III. Analysis

This Final Report reviews agency actions pursuant to Executive Order 13783, Promoting Energy Independence and Economic Growth, that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. As discussed in Section II, the Executive Order requires agencies to review their existing regulations, orders, guidance documents, policies, and any other similar agency actions that potentially burden the development or use of domestically produced energy resources. The analysis in this Final Report identifies agency actions that are subject to the notification requirements of Section 2(d) of the Executive Order (as interpreted by the OMB Guidance Memo).

Section II of the Executive Order requires agencies to review existing regulations, orders, guidance documents, policies, and any other similar agency actions that potentially burden the development or use of domestically produced energy resources. This Final Report reviews agency actions pursuant to Executive Order 13783, Promoting Energy Independence and Economic Growth, that are subject to the notification requirements of Section 2(d) of the Executive Order. The analysis in this Final Report identifies agency actions that are subject to the notification requirements of Section 2(d) of the Executive Order.


DATES: November 1, 2017.
often require compliance, such as the National Environmental Policy Act, the Endangered Species Act, the Coastal Zone Management Act, and the Clean Water Act.

III. Commission Review of Agency Actions Pursuant to Section 2

A. Scope of Review

Domestic Energy Sources: Section 2 of the Executive Order states that the review should place particular attention on oil, natural gas, coal, and nuclear energy resources. In addition, section 1 of the Executive Order and the Guidance Memo list renewable sources, including flowing water, as domestic energy sources. Therefore, this final report considers agency actions that potentially affect not only oil, natural gas, coal, and nuclear energy resources, but also hydropower and other renewable generation resources.

Potentially Material Burdens: Section 2(b) of the Executive Order states that “burden” means “to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.” Based on the Executive Order’s definition of “burden,” as informed by the Guidance Memo which highlights agency actions that “materially” affect domestic energy production, this final report considers an agency action “material” if it could: (1) directly affect the development or use of domestic energy resources; or (2) have a primary indirect effect on the development or use of domestic energy resources. Given the Commission’s limited jurisdiction, none of the Commission’s agency actions would materially affect the design and/or location of drilling or mining of energy production resources.

Agency Actions: This final report considers the following types of binding Commission agency actions in existence as of March 28, 2017 (i.e., the date of issuance of Executive Order 13783): codified regulations published by the Commission (i.e., 18 CFR); final rules; public policy statements and guidance documents; and case-specific orders and opinions that establish policies that are broadly applied and not otherwise codified by the Commission.5

B. Methodology

This final report identifies and classifies the potentially relevant agency actions based on: (1) the type of action undertaken; (2) the energy source potentially affected by that action; and (3) whether the potential effects of the action are direct or indirect. This final report focuses on agency actions in four jurisdictional areas: (1) hydropower licensing; (2) LNG facility, and natural gas pipeline and storage facility siting; (3) centralized electric capacity market policies in PJM Interconnection, L.L.C. (PJM), ISO New England, Inc. (ISO–NE), and New York Independent System Operator, Inc. (NYISO); and (4) electric generator interconnection policies.

Commission actions in these four jurisdictional areas have the greatest potential to materially burden domestic energy resources as contemplated under the Executive Order. In particular, the Commission’s hydropower licensing program has the potential to directly affect the design, location, and development of hydropower resources. In addition, the Commission’s jurisdiction over the siting of LNG terminals and natural gas pipelines may affect the delivery to market of natural gas, and have a primary indirect effect on the use of that domestically produced energy resource.

Agency actions related to electric capacity market policies and generator interconnection policies may have a primary indirect effect on the development, retention, or retirement of domestic energy resources. As the Commission has recently recognized in its ongoing efforts concerning the interplay of wholesale electric markets and state policy, the centralized electric capacity markets in PJM, ISO–NE, and NYISO are intended to ensure long-term resource adequacy by sending accurate price signals for investment in electric capacity resources, when and where needed. By signaling the value of capacity, including the potential need for new generation resources, these markets serve a function in those regions that would otherwise typically be performed through integrated resource planning, often before a state public service commission. As a result, Commission actions related to electric capacity market policies could have a primary indirect effect on the development and use of generation resources.

