance with § 510.105(a).

■ 3. Section 510.105 is amended by revising paragraph (a) to read as follows:

**§ 510.105 Geographic areas.**

(a) *General.* The geographic areas for inclusion in the CJR model are obtained based on a stratified random sampling of certain MSAs in the United States.

(1) All counties within each of the selected MSAs are selected for inclusion in the CJR model.

(2) Beginning with performance year 3, the selected MSAs are designated as either mandatory participation MSAs or voluntary participation MSAs.

\* \* \* \* \*

■ 4. Section 510.115 is added to read as follows:

**§ 510.115 Voluntary participation election.**

(a) *General.* To continue participation in performance year 3 and participate in performance year 4 and performance year 5, the following hospitals must submit a written participation election letter as described in paragraph (c) of this section during the voluntary participation election period specified in paragraph (b) of this section:

(1) Hospitals (other than those excluded under § 510.100(b)) with a CCN primary address in a voluntary MSA.

(2) Low-volume hospitals with a CCN primary address in a mandatory MSA.

(3) Rural hospitals with a CCN primary address in a mandatory MSA.

(b) *Voluntary participation election period.* The voluntary participation election period begins on January 1, 2018 and ends on January 31, 2018.

(c) *Voluntary participation election letter.* The voluntary participation election letter serves as the model participation agreement. CMS accepts the voluntary participation election letter if the letter meets all of the following criteria:

(1) Includes the following:

- (i) Hospital name.
- (ii) Hospital address.
- (iii) Hospital CCN.
- (iv) Hospital contact name, telephone number, and email address.
- (v) Model name (that is, CJR model).
- (vi) Attestation of CEHRT use as specified in § 510.120(a)(1) (if the hospital is choosing to participate in the Advanced APM track).

(2) Includes a certification that the hospital will—

- (i) Comply with all applicable requirements of this part and all other laws and regulations applicable to its participation in the CJR model; and
- (ii) Submit data or information to CMS that is accurate, complete and truthful, including, but not limited to, the participation election letter and any quality data or other information that CMS uses in its reconciliation processes.

(3) Is signed by the hospital administrator, CFO or CEO.

(4) Is submitted in the form and manner specified by CMS.

■ 5. Section 510.120, as added January 3, 2017 (82 FR 180), delayed until October 1, 2017, on March 21, 2017 (82 FR 14464), further delayed until January

1, 2018, on May 19, 2017 (82 FR 22895), is amended by removing paragraph (b)(4), revising paragraph (c), and adding paragraphs (d) and (e).

The revision and additions read as follows:

**§ 510.120 CJR participant hospital CEHRT track requirements.**

\* \* \* \* \*

(c) *Clinician engagement list.* Each participant hospital that chooses CEHRT use as provided in paragraph (a)(1) of this section must submit to CMS a clinician engagement list in a form and manner specified by CMS on a no more than quarterly basis. This list must include the following information on individuals for the period of the performance year specified by CMS:

(1) For each physician, nonphysician practitioner, or therapist who is not a CJR collaborator during the period of the CJR model performance year specified by CMS but who does have a contractual relationship with the participant hospital based at least in part on supporting the participant hospital's quality or cost goals under the CJR model during the period of the performance year specified by CMS:

- (i) The name, TIN, and NPI of the individual.
- (ii) The start date and, if applicable, the end date for the contractual relationship between the individual and participant hospital.

(2) [Reserved]

(d) *Attestation to no individuals.* If there are no individuals that meet the requirements to be reported, as specified in paragraphs (b)(1) through (3) or paragraph (c) of this section, the participant hospital must attest in a form and manner required by CMS that there are no individuals to report.

(e) *Documentation requirements.* (1) Each participant hospital that chooses CEHRT use as provided in paragraph (a)(1) of this section must maintain documentation of their attestation to CEHRT use, clinician financial arrangements lists, and clinician engagement lists.

(2) The participant hospital must retain and provide access to the required documentation in accordance with § 510.110.

■ 6. Section 510.210 is amended by revising paragraph (b) to read as follows:

**§ 510.210 Determination of the episode.**

\* \* \* \* \*

(b) *Cancellation of an episode.* The episode is canceled and is not included in the determination of NPRA as specified in § 510.305 if any of the following occur:

- (1) The beneficiary does any of the following during the episode:

(i) Ceases to meet any criterion listed in § 510.205.

(ii) Is readmitted to any participant hospital for another anchor hospitalization.

(iii) Initiates an LEJR episode under BPCI.

(iv) Dies.

(2) For performance year 3, the participant hospital did not submit a participation election letter that was accepted by CMS to continue participation in the model.

■ 7. Section 510.300 is amended by revising paragraph (b)(6) to read as follows:

**§ 510.300 Determination of quality-adjusted episode target prices.**

\* \* \* \* \*

(b) \* \* \*

(6) *Exclusion of incentive programs and add-on payments under existing Medicare payment systems.* Certain incentive programs and add-on payments are excluded from historical episode payments by using, with certain modifications, the CMS Price (Payment) Standardization Detailed Methodology used for the Medicare spending per beneficiary measure in the Hospital Value-Based Purchasing Program.

\* \* \* \* \*

■ 8. Section 510.305 is amended by revising paragraph (d)(1) to read as follows:

**§ 510.305 Determination of the NPRA and reconciliation process.**

\* \* \* \* \*

(d) \* \* \*

(1) Beginning 2 months after the end of each performance year, CMS does all of the following:

(i) Performs a reconciliation calculation to establish an NPRA for each participant hospital.

(ii) For participant hospitals that experience a reorganization event in which one or more hospitals reorganize under the CCN of a participant hospital performs—

(A) Separate reconciliation calculations (during both initial and subsequent reconciliations for a performance year) for each predecessor participant hospital for episodes where anchor hospitalization admission occurred before the effective date of the reorganization event; and

(B) Reconciliation calculations (during both initial and subsequent reconciliations for a performance year) for each new or surviving participant hospital for episodes where the anchor hospitalization admission occurred on or after the effective date of the reorganization event.

\* \* \* \* \*

■ 9. Section 510.410 is amended by adding paragraph (b)(1)(i)(G) to read as follows:

**§ 510.410 Compliance enforcement.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) \* \* \*

(G) Failing to participate in CJR model-related evaluation activities conducted by CMS or its contractors or both.

\* \* \* \* \*

■ 10. Section 510.605 is amended by revising paragraph (c)(2) to read as follows:

**§ 510.65 Waiver of certain telehealth requirements.**

\* \* \* \* \*

(c) \* \* \*

(2) CMS waives the payment requirements under section 1834(m)(2)(B) of the Act to allow the distant site payment for telehealth home visit HCPCS codes unique to this model.

\* \* \* \* \*

**PART 512—[REMOVED AND RESERVED]**

■ 11. Part 512, as added January 3, 2017 (82 FR 180), delayed until October 1, 2017, on March 21, 2017 (82 FR 14464),

further delayed until January 1, 2018, on May 19, 2017 (82 FR 22895), is removed and reserved.

Dated: August 10, 2017.

**Seema Verma,**

*Administrator, Centers for Medicare & Medicaid Services.*

Dated: August 11, 2017.

**Thomas E. Price,**

*Secretary, Department of Health and Human Services.*

[FR Doc. 2017-17446 Filed 8-15-17; 4:15 pm]

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