Finally, agency actions involving generator interconnection policies could have a primary indirect effect on the development of domestic energy resources. For example, a wind or solar generator at utility scale typically must interconnect to the transmission grid in order to deliver the electricity produced by those domestic energy resources to the wholesale purchaser. If Commission policies or actions lead to a delay in interconnection or otherwise affect the generator’s ability to interconnect, then the project developer may not develop that energy resource, which would impact the development or use of domestic energy resources.

This final report does not review agency actions involving oil and natural gas pipeline rates; electric energy and ancillary service rates and market policies; electric transmission rates, including return on equity issues; demand response resources; mergers; enforcement; reliability; backstop transmission siting authority; and the Public Utilities Regulatory Policies Act. Commission action in these areas may indirectly impact the design, location, development, or use of domestic energy resources, but would not have a primary indirect effect, as discussed above.

Pursuant to the Guidance Memo’s recommendation, this effort with respect to Executive Order 13783, to the extent appropriate, was coordinated with the Commission’s Regulatory Reform Task Force created pursuant to Executive Order 13777.7 This final report discusses those agency actions that rose to the level of a potential material burden as contemplated by the Executive Order and clarified by the Guidance Memo. For hydropower licensing and the LNG

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5 The Guidance Memo indicates that agencies should review actions that both directly and indirectly affect domestic energy sources. This final report uses the term “primary indirect effect” to define the scope of indirect effects that will be considered for review. A primary indirect effect is an effect that is only one step removed from a direct effect. In other words, a primary indirect effect occurs when an agency action affects a factor that, in turn, affects a domestic energy source.

6 Commission actions on energy and ancillary service market rules are less directly related to the development and use of domestic energy resources than Commission actions on centralized capacity market rules. While energy and ancillary service markets have an effect on the economic viability and day-to-day use of generation resources, the market rules established by the Commission are intended to ensure recovery of variable costs (e.g., fuel costs) for marginal units, rather than to be the primary source of fixed cost recovery for new generation resources. That is, in regions that do not have capacity markets, there is an additional mechanism to address fixed cost recovery typically administered by the relevant state regulatory commission, in the case of investor-owned public utilities, or the management of public power utilities.

7 As with Executive Order 13783, independent regulatory agencies like the Commission are not subject to Executive Order 13777, but are encouraged to comply.
Additionally, the Commission must includes processing the filing of plans, operating, and maintaining hydropower projects. The Commission also requires licensees to prepare emergency action plans and conducts training sessions on how to develop and test these plans.

The vast majority of agency actions relating to the Commission’s hydropower program do not present a material burden to hydropower resources. Specifically, most agency actions: (1) are necessary to administer the Commission’s hydropower program and process hydropower license applications in an orderly manner; and/or (2) do not negatively affect the development of hydropower resources. As outlined below, however, this final report identifies three areas where potential material burdens may exist: licensing processes; exemption processes; and determinations on deficient applications.

### i. Licensing Processes

#### a. Licensing Processes

##### 1. ILP Default Regulation

The Commission’s regulations include three hydropower licensing processes for applicants: the Integrated Licensing Process (ILP), the Traditional Licensing Process (TLP), and the Alternative Licensing Process (ALP). The Commission’s regulations assign the ILP as the default process for all license requests, and an applicant must specifically request and justify the use of either the TLP or ALP. Assigning the ILP as the default process could be materially burdensome due to: (1) the time and costs associated with obtaining the Commission’s approval to use the TLP or ALP; and (2) in the event the Commission denies the request to use the TLP/ALP, there may be additional time and costs associated with the ILP, due to the structured nature of the process. The level of burden caused by the ILP default regulation is largely project-specific, and may be negligible/non-existent for complex proceedings that could benefit from a more structured process such as the ILP. However, any material burden could be alleviated by making the ILP optional, and removing the requirement to seek Commission authorization to use the TLP and ALP (see 18 CFR 4.30, 5.1, 5.3, 5.8, 16.1).

#### ii. Pre-Filing Application Requirement

In the final stages of the Commission’s pre-filing process for hydropower projects, the Commission’s regulations require a potential applicant to submit a draft license application or preliminary licensing proposal before submitting a final license application (18 CFR 4.38(c)(4) and 5.16, respectively). The Commission’s regulations include minimum filing requirements for these documents (e.g., study results, analyses, and environmental measures), and a stakeholder review process. The requirement to file the draft application and preliminary licensing proposal may be materially burdensome in terms of the cost and delay associated with the preparation of the documents and the stakeholder review process. To eliminate material burdens, the Commission could consider revising its regulations to make this aspect of the pre-filing process optional for license applicants.

#### iii. Pre-Filing Schedule

The ILP contains comment and filing deadlines throughout the pre- and post-filing application process to ensure a structured approach to hydropower licensing. The ILP, however, may be materially burdensome in terms of the schedule established for the pre-filing process (3–3.5 years total). To alleviate this burden, the Commission could consider certain comment and filing deadline reductions to allow for an overall time savings of three months: (1) reduce the time that an applicant has to file a proposed study plan, and the Commission has to issue a second scoping document, from 45 days to 30 days after receiving comments (18 CFR 5.10 and 5.11); (2) reduce the time for entities to file comments on the proposed study plan, from 90 days to 60 days (18 CFR 5.12); (3) reduce the time an applicant has to file a revised study plan, from 30 days to 15 days (18 CFR 5.13); and (4) reduce the time for filing comments on an applicant’s preliminary licensing proposal, from 90 days to 60 days (18 CFR 5.16).
iv. License Term Policy

Section 6 of the FPA provides that hydropower licenses shall be issued for a term not to exceed 50 years. There is no minimum license term for original licenses (16 U.S.C. 799). Section 15(e) of the FPA provides that any new license for an existing project (i.e., relicensing) shall be for a term that the Commission determines to be in the public interest, but not less than 30 years or more than 50 years (16 U.S.C. 808(e)). Current Commission policy is to set a 30-year license term where there is little or no authorized redevelopment, new construction, or environmental mitigation and enhancement; a 40-year license term for a license involving a moderate amount of these activities; and a 50-year license term where there is an extensive amount of such activity.8 On November 17, 2016, the Commission issued a notice of inquiry in FERC Docket No. RM17–4–000 inviting comments on what changes, if any, should be made to the license term policy. The license terms provide operational certainty and govern the frequency of the license renewal process, which influences the overall cost of development. In turn, shorter license terms could burden development by increasing the cost of development. The Commission currently is considering comments on the license term policy, which it could use to further evaluate the need for any future changes to the license term policy.

v. Minimum Filing Requirements

The Commission’s regulations contain minimum filing requirements depending on the size of a project, and whether construction or modification of a dam is needed for project operation. Part 4 of the Commission’s regulations includes three subparts corresponding to these factors: (1) Subpart E—Application for License for Major Unconstructed Project and Major Modified Project (18 CFR 4.40); (2) Subpart F—Application for License for Major Project—Existing Dam (18 CFR 4.50); and (3) Subpart G—Application for License for Minor Water Power Projects and Major Water Power Projects 5 MW or Less (18 CFR 4.60). Subparts E and F apply to projects greater than 5 MW, and include more onerous filing requirements than Subpart G, which applies to projects less than or equal to 5 MW. The 5 MW threshold is based on section 405 of PURPA, which mandated a simplified and expeditious licensing procedure for small hydropower power projects with an installed capacity of 5 MW or less (see 46 FR 55,944 at 55,947 (1981); 16 U.S.C. § 2705). The Hydropower Regulatory Efficiency Act of 2013 has since amended PURPA by increasing the size of a small hydropower power project from 5 to 10 MW. Therefore, the 5 MW threshold in 18 CFR 4.40, 4.50, and 4.60 is materially burdensome to projects between 5 and 10 MW, in terms of the cost and time associated with the more onerous filing requirements of Subparts E and F. To eliminate the material burden, the Commission could consider revising its regulations to increase the threshold from 5 MW.

b. Exemption Processes

i. Increased Capacity Requirement

To qualify for a license exemption under section 405 of PURPA, an applicant must propose to install/ increase the total capacity of a project to not more than 10 MW (18 CFR 4.30(b)(31), 4.31(c), and 4.103(a)). The regulatory requirement to add new capacity at the project is not specifically required by section 405 of PURPA, and it materially burdens existing licensees that would otherwise be eligible to seek an exemption at the end of the existing license term. To eliminate this burden, the Commission could consider revising the regulations to remove the requirement to install or increase the capacity of the facility to qualify for an exemption.

ii. Small Hydropower Conversion Restrictions

In the event that the Commission rejects an exemption application, the Commission’s regulations do not explicitly provide an applicant with the ability to convert a small hydropower exemption application to a license application (18 CFR 4.105). The Commission’s Handbook for Hydroelectric Project Licensing and 5 MW Exemptions from Licensing, issued April 2004, explicitly states at section 6.3.2:

If the exemption application is dismissed, the process is terminated. There is no opportunity to convert the exemption application to an application for license.9

In comparison, the Commission has established a process for converting a small conduit exemption application to a license application (18 CFR 4.93). The process for small conduits allows the applicant to submit additional information necessary to conform the conduit exemption application to the relevant regulations for a license application, and then be accepted for filing as of the date the exemption application was accepted for filing. The inability of an applicant of a small hydropower exemption to convert its application to a license application is materially burdensome because the applicant must initiate an entirely new license process after its exemption is rejected, thereby causing delay to the development of the resource. To eliminate this burden, the Commission could consider amending its regulations to explicitly provide the small hydropower exemption applicant with the ability to convert its exemption application to a license application if the exemption application is rejected.

c. Prohibition on Refiling Subsequent License Applications

Pursuant to the authority provided in section 10(l) of the FPA (16 U.S.C. 803), the Commission routinely waives certain sections of Part I of the FPA when it issues a minor license. As relevant, the Commission routinely waives section 15 of the FPA, which governs the Commission’s procedures for issuing a new license to an existing licensee (i.e., a relicense) (16 U.S.C. and 808). Yet, the Commission’s regulations require the licensee to file an application for relicensing at least 24 months before the expiration of the existing license (18 CFR 16.20(c)). Moreover, if the Commission rejects the application, it cannot be refiled (18 CFR 16.9(b)(4)). Rejecting a relicensing application, and not providing the applicant with the opportunity to refile, is materially burdensome to the use of hydropower resources. To eliminate this burden, the Commission could consider revising its regulations at 18 CFR 16.20 to provide the applicant with the option of resubmitting the application if the deficiencies are corrected.

2. LNG Facility and Natural Gas Pipeline and Storage Facility Siting

Under section 7 of the NGA, 15 U.S.C. 717f, the Commission authorizes the construction, operation, or abandonment of interstate natural gas pipeline and storage projects, as well as certain types of LNG facilities (e.g., LNG plants engaged in the storage of interstate natural gas volumes). Similarly, under section 3 of the NGA, 15 U.S.C. 717b(e)(1), the Commission authorizes the siting, construction and operation of LNG terminals through which the commodity passes for export or import. As part of these responsibilities, the Commission conducts both a non-environmental and

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an environmental review of the proposed facilities. The non-environmental review focuses on the engineering design, rate, and tariff considerations. The Commission carries out the environmental review with the cooperation of numerous federal, state, and local agencies, and with the input of other interested parties. Under the NGA, the Commission also is the lead federal agency for coordinating all applicable federal authorizations (e.g., required permits under the Clean Water Act, Clean Air Act, and Coastal Zone Management Act, among others) and preparing environmental analyses required under the National Environmental Policy Act (NEPA) for all interstate natural gas infrastructure and LNG import/export proposals. There are several distinct phases to the review process for interstate natural gas and LNG facilities under the Commission’s jurisdiction: pre-filing review (if applicable); application review; and post-authorization compliance. During the pre-filing review, Commission staff begins work on the environmental review and engages with stakeholders with the goal of resolving issues before the filing of an application. Throughout the pre-filing process, Commission staff meets with stakeholders, visits the project site, and confers with federal, state, and local agencies. Once a project sponsor files an application with the Commission under NGA section 3 for LNG import/export terminals or under NGA section 7 for interstate pipeline and storage facilities, Commission staff analyzes both environmental and non-environmental aspects for a proposed project, including for LNG terminals safety and engineering. An Environmental Assessment or Environmental Impact Statement typically is issued for public comment, and ultimately, the Commission will issue an order on an application after considering both environmental and non-environmental issues. During the post-authorization compliance period, Commission staff monitors the project sponsor’s compliance with the conditions directed by the Commission. Ultimately, Commission approval is required before the facility can begin operation and provide service. Pursuant to Executive Order 13783, the review encompassed the Commission’s regulations, guidance documents, and policies related to the certification of interstate natural gas transportation facilities, authorization of LNG import and export facilities, authorization of certain transportation by interstate and intrastate pipelines, and environmental review under NEPA. The majority of agency actions relating to the siting and construction of interstate natural gas transportation and LNG facilities do not materially burden the transportation or delivery of domestically produced natural gas. Specifically, most of the Commission’s actions: (1) Are necessary for the Commission to review and process NGA section 3 and 7 project applications; and/or (2) do not negatively affect the siting or construction of natural gas pipeline and storage facilities or LNG import/export facilities in a manner that has a direct or primary indirect effect on the development or use of domestic energy production. However, the Commission’s regulations require a prospective applicant for authorization under section 3 of the NGA to site and construct LNG terminals and related jurisdictional natural gas facilities to engage in the Commission’s pre-filing process. The Commission’s pre-filing regulations require applicants to use the pre-filing process for a minimum of 180 days before the filing of an application for any project that is required to engage in pre-filing. (18 CFR 157.21(a)(2)(1) and 153.6(c)). While, in general, the pre-filing process is designed to expedite the processing of applications, the mandatory imposition of the pre-filing process on LNG terminals and related pipeline projects for at least 180 days before an application can be filed may be materially burdensome for some projects in terms of the potential delay and costs associated with the process. Although the 180 day pre-filing process is required by statute for LNG terminals, 15 U.S.C. 717b–1(a), the statute did not mandate that the Commission also require “related jurisdictional natural gas facilities” to engage in pre-filing. However, related jurisdictional natural gas pipeline facilities need to be evaluated concurrent with a proposed LNG terminal to avoid segmentation under the National Environmental Policy Act. Further, the pre-filing process allows stakeholders to become involved in the overall Project at an early stage, and applicants can benefit from stakeholder’s early identification and resolution of issues that may overlap with the LNG terminal. Without using the pre-filing process for related jurisdictional natural gas facilities, delays could occur during the application review, when issues are first identified and need resolution. Thus, although the pre-filing process may result in delays or additional costs to the applicant early on in a project’s development, its overall result is a more timely application review by considering all issues regarding a project concurrently. As such, there is no need for the Commission to consider any revision to this regulation.

3. Centralized Electric Capacity Market Policies

Three of the Regional Transmission Operator/Independent System Operator (RTO/ISO) markets in the eastern U.S. have adopted centralized capacity markets to help address resource adequacy concerns. In particular, PJM, ISO–NE, and NYISO have implemented centralized capacity markets that were designed, in part, to ensure long-term resource adequacy by sending accurate price signals for investment in capacity resources, when and where needed. As a result, agency actions related to capacity market policies could have a primary indirect effect on the development and use of generation resources, including renewables, natural gas, and nuclear facilities. The centralized capacity markets require load-serving entities to secure, either through self-supply or participation in the capacity auction, sufficient resources to meet their capacity obligation at a future time. All three centralized capacity markets allow participation by any resource that is technically qualified to provide the capacity product being procured and each market generally models locational constraints. Each conducts a capacity auction where eligible offers to sell capacity are compared to the demand for capacity resources, which is established through an administratively-

10 The Commission has defined resource adequacy as “the availability of an adequate supply of generation or demand resources to support safe and reliable operation of the grid.” Cal. Indep. Sys. Operator Corp., 122 FERC ¶ 61,017, at P 3 (2008).
11 “Capacity is not actual electricity. It is a commitment to produce electricity or forgo consumption of electricity when required.” Advance Energy Mgmt. All. v. FERC, No. 16–1234, 2017 WL 2636455, at *1 (D.C. Cir. Jun. 20, 2017); see Conn. Dep’t of Pub. Util. Control v. FERC, 569 F.3d 477, 482 (D.C. Cir. 2009) (explaining that capacity “amounts to a kind of call option that electricity transmitters purchase from parties—generally, generators—who can either produce more or consumer less when required”).
12 It is important to note that the Commission has not required RTOs/ISOs to implement centralized capacity markets; rather, the determination to include such markets has been a voluntary decision by the stakeholders in each particular RTO/ISO. However, once an RTO/ISO decides to implement such a capacity market, the Commission must ensure that the tariff provisions establishing the capacity market rules are just and reasonable and not unduly discriminatory or preferential.
13 While the specific rules vary by RTO/ISO, load-serving entities can own or construct resources or contract bilaterally for capacity from resources owned by other entities.
determined demand curve. Generally speaking, the market clears based on the intersection between the supply and demand curves. All cleared resources receive the market clearing price for capacity regardless of resource type.

The Commission has issued multiple agency actions (i.e., Commission orders addressing the capacity market designs of the relevant organized markets) that govern the rules and design of the centralized capacity markets. Agency actions related to electric capacity markets were reviewed to determine if they impose a material burden on the development and use of domestic energy resources. In general, agency actions regarding centralized electricity capacity market design do not impose a material burden on the development and use of domestic energy resources because they generally seek to ensure adequate resources, and thereby facilitate the development of domestic energy resources, rather than create material burdens to the development and use of these resources. However, this final report discusses Commission actions regarding one aspect of centralized electricity capacity markets, buyer-side market power mitigation rules, due to the potentially material burdens Commission actions may have on the development of domestic energy resources.

All three eastern RTOs/ISOs use some form of a minimum offer price rule (MOPR) as approved by Commission order. MOPRs as currently designed establish offer floors for certain new resources to protect against subsidized new entry that has the potential to artificially suppress capacity market prices. New resources that trigger this rule are required to submit offers into the capacity market auction at or above the floor. If the resource’s mitigated offer price is too high to clear in the auction, customers and receive benefits from the wholesale electric markets. The interconnection process is designed to ensure a new resource can safely and reliably deliver its output to end-users and to assign the costs to the party causing the costs of any system upgrades required to maintain safety and reliability. If a generator is not able to interconnect to the transmission system, or if it is too difficult or expensive to do so, the developer may decide not to pursue the electricity they produce due to market price signals and revenue streams, thereby facilitating development and retention of other resources that might use domestic energy resources.

4. Generator Interconnection Policies

Electric generators use domestic energy resources to produce electricity. Electric generators at utility scale must interconnect to the transmission system to deliver the electricity they produce to customers and receive benefits from the wholesale electric markets. The interconnection process is designed to ensure a new resource can safely and reliably deliver its output to end-users and to assign the costs to the party causing the costs of any system upgrades required to maintain safety and reliability. If a generator is not able to interconnect to the transmission system, or if it is too difficult or expensive to do so, the developer may decide not to pursue the electricity they produce due to market price signals and revenue streams, thereby facilitating development and retention of other resources that might use domestic energy resources.

Order No. 2006: In Order No. 2006, the Commission created standard small generator interconnection procedures and a standard small generator interconnection agreement for the interconnection of electric generators no larger than 20 MW.¹⁵

Order No. 661: In Order No. 661, the Commission required public utilities to add standard procedures and technical requirements for the interconnection of large wind generation resources to their standard large generator interconnection procedures and large generator interconnection agreements in their open access transmission tariffs.¹⁶

Order No. 827: In Order No. 827, the Commission revised the interconnection agreements for both large and small non-synchronous generators to eliminate exemptions for wind generators from providing reactive power.¹⁷

Order No. 828: In Order No. 828, the Commission modified the small generator interconnection agreement as set forth in Order Nos. 2006 and 792 to require newly interconnecting small generating facilities to ride through abnormal frequency and voltage events and not disconnect during such events.¹⁸

Order No. 792: In Order No. 792, the Commission revised the standard small generator interconnection procedures and standard small generator interconnection agreement for the interconnection of electric generators no larger than 20 MW.¹⁹

None of these orders materially burden the development or use of domestic energy resources. The Commission’s generator interconnection orders establish an orderly, uniform process for all types of generators to interconnect to the grid safely and reliably, facilitating their development by providing them with the means to deliver the electricity they produce to the purchaser. As such, these requirements will not unnecessarily obstruct, delay, curtail or otherwise


¹⁷ Reactive Power Requirements for Non-Synchronous Generators, Order No. 827, FERC Stats. & Regs. ¶ 31,385, order on reh’g, 157 FERC ¶ 61,003 (2016).


impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources and therefore they will not materially burden the production or use of domestic energy resources.

Kimberly D. Bose,
Secretary.

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Parts 24 and 111
[USCBP–2017–0025; CBP Dec. 17–16]

RIN 1515–AE25

Procedures To Adjust Customs COBRA User Fees To Reflect Inflation

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with changes, the amendments proposed to the U.S. Customs and Border Protection (CBP) regulations to reflect that customs user fees and limitations established by the Consolidated Omnibus Budget Reconciliation Act (COBRA) will be adjusted for inflation in accordance with the Fixing America’s Surface Transportation Act (FAST Act).

DATES: Effective November 1, 2017.

FOR FURTHER INFORMATION CONTACT:
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SUPPLEMENTARY INFORMATION:

Background

On December 4, 2015, the Fixing America’s Surface Transportation Act (FAST Act, Pub. L. 114–94) was signed into law. Section 32201 of the FAST Act amends section 13031 of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (19 U.S.C. 58c) by requiring certain customs COBRA user fees and corresponding limitations to be adjusted by the Secretary of the Treasury (Secretary) to reflect certain increases in inflation. The specific fees and corresponding limitations to be adjusted for inflation are set forth in Appendix A and Appendix B of part 24 in this final rule and include the commercial vessel arrival fees, commercial truck arrival fees, railroad car arrival fees, private vessel arrival fees, private aircraft arrival fees, commercial aircraft and vessel passenger arrival fees, dutiable mail fees, customs broker permit user fees, barges and other bulk carriers arrival fees, and merchandise processing fees as well as the corresponding limitations. (19 U.S.C. 58c(a) and (b)). Further, the FAST Act includes a particular measure of inflation for these purposes and special rules when considering adjustments.

According to the FAST Act, the customs COBRA user fees and limitations were to be adjusted on April 1, 2016, and at the beginning of each fiscal year to reflect the percent increase (if any) in the Consumer Price Index (CPI) for the preceding 12-month period compared to the CPI for fiscal year 2014. The statute permits the Secretary to ignore any CPI increase of less than one (1) percent from the time of the previous adjustment. As a result, if the increase in the CPI since the previous adjustment is less than one (1) percent, the Secretary has discretion to determine whether the fees should be adjusted.

On June 15, 2016, CBP published a notice in the Customs Bulletin announcing the April 2016 determination that no adjustment to the customs COBRA user fees and limitations was necessary based on the FAST Act provision as the increase of the CPI was less than one (1) percent. (Customs Bulletin, Vol. 50, No. 24, p. 13). CBP published a second notice in the Customs Bulletin on December 7, 2016, announcing that, based on a less than one (1) percent increase in inflation, no adjustment was necessary for fiscal year 2017. (Customs Bulletin Vol. 50, No. 49, p. 4).

Proposed Rule

On July 17, 2017, CBP published a notice of proposed rulemaking (NPRM) in the Federal Register (82 FR 32661) proposing to amend title 19 of the Code of Federal Regulations (19 CFR) to set forth the methodology for determining the required adjustments. The FAST Act specifies that the customs COBRA user fees and corresponding limitations should be adjusted to reflect the percentage of the increase (if any) in the average of the CPI for the preceding 12-month period compared to the CPI for fiscal year 2014. CBP determined that the 12-month period for comparison will be June through May. This timeframe was proposed to allow for sufficient notice to the public of any adjustments prior to any changes becoming effective for each fiscal year.

The FAST Act further requires the Secretary to round the amount of any increase in the CPI to the nearest dollar. The rounding requirement applies to the difference in the CPI from the comparison year to the current year when determining whether an adjustment is necessary. As written, the rounding requirement does not apply to the fee amount resulting from any adjustment. As noted above, if the difference in the CPI since the last adjustment is less than one (1) percent, the Secretary may elect not to adjust the fees and limitations. The statute requires CBP to use the Consumer Price Index—All Urban Consumers, U.S. All items, 1982–84 (CPI–U) which can be found on the U.S. Department of Labor, Bureau of Labor Statistics Web site: www.bls.gov/cpi/. The proposed rule provided that CBP’s Office of Finance will determine annually whether an adjustment to the fees and limitations is necessary and notice the amount of the fees and limitations will be published in the Federal Register for each fiscal year at least 30 days prior to the effective date of the new fees and limitations.

Technical Corrections

In addition, CBP proposed technical updates to paragraph (g) of 19 CFR 24.22 to reflect the elimination of the user fee exemption for passengers arriving from Canada, Mexico or one of the adjacent islands pursuant to the United States—Colombia Trade Promotion Agreement Implementation Act. (Colombia TPA, Pub. L. 112–42, October 21, 2011). Section 601 of the Colombia TPA amended 19 U.S.C. 58c(b)(1)(A)(i) to limit the fee exemption exclusively to passengers whose journey originated in a territory or possession of the United States, or originated in the United States and was limited to the territories and possessions of the United States. (19 U.S.C. 58c(b)(1)(A)(i)). Since the law became effective on November 5, 2011, CBP has been collecting only the non-exempt user fees. In accordance with the statute, CBP is removing the exemption for passengers arriving from Canada, Mexico, or one of the adjacent islands, from the regulations found in paragraphs [(g)(1)(i)(i)], [(g)(1)(i)(A)], [(g)(1)(i)(B)], [(g)(1)(ii)(i)], [(g)(1)(iii)(i)], [(g)(2)(i)], the chart in paragraph [(g)(2)(iv)], and the collection procedures in paragraphs [(g)(4)(iii)(A)], [(g)(4)(iii)(B)], [(g)(4)(iii)(C)], [(g)(4)(iii)(A)], [(g)(4)(iii)(B)], and [(g)(4)(iii)(C)]. (19 CFR 24.22(g)). CBP is also removing the definition of “adjacent islands” from paragraph